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Your Responsibility When Using the Information Provided Below:

When we wrote this information, we did our best to give you useful and accurate information because we know that prisoners often have difficulty obtaining legal information and we cannot provide specific advice to all the prisoners who request it. The laws change frequently and are subject to differing interpretations. We do not always have the resources to make changes to this material every time the law changes. If you want legal advice backed by a guarantee, try to hire a lawyer to address your specific problem. If you use this pamphlet 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 your institution law library.

Collateral Attacks on Criminal Convictions through State and Federal Habeas Corpus Petitions (revised August 2009)

We have received your letter requesting help in challenging your criminal conviction or sentence if you did not file a direct appeal, if you did not raise a particular issue in your direct appeal, or if your direct appeal has been denied. Unfortunately, this office cannot provide assistance with individual criminal case issues because we do not have staff or funds to meet this need. Attacking a conviction or sentence usually requires many hours of work and, in most cases, it is a futile attempt. We also do not know of 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 started by filing a petition for writ of habeas corpus. There are two types of habeas corpus 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 a brief overview of the main procedural requirements for each type of petition.

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State Court Habeas Corpus Petitions

The main reason for filing a state court habeas petition is to present a legal argument that was not fully raised as part of a direct criminal appeal. However, a habeas corpus petition is not supposed to take the place of a direct appeal, so if you did not file a direct appeal or did not raise a particular issue in your appeal, then you will have to explain why the court should hear your habeas petition. One circumstance in which a court may consider your petition is if your claim relies on evidence that was not presented to the trial court. For example, sometimes evidence might not have existed or been discovered until after your conviction. You might also argue in a habeas petition that your trial or appellate attorney provided ineffective assistance because the attorney failed to investigate your case, did not present all the important evidence to the trial court, or did not raise all of your valid legal issues.

A habeas corpus petition can be filed while you have a direct appeal going in state court or after your direct appeal has been denied. There are no specific time limits for filing a state habeas petition, but you should do it as soon as possible. Ideally, you should try to file your petition within 60 days after your direct appeal is over or after you discover the new evidence that supports your petition. Also, if you might want to later raise your issues in federal court, then you will need to take into account the very strict time rules for federal habeas petitions (see more information below in the discussion of federal habeas petitions). In addition, courts are 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 in a criminal case 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 "Petition for Writ of Habeas Corpus" judicial council form (Form MC-275), which should be available in the prison law library. There is no court fee for filing a state habeas petition. 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 a lawyer appointed to prepare your habeas petition. However, if you file a petition on your own, and the judge issues an "order to show cause" (meaning that the judge orders the district attorney or attorney general to submit a formal response or "return"), then the judge must also appoint a lawyer to represent you at state expense if you do not have the money to hire a lawyer. (Rule 4.551(c)(2).) If you want the court to appoint a lawyer, then you should file a "declaration of indigency and request for appointment of counsel," when you file your petition; this is a document that you must sign under penalty of perjury and that tells the court you have little or no money or income and that you want a court-appointed lawyer.

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

Federal Court Habeas Corpus Petitions

If your direct appeal or habeas corpus petition is denied by the state courts, then you can file a habeas corpus petition in federal court. The federal courts will only review legal arguments that are based on federal law such as the rights protected by the United States Constitution. The procedures and rules for federal habeas corpus are completely separate from the procedures for state habeas corpus. Also, federal habeas corpus has become a very complicated undertaking since 1996, when the U.S. Congress passed the “Antiterrorism and Effective Death Penalty Act” (AEDPA), which amended 28 U.S.C. 2241 et seq. and changed many of the federal habeas rules.

Before your claim will be considered by the federal court, you must “exhaust state remedies.” This means that you first have to raise each of your legal issues in the state courts all the way through the California Supreme Court, either in a direct criminal appeal or a state habeas corpus petition. A federal court will grant your habeas petition only if the state courts’ decision (1) was contrary to, or was an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, or (2) was based on an unreasonable determination of the facts in light of the evidence. (28 U.S.C. § 2254(d).)

In addition, you should raise all of your legal issues in one federal habeas petition. A court will only hear a second federal habeas petition if the claim relies on new retroactive rules of constitutional law or on new facts which could not have been discovered previously and which could establish by clear and convincing evidence that no reasonable fact-finder would have found the petitioner guilty of the criminal charges. (28 U.S.C. § 2244(b)(2).) 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)(3).)

There are very 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 the petition 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).) When a prisoner files a direct criminal appeal, including a petition for review in the California Supreme Court, the one-year time line for filing a federal habeas petition starts running 90 days after the date that the California Supreme Court issues the order denying review.

The time limits can be “tolled” (meaning the clock does not run) in some circumstances. The time limits are tolled while a “properly filed” state habeas corpus petition is pending, from the time the petition is filed until the petition is rejected by the highest level state court. (See 28 U.S.C. § 2244(d)(2).) However, if you did not file your state habeas petition promptly after your direct appeal was over, or if you did not promptly file your state petition to the next court level after it was denied in a lower court, then some or all of that time might not be tolled. There currently is no set rule about how prompt you need to be before the delay will be considered

“unreasonable;” as a general guideline, time periods of 30 to 60 days between denial in one court and filing in another are presumed to be reasonable. The federal courts have also held that the time limits may also be tolled if “extraordinary circumstances” beyond a prisoner’s control make it impossible to file a petition on time; such “equitable tolling” is granted only in unusual cases.

You should file your federal habeas petition in the United States District Court in the federal court district that covers the county 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 find out which district court has jurisdiction over your case and obtain the right form in the prison law library or from the court clerk (some courts also have the forms on their websites). You do not have to serve a copy of the petition on the district attorney or attorney general; if the court allows your petition to proceed, the court will serve a copy of your petition on the attorney general’s office.

There is a \$5.00 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 application to proceed “in forma pauperis.” You will also have to get a certificate from the prison staff confirming that you have very little or no money in your trust account. Both of these forms should be available in the prison law library or from the court.

You do not have a right to be appointed a lawyer in a federal habeas case that does not involve the death penalty. However, federal courts have discretion to appoint lawyers for habeas petitioners when doing so is in the interests of justice due to extraordinary circumstances. (28 U.S.C. § 1915(e).) Also, a court must appoint a lawyer 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.) If you want to ask that a lawyer be appointed to represent you at no charge, then you should file a motion for appointment of an attorney along with your habeas corpus petition, explaining why you cannot adequately pursue the case on your own.

You may appeal from a final order in a federal habeas proceeding by filing a timely notice of appeal in the district court. 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.)

Other Resources

The Prison Law Office provides free manuals that describe more specifically how to file state and federal petitions for writ of habeas corpus and that include addresses for the courts. The state habeas manual also includes the official petition form, a sample request for appointment of an attorney, and other model pleadings. If one of those manuals is not already included with this letter, please feel free to write back and request a manual.

There are several other resources that can 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, published by the Continuing Education of the Bar (C.E.B.) in Oakland, CA; this book covers both state and federal habeas corpus. Other helpful books are California Criminal Law Practice and Procedure, also published by C.E.B., and Hertz & Liebman, Federal Habeas Corpus Practice & Procedure, published by Lexis-Nexis. All of these books are updated on a regular basis and some or all of them should be available in the prison law library. The California State Prisoners Handbook (4th ed. 2008, with periodic supplements) also has information on state and federal habeas petitions; it may be found in the prison law library or can be ordered from the Prison Law Office.