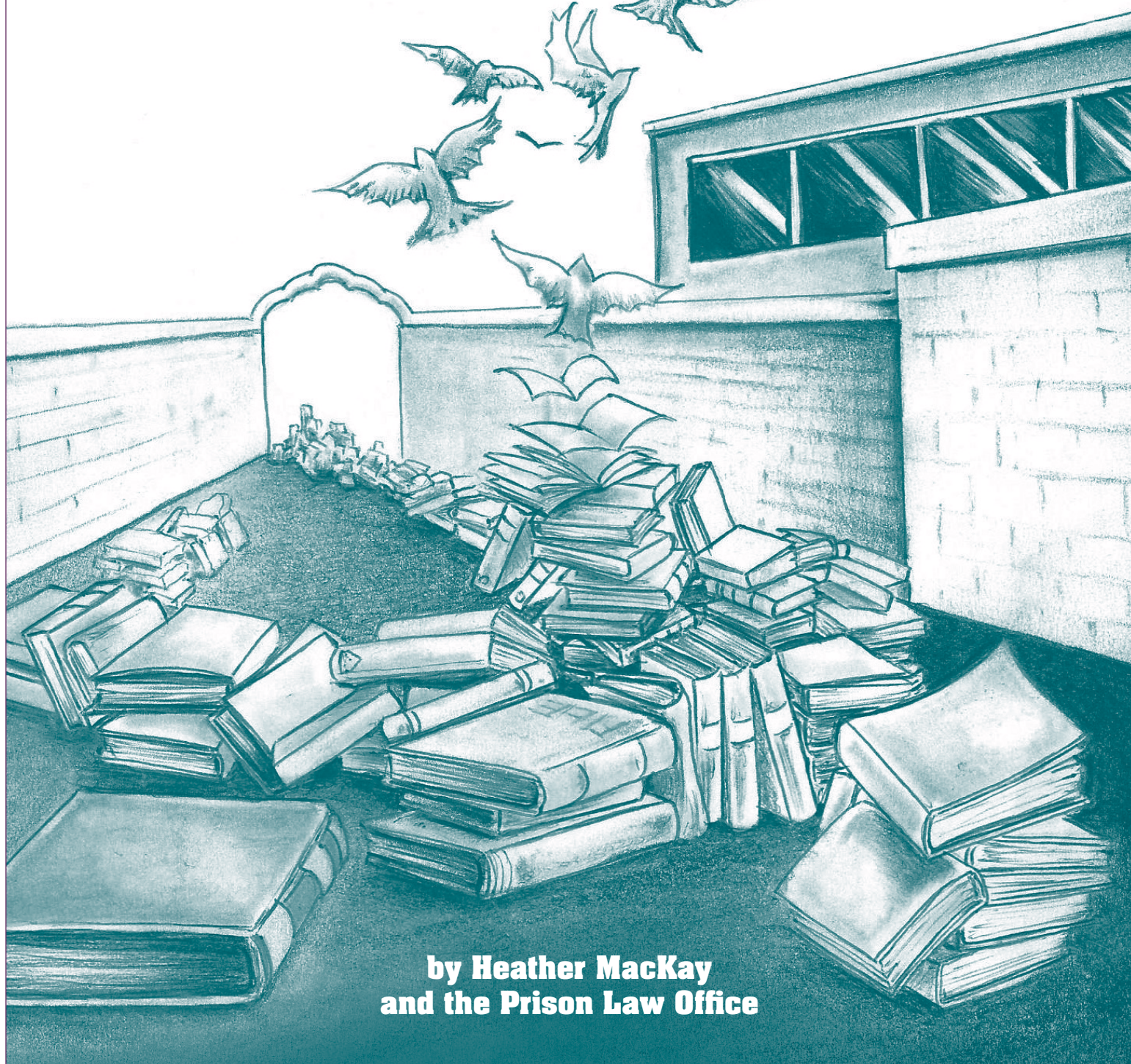


# **The California Prison and Parole Law Handbook**



**by Heather MacKay  
and the Prison Law Office**

# **THE CALIFORNIA PRISON & PAROLE LAW HANDBOOK**

**BY HEATHER MACKAY  
&  
THE PRISON LAW OFFICE**

ISBN: 978-0-692-95526-0

Copyright © 2019 by the Prison Law Office

Content Editor: Ritika Aggarwal

Production & Style Editor: Brandy Iglesias

Cover Art: Justus Evans

Cover Design: Tara Eglin

Assistance with Chapter 9: Kony Kim, former Staff Attorney at UnCommon Law, a non-profit that represents people at Board of Parole Hearings proceedings, challenges unjust parole policies and decisions, and provides training and information to people serving life terms and their advocates.

Assistance with Chapter 11: Anne Mania, former Staff Attorney at the Prison Law Office and Rosen, Bien, Galvan and Grunfeld, where she worked on ensuring due process for people undergoing parole violation processes.

Assistance with Chapter 13: Theo Cuison, Deputy Director and Clinical Supervisor in the Immigration Unit of the East Bay Community Law Center (EBCLC), a clinic of U.C. Berkeley School of Law.



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.

Order forms for *The California Prison and Parole Law Handbook* are available at: [www.prisonlaw.com](http://www.prisonlaw.com) or by writing to:

Prison Law Office  
General Delivery  
San Quentin, CA 94964

In addition, many self-help information packets on a variety of topics are available free of charge on the Resources page at [www.prisonlaw.com](http://www.prisonlaw.com) or by contacting the Prison Law Office at the address above.

\*\*\*

## **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 16

### **FEDERAL PETITIONS FOR WRIT OF HABEAS CORPUS**

---

- 16.1 Introduction and Overview of Federal Habeas Requirements
- 16.2 Who May File a Petition
- 16.3 Grounds for a Petition
- 16.4 Standard of Review of State Court Decisions
- 16.5 Exhaustion of State Court Remedies Requirement
- 16.6 Procedures When State Court Remedies Have Not Been Exhausted
- 16.7 Procedural Defaults in State Court
- 16.8 Seeking Relief from State Court Procedural Default
- 16.9 Time Limits for Filing
- 16.10 Statutory Tolling of the Time Limits
- 16.11 Equitable Tolling of the Time Limits
- 16.12 Restrictions on Multiple Petitions
- 16.13 Where to File the Petition
- 16.14 Who Should be Named as Respondent
- 16.15 Forms and Procedures for Filing a Petition
- 16.16 Requesting an Attorney
- 16.17 Procedures After a Petition is Filed
- 16.18 Motions for Modification of or Relief from the Judgment
- 16.19 Appealing a Denial
- 16.20 Notice of Appeal
- 16.21 Seeking a Certificate of Appealability
- 16.22 Requesting an Attorney for an Appeal
- 16.23 Petition for Writ of Certiorari in the U.S. Supreme Court

#### **16.1 Introduction and Overview of Federal Habeas Requirements**

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

Federal habeas corpus law is complicated. There are restrictions on rights of people held in state prisons to bring federal habeas cases, and there are limits on the federal courts' powers to overrule

---

<sup>1</sup> 28 U.S.C. § 2241 et seq.

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

## § 16.2

state court decisions. Many of these restrictions and limits are due to the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996.<sup>3</sup>

This chapter starts by discussing the requirements for a federal habeas petition brought by a person in state prison (or a person committed as an MDO or SVP):

- ◆ The petitioner must be “in custody” (§ 16.2).
- ◆ The petition must challenge the validity or length of confinement on federal legal grounds (§ 16.3).
- ◆ The petitioner must have exhausted state court remedies (§ 16.5; see also § 16.6 discussing options when remedies have not been fully exhausted).
- ◆ The state court decision being challenged must be contrary to or involve an unreasonable application of clearly established federal law or be based on an unreasonable determination of the facts (§ 16.4).
- ◆ The state court decision must not be based on an “independent and adequate” procedural default (§ 16.7; see also § 16.8 discussing options for relief from state procedural default).
- ◆ The petition must be filed within the applicable deadline, including any periods of time that are “tolled” (don’t count toward the time limit) (§§ 16.9–16.11).
- ◆ The petition must not be a “successive” (multiple) petition challenging the same criminal judgment or civil commitment (§ 16.12).

The chapter then discusses procedures for filing and litigating a federal habeas corpus petition. (§§ 16.13–16.18). The chapter ends with a summary of options for pursuing the case if the petition is dismissed or denied (§§ 16.19–16.23).

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

## 16.2 Who May File a Petition

A federal habeas petitioner must be “in custody” at the time the petition is filed.<sup>4</sup>

A person is “in custody” for purposes of federal habeas while confined in a prison or jail for a criminal charge or conviction.<sup>5</sup> A person also is “in custody” while on probation or parole, or

---

<sup>3</sup> 28 U.S.C. § 2241 et seq.

<sup>4</sup> 28 U.S.C. § 2254(a); *Carafas v. LaVallee* (1968) 391 U.S. 234, 238 [88 S.Ct. 1556; 20 L.Ed.2d 554]; *Sailer v. Gunn* (9th Cir. 1977) 548 F.2d 271, 273, fn. 1.

<sup>5</sup> *U.S. ex rel. Wirtz v. Sheehan* (E.D. Wis. 1970) 319 F.Supp. 146, 147.

released on their own recognizance.<sup>6</sup> Once a criminal sentence and any period of supervised release has been fully served, the petitioner is no longer in custody and generally cannot bring a petition.<sup>7</sup> An exception is that a person can use a petition for habeas corpus to request review of a prior conviction that is being used to enhance a new sentence that they are currently serving.<sup>8</sup>

A person who is in a hospital on a civil commitment generally is considered to be “in custody” for purposes of federal habeas corpus. Examples include persons found to be not guilty by reason of insanity (NGI), and persons committed as Mentally Disordered Offenders (MDOs) or as Sexually Violent Predators (SVPs).<sup>9</sup>

Placement of an immigration hold on a person held in state prison does not constitute being “in custody” on the immigration case.<sup>10</sup> On the other hand, if a person is serving a sentence in one jurisdiction and has a detainer for an unserved sentence in another jurisdiction, that person is deemed to be “in custody” on the second case.<sup>11</sup>

If a person is discharged from custody after filing a petition challenging a criminal conviction, courts will not dismiss the case as moot because they will assume that there are continuing “collateral consequences” of the conviction.<sup>12</sup> This rule has also been applied to an SVP civil commitment.<sup>13</sup>

In cases involving parole revocations or losses of credits due to disciplinary violations, courts will not assume that there are continuing “collateral consequences” after the petitioner is discharged

---

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

<sup>7</sup> *Williamson v. Gregoire* (9th Cir.1998) 151 F.3d 1180, 1183 (in custody requirement not met if only continuing requirement is to pay fine or register as person with sex offenses).

<sup>8</sup> *Pogue v. Ratelle* (S.D. Cal. 1999) 58 F.Supp.2d 1140; *Brock v. Weston* (9th Cir.1994) 31 F.3d 887; *United States v. Price* (9th Cir.1995) 51 F.3d 175; *Custis v. United States* (1994) 511 U.S. 485, 497 [114 S.Ct. 1732; 128 L.Ed.2d 517]; but see *Maleng v. Cook* (1989) 490 U.S. 488, 492 [109 S.Ct. 1923; 104 L.Ed.2d 540]; *Allen v. Oregon* (9th Cir. 1998) 153 F.3d 1046, 1048-1049; *Feldman v. Perrill* (9th Cir. 1990) 902 F.2d 1445, 1448-1449.

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

<sup>10</sup> *Garcia v. Taylor* (9th Cir. 1994) 40 F.3d 299, 303-304.

<sup>11</sup> *Maleng v. Cook* (1989) 490 U.S. 488, 493-494 [109 S.Ct. 1923; 104 L.Ed.2d 540].

<sup>12</sup> *Carafas v. LaVallee* (1968) 391 U.S. 234, 237-238 [88 S.Ct. 1556; 20 L.Ed.2d 554]; *Selam v. Warm Springs Tribal Correctional Facility* (9th Cir. 1998) 134 F.3d 948, 951; *Chacon v. Wood* (9th Cir. 1994) 36 F.3d 1459, 1463; *Sailer v. Gunn* (9th Cir. 1977) 548 F.2d 271, 273.

<sup>13</sup> *Carty v. Nelson* (9th Cir. 1995) 426 F.3d 1064, 1071.

from custody. The court thus will dismiss the petition unless the petitioner can show that there are still actual consequences of the parole revocation or disciplinary finding.<sup>14</sup>

### 16.3 Grounds for a Petition

A federal habeas petition can be used *only* to challenge the validity of confinement or to challenge actions that lengthen the period of confinement, such as claims that a criminal conviction or sentence or a civil MDO or SVP commitment is unlawful.<sup>15</sup> This also includes challenges to the denial or loss of prison time credits or the denial or revocation of parole – *if* those actions actually increase the length of time the person must serve in confinement *and* the relief sought is immediate or speedier release.<sup>16</sup>

Federal habeas corpus *cannot* be used to challenge poor prison conditions of confinement or unfair state parole conditions, because those matters do not affect the length of confinement.

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

There is one important exception to the general rule that people can bring federal habeas claims on any federal constitutional grounds. Violations of the U.S. Constitution's Fourth-Amendment right to be free from unreasonable search and seizure may not be challenged in a federal

<sup>14</sup> *Spencer v. Kemna* (1998) 523 U.S. 1, 8-9 [118 S.Ct. 978; 140 L.Ed.2d 43]; *Lane v. Williams* (1982) 455 U.S. 624, 631 [102 S.Ct. 1322; 71 L.Ed.2d 508]; *Cox v. McCarthy* (9th Cir. 1987) 829 F.2d 800, 803. This is a difficult standard to meet. See, e.g., *Spencer v. Kemna* (1998) 523 U.S. 1, 14-16 [118 S.Ct. 978, 140 L.Ed.2d 43] (rejecting argument that parole revocation fully served had continuing collateral consequences because it could be considered in future sentencing or parole proceedings or for impeachment; also rejecting claim that petition should be allowed because civil rights action for money damages was barred unless parole revocation was deemed invalid by habeas proceeding); *Maciel v. Cate* (9th Cir. 2013) 731 F.3d 928, 932 (no continuing consequence of expired parole term); *Burnett v. Lampert* (9th Cir. 2005) 432 F.3d 996, 999-1000 (challenge to deferral of parole date was made moot by person's release and subsequent re-incarceration for violating parole); *Munoz v. Rowland* (9th Cir. 1997) 104 F.3d 1096, 1098 (rejecting argument that challenge to gang segregation had continuing consequences because the gang validation could be a basis for segregation during future incarceration). See also *Wilson v. Terhune* (9th Cir. 2003) 319 F.3d 477, 480 (petition moot where person challenged disciplinary finding for escape, but the punishments had been completed or withdrawn, and collateral consequences – increase in classification score, loss of family visits, possibility of delayed suitability for parole, and transfer -- were either based on the fact of the underlying behavior or speculative).

<sup>15</sup> *Muhammad v. Close* (2004) 540 U.S. 749, 750 [124 S.Ct. 1303; 158 L.Ed.2d 32]; *Preiser v. Rodriguez* (1973) 411 U.S. 475, 500 [93 S.Ct. 1827; 36 L.Ed.2d 439]. A federal court has no jurisdiction to hear a petition from a person in state prison that challenges only a restitution order, because the person is not challenging their custody. *Bailey v. Hill* (9th Cir. 2010) 599 F.3d 976, 979.

<sup>16</sup> *Preiser v. Rodriguez* (1973) 411 U.S. 475, 476-477, 490 [93 S.Ct. 1827; 36 L.Ed.2d 439]. Some challenges to disciplinary or parole matters do not meet this standard and must be brought as § 1983 civil rights lawsuits (see Chapter 17) instead of as habeas petitions. See e.g., *Nettles v. Grounds* (9th Cir. 2016) 830 F.3d 922, 934-935 (challenge to disciplinary finding of guilt by person with life sentence who had passed his MEPD); *Bogovich v. Sandoval* (9th Cir. 1999) 189 F.3d 999, 1003-1004 (challenge under ADA to BPH reliance on long-past substance abuse as factor for denial of parole).

habeas corpus petition if there has been a full and fair review of the issue by the state courts.<sup>17</sup> However, if a person's trial or appellate attorney failed to competently challenge an unconstitutional search or seizure, then the person may be able to bring a habeas petition for a Sixth Amendment claim of ineffective assistance of counsel.<sup>18</sup>

Federal habeas corpus cannot be used to bring claims based on violations of state laws, statutes, or regulations. However, in many circumstances, petitioners may be able to argue that a violation of a state law also resulted in denial of a federal constitutional right, like the right to due process.<sup>19</sup> But not all state law errors violate federal due process. A notable example is that the correct application of the "some evidence" standard in California parole suitability cases is a matter of state law only, and not a federal due process right. Thus, a person with a life sentence who has been denied parole cannot use a federal habeas petition to argue that the decision was not supported by "some evidence."<sup>20</sup>

## 16.4 Standard of Review of State Court Decisions

As discussed in § 16.5, a person in state prison who wants to bring a federal habeas petition must first raise the claims in the state courts. When the federal court reviews the petition, it has limited power to overturn the state court decisions in the case. A federal court may not grant a petition for writ of habeas corpus on any claim that has been decided on the merits in state court, unless:

- ◆ The state court decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. The governing law is the law as it stood at the time the state court issued its decision, not at the time when the habeas petition is being considered.<sup>21</sup>

OR

- ◆ The state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.<sup>22</sup> A federal court will presume

<sup>17</sup> *Stone v. Powell* (1976) 428 U.S. 465, 489-495 [96 S.Ct. 3037; 49 L.Ed.2d 1067]; *Newman v. Wengler* (9th Cir. 2015) 790 F.3d 876.

<sup>18</sup> *Kimmelman v. Morrison* (1986) 477 U.S. 365, 368 [106 S.Ct. 2574; 91 L.Ed.2d 305].

<sup>19</sup> *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S.Ct. 475; 116 L.Ed.2d 385]; and see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227; 65 L.Ed.2d 175].

<sup>20</sup> *Swarthout v. Cooke* (2011) 562 U.S. 216 [131 S.Ct. 859; 178 L.Ed.2d 732].

<sup>21</sup> 28 U.S.C. § 2254(d)(1); *Greene v. Fisher* (2011) 565 U.S. 34, 46-47 [132 S.Ct. 38; 181 L.Ed.2d 336]; *Williams v. Taylor* (2000) 529 U.S. 362, 410 [120 S.Ct. 1495; 146 L.Ed.2d 389]; *Schriro v. Landrigan* (2007) 550 U.S. 465, 473 [127 S.Ct. 1933; 167 L.Ed.2d 836]; *Thompson v. Runnels* (9th Cir. 2013) 705 F.3d 1089, 1096. When deciding if a constitutional principle is clearly established, a federal court may rely only on U.S. Supreme Court precedents, and may not rely on decisions of lower federal courts. *Lopez v. Smith* (2014) \_\_\_ U.S. \_\_\_ [135 S.Ct. 1; 190 L.Ed.2d 1]. This standard applies to determinations that a constitutional error was harmless beyond a reasonable doubt. *Davis v. Ayala* (2015) \_\_\_ U.S. \_\_\_ [135 S.Ct. 2187; 192 L.Ed.2d 323]. A federal court must presume that a state court applied state case law narrowing the interpretation of a statute, even if there was no citation to such cases. *Bell v. Cone* (2005) 543 U.S. 447, 455-456 [125 S.Ct. 847; 160 L.Ed.2d 881]. This limit on federal court habeas review has been upheld as constitutional. *Crater v. Galaza* (9th Cir. 2007) 491 F.3d 1119, 1124.

