

/* These rules mirror those for state prisoners. */

RULES GOVERNING SECTION 2255 PROCEEDINGS

Rule 1. Scope of Rules

These rules govern the procedure in the district court on a motion under 28 USC s. 2255:

- (1) by a person in custody pursuant to a judgment of that court for a determination that the judgment was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack; and
- (2) by a person in custody pursuant to a judgment of a state or other federal court and subject to future custody under a judgment of the district court for a determination that such future custody will be in violation of the Constitution or laws of the United States, or that the district court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

Rule 2. Motion

- (a) Nature of Application for Relief. If the person is presently in custody pursuant to the federal judgment in question, or if not presently in custody may be subject to such custody in the future pursuant to such judgment, the application for relief shall be in the form of a motion to vacate, set aside, or correct the sentence.
- (b) Form of Motion. The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.
- (c) Motion to be Directed to One Judgment Only. A motion shall be limited to the assertion of a claim for relief against one judgment only of the district court. If a movant desires to attack the validity of other judgments of that or any other district court under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate motions.
- (d) Return of Insufficient Motion. If a motion received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the movant, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion.

Rule 3. Filing Motion

(a) Place of Filing; Copies. A motion under these rules shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof.

(b) Filing and Service. Upon receipt of the motion and having ascertained that it appears on its fact to comply with rules 2 and 3, the clerk of the district court shall file the motion and enter it on the docket in his office in the criminal action in which was entered the judgment to which it is directed. He shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the United States Attorney of the district in which the judgment under attack was entered. The filing of the motion shall not require said United States Attorney to answer the motion or otherwise move with respect to it unless so ordered by the court.

Rule 4. Preliminary Consideration by Judge

(a) Reference to Judge; Dismissal or Order to Answer. The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.

(b) Initial Consideration by Judge. The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the fact of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

Rule 5. Answer; Contents

(a) Contents of Answer. The answer shall respond to the allegations of the motion. In addition it shall state whether the movant has used any other available federal remedies including any prior post-conviction motions under these rules or those existing previous to the adoption of the present rules. The answer shall also state whether an evidentiary hearing was accorded the movant in a federal court.

(b) Supplementing the Answer. The court shall examine its files and records to determine whether it has available copies of transcripts and briefs whose existence the answer has indicated. If any of these items should be absent, the government shall be ordered to supplement its answer by filing the needed records. The court shall allow the government an appropriate period of time in which to do so, without unduly delaying the consideration of the motion.

Rule 6. Discovery

(a) Leave of Court Required. A party may invoke the processes of discovery available under

the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a movant who qualifies for appointment of counsel under 18 USC s. 3006A(g).

(b) Requests for Discovery. Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(c) Expenses. If the government is granted leave to take the deposition of the movant or any other person, the judge may as a condition of taking it direct that the government pay the expenses of travel and subsistence and fees of counsel for the movant to attend the taking of the deposition.

Rule 7. Expansion of Record

(a) Direction for Expansion. If the motion is not dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.

(b) Materials to be Added. The expanded record may include, without limitation, letters predating the filing of the motion in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(c) Submission to Opposing Party. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(d) Authentication. The court may require the authentication of any material under subdivision (b) or (c).

Rule 8. Evidentiary Hearing

(a) Determination by Court. If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

(b) Function of the Magistrate.

(1) When designated to do so in accordance with 28 USC s. 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the motion, and submit to a judge of the court

proposed findings and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(c) Appointment of Counsel; Time for Hearing. If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 USC s. 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. s. 3006A at any stage of the proceeding if the interest of justice so requires.

Rule 9. Delayed or Successive Motions

(a) Delayed Motions. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(b) Successive Motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

Rule 10. Powers of Magistrates

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. s. 636.

Rule 11. Time for Appeal

The time for appeal from an order entered on a motion for relief made pursuant to these rules is as provided in Rule 4 (a) of the Federal Rules of Appellate Procedure. Nothing in these rules shall be construed as extending the time to appeal from the original judgment of conviction in the district court.

Rule 12. Federal Rules of Criminal and Civil Procedure; Extent of Applicability

If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.

APPENDIX OF FORMS
MODEL FORM FOR MOTIONS UNDER
28 USC s. 2255

Name _____
Prison Number _____
Place of Confinement _____
United States District Court _____ District of _____
Case No. _____
(to be supplied by Clerk of U.S. District Court)

United States,

v.

(full name of movant)

(If movant has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion in the federal court which entered the judgment).

MOTION TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

(1) This motion must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.

(4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed in forma pauperis, in which event you must execute the declaration on the last page, setting forth information establishing your inability to pay the costs. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of

money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each such judgment.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.

