

March 22, 2018



Pursuant to 28 U.S.C. § 2071(b), comments are invited on proposed revisions to Circuit Rules 22-1 through 22-6, Habeas Corpus Appeals; and Circuit Rule 25-5(f), Certificate of Service Requirement. The proposed changes are primarily designed to clarify language and mirror existing practice, and to bring the rules into conformity with FRAP planned revisions for December 2018 that will place limits on stays of mandates in some circumstances and will eliminate a certificate of service requirement for electronically filed documents. If ultimately approved by the Court, these rules would become effective December 1, 2018.

Please direct comments to Molly C. Dwyer, Clerk of Court at Molly_Dwyer@ca9.uscourts.gov, and Susan V. Gelmis, Chief Deputy Clerk at Susan_Gelmis@ca9.uscourts.gov. Comments must be submitted no later than April 30, 2018.

PROPOSED RULE 22 REVISIONS

CIRCUIT RULE 22-1. CERTIFICATE OF APPEALABILITY (COA)

- (a) **General Procedures.** ~~Petitioners appealing Appeals from~~ the district court's judgment in either a 28 U.S.C. § 2254 or a § 2255 proceeding ~~shall follow~~ are governed by the procedures set forth in FRAP 4 and 22(b). A ~~request motion~~ for a certificate of appealability ("COA") must first be considered by the district court. If the district court grants a COA, ~~that cCourt~~ shall state which issue or issues satisfy the standard set forth in 28 U.S.C. § 2253(c)(2). The court of appeals will not act on a ~~request motion~~ for a COA if the district court has not ruled first. (Rev. 1/1/04; 12/1/09; 12/1/18)
- (b) **District Court Records.** If the district court denies a COA in full in a § 2254 proceeding and the district court record cannot be accessed electronically, the district court clerk shall forward the entire record to the court of appeals. If the district court denies a COA in full in a § 2255 proceeding and the district court record cannot be accessed electronically, the district court clerk shall forward that portion of the record beginning with the filing of the § 2255 motion. (Rev. 1/1/04; 12/1/09)
- (c) **Grant in Part or in Full by District Court.** If the district court grants a COA as to any or all issues, a briefing schedule will be established by the ~~cCourt~~ of appeals at case opening and ~~petitioner appellant~~ shall brief only those issues certified or otherwise proceed according to section (e), below. (Rev. 1/1/04; 3/11/04)
- (d) **Denial in Full by District Court.** If the district court denies a COA as to all issues, ~~petitioner appellant~~ may file a ~~request motion~~ for a COA in the court of appeals within 35 days of the ~~filing of a notice of appeal district court's entry of its order (1) denying a COA in full, or, (2) denying a timely filed post-judgment motion, whichever is later.~~ The notice of appeal must be timely filed pursuant to 28 U.S.C. § 2107 and FRAP 4(a), regardless of whether appellant files a request for COA. If ~~petitioner appellant~~ does not file a COA ~~motion request~~ with the court of appeals after the district court denies a COA ~~motion~~ in full, the court of appeals will deem the notice of appeal to constitute a ~~request motion~~ for a COA. ~~If the court of appeals appoints counsel to represent petitioner, counsel will be given additional time to file a renewed COA motion.~~ (Rev. 1/1/04; 12/1/09; 12/1/18)

If ~~petitioner appellant~~ files a ~~request motion~~ for a COA with the court of appeals, ~~respondent appellee~~ may, and in capital cases with no pending execution date shall, file a response to the ~~motion request~~ for a COA within

35 days from service of the COA ~~motion request~~. In capital cases where an execution date is scheduled and no stay is in place, ~~respondent-appellee~~ shall file a response as soon as practicable after the date ~~petitioner's-appellant's motion request~~ is served or, if no ~~motion request~~ is filed, as soon as practicable after the district court's entry of its order denying a COA. (New 1/1/04; Rev. 12/1/09; 12/1/18)

If, after the district court has denied a COA in full, the ~~motions panel court of appeals~~ also denies a COA in full, ~~petitioner-appellant~~, pursuant to Circuit Rule 27-10, may file a motion for reconsideration. (New 1/1/04; Rev 12/1/18)

When ~~a motions panel~~ the court of appeals grants a COA in part and denies a COA in part, a briefing schedule will be established and no motion for reconsideration will be entertained. ~~Petitioner-Appellant~~ shall brief only those issues certified or otherwise proceed according to section (e), below. (New 1/1/04; Rev 12/1/18)

