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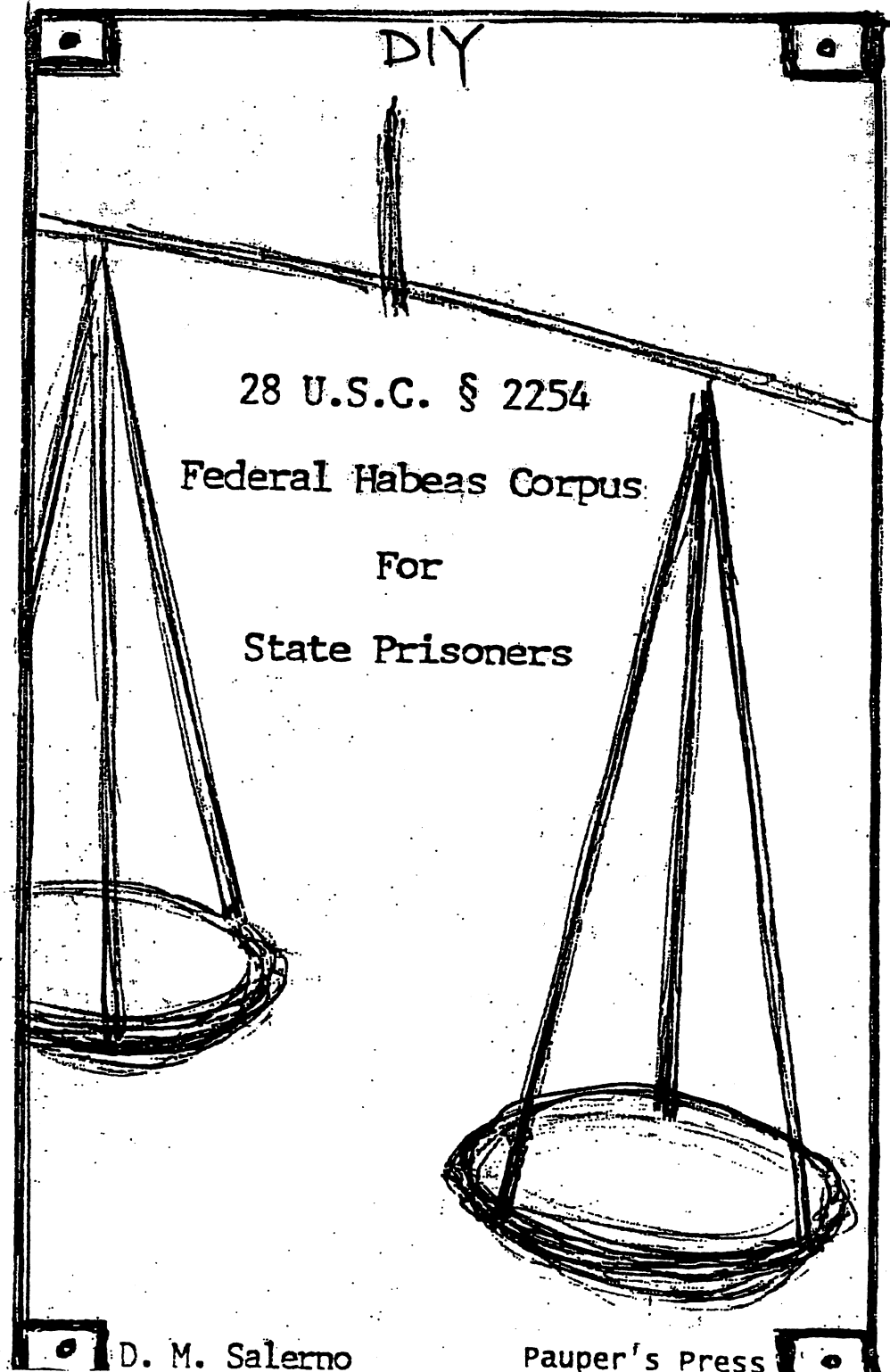
DIY

28 U.S.C. § 2254

Federal Habeas Corpus

For

State Prisoners



D. M. Salerno

Pauper's Press

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From The Bench Newsletter

This is a pro-se litigant's resource and contains a variety of articles in each issue that may help a prisoner litigant learn about legal doctrine, how to draft documents, changes in law, procedure and general legal knowledge. This newsletter is normally published four to six times each year. The actual number of issues may vary due to availability of resources needed to produce it.

