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KNOW YOUR RIGHTS: FEDERAL HABEAS CORPUS (CRIMINAL CASES)¹

What is a federal habeas corpus proceeding?

Habeas corpus is the procedure by which a court can look into whether a person is being held illegally in prison or jail, or is illegally on probation or parole, or is illegally “in custody” in another way. If the court decides that a person is being detained by the government illegally, the court can order state authorities to release the prisoner from custody. Technically, a habeas corpus proceeding is considered to be a civil lawsuit that is separate and independent from the appeal in a criminal case. In a habeas corpus proceeding, the prisoner is the party who brings the lawsuit and is called the “petitioner.” Unlike in a criminal case where the government has the burden of proving its case, the petitioner has the burden of proof in a habeas corpus proceeding. The federal habeas corpus law provides a way that a prisoner in *state* custody can ask a *federal* court to decide whether his or her conviction is unconstitutional after the prisoner has first presented all of his constitutional claims to the state courts.

Who can petition for a writ of habeas corpus?

A person can only file a habeas petition if he or she is “in custody” because of the order of a state or federal court.² A person is “in custody” if he or she is being held in a prison or jail, *or* if he or she is on probation or parole, *or any time* he or she “cannot come and go as she or he pleases,” such as when a person is released on bail or on his or her own recognizance before trial.³ A person who *used* to be in prison or jail or on probation or parole but is now finished with these court-ordered restrictions cannot bring a habeas corpus case.

What kind of claims may be brought in a federal habeas corpus proceeding?

A “cognizable” claim is a claim that may be properly brought and addressed by a court in a particular kind of legal proceeding. A court will not address an issue if it is not “cognizable” in the proceeding before the court. The kinds of issues or claims that can be brought in federal habeas corpus proceedings (the kinds of claims that are “cognizable”) are relatively broad, but they always have to be based on the United States Constitution or a federal law, and they must relate to rights that criminal

¹ This handout is only a brief overview of federal habeas corpus practice and procedure as it applies to *state criminal* cases. The federal habeas corpus procedures that apply to *federal* criminal cases are not discussed here. For a comprehensive analysis of federal habeas corpus procedures, including a discussion of its application to federal prisoners and to immigration cases, we recommend *Federal Habeas Corpus Practice and Procedure* (5th ed. 2005), by Randy Hertz and James S. Liebman. The authors update this manual each year with a supplement. You may find it at a law school library or you can order it online at <http://bookstore.lexis.com/bookstore>.

² 28 U.S.C. § 2254(a) (prisoners in state custody); 28 U.S.C. § 2255 (prisoners in federal custody).

³ *See, e.g., Hensley v. Municipal Court*, 411 U.S. 345, 351-53 (1973) (holding that petitioner released on own recognizance pending appeal was “in custody” for purpose of habeas); *Jones v. Cunningham*, 371 U.S. 236, 240 (1963) (finding that a paroled petitioner is “in custody” because parole restrictions “significantly restrain petitioner’s liberty”).

defendants possess at trial or on direct appeal.⁴ The only federal constitutional claim that cannot be brought in a federal habeas proceeding is a claim asserting that a search or seizure was unconstitutional under the Fourth Amendment.⁵ However, federal habeas corpus is not available to correct errors of state law.⁶

What is the “exhaustion of state remedies” requirement?

Habeas petitioners who are in *state* custody must “exhaust state remedies” before they can seek a writ of habeas corpus in federal court.⁷ This means that in order to give the state courts the first opportunity to decide whether the petitioner is in custody illegally, the petitioner must “fairly present” each of his or her constitutional claims to the state courts before bringing those same claims in a federal habeas corpus petition.⁸ To “fairly present” a claim to the state courts, a petitioner has to explain to the state courts *both* the facts of the claim⁹ *and* the legal basis of the claim (in other words, the specific constitutional right or federal law that the petitioner claims was violated).¹⁰

In order to fully exhaust a claim for relief, a petitioner has to pursue a claim either (1) through all stages of the state’s direct appeal process, including any stages of “discretionary review”¹¹ that are a part of the “normal” or “established” process of state appellate review *or* (2) all the way through all stages of the habeas corpus process in the state courts.¹²

Furthermore, every claim that the petitioner raises in a federal habeas petition has to be “exhausted.” This means that if a petitioner files a federal habeas petition that contains some claims that have been “exhausted” but others that have not been, the federal court may dismiss the entire petition.¹³

⁴ 28 U.S.C. § 2254(a).

⁵ *Brown v. Allen*, 344 U.S. 443, 458 (1953).