- (e) **Briefing Uncertified Issues.** ~~Petitioners-Appellants~~ shall brief only issues certified by the district court or the court of appeals, except that,- ~~Alternatively,~~ if an ~~appellant-petitioner~~ concludes during the course of preparing the opening brief, that an uncertified issue should be discussed in the brief, the ~~petitioner-appellant~~ shall first brief all certified issues under the heading, "Certified Issues," and then, in the same brief, shall discuss any uncertified issues under the heading, "Uncertified Issues." Uncertified issues raised and designated in this manner will be construed as a motion to expand the COA and will be addressed by the merits panel to such extent as it deems appropriate. Except in the extraordinary case, the Court will not permit a longer brief to accommodate the uncertified issues. (New 1/1/04; Rev. 7/1/16; 12/1/18)
- (f) **Response to Uncertified Issues.** ~~Respondent-Appellee~~ may, but need not, address any uncertified issues in its responsive brief. The Court will afford ~~respondent-appellee~~ an opportunity to respond before relief is granted on any previously uncertified issue. (New 1/1/04)

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 22-1

~~The Court strongly encourages petitioner to brief only certified issues. However, if petitioner concludes that an uncertified issue should be discussed in the opening brief, petitioner shall first discuss certified issues under the heading, "Certified Issues" and then, in the same brief, shall discuss uncertified issues under the heading, "Uncertified Issues." The Court may decline to address uncertified issues if they are not raised and designated as required by this Rule. (Rev. 1/1/04; 12/1/18)~~

CIRCUIT RULE 22-2. DIRECT CRIMINAL APPEALS, FIRST PETITIONS, AND STAYS OF EXECUTION: CAPITAL CASES

- (a) **Assignment.** In direct criminal appeals and section 2241, section 2254, and section 2255 appeals which involve judgments of death and finally dispose of the case, the Clerk, ~~upon the completion of briefing,~~ will assign the appeal to a death penalty panel composed of active judges and senior judges willing to serve on death penalty panels. However, when an execution is scheduled and no stay is in place, the Clerk may select a panel to hear the appeal and any emergency motion whenever in the Clerk's discretion it would be prudent to do so. (Rev. 12/1/09)
- (b) **Related Civil Proceedings.** The Court may apply the provisions of Circuit Rule 22 to any related civil proceedings challenging an execution as being in violation of federal law, including proceedings filed by the prisoner or someone else on his or her behalf.
- (c) **Duties.** Once a case is assigned to a death penalty panel, the panel will handle all matters pertaining to the case, including motions for leave to file a second or successive petition or motion, appeals from authorized second or successive petitions or motions, any related civil proceedings, and remands from the Supreme Court of the United States. When a case is pending before a death penalty en banc court, any additional applications for relief pertaining to that case will be assigned to the panel with responsibility for that case, unless the question presented is such that its decision would resolve an issue then before the en banc court, in which event the additional application will be assigned to the en banc court. The determination as to whether the case is assigned to the panel or the en banc court is made by the Chief Judge in consultation with the concerned panel and the en banc court. (Rev. 12/1/09)
- (d) **The En Banc Court.** The Clerk shall include in the pool of the names of all active judges, and the names of those eligible senior judges willing to serve on the en banc court. An eligible senior judge is one who sat on the panel whose decision is subject to review. Judges shall be assigned by random drawing from the pool, and in accordance with Circuit Rule 35-3. Review by the en banc court may include not only orders granting or denying applications for a certificate of appealability and motions to stay or vacate a stay of execution, but may extend to all other issues on appeal.
- (e) **Stays of Execution.** Counsel shall communicate with the Clerk of this Court by telephone or email as soon as it becomes evident that emergency relief will be sought from this Court. Any motion for a stay of execution filed before a case has been assigned to a death penalty panel will be presented for decision to a motions panel. Once a death penalty panel has been assigned, that panel then must decide all subsequent matters (unless the case is then before the en banc court).

Any motion for a stay of execution shall be filed electronically and the Clerk will immediately forward the motion to the panel. If a motion for a stay of execution is presented to a judge of this Court not on the death penalty panel rather than to the Clerk of the Court of Appeals, that judge shall refer the motion to the Clerk, unless the execution is imminent. If an execution is imminent and the death penalty panel has not yet determined whether to grant a stay pending final disposition of the appeal, any judge may issue a temporary stay of a scheduled execution. Any judge or judges who issue a temporary stay of execution shall immediately notify the Clerk and the panel of such action. By majority vote, the panel may vacate such a stay of execution.

