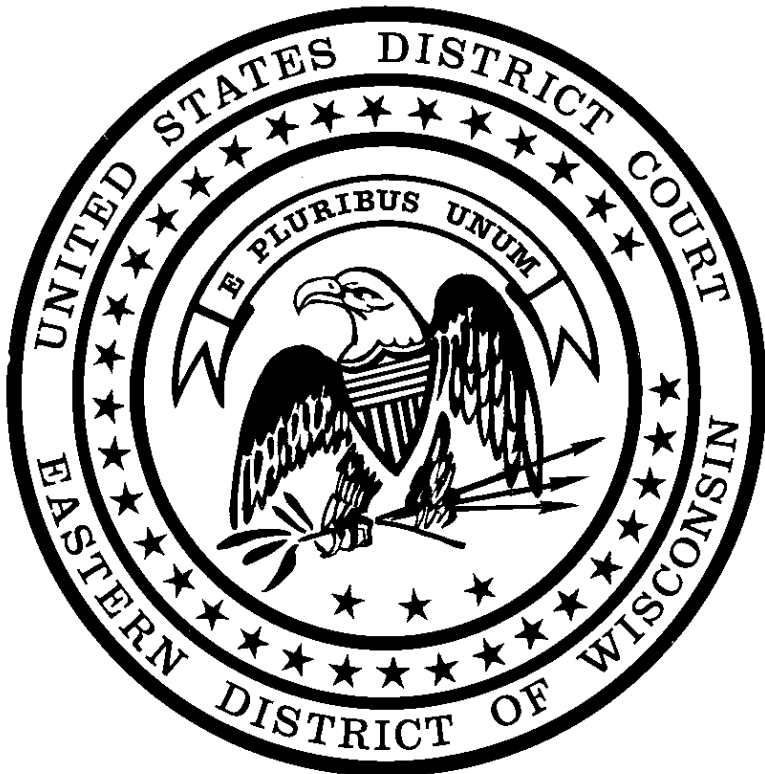


# HABEAS CORPUS: ANSWERS TO STATE PETITIONERS' COMMON QUESTIONS

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UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF WISCONSIN



***Clerk of Court – Milwaukee Division***

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## Introduction

For a variety of reasons, many people represent themselves in court. A person who represents himself in court is often said to be proceeding “pro se” (pronounced “pro say”) and may be called a “pro se litigant” or a “self-represented litigant.”

A person who is not a lawyer can represent only himself in court. A non-lawyer generally cannot represent another person in court even, if that person is a good friend or close family member.

This guide will provide basic information for persons who are in the custody of the State of Wisconsin and seek to challenge their custody with a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in federal court in the Eastern District of Wisconsin.

It is designed to address questions that come up in routine cases. This guide provides only the most basic information. It is not a substitute for an attorney. This information is general in nature and some of it might not apply to your case.

The staff of the Clerk of Court’s office will be able to answer certain procedural questions, but they absolutely **cannot give you legal advice**. Therefore, the staff of the Clerk of Court’s office will **not** be able to predict whether you might win your case, recommend a strategy of how you might win your case, predict how a judge might decide an issue, or interpret the meaning of any statute, rule, regulation, order, or decision.

You will be notified about all of the court’s actions in your case through the mail. Therefore, **if your mailing address changes while this case is pending you must immediately notify the court**. Do not assume that your mail will be forwarded to you or that the court knows that your address changed. It is your responsibility to notify the court. If you fail to update your address, you might not receive important information about your case. This could result in you losing important rights or losing your entire case.

## **What are the rules and statutes that will apply to my petition?**

A petition for a writ of habeas corpus filed by a person in state custody is governed primarily by 28 U.S.C. § 2254. Other provisions of Chapter 153 of Title 28 of the United States Code, most specifically 28 U.S.C. §§ 2241-2253 also apply to aspects of petitions for a writ of habeas corpus filed by people in state custody.

The Rules Governing Section 2254 Cases are procedural rules that control many aspects of petitions for a writ of habeas corpus filed by people in state custody. Additionally, certain provisions of the [Federal Rules of Civil Procedure](#) and this district's [Local Rules](#) also will apply.

Your institution's law library should be able to provide you with these statutes and rules.

## **How do I file a petition for a writ of habeas corpus?**

If you are in custody as a result of a state court judgment and wish to challenge your custody by filing a petition for a writ of habeas corpus in the Eastern District of Wisconsin, you must use the district's "[Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody](#)" form. This form is available from the Clerk of Court or the court's website. Your institution also might be able to provide you with this form.