Booklets and Zines mentioned in this booklet may be requested from one of the books to prisoners outfits listed below. Please keep in mind that books to prisoner's outfits make reading materials available for prisoners using Volunteers and donations. These items and postage to mail them has a price. So, PLEASE DONATE funds of any amount or embossed envelopes or other postage when you can, to a books to prisoner's outfit.

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Introduction

By the time a prisoner gets to the stage where s/he is able to file a federal habeas corpus application the person should be aware that each type of court has its own set of rules. The trial court has rules for filing various motions, the Court of Appeals has rules for filing briefs and other pleadings, the state supreme court has its own rules as does the U.S. Supreme Court for filing the two allotted timely petitions for a writ of certiorari - the first can be filed after the state supreme court action is denied.

People are usually left without a lawyer by the time they get to the federal habeas stage. That is when there is a scramble to figure out how to file for a habeas corpus and everything that comes with court actions. Unfortunately too many will panic and will either not learn how to file the paperwork themselves or the prisoner will go to another prisoner who may or may not have someone else's best interests in mind. Only a small handful will discover there are rules specifically written for the habeas corpus action.

For some unknown reason it can be difficult to find out where the rules for the section 2254 habeas corpus are in the prison law library. Some prisoner law library clerks may not even know the rules exist. Many people don't know what book to find the rules in nor how to find them using the computer based research systems that some state prisons now use. Housing status can also hinder the availability of the rules.

The rules that apply specifically to the Title 28 U.S.C. § 2254 habeas corpus are included in this booklet. These are the rules for a state prisoner who is filing a habeas corpus with a federal district court that challenges a state court conviction.

These rules show that the federal rules of civil procedure apply to a habeas corpus proceeding and, among many other things, that a prisoner may request discovery of evidence using the federal rules of civil procedure.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

FOOTNOTES:

Footnote 1. Published in *Moore's Rules Pamphlet*, Part 3, Habeas Corpus Rules.

Footnote 2. Published in *Moore's Rules Pamphlet*, Part 3, Habeas Corpus Rules.

Footnote *. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

These rules also apply to a prisoner who needs to file a second or successive habeas corpus action as the procedure is mentioned in rule 9. the rules themselves are simply rules and usually offer no guidance on how to actually 'use' them. For this reason a future legal booklet is planned on the topic of second and successive habeas corpus actions but will also be treated herein in brief.

There are a few different sections under which a prisoner may file for a habeas corpus. A state prisoner files under section 2254; a federal prisoner files under 2255 and a variety of prisoner actions might fall under the broad scope of 2244 itself. Research will show when a 2244 might apply.

There is a one year time limitation for filing a habeas corpus action due to federal legislation in the AEDPA. The limitation has exceptions that are rare but may apply. Research on the issue will uncover whether it applies to an individual's situation.

If you or another prisoner you know needs help learning about how to use the law library or how to write a motion or an appeal, please pass on the information that the first Booklet, How to use the law library and write your own law work is available free to prisoners from many books to prisoners outfits. that booklet, the first in the criminal law series, will give the knowledge and confidence needed to begin finding the way through the courts. A list of other Pauper's Press /D. M. Salerno booklets and zines and some places they may be requested from is found at the back of this booklet.

If you write and ask for free information from a books to prisoners outfit, please donate any amount you can afford or embossed envelopes or other stamps. Most books to prisoner's places are staffed by volunteers who often pay for postage and for copies and the books themselves out of their own pockets. Let's help them help us.

