

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA**

**INSTRUCTIONS FOR FILING A PETITION FOR
WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY
PURSUANT TO 28 U.S.C. § 2254**

I. General Information About the Habeas Corpus Form:

- A. The Form. The petition for writ of habeas corpus by a person in state custody form is designed to help prisoners prepare a petition challenging their custody on the grounds that their state conviction or sentence violates the United States Constitution or other federal law. The judges of this court require that habeas corpus petitions be filed on the court-approved form. Your petition must be typewritten or legibly handwritten. All questions must be answered clearly and concisely in the appropriate space on the form. If needed, attach additional pages. The form, however, must be completely filled in to the extent applicable. Do **not** write on the back of any page.
- B. Your Signature. The petition must be signed by you (the petitioner) under penalty of perjury. Any false statement of a material fact may serve as a basis for prosecution and conviction for perjury. Your signature must be an original signature, not a photocopy.
- C. The Filing Fee. Your petition for writ of habeas corpus must be accompanied by the \$5 filing fee (checks or money orders should be made payable to the Clerk of Court, District of South Dakota). If you are unable to pay the filing fee when the petition is filed, you may request permission to proceed in forma pauperis or without prepayment of fees by completing and signing the Motion to Proceed Without Prepayment of Fees and Declaration provided with the petition form. You must also have an official at the prison or jail complete the enclosed Prisoner Trust Account Report. If the amount of money in your prison account (including frozen funds) exceeds \$25, you must pay the \$5 filing fee. See 28 U.S.C. § 1915.
- D. Court Divisions. The District of South Dakota consists of four divisions. A list of the counties that make up each division is included below. Your petition for writ of habeas corpus should be filed in the division that includes the county from which the conviction you are challenging arose.

Southern DivisionWestern DivisionCentral DivisionNorthern Division

Aurora
Beadle
Bon Homme
Brookings
Brule
Charles Mix
Clay
Davison
Douglas
Hanson
Hutchinson
Kingsbury
Lake
Lincoln
McCook
Miner
Minnehaha
Moody
Sanborn
Turner
Union
Yankton

Bennett
Butte
Custer
Fall River
Harding
Jackson
Lawrence
Meade
Pennington
Perkins
Shannon

Buffalo
Dewey
Faulk
Gregory
Haakon
Hand
Hughes
Hyde
Jerault
Jones
Lyman
Mellette
Potter
Stanley
Sully
Todd
Tripp
Ziebach

Brown
Campbell
Clark
Codington
Corson
Day
Deuel
Edmunds
Grant
Hamlin
McPherson
Marshall
Roberts
Spink
Walworth

You should mail the petition with the \$5 filing fee (or the Motion to Proceed Without Prepayment of Fees and the Prisoner Trust Account Report) to:

Southern Division:

U.S. District Court Clerk
U.S. Courthouse
400 S. Phillips Avenue #128
Sioux Falls, SD 57104

Central & Northern Divisions:

U.S. District Court Clerk
U.S. Post Office & Courthouse
225 South Pierre Street #405
Pierre, SD 57501

Western Division:

U.S. District Court Clerk
Andrew W. Bogue Federal
Bldg. & U.S. Courthouse
515 Ninth Street #302
Rapid City, SD 57701

- E. Certificate of Service on Respondent: You must furnish the respondent or respondent's attorney with a copy of any document you submit to the court other than the initial petition. Pursuant to Rules 5(a) and (d) of the Federal Rules of Civil Procedure, each original document (except the initial petition) must include a certificate of service on the last page of the document stating the date a copy of the document was mailed to the respondent or respondent's attorney and the address(es) to which it was mailed. Any document received by the court which does not include a certificate may be stricken. A certificate of service should be in the following form:

Certificate of Service

I hereby certify that a copy of the foregoing document was mailed this ____ day of (month) ,
 (year) , to:

Name: _____

Address: _____

Attorney for Respondent.