<sup>22</sup> 28 U.S.C. § 2254(d)(2); *Williams v. Taylor* (2000) 529 U.S. 362, 410 [120 S.Ct. 1495; 146 L.Ed.2d 389]; *Schriro v. Landrigan* (2007) 550 U.S. 465, 473 [127 S.Ct. 1933; 167 L.Ed.2d 836].



that a determination of a factual issue made by a state court was correct. However, a petitioner may overcome this presumption by clear and convincing evidence that the factual finding was incorrect.<sup>23</sup> In order to meet these standards, a petitioner must show that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement."<sup>24</sup> If there is a valid ground for upholding the state court's decision, the federal court will reject the habeas claim even if there are valid grounds for overturning the decision.<sup>25</sup>

If a claim was denied by the state courts on procedural grounds, but is heard by a federal court under an exception allowing relief from procedural default (see §§ 16.7-16.8), the federal court does not have to apply this deferential standard of review, and review is not limited to the record that was before the state court.<sup>26</sup>

In cases where a state court denied a petitioner's claim on the merits, federal court review may be based only on the record that was before the state court.<sup>27</sup> There is an exception if (1) the claim relies on a new rule of constitutional law that is made retroactive to cases on collateral review, or the claim relies on facts that could not have been previously discovered through the exercise of due diligence; *and* (2) the facts underlying the claim would establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the petitioner guilty. In such cases, an evidentiary hearing may be held.<sup>28</sup>

## 16.5 Exhaustion of State Court Remedies Requirement

A person must "exhaust" all state court remedies before filing a federal habeas petition.<sup>29</sup> This requirement ensures that the state courts have the opportunity to correct any constitutional errors in the criminal proceedings and respects the right of state courts to resolve issues on independent state procedural grounds.

To meet the exhaustion requirement, the petitioner must have provided the highest state court with an opportunity to rule on the issues in the case.<sup>30</sup> In California, a person challenging a felony criminal conviction or sentence can exhaust state remedies by a direct appeal to a state Court of Appeal

<sup>23</sup> 28 U.S.C. § 2254(e)(1).

<sup>24</sup> *Harrington v. Richter* (2011) 562 U.S. 86 [131 S.Ct. 770; 178 L.Ed.2d 624]; *Premo v. Moore* (2011) 562 U.S. 115 [131 S.Ct. 733, 739; 178 L.Ed.2d 649].

<sup>25</sup> *Parker v. Matthews* (2012) 567 U.S. 37 [132 S.Ct. 2148; 183 L.Ed.2d 32].

<sup>26</sup> *Gentry v. Sinclair* (9th Cir. 2012) 705 F.3d 884, 896, 899.

<sup>27</sup> *Cullen v. Pinholster* (2011) 563 U.S. 170 [131 S.Ct. 1388; 179 L.Ed. 557]. The federal court may review the entire trial court record, even if the state court of appeal did not consider all of the materials. *McDaniels v. Kirkland* (9th Cir. 2015) 813 F.3d 770, 780-781; *Jamerson v. Rannels* (9th Cir. 2013) 713 F.3d 1218, 1227. The federal court must either obtain and review relevant portions of the record on which a state court based its judgment, or conduct an evidentiary hearing of its own. 28 U.S.C. § 2254(d); *Nasby v. McDaniel* (9th Cir. 2017) 853 F.3d 1049, 1052-1054.

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

<sup>29</sup> 28 U.S.C. § 2254(b)(1)(A); *Baldwin v. Reese* (2004) 541 U.S. 27, 29 [124 S.Ct. 1347; 158 L.Ed.2d 64]; *Alfaro v. Johnson* (9th Cir. 2017) 862 F.3d 1176, 1180.

<sup>30</sup> *McQuown v. McCartney* (9th Cir. 1986) 795 F.2d 807, 809; *Alfaro v. Johnson* (9th Cir. 2017) 862 F.3d 1176, 1181-1182.

followed by a petition for review in the California Supreme Court.<sup>31</sup> The person does not need to present the same claim again in state habeas corpus proceedings.<sup>32</sup>

If an issue has not been presented to the state courts through a direct appeal followed by a petition for review then a petitioner can exhaust state remedies by filing habeas corpus petitions in the California state courts. For example, a state habeas petition must be filed before filing a federal habeas case if the error was not or could not be raised on appeal, or if no petition for review was filed after the state court of appeal decision. A person must use state habeas if the issue cannot be reviewed by direct appeal in court, such as a challenge to a prison disciplinary credit loss or a denial of parole suitability. (See Chapter 15 for detailed information on California state court habeas procedures.)

When the California Supreme Court denies a petition for review or a habeas corpus petition, then state remedies usually have been exhausted. However, if a state court denies an appeal or petition on state law *procedural* grounds, then state remedies have not been exhausted because the highest state court has not ruled on the actual merit of the issues in the case.<sup>33</sup> §16.8 discusses the options when a case has been procedurally defaulted in state court.

A person filing a claim in state court, who may want to file a federal habeas case in the future, should make sure to present the state court claims in a way that will preserve federal habeas rights. The state court actions should explicitly set forth all of the potential federal legal claims and the specific facts upon which they are based.<sup>34</sup> It is best to say in every state court brief filed at every level that the claim is federal, citing the governing section of the U.S. Constitution or federal statute and at least one or two federal cases.<sup>35</sup>

The exhaustion requirement is strictly applied. However, an exception may be allowed when exhausting remedies would be futile. To show that raising the claim in the state courts would be futile, a petitioner must show that the California Supreme Court has recently or consistently resolved the

<sup>31</sup> *Roman v. Estelle* (9th Cir. 1990) 917 F.2d 1505, 1506; see generally *O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 842 [119 S.Ct. 1728; 144 L.Ed.2d 1]; *Carrothers v. Rhy* (9th Cir. 1979) 594 F.2d 225, 228. The person does not need to have filed a petition for certiorari asking the United States Supreme Court to review the direct appeal case. *Fay v. Noia* (1963) 372 U.S. 391, 435 [83 S.Ct. 822; 9 L.Ed.2d 837]. Note that misdemeanor-only cases are appealed to the appellate division of the superior court and any further review is at the discretion of the court of appeal; if the court of appeal refuses to accept transfer of the case, state court remedies are exhausted. *McMonagle v. Meyer* (9th Cir. 2015) 802 F.3d 1093, 1096.

<sup>32</sup> *Brown v. Allen* (1953) 344 U.S. 443, 447 [73 S.Ct. 397; 97 L.Ed. 469]; *Lopez v. Schriro* (9th Cir. 2007) 491 F.3d 1029, 1040.

<sup>33</sup> *Kirkpatrick v. Chappell* (9th Cir. 2017) 872 F.3d 1047, 1056-1057.

<sup>34</sup> *Duncan v. Henry* (1995) 513 U.S. 364, 366 [115 S.Ct. 887; 130 L.Ed.2d 865]. The requirement applies to *pro se* petitioners. *Lyons v. Cranford* (9th Cir. 2000) 232 F.3d 666, 669.

<sup>35</sup> *Baldwin v. Resse* (2004) 541 U.S. 27, 31 [124 S.Ct. 1347; 157 L.Ed.2d 64] (federal claim not fairly presented if court must read beyond the petition or brief to find claim); *Castillo v. McFadden* (9th Cir. 2005) 399 F.3d 993, 1000 (no exhaustion unless petitioner presented the federal claim "within the four corners of his appellate briefing"); *Casey v. Moore* (9th Cir. 2004) 386 F.3d 896, 915 (federal law claims not fairly presented when raised for first time in petition for review to state supreme court); *Peterson v. Lampert* (9th Cir. 2002) 277 F.3d 1073, 1076 (same); *Wooten v. Kirkland* (9th Cir. 2008) 540 F.3d 1019 (to exhaust claim of cumulative error, the claim must have been presented as separate issue from the underlying individual claims); *Solis v. Garcia* (9th Cir. 2000) 219 F.3d 922, 930 (same).

issue adversely to petitioners *and* that there are no new U.S. Supreme Court decisions addressing the issues and no other indication that the state courts will change their position.<sup>36</sup>

## 16.6 Procedures When State Court Remedies Have Not Been Exhausted

If a petitioner has not exhausted state remedies, the state can consent to have the federal court hear the case without exhaustion.<sup>37</sup> Otherwise, the general rule is that the federal court must dismiss the petition without prejudice to re-filing the petition after state remedies have been exhausted.<sup>38</sup> The court cannot deny the petition outright unless it is clear that the petitioner's claim is frivolous.<sup>39</sup>

When a petitioner files a "mixed" federal habeas petition that includes some exhausted claims and some unexhausted claims, the federal court must give the petitioner the choice of either amending the petition to proceed on only the exhausted claims or having the case dismissed so that the petitioner may return to state court to exhaust all the claims.<sup>40</sup>

If some or all of the claims are unexhausted, a petitioner can request a "stay and abeyance"; if the court grants the request, it will dismiss the unexhausted claims and hold off on any further action to give the petitioner time to exhaust the claims and then amend the petition to add those claims again. This procedure benefits a petitioner where it would be difficult or impossible to file an amended petition within the statutory time limits. A court has discretion to grant a stay and abeyance when "the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics."<sup>41</sup> However, a court has no duty to advise the petitioner about the stay-and-abeyance procedure or explain how to request a stay.<sup>42</sup>

A petitioner may also be able to use a stay-and-abeyance procedure to exhaust state remedies for new issues not raised in the original federal habeas petition (or raised but dismissed for failure to exhaust) and then amend the petition to include the new issues. The rule is that the new issues may be allowed if they "relate back" to the original petition. Issues relate back if they arise out of the same

<sup>36</sup> *Lynce v. Mathis* (1997) 519 U.S. 433, 436, n. 4 [117 S.Ct. 891; 137 L.Ed.2d 63].

<sup>37</sup> 28 U.S.C. § 2254(b)(2) and (3).

<sup>38</sup> 28 U.S.C. § 2254(b) and (d); *Slack v. McDaniel* (2000) 529 U.S. 473, 485 [120 S.Ct. 1595; 146 L.Ed.2d 542]; *Stewart v. Martinez-Villareal* (1998) 523 U.S. 637, 644 [118 S.Ct. 1618; 140 L.Ed.2d 849]; *Rose v. Lundy* (1982) 455 U.S. 509, 510 [102 S.Ct. 1198; 71 L.Ed.2d 379]; *Anthony v. Cambra* (9th Cir. 2000) 236 F.3d 568, 574.

<sup>39</sup> *Cassatt v. Stewart* (9th Cir. 2005) 406 F.3d 614, 624.

<sup>40</sup> *Rose v. Lundy* (1982) 455 U.S. 509, 520 [102 S.Ct. 1198; 71 L.Ed.2d 379]; *Henderson v. Johnson* (9th Cir. 2013) 710 F.3d 872, 873; *Jefferson v. Budge* (9th Cir. 2005) 419 F.3d 1013, 1015.

<sup>41</sup> *Rhines v. Weber* (2005) 544 U.S. 269, 277 [125 S.Ct. 1528; 161 L.Ed.2d 440]; *Mena v. Long* (9th Cir. 2016) 813 F.3d 907, 908 (expanding stay and abey to cases where all claims are unexhausted); *King v. Ryan* (9th Cir. 2009) 564 F.3d 1133; *Olivera v. Giurbino* (9th Cir. 2004) 371 F.3d 569, 573 (failure to grant stay and abeyance was abuse of discretion); *Dixon v. Baker* (9th Cir. 2017) 847 F.3d 714, 720 (same); see also *Pace v. DiGuglielmo* (2005) 544 U.S. 408, 416 [125 S.Ct. 1807; 161 L.Ed.2d 669] (confusion about timeliness of filing may constitute "good cause").

<sup>42</sup> *Pliler v. Ford* (2004) 542 U.S. 225, 231 [124 S.Ct. 2441; 159 L.Ed.2d 338]; *Raspberry v. Garcia* (9th Cir. 2006) 448 F.3d 1150, 1153.

“conduct, transaction or occurrence” challenged in the original petition.<sup>43</sup> However, an issue does not relate back if the legal claim is different, even though it may concern the same testimony.<sup>44</sup> Also, new issues do not relate back if they assert new grounds for relief separated in both time and type from those grounds set forth in the original pleading.<sup>45</sup>

In addition, a petitioner can ask for a stay to exhaust state remedies when new evidence is discovered after a federal habeas petition has already been filed. If the petitioner could not previously have discovered the evidence through reasonable efforts, the district court should stay the proceedings to allow the petitioner to exhaust state remedies by presenting the new evidence and any new related claims in the state courts.<sup>46</sup>

Another situation in which a petitioner can ask for a stay to exhaust state remedies is where they can show good cause for failure to exhaust state remedies, such as showing that post-conviction counsel was ineffective in failing to discover evidence of the petitioner's abusive upbringing and history of mental illness.<sup>47</sup>

A person cannot appeal a court order staying a habeas corpus proceeding pending exhaustion until after the court enters a final judgment on the habeas petition.<sup>48</sup>

## 16.7 Procedural Defaults in State Court

As discussed in § 16.5, people who want to file federal habeas petitions must first exhaust state judicial remedies. However, sometimes the state courts refuse to address legal issues because of procedural problems. For example, a state court might find that an issue was forfeited by failure to object during the trial or sentencing or might find that an appeal or petition was not timely filed. If a state court decides a case on “adequate and independent” state law procedural grounds, then state remedies have not been exhausted because the court has not ruled on the actual issues in the case.<sup>49</sup>

The initial burden of asserting that an issue had been procedurally defaulted is on the state. The burden then shifts to the petitioner to show why the state procedural grounds were not adequate and independent. Ultimately, the state bears the burden of proving that an issue was procedurally defaulted.<sup>50</sup>

It is easy to tell that the state court denied relief on procedural grounds if the court plainly states a procedural reason, or if the court cites a law or controlling case authorizing denial for a

---

<sup>43</sup> *Mayle v. Felix* (2005) 545 U.S. 644, 657 [125 S.Ct. 2562, 162 L.Ed.2d 582]; *King v. Ryan* (9th Cir.2009) 564 F.3d 1133; *Kelly v. Small* (9th Cir. 2003) 315 F.3d 1063.

<sup>44</sup> *Hebner v. McGrath* (9th Cir. 2008) 543 F.3d 1133, 1138.

<sup>45</sup> *Mayle v. Felix* (2005) 545 U.S. 644, 649 [125 S.Ct. 2562; 162 L.Ed.2d 582].

<sup>46</sup> *Gonzalez v. Wong* (9th Cir. 2011) 667 F.3d 965, 977.

<sup>47</sup> *Blake v. Baker* (9th Cir. 2014) 745 F.3d 977, 980-984.

<sup>48</sup> *Thompson v. Frank* (9th Cir. 2010) 599 F.3d 1088, 1090.

<sup>49</sup> *Powell v. Lambert* (9th Cir. 2004) 357 F.3d 871, 874.

<sup>50</sup> *Bennett v. Mueller* (9th Cir. 2002) 322 F.3d 573, 586.

procedural reason.<sup>51</sup> In other cases, it may not be clear whether a denial is on the merits or on a procedural ground. For example, when the California Supreme Court denies a petition with a one-line order (called a “postcard denial”) that does not state the reason for denying the petition, the denial might be on either the merits or on procedural grounds.<sup>52</sup> The federal courts have adopted some presumptions to handle these ambiguous denials. If the state Supreme Court states that it has considered the habeas petition and relief is not warranted, the fair interpretation is that the Court denied the claim on the merits.<sup>53</sup> If the last reasoned state court decision imposes a procedural default, it will be presumed that summary denials by the higher state courts also were based on the procedural bar;<sup>54</sup> however, this presumption can be overcome by strong evidence that the last reasoned state court decision was based on the merits.<sup>55</sup> Otherwise, unless a state court expressly states that it is relying on a procedural bar, the presumption is that the court is acting on the merits.<sup>56</sup> Also, when a state court rejects some claims on the merits but does not expressly address another claim raised by the petitioner, there is a rebuttable presumption that the other claim also was decided on the merits.<sup>57</sup>

Not all types of state law procedural denials are sufficient to bar federal habeas relief. A federal court may refuse to hear a claim only if the state courts have decided the issue on state law procedural grounds that are “adequate and independent.”<sup>58</sup> To be “independent,” the state court’s decision must be based on state law that is independent of federal law.<sup>59</sup> To be “adequate,” the procedural rule must be clearly and consistently applied by the state courts.<sup>60</sup> A state procedural rule can be adequate even if judges can exercise discretion to excuse a failure to comply with the rule.<sup>61</sup> There can be disputes about which state procedural rules are “adequate.” For example, the California doctrine that a person may not bring a habeas claim on an issue that was already considered on a direct appeal is *not* an adequate procedural ground, because the state courts sometimes make exceptions for cases involving fundamental constitutional rights.<sup>62</sup> In contrast, the California rule that a person may not raise an issue

<sup>51</sup> *Harris v. Reed* (1989) 489 U.S. 255, 264 [109 S.Ct. 1038; 103 L.Ed.2d 308]; *Nitschke v. Belleque* (9th Cir. 2012) 680 F.3d 1105, 1109; *Kim v. Villalobos* (9th Cir. 1986) 799 F.2d 1317, 1320-1321; *Harris v. Superior Court* (9th Cir. 1974) 500 F.2d 1124, 1128; *Curiel v. Miller* (9th Cir. 2016) 830 F.3d 864, 870.

<sup>52</sup> *Evans v. Chavis* (2006) 546 U.S. 189, 197-198 [126 S.Ct. 846; 163 L.Ed.2d 684].

<sup>53</sup> *Chambers v. McDaniel* (9th Cir. 2008) 549 F.3d 1191, 1195-1199; see also *Greene v. Lambert* (9th Cir. 2002) 288 F.3d 1081, 1087 (order could be characterized as denial on the merits even though it was curt and ambiguous).

<sup>54</sup> *Ylst v. Nunnemaker* (1991) 501 U.S. 797 [111 S.Ct. 2590; 115 L.Ed.2d 706].

<sup>55</sup> *Kernan v. Hinojosa* (2016) 578 U.S. \_\_ [136 S.Ct. 1603; 194 L.Ed.2d 701].

<sup>56</sup> *Smith v. Oregon Bd. of Parole* (9th Cir. 2013) 736 F.3d 857, 859; *Curiel v. Miller* (9th Cir. 2016) 830 F.3d 864, 871.

<sup>57</sup> *Johnson v. Williams* (2013) 568 U.S. 289 [133 S.Ct. 1088; 185 L.Ed.2d 105].

<sup>58</sup> *Stewart v. Smith* (2002) 536 U.S. 856, 858 [122 S.Ct. 2578; 153 L.Ed.2d 762]; *Coleman v. Thompson* (1991) 501 U.S. 722, 729 [111 S.Ct. 2546; 115 L.Ed.2d 640]; see, e.g., *Carter v. Giurbino* (9th Cir. 2004) 385 F.3d 1194, 1197 (California rule that sufficiency of evidence claims cannot be considered unless raised on direct appeal is independent and adequate state procedural bar).