Sempre avanti -- Always forward
D. M. Salerno, January 2014

§ 2254 habeas Corpus Filing

What To Expect

If you have taken your case to the highest court in your state you may either file your first petition for a writ of certiorari with the United States supreme Court or you may pass over that opportunity and can file a section 2254 habeas corpus application with a federal district court. If you filed the petition for a writ of certiorari in the United States Supreme Court you may file the habeas corpus action in the federal district court after the U.S. Supreme Court action has been disposed of.

In order to file the habeas corpus action, you must either draft your own form for the habeas corpus or you can use fill in the blank forms. In order to get the fill in the blank forms you could check in your prison law library to see if they have a set you can photocopy. Keep in mind that forms in prison law libraries are sometimes out of date. In order to get up to date forms for most state actions a prisoner, in Ohio, for example, could write to the Ohio Public Defender's Office and ask for a sample form with instructions for the type of action the prisoner wants to file. In this case, a federal habeas corpus action, the prisoner should write to the Clerk of the Federal District Court nearest to where the prisoner is housed. The letter would be short and would ask, simply:

Dear Clerk:

Please send me the forms, instructions and a copy of any local rules needed for filing a habeas corpus application in your court. I am a state prisoner and am challenging a state court conviction.

The letter could alternatively read:

Dear Clerk: Please send me the forms and instructions needed for me to file a section 2254

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals. *[Adopted 1967; last amended December 1, 1998.]*

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

.....
Signature of Movant)

CERTIFICATE

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

.....
.....
.....
.....

.....
Authorized Officer of Institution

**Model Form for Use in 28 U.S.C. § 2254 Cases Involving a Rule 9
Issue [Abrogated.]**

The Model Form for Use in 28 U.S.C. § 2254 Cases Involving a Rule 9
Issue (Form No. 9), captioned "Petitioner's Response as to Why His Petition
Should Not Be Barred Under Rule 9," was abrogated, effective December 1,
2007.

Habeas Corpus action in your court.

The office of the court clerk is often a busy place where
first priority is not given to letters asking for forms
so expect your request to take a few weeks to be filled.

There are many pages to the forms and instructions.
don't let that discourage you. The forms are easy to
fill out. The information you'll need to fill in the
forms is found on and within other documents that have
been filed in the courts for your case. You will need to
know the name of your judge, your sentence, the date of
conviction, your case number/s, what issues you presented
to the courts on appeal and other information that is
easily found on and within the motions and appeals that
were filed in your case. You may also need to review
your indictment and your sentencing order or other case
documents.

A set of sample habeas corpus forms are included in this
booklet. This format has been nearly the same for many
years and there is rarely a change to the form that is
drastic. That being said, you should always use the most
current form available. There may be information on a
new version of the form that the court needs that was not
asked for on an older version.

Along with the basic habeas corpus form you will also
receive a form to file if you will ask the court for
Pauper Status. If you are given Pauper status you will
not have to pay the full filing fee and will not be
liable for the costs of the action. The form for
requesting Pauper Status is often called the In Forma
pauperis Affidavit. This form has many pages and asks
you to fill in the amounts you received or pay for
various things. Every question must be answered even if
it does not apply to you. If it does not apply you would
put an "N.A." in the answer space or a zero where an
amount is asked for.

Once you have filled in the answers for the beginning of the habeas corpus forms with information like your name, the name of the court, your sentence, the courts and actions you filed up to that point that challenged the conviction and what issues you presented to those courts, you will be asked to list the issues you want the federal court to review. The issues presented to the habeas court are called 'Grounds.'

When writing your grounds for review you should keep them brief. You should not argue law in the space provided but should simply list the ground you want relief on. You are allowed to file a brief in support of your habeas corpus application; the brief is where you write legal argument.

When writing anything you file in a court you should write the way you normally would. Write like you speak, without 'bad' words, and the court will understand what you are saying. Do not try to sound like a lawyer. You are not a lawyer and might accidentally use a term in an incorrect way so that whatever you are writing to the court is not what you intended.