(7) When the motion is fully complete, the original and two copies must be mailed to the Clerk of the United States District Court whose address is _____

(8) Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION

1. Name and location of court which entered the judgment of conviction under attack _____

2. Date of judgment of conviction _____

3. Length of sentence _____

4. Nature of offense involved (all counts) _____

5. What was your plea? (Check one)

(a) Not guilty _____

(b) Guilty _____

(c) Nolo contendere _____

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

6. Kind of trial: (Check one)

(a) Jury _____

(b) Judge only _____

7. Did you testify at the trial?

Yes ____ No ____

8. Did you appeal from the judgment of conviction?

Yes ____ No ____

9. If you did appeal, answer the following:

(a) Name of court _____

(b) Result _____

(c) Date of result _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

Yes ____ No ____

11. If you answer to 10 was "yes," give the following information:

(a) (1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ____

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ____

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ____

(d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ____ No ____

(2) Second petition, etc. Yes ____ No ____

(3) Third petition, etc. Yes ____ No ____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

Caution: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion

all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one:_____

Supporting FACTS (tell your story briefly without citing cases or law):_____

B. Ground two:_____

Supporting FACTS (tell your story briefly without citing cases or law):_____

C. Ground three:_____

Supporting FACTS (tell your story briefly without citing cases or law):_____

D. Ground four:_____

Supporting FACTS (tell your story briefly without citing cases or law):_____

13. If any of the grounds listed in 12A, B, C, and D were not previously, state briefly what grounds were not so presented, and give your reasons for not presenting them:____

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes ____ No ____

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing_____

(b) At arraignment and plea_____

(c) At trial_____

(d) At sentencing_____

(e) On appeal_____

(f) In any post-conviction proceeding_____

(g) On appeal from any adverse ruling in a post-conviction proceeding_____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time:

Yes ____ No ____

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ____ No ____

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) And give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ____ No ____

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____ (date).

Signature of Movant

IN FORMA PAUPERIS DECLARATION

(Insert appropriate court)

United States
OF REQUEST

DECLARATION IN SUPPORT

v.

(Movant)

TO PROCEED
IN FORMA PAUPERIS

I, _____, declare that I am the movant in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently 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. Gifts or inheritances?
Yes ____ No ____

e. 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 own any cash, or do you have money in a checking or savings account:

Yes ____ No ____ (Include any funds in prison accounts)

If the answer is "yes," state the total value of the items owned. _____

4. Do you own real estate, stocks, bonds, notes, automobiles, or other valuable property (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 (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____ (date).

Signature of Movant

CERTIFICATE

I hereby certify that the movant herein has the sum of \$_____ on account to his credit at the _____ institution where he is confined.

I further certify that movant likewise has the following securities to his credit according to the records of said _____ institution: _____

Authorized Officer of Institution

MODEL FORM FOR USE IN 28 U.S.C. s. 2255
CASES INVOLVING A RULE 9 ISSUE

Form No. 9

United States District Court
District of _____
Case No. _____
United States
v.

(Name of Movant)

Movant's Response as to Why His Motion Should
Not be Barred Under Rule 9

Explanation and Instructions -- Read Carefully

(1) Rule 9. Delayed or Successive Motions.

(a) Delayed motions. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(b) Successive Motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

(II) Your motion to vacate, set aside, or correct sentence has been found to be subject to dismissal under rule 9() for the following reason(s): _____

(III) This form has been sent so that you may explain why your motion contains the defect(s) noted In (II) above. It is required that you fill out this form and send it back to the court within ____ days. Failure to do so will result in the automatic dismissal of your motion.

(IV) When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is _____

(V) This response must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(VI) Additional pages are not permitted except with respect to the facts which you rely upon in item 4 or 5 in the response. Any citation of authorities should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.

(VII) Respond to 4 or 5, not to both, unless (II) above indicates that you must answer both sections.

RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your motion is attacking was entered?

Yes ____ No ____

2. If you checked "yes" above, specify as precisely as you can the period(s) of time during which you received such assistance, up to and including the present. _____

3. Describe the nature of the assistance, including the names of those who rendered it to you. _____

4. If your motion is in jeopardy because of delay prejudicial to the government under rule 9(a), explain why you feel the delay has not been prejudicial and/or why the delay is excusable under the terms of 9(a). This should be done by relying upon FACTS, not your opinions or conclusions. _____

5. If your motion is in jeopardy under rule 9(b) because it asserts the same grounds as a previous motion, explain why you feel it deserves a reconsideration. If its fault under rule 9(b) is that it asserts new grounds which should have been included in a prior motion, explain why you are raising these grounds now rather than previously. Your explanation should rely on FACTS, not your opinions or conclusions. _____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____ (date).

Signature of Movant