<sup>59</sup> *Michigan v. Long* (1983) 463 U.S. 1032, 1038 [103 S.Ct.3469; 77 L.Ed.2d 1201].

<sup>60</sup> *Johnson v. Mississippi* (1988) 486 U.S. 578, 587 [108 S.Ct. 1981; 100 L.Ed.2d 575]; *James v. Kentucky* (1984) 466 U.S. 341, 348-349 [104 S.Ct. 1830; 80 L.Ed.2d 346].

<sup>61</sup> *Beard v. Kindler* (2009) 558 U.S. 53, 60 [130 S.Ct. 612; 175 L.Ed.2d 417].

<sup>62</sup> *Hill v. Roe* (9th Cir. 2003) 321 F.3d 787, 789; *Park v. California* (9th Cir. 2000) 202 F.3d 1146, 1151-1152; see also *Powell v. Lambert* (9th Cir. 2004) 357 F.3d 871, 879 (courts may look outside of published case law to determine actual practice of state courts as to whether a procedural rule is clearly and consistently applied).



for the first time in a state habeas petition if the issue could have been raised earlier on direct appeal (called the “*Dixon*” bar) is an “independent and adequate” state law procedural ground which bars federal habeas review.<sup>63</sup> Likewise, California’s rule that a state habeas petition must be filed without substantial delay also constitutes an “independent and adequate” state law ground for denial of a habeas petition.<sup>64</sup>

A person may be able to show that a claim was not defaulted if the state courts’ reason for denying the claim is clearly mistaken, even if there was some other possible procedural default that was not mentioned by the state court.<sup>65</sup>

If a federal court decides that a claim is procedurally barred, dismissal of the claim should be without prejudice to future re-filing, unless it is clear that the procedural problem cannot be remedied.<sup>66</sup>

## 16.8 Seeking Relief from State Court Procedural Default

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

If the procedural problem can be corrected, the petitioner must try to solve the problem and get the state court to rule on the issues.<sup>67</sup> For example, if the state court dismissed habeas claims for not being sufficiently specific, then the petitioner should file a new more detailed habeas petition in the state court.<sup>68</sup>

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

Even if the procedural problem cannot be corrected, federal courts may grant relief from a state procedural default if the petitioner can show good cause for not complying with the state procedural rule *and* actual prejudice from the default. For example, there may be good cause for relief if the procedural default was due to abandonment by counsel without notice, or a similar factor beyond

---

<sup>63</sup> *Johnson v. Lee* (2016) \_\_\_ U.S. \_\_\_ [136 S.Ct. 1802; 195 L.Ed.2d 92].

<sup>64</sup> *Walker v. Martin* (2011) 562 U.S. 307 [131 S.Ct. 1120; 179 L.Ed.2d 62].

<sup>65</sup> *Cone v. Bell* (2009) 556 U.S. 449, 467 [129 S.Ct. 1769; 173 L.Ed.2d 701].

<sup>66</sup> *Cassatt v. Stewart* (9th Cir. 2005) 406 F.3d 614, 624.

<sup>67</sup> *Sweet v. Cupp* (9th Cir. 1981) 640 F.2d 233, 237-238.

<sup>68</sup> *Kim v. Villalobos* (9th Cir. 1986) 799 F.2d 1317, 1319.

<sup>69</sup> *Ha Van Nguyen v. Curry* (9th Cir. 2013) 736 F.3d 1287, 1291 (failure of appellate counsel to raise claim); *Woods v. Sinclair* (9th Cir. 2014) 764 F.3d 1109, 1137 (failure to discover evidence).

the petitioner's control.<sup>70</sup> Federal courts may also excuse a procedural default where a state generally requires people to raise an issue by state habeas corpus rather than on direct appeal, but does not guarantee appointment of counsel or effective assistance by counsel for the state habeas proceeding.<sup>71</sup>

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

## 16.9 Time Limits for Filing

There are strict time limits (called a “statute of limitations”) for filing a federal habeas corpus petition. However, there are some circumstances in which time is “tolled,” meaning that the time does not count toward the deadline; these tolling provisions are discussed in §§ 16.10-16.11.

---

<sup>70</sup> *Maples v. Thomas* (2012) 565 U.S. 266, 283-284 [132 S.Ct. 912, 924; 181 L.Ed.2d 807]; *Edwards v. Carpenter* (2000) 529 U.S.446, 451 [120 S.Ct. 1587; 146 L.Ed.2d 518]; *Coleman v. Thompson* (1991) 501 U.S. 722, 753 [111 S.Ct. 2546; 115 L.Ed.2d 640]; *Wainwright v. Sykes* (1977) 433 U.S. 72, 87 [97 S.Ct. 2497; 53 L.Ed.2d 594]; *Strickler v. Greene* (1999) 527 U.S. 263, 268 [119 S.Ct. 1936; 144 L.Ed.2d 286] (good cause to excuse procedural default where prosecutor did not disclose exculpatory material); *Murray v. Carrier* (1986) 477 U.S. 478, 488 [106 S.Ct. 2639, 91 L.Ed.2d 397] (same); *Manning v. Foster* (9th Cir. 2000) 224 F.3d 1129, 1133 (prison officials' interference with a petitioner's access to administrative remedies can be cause for a procedural default).

<sup>71</sup> *Trevino v. Thaler* (2013) 569 U.S. 413 [133 S.Ct. 1911, 1918; 185 L.Ed.2d 1044] (where state procedures make it unlikely that defendant had a meaningful opportunity to raise ineffective assistance claim on direct appeal, there is good cause to excuse procedural default if the defendant had no counsel or counsel was ineffective during the state collateral-review proceedings); *Martinez v. Ryan* (2012) 566 U.S. 1 [132 S.Ct. 1309; 182 L.Ed.2d 272]; *Sexton v. Cozner* (9th Cir. 2012) 679 F.3d 1150, 1157; *Lopez v. Ryan* (9th Cir. 2012) 678 F.3d 1131, 1137; *Davila v. Davis* (2017) \_\_ U.S. \_\_ [137 S.Ct. 2058, 2065; 198 L.Ed.2d 603] (*Martinez* and *Trevino* rule excusing procedural default does not extend to procedurally defaulted claim of ineffective assistance of appellate counsel when petitioner's state post-conviction counsel provides ineffective assistance by failing to raise that claim).

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

<sup>73</sup> *Schlup v. Delo* (1995) 513 U.S. 298, 333 [115 S.Ct. 851, 130 L.Ed.2d 808]; *House v. Bell* (2006) 547 U.S. 518, 536 [126 S.Ct. 2064, 165 L.Ed.2d 1]. Before addressing a claim of actual innocence, a court must address any non-defaulted claims that might result in comparable relief. *Dretke v. Haley* (2004) 541 U.S. 386, 393 [124 S.Ct. 1847; 158 L.Ed.2d 659]. Similarly, in death penalty cases, a federal court may address a procedurally defaulted claim if, “but for a constitutional error, no reasonable jury would have found the petitioner eligible for the death penalty.” *Jenkins v. Hutton* (2017) \_\_ U.S. \_\_ [137 S.Ct. 1769, 1772; 198 L.Ed.2d 415]; citing *Sanyer v. Whitley* (1992) 505 U.S. 333, 336 [112 S.Ct. 2514, 120 L.Ed.2d 269].

<sup>74</sup> *Carriger v. Stewart* (9th Cir. 1997) 132 F.3d 463, 477.

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

The basic rule is that a person has one year to file a federal habeas corpus petition, but there are several different events that can trigger the start of the one-year period.<sup>76</sup> The timelines apply to each claim on an individual basis, so sometimes different claims may have different deadlines.<sup>77</sup>

A federal habeas petition is timely if the petition is filed within one year and 90 days after the California Supreme Court files an order denying a petition for review in a felony criminal appeal case; the additional 90 days is for the period of time in which the appellant could have filed a petition for writ of certiorari in the United States Supreme Court.<sup>78</sup> If a petition for certiorari is filed, the one-year deadline starts running on the date the petition for certiorari is denied.

If a state court reverses all or part of a sentence and remands the case for re-sentencing, the one-year timeline does not begin to run until the re-sentencing happens and any direct appeal from the re-sentencing has concluded.<sup>79</sup>

If a person does not timely appeal or timely petition for review, the federal habeas timeline starts running when the time for filing the notice of appeal or the petition for review expires.<sup>80</sup> In California felony criminal cases, this means that if the defendant did not pursue a direct appeal, the federal habeas timeline starts to run 60 days after the judgment is pronounced.<sup>81</sup> If the defendant pursues a direct appeal, but does not file a timely petition for review in the California Supreme Court, the clock presumably starts running either 40 or 60 days after the Court of Appeal decision is issued.<sup>82</sup>

In a case where there is no right to a direct appeal in court<sup>83</sup> – such as a denial of parole suitability, or a prison disciplinary decision resulting in a credit loss – the federal habeas timeline begins to run when the prison or parole officials' decision becomes final. If any type of administrative appeal is available, then the clock will not start to run until either the deadline for filing or re-filing an administrative appeal expires or the administrative appeal is decided at the highest level.<sup>84</sup>

---

<sup>76</sup> 28 U.S.C. § 2244(d)(1).

<sup>77</sup> *Mardesich v. Cate* (9th Cir. 2012) 668 F.3d 1164, 1169.

<sup>78</sup> *Clay v. United States* (2003) 537 U.S. 522, 527-528 [123 S.Ct. 1072; 155 L.Ed.2d 88]. If the California Supreme Court reopens direct review of a case, the one-year timeline starts anew when the state Supreme Court issues its final decision. *Thomson v. Lea* (9th Cir. 2012) 681 F.3d 1093, 1093-1094.

<sup>79</sup> *Burton v. Stewart* (2007) 549 U.S. 147, 156-158 [127 S.Ct. 793, 166 L.Ed.2d 628]; *Magwood v. Patterson* (2010) 561 U.S. 320, 332-333 [130 S.Ct. 2788; 177 L.Ed.2d 592]; *Smith v. Williams* (9th Cir. 2017) 871 F.3d 684, 687-688. For information on when a misdemeanor-only case becomes final, see *McMonagle v. Meyer* (9th Cir. 2015) 802 F.3d. 1093.

<sup>80</sup> *Hemmerle v. Schriro* (9th Cir. 2007) 495 F.3d 1069, 1073. When a state court dismisses a case because the notice of appeal was untimely filed, the dismissal decision does not "restart" the one-year timeline. *Randle v. Crawford* (9th Cir. 2010) 604 F.3d 1047, 1055. However, if a state court allows a case to go forward even though the notice of appeal was filed late, the one-year timeline starts does not start running until the appeal case is finished. *Jimenez v. Quarterman* (2009) 555 U.S. 113, 119 [129 S.Ct. 681; 172 L.Ed.2d 475].

<sup>81</sup> California Rules of Court, rule 8.104.

<sup>82</sup> There is no published case on this. However, 40 days is the deadline for filing a petition for review and 60 days is the deadline for the court to grant review on its own motion. California Rules of Court, rule 8.264(b); California Rules of Court, rule 8.500(e).

<sup>83</sup> See Chapter 14 for information about direct criminal appeals.

<sup>84</sup> *Shelby v. Bartlett* (9th Cir. 2004) 391 F.3d 1061, 1063; *Redd v. McGrath* (9th Cir. 2003) 343 F.3d 1077, 1081 (note: since this case was decided, the BPH has abolished its administrative appeal procedure).

## § 16.9

Other events can trigger the start of the one-year timeline. If new facts about the case are discovered, then the time starts to run on the date the facts first could have been discovered through “the exercise of due diligence.”<sup>85</sup>

The one-year timeline for raising a claim can also start when a newly-recognized legal right is created by the U.S. Supreme Court.<sup>86</sup> However, a California Supreme Court decision in an unrelated case that clarifies state substantive or procedural law in a manner favorable to a petitioner does *not* trigger a new one-year deadline.<sup>87</sup>

Another event that can start the one-year timeline is the removal of an “unconstitutional impediment” to filing.<sup>88</sup>

Courts may excuse a failure to comply with the one-year timeline for claims of actual innocence.<sup>89</sup> Any unjustifiable delay on the petitioner’s part may be considered as a factor in determining whether actual innocence has been reliably shown, but such delay is not an absolute bar to relief. A petitioner invoking this exception “must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.”<sup>90</sup>

A petition is deemed filed when it is delivered to prison authorities for mailing.<sup>91</sup> Even if the document never actually gets delivered to the court, a person gets the benefit of this “prison mailbox rule” as long as they follow up after failing to receive a response from the court within a reasonable period of time.<sup>92</sup> In order to be able to prove that the document was delivered to prison authorities, a person should try to keep records and get confirmations of the date the document was presented for legal mailing.

A federal court may on its own motion consider whether a federal habeas petition is timely. However, before dismissing a petition as untimely, the court must give the parties notice and an opportunity to show why the petition should not be dismissed as untimely. If the court does not address an untimeliness concern on its own motion, then the state may raise it as a defense in its first responsive pleading by arguing that the petitioner has not met the timelines.<sup>93</sup> If a state deliberately

---

<sup>85</sup> 28 U.S.C. § 2244(d)(1); *Lee v. Lampert* (9th Cir. 2011) 653 F.3d 929, 933.

<sup>86</sup> 28 U.S.C. § 2244(d)(1).

<sup>87</sup> *Shannon v. Newland* (9th Cir. 2005) 410 F.3d 1083, 1087.

<sup>88</sup> 28 U.S.C. § 2244(d)(1).

<sup>89</sup> *Vosgien v. Persson* (9th Cir. 2014) 742 F.3d 1131, 1133; *Stewart v. Cate* (9th Cir. 2014) 757 F.3d 929, 939.

<sup>90</sup> *McQuiggin v. Perkins* (2013) 569 U.S. 383 [133 S.Ct. 1924; 185 L.Ed.2d 1019].

<sup>91</sup> *Houston v. Lack* (1988) 487 U.S. 266, 270 [108 S.Ct. 2379, 101 L.Ed. 245]; *Miles v. Prunty* (9th Cir. 1999) 187 F.3d 1104, 1106, fn. 2; *Hernandez v. Spearman* (9th Cir. 2014) 764 F.3d 1071, 1074.

<sup>92</sup> *Huizar v. Carey* (9th Cir. 2001) 273 F.3d 1220, 1123.

<sup>93</sup> Federal Rules of Civil Procedure, rule 8(c); Federal Rules of Civil Procedure, rule 12(b); *Day v. McDonough* (2006) 547 U.S. 198, 207 [126 S.Ct. 1675, 164 L.Ed.2d 376]; *Morrison v. Maboney* (9th Cir. 2005) 399 F.3d 1042. For purposes of this rule, “responsive pleadings” do not include a motion to dismiss due to failure to exhaust state remedies, a stipulation to stay the proceedings, or an opposition to a motion to reopen the case following exhaustion. *Randle v. Crawford* (9th Cir. 2010) 604 F.3d 1047, 1052.

waives the right to challenge a petition as being untimely, the federal court may not on its own motion dismiss the petition on untimeliness grounds.<sup>94</sup>

## 16.10 Statutory Tolling of the Time Limits

Federal habeas law states that the time during which a “properly filed application for State post-conviction or other collateral review” with respect to the judgment or claim is “pending” shall not count toward the one-year time limits for filing a federal habeas petition.<sup>95</sup> The federal habeas timeline stops running even if the post-conviction proceeding, such as a state habeas petition, does not include the claim that is later asserted in the federal habeas petition.<sup>96</sup> Stopping the timeline clock during such periods is called “statutory tolling.” To qualify for tolling, a state habeas petition must comply with the procedural laws and rules that set the requirements for the time of filing, the form of the document, the location and type of court in which it must be filed, and any filing fee.<sup>97</sup>

To be properly filed, a state habeas petition must be timely.<sup>98</sup> Generally, so long as a petitioner proceeds in a timely fashion, statutory tolling covers the entire period from the date the initial state habeas petition is filed through re-filing in the court of appeal and state supreme court, including the time between a lower court’s decision and re-filing at the next level.<sup>99</sup> It also covers periods of time when the state courts have put the case on hold.<sup>100</sup> When the state Supreme Court habeas decision becomes final, the federal habeas clock begins to run.<sup>101</sup>

California’s lack of any set deadline for filing a state habeas corpus petition or re-filing a petition to a higher court after a denial (see § 15.9, § 15.27, and § 15.29) has led to disagreement about the circumstances in which a state habeas corpus petition is properly filed and pending for purposes of tolling the federal habeas deadline. Over time, courts have established some general principles in

<sup>94</sup> *Wood v. Milyard* (2012) 566 U.S. 463 [132 S.Ct. 1826; 182 L.Ed.2d 733].

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

<sup>96</sup> *Tillema v. Long* (2001) 253 F.3d 494, 502.

<sup>97</sup> The issue of whether a petition has been “properly filed” is separate from the issues of whether the claims in the petition are procedurally barred; thus, sometimes a petition has been properly filed even if the state courts denied the claims on procedural grounds. *Artuz v. Bennett* (2000) 531 U.S. 4, 8 [121 S.Ct. 361; 148 L.Ed.2d 213].

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

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

<sup>100</sup> *Rogers v. Ferriter* (9th Cir. 2015) 796 F.3d 1009; *Brown v. Poole* (9th Cir. 2003) 337 F.3d 1155, 1158-1159.

<sup>101</sup> A California Supreme court order denying a habeas petition becomes final immediately in cases in which no order to show cause was issued. If an order to show cause was issued, then the decision becomes final 30 days after the order denying the petition is issued. California Rules of Court, rule 8.532. The federal habeas timeline is not tolled further to allow a state habeas petitioner to file a petition for writ of certiorari in the United States Court or while a certiorari petition is pending. *Lawrence v. Florida* (2007) 549 U.S. 327, 331 [127 S.Ct. 1079; 166 L.Ed.2d 924].



this arena. If a state habeas petition is rejected by the state court as untimely, it is not properly filed and there is no statutory tolling for the time preceding the petition.<sup>102</sup> If the state court cites reasons other than untimeliness for rejecting the petition, the federal court may presume that the state court considered the petition to be timely.<sup>103</sup> However, even if the state courts are silent about the reasons for denial or address the merits or other procedural issues without mentioning untimeliness, federal courts still can decide that not all of the time between filings is statutorily tolled if there were unreasonable delays.<sup>104</sup> A period of 30 or 60 days between a lower court denial and filing in a higher court is presumptively reasonable.<sup>105</sup> But there is no bright-line rule about how much delay is unreasonable and courts have reached various conclusions in different circumstances.<sup>106</sup> At the request of the Ninth Circuit Court of Appeals, the California Supreme Court is currently considering this issue.<sup>107</sup> Also, if a person does not actually file a habeas petition at the next state level, the clock resumes ticking as soon as the last denial is issued.<sup>108</sup>

More complications arise when a person files multiple rounds of state court habeas proceedings. Whether the period between the rounds is tolled depends on when the various sets of habeas actions were filed and what issues were raised. If a person completes a full round of petitions and then brings a new round of petitions raising different claims, the time between the end of the first round and the start of the second round is not tolled.<sup>109</sup> If a person files two separate rounds of petitions on the same claims, the gaps between the two rounds are tolled only if the second set of petitions simply attempted to correct deficiencies in the original petition and the time between the two rounds was not unreasonable.<sup>110</sup> If several overlapping sets of timely petitions are filed, the person will most likely be entitled to tolling until the last set of petitions is decided.<sup>111</sup>

<sup>102</sup> *Pace v. DiGuglielmo* (2005) 544 U.S. 408, 418 [125 S.Ct.1807; 161 L.Ed.2d 669]; *Bonner v. Carey* (9th Cir. 2005) 425 F.3d 1146, 1148.