A sample Ground might be written like:

GROUND ONE: The decision of Crawford v. Washington, 124, S.Ct. 1354 (2004) applies retroactively to my case.

a. supporting facts: My case was on direct review at the time Crawford was decided. At trial, an unsigned letter was used as evidence; the purported author of the letter is the deceased victim. the letter's author was not ever cross-examined regarding the contents of the letter. The trial judge admits that the Crawford case applies but refused to vacate the conviction based on procedure.

Another example of how to write your Ground might be:

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?

Yes No (Include any funds in prison accounts)

If the answer is "yes," state the total value of the items owned.

.....

.....

.....

4. Do you own 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 these persons, and indicate how much you contribute toward their support:

.....

.....

.....

In Forma Pauperis Declaration

1 Forma Pauperis Declaration

1 Forma Pauperis Declaration

.....
(insert appropriate court)

United States v.
(Movant)

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

....., declare that I am the movant in the above entitled case; that I 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.

Are you presently employed?

es No

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

.....
.....

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

.....
.....

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

Business, profession or form of self-employment?

GROUND TWO: Insufficient Evidence to prove elements of the offense beyond a reasonable doubt.

a. Supporting Facts: No sufficient evidence presented at trial to prove the 'venue' of the offense.

If you still cannot figure out how to write a 'ground' you could find the appeal brief from the highest state court to hear your appeal and look for the issues that were presented. The issues could be used as your grounds if you cannot otherwise figure out how to write them. the court would understand what you were trying to have them look at in your case.

There is room on the habeas forms for four grounds to be listed. If you do not have four grounds simply do not fill in the blanks for the other grounds. If you have more than four grounds you may attach additional pages as long as you write out the answers to all of the questions.

After you finish filling out the forms you will file them with the Court Clerk by sending two copies and the original. That means three total copies of the habeas corpus application. An original is the copy of the form that you actually signed. Some people refer to that signature as the 'live' signature and the others as the copied signature. Along with the three copies of the habeas petition you will need to pay the five dollar filing fee. While there is the Informa Pauperis Application you can fill out and file with the habeas corpus forms there is only the smallest chance of the court issuing an order that you do not have to pay the filing fee - since it is only five dollars.

When the Clerk receives the forms from you a judge, or Magistrate if a judge is unavailable, will review the forms to see if they are complete and for determining whether your 'state court remedies' have been exhausted. The judge may also decide whether the grounds you present

are wholly incredible or patently false, and will find whether your petition is a 'mixed' petition requiring dismissal.

A 'mixed petition' is one that presents grounds to the federal court that were exhausted through the state's highest court along with new grounds that were not presented to the state courts. If you file a mixed petition the federal judge will dismiss the petition for being mixed and will allow you the opportunity to correct it by either removing the unexhausted grounds or to present the unexhausted claims to the state courts and then return to the federal court with the habeas corpus at a later date. Please be aware that if you are in this predicament and you decide to present the new grounds to the state courts and return to the federal court at a later date you must still have the habeas corpus filed within the one year time limit set by the AEDPA. Many prisoners find themselves procedurally barred from filing the habeas corpus petition because they ran out of time after their mixed petition was dismissed and they filed motions in state court attempting to exhaust the grounds before returning to the federal district court. Remember that the courts move slowly at times and you will need to always be aware of your filing deadlines.

If your petition is accepted by the court the judge will order Rule Five material to be produced by the State and may order the state to file a reply in so many days followed by your traverse thereafter, in so many days.

Rule Five material is, generally, the transcripts in the case that are relevant to the grounds raised along with a copy of all appeals and other relevant motions that the grounds were presented in. Other materials may be ordered by the judge. If the judge does not order the state to answer your petition then the state does not have to file any answer at all. The court would then proceed only on the habeas petition and the documents filed through rule Five and any motions you file.

If the state is ordered to file an answer the judge may give them 45 days to do so and then you will have maybe

Therefore, petitioner asks that the Court grant the following relief:

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on _____ (month, date, year).

Executed (signed) on _____ (date).

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

15 days to file your reply to the answer. That is in general, times for answers and replies vary depending on the court and how full the dockets are and whether there are trials happening at the time.