(Signature of Petitioner)

- F. Exhibits. You should attach a copy of all final state court written decisions and all written decisions by the Eighth Circuit Court of Appeals regarding the conviction you are challenging. You should **not** submit any other exhibits with the petition. Instead, the relevant information should be paraphrased in the petition.
- G. Inquiries and Copying Requests. You will be notified as soon as the court issues an order in your case. Because of the large volume of cases filed by prisoners in this court and limited court resources, the court and clerk's office will not answer inquiries concerning the status of your case or provide copies of documents, except at a charge of fifty cents (\$0.50) per page. You must therefore keep copies of all documents submitted to the court for your own records.
- H. Change of Address. You must immediately notify the clerk and the opposing parties or their attorneys in writing of any change in your mailing address. Failure to notify the court of any change in your mailing address may result in the dismissal of your case.
- I. Amended Petition. If you need to change any of the information in the initial petition you must file an amended petition. The amended petition must be written on the court-approved petition for habeas corpus form. The amended petition will take the place of the original petition, so you must include any and all grounds for relief in the amended petition. Any grounds not included in the amended petition are considered dismissed.
- J. Letters and Motions. It is generally inappropriate to write a letter to any of the district judges, magistrate judges, or the staff of any of the judicial officers. The appropriate way to communicate with these persons is by filing a written pleading or motion.

II. Completing the Habeas Corpus Form:

HEADING:

1. Your Name and Address. Print your name, prison or jail number, and mailing address on the lines provided in the upper left hand corner of the form.
2. Petitioner. Print your full name and also the name under which you were convicted on the first line of the caption.
3. Respondent. Print the name of the secretary of the department of corrections, or the warden of the institution where you are confined, or some other official who has responsibility for your current custody.

Part A. JUDGMENT OF CONVICTION:

Only one state judgment of conviction may be challenged in a single petition for writ of habeas corpus. Multiple counts which resulted in a single judgment of conviction may be challenged in the same petition for writ of habeas corpus. If you wish to challenge more than one judgment, however, you must file separate habeas corpus petitions for each judgment. Print all the requested information regarding your judgment of conviction and sentence on the spaces provided.

Part B. APPEALS:

Answer each of the questions regarding your direct appeals in the state courts. If you filed appeals in the state courts, you must provide the requested information for each appeal on the spaces provided. Attach a copy of all written decisions on your appeal.

Part C. STATE HABEAS CORPUS PROCEEDINGS:

Most states provide a specific method for challenging a conviction in the state courts after direct appeals have been completed. In South Dakota, the method is a petition for habeas corpus pursuant to South Dakota Codified Law 21-27-1, *et seq.* Answer each of the questions regarding your state habeas corpus proceedings. Attach a copy of all written decisions on your petition and appeal.

Part D. FEDERAL PROCEEDINGS:

If this is not your first federal habeas corpus petition challenging this conviction, answer each of the questions regarding your prior federal petition. If your previous federal petition was denied with prejudice, you must obtain permission from the Eighth Circuit Court of Appeals before you may file a second petition in the federal courts. If the court of appeals has granted you permission to file a successive petition, attach a copy of the court's written decision.

Part E. PENDING PROCEEDINGS:

If you have an appeal, petition, or other proceeding currently pending regarding the conviction you are challenging in this petition, answer each of the questions in the spaces provided. Ordinarily, you may not file a federal petition for writ of habeas corpus if you have an appeal still pending in the state courts.

Part F. REPRESENTATION:

Print the name of the attorney who represented you at each stage of your state court criminal proceedings. If you represented yourself at any stage, check the box marked "Pro Se."

Part G. OTHER SENTENCES:

If you have any other sentences to serve aside from the sentence imposed by the judgment you are challenging in this petition, answer each of the questions regarding your other convictions and sentences.

CLAIMS FOR RELIEF:

State concisely every ground for which you claim that your conviction or sentence violates the United States Constitution or other federal law. Your claims should not be based on state law. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and supporting facts. **You must raise all grounds based on the United States Constitution or other federal law for relief from your conviction or sentence that you wish to pursue.**

Parts H-K. GROUNDS:

The form includes space for only four grounds. If you are alleging more than four grounds, answer all of the questions for each additional ground on a separate page.

1. You must identify which constitutional right or other federal law was violated. You may allege the violation of only one federal right or law per ground. Your claim should not be based on state law.
2. Supporting facts. After you have identified which constitutional right or other federal law was violated, you need to state the supporting facts. Be as specific as possible. Tell your story briefly without citing cases or law.
3. Exhaustion. In order to proceed in federal court, you ordinarily must exhaust the remedies available to you in the state courts as to each claim on which you request action by the federal court. If you did not fairly present each of your grounds to the state supreme court, your petition may be dismissed. If you did not present one or more of your grounds to the state supreme court, explain why you did not.

SIGNATURE:

You must sign your name and print the date you signed the petition. Your signature must be an original signature, not a photocopy. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury.

III. Final Note

You should follow these instructions carefully. Failure to do so may result in your petition being stricken or dismissed by the court. All questions must be answered concisely in the proper space on the form. If needed, you may attach additional pages. The form, however, must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the petition is being continued and number all pages.