When completing this form, you must be careful to follow all the directions. You should make sure that your petition is readable.

You must attach the decisions of all the state courts that previously considered your case.

You should not use the petition form to provide legal arguments as to why you think your petition should be granted. If you wish, you can prepare a brief of up to 15 pages that includes legal arguments in support of your petition and submit it along with your petition.

## **How much does it cost to file a petition for a writ of habeas corpus?**

The fee to file a petition for a writ of habeas corpus in federal district court is \$5.00. This fee must be paid at the time you file your petition.

If you are unable to afford the filing fee, you may ask the court to proceed in forma pauperis (IFP). If you wish to ask the court to allow you to proceed IFP, at the time you file your petition you must submit a "[Request to Proceed without Prepaying the Filing Fee.](#)" This form can be obtained from the Clerk of Court, the court's website, or some institutions. If you are incarcerated, you must also submit a copy of your institutional trust account statement for the last six-months. There is no need to submit these documents if you paid the filing fee.

The court will review the documents you submit to determine if you are able to pay the \$5.00 filing fee and if your petition is sufficient to proceed. If the court grants you permission to proceed IFP, the \$5.00 filing fee will be waived.

## **Where should I file my petition?**

There are two federal districts in Wisconsin; the Eastern District of Wisconsin which includes roughly the eastern third of the state, and the Western District of Wisconsin which includes roughly the western two-thirds of the state.

A petitioner may file a petition for a writ of habeas corpus in either the district that includes the county where he was convicted or in the district where he is incarcerated. In many instances, the district will be the same but some petitioners may have the choice to file in either the Eastern District or the Western District.

You can file a petition in the Eastern District of Wisconsin if you were convicted in one of these counties:

Brown, Calumet, Dodge, Door, Florence, Fond du Lac, Forest, Green Lake, Kenosha, Kewaunee, Langlade, Manitowoc, Marinette, Marquette, Menominee, Milwaukee, Oconto,

Outagamie, Ozaukee, Racine, Shawano, Sheboygan, Walworth, Washington, Waukesha, Waupaca, Waushara, and Winnebago.

You can file a petition in the Eastern District of Wisconsin if, at the time you file your petition, you are incarcerated in one of these state institutions:

Dodge Correctional Institution, Drug Abuse Correctional Center, Felmers O. Chaney Correctional Center, Fox Lake Correctional Institution, Green Bay Correctional Institution, John C. Burke Correctional Center, Kenosha Correctional Center, Kettle Moraine Correctional Institution, Marshall E. Sherrer Correctional Center, Milwaukee Secure Detention Facility, Milwaukee Women's Correctional Center, Oshkosh Correctional Institution, Racine Correctional Institution, Racine Youthful Offender Correctional Facility, Redgranite Correctional Institution, Robert E. Ellsworth Correctional Center, Sanger B. Powers Correctional Center, Sturtevant Transitional Facility, Taycheedah Correctional Institution, Waupun Correctional Institution, and Winnebago Correctional Center.

If you want to file a petition for a writ of habeas corpus in the Eastern District of Wisconsin, mail your completed original petition, all attachments, along with the \$5.00 filing fee or [Request to Proceed without Prepaying the Filing Fee](#) to:

Clerk of Court

United States District Court for the Eastern District of Wisconsin  
517 E. Wisconsin Ave., Room 362  
Milwaukee, WI 53202

Inmates of certain institutions may be able to file documents by submitting them to institutional staff in accordance with the institution's policies. The institution will then ensure the documents are electronically submitted to the Clerk of Court.

## **How long do I have to file my petition?**

You have 1 year to file your petition, but when this 1-year clock starts running and whether the clock might stop for a period of time will vary depending upon the unique circumstances of your case. For more information, review 28 U.S.C. § 2244(d).

The 1-year clock generally starts running when your conviction becomes “final.” Usually, a conviction is final once you have completed a direct appeal of your conviction or the time for doing so has expired.

The 1-year clock might stop during the time a “properly filed” collateral challenge to your conviction is pending in state court. The 1-year clock then starts running again once the courts have completed their review of your collateral challenge or a deadline for seeking review by a higher state court passes without a proper request for review being filed.

Calculating the precise deadline for filing a petition for a writ of habeas corpus requires careful analysis of the unique history of your case. This process can be complex and difficult.