<sup>103</sup> See also *Curiel v. Miller* (9th Cir 2016) 830 F.3d 864, 871.

<sup>104</sup> *Carey v. Saffold* (2002) 536 U.S. 214, 225 [122 S.Ct. 2134; 153 L.Ed.2d 260]; *Evans v. Chavis* (2006) 546 U.S. 189, 197 [126 S.Ct. 846, 163 L.Ed.2d 684].

<sup>105</sup> *Evans v. Chavis* (2006) 546 U.S. 189, 201 [126 S.Ct. 846; 163 L.Ed.2d 684].

<sup>106</sup> *Chaffer v. Prosper* (9th Cir. 2010) 592 F.3d 1046, 1048 (no tolling for 115 days between denial of habeas petition by superior court and refiling in the court of appeal, or for 101 days between denial of petition by the court of appeal and filing in the California Supreme Court); *Waldrup v. Hall* (9th Cir. 2008) 548 F.3d 729, 734 (no tolling during an unjustified eight-month delay between denial of habeas petition by a lower court and refiling in the California Supreme Court); *Gaston v. Palmer* (9th Cir. 2006) 447 F.3d 1165, 1167 (no tolling for unexplained gaps of 15 months, 18 months and 10 months); *Culver v. Director of Corrections* (C.D. Cal. 2006) 450 F.Supp.2d 1135, 1140-1141 (intervals of 97 and 71 days between state petitions were unreasonable); *Osumi v. Giurbino* (C.D. Cal. 2006) 445 F.Supp.2d 1152, 1158-1159 (96 and 98 day intervals were not unreasonable in complex case).

<sup>107</sup> *Robinson v. Lewis*, No. S228137; *Robinson v. Lewis* (9th Cir 2015) 795 F.3d 926.

<sup>108</sup> *Maes v. Chavez* (9th Cir 2015) 792 F.3d 1132, 1135.

<sup>109</sup> *Biggs v. Duncan* (9th Cir. 2003) 339 F.3d 1045, 1048; see also *Welch v. Carey* (9th Cir. 2003) 350 F.3d 1079, 1082 (no tolling for four-year period between denial of petition in superior court, with no further pursuit of those issues).

<sup>110</sup> *Banjo v. Ayers* (9th Cir. 2010) 614 F.3d 964, 969-971; *Hemmerle v. Schriro* (9th Cir. 2007) 495 F.3d 1069, 1075; *King v. Roe* (9th Cir. 2003) 340 F.3d 821, 823.

<sup>111</sup> *Delhomme v. Ramirez* (9th Cir. 2003) 340 F.3d 817, 819; *Stanley v. Clay* (9th Cir. 2012) 692 F.3d 948, 953 (gaps between filings of petitions does not count towards one-year deadline if the later petition is filed to elaborate facts relating to the first petition or if the petitioner was attempting to correct deficiencies in the first petition and the petition was deemed timely); *Hernandez v. Spearman* (9th Cir. 2014) 764 F.3d 1071, 1077.

## 16.11 Equitable Tolling of the Time Limits

The federal habeas timeline may be extended in the interests of justice if the person pursued their case diligently, but extraordinary circumstances beyond the person's control made it impossible to file the federal habeas petition on time;<sup>112</sup> this is called “equitable tolling.”

A person's mental impairment may justify equitable tolling, depending on how severe the impairment is and the degree to which it affects the person's ability to meet the timeline.<sup>113</sup> The petitioner must show diligence in pursuing the petition to the extent they are able to do so, and that the mental impairment made it impossible to meet the filing deadline under the totality of the circumstances, including consideration of any reasonably available types of assistance.<sup>114</sup>

Lack of access to the case file or to adequate legal materials can be grounds for equitable tolling. A petitioner who is seeking equitable tolling on this ground should explain why the circumstances prevented filing a timely petition and what diligent steps were taken to file a petition as soon as possible.<sup>115</sup> Ordinary limits on access to a law library and copying facilities due to placement in segregation will not result in tolling.<sup>116</sup>

<sup>112</sup> *Holland v. Florida* (2010) 560 U.S. 631, 633 [130 S.Ct. 2549; 177 L.Ed.2d 130]; *Nedds v. Calderon* (9th Cir. 2012) 678 F.3d 777, 780; *Spitsyn v. Moore* (9th Cir. 2003) 345 F.3d 796, 799.

<sup>113</sup> *Bills v. Clark* (9th Cir. 2010) 628 F.3d 1092, 1100 (tolling where person had low IQ and low literacy so severe he was unable to understand timeliness requirement); *Roberts v. Marshall* (9th Cir. 2010) 627 F.3d 768, 772 (no tolling even though person was taking psychotropic medications, where no indication they were unable to function well enough to file timely petition); *Espinoza-Matthews v. California* (9th Cir. 2005) 432 F.3d 1021, 1024 (petitioner's mental health were important factors in considering tolling); *Laws v. LaMarque* (9th Cir. 2003) 351 F.3d 919 (person in state prison was entitled to further factual development of or an evidentiary hearing on the issue of whether his mental illness prevented him from timely filing petition for writ of habeas corpus); *Forbess v. Franke* (9th Cir. 2014) 749 F.3d 837, 840 (severe mental delusions that prevented petitioner from understanding filing rules justified tolling); *Yow Ming Yeh v. Martel* (9th Cir. 2014) 751 F.3d 1075, 1078 (mental illness not severe enough to merit tolling).

<sup>114</sup> *Stancle v. Clay* (9th Cir. 2012) 692 F.3d 948, 958; see *Orthel v. Yates* (9th Cir. 2015) 795 F.3d 935 (denying tolling).

<sup>115</sup> *Chaffer v. Prosper* (9th Cir. 2010) 592 F.3d 1046, 1049 (no tolling where delay was due to person's reliance on “jailhouse lawyers” who were busy or transferred); *Waldron-Ramsey v. Pacholke* (9th Cir. 2009) 556 F.3d 1008, 1011 (denial of tolling where person did not act diligently); *Bryant v. Schriro* (9th Cir. 2007) 499 F.3d 1056, 1060 (petitioner failed to show how lack of access to case law caused delay and failed to show due diligence); *Roy v. Lampert* (9th Cir. 2006) 465 F.3d 964, 969 (hearing proper where sufficient allegations that claims were diligently pursued and extraordinary circumstance existed); *Mendoza v. Carey* (9th Cir. 2006) 449 F.3d 1065, 1069 (lack of Spanish-language materials may merit equitable tolling); *Yow Ming Yeh v. Martel* (9th Cir. 2014) 751 F.3d 1075, 1078 (limited English proficiency did not merit equitable tolling); *Whalem/Hunt v. Early* (9th Cir. 2000) 233 F.3d 1146, 1148 (remanding to determine whether there were impediments that merited equitable tolling); *Stillman v. LaMarque* (9th Cir. 2003) 319 F.3d 1199, 1201 (petitioner entitled to tolling because of officials' misconduct in breaking promise to obtain signature in time for filing); *Lott v. Mueller* (9th Cir. 2002) 304 F.3d 918, 922 (deadline may be tolled during period in which petitioner lacked access to legal files); *Grant v. Swarthout* (9th Cir. 2017) 862 F.3d 914, 923-926 (petitioner entitled to tolling where he acted diligently while waiting for prison staff to furnish certificate required to file *in forma pauperis* petition).

<sup>116</sup> *Ramirez v. Yates* (9th Cir. 2009) 571 F.3d 993, 998.

## § 16.11

A person's lack of knowledge that the state courts had decided the case may be grounds for equitable tolling if they acted diligently after learning about the decision.<sup>117</sup>

Equitable tolling is not justified where an attorney negligently gives wrong advice to a person about the federal habeas deadline.<sup>118</sup> However, equitable tolling may be appropriate if an attorney commits egregious professional misconduct or abandons the person in prison and the person was diligent in attempting to pursue the case. This might occur when an attorney is hired or promises to represent the person, but fails to timely file necessary documents, especially if the attorney disregards the client's requests for information or for return of the case file.<sup>119</sup>

Equitable tolling may also be granted when a person relies on a court's incorrect advice or erroneous ruling about procedures or timelines.<sup>120</sup> Similarly, time may be tolled if the federal court erroneously dismisses the petition or gives incorrect information on the consequences of a dismissal to pursue exhaustion.<sup>121</sup> To get tolling, a petitioner must still be diligent in pursuing exhaustion in state court.<sup>122</sup> Also, equitable tolling is not justified if the court does not affirmatively mislead the petitioner.<sup>123</sup> However, failure to notify the petitioner that they can abandon the unexhausted claims and proceed with the exhausted claims, where the district court is dismissing the petition as containing

---

<sup>117</sup> *Ramirez v. Yates* (9th Cir. 2009) 571 F.3d 993, 998; *Gibbs v. Legrand* (9th Cir. 2014) 767 F.3d 879, 886 (attorney's failure to notify petitioner that state supreme court denied appeal was abandonment and excused petitioner's failure to file within statutory deadline).

<sup>118</sup> *Frye v. Hickman* (9th Cir. 2001) 273 F.3d 1144, 1146.

<sup>119</sup> *Brooks v. Yates* (9th Cir. 2016) 818 F.3d 532, 534; *Luna v. Kernan* (9th Cir. 2015) 784 F.3d 640; *Rudin v. Myles* (9th Cir. 2014) 781 F.3d 1043; *Doe v. Busby* (9th Cir. 2011) 661 F.3d 1001, 1011; *Porter v. Ollison* (9th Cir. 2010) 620 F.3d 952, 960; *Spitsyn v. Moore* (9th Cir. 2003) 345 F.3d 796, 801; see also *United States v. Battles* (9th Cir. 2004) 362 F.3d 1195, 1197.

<sup>120</sup> *Fue v. Biter* (9th Cir. 2016) 842 F.3d 650 (tolling granted where court clerk provided misleading information on status of state court habeas petition); *McMonagle v. Meyer* (9th Cir. 2015) 802 F.3d 1093, 1099-1100 (tolling granted where court overruled prior decision regarding exhaustion of remedies in misdemeanor cases); *Sossa v. Diaz* (9th Cir. 2013) 729 F.3d 1225, 1230 (tolling granted after person reasonably relied on district court's orders setting filing dates for an amended petition); *Nedds v. Calderon* (9th Cir. 2012) 678 F.3d 777, 782 (equitable tolling may apply where petitioner relies on precedent that is later overturned); *Harris v. Carter* (9th Cir. 2008) 515 F.3d 1051, 1054 (people entitled to tolling where they relied on then-effective interpretation of the timeline, which was later overruled); *Townsend v. Knowles* (9th Cir. 2009) 562 F.3d 1200, 1205 (same). However, there was no tolling where a person neither showed that he relied on the Ninth Circuit's prior incorrect interpretation of the law nor showed good cause for a further delay in filing after the U.S. Supreme Court overruled the Ninth Circuit. *Lakey v. Hickman* (9th Cir. 2011) 633 F.3d 782, 787.

<sup>121</sup> *Tillema v. Long* (9th Cir. 2001) 253 F.3d 494, 503 (tolling where court dismissed mixed petition without giving option of proceeding on only the exhausted claims); *Smith v. Ratelle* (9th Cir. 2003) 323 F.3d 813, 819 (person entitled to tolling because court misled him to believe he could dismiss petition, exhaust claims, and then re-file even though the time limits expired).

<sup>122</sup> *Guillory v. Roe* (9th Cir. 2003) 329 F.3d 1015, 1018; *Fail v. Hubbard* (9th Cir. 2002) 315 F.3d 1059, 1062.

<sup>123</sup> *Ford v. Pliler* (9th Cir. 2009) 590 F.3d 782, 786 (person not entitled to tolling where federal court did not affirmatively misadvise him, even though court failed to warn that the deadline had expired and that voluntarily dismissing the petition would bar them from pursuing the claims); *Brambles v. Duncan* (9th Cir. 2005) 412 F.3d 1066, 1070 (person not entitled to tolling when court failed to inform him of all consequences of choosing to have a mixed petition dismissed, but did not affirmatively mislead the petitioner); *Pliler v. Ford* (2004) 542 U.S. 225, 231 [124 S.Ct. 2441; 159 L.Ed.2d 338] (court not required to warn petitioner that court would have no power to consider motion to stay petition unless he opted to amend it and dismiss unexhausted claims, and that petitioner's claims would be time-barred if he opted to dismiss the petitions without prejudice and return to state court to exhaust all of his claims).

both exhausted and unexhausted claims, will merit equitable tolling so long as the petitioner is pursuing federal habeas remedies with diligence.<sup>124</sup>

## 16.12 Restrictions on Multiple Petitions

A person should attempt to bring all the federal habeas claims for a case in one petition. However, if new claims arise or become exhausted after a petition has been filed but while it is still pending, the federal court may allow the petitioner to amend the petition to add the new claims.<sup>125</sup>

There are a few situations in which a person can file multiple petitions without the extra petitions being considered to be “successive” petitions. A new petition can be filed following an amended judgment or a resentencing,<sup>126</sup> and likewise can be filed after a state court’s recalculation of time-served credits.<sup>127</sup> A petition challenging prison officials’ calculation of a release date is not a successive petition, even if the person has previously filed a petition challenging the underlying conviction and sentence.<sup>128</sup> Similarly, a petition challenging a state court’s denial of a resentencing petition is not a successive petition challenging the original conviction.<sup>129</sup> When a person proceeding *pro se* files a second petition before a prior petition has been decided, the new petition should be deemed to be a motion to amend the original petition rather than as a successive petition.<sup>130</sup>

Otherwise, a person who wants to bring a second habeas petition must apply for permission to do so from the Ninth Circuit Court of Appeals.<sup>131</sup> If the Ninth Circuit denies the motion, the petitioner cannot ask for rehearing or request review in the U.S. Supreme Court.<sup>132</sup>

There are very limited circumstances in which a person will be allowed to proceed with a second petition. Any claim that has been previously raised and denied on the merits in a federal habeas petition will be dismissed.<sup>133</sup> Any claim that has previously been dismissed due to procedural default (see § 16.7) will be dismissed.<sup>134</sup> A second petition can be filed only if:

<sup>124</sup> *Butler v. Long* (9th Cir. 2014) 752 F.3d 1177, 1181.

<sup>125</sup> See, e.g., *Willis v. Collins* (5th Cir. 1993) 989 F.2d 187, 188; *Diaz v. United States* (11th Cir. 1991) 930 F.2d 832, 835.

<sup>126</sup> *Magwood v. Patterson* (2010) 561 U.S. 320, 332-333 [130 S.Ct. 2788; 177 L.Ed.2d 592]; *Wentzell v. Neven* (9th Cir. 2012) 674 F.3d 1124, 1126; *Smith v. Williams* (9th Cir. 2017) 871 F.3d 684, 687-688.

<sup>127</sup> *Gonzalez v. Sherman* (9th Cir. 2017) 873 F.3d 763, 769-770.

<sup>128</sup> *Hill v. Alaska* (9th Cir. 2002) 297 F.3d 895, 899.

<sup>129</sup> *Clayton v. Biter* (9th Cir. 2017) 838 F.3d 840, 844-845 (habeas petition challenging an order or judgment resentencing petitioner under California’s three-strikes reform law is not successive).

<sup>130</sup> *Woods v. Carey* (9th Cir. 2008) 525 F.3d 886, 889; *Goodrum v. Busby* (9th Cir. 2016) 824 F.3d 1188.

<sup>131</sup> 28 U.S.C. § 2244(b)(3); *Felker v. Turpin* (1996) 518 U.S. 651, 662 [116 S.Ct. 2333; 135 L.Ed.2d 827].

<sup>132</sup> 28 U.S.C. § 2244(b)(4).

<sup>133</sup> 28 U.S.C. § 2244(b)(1); *Moormann v. Schriro* (9th Cir. 2012) 672 F.3d 644, 647; *Allen v. Ornoski* (9th Cir. 2006) 435 F.3d 946, 955 (successive petition barred).

<sup>134</sup> *Henderson v. Lampert* (9th Cir. 2004) 396 F.3d 1049, 1053.

## § 16.13

- ◆ the claim relies on a new retroactive rule of constitutional law,<sup>135</sup> or
- ◆ the claim relies on new facts that could not previously have been discovered through reasonable efforts, *and* the new facts show by clear and convincing evidence that no reasonable fact-finder would have found the person guilty if those facts had been presented at trial.<sup>136</sup>

Even if successive petitions are allowed, the petitioner must still meet the time limits for filing. Time when a federal habeas petition is pending does not toll the timeline for filing a successive petition.<sup>137</sup>

### 16.13 Where to File the Petition

A federal petition for writ of habeas corpus challenging a criminal judgment should be filed in the federal district court for the region where the person was convicted and sentenced. A petition challenging a decision by prison or parole officials should be filed in the district court for the region where the person is incarcerated. Appendix 16-A is a list of the federal courts and the counties and institutions in their regions.

A habeas petition may be transferred from one district to another in the furtherance of justice.<sup>138</sup>

### 16.14 Who Should be Named as Respondent

A petitioner must name the state officer having custody as the respondent.<sup>139</sup> Typically, this is the warden of the facility in which the petitioner is incarcerated.<sup>140</sup> The Secretary (formerly the Director) of the CDCR also may be named as the respondent.<sup>141</sup>

---

<sup>135</sup> 28 U.S.C. § 2244(b)(2); *Tyler v. Cain* (2001) 533 U.S. 656, 662 [121 S.Ct. 2478; 150 L.Ed.2d 632] (new case that did not apply retroactively could not be basis for successive petition); *United States v. Geozos* (9th Cir. 2017) 870 F.3d 890 (although petitioner had previously petitioned to vacate sentence, new habeas petition challenging conviction was permitted because it relied on new constitutional rule interpreting the statute under which he was convicted).

<sup>136</sup> 28 U.S.C. § 2244(b)(2); *Pizzuto v. Blades* (9th Cir. 2012) 673 F.3d 1003, 1009; *Bible v. Schriro* (9th Cir. 2011) 651 F.3d 1060, 1063; *Cooper v. Calderon* (9th Cir. 2002) 308 F.3d 1020, 1024 (when petitioner was aware at the time of trial of the confession of another person, that confession is not new evidence and successive petition will not be heard). Successive petitions are not subject to the actual innocence (“*Schlup*”) exception to procedural defaults. *Gage v. Chappell* (9th Cir. 2015) 793 F.3d 1159, 1168-1169.

<sup>137</sup> *Duncan v. Walker* (2001) 533 U.S. 167, 172 [121 S.Ct. 2120; 150 L.Ed.2d 251].

<sup>138</sup> 28 U.S.C. § 2241(d).

<sup>139</sup> 28 U.S.C. § 2254; Federal Rules of Habeas Corpus, rule 2(a).

<sup>140</sup> *Stanley v. California* (9th Cir. 1994) 21 F.3d 359, 360.

<sup>141</sup> *Ortiz-Sandoval v. Gomez* (9th Cir. 1996) 81 F.3d 891, 895.