Name and Prisoner/Booking Number

Place of Confinement

Mailing Address

City, State, Zip Code

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
_____ DIVISION**

_____,
FULL NAME OF PETITIONER

(include name under which you were convicted)

Petitioner,

vs.

Case No. _____

(To be supplied by the Clerk)

_____,
(Name of Warden, Superintendent, Jailor or
authorized person having custody of Petitioner)

Respondent,

**PETITION FOR
WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY
PURSUANT TO 28 U.S.C. § 2254**

A. JUDGMENT OF CONVICTION

1. Name and location of court which entered the judgment of conviction you are challenging:

2. Case number: _____

3. Date of judgment of conviction: _____ (month/day/year)

4. Length of sentence(s): _____

5. Nature of offense(s) of which you were convicted (all counts): _____

6. What was your plea? ☐ Guilty ☐ Not guilty ☐ Nolo contendere ☐ Insanity plea

7. Kind of trial? ☐ Jury ☐ Judge only

8. Did you testify? ☐ Yes ☐ No

B. APPEALS

1. Did you appeal the conviction or sentence you are challenging to the state supreme court?

☐ Yes

☐ No

If you did appeal, answer the following:

- a. Name of court: _____
b. Date the appeal was filed: _____ (month/day/year)
c. Case number: _____
d. Grounds raised: _____

e. Result: _____

f. Date the appeal was decided: _____ (month/day/year)

2. Did you file a petition for writ of certiorari in the United States Supreme Court? ☐ Yes ☐ No

If you answered "yes", answer the following:

- a. Date the petition was filed: _____ (month/day/year)
b. Case number: _____
c. Result: _____
d. Date the petition was decided: _____ (month/day/year)

C. STATE HABEAS CORPUS PROCEEDINGS

1. Did you file a petition for habeas corpus relief in the state court?

☐ Yes

☐ No

If you answered "yes", answer the following:

- a. Name of court: _____
b. Date the petition was filed: _____ (month/day/year)
c. Case number: _____
d. Grounds raised: _____

e. Was there an evidentiary hearing? ☐ Yes ☐ No

f. Result: _____

g. Date the petition was decided: _____ (month/day/year)

2. Did you seek review of your petition in the state supreme court?

☐ Yes

☐ No

If you answered "yes", answer the following:

- a. Date the petition was filed: _____ (month/day/year)
b. Case number: _____
c. Result: _____
d. Date the petition was decided: _____ (month/day/year)

If you did not file a petition for review, explain why you did not: _____

Attach a copy of all state court written decisions regarding the conviction or sentence you are challenging

D. FEDERAL PROCEEDINGS

Is this your first federal petition for writ of habeas corpus challenging this conviction?

☐ Yes ☐ No

If this is not your first federal petition challenging this conviction, answer the following:

1. Name of court where the prior petition was filed: _____
2. Date the petition was filed: _____ (month/day/year)
3. Case number of the prior action: _____
4. Date the action was decided: _____ (month/day/year)
5. Did you raise any of the issues in this petition in your prior petition? ☐ Yes ☐ No
6. Was the prior petition ☐ Granted, ☐ Denied on the merits, or ☐ Denied on procedural grounds?
7. If the prior petition was denied with prejudice, has the Eighth Circuit Court of Appeals granted permission for you to file a successive petition? ☐ Yes ☐ No

Attach a copy of all Eighth Circuit Court of Appeals written decisions

E. PENDING PROCEEDINGS

Do you have any appeal, petition, application, motion, or other action currently pending regarding the conviction you are challenging in this petition? ☐ Yes ☐ No

If you answered “yes”, answer the following:

1. Nature of the action: _____ (e.g., appeal, special action, habeas corpus, etc.)
2. Name of court where the action is pending: _____
3. Date the action was filed: _____ (month/day/year)
4. Case number: _____

F. REPRESENTATION

Who was the attorney who represented you in the following state court proceedings? Identify whether the attorney was appointed, retained, or whether you represented yourself pro se (without counsel).

| | Name of Attorney | Appointed | Retained | Pro Se |
|----------------------------------|------------------|--------------------------|--------------------------|--------------------------|
| 1. Preliminary hearing: | _____ | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Arraignment and plea: | _____ | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Trial/guilty plea: | _____ | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. Sentencing: | _____ | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. Direct appeal: | _____ | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 6. State habeas corpus petition: | _____ | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

