Pro Se Prisoner Handbook:

A Simple Guide To Filing An Action While Incarcerated

United States District Court
Western District of Kentucky

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PURPOSE OF THIS HANDBOOK

The purpose of this handbook is to provide general information about the federal court system and to assist incarcerated individuals wishing to file a complaint in the United States District Court for the Western District of Kentucky under 42 U.S.C. § 1983/*Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), a habeas corpus action under 28 U.S.C. §§ 2254 or 2241, or a motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255.

You should not expect this handbook to answer all of your questions, and it does not cover all types of actions that could be filed. You should consider it as a starting point only.

This handbook is not legal advice and should not be cited as legal authority.

WHAT DOES *PRO SE* MEAN?

If you are representing yourself without the benefit of an attorney, you are known as a ***"Pro Se* Litigant**." "*Pro Se*" is a Latin term meaning "for oneself." As a *pro se* litigant, you enjoy every right entitled to you under the law. You will not be penalized because you are not represented by an attorney. At the same time, *pro se* litigants are expected to follow the rules that govern the practice of law in the federal courts. *Pro se* litigants should be familiar with the Federal Rules of Civil Procedure and the Local Rules of this Court. Many of those rules are summarized in this handbook. Additionally, your jail or prison may keep a copy of the Court's Local Rules and/or the Federal Rules of Civil Procedure for inmates to use. If you are viewing this document on the internet, the hyperlinks can also be used to view the pertinent rules.

As a *pro se* litigant you may **not** authorize another person who is not an attorney to appear for you. While you may receive help from fellow inmates or other non-attorneys in drafting your pleadings and other papers, you must personally sign your complaint and all additional papers filed with the Court. If several prisoners commence an action together, each prisoner must personally sign the complaint.

PRO SE FORMS

The Clerk's Office has the following forms available for use by *pro se* litigants: 28 U.S.C. § 2254 Packet; 28 U.S.C. § 2255 Packet; 42 U.S.C. § 1983 Prisoner Packet; General Complaint Form; Title VII Form; Prisoner Application to Proceed Without Prepayment of Fees; Non-prisoner Application to Proceed Without Prepayment of Fees; Motion Form & Instructions; Notice of Appeal Form; and Copy Request Form.

You can obtain free copies of any of the Court's *pro se* forms by contacting the Clerk's Office and requesting that the forms be mailed to you. The forms are also on the Court's website. Click here to view the Court's pro se forms.

ORGANIZATION OF FEDERAL COURTS

The federal court system is made up of courts on three different levels: the district courts, the circuit courts, and the United States Supreme Court.

The first level is comprised of the district courts. District court is where your action will begin and where it will be decided. Congress has divided the country into ninety-four districts. Kentucky has two districts, the Eastern District of Kentucky and the Western District of Kentucky. **This handbook covers actions in the Western District of Kentucky**. The rules and procedures of other federal district courts may be different.

The federal appeals courts, the second level, are referred to as circuit courts. There are thirteen United States Courts of Appeals. The United States Court of Appeals for the Sixth Circuit hears appeals from the federal district courts in Kentucky, Michigan, Ohio, and Tennessee. Generally, every litigant has a right to appeal a final district court decision to circuit court. The Sixth Circuit Court of Appeals can be contacted as follows:

Office of the Clerk
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S.Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202-3988
Phone: (513) 564-7000

The United States Supreme Court, the third and highest level, hears select cases from the circuit courts and from the highest state courts. However, since the Supreme Court has the authority to select which cases it chooses to hear, it hears only a small percentage of the cases it is asked to review. The United States Supreme Court can be contacted as follows:

Supreme Court of the United States
One First Street N.E.
Washington, DC 20543

THE WESTERN DISTRICT OF KENTUCKY

The Western District of Kentucky is divided into four jury divisions: Bowling Green, Louisville, Owensboro, and Paducah. Each jury division covers certain counties. The Clerk of Court has an office in each of the four divisions. A civil action may be filed in any division. Civil actions are assigned to particular jury divisions by the Clerk of Court. In the event of improper assignment, the case will be transferred to the correct jury division. The validity of the filing is not affected by the Clerk's improper assignment. *See* Local Rule 3.2. Pleadings, motions and other papers may be filed in any of the four divisional offices. They need not be filed in the same division where the case is pending. Below is a listing of the counties covered by each division and the address and phone number of the Clerk's Office in each division.

