

October 19, 2015

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Pursuant to 28 U.S.C. § 2071(b), comments are invited on the proposed amendments to Ninth Circuit Rule 22-3 and companion Form 12.

Please direct comments to Molly C. Dwyer, Clerk of Court at Molly_Dwyer@ca9.uscourts.gov and Cole Benson, Supervising Deputy Clerk at Cole_Benson@ca9.uscourts.gov.

Comments must be submitted no later than November 23, 2015.

Summary of amendments: Relax certain requirements for unrepresented litigants, resolve inconsistencies between the rule and the form; update form to reflect changes in case law; clarify district court's role in responding to unauthorized second/successive motions or petitions; request information specific to capital and non-capital cases.

**CIRCUIT RULE 22-3. APPLICATIONS FOR AUTHORIZATION
TO FILE SECOND OR SUCCESSIVE 28 U.S.C. § 2254 PETITION
OR § 2255 MOTION - ALL CASES; STAY OF EXECUTION -
CAPITAL CASES**

(a) Applications. Any applicant ~~petitioner~~ seeking authorization to file a second or successive 28 U.S.C. § 2254 petition or 28 U.S.C. § 2255 motion in the district court must file an application in the Court of Appeals demonstrating entitlement to such leave under sections 28 U.S.C. § 2254 or § 2255. *See* Form 12. An original in paper format of the application must be filed with the Clerk of the Court of Appeals unless the application is submitted via Appellate ECF. No filing fee is required.

If a ~~second or successive petition or motion~~, or an application for authorization to file a second or successive section 2254 petition or section 2255 motion such a ~~petition or motion~~, is mistakenly submitted to the district court, the district court shall refer it to the court of appeals. (*Rev.*)

If an unauthorized second or successive section 2254 petition or section 2255 motion is submitted to the district court, the district court may, in the interests of justice, refer it to the Court of Appeals. (*Rev. 12/1/09; Rev. 7/1/13; Rev.*)

The applicant application must:

(1) include Form 12 if submitted by an applicant not represented by counsel;

~~(2)(1)~~ include the proposed section 2254 petition or section 2255 motion ~~a copy of the second or successive 2254 petition or 2255 motion which~~ that the applicant seeks to file in the district court; ~~and~~ (Rev.)

~~(3)~~ (2) state as to each claim presented whether it previously has been raised in any state or federal court and, if so, the name of the court and the date of the order disposing of such claim(s); and

~~(4)(3)~~ state how the requirements of sections 2244(b) or 2255 have been satisfied.

(b) Attachments. If reasonably available to the applicant petitioner, the application must include copies of all relevant state court orders and decisions ~~and all dispositive district court orders in prior federal proceedings.~~ ~~If attachments filed by petitioner are incomplete, respondent may file supplemental attachments.~~ (Rev. 12/1/09; Rev.)

(c) Service.

(1) Capital cases: In capital cases, the applicant petitioner ~~must~~ serve a copy of the application, ~~and all attachments,~~ and proposed section 2254 petition/section 2255 motion on the respondent, and must attach a certificate of service to the application filed with the Court. (Rev.)

(2) Noncapital cases: In noncapital cases, service of the application on the respondent is not required. (Rev.)

(d) Response.

(1) Capital Cases: In capital cases where an execution date is scheduled and no stay is in place, respondent shall respond to the application and file supplemental attachments as soon as practicable. Otherwise, in capital cases, respondent shall respond and file supplemental attachments within 14 days of the date the application is served. (Rev. 12/1/09; Rev.)

(2) Noncapital cases: In noncapital cases, no response is required unless ordered by the Court. Respondent may include supplemental attachments with its response. (Rev.)

(e) Decision. The application will be determined by a three-judge panel. In capital cases where an execution date is scheduled and no stay is in place, the Court will grant or deny the application, and state its reasons therefore, as soon as practicable.

(f) Stays of Execution. If an execution date is scheduled and no stay is in place, any judge may, if necessary, enter a stay of execution, see Circuit Rule 22-2(e), but the question will be presented to the panel as soon as practicable. If the Court grants leave to file a second or successive application, the Court shall stay applicant's ~~petitioner's~~ execution pending disposition of the second or successive petition by the district court. (Rev.)

Cross Reference:

- Circuit Rule 25-5. Electronic Filing on page 83, specifically Circuit Rule 25-5(c), Documents that may be submitted either electronically or in paper format (Rev. 12/1/09; Rev. 7/1/13; Rev.)

Circuit Advisory Committee Note to Rule 22-3

The district court is required to transfer only mistakenly filed applications for authorization to file a second or successive section 2254 petition or 2255 motion. If an applicant files a document that appears to be an unauthorized section 2254 petition or 2255 motion and facially alleges a claim based upon a new rule of constitutional law or newly discovered evidence of actual innocence, the district court may transfer the filing to the court of appeals in the interest of justice. In the alternative, the district court may dismiss the filing without prejudice to the applicant seeking authorization from the court of appeals on Ninth Circuit Form 12.