G. OTHER SENTENCES

Do you have any other sentences to serve after you complete the sentence imposed by the judgment you are challenging in this petition? ☐ Yes ☐ No

If you answered “yes”, answer the following:

1. Name of the court that imposed the other sentence: _____
2. Date of judgment of conviction: _____ (month/day/year)
3. Length and terms of sentence: _____
4. Have you filed or do you plan to file any petition attacking the judgment which imposed the sentence to be served in the future? ☐ Yes ☐ No

CLAIMS FOR RELIEF

On the following pages, state concisely every ground for which you claim that your conviction or sentence violates the United States Constitution or other federal law. Your claims should not be based on state law. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and supporting facts.

CAUTION:

- **Exhaustion of State Court Remedies:** In order to proceed in federal court you must ordinarily first exhaust (use up) your state court remedies as to each ground on which you request action by the federal court. This means that even if you have exhausted some grounds by raising them before the state supreme court, you must first present all other grounds to the state supreme court before raising them in your federal Petition.
- **Single Petition:** If you fail to set forth all grounds in this Petition challenging a specific judgment, you may be barred from presenting additional grounds challenging the same judgment at a later date.
- **Factual Specificity:** You must state facts, not conclusions, in support of your grounds. For example, if you are claiming incompetence of counsel you must state facts setting forth specifically what your attorney did or failed to do. A rule of thumb is—state who did exactly what to violate your federal constitutional rights at what time or place.
- **Timeliness of Petition:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations contained in 28 U.S.C. § 2244(d)¹ does not bar your petition. _____

H. GROUND I

1. My state conviction or sentence violates the following constitutional right or other federal law:

¹ § 2244. FINALITY OF DETERMINATION

- (d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

a. Did you present the issue raised in Ground I to the state supreme court? ☐ Yes ☐ No

b. If you did present the issue to the state supreme court, was the issue presented:

☐ In a direct appeal

☐ In your habeas corpus relief proceeding

☐ Other: _____ (e.g., special action)

c. If you did not present the issue to the state supreme court, explain why you did not:

I. GROUND II

1. My state conviction or sentence violates the following constitutional right or other federal law:

2. **Supporting Facts:** (State as briefly as possible the FACTS supporting Ground II. State the facts clearly in your own words without citing cases or legal arguments).

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3. Exhaustion of state court remedies:

- a. Did you present the issue raised in Ground II to the state supreme court? ☐ Yes ☐ No
- b. If you did present the issue to the state supreme court, was the issue presented:
- ☐ In a direct appeal
- ☐ In your habeas corpus relief proceeding
- ☐ Other: _____ (e.g., special action)
- c. If you did not present the issue to the state supreme court, explain why you did not:

1. My state conviction or sentence violates the following constitutional right or other federal law:

2. **Supporting Facts:** (State as briefly as possible the FACTS supporting Ground III. State the facts clearly in your own words without citing cases or legal arguments).

3. Exhaustion of state court remedies:

- a. Did you present the issue raised in Ground III to the state supreme court? ☐ Yes ☐ No
- b. If you did present the issue to the state supreme court, was the issue presented:
- ☐ In a direct appeal
- ☐ In your habeas corpus relief proceeding
- ☐ Other: _____ (e.g., special action)
- c. If you did not present the issue to the state supreme court, explain why you did not:

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (28 U.S.C. § 2254)

K. GROUND IV

1. My state conviction or sentence violates the following constitutional right or other federal law:

2. Supporting Facts: (State as briefly as possible the FACTS supporting Ground IV. State the facts clearly in your own words without citing cases or legal arguments).

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3. Exhaustion of state court remedies:

- a. Did you present the issue raised in Ground IV to the state supreme court? ☐ Yes ☐ No
- b. If you did present the issue to the state supreme court, was the issue presented:
- ☐ In a direct appeal
- ☐ In your habeas corpus relief proceeding
- ☐ Other: _____ (e.g., special action)
- c. If you did not present the issue to the state supreme court, explain why you did not:

WHEREFORE, Petitioner prays that the court will grant Petitioner the relief to which he may be entitled in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on _____
DATE

SIGNATURE OF PETITIONER

(Name and title of paralegal, legal assistant,
or other person who helped prepare this petition)

(Signature of attorney, if any)

(Attorney's address & telephone number)

ADDITIONAL PAGES

All questions must be answered concisely in the proper space on the form. If needed, you may attach additional pages. The form, however, must be completely filled in to the extent applicable.