Bowling Green

The following counties are in the Bowling Green Division: Adair, Allen, Barren, Butler, Casey, Clinton, Cumberland, Edmonson, Green, Hart, Logan, Metcalf, Monroe, Russell, Simpson, Taylor, Todd, and Warren.

Clerk's Office
241 East Main Street, Suite 120
Bowling Green, KY 42101-2175
Phone: (270) 393-2500

Louisville

The following counties are in the Louisville Division: Breckinridge, Bullitt, Hardin, Jefferson, Larue, Marion, Meade, Nelson, Oldham, Spencer, and Washington.

Clerk's Office
601 W. Broadway, Rm 106
Gene Snyder United States Courthouse
Louisville, KY 40202
Phone: (502) 625-3500

Owensboro

The following counties are in the Owensboro Division: Daviess, Grayson, Hancock, Henderson, Hopkins, McLean, Muhlenberg, Ohio, Union, and Webster.

Clerk's Office
423 Frederica Street, Suite 126
Owensboro, KY 42301-3013
Phone: (270) 689-4400

Paducah

The following counties are in the Paducah Division: Ballard, Caldwell, Calloway, Carlisle, Christian, Crittenden, Fulton, Graves, Hickman, Livingston, Lyon, McCracken, Marshall, and Trigg.

Clerk's Office
501 Broadway, Suite 127
Paducah, KY 42001-6801
Phone: (270) 415-6400

SOME THINGS YOU SHOULD KEEP IN MIND FOR ALL ACTIONS

✓ **You must pursue your case diligently.**

It is very important to be diligent in pursuing your case. All parties must make their best efforts to comply with the Court's deadlines and orders. If you cannot comply with a deadline, it is your responsibility to file a motion for additional time. You should not assume that the Court will simply "know" you need more time. If you fail to prosecute your case diligently, it could be dismissed.

✓ **The Court must be able to contact you in writing at all times.**

Local Rule 5.2 provides that "failure to notify the Clerk of an address change may result in the dismissal of the litigant's case or other appropriate sanctions." Always keep the Court

aware of your current address. If you are released from incarceration or transferred to another facility, it is **VERY IMPORTANT for you to provide the Court with your new address in writing.** Do **not** rely on the prison to do it for you or expect the Court to locate you. When you file a notice of a change of address with the Court, write all your open case numbers on it. It is always a good idea to notify the Court if you think you are going to be in transit for a period of time. As soon as you reach a more permanent location, you should contact the Clerk's Office in writing to check on the status of your action and update the Clerk's Office with your new address.

✓ **If you want the Court to do anything in your action, you must file a motion.**

Federal Rule of Civil Procedure 7 states that "a request for a court order must be made by motion. The motion must: (A) be in writing unless made during a hearing or trial; (B) state with particularity the grounds for seeking the order; and (C) state the relief sought."

Unless you are physically in front of the Judge at a hearing or trial, the only way the Court can take action on your case is for you to file a formal, written motion. It will not do you any good to write a letter to or call the Clerk's Office or the Judge. The Clerk's Office has an approved motion form for use by *pro se* litigants. It contains an instruction page that explains how to prepare, file, and serve your motion. You are strongly encouraged to use the motion form if you need to file a motion in your action. Your institution may have a copy of this form or you may request one from the Clerk's Office. Click here to view a copy of the Court's motion form and instructions.

✓ **You should keep a copy of everything you file in your action.**

You should keep a copy of everything you file for your future use. If you cannot afford photocopies, you can make a handwritten copy for yourself. The Clerk's Office does not provide free copies of documents. Copies of electronically stored records are ten cents per page. Copies of paper documents are fifty cents per page with the exception of Opinions which are twenty-five cents per page. A copy request form is available from the Clerk's Office. All copies must be paid for in advance before the Clerk's Office will complete your copy request. Click here to view the Court's copy request form.

✓ **You should not include sensitive information in any court filing.**

You should not include sensitive information in any document filed with the Court unless such inclusion is necessary and relevant to the case. Any personal information you include will be available over the internet via WebPACER.[1] If sensitive information must be included, the following personal identifiers must be partially redacted from the document whether it is filed on paper or electronically:

A. **SOCIAL SECURITY NUMBERS.** If an individual's social security number must be included in a document, only the last four digits of the number should be used.

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[1]WebPACER is a website that allows public access to filings in the Court's electronic case filing system (called Case Management/Electronic Case Files, or CM/ECF).

