

HOW TO APPEAL YOUR HABEAS CORPUS CASE¹
TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
(SUPPLEMENT TO "HOW TO APPEAL YOUR CIVIL CASE")

PLEASE NOTE THAT ORDINARILY AN ORIGINAL *PETITION FOR A WRIT OF HABEAS CORPUS* MUST BE FILED WITH THE DISTRICT COURT.

FORMS AND INSTRUCTIONS MAY BE OBTAINED FROM THE APPROPRIATE DISTRICT COURT. *Ordinarily, the appropriate district court is the district court for the district in which the defendant was convicted.* An appeal may be accepted for filing in the district court in the district in which the defendant is incarcerated. In that event, it will likely be transferred to the district in which the defendant was convicted. It is therefore advisable to file in that court in the first instance.

TREATED AS A CIVIL CASE

Although a Petition for a Writ of Habeas Corpus is generally an attack on a criminal conviction, it is processed in the federal courts as a civil case. Therefore, please refer to the instructions entitled, "HOW TO APPEAL YOUR CIVIL CASE".

FEDERAL PRISONER VERSUS STATE PRISONER HABEAS

Federal Convictions. Persons convicted in federal court may proceed by filing a §2255 petition in the federal district court. Ordinarily, a §2255 petition should not be filed until the direct appeal has been concluded. This petition is processed in the same way as any other civil case, with two exceptions: first, the record on appeal must include the documents filed in the underlying criminal case as well as those filed under the civil docket number; second, no separate judgment will issue. For this reason, the time for filing a Notice of Appeal runs from the date of the order denying the petition.

¹ These instructions are only a summary of the Court of Appeals procedures. Please refer to the Federal Rules of Appellate Procedure, as supplemented by the Local Rules of this Court, for answers to specific questions.

State Convictions. A person convicted in state court should first complete all appeals in state court before bringing the case to federal court. A Petition for Writ of Habeas Corpus (§2254) should first be filed in the federal district court whose area contains the jurisdiction where the person was convicted. Only after the petition is denied by the district court, and a judgment is entered, should an appeal be filed in the Court of Appeals.

NECESSITY OF CERTIFICATE OF APPEALABILITY (COA)

An appeal from either the denial of a writ of habeas corpus under §2254 or from a §2255 motion cannot proceed in the Court of Appeals *unless a district or circuit judge issues, or denies a request to issue, a certificate of appealability (COA).*

[**EXCEPTION:** 2255 motions filed in the district court prior to April 24, 1996, the enactment date of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), do not require a certificate of appealability.]

An appeal by a state or its representative from the granting of a writ does not require a certificate of appealability.

A request for a certificate of appealability should first be made to the district court judge who rendered the judgment denying the writ, or who denied the §2255 motion. The district court judge will either issue a certificate of appealability or state the reasons why a certificate should not issue. Often this language is contained in the order disposing of the writ or motion. The district court should then forward the certificate or statement to the Court of Appeals together with the Notice of Appeal.

CERTIFICATE OF APPEALABILITY (COA) DENIED

If the district court judge has denied the certificate of appealability, the appellant may request the issuance of a certificate of appealability by the Court of Appeals, by making a formal motion. The motion must be made on the Court's T-1080 Notice of Motion form, accompanied by an affidavit in support, and a certificate or affidavit of service on opposing counsel. An original plus four copies of the motion and supporting papers are required, pursuant to Second Circuit Rule 22(a). In the absence of a formal motion for a certificate of appealability, the notice of appeal will be construed as an application for a

certificate of appealability.

CERTIFICATE OF APPEALABILITY (COA) NOT REQUESTED

If a certificate of appealability has not been requested in the district court by the time the Notice of Appeal is docketed in the Court of Appeals, the appeal will be dismissed without prejudice. The order will provide that the appeal may be reinstated within 30 days after the district court judge decides the motion for the certificate of appealability. As soon as the motion has been decided, the appellant should notify the Court of Appeals so that the appeal can be reinstated.

CERTIFICATE OF APPEALABILITY (COA) GRANTED

If the certificate of appealability has been granted by the district court, the appeal may proceed in the Court of Appeals without further requests for such relief.

HOW TO APPLY TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FOR LEAVE TO FILE IN THE DISTRICT COURT A SECOND OR SUCCESSIVE HABEAS CORPUS PETITION, OR A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE.

NECESSITY OF FILING AN APPLICATION WITH THE COURT OF APPEALS

Sections 2244 and 2255 of title 28, United States Code, were amended on April 24, 1996, to require that, before a federal court may entertain a second or successive petition for writ of habeas corpus by a prisoner in State custody, or a second or successive motion under section 2255 filed by a federal prisoner, a panel of the appropriate court of appeals must certify that certain legal requirements have been met. An application must be made to the court of appeals for an order authorizing the district court to consider the petition or motion.

SECOND CIRCUIT APPLICATION FORMS ATTACHED

In the Second Circuit, a prisoner, or counsel for a prisoner, must make an application to this Court for leave to file a second or successive petition or motion in a district court within this circuit, using one of the attached forms created for this purpose. Because strict time limits for filing habeas petitions and §2255 motions have been imposed, applications to this Court should be made as soon as possible.

CIRCUIT DECISION WITHIN 30 DAYS

The statute provides that a three-judge panel of the court of appeals shall grant or deny the motion for authorization to file a second or successive application not later than 30 days after the filing of the motion. The movant will be notified promptly when a decision has been reached.

NO FURTHER APPEAL ON THE APPLICATION

The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing to this Court or a petition for a writ of certiorari to the Supreme Court of the United States.