## 16.15 Forms and Procedures for Filing a Petition

District courts have created official forms for people to use when filing federal habeas petitions.<sup>142</sup> Districts have their own forms and filing instructions. People who are filing habeas petitions on their own must use these forms. The forms are also useful for attorneys because they show what must be included in a petition. The habeas corpus petition forms and instructions for the federal district courts in California are in Appendix 16-B. Free copies of the forms may be obtained by writing to the clerk of the court. Most of the courts also have the forms and rules available on their websites.

The discussion in § 19.12 and § 19.29 about how to set forth facts and issues in a legal pleading apply to federal habeas petitions. The petitioner should state the facts and legal grounds specifically but concisely, and should attach as exhibits documents that help prove the case. If a petition is too vague, the court can dismiss the case. However, the court should first allow the petitioner an opportunity to amend the petition to correct the problem, unless the court determines that there is no possible valid legal claim.<sup>143</sup>

There is a \$5.00 fee for filing a petition for writ of habeas corpus in federal court. A person who has little or no money can get permission to file without paying the fee. This is called *in forma pauperis* status. To get *in forma pauperis* status, a petitioner must fill out and file a form listing any income or property. The petitioner must attach a trust account statement showing transactions for the last six months, and a certificate signed by a prison staff member.<sup>144</sup> The *in forma pauperis* application forms for the federal district courts in California are in Appendix 16-C.

A petitioner should keep a copy of every document that is submitted to the court. Also, when a petitioner sends a document for filing, they should send the court an extra cover page, a self-addressed stamped envelope, and a note asking the court clerk to file-stamp the cover page and return it to them. The court clerk should then file stamp the extra cover page and return it to the petitioner as proof of filing.

The petitioner does not have to serve the petition on the respondent. If the court allows the petition to proceed, it will serve the petition on the respondent.<sup>145</sup> However, a petitioner who wishes to serve the petition themselves can mail a copy of the petition to the state Attorney General's Office.

---

<sup>142</sup> Federal Rules of Habeas Corpus, rule 2(c).

<sup>143</sup> *Jarvis v. Nelson* (9th Cir. 1971) 440 F.2d 13, 14; *Ballard v. Nelson* (9th Cir. 1970) 423 F.2d 71, 73.

<sup>144</sup> A person who is nearing the filing deadline and is having problems getting prison staff to provide the supporting paperwork for the *in forma pauperis* application should go ahead and file the petition and *in forma pauperis* declaration. The court clerk must accept the petition without a filing fee. Federal Rules of Habeas Corpus, rule 3(b). The person should be allowed to file the rest of the *in forma pauperis* documents within a reasonable period of time.

<sup>145</sup> Federal Rules of Habeas Corpus, rule 4.

## 16.16 Requesting an Attorney

Generally, there is no right to an attorney in a federal habeas case (except for cases involving the death penalty).<sup>146</sup> There are exceptions – the court must appoint an attorney if necessary for effective discovery, if an evidentiary hearing is necessary, or if necessary for due process.<sup>147</sup>

Federal judges have discretion to appoint an attorney in other extraordinary circumstances if doing so is in the interests of justice. A court making such a determination will consider the strength and complexity of the issues and the petitioner’s ability to articulate the claims.<sup>148</sup>

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

A petitioner cannot appeal from the denial of a request for an attorney until after the district court decides the habeas petition.<sup>149</sup>

## 16.17 Procedures After a Petition is Filed

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

If the court allows the petition to proceed, it will issue an order giving the respondent an opportunity to file a brief. The respondent can either file a motion to dismiss the petition due to a procedural defect, or file an “answer” responding to the legal and factual issues in the petition. If the respondent files an answer, the respondent must state what records are available for the case and attach any relevant state court transcripts, briefs, and decisions.<sup>150</sup>

The petitioner will then have an opportunity to file either an opposition to a motion to dismiss, or a reply (called a traverse) to the respondent’s answer.<sup>151</sup> The petitioner should serve the respondent by mail with a copy of any document filed in the court.

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

---

<sup>146</sup> *Chaney v. Lewis* (9th Cir. 1986) 801 F.2d 1191, 1196. For more information about the right to counsel in death penalty cases, see 18 U.S.C. § 3599 and *Christenson v. Roper* (2015) \_\_ U.S. \_\_ [135 S.Ct. 891; 190 L.Ed.2d 763].

<sup>147</sup> Federal Rules of Habeas Corpus, rule 6(a) (discovery) and rule 8(c) (evidentiary hearing); *Eskridge v. Rhy* (9th Cir. 1965) 345 F.2d 778, 782 (due process); *Dillon v. United States* (9th Cir. 1962) 307 F.2d 445, 447 (due process).

<sup>148</sup> 18 U.S.C. § 3006A; 28 U.S.C. § 1915(d); 28 U.S.C. § 2254(h); Federal Rules of Habeas Corpus, rule 8(c); *Bashor v. Risley* (9th Cir. 1984) 730 F.2d 1228, 1234.

<sup>149</sup> *Kuster v. Block* (9th Cir. 1985) 773 F.2d 1048, 1049.

<sup>150</sup> Federal Rules of Habeas Corpus, rule 5(a)-(d).

<sup>151</sup> Federal Rules of Habeas Corpus, rule 5(e).

The federal court can order parties to produce additional documents or evidence; this is called an order for discovery.<sup>152</sup> In limited circumstances, the court may also allow parties to expand the record by filing additional documents or holding evidentiary hearings to develop the facts.<sup>153</sup>

The federal judge may ask the parties to consent to have the case heard by a magistrate judge. If consent is given, the magistrate judge will conduct the proceedings and will make findings and recommendations, which the federal district court judge will adopt or reject.<sup>154</sup>

## 16.18 Motions for Modification of or Relief from the Judgment

If a habeas petition is dismissed or denied, the petitioner may be able to file a “Rule 59” motion to amend the judgment in the district court. The motion may ask the district court to “correct manifest errors of law or fact upon which the judgment rests” by reconsidering its ruling. Such a motion must be filed no later than 28 days after the dismissal or denial order is filed.<sup>155</sup> The motion will toll the timeline for filing a notice of appeal until the court rules on the motion.<sup>156</sup>

Another option following dismissal or denial is to file a “Rule 60(b)” motion for relief from the judgment in the district court. A motion based on clerical mistake can be filed any time except when an appeal is pending. A motion based on other reasons must be filed within a “reasonable time,” with the added requirement that motions based on mistake or excusable neglect, or based on fraud or misconduct by an opposing party, must be filed within one year after the entry of the dismissal or denial order.<sup>157</sup> Thus, a Rule 60(b) motion can be filed after the time to appeal has expired (see § 16.20).

The rights to file Rule 59 and Rule 60 motions are limited by the AEDPA rule prohibiting people in prison from filing successive petitions. This means that such motions cannot seek to present new evidence, raise a new legal claim for relief, or seek to vacate the judgment because of a subsequent change in the law. However, a Rule 59 or Rule 60 motion can be used to challenge a defect in the integrity of the federal habeas proceedings.<sup>158</sup> For Rule 59 motions, this means a petitioner can ask the district court to reconsider its decision regarding any claim on grounds already raised.<sup>159</sup> For Rule 60

---

<sup>152</sup> 28 U.S.C. § 2254; Federal Rules of Habeas Corpus, rule 6; *Bracy v. Gramley* (1997) 520 U.S. 899, 908-909 [117 S.Ct. 1793; 138 L.Ed.2d 97].

<sup>153</sup> Federal Rules of Habeas Corpus, rules 7-8.

<sup>154</sup> 28 U.S.C. § 636; Federal Rules of Habeas Corpus, rule 10.

<sup>155</sup> Federal Rules of Civil Procedure, rule 59(e); *Rishor v. Ferguson* (9th Cir. 2016) 822 F.3d 482, 492-494.

<sup>156</sup> Federal Rule of Appellate Procedure, rule 4(a).

<sup>157</sup> Federal Rules of Civil Procedure, rule 60.

<sup>158</sup> *Gonzalez v. Crosby* (2005) 545 U.S. 524, 532-533 [125 S.Ct. 2641; 162 L.Ed.2d 180]; *Rishor v. Ferguson* (9th Cir. 2016) 822 F.3d 482; 28 U.S.C. § 2244(b). *Phelps v. Alameida* (9th Cir. 2009) 569 F.3d 1120, 1134 (petitioner entitled to reconsideration where Ninth Circuit panels reached varying outcomes in similar cases pending at same time, legal issue was subsequently resolved in person’s favor, and person acted diligently in pursuing case).

<sup>159</sup> *Rishor v. Ferguson* (9th Cir. 2016) 822 F.3d 482, 493-494.

## § 16.19

motions, AEDPA prohibits attacking the district court's decision on the merits, and allows only attacks on procedural matters.<sup>160</sup>

## 16.19 Appealing a Denial

An appeal may be made from a final order in a federal habeas corpus proceeding.<sup>161</sup> In order to appeal such an order, a petitioner must file two documents: a notice of appeal (see § 16.20) and a request for a certificate of appealability (see § 16.21).

## 16.20 Notice of Appeal

To appeal from a denial of a federal habeas petition, a petitioner must file a notice of appeal in the federal district court within 30 days after the entry of the district court's final order.<sup>162</sup> As with other federal habeas documents, a *pro se* notice of appeal is deemed to be "filed" when it is delivered to prison authorities for mailing.<sup>163</sup>

A petitioner who cannot meet the 30-day deadline may request an extension of time or permission to file a late notice of appeal. The request must be made within 60 days after the district court order. The petitioner must show that failure to meet the filing deadline was due to excusable neglect or good cause.<sup>164</sup> The time for filing a notice of appeal can be extended no longer than the

---

<sup>160</sup> *Gonzalez v. Crosby* (2005) 545 U.S. 524, 532-533 [125 S.Ct. 2641; 162 L.Ed.2d 180] (disallowing motion seeking to raise substantive claims, but allowing motion challenging dismissal for untimeliness); *Hall v. Haws* (9th Cir. 2017) 861 F.3d 977 (motion to reopen where petitioner had abandoned claim based on erroneous belief that he was joined in co-defendant's habeas petition motion); *Washington v. Ryan* (9th Cir. 2016) 833 F.3d 1087 (motion where court clerk errors caused failure to file timely notice of appeal); *Brooks v. Yates* (9th Cir. 2016) 818 F.3d 532 (motion challenging dismissal for untimeliness due to attorney abandonment); *Foley v. Biter* (9th Cir. 2015) 793 F.3d 998 (motion where attorney abandonment caused petitioner to miss timeline to file notice of appeal); *Phelps v. Alameida* (9th Cir. 2009) 569 F.3d 1120, 1134 (motion challenging untimeliness dismissal); *Butz v. Mendoza-Powers* (9th Cir. 2007) 474 F.3d 1193 (motion challenging dismissal for failure to pay filing fee or request *in forma pauperis* status).

<sup>161</sup> 28 U.S.C. § 2253. An order requiring a new parole hearing is not a final judgment and thus cannot be appealed. *Prellwitz v. Sisto* (9th Cir. 2011) 657 F.3d 1035, 1038. (Note that this case involved an order issued before *Swarthout v. Cooke* (2011) 562 U.S. 216 [131 S.Ct. 859; 178 L.Ed.2d 732] held that people with life sentences in California cannot bring federal habeas petitions challenging denials of parole suitability for lack of some evidence).

<sup>162</sup> Federal Rules of Appellate Procedure, rule 4(a); 28 U.S.C. § 2107; *Browder v. Illinois Dept. of Corrections* (1978) 434 U.S. 257, 265 [98 S.Ct. 556, 54 L.Ed.2d 521].

<sup>163</sup> *Houston v. Lack* (1988) 487 U.S. 266, 270 [108 S.Ct. 2379; 101 L.Ed. 245]; *Caldwell v. Amend* (9th Cir. 1994) 30 F.3d 1199, 1201.

<sup>164</sup> Federal Rules of Appellate Procedure, rule 4(a)(5); *Browder v. Illinois Dept. of Corrections* (1978) 434 U.S. 257, 265 [98 S.Ct. 556; 54 L.Ed.2d 521]; *Pratt v. McCarthy* (9th Cir. 1988) 850 F.2d 590, 592-593; *Malone v. Avenenti* (9th Cir. 1988) 850 F.2d 569, 571; *Felix v. Cardwell* (9th Cir. 1976) 545 F.2d 92, 93; *Mendez v. Knowles* (9th Cir. 2009) 556 F.3d 757, 765 (petitioner allowed to file a late notice of appeal where attorney put the notice in the mail several days before the deadline, but the notice arrived at the court, which was just across town, one day late). "Excusable neglect" for failure to timely file notice of appeal is where the failure is due to negligence is excusable taking into account all relevant circumstances. *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership* (1993) 507 U.S. 380, 395 [113 S.Ct. 1489; 123 L.Ed.2d 74]. If a person fails to timely file a notice of appeal because of abandonment by an attorney or an error by a court, they can ask the district court to vacate and re-enter the judgment under the "catch-all" clause of Rule 60(b)(6) of the Federal Rules of Civil Procedure. *Washington v. Ryan* (9th Cir. 2016) 833 F.3d 1087; *Mackey v. Hoffman* (9th Cir. 2012) 682 F.3d 1247, 1253.

60th day after the district court judgment was entered, or the 10th day following an order granting an extension of time.<sup>165</sup>

The notice of appeal must identify the name and court number of the case being appealed, the name of the person bringing the appeal, and the court in which the appeal will be filed (for California cases, this is the Ninth Circuit Court of Appeals).<sup>166</sup>

With the notice of appeal, the petitioner must either pay filing and docketing fees (currently a total of \$255) or get permission to proceed *in forma pauperis*.<sup>167</sup> A petitioner who has already been granted permission to proceed *in forma pauperis* for the habeas petition does not have to file a new *in forma pauperis* request for the appeal, unless there have been significant changes in the petitioner's financial status.<sup>168</sup>

## 16.21 Seeking a Certificate of Appealability

In addition to filing a notice of appeal, a petitioner who wants to appeal must obtain a certificate of appealability (COA).<sup>169</sup>

The district court must grant or deny a COA when it enters a final order in the habeas case. Before making the order, the court may ask the parties to submit briefs on whether a certificate should be issued.<sup>170</sup>

If the district court refuses to issue a COA, the petitioner should file a request for a COA in the Ninth Circuit Court of Appeals.<sup>171</sup>

The court can deny or grant a COA on an issue-by-issue basis. Thus, the petitioner must specifically ask for a COA for each issue being appealed.<sup>172</sup>

To get a COA for claims that were denied on the merits, the petitioner must make a substantial showing that a constitutional right has been denied, and must state the facts supporting the claims.<sup>173</sup>

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

<sup>165</sup> Federal Rules of Appellate Procedure, rule 4(a)(5)(B).

<sup>166</sup> Federal Rules of Appellate Procedure, rule 3(c)(1).

<sup>167</sup> 28 U.S.C. § 1913 (docket fee); 28 U.S.C. § 1915(a) (*in forma pauperis* status); 28 U.S.C. § 1917 (filing fee).

<sup>168</sup> Federal Rules of Appellate Procedure, rule 24(a)(3).

<sup>169</sup> 28 U.S.C. § 2253(c).

<sup>170</sup> Federal Rules of Habeas Corpus, rule 11(a).

<sup>171</sup> Federal Rules of Appellate Procedure, rule 22(b). The COA request may be decided by a single judge or a panel of judges. *Santiago Salgado v. Garvia* (9th Cir. 2004) 384 F.3d 769, 772.

<sup>172</sup> 28 U.S.C. § 2253(c). People with life sentences who are challenging parole suitability denials or reversals are *not* exempt from the COA requirement. *Hayward v. Marshall* (9th Cir. 2010) 603 F.3d 546, 553 (overruled on other grounds). A court of appeals judge's failure to indicate on the COA which specific issues are appealable does not deprive the court of the power to decide the appeal. *Gonzalez v. Thaler* (2012) 565 U.S. 134 [132 S.Ct. 641; 181 L.Ed.2d 619].

<sup>173</sup> 28 U.S.C. § 2253(c); Federal Rules of Appellate Procedure, rule 22(b).



## § 16.22

(2) reasonable jurists could debate whether the habeas petition stated a valid claim that a constitutional right was denied.<sup>174</sup>

### 16.22 Requesting an Attorney for an Appeal

If the district court appointed an attorney for the petitioner for the habeas case, the appointment will generally extend to the appeal.<sup>175</sup> A person who was *pro se* in the district court also may file a request for appointment of an attorney in the Ninth Circuit Court of Appeals. The petitioner must show that appointment of counsel is necessary because the issues are important and complex.<sup>176</sup>

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

A federal habeas petitioner who does not succeed on appeal may file a petition for writ of certiorari asking the United States Supreme Court to review the case. The petition must be filed 90 days after the appellate court issues its final decision.<sup>177</sup> The petition must include a description of the issues, a statement of jurisdiction, and the reasons why the issues are of such wide importance that the Court should hear the case.<sup>178</sup> Instructions and forms for filing a *pro se* petition for writ of certiorari are available on the U.S. Supreme Court website.<sup>179</sup>

A person seeking a writ of certiorari must either pay a filing fee or request permission to proceed *in forma pauperis* in the Supreme Court. The Court's forms for *pro se* people include a motion for *in forma pauperis* status. If a person abuses the system by filing large numbers of frivolous certiorari petitions, the Court may ban the person from filing any further *in forma pauperis* petitions.<sup>180</sup>

---

<sup>174</sup> *Slack v. McDaniel* (2000) 529 U.S. 473, 483 [120 S.Ct. 1597; 146 L.Ed.2d 542].

<sup>175</sup> 18 U.S.C. § 3006A.

<sup>176</sup> 18 U.S.C. § 3006A(c); *Dillon v. United States* (9th Cir. 1962) 307 F.2d 445, 450.

<sup>177</sup> U.S. Supreme Court Rules, rule 13.3.

<sup>178</sup> U.S. Supreme Court Rules, rule 14.1.

<sup>179</sup> U.S. Supreme Court website, [www.supremecourtus.gov](http://www.supremecourtus.gov).

<sup>180</sup> U.S. Supreme Court Rules, rule 39; *In re Demos* (1991) 500 U.S. 16, 16 [111 S.Ct. 1569; 114 L.Ed.2d 20].