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
DIVISION**

Plaintiff/Petitioner,

vs.

Defendant/Respondent.

Case No. _____

(To be supplied by the Clerk)

**MOTION TO PROCEED
WITHOUT PREPAYMENT OF FEES
AND DECLARATION**

I, _____, declare that I am the plaintiff/petitioner in the above-entitled case; that in support of my request to proceed without being required to prepay fees or costs under 28 U.S.C. § 1915 I declare that because of my poverty I am unable to pay the costs of said proceeding and that I believe I am entitled to the relief sought in the complaint/petition.

In support of this motion, I answer the following questions under penalty of perjury:

1. Are you currently employed? ☐ Yes ☐ No
 - a. If the answer is “yes,” state the amount of your salary or wages per month, and give the name and address of your employer: _____

 - b. If the answer is “no,” state the date of last employment and the amount of the salary and wages per month which you received: _____

2. Have you received within the past twelve months any money from any of the following sources?
 - a. Business, profession or form of self-employment? ☐ Yes ☐ No
 - b. Rent payments, interest or dividends? ☐ Yes ☐ No
 - c. Pensions, annuities or life insurance payments? ☐ Yes ☐ No
 - d. Disability or workers compensation payments? ☐ Yes ☐ No
 - e. Gifts or inheritances? ☐ Yes ☐ No
 - f. Any other sources? ☐ Yes ☐ No

If the answer to any of the above is “yes,” describe each source of money and state the amount received from each during the past twelve months: _____

3. Do you have any cash or have money in a checking or savings account (include any funds in prison accounts)? ☐ Yes ☐ No

If the answer is "yes," state the total dollar amount: _____

4. Do you own any real estate, stocks, bonds, securities, other financial instruments, automobiles, or any other thing of value (excluding ordinary household furnishings and clothing)? ☐ Yes ☐ No

If the answer is "yes," describe the property and state its approximate value: _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support: _____

I declare under penalty of perjury that the above information is true and correct.

DATE

SIGNATURE OF APPLICANT

NOTICE TO PRISONERS: A Prisoner seeking to proceed in forma pauperis shall also submit a Prisoner Trust Account Report certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified report for each account.

PRISONER TRUST ACCOUNT REPORT

(To be Completed by the Institution of Incarceration)

PRISONER'S FULL NAME: _____

PRISONER'S IDENTIFICATION NUMBER: _____

Under the Prison Litigation Reform Act, a prisoner filing a civil case or appeal in the United States courts under 28 U.S.C. § 1915, must obtain from the trust officer of each institution in which the prisoner was confined during the preceding six months, a certified copy of the prisoner's trust account statement for the six months prior to filing the case.

Please complete this form, attach supporting ledger sheets if any, and return these documents to the prisoner for mailing to the court.

CERTIFICATE OF AUTHORIZED OFFICER

I certify that I have reviewed the financial records of the above-named prisoner and the following information is correct:

CURRENT BALANCE OF PRISON ACCOUNT: _____

AVERAGE MONTHLY DEPOSITS (past six months): _____

AVERAGE MONTHLY BALANCE (past six months): _____

(Any frozen funds must not be included in the calculations.)

I certify that the above information accurately states the deposits and balances in the applicant's trust account for the period shown and that the attached ledger sheets are true copies of account records maintained in the ordinary course of business.

DATE

Authorized Officer of Institution (signature)

PRISONER TRUST ACCOUNT REPORT

**UNITED STATES CODE SECTIONS
UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA**

TITLE 28 UNITED STATES CODE

§ 2244. FINALITY OF DETERMINATION

- (d)
 - (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
 - (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

§ 2254. STATE CUSTODY; REMEDIES IN FEDERAL COURTS

- (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
- (b)
 - (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–
 - (A) the applicant has exhausted the remedies available in the courts of the State; or
 - (B)
 - (i) there is an absence of available State corrective process; or
 - (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
 - (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
 - (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
- (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

**UNITED STATES CODE SECTIONS
UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA**

- (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
 - (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.
- (e)
 - (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
 - (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
 - (A) the claim relies on –
 - (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
 - (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
 - (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
- (f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.
- (g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.
- (h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

**UNITED STATES CODE SECTIONS
UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA**

- (i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 1. Scope

- (a) **Cases Involving a Petition under 28 U.S.C. § 2254.** These rules govern a petition for a writ of habeas corpus filed in a United States district court under 28 U.S.C. § 2254 by:
 - (1) a person in custody under a state-court judgment who seeks a determination that the custody violates the Constitution, laws, or treaties of the United States; and
 - (2) a person in custody under a state-court or federal-court judgment who seeks a determination that future custody under a state-court judgment would violate the Constitution, laws, or treaties of the United States.
- (b) **Other Cases.** The district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a).