A motion for stay of execution shall state whether relief was sought in the district court and, if so, whether all grounds advanced in support thereof in ~~this the c~~Court of appeals were submitted to the district court and if not, why the matter should not be remanded to the district court or relief denied for that reason. If a majority of the panel votes to deny the stay, it shall enter an order to that effect and, unless impracticable, state the issues presented and the reasons for the denial. If no execution date is set, the ordinary rules for obtaining en banc review of a three-judge panel decision shall apply on a first petition or motion.

When the panel affirms a denial or reverses a grant of a first petition or motion, it shall enter an order staying the mandate pursuant to FRAP 41(b), but any such stay is subject to the limits set forth in FRAP 41(d). If the panel affirms the denial of a first section 2254 petition or section 2255 motion in a capital case and denies a stay of execution, any judge of the Court may request en banc rehearing and issue a temporary stay of execution. (Rev. 12/1/18)

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.** An applicant 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~~ court of ~~Appeals~~ appeals demonstrating entitlement to such leave under sections 2254 or 2255. See Form 12. An original in paper format of the application must be filed with the Clerk of the ~~Court~~ court of ~~Appeals~~ appeals unless the application is submitted via Appellate CM/ECF. No filing fee is required. If an application for authorization to file a second or successive section 2254 petition or section 2255 motion is mistakenly submitted to the district court, the district court shall refer it to the court of appeals. 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~~ court of ~~Appeals~~ appeals. (Rev. 12/1/09; Rev. 7/1/13; Rev. 7/1/16)

The applicant must:

- (1) include Form 12 if submitted by an applicant not represented by counsel;
 - (2) include the proposed section 2254 petition or section 2255 motion that the applicant seeks to file in the district court;
 - (3) 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) state how the requirements of sections 2244(b) or 2255 have been satisfied.
- (b) **Attachments.** If reasonably available to the applicant, the application must include copies of all relevant state court orders and decisions. (Rev. 12/1/09; Rev 7/1/16)
- (c) **Service.**
- (1) **Capital Cases:** In capital cases, the applicant must serve a copy of the application, 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. 7/1/16)
 - (2) **Noncapital Cases:** In noncapital cases, service of the application on the respondent is not required. (New 7/1/16)
- (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*)
 - (2) **Noncapital Cases:** In noncapital cases, no response is required unless ordered by the Court. Respondent may include supplemental attachments with its response. (*Rev. 7/1/16*)
- (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~~immediately. If the Court grants leave to file a second or successive application, the Court shall stay the applicant's execution pending disposition of the second or successive petition by the district court.

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 22-3

The district court is required to transfer 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 on 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 interests of justice or, 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 the c~~Court of appeals with the proposed petition or motion. Pro se applicants are encouraged to use the form petition or motion adopted by the district court where the applicant anticipates filing the document. (New 7/1/16)

CIRCUIT RULE 22-4. APPEALS FROM AUTHORIZED SECOND OR SUCCESSIVE 2254 PETITIONS OR 2255 MOTIONS IN CAPITAL CASES

This rule applies to appellate proceedings involving any authorized second or successive (“SOS”) section 2254 petition or 2255 motion in capital proceedings.
(Rev. 12/1/18)

- (a) **Necessary Documents.** A petitioner appealing the denial of an authorized SOS petition or motion and filing a motion for a certificate of appealability and/or a stay of execution, shall file with the ~~Clerk of the Court of Appeals~~ the following documents in an attachment to any COA request:
- (1) the original application for ~~a certificate of appealability permission to file a second or successive section 2254 petition or 2255 motion (“COASOS”)~~ and/or a motion for stay of execution;
 - (2) all papers filed in the subsequent proceeding in district court;
 - (3) all orders issued by the district court in the subsequent proceeding;
 - (4) a copy of any all relevant state or federal court opinions or judgments or, if there is are no written opinions or judgments, a copy of the relevant portions of the transcripts; and
 - (5) a copy of the notice of appeal.