You should familiarize yourself with Rules Seven, Fifteen, and Sixty B. These rules are found in the Federal rules of Civil Procedure and are for filing an amendment to the petition, a supplement to the petition and for Relief From Judgment. There are other motions that you can file as well, such as to expand the record with additional evidence. You will need to read the federal rules of civil procedure along with habeas corpus rules and other research to discover what motions you may wish to file.

Once the answer and reply [traverse] have been filed the case will go to a Magistrate judge to review. Once the Magistrate has reviewed the case and all documents filed a Report and Recommendation will be filed stating what relief, if any, the Magistrate recommends to the court in your case. This is typically referred to as the R and R. If the recommendation is to deny the petition, or if it is a favorable decision in some respects, and you want to appeal the decision, you must file objections to the Magistrate's Report and Recommendation.

If you do not file objections to the R and R you will not be allowed to file an appeal. Your case will be finished.

Objections to the Magistrate's Report and Recommendation are nothing more than you stating to the judge, in a formal pleading that is set up the same way a regular motion is, why the recommendation is incorrect, incomplete or wrong. You would need to object to each and every point you believe is not correct. After listing your objections you file it with the court and the entire case is sent to the judge for what is called a 'de novo' review.

Therefore, petitioner asks that the Court grant the following relief:

or any other relief to which petitioner may be entitled.

De novo review means the judge reviews the entire case and all documents filed in the case as if there had not ever been a review in that court. The judge also looks at the report and recommendation and your objections. Whatever the judge's decision is will determine what the final disposition in the case is.

If the judge denies your petition for a habeas corpus you have only a short period to challenge the denial. You have some options to do so and a few of them are either to file a rule 60 B motion under the federal rules of civil procedure or to file a certificate of appealability.

A Rule Sixty B motion is a motion for relief from judgment and has Six subsections that the request for relief from judgment must fall under in order to qualify for the ruling to be modified in some way. You will need to read Rule 60 B and follow up with research and reading case law surrounding rule 60 B.

If you do not file a rule 60 B motion or if you choose not to, and you want to appeal the decision that denied your petition, you must file a certificate of appealability with the court. Generally, federal district courts have been summarily denying certificates of appealability before they are even filed; the judge will state in the decision denying the habeas petition that no certificate of appealability can be filed with the court. In that case you could either file one anyway, since rule and case law show a certificate of appealability request must be filed first with the district court and then, if denied, with the Federal Circuit court. If the district court denies the issuance of a certificate of appealability you must file a notice of appeal and a certificate of appealability with the Federal Circuit Court of Appeals.

If you only file a notice of appeal the Federal Circuit Court will take the notice of appeal as a request for a certificate of appealability and the Federal Circuit

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition. *

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: _____

(b) At arraignment and plea: _____

(c) At trial: _____

(d) At sentencing: _____

(e) On appeal: _____

Court is supposed to review the case to see if there are any issues worthy of an appeal. If so, the Circuit court will issue the Certificate of appealability and will also send you a pro se appeal instruction form. This form is one page and explains how to write and file the appeal to the federal circuit court. If no Certificate of appealability is issued you may proceed to the next highest court, which is the United States Supreme Court.

A Request for a Certificate of Appealability is similar to a mini brief, of sorts. It is a court pleading that lists the issues in the case that you believe are strong and need to be reviewed. You list an issue and then write an argument supporting why it should be heard by the appeal court.

If no certificate of appealability is issued you will need to file a petition for a writ of certiorari with the U.S. Supreme Court. Though there are no forms available for filing a request for a federal district or federal circuit court request for a certificate of appealability there are forms available for filing a petition for a writ of certiorari.

To get forms you would mail a letter of request to the Clerk of the United States Supreme Court, which might sound like this:

Office of the Clerk
United States Supreme Court
1 First Street, NE
Washington DC 20543

-- date --

Dear Clerk:

Please send me the forms and instructions needed to file a petition for a writ of certiorari with your court. Please also send me a current copy of the rules of court.