Rule 2. The Petition

- (a) **Current Custody; Naming the Respondent.** If the petitioner is currently in custody under a state-court judgment, the petition must name as respondent the state officer who has custody.
- (b) **Future Custody; Naming the Respondents and Specifying the Judgment.** If the petitioner is not yet in custody – but may be subject to future custody – under the state-court judgment being contested, the petition must name as respondents both the officer who has current custody and the attorney general of the state where the judgment was entered. The petition must ask for relief from the state-court judgment being contested.
- (c) **Form.** The petition must:
 - (1) specify all the grounds for relief available to the petitioner;
 - (2) state the facts supporting each ground;
 - (3) state the relief requested;
 - (4) be printed, typewritten, or legibly handwritten; and,
 - (5) be signed under penalty of perjury by the petitioner or by a person authorized to sign it for the petitioner under 28 U.S.C. § 2242.
- (d) **Standard Form.** The petition must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule. The clerk must make forms available to petitioners without charge.
- (e) **Separate Petitions for Judgments of Separate Courts.** A petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court.

Rule 3. Filing the Petition; Inmate Filing

- (a) **Where to File; Copies; Filing Fee.** An original of the petition must be filed with the clerk and must be accompanied by:
 - (1) the applicable filing fee, or

**UNITED STATES CODE SECTIONS
UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA**

- (2) a motion for leave to proceed in forma pauperis, the affidavit required by 28 U.S.C. § 1915, and a certificate from the warden or other appropriate officer of the place of confinement showing the amount of money or securities that the petitioner has in any account in the institution.
- (b) **Filing.** The clerk must file the petition and enter it on the docket.
- (c) **Time to File.** The time for filing a petition is governed by 28 U.S.C. § 2244(d).
- (d) **Inmate Filing.** A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day of filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

Rule 4. Preliminary Review; Serving the Petition and Order

The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

Rule 5. The Answer and the Reply

- (a) **When Required.** The respondent is not required to answer the petition unless a judge so orders.
- (b) **Contents: Addressing the Allegations; Stating a Bar.** The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.
- (c) **Contents: Transcripts.** The answer must also indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded but not transcribed. The respondent must attach to the answer parts of the transcript that the respondent considers relevant. The judge may order that the respondent furnish other parts of existing transcripts or that parts of untranscribed recordings be transcribed and furnished. If a transcript cannot be obtained, the respondent may submit a narrative summary of the evidence.
- (d) **Contents: Briefs on Appeal and Opinions.** The respondent must also file with the answer a copy of:
 - (1) any brief that the petitioner submitted in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding;
 - (2) any brief that the prosecution submitted in an appellate court relating to the conviction or sentence; and
 - (3) the opinions and dispositive orders of the appellate court relating to the conviction or the sentence.

UNITED STATES CODE SECTIONS
UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

- (e) **Reply.** The petitioner may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

Rule 6. Discovery

- (a) **Leave of Court Required.** A judge may, for good cause shown, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery. If necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A.
- (b) **Requesting Discovery.** A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.
- (c) **Deposition Expenses.** If the respondent is granted leave to take a deposition, the judge may require the respondent to pay the travel expenses, subsistence expenses, and fees of the petitioner's attorney to attend the deposition.

Rule 7. Expanding the Record

- (a) **In General.** If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.
- (b) **Types of Materials.** The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.
- (c) **Review by the Opposing Party.** The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

Rule 8. Evidentiary Hearing

- (a) **Determining Whether to Hold a Hearing.** If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.
- (b) **Reference to a Magistrate Judge.** A judge may, under 28 U.S.C. § 636(b), refer the petition to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within 14 days after being served, a party may file objections as provided by local court rule. The judge must determine *de novo* any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.
- (c) **Appointing Counsel; Time of Hearing.** If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding.

**UNITED STATES CODE SECTIONS
UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA**

Rule 9. Second or Successive Petitions

Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244(b)(3) and (4).

Rule 10. Powers of a Magistrate Judge

A magistrate judge may perform the duties of a district judge under these rules, as authorized under 28 U.S.C. § 636.

Rule 11. Certificate of Appealability; Time to Appeal

- (a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.
- (b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Rule 12. Applicability of the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.