B. **NAMES OF MINOR CHILDREN.** If the involvement of a minor child must be mentioned, only the initials of that child should be used.

C. **DATES OF BIRTH.** If an individual's date of birth must be included in a document, only the year should be used.

D. **FINANCIAL ACCOUNT NUMBERS.** If financial account numbers are relevant, only the last four digits of these numbers should be used.

It is the responsibility of the parties to be sure that all pleadings and other papers comply with the rules of this Court requiring redaction of personal identifiers. If you include sensitive information about yourself in a filing, the Clerk's Office will not redact it for you. The Court's Amended Notice of Electronic Availability of Civil Case File Information is attached.

✓ **What the Clerk's Office Can and Cannot Do For You.**

The Clerk's Office is here to provide procedural assistance and help you in filing your documents. Remember though that the Clerk's Office staff are not your attorneys and **cannot** give you legal advice.

The Clerk's Office maintains an automated record, or docket, for every case that is filed. The docket is a chronological summary of all significant events in the case. The docket can be reviewed on the public access terminals located in the Clerk's Office; or you can request the Clerk's Office to mail you a copy of your docket sheet. Copies of docket sheets are ten cents per page.

The Clerk's Office can:

- send you copies of forms
- check on the status of your action and send you a docket sheet
- make copies of requested court documents upon receipt of copying fees
- confirm that your filings have been docketed
- answer procedural questions like how much time you have to file a response

The Clerk's Office cannot:

- tell you whether this is the proper court in which to file your complaint
- tell you which form to use or who you should name as defendants
- recommend how you should proceed in your case
- look up case law for you
- interpret statutes, case law, or rulings for you
- provide you with the reasons for a judge's decision
- tell you when a judge will respond to a motion or issue a ruling in a case

PRISONER SUITS UNDER 42 U.S.C. § 1983 AND/OR *BIVENS*

If you feel that a federal or state actor has violated your federal constitutional or other federal rights and you want to sue that individual, you may want to file an action under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

If your complaint concerns the actions of state actors, you should file it under 42 U.S.C. § 1983. If your complaint concerns the actions of federal actors, you should file it under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

Use of the Court's Approved Form

The Court has an approved form for prisoners wishing to file complaints under 42 U.S.C. § 1983/*Bivens*. *Pro se* litigants wishing to file such actions are **strongly** encouraged to use this form. If you submit a 42 U.S.C. § 1983/*Bivens* complaint that is not on a court-supplied form, the Clerk will accept the paper for filing and forward it to an appropriate judicial officer for review. You may be directed to re-submit the complaint on the form. Local Rule 5.2(b) provides that a *pro se* litigant's "failure to file his or her complaint on a court-supplied form after having been instructed to do so by the Court may be grounds for dismissal."

Exhaustion

Under 42 U.S.C. § 1997e(a) prisoners are required to exhaust all available administrative remedies before filing suit. This statute states: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." You do not have to plead exhaustion in your complaint. However, you should be aware that if you do not exhaust all available remedies prior to filing your complaint and the defendants raise exhaustion as an affirmative defense, your complaint may be dismissed.

Filling out the Form

The Court's approved 42 U.S.C. § 1983/*Bivens* form contains an instruction sheet that explains how to fill out the form. You should follow those instructions. Your institution may have a copy of this form or you may request one from the Clerk's Office. Click here to view the form.

Summons forms

You must prepare a summons for each defendant you have sued. However, do not serve the summonses on the defendants. Mail them to the Court along with your complaint. As explained below, if the Court allows any of your claims to proceed, it will direct service of the summonses at a later date. Click here to view a copy of the summons form.

Filing Fees

The filing fee for a 42 U.S.C. § 1983/*Bivens* action is $350.00, plus a $50.00 administrative fee. At the time you file your complaint, you must either pay the fees in full or file a fully completed prisoner application to proceed without prepayment of fees along with a certified copy of your prison trust account statement for the six-month period immediately preceding the filing of the complaint obtained from the appropriate official at your prison. 28 U.S.C. § 1915(a)(2).

If you are filing a case along with one or more other prisoners, you each must pay your own equal share of the filing fee. One prisoner cannot pay for the others. Any prisoner that will

be seeking permission to proceed without prepayment of fees must file his own application and prison trust account statement.

