

Collateral Attacks on Criminal Convictions
Prison Law Office
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This informational letter discusses how you can challenge your criminal conviction or sentence after your direct appeal has been denied or if you did not file a direct appeal. Unfortunately, this office cannot provide assistance with criminal case issues because we do not have staff or funds to meet this need. Nearly all prisoners want to overturn their convictions, and attacking a conviction or sentence usually requires many hours of work. In most cases, it is a futile attempt. We also do not know of any other attorneys or organizations that generally assist prisoners in such matters without charging fees.

A "collateral attack" (collateral means "indirect" or "secondary") on your conviction or sentence can be done by filing a petition for writ of habeas corpus. A habeas corpus petition can be filed while you have a direct appeal in state court or after your direct appeal has been denied. You can sometimes file a habeas corpus petition if you did not file a direct appeal and the time to file a direct appeal has run out. However, a habeas corpus petition is not supposed to take the place of a direct appeal, so you will have to explain in your petition why you did not appeal. A habeas corpus petition also can be used when you are attacking your conviction based on evidence that is not contained in the trial record (for example, ineffective assistance of counsel or new facts discovered after the conviction).

There are two types of habeas petitions - state court petitions and federal court petitions. They are used at different times and have different rules. You should be very careful to pick the right type of petition to file and to follow the rules that apply. Following is an overview of some of the main procedural requirements for each type of petition.

State Court Habeas Corpus Petitions

There are no specific time limits for filing a state habeas petition, but if you want to file one, you should do it as soon as possible. Also, there are time limits for federal habeas petitions and in many cases you will need to file a state habeas petition before you can file a federal one; thus, you should be careful not to miss any federal petition deadlines (see more information below in the discussion of federal habeas petitions). In addition, courts are also getting more strict about accepting multiple petitions challenging the same conviction. Therefore it is important to include all known claims in your first petition.

A state court habeas petition must normally be filed first

in the Superior Court in the county which you were convicted and sentenced. The petition must be on the official judicial council form, which should be available in the prison law library. You must serve a copy of the petition on the district attorney in the county where you file the petition. The full procedural rules for filing state habeas petitions can be found in California Rules of Court, rules 4.550-4.552.

There is no right to have an attorney appointed to prepare the petition, but if the judge issues an order to show cause after you file the petition, and you have no or very little money, then the judge should appoint an attorney to represent you. (Rule 4.551(c)(2).) Therefore, if you have no money and want a lawyer, you should file a "declaration of indigency and request for appointment of counsel," when you file your petition.

If your state habeas petition is denied, you cannot file an appeal. However, you can re-file the petition in the Court of Appeal and then in the California Supreme Court.

Federal Court Habeas Corpus Petitions

In 1996, Congress passed the "Antiterrorism and Effective Death Penalty Act" (AEDPA), which amended 28 U.S.C. 2241 et seq. and changed many of the rules for federal habeas corpus proceedings. Habeas corpus in the federal courts has become a very technical undertaking. This letter gives only a brief overview of some of the main issues you may face in doing a federal habeas petition.

Before your claim will be considered by the federal court, you must exhaust state remedies by raising all your legal issues in the state Court of Appeal and state Supreme Court, either in a direct appeal or state habeas petition. Also, the federal court will give great deference to the state court decisions on the issue. A federal court will usually only grant a habeas petition if the state court either 1) reached a decision that was contrary to, or resulted in an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or 2) resulted in a decision that was based on an unreasonable application of the facts in light of the evidence. (28 U.S.C. § 2254.)

In addition, you should raise all of your legal issues in one petition; a court will only hear a second petition if the claim relies on new retroactive rules of constitutional law or new facts which could not previously have been discovered. (28 U.S.C. § 2244(b).) Also, if a prior habeas petition was dismissed or denied with prejudice, you will need to seek permission from the Ninth Circuit Court of Appeals before you can file a second habeas petition in the district court. (28 U.S.C. § 2244(b).)

You should also be careful to comply with the strict time limits for filing federal habeas petitions. You must file your

petition within one year of either: 1) the conclusion of direct review or time for seeking such review; 2) the date that an unconstitutional impediment to filing was removed; 3) the date that a newly recognized right was created by the U.S. Supreme Court; or 4) the date the facts behind the claim "could have been discovered" through "the exercise of due diligence." (28 U.S.C. § 2244(d)(1).) Time limits are "tolled", meaning the clock does not run, in some circumstances. The time limits are tolled while a state habeas corpus petition or other collateral attack is pending, from the time the petition is filed until the petition is rejected by the highest level court in which it is filed. (See 28 U.S.C. § 2244(d)(2).) Time limits may also be tolled if "extraordinary circumstances" beyond a prisoner's control make it impossible to file a petition on time; such tolling is granted only in unusual cases.

You can file your federal habeas petition in one of two federal court districts: either the court for the area in which you are incarcerated or the court in the area in which you were convicted and sentenced. Each of the California federal district courts has created its own form petition that prisoners must use. You should be able to obtain the right form in the prison law library or from the court. You should not have to serve a copy of the petition on the attorney general.

There is a fee for filing a federal habeas petition, but it will be waived if you have no money. If you want to file a petition without paying the fee, you will have to file an in forma pauperis declaration; this form should be available in the law library or from the court. You will also have to get a certificate from the prison confirming that you have no money in your trust fund.

There is no right to be appointed an attorney in a federal habeas case that does not involve the death penalty. However, federal courts have discretion to appoint an attorney if it is in the interest of justice. (28 U.S.C. § 1915(d).) Also, a court must appoint an attorney if an evidentiary hearing is necessary, if counsel is required for effective use of discovery, or if it is necessary for due process, particularly in complex cases. (Federal Rules of Habeas Corpus, rules 6(a) and 8(c); Dillon v. United States (9th Cir. 1962) 307 F.2d 445.) Thus, along with your petition, you should file a motion for appointment of an attorney, explaining why the court should appoint counsel to represent you.

You may appeal from a final order in a federal habeas proceeding by filing a timely notice of appeal in the district court. (28 U.S.C. §§ 2107, 2253.) In order to get permission to appeal, you must also request and be granted a "certificate of appealability" from the district court, and have that certificate approved by the Ninth Circuit Court of Appeals. (28 U.S.C. § 2253(c).)

Other resources

There are several resources that provide information and forms to help you prepare a state or federal habeas petition. The best is a book called Appeals and Writs in Criminal Cases (2nd Ed., updated 4/02), published by the Continuing Education of the Bar (C.E.B.) in Oakland, CA. This book covers both state and federal habeas corpus and should be available in the prison law library. Other helpful books are California Criminal Law and Procedure (3rd Ed., 2002), also published by C.E.B., and Liebman & Hertz, Federal Habeas Corpus Practice & Procedure (4th Ed. 2001), published by Lexis-Nexis. The California State Prisoners Handbook (3rd ed. 2001), published by the Prison Law Office, also has information on state and federal habeas petitions; it can be ordered from the Prison Law Office or may be found in the law library.