⁶ *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991); *Engle v. Isaac*, 456 U.S. 107, 121 (1982).

⁷ 28 U.S.C. § 2254(b)(1)(A).

⁸ *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *Picard v. Connor*, 404 U.S. 270, 277 (1971).

⁹ *Vasquez v. Hillery*, 474 U.S. 254, 260 (holding that if a petitioner presents facts in federal court for the first time that “fundamentally” change the claim, the federal court will rule that the claim has not been “exhausted,” but if the petitioner only supplements and clarifies the facts that he or she presented in state court, the federal court does not necessarily have to find that the claim has not been “exhausted”).

¹⁰ *See Baldwin v. Reese*, 541 U.S. at 30-34 (finding that the petitioner did not “fairly present” a claim to the state courts where he did not clearly indicate the federal constitutional basis of the claim); *Picard v. Connor*, 404 U.S. at 278 (finding that the legal bases for the claim presented to the state courts must be “the substantial equivalent” of the legal bases relied upon in the federal petition).

¹¹ “Discretionary” stages of the state appeals process are stages where the appellate court is not required to review the case but instead has discretion to review it, such as a stage of the process where the appellant can petition the appellate court for “certiorari” or “discretionary” review.

¹² *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). If the petitioner has already “fully exhausted” a constitutional claim by seeking review of the claim through all stages of the state’s direct appeal process (including any “discretionary” stages), the petitioner is not required to also seek further review of the claim through the state habeas corpus process in order to bring it in a federal habeas petition.

¹³ *Slack v. McDaniel*, 529 U.S. 473, 478-79, 486-89 (2000) (holding that a federal district court correctly dismissed “mixed” habeas corpus petition containing both unexhausted and exhausted claims); *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982) (holding that a federal district court must dismiss “mixed” petitions). Instead of dismissing a “mixed” petition in its entirety, the federal court also has the discretion to stay proceedings on the exhausted claims and dismiss the unexhausted claims to allow the petitioner to return to state courts to exhaust the unexhausted claims. *See Rhines v. Weber*, 544 U.S. 269, 274-78 (2005) (endorsing a procedure in “limited circumstances” that allows a petitioner to return to state court to exhaust unexhausted claims).

What is the deadline for filing a federal habeas petition?

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established a one-year limitations period for filing most federal habeas corpus petitions. The statute of limitations (SOL) period begins to run from the *latest* of these four possible dates:¹⁴

(1) the date on which the United States Supreme Court denied a petition for certiorari to review the state courts' decision on direct appeal, or, if no petition for certiorari was filed in the Supreme Court, the date on which the 90-day period for filing a petition for certiorari expired;¹⁵

(2) if the state imposed some illegal obstacle that prevented the petitioner from filing a federal habeas petition, the date on which that obstacle was removed;

(3) if the United States Supreme Court ruled that a new constitutional right exists and it applies to cases that are already in habeas proceedings, the date on which the Supreme Court issued its ruling; or

(4) if the petitioner previously could not have discovered the facts supporting the claim by exercising "due diligence" – for example, in cases where the state suppressed evidence, making it impossible for the facts to be discovered – the date on which the petitioner could have discovered the facts through the exercise of due diligence.

The one-year limitations period for filing a federal habeas petition is "tolled," or suspended, during the period of time that a "properly filed" state habeas corpus petition is pending in the state courts.¹⁶ However, the SOL is not tolled during the period after the state courts have ruled on the state habeas case and while the petitioner is asking the United States Supreme Court to review the case.¹⁷

Is there a right to counsel in federal habeas corpus proceedings?

The United States Supreme Court has held that the Constitution does not require either the state or the federal government to provide lawyers to poor prisoners in habeas corpus proceedings.¹⁸ In death penalty cases, Congress has decided that the government must provide an attorney to all indigent federal habeas petitioners.¹⁹ In cases that do not involve the death penalty, federal judges are required to appoint counsel in only two circumstances: (1) if the judge allows the petitioner to conduct discovery and appointment of counsel is "necessary for effective discovery";²⁰ and (2) if the judge finds that a petitioner is entitled to present evidence to prove his or her claim.²¹ This means that unless one of these

¹⁴ 28 U.S.C. § 2244(d).

¹⁵ *Clay v. United States*, 537 U.S. 522, 524-25, 527 (2003). A petition asking the United States Supreme Court to review the judgment of the state appellate court (called a "petition for certiorari") must be filed within ninety days after the state appellate court rules on the case.