You cannot bring a new civil action *in forma pauperis* if you have, on three or more occasions, while incarcerated, brought a civil action or appeal in federal court that was dismissed because it was (1) frivolous, or (2) malicious, or (3) failed to state a claim upon which relief may be granted. 28 U.S.C. § 1915(g). The only exception to this is if you are in "imminent danger of serious physical harm." This is known as the "Three Strikes Rule." It applies to 42 U.S.C. § 1983/*Bivens* actions. However, if you pay the full filing and administrative fees up front and are not proceeding *in forma pauperis*, you may file a new civil action or appeal even if you have three or more of these dismissals.

Upon filing a 42 U.S.C. § 1983/*Bivens* action, you become responsible for the entire fee regardless of the outcome of the action. Even if you later voluntarily dismiss your case, you will not be entitled to a refund or be able to stop collections out of your prison trust account.

What happens after my 42 U.S.C. § 1983 and/or *Bivens* complaint has been filed?

1. You will receive a case number.

Your case will be assigned a civil action number and be assigned to a particular Judge. After you receive your case number, you should write it on all documents you send to the Court that relate to your action. Do **not** presume that the Clerk of Court will know what action you want your papers filed in. It is your responsibility to write your case number on your filings.

2. The Clerk of Court will review your complaint for any deficiencies.

The Clerk of Court will review your complaint to make sure you have properly submitted it to the Court. For example, the Clerk of Court will make sure you filed an original, signed complaint, that you paid the filing fee and administrative fee or filed a prisoner application to proceed without prepayment of fees, that your complaint has been filed on a court-approved form, and that you included summonses for all the defendants named in your complaint. If you do not properly submit your complaint, you may receive a "deficiency notice" from the Clerk's Office. The notice will tell you if there is something wrong with your filing and provide you with a period of time to correct the deficiency. Failure to respond to a deficiency notice from the Clerk's Office could lead to dismissal of your complaint.

3. If you are seeking permission to proceed without prepayment of fees, the Court will rule on your application.

If the Court grants your application, it does not mean that you do not have to pay the filing fee. It means that instead of paying the entire $350.00 fee at once, you will be permitted to pay it in installments as described in 28 U.S.C. § 1915. When funds exist, the Court will assess an initial partial filing fee equal to twenty percent of the greater of (1) the average monthly deposits to your prison trust account; or (2) the average monthly balance in your prison trust account for the six-month period immediately preceding the filing of the complaint. After payment of the initial partial filing fee, you will be required to make monthly payments of twenty percent of the preceding month's income credited to your prison trust account, each time the

amount in your account exceeds ten dollars until the entire filing fee has been paid. If the Court grants your application, you will not have to pay the $50.00 administrative fee.

The Court will send an order to your institution directing it to collect the fee as outlined above. You will receive a copy of this order. If your institution fails to comply with the Court's order for some reason, it will not affect your action.

If the Court denies your application, it will provide you with an additional period of time to pay the fees.

4. The Judge assigned to your case will screen your complaint under 28 U.S.C. § 1915A.

The Court is required by statute to screen your complaint before service under 28 U.S.C. § 1915A. It provides:

> (a) Screening. The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.
>
> (b) Grounds for dismissal. On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--
>
> (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
>
> (2) seeks monetary relief from a defendant who is immune from such relief.

Your complaint will NOT be served on the defendants until it has been screened by the Court.

Many *pro se* prisoners want to know how long it will take for the Court to screen their complaints. There is no set amount of time. The Court tries to review complaints in a timely manner. However, you must remember that the judges have hundreds of cases assigned to them each year. Do not be alarmed if you do not hear from the Court immediately after filing your complaint. You can always write the Clerk's Office to check on the status of your case.

After the Court has screened your complaint, the Court will issue an order. The order will inform you if any of your claims were dismissed, and if so, why. The order will also inform you if any of your claims were allowed to proceed for further development.

If all of your claims are dismissed at the screening stage, then your complaint will not be served on defendants.

If any of your claims are allowed to proceed past initial screening for further development, you will receive a scheduling order from the Court. The scheduling order will set out the claims that are allowed to proceed, specify how service will be conducted, and set a

schedule for the action. **It is VERY important for you to follow all of the directions and meet all of the deadlines in the scheduling order.** If you are unable to do so, you should notify the Court in writing before the deadline passes and ask for additional time to comply. If you fail to comply with the scheduling order, your action could be dismissed.