If all documents referred to in this provision are not filed, ~~petitioner appellant~~ shall state why the documents are unavailable and where they may be obtained. If ~~petitioner appellant~~ does not provide the documents, ~~respondent appellee~~ shall provide them or state in any response why they are not available. *(Rev. 12/1/09)*

If ~~petitioner appeals the district court’s denial of an authorized SOS petition or motion and~~ the district court has denied in full an application for a COA, ~~petitioner appellant~~ shall file with the ~~Clerk of the Court court of Appeals~~ appeals a motion for a COA. Circuit Rule 22-1 shall apply to the extent not inconsistent with this rule. *(Rev. 12/1/09; 12/1/18)*

- (b) **Capital Cases, Emergency Motions.** ~~In capital cases w~~When the district court has denied an authorized SOS petition or motion and an execution is scheduled and imminent, counsel shall adhere to Circuit Rule 27-3 regarding emergency motions, except to the extent that it may be inconsistent with these rules. Any such motion will be presented to the panel assigned to the case pursuant to Circuit Rule 22-2. *(New 12/1/09; Rev. 12/1/18)*
- (c) **Capital Cases, COA Applications.** ~~In all capital cases w~~Where the district court has denied an authorized SOS petition or motion and denied a COA in full, the Clerk shall refer the motion for a COA to the death penalty panel.

Oral argument may be held at the request of any member of the panel. Any member of the panel may grant a COA. If the panel votes unanimously to deny a COA in full, it shall enter an order setting forth the issues presented and the reasons why a COA should not issue. A copy of the order shall be circulated by the Clerk to all judges. *(New 12/1/09)*

- (d) **En Banc Review.** Any active or senior judge of the Court may request that the en banc court review the panel's order. The request shall be supported by a statement setting forth the requesting judge's reasons why the order should be vacated. If an execution date is scheduled and imminent, the Clerk shall notify the parties when a request for rehearing en banc is made and of the time frame for voting or, if no such request has been made, the Clerk shall notify the parties upon expiration of the period to request en banc rehearing. Such a request for rehearing en banc shall result in en banc review if a majority of active judges votes in favor of en banc review. A judge's failure to vote within the time established by General Order 5.5(b) shall be considered a "yes" vote in favor of en banc review. The en banc coordinator, if time permits, may set a schedule in which other judges may respond to the points made in the request for en banc review. If a majority of active judges votes in favor of en banc review, the Clerk shall notify the parties that the matter will receive en banc review, and identify the members of the en banc court. *(New 12/1/09)*

Any active judge may request a rehearing of the decision of the en banc court by all the active judges of the Court. If no stay is in effect, such judge may issue a temporary stay. The eleven-judge en banc court by majority vote may vacate such a temporary stay, and in that event there will be no stay in effect unless a stay is granted by the full court. *(New 12/1/09)*

- (e) **Stays of Execution.** ~~In all capital cases w~~Where petitioner-appellant seeks a stay of execution, any motion for stay of execution shall be filed electronically, and the Clerk shall refer any such motion ~~for a stay of execution~~ to the death penalty panel. Oral argument may be held at the request of any member of the panel. If a majority of the panel votes to deny the stay, it shall enter an order setting forth the issues presented and the reasons for the denial. *(New 12/1/09; Rev. 12/1/18)*

If the panel denies a stay of execution and the execution date is imminent, any judge of the Court who requests en banc review may issue a temporary stay of execution. That stay shall lapse and be dissolved if a majority of active judges does not vote in favor of en banc review. A judge's failure to vote within the time established by General Order 5.5(b) shall be considered a "yes" vote in favor of en banc review. *(New 12/1/09)*

If the matter receives en banc review, the stay shall remain in effect until the en banc court completes voting on the question of granting a stay. Voting is complete when all available judges have been polled and a majority of the en banc court has voted either to grant or deny a stay. If at the completion of

voting, a majority of the en banc court has not voted to grant the stay, there will be no stay in effect unless granted by the full court. *(New 12/1/09)*

~~If a motion for a stay of execution is presented to a judge of this Court not on the panel rather than to the Clerk of the Court of Appeals, that judge shall refer the motion to the Clerk for determination by the panel, unless the execution is imminent.~~ If an execution is imminent and the panel has not yet determined whether to grant a stay pending final disposition of the appeal, any judge of the Court may issue a temporary stay of a scheduled execution. Any judge or judges who issue a temporary stay of execution shall immediately notify the Clerk and the panel of such action. By majority vote the panel may vacate such a stay of execution. *(New 12/1/09; Rev. 12/1/18)*