The 1-year deadline is very strict. If your petition is untimely, in all but extremely rare circumstances, your petition will be dismissed and you will lose your case.

## **Who is the respondent?**

If you are incarcerated, the respondent to your petition likely will be the warden or superintendent in charge of the institution where you reside.

If you are not incarcerated, the respondent likely will be the Attorney General for the State of Wisconsin.

## **What is “exhaustion?”**

“Exhaustion” means that you have adequately presented your claim to every state court you can. Generally, this means that you have presented your claim to a Wisconsin Circuit Court, the Wisconsin Court of Appeals, and the Wisconsin Supreme Court.

## **What happens if I have not exhausted all my claims?**

Usually, a federal court can grant a state inmate relief on a petition for a writ of habeas corpus only for claims that the petitioner has exhausted in state court. If you have not presented your claim to the Wisconsin Supreme Court in, for example, a petition for review, the federal court usually cannot consider the claim for relief.

Under what is called the “total exhaustion” rule, if a petition contains both claims that a petitioner has exhausted and claims the petitioner has not exhausted, the petition is considered “mixed” and the court cannot grant the petition. For example, if a petition contains 5 exhausted claims and only 1 unexhausted claim, the court usually cannot grant the petition, even on a claim that has been exhausted.

Because including an unexhausted claim in your petition might result in your entire petition being denied, you should take care to ensure that all claims you include in your petition have been exhausted in state court.

For more information about exhaustion, you may wish to review court cases that deal with the issue, including Rose v. Lundy, 455 U.S. 509 (1982), Slack v. McDaniel, 529 U.S. 473 (2000), and Rhines v. Weber, 544 U.S. 269 (2005).

## **What is “custody?”**

Only a person who is “in custody” may seek habeas corpus relief in federal court. This includes a person who is incarcerated in jail or prison but also persons whose liberty is otherwise significantly restrained.

For example, courts have said that people who are on probation or parole may be “in custody.” However, people who are simply required to register as a sex offender, had their driver’s license revoked, or have been fined, probably are not “in custody.” Whether or not a particular person is in custody might depend upon the unique circumstances of the case.

Only claims that directly led to your current custody can be challenged in a federal petition for a writ of habeas corpus. For



example, even if you are now in prison, a federal court probably could not consider a claim that the state court made a mistake in calculating the amount of restitution owed, unless you can show that changing the amount of restitution you owe would affect whether you would remain incarcerated.

Also, you probably cannot use a federal petition for a writ of habeas corpus to challenge a prior conviction for which you have completed your sentence, even if you are currently incarcerated for another offense.

### **What sorts of claims can I include in my petition?**

Generally, federal courts can consider only claims that allege that your current custody is the result of a violation of the United States Constitution or other federal law. The right you allege was violated must have been recognized by the United States Supreme Court. Therefore, it is not appropriate to argue in a federal petition for a writ of habeas corpus that some new right should be protected under the United States Constitution. Usually, you must be able to allege that there is a specific decision of the United States Supreme Court that is inconsistent with the decision the state court reached in your case.

However, not all alleged violations of the United States Constitution are appropriate for a federal habeas petition. For example, the United States Supreme Court has said that if you had a full and fair opportunity to raise the issue in state court, an alleged violation of the Fourth Amendment is generally not grounds for federal habeas corpus relief.

Similarly, claims that your conviction resulted from a state law or the state constitution will generally not be appropriate for federal habeas corpus relief.

### **What must I show for the court to grant my petition?**

In order for a state petitioner to win on a petition for a writ of habeas corpus in federal court, the petitioner must satisfy a much higher standard than what is usually needed to win on appeal in state court.

If the state court denied your claim on its merits, a federal court can grant your petition for a writ of habeas corpus only if you are in custody as a result of:

(1) “a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court” or

(2) “a decision that was based on an unreasonable determination of the facts in light of the evidenced presented in the State court proceeding.”

28 U.S.C. § 2254(d).

If the state court denied your claim on its merits, a federal court merely disagreeing with the decision of the state court usually is not enough for the court to grant your petition. Rather, the federal court can grant your petition only if it disagrees so strongly with the state court’s decision that, in the federal court’s view, the state court’s decision was unreasonable.

### **What happens after I file my petition?**

After you file your completed petition, you will be provided a [“Consent/Refusal to Proceed Before U.S. Magistrate Judge”](#) form. You must complete this form and promptly return it. The court might not take any action on your petition until this form is returned to the court.