The Clerk will send you a packet including the fill in the blank forms, instructions and the rules of the U.S.

supreme Court. The Petition for a Writ of Cert. is probably the easiest form of relief you will ever file. The questions are easy. the hardest parts of the forms are getting the table of authorities in order and keeping your legal argument up to date. Because it will take a few years to get your case through the federal courts you will need to continually update your research on the issues you are presenting. New cases must always be added and your legal argument must be adjusted depending on the decisions of the courts on the issues.

This has been a basic and general overview of one path through the habeas corpus cycle of litigation. There are always alternate routes depending on what motions are filed, whether new cases come out that influence the case or if newly discovered evidence comes into the picture or some other issue presents itself.

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: _____

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. _____

Rules Governing Section 2254 Cases in the United States District Courts¹

Section 2254 Rule 1

Rule 1. Scope.

(a) Cases Involving a Petition Under 28 U.S.C. § 2254. These rules govern a petition for a writ of habeas corpus filed in a United States district court under 28 U.S.C. § 2254 by:

(1) a person in custody under a state-court judgment who seeks a determination that the custody violates the Constitution, laws, or treaties of the United States; and

(2) a person in custody under a state-court or federal-court judgment who seeks a determination that future custody under a state-court judgment would violate the Constitution, laws, or treaties of the United States.

(b) Other Cases. The district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a). [*Amended effective Dec. 1, 2004.*]

Section 2254 Rule 2

Rule 2. The Petition.

(a) Current Custody; Naming the Respondent. If the petitioner is currently in custody under a state-court judgment, the petition must name as respondent the state officer who has custody.

(b) Future Custody; Naming the Respondents and Specifying the Judgment. If the petitioner is not yet in custody—but may be subject to future custody—under the state-court judgment being contested, the petition must name as respondents both the officer who has current custody and the attorney general of the state where the judgment was entered. The petition must ask for relief from the state-court judgment being contested.

Docket or case number (if you know): _____

Date of the court's decision: _____

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

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: _____

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes No 42

Form. The petition must:

- 1) specify all the grounds for relief available to the petitioner;
 - 2) state the facts supporting each ground;
 - 3) state the relief requested;
 - 4) be printed, typewritten, or legibly handwritten; and
 - 5) be signed under penalty of perjury by the petitioner or by a person authorized to sign it for the petitioner under 28 U.S.C. § 2242.
-) Standard Form. The petition must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule. The clerk must make forms available to petitioners without charge.

) Separate Petitions for Judgments of Separate Courts. A petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court. [*Amended Effective Dec. 1, 2004.*]

Section 2254 Rule 3

Rule 3. Filing the Petition; Inmate Filing.

a) Where to File; Copies; Filing Fee. An original and two copies of the petition must be filed with the clerk and must be accompanied by:

- (1) the applicable filing fee, or

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

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

(3) Did you receive a hearing on your motion or petition?

Yes No

(4) Did you appeal from the denial of your motion or petition?

Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) Direct Appeal of Ground Four:

1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

2) If you did not raise this issue in your direct appeal, explain why:

d) Post-Conviction Proceedings:

(2) a motion for leave to proceed in forma pauperis, the affidavit required by 28 U.S.C. § 1915, and a certificate from the warden or other appropriate officer of the place of confinement showing the amount of money or securities that the petitioner has in any account in the institution.

(b) Filing. The clerk must file the petition and enter it on the docket.

(c) Time to File. The time for filing a petition is governed by 28 U.S.C. § 2244(d).

(d) Inmate Filing. A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid. [*Amended effective Dec. 1, 2004.*]

Section 2254 Rule 4

Rule 4. Preliminary Review; Serving the Petition and Order. The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved. [*Amended effective Dec. 1, 2004.*]

Section 2254 Rule 5

Rule 5. The Answer and the Reply.

(a) When Required. The respondent is not required to answer the petition unless a judge so orders.

(b) Contents: Addressing the Allegations; Stating a Bar. The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.