~~If a motion for a stay of execution is presented to a judge of this Court not on the panel, counsel presenting such motion shall include in the materials presented a declaration that shall reflect:~~

~~why the motion is being presented to a single judge instead of the Clerk of the Court of Appeals for reference to the panel;~~

~~the name of any other judge to whom the motion has been presented, including any district judge, and the date when such application was made, and any ruling on the motion;~~

~~what petitions, applications, motions and appeals are then pending before this Court in any case involving the same prisoner, together with a report of the status of each such proceeding.~~ *(New 12/1/09)*

~~Before presenting such a motion to a single judge, the applicant shall make every practicable effort to notify the Clerk and opposing counsel and to serve the motion at the earliest possible time. A certificate of counsel for the applicant shall follow the cover page of the motion and shall contain:~~

~~the telephone numbers and office addresses of the attorneys for the parties;~~

~~facts showing the existence and nature of the claimed emergency; and~~

~~when and how counsel for the other parties were notified and served with the motion, or, if not notified and served, why that was not done.~~

If the relief sought was available in the district court, the motion shall state whether all grounds advanced in support thereof in ~~this Court~~the court of appeals were submitted to the district court, and, if not, why the matter should not be remanded to the district court or the relief denied for that reason. *(New 12/1/09; Rev. 12/1/18)*

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 22-4

If a prisoner has been previously granted relief, in whole or in part, a petition or motion challenging a subsequent conviction or sentence shall be considered as a “first petition” or “first motion” and this rule shall not apply. Such a petition or motion will be assigned to the same panel to which the initial petition or motion was assigned. (Rev. 12/1/09; 12/1/18)

CIRCUIT RULE 22-5. SUBSEQUENT PETITIONS OR MOTIONS; RELATED CIVIL PROCEEDINGS

[Abrogated 12/1/09]

CIRCUIT RULE 22-6. RULES APPLICABLE TO ALL DEATH PENALTY CASES

- (a) **Notice of Emergency Motions.** Upon the filing of a notice of appeal where an execution date has been set and the district court has denied a stay of execution, the clerk of the district court shall immediately notify the Clerk of ~~this Court~~the court of appeals by telephone or email of such filing and electronically transmit the notice of appeal. Counsel shall communicate with the Clerk ~~of this Court~~ by telephone or email as soon as it becomes evident that emergency relief will be sought from ~~this Court~~the court of appeals. (Rev. 12/1/09; 12/1/18)
- (b) *[Abrogated, see Circuit Rule 32-4, 1/1/99]*
- (c) **Excerpts of Record.** The appellant shall prepare and file excerpts of record in compliance with Circuit Rule 30-1. An appellant unable to obtain all or part of the record shall so notify the Court. In addition to the documents listed in Circuit Rule 30-1.2, excerpts of record shall contain all final orders and rulings of all state courts in appellate and post-conviction proceedings. Excerpts of records shall also include all final orders of the Supreme Court of the United States involving the conviction or sentence.
- (d) ~~**Retention of Record.** The clerk shall keep all papers filed in the Court of Appeals for future use of the Court. (Eff. 7/1/97) (Abrogated 12/1/18)~~

Proposed Amendments to CR 25-5(f)

(f) Service. All filings not submitted through the Court's electronic filing system require a certificate of service or equivalent statement. A sample certificate ~~may~~ can be found on the Court's website.

(a) Filings Submitted Electronically That Are Served Electronically

When a document (other than an original proceeding or petition for review) is submitted electronically, the ~~Appellate CM/ECF~~ Court's electronic filing system will automatically notify the other parties and counsel who are registered for electronic filing of the submission; no certificate of service or service of paper copies upon other parties and counsel registered for electronic filing is necessary. Registration for the ~~Appellate CM/ECF~~ Court's electronic filing system constitutes consent to electronic service.

(b) Filings Submitted Electronically That Are Not Served Electronically

Original proceedings, petitions for review, sealed filings, and any electronically submitted filing in a case involving a pro se litigant or an attorney who is not registered for the Court's electronic filing system ~~If a counsel has successfully applied for an exemption from the electronic filing requirement, that counsel must be served paper copies consistent with the applicable provisions of pursuant to FRAP 25(c)(1); other parties to the litigation must serve the exempt counsel in that fashion and must be accompanied by a certificate of service or equivalent statement.~~

Cross-Reference: Interim Ninth Circuit Rule 27-13(c) (documents submitted under seal).