## FEDERAL DISTRICT COURTS

### U.S. District Court for the Northern District of California,

	<i>CDCR Facilities</i>	<i>Counties</i>
<b>Oakland Division</b>  <i>U.S. Courthouse</i> 1301 Clay St., Suite 400 S Oakland, CA 94612		Alameda Contra Costa
<b>San Francisco Division</b>  <i>U.S. Courthouse</i> 450 Golden Gate Ave. 16th Floor San Francisco, CA 94102	Pelican Bay State Prison (PBSP) San Quentin State Prison (SQSP)	Del Norte      Napa Humboldt      San Francisco Lake      San Mateo Mendocino      Sonoma Marin
<b>San Jose Division</b>  <i>U.S. Courthouse</i> 280 South 1st Street San Jose, CA 95113	Correctional Training Fac. (CTF) Salinas Valley State Prison (SVSP)	Santa Clara Monterey San Benito Santa Cruz

### U.S. District Court for the Eastern District of California,

	<i>CDCR Facilities</i>	<i>Counties</i>
<b>Fresno Division</b>  <i>U.S. Courthouse</i> 2500 Tulare St., Ste. 1501 Fresno, CA 93721	Avenal State Prison (ASP) CSP – Corcoran (COR) Cal. Correctional Inst. (CCI) Central Cal. Women’s Fac. (CCWF) Kern Valley State Prison (KVSP) North Kern State Prison (NKSP) Pleasant Valley State Prison (PVSP) Subst. Abuse Treatmt. Fac. (SATF) Sierra Conservation Center (SCC) Valley State Prison (VSP) Wasco State Prison (WSP)	Calaveras      Mariposa Fresno      Merced Inyo      Stanislaus Kern      Tulare Kings      Tuolumne Madera
<b>Sacramento Division</b>  <i>U.S. Courthouse</i> 501 “I” St., Ste. 4-200 Sacramento, CA 95814	CSP – Sacramento (SAC) CSP – Solano (SOL) California Correctional Ctr. (CCC) California Health Care Fac. (CHCF) California Medical Facility (CMF) Deuel Vocational Inst. (DVI) Folsom State Prison (FSP) High Desert State Prison (HDSP) Mule Creek State Prison (MCSP)	Alpine      Sacramento Amador      San Joaquin Butte      Shasta Colusa      Sierra El Dorado      Siskiyou Glenn      Solano Lassen      Sutter Modoc      Tehama Mono      Trinity Nevada      Yolo Placer      Yuba Plumas

**U.S. District Court for the Central District of California,**

	<i>CDCR Facilities</i>	<i>Counties</i>
<b>Western Division</b>  <i>U.S. Courthouse</i> 255 East Temple St. Los Angeles, CA 90012	California Men's Colony (CMC) CSP – Los Angeles County (LAC)	Los Angeles San Luis Obispo Santa Barbara Ventura
<b>Eastern Division</b>  <i>U.S. Courthouse</i> 3470 Twelfth St. Riverside, CA 92501	California Institution for Men (CIM) California Institution for Women (CIW) California Rehabilitation Center (CRC) Chuckawalla Valley State Prison (CVSP) Ironwood State Prison (ISP)	Riverside San Bernardino
<b>Southern Division</b>  <i>U.S. Courthouse</i> 411 West 4th St., Rm 1053 Santa Ana, CA 92701		Orange

**U.S. District Court for the Southern District of California**

	<i>CDCR Facilities</i>	<i>Counties</i>
<i>U.S. Courthouse</i> 333 West Broadway Ste. 420 San Diego, CA 92101	CSP – Centinela (CEN) Calipatria State Prison (CAL) Richard J. Donovan Corr. Fac. (RJD)	Imperial San Diego

**FEDERAL COURT OF APPEALS**

	<i>CDCR Facilities</i>	<i>Counties</i>
<i>U.S. Court of Appeals for the Ninth Circuit</i> P.O. Box 193939 San Francisco, CA 94119	(All CDCR facilities)	(All California counties)

**UNITED STATES SUPREME COURT**

	<i>CDCR Facilities</i>	<i>Counties</i>
<i>United States Supreme Court</i> 1 First Street NE Washington, DC 20543	(All facilities)	(All counties)

NAME

PRISON IDENTIFICATION/BOOKING NO.

ADDRESS OR PLACE OF CONFINEMENT

Note: It is your responsibility to notify the Clerk of Court in writing of any change of address. If represented by an attorney, provide his or her name, address, telephone and facsimile numbers, and e-mail address.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

FULL NAME (Include name under which you were convicted)

Petitioner,

v.

NAME OF WARDEN, SUPERINTENDENT, JAILOR, OR AUTHORIZED  
PERSON HAVING CUSTODY OF PETITIONER

Respondent.

CASE NUMBER:

CV

To be supplied by the Clerk of the United States District Court

☐ AMENDED

PETITION FOR WRIT OF HABEAS CORPUS  
BY A PERSON IN STATE CUSTODY  
28 U.S.C. § 2254

PLACE/COUNTY OF CONVICTION

PREVIOUSLY FILED, RELATED CASES IN THIS DISTRICT COURT  
(List by case number)

CV

CV

INSTRUCTIONS - PLEASE READ CAREFULLY

1. To use this form, you must be a person who either is currently serving a sentence under a judgment against you in a California state court, or will be serving a sentence in the future under a judgment against you in a California state court. You are asking for relief from the conviction and/or the sentence. This form is your petition for relief.
2. In this petition, you may challenge the judgment entered by only one California state court. If you want to challenge judgments entered by more than one California state court, you must file a separate petition for each court.
3. Make sure the form is typed or neatly handwritten. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
4. Answer all the questions. You do not need to cite case law, but you do need to state the federal legal theory and operative facts in support of each ground. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a legal brief or arguments, you may attach a separate memorandum.
5. You must include in this petition all the grounds for relief from the conviction and/or sentence that you challenge. You must also state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.
6. You must pay a fee of \$5.00. If the fee is paid, your petition will be filed. If you cannot afford the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out and sign the declaration of the last two pages of the form. Also, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account at the institution. If your prison account exceeds \$25.00, you must pay the filing fee.
7. When you have completed the form, send the original and two copies to the following address:  
Clerk of the United States District Court for the Central District of California  
United States Courthouse  
ATTN: Intake/Docket Section  
255 East Temple Street, Suite TS-134  
Los Angeles, California 90012

PLEASE COMPLETE THE FOLLOWING (*check appropriate number*):

This petition concerns:

1. ☐ a conviction and/or sentence.
2. ☐ prison discipline.
3. ☐ a parole problem.
4. ☐ other.

### PETITION

1. Venue

- a. Place of detention \_\_\_\_\_
- b. Place of conviction and sentence \_\_\_\_\_

2. Conviction on which the petition is based (*a separate petition must be filed for each conviction being attacked*).

- a. Nature of offenses involved (*include all counts*) : \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- b. Penal or other code section or sections: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- c. Case number: \_\_\_\_\_
- d. Date of conviction: \_\_\_\_\_
- e. Date of sentence: \_\_\_\_\_
- f. Length of sentence on each count: \_\_\_\_\_  
\_\_\_\_\_
- g. Plea (*check one*) :  
☐ Not guilty  
☐ Guilty  
☐ Nolo contendere
- h. Kind of trial (*check one*) :  
☐ Jury  
☐ Judge only

3. Did you appeal to the California Court of Appeal from the judgment of conviction? ☐ Yes ☐ No

If so, give the following information for your appeal (*and attach a copy of the Court of Appeal decision if available*):

- a. Case number: \_\_\_\_\_
- b. Grounds raised (*list each*) :  
(1) \_\_\_\_\_  
(2) \_\_\_\_\_

- (3) \_\_\_\_\_  
(4) \_\_\_\_\_  
(5) \_\_\_\_\_  
(6) \_\_\_\_\_

- c. Date of decision: \_\_\_\_\_  
d. Result \_\_\_\_\_  
\_\_\_\_\_

4. If you did appeal, did you also file a Petition for Review with the California Supreme Court of the Court of Appeal decision? ☐ Yes ☐ No

If so, give the following information *(and attach copies of the Petition for Review and the Supreme Court ruling if available)*:

- a. Case number: \_\_\_\_\_  
b. Grounds raised *(list each)*:  
(1) \_\_\_\_\_  
(2) \_\_\_\_\_  
(3) \_\_\_\_\_  
(4) \_\_\_\_\_  
(5) \_\_\_\_\_  
(6) \_\_\_\_\_  
c. Date of decision: \_\_\_\_\_  
d. Result \_\_\_\_\_  
\_\_\_\_\_

5. If you did not appeal:

- a. State your reasons \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
b. Did you seek permission to file a late appeal? ☐ Yes ☐ No

6. Have you previously filed any habeas petitions in any state court with respect to this judgment of conviction?

☐ Yes ☐ No

If so, give the following information for each such petition *(use additional pages, if necessary, and attach copies of the petitions and the rulings on the petitions if available)*:

- a. (1) Name of court: \_\_\_\_\_  
(2) Case number: \_\_\_\_\_  
(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: \_\_\_\_\_

(4) Grounds raised *(list each)*:

- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
- (d) \_\_\_\_\_
- (e) \_\_\_\_\_
- (f) \_\_\_\_\_

(5) Date of decision: \_\_\_\_\_

(6) Result \_\_\_\_\_

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

b. (1) Name of court: \_\_\_\_\_

(2) Case number: \_\_\_\_\_

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: \_\_\_\_\_

(4) Grounds raised *(list each)*:

- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
- (d) \_\_\_\_\_
- (e) \_\_\_\_\_
- (f) \_\_\_\_\_

(5) Date of decision: \_\_\_\_\_

(6) Result \_\_\_\_\_

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

c. (1) Name of court: \_\_\_\_\_

(2) Case number: \_\_\_\_\_

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: \_\_\_\_\_

(4) Grounds raised *(list each)*:

- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
- (d) \_\_\_\_\_
- (e) \_\_\_\_\_
- (f) \_\_\_\_\_

(5) Date of decision: \_\_\_\_\_

(6) Result \_\_\_\_\_

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

7. Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes ☐ No

If yes, answer the following:

(1) Docket or case number (if you know): \_\_\_\_\_

(2) Result: \_\_\_\_\_

(3) Date of result (if you know): \_\_\_\_\_

(4) Citation to the case (if you know): \_\_\_\_\_

8. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than five grounds. Summarize briefly the facts supporting each ground. For example, if you are claiming ineffective assistance of counsel, you must state facts specifically setting forth what your attorney did or failed to do.

**CAUTION:** *Exhaustion Requirement:* In order to proceed in federal court, you must ordinarily first exhaust your state court remedies with respect to each ground on which you are requesting relief from the federal court. This means that, prior to seeking relief from the federal court, you first must present all of your grounds to the California Supreme Court.

a. Ground one: \_\_\_\_\_

(1) Supporting FACTS: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☐ No

b. Ground two: \_\_\_\_\_

(1) Supporting FACTS: \_\_\_\_\_

\_\_\_\_\_



---

---

---

- (2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☐ No
- (3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☐ No
- (4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☐ No

c. Ground three: \_\_\_\_\_

(1) Supporting FACTS: \_\_\_\_\_

---

---

---

- (2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☐ No
- (3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☐ No
- (4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☐ No

d. Ground four: \_\_\_\_\_

(1) Supporting FACTS: \_\_\_\_\_

---

---

---

- (2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☐ No
- (3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☐ No
- (4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☐ No

e. Ground five: \_\_\_\_\_

(1) Supporting FACTS: \_\_\_\_\_

---

---

---

- (2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☐ No

9. If any of the grounds listed in paragraph 8 were not previously presented to the California Supreme Court, state briefly which grounds were not presented, and give your reasons: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

10. Have you previously filed any habeas petitions in any federal court with respect to this judgment of conviction?

☐ Yes ☐ No

If so, give the following information for each such petition (*use additional pages, if necessary, and attach copies of the petitions and the rulings on the petitions if available*):

a. (1) Name of court: \_\_\_\_\_

(2) Case number: \_\_\_\_\_

(3) Date filed (*or if mailed, the date the petition was turned over to the prison authorities for mailing*): \_\_\_\_\_

(4) Grounds raised (*list each*):

(a) \_\_\_\_\_

(b) \_\_\_\_\_

(c) \_\_\_\_\_

(d) \_\_\_\_\_

(e) \_\_\_\_\_

(f) \_\_\_\_\_

(5) Date of decision: \_\_\_\_\_

(6) Result \_\_\_\_\_  
\_\_\_\_\_

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

b. (1) Name of court: \_\_\_\_\_

(2) Case number: \_\_\_\_\_

(3) Date filed (*or if mailed, the date the petition was turned over to the prison authorities for mailing*): \_\_\_\_\_

(4) Grounds raised (*list each*):

(a) \_\_\_\_\_

(b) \_\_\_\_\_

(c) \_\_\_\_\_

(d) \_\_\_\_\_

(e) \_\_\_\_\_

(f) \_\_\_\_\_

(5) Date of decision: \_\_\_\_\_

(6) Result \_\_\_\_\_

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

11. Do you have any petitions now pending (i.e., filed but not yet decided) in any state or federal court with respect to this judgment of conviction? ☐ Yes ☐ No

If so, give the following information (and attach a copy of the petition if available):

(1) Name of court: \_\_\_\_\_

(2) Case number: \_\_\_\_\_

(3) Date filed (or if mailed, the date the petition was turned over to the prison authorities for mailing): \_\_\_\_\_

(4) Grounds raised (list each):

(a) \_\_\_\_\_

(b) \_\_\_\_\_

(c) \_\_\_\_\_

(d) \_\_\_\_\_

(e) \_\_\_\_\_

(f) \_\_\_\_\_

12. Are you presently represented by counsel? ☐ Yes ☐ No

If so, provide name, address and telephone number: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

WHEREFORE, petitioner prays that the Court grant petitioner all relief to which he may be entitled in this proceeding.

\_\_\_\_\_  
*Signature of Attorney (if any)*

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on \_\_\_\_\_  
*Date*

\_\_\_\_\_  
*Signature of Petitioner*

PETITION UNDER 28 USC § 2254 FOR WRIT OF  
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

<b>United States District Court</b>		District _____
Name _____	Prisoner No. _____	Case No. _____
Place of Confinement _____		
Name of Petitioner (include name under which convicted) _____		Name of Respondent (authorized person having custody of petitioner) _____
V.		
The Attorney General of the State of: _____		
<b>PETITION</b>		
1. Name and location of court which entered the judgment of conviction under attack _____ _____		
2. Date of judgment of conviction _____		
3. Length of sentence _____		
4. Nature of offense involved (all counts) _____ _____ _____ _____		
5. What was your plea? (Check one)		
(a) Not guilty <input type="checkbox"/>		
(b) Guilty <input type="checkbox"/>		
(c) Nolo contendere <input type="checkbox"/>		
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____ _____		
6. If you pleaded not guilty, what kind of trial did you have? (Check one)		
(a) Jury <input type="checkbox"/>		
(b) Judge only <input type="checkbox"/>		
7. Did you testify at the trial?		
Yes <input type="checkbox"/> No <input type="checkbox"/>		
8. Did you appeal from the judgment of conviction?		
Yes <input type="checkbox"/> No <input type="checkbox"/>		

9. If you did appeal, answer the following:

(a) Name of court \_\_\_\_\_

(b) Result \_\_\_\_\_

(c) Date of result and citation, if known \_\_\_\_\_

(d) Grounds raised \_\_\_\_\_

\_\_\_\_\_

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court \_\_\_\_\_

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

\_\_\_\_\_

(3) Date of result and citation, if known \_\_\_\_\_

(4) Grounds raised \_\_\_\_\_

\_\_\_\_\_

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court \_\_\_\_\_

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

\_\_\_\_\_

(3) Date of result and citation, if known \_\_\_\_\_

(4) Grounds raised \_\_\_\_\_

\_\_\_\_\_

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☐ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court \_\_\_\_\_

(2) Nature of proceeding \_\_\_\_\_

\_\_\_\_\_

(3) Grounds raised \_\_\_\_\_

\_\_\_\_\_

---



---



---

(4) Did you receive an evidentiary hearing on your petition, application or motion?  
 Yes ☐ No ☐

(5) Result 

---

(6) Date of result 

---

(b) As to any second petition, application or motion give the same information:

(1) Name of court 

---

(2) Name of proceeding 

---

(3) Grounds raised 

---

---



---



---



---

(4) Did you receive an evidentiary hearing on your petition, application or motion?  
 Yes ☐ No ☐

(5) Result 

---

(6) Date of result 

---

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

---



---



---

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: \_\_\_\_\_

Supporting FACTS (state *briefly* without citing cases or law): \_\_\_\_\_

B. Ground two: \_\_\_\_\_

Supporting FACTS (state *briefly* without citing cases or law): \_\_\_\_\_

C. Ground three: \_\_\_\_\_

Supporting FACTS (state *briefly* without citing cases or law): \_\_\_\_\_

D. Ground four: \_\_\_\_\_

Supporting FACTS (state *briefly* without citing cases or law): \_\_\_\_\_

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: \_\_\_\_\_

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?  
Yes ☐ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing \_\_\_\_\_

(b) At arraignment and plea \_\_\_\_\_



(c) At trial \_\_\_\_\_

(d) At sentencing \_\_\_\_\_

(e) On appeal \_\_\_\_\_

(f) In any post-conviction proceeding \_\_\_\_\_

(g) On appeal from any adverse ruling in a post-conviction proceeding \_\_\_\_\_

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☐

(a) If so, give name and location of court which imposed sentence to be served in the future: \_\_\_\_\_

(b) Give date and length of the above sentence: \_\_\_\_\_

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

\_\_\_\_\_  
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Petitioner

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

**INSTRUCTIONS FOR FILING A PETITION FOR A WRIT OF HABEAS CORPUS  
BY A PERSON IN STATE CUSTODY UNDER 28 U.S.C. § 2254**

---

I. SCOPE OF 28 U.S.C. § 2254

You may file a petition for a writ of habeas corpus under 28 U.S.C. § 2254 if you are in custody pursuant to the judgment of a state court in violation of the federal constitution or federal statutes. You may challenge either the fact or duration of your state sentence.

Any challenge to violations of federal law that affect the *conditions*—as opposed to the fact or duration—of your confinement should be brought in a civil rights complaint under 42 U.S.C. § 1983. If you wish to file a civil rights complaint under § 1983, you may do so on the forms provided by the clerk. Ask for the packet titled *Instructions for Filing a Civil Rights Complaint by a Prisoner under 42 U.S.C. § 1983*.

IMPORTANT NOTES

- If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction or sentence you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the U.S. Court of Appeals for the Ninth Circuit for an order authorizing this court to consider this petition. You may not file a second or successive federal habeas petition without first obtaining such an order. 28 U.S.C. § 2244(b).
- A petition for a writ of habeas corpus under 28 U.S.C. § 2254 will not be granted unless you have exhausted the remedies available in state court.
- Only one sentence or conviction may be challenged in a single petition. If you challenge more than one sentence or conviction, you must do so by separate petitions.

II. FILING A PETITION

A. Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: **Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, San Francisco, San Mateo, Santa Clara, Santa Cruz or Sonoma**. You also should file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good-time credits, and you are confined in one of these counties. *Habeas Corpus Local Rule 2254-3(a)*.

If you are challenging your conviction or sentence and you were *not* convicted and sentenced in one of the above-named counties, your petition will likely be transferred to the federal district court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not incarcerated in one of the counties listed above, your petition will likely be transferred to the federal district court for the district that includes the institution where you are confined. *Habeas Corpus Local Rule 2254-3(b)*.

B. Whom to Name as Respondent

Name the person who has actual custody of you, which usually means the warden or jailor. Do not name the state, a city, a county or a court. These are not proper respondents. If you are not presently in custody pursuant to the judgment against which you seek relief but may be subject to such custody in the future (e.g., detainees), name the person in whose custody you are now and the Attorney General of the state in which the

judgment you seek to challenge was entered.

### C. How to File

To file a habeas action, send the court the following items:

- Your original, completed petition form  
Your petition must be legibly handwritten or typewritten, and you must sign it and declare under penalty of perjury that the facts stated in it are correct. Read the entire form and explanatory comments that appear throughout it before you answer the questions. Complete all applicable questions in the blanks provided; attach additional pages if you need more space for any of your answers, clearly noting the question number to which any such continued answer refers.
- A check or money order for \$5 or a completed application to proceed in forma pauperis (IFP)  
The fee for filing a petition for a writ of habeas corpus is \$5. If you cannot afford to pay the fee at the time you file your petition, you may apply to proceed IFP using the forms provided by the clerk. Ask for the packet titled *Instructions for Filing an Application to Proceed In Forma Pauperis by a Prisoner under 28 U.S.C. § 1915*.