(c) Contents: Transcripts. The answer must also indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded but not transcribed. The respondent must attach to the answer parts of the transcript that the respondent considers relevant. The judge may order that the respondent furnish other parts of existing transcripts or that parts of untranscribed recordings be transcribed and furnished. If a transcript cannot be obtained, the respondent may submit a narrative summary of the evidence.

(d) Contents: Briefs on Appeal and Opinions. The respondent must also file with the answer a copy of:

(1) any brief that the petitioner submitted in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding;

(2) any brief that the prosecution submitted in an appellate court relating to the conviction or sentence; and

(3) the opinions and dispositive orders of the appellate court relating to the conviction or the sentence.

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

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

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: _____

GROUND FOUR: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

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

(3) Did you receive a hearing on your motion or petition?

Yes No

(4) Did you appeal from the denial of your motion or petition?

Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(e) Reply. The petitioner may submit a reply to the respondent's answer or other pleading within a time fixed by the judge. [*Amended effective Dec. 1, 2004.*]

Section 2254 Rule 6

Rule 6. Discovery.

(a) Leave of Court Required. A judge may, for good cause, authorize a part to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery. If necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A.

(b) Requesting Discovery. A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.

(c) Deposition Expenses. If the respondent is granted leave to take a deposition, the judge may require the respondent to pay the travel expenses subsistence expenses, and fees of the petitioner's attorney to attend the deposition. [*Amended effective Dec. 1, 2004.*]

Section 2254 Rule 7

Rule 7. Expanding the Record.

(a) In General. If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.

(b) Types of Materials. The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under

a to written interrogatories propounded by the judge. Affidavits may also submitted and considered as part of the record.

Review by the Opposing Party. The judge must give the party against om the additional materials are offered an opportunity to admit or deny ir correctness. [Amended effective Dec. 1, 2004.]

Section 2254 Rule 8

le 8. Evidentiary Hearing.

Determining Whether to Hold a Hearing. If the motion is not dismissed, judge must review the answer, any transcripts and records of prior ceedings, and any materials submitted under Rule 7 to determine ether an evidentiary hearing is warranted.

Reference to a Magistrate Judge. A judge may, under 28 U.S.C. § 5(b), refer the motion to a magistrate judge to conduct hearings and to e proposed findings of fact and recommendations for disposition. When y are filed, the clerk must promptly serve copies of the proposed findings d recommendations on all parties. Within 14 days after being served, a ty may file objections as provided by local court rule. The judge must ermine de novo any proposed finding or recommendation to which ection is made. The judge may accept, reject, or modify any proposed ding or recommendation.

Appointing Counsel; Time of Hearing. If an evidentiary hearing is ranted, the judge must appoint an attorney to represent a moving party o qualifies to have counsel appointed under 18 U.S.C. § 3006A. The lge must conduct the hearing as soon as practicable after giving the orneys adequate time to investigate and prepare. These rules do not limit e appointment of counsel under § 3006A at any stage of the proceeding.

Producing a Statement. Federal Rule of Criminal Procedure 26.2(a)-(d) d (f) applies at a hearing under this rule. If a party does not comply with a

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

(b) If you did not exhaust your state remedies on Ground Three, explain why: _____

(c) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

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

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two:

GROUND THREE:

Rule 26.2(a) order to produce a witness's statement, the court must not consider that witness's testimony. [Amended effective Dec. 1, 2004; Dec. 1 2009.]

Section 2254 Rule 9

Rule 9. Second or Successive Petitions. Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244(b)(3) and (4). [Amended effective Dec. 1, 2004.]

Section 2254 Rule 10

Rule 10. Powers of a Magistrate Judge. A magistrate judge may perform the duties of a district judge under these rules, as authorized under 28 U.S.C. § 636. [Amended effective Dec. 1, 2004.]

Section 2254 Rule 11

Rule 11. Certificate of Appealability; Time to Appeal.

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability. [Adopted Mar. 26, 2009, effective Dec. 1, 2009.]