The rule requires applicants to provide this Court with the proposed petition or motion. Pro se applicants are encouraged to use the form petition or motion adopted by the district court where applicant anticipates filing the document.
(New)

**Form 12. Application for Leave to File Second or Successive Petition
Under 28 U.S.C. § 2254 or Motion Under 28 U.S.C. § 2255**

(New, 7/1/02; Rev.)

**UNITED STATES COURT of APPEALS
for the NINTH CIRCUIT
~~95 Seventh Street~~ P.O. Box 193939
San Francisco, California ~~94103~~ 94119-3939**

Docket Number _____
(to be provided by court)
Applicant's ~~Petitioner's~~ name _____
Prisoner registration number _____
Address _____
Name of respondent _____

Instructions - Read Carefully

- (1) This application, whether handwritten or typewritten, must be legible and signed by the applicant ~~petitioner~~ under penalty of perjury. An original ~~and five (5) copies~~ must be provided to the Clerk of the Ninth Circuit. The application must comply with 9th Circuit Rule 22-3, which is attached to this form.
- (2) All questions must be answered concisely. Add separate sheets if necessary.
- (3) If this is a capital case, the applicant ~~The petitioner~~ **shall** serve a copy of this application and any attachments on respondent and must complete and file a the proof of service that accompanies this form with this application. If this is not a capital case, service on the respondent is not required.
- (4) ~~The petitioner shall attach to this application copies of the magistrate judge's report and recommendation and the district court's opinion in any prior federal habeas proceeding under 28 U.S.C. § 2254 or § 2255 or state why such documents are unavailable to petitioner.~~ The proposed 28 U.S.C. § 2254 petition or 28 U.S.C. § 2255 motion that applicant seeks to file in the district court must be included with this form.
- (5) Applicants seeking authorization to file a second or successive section 2254 habeas corpus petition shall include copies of all relevant state court decisions if reasonably available.

You *Must* Answer the Following Questions:

- (1) What conviction(s) are you challenging?
-

(2) In what court(s) were you convicted of these crime(s)?

(3) What was the date of each of your conviction(s) and what is the length of each sentence?

For questions (4) through (10), provide information separately for each of your previous §§ 2254 or 2255 proceedings. Use additional pages if necessary.

(4) Has the judgment of your conviction or sentence been modified or amended? If yes, when and by what court?

(4) (5) With respect to **each** conviction and sentence, have you ever filed a petition or motion for habeas corpus relief in federal court under **28 U.S.C. § 2254** or **§ 2255**?

Yes No

(a) In which federal district court did you file a petition or motion?

(b) What was the docket number? _____

(c) On what date did you file the petition/motion? _____

(5) (6) What grounds were raised in your previous habeas proceeding?
(list all grounds and issues previously raised in that petition/ motion)

(6) (7) Did the district court hold an evidentiary hearing? Yes No

(7) (8) How did the district court rule on your petition/motion?

District court **dismissed** petition/motion? If yes, on what grounds?

District court **denied** petition/motion;

District court **granted** relief;

if yes, on what claims and what was the relief?

~~(Attach copies of all reports and orders issued by the district court.)~~

(8) (9) On what date did the district court decide your petition/motion?

~~(9)~~ (10) Did you file an appeal from that disposition? Yes No

(a) What was the docket number of your appeal? _____

(b) How did the court of appeals decide your appeal? _____

~~(10)~~ (11) State concisely each and every ground or issue you wish to raise in your current petition or motion for habeas relief. Summarize briefly the facts supporting each ground or issue.

~~(11)~~ (12) For each ground raised, was it raised in the state courts? If so, what did the state courts rule and when?

(Attach a copy of all relevant state court decisions, if available)

~~(12)~~ (13) For each ground/issue raised, was this claim raised in any prior federal petition/motion? (list each ground separately)

~~(13)~~ (14) For each ground/issue raised, does this claim rely on a new rule of constitutional law? (list each ground separately and give case name and citation for each new rule of law)

~~(14)~~ (15) For each ground/issue raised, does this claim rely on newly discovered evidence? What is the evidence and when did you discover it? Why has this newly discovered evidence not been previously available to you? (list each ground separately)

~~(15)~~ (16) For each ground/issue raised, does the newly discovered evidence establish your innocence?
How?

~~(16)~~ (17) For each ground/issue raised, does the newly discovered evidence establish a federal constitutional error? Which provision of the Constitution was violated and how?

(17) (18) Provide any other basis for your application not previously stated.

Date: _____ Signature: _____

In capital cases only, proof of service on respondent MUST be attached. A sample proof of service is attached to this form.

Attach proposed section 2254 petition or section 2255 motion to this application.

CERTIFICATE OF SERVICE

APPLICATIONS FOR LEAVE TO FILE SECOND OR SUCCESSIVE 28 U.S.C. §§ 2254/2255 PETITIONS/MOTIONS

DEATH PENALTY CASES ONLY

Case Name: _____ v. _____

I certify that a copy of the application for leave to file a second or successive 28 U.S.C. § 2254 petition or § 2255 motion with any attachments was served, either in person or by mail, on the person listed below.

Signature

Notary NOT required

Name

Address

Date of Service

Note: Rule 22-3 will be attached to Form 12 upon final adoption of changes to rule