¹⁶ Any period of time that ran off the one-year SOL before it was "tolled" by the filing of a "properly filed" state habeas petition is lost and deducted from the one-year period when the SOL begins to run again. Therefore, when all state court proceedings on a properly filed state habeas petition have concluded, the SOL begins to run again *minus* the amount of time that may have already run off the one-year period before the SOL was tolled.

¹⁷ *Lawrence v. Florida*, 549 U.S. 327, 329 (2007).

¹⁸ *Coleman v. Thompson*, 501 U.S. 722, 755 (1991) (stating that there is no constitutional right to an attorney for indigent prisoners in habeas corpus proceedings).

¹⁹ See 18 U.S.C. § 3599(a)(2).

²⁰ R. Governing § 2254 Cases in the U.S. Dist. Cts. 6(a).

²¹ R. Governing § 2254 Cases in the U.S. Dist. Cts. 8(c).

two circumstances applies, a federal habeas corpus petitioner must (1) pay for an attorney, (2) find a volunteer attorney, or (3) represent himself or herself without a lawyer.

Is “discovery” of information and materials in the state’s possession available to the petitioner in federal habeas corpus proceedings?

A judge may allow a petitioner to conduct discovery if the petitioner shows “good cause.”²² However, the judge can limit the extent of this discovery and generally does. The discovery methods available include depositions, requests for access to documents or other physical materials, physical and mental examinations, requests for the government to admit facts, and written questions called “interrogatories.”²³ A petitioner may use discovery to develop facts sufficient either to require an evidentiary hearing or to justify the court ruling in favor of the petitioner without a hearing.

Who has the burden of proof in a federal habeas corpus case?

The habeas petitioner generally has the burden of proving a violation of federal law by a “preponderance of the evidence.”²⁴ Federal courts have to presume that the facts that were found by the state courts in earlier stages of the appeal or state habeas process are correct. However, the petitioner may rebut that “presumption of correctness” if he or she presents “clear and convincing evidence” showing that the state court fact-findings are incorrect.²⁵

What is the standard for winning a federal habeas case?

Winning a federal habeas case is difficult. A petitioner will only win if the state courts were not only wrong, but unreasonably wrong, in denying one or more of the petitioner’s federal constitutional claims. The federal habeas statute says that a federal court may not grant relief on one of the petitioner’s claims unless the state courts’ consideration of that claim either “(1) resulted in a decision that was contrary to, or involved 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 determination of the facts in light of the evidence presented in the state court proceeding.”²⁶ This complicated language basically means that the state courts’ ruling on the claim must have either (1) gone against a clear constitutional rule announced by the United States Supreme Court or (2) involved an unreasonable determination of the facts based on the evidence developed in the state court proceedings.

Can the federal district court’s denial of a habeas petition be appealed?

A petitioner in a federal habeas case does not have an automatic right to appeal a federal district court’s ruling to the federal circuit court of appeals.²⁷ Instead, the prisoner must get permission to appeal from either the district court or the court of appeals by applying for a “certificate of appealability” (COA).²⁸ For either court to issue a COA, the petitioner must make a “substantial

²² R. Governing § 2254 Cases in the U.S. Dist. Cts. 6(a).

²³ Fed. R. Civ. P. 26(a).

²⁴ *Parke v. Raley*, 506 U.S. 20, 31 (1992); *Sumner v. Mata*, 449 U.S. 539, 551 (1981).

²⁵ 28 U.S.C. § 2254(e)(1).

²⁶ 28 U.S.C. § 2254(d).

²⁷ *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

²⁸ 28 U.S.C. § 2253(c)(1) (“Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals.”).

showing of the denial of a constitutional right.”²⁹ This does not mean that the petitioner must be able to show that he should win the case; only that the appeal presents issues that are “debatable” or that other “reasonable judges” could have decided differently. To do this, the petitioner has to show the court in his application for COA that: (1) reasonable judges could disagree on at least one issue in the case, (2) a court could rule on at least one issue differently than the district court did, (3) at least one issue is “adequate to deserve encouragement to proceed further,” or (4) at least one issue is not clearly a losing issue because of the law or because there is no basis for the issue in the facts of the case.³⁰

Additional resources:

Equal Justice Initiative, *Alabama Capital Postconviction Manual* (5th ed.). The manual costs \$30 and you can order it by calling 334-269-1803.

John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure*, 47 S.C. L. Rev. 271 (1996).

Todd Maybrow, *Federal Habeas Corpus Review* (1999),
<http://library.findlaw.com/1999/Jan/1/241464.html>.

²⁹ 28 U.S.C. § 2253(c)(2).

³⁰ *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 894 (1983).