Section 2254 Rule 12

le 12. Applicability of the Federal Rules of Civil Procedure. The Federal
les of Civil Procedure, to the extent that they are not inconsistent with
statutory provisions or these rules, may be applied to a proceeding
er these rules. [Amended effective Dec. 1, 2004; renumbered from Rule
Dec. 1, 2009.]

Model Forms

**Petition for Relief From a Conviction or Sentence By a Person in
ate Custody²**

ition for Relief From a Conviction or Sentence By a Person in State
study

**stitution Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus)
structions**

1. To use this form, you must be a person who is currently
serving a sentence under a judgment against you in a state court.
You are asking for relief from the conviction or the sentence.
This form is your petition for relief.
2. You may also use this form to challenge a state judgment that
imposed a sentence to be served in the future, but you must fill
in the name of the state where the judgment was entered. If you
want to challenge a federal judgment that imposed a sentence to
be served in the future, you should file a motion under 28
U.S.C. § 2255 in the federal court that entered the judgment.
3. Make sure the form is typed or neatly written.
4. 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.
5. Answer all the questions. You do not need to cite law. You
may submit additional pages if necessary. If you do not fill out

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for
habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

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

(3) Did you receive a hearing on your motion or petition?

Yes No

(4) Did you appeal from the denial of your motion or petition?

Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the

ROUND TWO: _____

a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

b) If you did not exhaust your state remedies on Ground Two, explain why:

c) Direct Appeal of Ground Two:

1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

2) If you did not raise this issue in your direct appeal, explain why:

the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.

6. You must pay a fee of \$5. If the fee is paid, your petition will be filed. If you cannot pay the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you. If your account exceeds \$ _____, you must pay the filing fee.

7. In this petition, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different court (either in the same state or in different states), you must file a separate petition.

8. When you have completed the form, send the original and two copies to the Clerk of the United States District Court at this address:

Clerk, United States District Court for _____

Address

City, State Zip Code

9. CAUTION: You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must 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.

10. CAPITAL CASES: If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel.

ABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court
Name (under which you were convicted):
Place of Confinement:
Petitioner (include the name under which
you were convicted)

The Attorney General of the State of

District

CASE OR DOCKET NUMBER
Respondent:
(Person in
custody of prisoner)

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

(b) Criminal docket or case number (if you know):

2. (a) Date of the judgment of conviction (if you know):

(b) Date of sentencing:

3. Length of sentence:

4. In this case, were you convicted on more than one count or of more than one crime? Yes No

5. Identify all crimes of which you were convicted and sentenced in this case:

6. (a) What was your plea? (Check one)

Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

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

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

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(2) If you did not raise this issue in your direct appeal, explain why:

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

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

(3) Did you receive a hearing on your motion or petition?

Yes No

(4) Did you appeal from the denial of your motion or petition?

- (1) Not guilty
(2) Guilty

- (3) Nolo contendere (no conte
(4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? _____

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes No

8. Did you appeal from the judgment of conviction?

Yes No

9. If you did appeal, answer the following:

(a) Name of court: _____

(b) Docket or case number (if you know): _____

(c) Result: _____

(d) Date of result (if you know): _____

(e) Citation to the case (if you know): _____

Grounds raised: _____

Did you seek further review by a higher state court? Yes No

es, answer the following:

Name of court: _____

Docket or case number (if you know): _____

Result: _____

Date of result (if you know): _____

Citation to the case (if you know): _____

Grounds raised: _____

Did you file a petition for certiorari in the United States Supreme Court?
s No

res, answer the following:

to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

(b) If you did not exhaust your state remedies on Ground One, explain why:

(c) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes No

(7) Result: _____

(8) Date of result (if you know): _____

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition:	Yes	No
---------------------	-----	----

(2) Second petition:	Yes	No
----------------------	-----	----

(3) Third petition:	Yes	No
---------------------	-----	----

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not: _____

12. 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 four grounds. State the facts supporting each ground.

CAUTION:

To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail

(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): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes No

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

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes No

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes No

(7) Result: _____

(8) Date of result (if you know): _____

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____