Your case will be randomly assigned to a judge, and after you either pay the \$5.00 filing fee or are granted leave to proceed in forma pauperis, the judge will review your petition to make sure that it is not plainly without merit. Judges differ as to how they will review your petition at this very early stage. The judge will give you a written decision of his or her review of your petition.

If the court allows the petition to go forward, the court will provide the respondent with a copy of your petition and order the respondent to respond to the petition by a certain deadline.

If the respondent submits an answer, the respondent addresses the claims you made in your petition. In addition to the answer,

the respondent usually will submit transcripts of all proceedings in the circuit court as well as copies of all briefs submitted to the state courts and decisions of all the state courts that decided your case.

At this point, judges may process petitions differently. Some judges consider the answer to the petition as the respondent's only opportunity to address the merits of your petition. Therefore, sometimes the respondent will also submit a legal brief to support his or her position on your petition at the time he or she submits the answer. You will be given the opportunity to reply to the respondent's answer. The court will then decide the petition.

Other judges might set a separate briefing schedule where after the respondent submits the answer, the court will have you submit a brief in support of your petition. The respondent will be able to respond to that brief, and you will be able to reply. The court will then decide the petition.

Sometimes the respondent believes that your petition is improper, for example, because you failed to exhaust your remedies in state court, the petition is untimely, or you are not in custody. Therefore, instead of or along with filing an answer, the respondent might file a motion to dismiss. If the respondent files a motion to dismiss instead of or in addition to an answer, you will be able to respond to that motion. Some judges may then permit the respondent to reply. The court will then resolve the motion. If the court grants the motion to dismiss, your petition will be dismissed and this will end your case in the district court. If the court denies the motion, the court will usually order the respondent to answer the petition, if the respondent has not already done so.

## **Can the court appoint a lawyer to represent me?**

There is no constitutional right to have a lawyer assist you with a petition for a writ of habeas corpus. However, in a few special cases, the court may appoint a lawyer for a state inmate on a petition for a writ of habeas corpus.

If you are unable to find a lawyer on your own, you may ask the court to appoint one for you. In this motion, you must explain why you are unable to retain a lawyer on your own and offer reasons why you think a lawyer should be appointed to represent you, including reasons why you think having a lawyer would make it more likely that your petition would be granted. The court will review the motion and consider various factors including the difficulty of the case and your ability to handle the case on your own.

## **If my petition is denied, can I appeal?**

There is no automatic right to appeal a denial of a petition for a writ of habeas corpus. Before you can appeal a denial of your petition, you must get permission to do so by obtaining a Certificate of Appealability (COA) from the court.

The district court usually will grant or deny a COA at the same time the court decides the merits of your petition. If the district court grants you a COA, you may then appeal the denial of your petition to the United States Court of Appeals for the Seventh Circuit by filing a notice of appeal with the district court and either paying \$455 in fees or obtaining permission to proceed in forma pauperis, if you have not already received permission to do so at the time you filed your petition.

If the district court denies you a COA, you can appeal only if you obtain a COA from the United States Court of Appeals for the Seventh Circuit.

A court will grant a COA only if it concludes that you have made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The United States Supreme Court has said that a court should issue a COA if reasonable judges could debate the outcome of a petition or that the issues are adequate to deserve encouragement to proceed further.

There are strict time limits for pursuing an appeal. Consult 28 U.S.C. § 2253 and the Federal Rules of Appellate Procedure for further details on pursuing an appeal.

**Can I file another petition?**

A petitioner usually can file only one federal petition for a writ of habeas corpus for the same conviction. Even if the second petition raises wholly different claims for relief, the court generally cannot consider it if it relates to the same conviction you raised in an earlier petition. Before the district court could consider a second petition dealing with the same conviction you raised in an earlier petition, you must get permission from the United States Court of Appeals for the Seventh Circuit to file a second petition. See 28 U.S.C. § 2244 for more information.

**What does that word mean? A glossary of common legal terms.**

Courts and lawyers often use terms that have special meanings when used in the legal setting. Simple definitions of some terms that might come up in your case are set forth below. Additional information can be found at various websites such as <http://www.uscourts.gov/glossary> or by consulting a legal dictionary.