5. Service of your complaint

If the Court allows any of your claims to proceed and you are proceeding *in forma pauperis,* the Court will direct the United States Marshals Service to serve your complaint and the summonses you prepared on the defendants against whom the action proceeds. Fed. R. Civ. P. 4(c)(3). If the Marshals Service is unable to complete service, it will notify the Court that the summons for that defendant was returned unexecuted. A notation will be placed in the docket sheet. Remember that it is your responsibility to make sure that all the defendants named in your complaint have been served with the complaint. The most common reason service is not perfected is that the plaintiff has not provided the correct address for the defendant named in the complaint. You may write the Clerk's Office at any time to check on the status of service.

If you paid the filing fee, the Court will notify you if you are required to serve your complaint and summons yourself. If you do not wish to do so, you may request the Court to direct the United States Marshals Service to serve your summonses and complaint. Fed. R. Civ. P. 4(c)(3).

6. After service of process, the defendant will have a period of time to respond to your complaint.

The defendant will either: file an answer, file a motion, or do nothing.

The answer is a formal response to the complaint by the defendant, including any denials of and defenses to the allegations in the plaintiff's complaint. Under Federal Rule of Civil Procedure 12(a)(1)(A), "a defendant must serve an answer: (i) within 21 days after being served with the summons and complaint; or (ii) if it has timely waived service under Rule 4(d), within 60 days after the request for waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States." The requirements for answers are set out in Federal Rule of Civil Procedure 8. Unless directed to do so by the Court, you should not respond to the answer.

A motion by a defendant at this stage would likely ask the Court to dismiss the complaint for one of the reasons set out in Federal Rule of Civil Procedure 12. If the defendant files a motion to dismiss, you will have 21 days from the date of service to respond. In the response, you may explain to the Judge why you believe the action should not be dismissed. The defendant will then be permitted to file a reply within 14 days of the date of service of the response. After the time for filing a reply passes, the motion will be submitted to the Judge for a decision.

If the defendant fails to timely answer or move to dismiss the complaint, you may seek entry of default judgment against the defendant by making a motion for a default.

7. After the complaint has been served, the parties may engage in discovery.

Discovery is the process of collecting the evidence necessary to support a claim or defense. During discovery, you may uncover relevant facts and identify documents and witnesses whose testimony can establish those facts. You may obtain evidence from the other parties to the litigation (plaintiffs and defendants), non-parties, and public records.

Federal Rule of Civil Procedure 26(b)(1) states that the parties may obtain discovery regarding any non-privileged matter that is relevant to the claim or defense of any party to an action. You may request any material that is reasonably likely to lead to the discovery of admissible evidence relevant to a claim or defense.

The scheduling order you receive from the Court will have a discovery deadline in it. This means that you will not be able to take discovery beyond this date. Either party can seek additional time. However, there is no guarantee that the Court will grant the request. If you need additional time, you must ask for it in a motion.

The discovery process is designed to go forward between the parties, with minimal involvement by the Court. Only if the parties have disputes or disagreements about the proper scope of discovery and cannot resolve the problems themselves, should the dispute be raised before the Court. Local Rule 37.1 provides that: "prior to filing a discovery motion, all counsel must make a good faith effort to resolve extrajudicially any dispute relating to discovery. The Court will not entertain discovery motions unless counsel have conferred -- or attempted to confer -- with other affected parties in an effort to resolve their dispute." The party filing the motion must include a certification detailing the efforts that the parties took to try and resolve their disagreement.

Unless requested to do so by the Court, discovery requests and responses should not be filed with the Court until relied on by a party. For example, it would **not** be proper to file your document requests to the defendant with the Court. They should simply be mailed to the defendant or his counsel if he is represented. However, it would be proper to file the defendant's answers to your interrogatories as an exhibit to your response to a summary judgment motion if you relied on the answers in your response.

The general methods of discovery--depositions, interrogatories, document requests, requests for admissions, subpoenas, and mental/physical examinations--are briefly described below.

Pro se actions brought by persons in custody of the United States, a state, or a state subdivision are exempt from the initial disclosure requirements of Federal Rule of Civil Procedure 26(a)(1).

Depositions. Depositions are question-and-answer sessions held before trial. In them, one party to a lawsuit asks another person questions about the issues raised in the lawsuit. The answers are given under oath subject to the penalty of perjury and are recorded in some way. Rules 27 through 31 of the Federal Rules of Civil Procedure explain the procedures for taking a

deposition. If the person who will answer the questions is not a party to the lawsuit, Rule 45 explains how they can be made to appear for questioning.