Make copies for your records and mail the original copies of your completed forms to: Clerk, U.S. District Court for the Northern District of California, 450 Golden Gate Avenue, Box 36060, San Francisco, CA 94102.

### III. MAGISTRATE JUDGE JURISDICTION

Magistrate judges are selected through a statutorily prescribed merit selection process and are appointed by the judges of this court. The court encourages parties to consent to magistrate judge jurisdiction as it may result in an earlier resolution of the matter; the rules and procedures used to decide your case will be the same regardless of whether a district judge or a magistrate judge decides your case. But you are free to decline magistrate judge jurisdiction and request that your case be decided by a district judge. Please indicate on the *Consent or Declination to Magistrate Judge Jurisdiction* form provided by the clerk whether you consent or decline to consent to magistrate judge jurisdiction.

### IV. AFTER YOUR PETITION IS FILED

The clerk will assign a case number and judge to your petition and mail you a copy of the first page, which will have the case number and judge's initials stamped on it. Please retain this copy for your records and put the case number on any case-related document you send to the court. If your petition is deficient in any way, the clerk may send you a notice that will require your response. If your case is assigned to a magistrate judge before you consented or declined to consent to magistrate judge jurisdiction, the clerk may send you a *Consent or Declination to Magistrate Judge Jurisdiction* form that will require your response. Please note that it is your responsibility to inform the court in writing without delay if your address changes. You will be notified at the address the court has on record whenever the court issues an order. A failure to respond to notices or orders or a failure to update your address may result in the dismissal of your case.

### V. INQUIRIES AND COPYING REQUESTS

Because of the large volume of cases filed in this court and limited court resources, the court will not answer inquiries concerning the status of your case or provide copies of documents, except at a charge of fifty cents (\$0.50) per page. It is therefore recommended that you make and keep a copy of every document you submit to the court for your records.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name: \_\_\_\_\_  
LAST FIRST MIDDLE INITIAL

Prisoner Number: \_\_\_\_\_

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

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

_____	)	Case Number: _____ (Provided by the clerk upon filing)
	)	
	)	
Petitioner,	)	
vs.	)	
	)	
_____	)	PETITION FOR A WRIT OF HABEAS CORPUS
	)	
Respondent(s).	)	
_____	)	

I. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

A. What sentence are you challenging in this petition?

1. Name and location of court that imposed sentence (for example: Alameda County Superior Court, Oakland):  
\_\_\_\_\_
2. Court \_\_\_\_\_
3. Location \_\_\_\_\_
4. Case number, if known \_\_\_\_\_
5. Date and terms of sentence \_\_\_\_\_
6. Are you now in custody serving this term? ("In custody" means in jail, on parole or probation, etc.) ..... YES NO

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

If yes, provide name and address of institution:

---

---

B. For what crime were you given this sentence?

**Note:** If your petition challenges a sentence for more than one crime, list each crime separately using California Penal Code numbers, if known. If you are challenging more than one sentence, you should file a different petition for each sentence.

---

---

---

C. Did you have any of the following proceedings?

Arraignment: ..... YES NO  
Preliminary Hearing: ..... YES NO  
Motion to Suppress: ..... YES NO

D. How did you plead? ..... Guilty Not Guilty Nolo Contendere

Any other plea (specify) \_\_\_\_\_

E. If you went to trial, what kind of trial did you have?

Jury Judge alone Judge alone on a transcript

F. Did you testify at your trial? ..... YES NO

G. Did you have an attorney at the following proceedings:

1. Arraignment ..... YES NO  
2. Preliminary hearing ..... YES NO  
3. Time of plea ..... YES NO  
4. Trial ..... YES NO  
5. Sentencing ..... YES NO  
6. Appeal ..... YES NO  
7. Other post-conviction proceeding ..... YES NO

H. Did you appeal your conviction? ..... YES NO

1. If you appealed, to what court(s) did you appeal?

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

Court of Appeal..... YES    Year:\_\_\_\_\_ NO  
 Result: \_\_\_\_\_  
 Supreme Court of California..... YES    Year:\_\_\_\_\_ NO  
 Result: \_\_\_\_\_  
 Any other court ..... YES    Year:\_\_\_\_\_ NO  
 Result: \_\_\_\_\_  
 2. If you appealed, were the grounds the same as those that you are raising in this  
 petition?..... YES    NO  
 3. Did the court issue an opinion?..... YES    NO  
 4. Did you seek permission to file a late appeal under Rule 31(a)?..... YES    NO  
 If you did, give the name of the court and the result: \_\_\_\_\_  
 \_\_\_\_\_  
 I. Other than appeals, have you previously filed any petitions, applications or motions with  
respect to this conviction in any court, state or federal?..... YES    NO  
**Note:** If you previously filed a petition for a writ of habeas corpus in federal court challenging the  
 same conviction you are challenging now and if that petition was denied or dismissed with  
 prejudice, you must first file a motion in the U. S. Court of Appeals for the Ninth Circuit  
 for an order authorizing this court to consider this petition. You may not file a second or  
 successive federal habeas petition without first obtaining such an order from the Ninth Circuit.  
 28 U.S.C. § 2244(b).  
 If you sought relief in any proceeding other than an appeal, answer the following  
 questions for each proceeding. Attach extra paper if you need more space.  
 1. Name of court: \_\_\_\_\_  
 Type of proceeding: \_\_\_\_\_  
 Grounds raised (be brief but specific):  
 a. \_\_\_\_\_  
 b. \_\_\_\_\_  
 c. \_\_\_\_\_  
 d. \_\_\_\_\_  
 Result: \_\_\_\_\_ Date of result: \_\_\_\_\_

1        2. Name of court: \_\_\_\_\_

2        Type of proceeding: \_\_\_\_\_

3        Grounds raised (be brief but specific):

4        a. \_\_\_\_\_

5        b. \_\_\_\_\_

6        c. \_\_\_\_\_

7        d. \_\_\_\_\_

8        Result: \_\_\_\_\_ Date of result: \_\_\_\_\_

9        3. Name of court: \_\_\_\_\_

10       Type of proceeding: \_\_\_\_\_

11       Grounds raised (be brief but specific):

12       a. \_\_\_\_\_

13       b. \_\_\_\_\_

14       c. \_\_\_\_\_

15       d. \_\_\_\_\_

16       Result: \_\_\_\_\_ Date of result: \_\_\_\_\_

17       4. Name of court: \_\_\_\_\_

18       Type of proceeding: \_\_\_\_\_

19       Grounds raised (be brief but specific):

20       a. \_\_\_\_\_

21       b. \_\_\_\_\_

22       c. \_\_\_\_\_

23       d. \_\_\_\_\_

24       Result: \_\_\_\_\_ Date of result: \_\_\_\_\_

25       J. Is any petition, appeal or other post-conviction proceeding now pending in any court?

26       ..... YES      NO

27       Name and location of court: \_\_\_\_\_

28       \_\_\_\_\_

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

6  
78  
910  
1114  
1516  
1720  
2122  
23

26  
27  
28



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

List, by name and citation only, any cases that you think are close factually to yours so that they are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning of these cases: \_\_\_\_\_

Do you have an attorney for this petition? ..... YES NO

If you do, give the name and address of your attorney: \_\_\_\_\_

WHEREFORE, petitioner prays that the court grant him/her the relief to which he/she may be entitled in this action. I verify under penalty of perjury that the foregoing is true and correct.

Executed on:

\_\_\_\_\_ *Date*

\_\_\_\_\_ *Signature of Petitioner*

**INSTRUCTIONS FOR FILING**  
**PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS**  
**IN THE UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**  
**BY A PERSON IN *STATE* CUSTODY**

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the *state* where the judgment was entered. If petitioner has a sentence to be served in the future under a *federal* judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court that entered the judgment.)

- (1) This petition must be legibly handwritten or typewritten. You must tell the truth in the petition and you must sign the petition under penalty of perjury. If you do not tell the truth in this petition, you may be prosecuted for and convicted of perjury.
- (2) Answer all the questions on the form as concisely as you can. You do not need to cite cases. Include the facts supporting your grounds for relief. If briefs or arguments are submitted, they should be submitted as a separate memorandum.
- (3) You must pay a **\$5.00 filing fee** to have your petition filed. The \$5.00 fee must be submitted with the petition, not separately. If you do not have the \$5.00 for the filing fee and any other costs, you may request permission to proceed in forma pauperis. To do so, fill out and submit the “Motion to Proceed in Forma Pauperis” form provided by the Court with your petition. You also **MUST** have an authorized officer at the penal institution complete the “Prison Certificate” statements stating the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You may only challenge a judgment entered by one court in a single petition. If you want to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.
- (5) You must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.
- (6) When the petition is fully completed, the original and at least one copy must be mailed to: Clerk of U.S. District Court, 333 West Broadway Suite 420, San Diego CA 92101.
- (7) Petitions that do not conform to these instructions will be returned with a notation as to the deficiency.

\_\_\_\_\_  
NAME

\_\_\_\_\_  
PRISON NUMBER

\_\_\_\_\_  
CURRENT ADDRESS OR PLACE OF CONFINEMENT

\_\_\_\_\_  
CITY, STATE, ZIP CODE

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

\_\_\_\_\_  
(FULL NAME OF PETITIONER)

**PETITIONER**

v.

\_\_\_\_\_  
(NAME OF WARDEN, SUPERINTENDENT, JAILOR, OR AUTHORIZED  
PERSON HAVING CUSTODY OF PETITIONER [E.G., DIRECTOR OF THE  
CALIFORNIA DEPARTMENT OF CORRECTIONS])

**RESPONDENT**

and

\_\_\_\_\_  
The Attorney General of the State of  
California, Additional Respondent.

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

(TO BE FILLED IN BY CLERK OF U.S. DISTRICT COURT)

**PETITION FOR WRIT OF HABEAS CORPUS**

UNDER 28 U.S.C. § 2254  
BY A PERSON IN STATE CUSTODY

1. Name and location of the court that entered the judgment of conviction under attack: \_\_\_\_\_  
\_\_\_\_\_
2. Date of judgment of conviction: \_\_\_\_\_
3. Trial court case number of the judgment of conviction being challenged: \_\_\_\_\_  
\_\_\_\_\_
4. Length of sentence: \_\_\_\_\_

5. Sentence start date and projected release date: \_\_\_\_\_  
\_\_\_\_\_
6. Offense(s) for which you were convicted or pleaded guilty (all counts): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
7. What was your plea? (CHECK ONE)  
(a) Not guilty ☐  
(b) Guilty ☐  
(c) Nolo contendere ☐
8. If you pleaded not guilty, what kind of trial did you have? (CHECK ONE)  
(a) Jury ☐  
(b) Judge only ☐
9. Did you testify at the trial?  
☐ Yes ☐ No

**DIRECT APPEAL**

10. Did you appeal from the judgment of conviction in the **California Court of Appeal**?  
☐ Yes ☐ No
11. If you appealed in the **California Court of Appeal**, answer the following:  
(a) Result: \_\_\_\_\_  
(b) Date of result (if known): \_\_\_\_\_  
(c) Case number and citation (if known): \_\_\_\_\_  
\_\_\_\_\_  
(d) Grounds raised on direct appeal: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
12. If you sought further direct review of the decision on appeal by the **California Supreme Court** (e.g., a Petition for Review), please answer the following:  
(a) Result: \_\_\_\_\_  
(b) Date of result (if known): \_\_\_\_\_  
(c) Case number and citation (if known): \_\_\_\_\_  
\_\_\_\_\_  
(d) Grounds raised: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

13. If you filed a petition for certiorari in the **United States Supreme Court**, please answer the following with respect to that petition:

(a) Result: \_\_\_\_\_

(b) Date of result (if known): \_\_\_\_\_

(c) Case number and citation (if known): \_\_\_\_\_

(d) Grounds raised: \_\_\_\_\_

#### **COLLATERAL REVIEW IN STATE COURT**

14. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Superior Court**?

☐ Yes ☐ No

15. If your answer to #14 was "Yes," give the following information:

(a) **California Superior Court** Case Number (if known): \_\_\_\_\_

(b) Nature of proceeding: \_\_\_\_\_

(c) Grounds raised: \_\_\_\_\_

(d) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☐ No

(e) Result: \_\_\_\_\_

(f) Date of result (if known): \_\_\_\_\_

16. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Court of Appeal**?

☐ Yes ☐ No

17. If your answer to #16 was “Yes,” give the following information:

- (a) **California Court of Appeal** Case Number (if known): \_\_\_\_\_
- (b) Nature of proceeding: \_\_\_\_\_  
\_\_\_\_\_
- (c) Grounds raised: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- (d) Did you receive an evidentiary hearing on your petition, application or motion?  
☐ Yes ☐ No
- (e) Result: \_\_\_\_\_
- (f) Date of result (if known): \_\_\_\_\_

18. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Supreme Court**?

☐ Yes ☐ No

19. If your answer to #18 was “Yes,” give the following information:

- (a) **California Supreme Court** Case Number (if known): \_\_\_\_\_
- (b) Nature of proceeding: \_\_\_\_\_  
\_\_\_\_\_
- (c) Grounds raised: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- (d) Did you receive an evidentiary hearing on your petition, application or motion?  
☐ Yes ☐ No
- (e) Result: \_\_\_\_\_
- (f) Date of result (if known): \_\_\_\_\_

20. If you did **not** file a petition, application or motion (e.g., a Petition for Review or a Petition for Writ of Habeas Corpus) with the **California Supreme Court**, containing the grounds raised in this federal Petition, explain briefly why you did not:

---

---

---

---

### **COLLATERAL REVIEW IN FEDERAL COURT**

21. Is this your **first** federal petition for writ of habeas corpus challenging this conviction?

☐ Yes ☐ No (IF "YES" SKIP TO #22)

(a) If no, in what federal court was the prior action filed? \_\_\_\_\_

(i) What was the prior case number? \_\_\_\_\_

(ii) Was the prior action (CHECK ONE):

☐ Denied on the merits?

☐ Dismissed for procedural reasons?

(iii) Date of decision: \_\_\_\_\_

(b) Were any of the issues in this current petition also raised in the prior federal petition?

☐ Yes ☐ No

(c) If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this second or successive petition?

☐ Yes ☐ No

### **CAUTION:**

- **Exhaustion of State Court Remedies:** In order to proceed in federal court you must ordinarily first exhaust your state court remedies by presenting your claims to the California Supreme Court. Even if you have exhausted some grounds by raising them before the California Supreme Court, you must first present ***all*** grounds to the California Supreme Court before raising them in your federal Petition.
- **Single Petition:** If you do not present all your grounds for challenging a specific judgment in this Petition, you may not be able to present additional grounds challenging the same judgment at a later date.
- **Factual Specificity:** You must state facts, not conclusions, in support of your grounds. For example, if you are claiming incompetence of counsel you must say what your attorney did wrong or failed to do. A rule of thumb to follow is — state who did exactly what to violate your federal constitutional rights at what time or place.

**GROUND S FOR RELIEF**

22. State *concisely* every ground on which you claim that you are being held in violation of the constitution, law or treaties of the United States. Summarize *briefly* the facts supporting each ground. (e.g. what happened during the state proceedings that you contend resulted in a violation of the constitution, law or treaties of the United States.) If necessary, you may attach pages stating additional grounds and/or facts supporting each ground.

(a) **GROUND ONE:** \_\_\_\_\_

Supporting FACTS: \_\_\_\_\_

**Did you raise GROUND ONE in the California Supreme Court?**

☐ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): \_\_\_\_\_

(2) Case number or citation: \_\_\_\_\_

(3) Result (attach a copy of the court's opinion or order if available): \_\_\_\_\_



(b) **GROUND TWO:** \_\_\_\_\_

**Supporting FACTS:** \_\_\_\_\_

**Did you raise GROUND TWO in the California Supreme Court?**

☐ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): \_\_\_\_\_

(2) Case number or citation: \_\_\_\_\_

(3) Result (attach a copy of the court's opinion or order if available): \_\_\_\_\_

(c) **GROUND THREE:** \_\_\_\_\_

**Supporting FACTS:** \_\_\_\_\_

**Did you raise GROUND THREE in the California Supreme Court?**

☐ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): \_\_\_\_\_

(2) Case number or citation: \_\_\_\_\_

(3) Result (attach a copy of the court's opinion or order if available): \_\_\_\_\_

(d) **GROUND FOUR:** \_\_\_\_\_

**Supporting FACTS:** \_\_\_\_\_

**Did you raise GROUND FOUR in the California Supreme Court?**

☐ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): \_\_\_\_\_

(2) Case number or citation: \_\_\_\_\_

(3) Result (attach a copy of the court's opinion or order if available): \_\_\_\_\_

23. Do you have any petition or appeal **now pending** in any court, either state or federal, pertaining to the judgment under attack?

☐ Yes ☐ No

24. If your answer to #23 is "Yes," give the following information:

(a) Name of Court: \_\_\_\_\_

(b) Case Number: \_\_\_\_\_

(c) Date action filed: \_\_\_\_\_

(d) Nature of proceeding: \_\_\_\_\_

\_\_\_\_\_

(e) Grounds raised: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(f) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☐ No

25. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: \_\_\_\_\_

\_\_\_\_\_

(b) At arraignment and plea: \_\_\_\_\_

\_\_\_\_\_

(c) At trial: \_\_\_\_\_

\_\_\_\_\_

(d) At sentencing: \_\_\_\_\_

\_\_\_\_\_

(e) On appeal: \_\_\_\_\_

(f) In any post-conviction proceeding: \_\_\_\_\_

\_\_\_\_\_

(g) On appeal from any adverse ruling in a post-conviction proceeding: \_\_\_\_\_

\_\_\_\_\_

26. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

☐ Yes ☐ No

27. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

☐ Yes ☐ No

(a) If so, give name and location of court that imposed sentence to be served in the future:

\_\_\_\_\_

(b) Give date and length of the future sentence: \_\_\_\_\_

\_\_\_\_\_

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

☐ Yes ☐ No

**28. Consent to Magistrate Judge Jurisdiction**

In order to insure the just, speedy and inexpensive determination of Section 2254 habeas cases filed in this district, the parties may waive their right to proceed before a district judge and consent to magistrate judge jurisdiction. Upon consent of all the parties under 28 U.S.C. § 636(c) to such jurisdiction, the magistrate judge will conduct all proceedings including the entry of final judgment. The parties are free to withhold consent without adverse substantive consequences.

The Court encourages parties to consent to a magistrate judge as it will likely result in an earlier resolution of this matter. If you request that a district judge be designated to decide dispositive matters, a magistrate judge will nevertheless hear and decide all non-dispositive matters and will hear and issue a recommendation to the district judge as to all dispositive matters.

You may consent to have a magistrate judge conduct any and all further proceedings in this case, including the entry of judgment, by indicating your consent below.

Choose only one of the following:

☐ Plaintiff consents to magistrate judge jurisdiction as set forth above

**OR**

☐ Plaintiff requests that a district judge be designated to decide dispositive matters and trial in this case

29. Date you are mailing (or handing to a correctional officer) this Petition to this court: \_\_\_\_\_

\_\_\_\_\_

Wherefore, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding.