**Affidavit:** A written or printed statement made under oath.

**Answer:** The document that a respondent files in response to a petition. In habeas corpus cases, this might also be called a “response” or a “return.” *See Rule 5 of the Rules Governing Section 2254 Cases.*

**Brief:** A written statement submitted to a court that explains a party’s factual and legal arguments in support of a motion or petition.

[Consent/Refusal to Proceed Before U.S. Magistrate Judge](#)

A form on which a party states whether he or she authorizes a United States Magistrate Judge to be the judge in the case. If all parties consent, the magistrate judge will handle all aspects of the case, including a jury trial, if necessary.

If even one party does not consent to have a magistrate judge handle the case, the case will be handled by a district judge

Dispositive motion: A motion that, if granted, would end a portion of a case or end an entire case. A motion to dismiss is one example.

District court: The court in the federal system where most actions start. The District Court for the Eastern District of Wisconsin is a district court.

District judge: A federal judge appointed to serve for life by the President and confirmed by the Senate to serve in a district court under Article III of the Constitution.

Docket: A brief written chronological list of what has happened in a case that is maintained by the Clerk of Court.

Electronic Court Filing (ECF):

A way for attorneys to file documents with the court by uploading them to a website. In the Eastern District of Wisconsin, pro se litigants cannot file documents this way. Pro se litigants must file documents by submitting them to the Clerk of Court. The Clerk's office staff will then upload the documents to the ECF system.

Inmates of certain institutions may be able to file documents by submitting them to institutional staff in accordance with the institution's policies. The institution will then ensure the documents are electronically submitted to the Clerk of Court.

Evidence:

Information presented in testimony or documents that is used to persuade a judge or jury to decide a case a certain way.

[Federal Rules of Civil Procedure:](#)

The rules for conducting a civil lawsuit filed in a federal court. Often abbreviated Fed. R. Civ. P.

[Federal Rules of Evidence:](#)

Rules that govern what types and how evidence may be presented in federal court. Often abbreviated Fed. R. Evid.

Hearsay:

Evidence where a witness recounts what he learned from someone else. Hearsay is generally not admissible in court. *See Fed. R. Evid. 801, 802, 803, 804, 806, 805, 807.*

In Forma Pauperis (IFP):	<p>Latin phrase meaning “as a poor person.” It is used when a party cannot afford to pay the filing fee to start a civil suit and therefore asks the court for permission to proceed “as a poor person” and not require him to pay the fee.</p> <p>A person wishing to proceed in forma pauperis must complete this district’s “<a href="#">Request to Proceed without Prepaying the Filing Fee.</a>,” which is available on the court’s website, from the Clerk of Court’s office, and at some institutions. <i>See 28 U.S.C. § 1915.</i></p>
Judgment:	The final action by the court that ends a case in a district court.
Jurisdiction:	The legal authority of a court to hear and decide a certain type of case. It also is used as a synonym for venue, meaning the geographic area over which the court has territorial jurisdiction to decide cases.
Litigant:	A party to a lawsuit.
<a href="#">Local Rules:</a>	Rules that apply to cases brought in a specific court. Often abbreviated L.R.
Magistrate judge:	A federal judge appointed by the judges in a district court who may oversee all aspects of a civil case if the parties consent.
Motion:	A request by a litigant to a judge for a decision on an issue relating to the case. <i>See Fed. R. Civ. P. 7(b); Civ. L.R. 7.</i>
Movant:	The party that files a motion.
Order:	The court’s command to a party, decision on a motion, or resolution of an issue in the case.



Petitioner:	The party that files a petition such as a petition for a writ of habeas corpus.
Pleadings:	Written statements filed with the court that describe a party's legal or factual assertions about the case. Pleadings may include a complaint, an answer, a motion, or a brief.
Prejudice:	Motions or cases can be resolved with or without prejudice. If "with prejudice," the case or motion cannot be filed again. If "without prejudice," the case or motion might be able to be re-filed at a later time.
Pro bono:	Phrase commonly used to refer to when a lawyer represents a person for free.
Relief:	What a party seeks either in a lawsuit or in a particular motion.
Reply:	A movant's submission following the other party's response to a motion or a petition.
Response:	A submission made by a party in opposition to a motion or petition.
Statute of limitations:	The time within which a lawsuit must be filed or a criminal prosecution begun. The deadline can vary, depending on the type of case.
Text Only Order:	An order entered by a judge that appears only on the docket and is not accompanied by a longer formal written order. These orders are generally short and for minor matters.