---

SIGNATURE OF ATTORNEY (IF ANY)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

---

(DATE)

---

SIGNATURE OF PETITIONER

Central District  
of California

\_\_\_\_\_  
*Petitioner*

\_\_\_\_\_  
*Respondent(s)*

**DECLARATION IN SUPPORT  
OF REQUEST  
TO PROCEED  
IN FORMA PAUPERIS**

I, \_\_\_\_\_, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? ☐ Yes ☐ No

a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer. \_\_\_\_\_

b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received. \_\_\_\_\_

2. Have you received, within the past twelve months, any money from any of the following sources?

- a. Business, profession or form of self-employment? ☐ Yes ☐ No
- b. Rent payments, interest or dividends? ☐ Yes ☐ No
- c. Pensions, annuities or life insurance payments? ☐ Yes ☐ No
- d. Gifts or inheritances? ☐ Yes ☐ No
- e. Any other sources? ☐ Yes ☐ No

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months: \_\_\_\_\_

3. Do you own any cash, or do you have money in a checking or savings account? (Include any funds in prison accounts)  
☐ Yes ☐ No

If the answer is yes, state the total value of the items owned: \_\_\_\_\_  
\_\_\_\_\_

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property? (*Excluding ordinary household furnishings and clothing*) ☐ Yes ☐ No

If the answer is yes, describe the property and state its approximate value: \_\_\_\_\_  
\_\_\_\_\_

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on \_\_\_\_\_  
Date Signature of Petitioner

#### CERTIFICATE

I hereby certify that the Petitioner herein has the sum of \$ \_\_\_\_\_ on account to his credit at the \_\_\_\_\_ institution where he is confined. I further certify that Petitioner likewise has the following securities to his credit according to the records of said institution: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Date Authorized Officer of Institution/Title of Officer



# UNITED STATES DISTRICT COURT

for the

Eastern District  
of California

\_\_\_\_\_  
*Plaintiff/Petitioner*

v.

\_\_\_\_\_  
*Defendant/Respondent*

)  
)  
) Civil Action No.  
)  
)

## APPLICATION TO PROCEED IN DISTRICT COURT WITHOUT PREPAYING FEES OR COSTS (Short Form)

I am a plaintiff or petitioner in this case and declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief requested.

In support of this application, I answer the following questions under penalty of perjury:

1. *If incarcerated.* I am being held at: \_\_\_\_\_.  
If employed there, or have an account in the institution, I have attached to this document a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months for any institutional account in my name. I am also submitting a similar statement from any other institution where I was incarcerated during the last six months.

2. *If not incarcerated.* If I am employed, my employer's name and address are:

My gross pay or wages are: \$ \_\_\_\_\_, and my take-home pay or wages are: \$ \_\_\_\_\_ per  
(specify pay period) \_\_\_\_\_.

3. *Other Income.* In the past 12 months, I have received income from the following sources (check all that apply):

- |  |                              |                             |
|--|------------------------------|-----------------------------|
| (a) Business, profession, or other self-employment | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| (b) Rent payments, interest, or dividends          | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| (c) Pension, annuity, or life insurance payments   | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| (d) Disability, or worker's compensation payments  | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| (e) Gifts, or inheritances                         | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| (f) Any other sources                              | <input type="checkbox"/> Yes | <input type="checkbox"/> No |

If you answered "Yes" to any question above, describe below or on separate pages each source of money and state the amount that you received and what you expect to receive in the future.

4. Amount of money that I have in cash or in a checking or savings account: \$ \_\_\_\_\_.

5. Any automobile, real estate, stock, bond, security, trust, jewelry, art work, or other financial instrument or thing of value that I own, including any item of value held in someone else's name *(describe the property and its approximate value)*:

6. Any housing, transportation, utilities, or loan payments, or other regular monthly expenses *(describe and provide the amount of the monthly expense)*:

7. Names (or, if under 18, initials only) of all persons who are dependent on me for support, my relationship with each person, and how much I contribute to their support:

8. Any debts or financial obligations *(describe the amounts owed and to whom they are payable)*:

*Declaration:* I declare under penalty of perjury that the above information is true and understand that a false statement may result in a dismissal of my claims.

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

\_\_\_\_\_  
*Applicant's signature*

\_\_\_\_\_  
*Printed name*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

**INSTRUCTIONS FOR FILING AN APPLICATION TO PROCEED  
IN FORMA PAUPERIS BY A PRISONER UNDER 28 U.S.C. § 1915**

---

You must submit to the court a completed Prisoner's Application to Proceed In Forma Pauperis if you are unable to pay the entire filing fee at the time you file your complaint or petition. Your application must include copies of the prisoner trust account statement showing transactions for the last six months and a certificate of funds in prisoner's account, signed by an authorized officer of the institution.

**A. Non-habcas Civil Actions**

The fee for filing any civil action other than a petition for a writ of habeas corpus is \$400.00 (\$350 filing fee plus \$50 administrative fee). Even if you are granted leave to proceed in forma pauperis, you must still pay the \$350 filing fee (not the \$50 administrative fee), but the filing fee will be paid in several installments. 28 U.S.C. § 1915.

You must pay an initial partial filing fee of 20 percent of the greater of (a) the average monthly deposits to your account for the 6-month period immediately before the complaint was filed or (b) the average monthly balance in your account for the 6-month period immediately before the complaint was filed. The court will use the information provided on the certificate of funds and the trust account statement to determine the filing fee immediately due and will send instructions to you and the prison trust account office for payment if in forma pauperis status is granted.

After the initial partial filing fee is paid, your prison's trust account office will forward to the court each month 20 percent of the most recent month's income to your prison trust account, to the extent the account balance exceeds ten dollars (\$10). Monthly payments will be required until the full filing fee is paid. If you have no funds over ten dollars (\$10) in your account, you will not be required to pay part of the filing fee that month.

*If your application to proceed in forma pauperis is granted, you will be liable for the full \$350 filing fee even if your civil action is dismissed. That means the court will continue to collect payments until the entire filing fee is paid.*

**B. Habeas Actions**

The fee for filing a petition for a writ of habeas corpus is \$5 (\$5 filing fee plus \$0 administrative fee). If you are granted leave to proceed in forma pauperis, you will not be required to pay any portion of this fee. If you are not granted leave to proceed in forma pauperis, you must pay the fee in one payment and not in installments.

*If you use a habeas form to file a non-habeas civil action, you will be required to pay the fee applicable to all non-habeas civil actions.*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

	)	
	)	
	)	
Plaintiff,	)	CASE NO. _____
	)	
vs.	)	<b>PRISONER'S</b>
	)	<b>APPLICATION TO PROCEED</b>
	)	<b><u>IN FORMA PAUPERIS</u></b>
	)	
Defendant.	)	
_____	)	

I, \_\_\_\_\_, declare under penalty of perjury that I am the plaintiff in the above entitled case and that the information I offer throughout this application is true and correct. I offer this application in support of my request to proceed without being required to prepay the full amount of fees and costs or give security. I state that because of my poverty I am unable to pay the costs of this action or give security, and that I believe that I am entitled to relief.

**IN SUPPORT OF THIS APPLICATION, I PROVIDE THE FOLLOWING INFORMATION:**

**1.** Are you presently employed? YES ☐ NO ☐

If your answer is "yes," state both your gross and net salary or wages per month, and give the name and address of your employer:

Gross: \_\_\_\_\_ Net: \_\_\_\_\_

Employer (name and address): \_\_\_\_\_

If the answer is "no," state the date of last employment and the amount of the gross and net salary and wages per month which you received. (If you are imprisoned, specify the last place of employment prior to imprisonment.)

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

2. Have you received, within the past twelve (12) months, any money from any of the following sources:

- |    |   |                              |                             |
|----|---|------------------------------|-----------------------------|
| a. | Business, profession or self employment?  | YES <input type="checkbox"/> | NO <input type="checkbox"/> |
| b. | Income from stocks, bonds or royalties?   | YES <input type="checkbox"/> | NO <input type="checkbox"/> |
| c. | Rent payments?  | YES <input type="checkbox"/> | NO <input type="checkbox"/> |
| d. | Pensions, annuities or life insurance payments?                                   | YES <input type="checkbox"/> | NO <input type="checkbox"/> |
| e. | Federal or state welfare payments,<br>Social Security or other government source? | YES <input type="checkbox"/> | NO <input type="checkbox"/> |

If the answer is "yes" to any of the above, describe each source of money and state the amount received from each.

---

---

3. Are you married? YES ☐ NO ☐

Spouse's Full Name: \_\_\_\_\_

Spouse's Place of Employment: \_\_\_\_\_

Spouse's Monthly Salary, Wages or Income:

Gross \$ \_\_\_\_\_ Net \$ \_\_\_\_\_

4. a. List amount you contribute to your spouse's support: \$ \_\_\_\_\_

- b. List the persons other than your spouse who are dependent upon you for support and indicate how much you contribute toward their support. (NOTE: For minor children, list only their initials and ages. Do not include their names.)

---

---

5. Do you own or are you buying a home? YES ☐ NO ☐

Estimated Market Value: \$ \_\_\_\_\_ Amount of Mortgage: \$ \_\_\_\_\_

6. Do you own an automobile? YES ☐ NO ☐

Make \_\_\_\_\_ Year \_\_\_\_\_ Model \_\_\_\_\_

Is it financed? Yes \_\_\_\_\_ No \_\_\_\_\_ If so, Total Due: \$ \_\_\_\_\_

Monthly Payment: \$ \_\_\_\_\_

7. Do you have a bank account? YES ☐ NO ☐

Name(s) and address(es) of bank (do not include account numbers): \_\_\_\_\_

\_\_\_\_\_

Present balance(s): \$ \_\_\_\_\_

Do you own any cash? YES ☐ NO ☐ Amount: \$ \_\_\_\_\_

Do you have any other assets? YES ☐ NO ☐

If "yes," provide a description of each asset and its estimated market value.

\_\_\_\_\_

\_\_\_\_\_

8. What are your monthly expenses?

Rent: \$ \_\_\_\_\_ Utilities: \_\_\_\_\_

Food: \$ \_\_\_\_\_ Clothing: \_\_\_\_\_

9. Do you have any charge accounts/credit cards? YES ☐ NO ☐

If yes, list them below. (Do not include account numbers.)

<u>Name of Account</u>	<u>Monthly Payment</u>	<u>Total Owed on This Acct.</u>
_____	\$ _____	\$ _____
_____	\$ _____	\$ _____
_____	\$ _____	\$ _____

10. Do you have any other debts? (List current obligations, indicating amounts and to whom they are payable. Do not include account numbers.)

\_\_\_\_\_

\_\_\_\_\_

11. Does the complaint you are seeking to file raise claims that have been presented in other lawsuits?

YES ☐ NO ☐

If so, please list the case name(s) and number(s) of the prior lawsuit(s), and the name of the court in which they were filed.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

I consent to prison officials withdrawing from my trust account and paying to the court the initial partial filing fee and all installment payments required by the court.

I declare under the penalty of perjury that the foregoing is true and correct and understand that a false statement herein may result in the dismissal of my claims.

---

DATE

---

SIGNATURE OF APPLICANT

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

**CERTIFICATE OF FUNDS  
IN PRISONER'S ACCOUNT**

I certify that attached hereto is a true and correct copy of the prisoner's trust account statement showing transactions of \_\_\_\_\_ for the last six months at  
*(Prisoner's Name)*  
\_\_\_\_\_, where (s)he is confined.  
*(Name of Institution)*

I further certify that the average deposits each month to this prisoner's account for the most recent six-month period were \$ \_\_\_\_\_ and the average balance in the prisoner's account each month for the most recent six-month period was \$ \_\_\_\_\_.

Date: \_\_\_\_\_ Officer Name: \_\_\_\_\_

Signature: \_\_\_\_\_  
*Authorized Officer of the Institution*



\_\_\_\_\_  
PLAINTIFF/PETITIONER/MOVANT'S NAME

\_\_\_\_\_  
PRISON NUMBER

\_\_\_\_\_  
PLACE OF CONFINEMENT

\_\_\_\_\_  
ADDRESS

**United States District Court  
Southern District Of California**

\_\_\_\_\_  
Plaintiff/Petitioner/Movant

v.

\_\_\_\_\_  
Defendant/Respondent

Civil No. \_\_\_\_\_  
(TO BE FILLED IN BY U.S. DISTRICT COURT CLERK)

**MOTION AND DECLARATION UNDER  
PENALTY OF PERJURY IN SUPPORT  
OF MOTION TO PROCEED IN FORMA  
PAUPERIS**

I, \_\_\_\_\_,  
declare that I am the Plaintiff/Petitioner/Movant in this case. In support of my request to proceed without  
prepayment of fees or security under 28 U.S.C. § 1915, I further declare I am unable to pay the fees of this  
proceeding or give security because of my poverty, and that I believe I am entitled to redress.

**In further support of this application, I answer the following question under penalty of perjury:**

1. Are you currently incarcerated? ☐ Yes ☐ No (If "No" go to question 2)

If "Yes," state the place of your incarceration \_\_\_\_\_

Are you employed at the institution? ☐ Yes ☐ No

Do you receive any payment from the institution? ☐ Yes ☐ No

[Have the institution fill out the Certificate portion of this affidavit and attach a certified copy of the trust  
account statement from the institution of your incarceration showing at least the last six months transactions.]

2. Are you currently employed? ☐ Yes ☐ No

a. If the answer is "Yes," state the amount of your take-home salary or wages and pay period and give the name and address of your employer. \_\_\_\_\_

\_\_\_\_\_

b. If the answer is "No" state the date of your last employment, the amount of your take-home salary or wages and pay period and the name and address of your last employer. \_\_\_\_\_

\_\_\_\_\_

3. In the past twelve months have you received any money from any of the following sources?:

- |   |  |
|---|--|
| a. Business, profession or other self-employment  | <input type="checkbox"/> Yes <input type="checkbox"/> No |
| b. Rent payments, royalties interest or dividends | <input type="checkbox"/> Yes <input type="checkbox"/> No |
| c. Pensions, annuities or life insurance          | <input type="checkbox"/> Yes <input type="checkbox"/> No |
| d. Disability or workers compensation             | <input type="checkbox"/> Yes <input type="checkbox"/> No |
| e. Social Security, disability or other welfare   | <input type="checkbox"/> Yes <input type="checkbox"/> No |
| e. Gifts or inheritances                          | <input type="checkbox"/> Yes <input type="checkbox"/> No |
| f. Spousal or child support                       | <input type="checkbox"/> Yes <input type="checkbox"/> No |
| g. Any other sources                              | <input type="checkbox"/> Yes <input type="checkbox"/> No |

If the answer to any of the above is "Yes" describe each source and state the amount received and what you expect you will continue to receive each month. \_\_\_\_\_

\_\_\_\_\_

4. Do you have any checking account(s)? ☐ Yes ☐ No

a. Name(s) and address(es) of bank(s): \_\_\_\_\_

b. Present balance in account(s): \_\_\_\_\_

5. Do you have any savings/IRA/money market/CDS' separate from checking accounts? ☐ Yes ☐ No

a. Name(s) and address(es) of bank(s): \_\_\_\_\_

b. Present balance in account(s): \_\_\_\_\_

6. Do you own an automobile or other motor vehicle? ☐ Yes ☐ No

a. Make: \_\_\_\_\_ Year: \_\_\_\_\_ Model: \_\_\_\_\_

b. Is it financed? ☐ Yes ☐ No

c. If so, what is the amount owed? \_\_\_\_\_

7. Do you own any real estate, stocks, bonds, securities, other financial instruments, or other valuable property?

☐ Yes ☐ No

If "Yes" describe the property and state its value. \_\_\_\_\_

\_\_\_\_\_

8. List the persons who are dependent on you for support, state your relationship to each person and indicate how much you contribute to their support. \_\_\_\_\_

\_\_\_\_\_

9. List any other debts (current obligations, indicating amounts owed and to whom they are payable): \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

10. List any other assets or items of value (specify real estate, gifts, trusts inheritances, government bonds, stocks, savings certificates, notes, jewelry, artwork, or any other assets [include any items of value held in someone else's name]): \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

12. If you answered all of the items in #3 "No," and have not indicated any other assets or sources of income anywhere on this form, you must explain the sources of funds for your day-to-day expenses. \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**I declare under penalty of perjury that the above information is true and correct and understand that a false statement herein may result in the dismissal of my claims.**

\_\_\_\_\_  
DATE

\_\_\_\_\_  
SIGNATURE OF APPLICANT

If you are a **prisoner** you must have an officer from your institution provide this official certificate as to the amount of money in your prison account. There are no exceptions to this requirement.

---

**PRISON CERTIFICATE**  
**(Incarcerated applicants only)**  
(To be completed by the institution of incarceration)

I certify that the applicant \_\_\_\_\_  
(NAME OF INMATE)

\_\_\_\_\_  
(INMATE'S CDC NUMBER)

has the sum of \$ \_\_\_\_\_ on account to his/her credit at \_\_\_\_\_

\_\_\_\_\_  
(NAME OF INSTITUTION)

I further certify that the applicant has the following securities \_\_\_\_\_

to his/her credit according to the records of the aforementioned institution. I further certify that **during**  
**the past six months** the applicant's *average monthly balance* was \$ \_\_\_\_\_

and the *average monthly deposits* to the applicant's account was \$ \_\_\_\_\_

ALL PRISONERS **MUST** ATTACH A CERTIFIED COPY OF THEIR TRUST ACCOUNT  
STATEMENT SHOWING TRANSACTIONS FOR THE SIX-MONTH PERIOD  
IMMEDIATELY PRECEDING THE FILING OF THE COMPLAINT PER 28 U.S.C. § 1915(a)(2).

\_\_\_\_\_  
DATE

\_\_\_\_\_  
SIGNATURE OF AUTHORIZED OFFICER OF INSTITUTION

\_\_\_\_\_  
OFFICER'S FULL NAME (PRINTED)

\_\_\_\_\_  
OFFICER'S TITLE/RANK

---

**TRUST ACCOUNT WITHDRAWAL AUTHORIZATION**  
**(Incarcerated applicants only)**

(This form **MUST** be completed by the prisoner requesting to proceed in forma pauperis. An incomplete "Trust Account Withdrawal Authorization Form," or "Prison Certificate" will result in automatic denial of the prisoner's request to proceed in forma pauperis.)

I, \_\_\_\_\_, request and authorize the agency holding me in  
(Name of Prisoner/ CDC No.)  
custody to prepare for the Clerk of the United States District Court for the Southern District of California, a certified copy of the statement for the past six months of my trust fund account (or institutional equivalent) activity at the institution where I am incarcerated.

I further request and authorize the agency holding me in custody to calculate and disburse funds from my trust fund account (or institutional equivalent) pursuant to any future orders issued by the Court relating to this civil action pursuant to the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, Title VIII, §§ 801-10, 110 Stat. 1321 (1996).

This authorization is furnished in connection with a civil action filed in the Southern District of California, and I understand that, pursuant to 28 U.S.C. §§ 1914 and 1915(b)(1), the total amount of filing fees for which I am obligated is either ☐ \$350 (civil complaint) or ☐ \$5 (habeas corpus petition) (check one). I also understand that this fee will be debited from my account regardless of the outcome of this action. This authorization shall apply to any other agency into whose custody I may be transferred.

---

DATE

---

SIGNATURE OF PRISONER