Interrogatories. Formal written questions, called interrogatories, may be used to discover information from parties in the action. You cannot send interrogatories to non-parties. The party answering the interrogatory answers in writing and must sign the answers under oath. If an interrogatory is objected to, the objecting party shall state the reasons for the objection and shall answer to the extent the interrogatory is not objectionable. The interrogatories shall be answered within thirty days after they are served. Parties are required to supplement their answers to interrogatories as additional information becomes available as provided by Federal Rule of Civil Procedure 26(e)(1). The rules and procedures governing interrogatories are contained in Federal Rule of Civil Procedure 33.

Requests for production of documents. Pursuant to Federal Rule of Civil Procedure 34, a written request to produce records, letters, contracts, or other materials; inspect or copy a document; or permit entry upon designated land or other property in the possession or control of the party upon whom the request is served, may be served on any party. You cannot make requests for production of documents on non-parties. The request shall specify a reasonable time, place, and manner of making the inspection or performing the related acts. The party upon whom the request is served shall serve a written response within thirty days. The response shall state whether the inspection or related activities will be permitted as requested. If the request is objected to, the reasons for the objection shall be stated.

Physical and mental examinations. Pursuant to Federal Rule of Civil Procedure 35, when the mental or physical condition of a party or of a person in the custody or under the legal control of a party is in controversy, the court in which the action is pending may order upon a showing of good cause, the party to submit to a physical or mental examination.

Requests for admission. Pursuant to Federal Rule of Civil Procedure 36, a party may serve upon any other party a written request to admit the truth of certain matters within the scope of Federal Rule of Civil Procedure 26(b)(1). You cannot serve requests for admission on non-parties. The matter is admitted unless, within thirty days after service of the request, the party to whom the request is directed serves upon the requesting party a written answer or objection signed by the party. Failure to answer constitutes an admission.

Subpoenas. Federal Rule of Civil Procedure 45 governs subpoenas. You may use a subpoena to request non-parties to appear and/or produce documents. A motion explaining who or what is being subpoenaed and why must should be filed before the subpoenas are needed. Expenses related to the subpoena, such as witness fees, mileage costs, and copying costs, are to be paid by the person requesting the subpoena.

8. The case may end before a trial either by way of a dispositive motion (motion to dismiss or summary judgment) or a settlement.

Dispositive motions are motions that dispose of the case without a complete trial. Two common types of dispositive motions are motions to dismiss and motions for summary

judgment. The scheduling order you receive from the Court will provide a deadline for filing dispositive motions.

Motion to Dismiss–Rule 12(b). A defendant may move to dismiss a complaint for a variety of reasons. Some common grounds for dismissal are lack of jurisdiction over the subject matter, failure to exhaust administrative remedies, and failure to state a claim upon which relief may be granted. Sometimes a defendant files a motion to dismiss before filing an answer. Motions to dismiss are governed by Federal Rule of Civil Procedure 12(b).

Summary Judgment- Rule 56. A trial is necessary only when there are disputed issues of material fact. At some point in the case, it may become apparent that the facts in the case are not in dispute, and one or more parties may file a motion for summary judgment. A motion for summary judgment can be filed at any time after the answer is filed. Federal Rule of Civil Procedure 56 governs motions for summary judgment. If the Court grants the motion in whole, the case will be over, and judgment will be entered in favor of the party who moved for summary judgment. If the Court grants the motion in part, the issues that are in dispute will be tried or scheduled for a settlement conference and those issues on which summary judgment was granted will not be tried. If the Court denies the motion, the case will be set for trial or scheduled for a settlement conference.

Settlement. Another way in which a case may end without a trial is when the parties reach what is called a settlement. A settlement is an agreement between the plaintiff and defendant to resolve the lawsuit. Generally, but not always, it involves a monetary payment to the plaintiff in exchange for the dismissal of the case. The Judge or Magistrate Judge may hold one or more settlement conferences. Parties can discuss settlement and settle the case at any time and do not need court intervention to settle a case. If a case is settled, a short order will generally be issued dismissing the case.

9. Trial

The last stage of a lawsuit in district court is a trial. If the Court does not dismiss the case or grant a motion for summary judgment, and if the parties do not agree to a settlement, then the case will go to trial. Very few cases actually make it this far. In fact, less than two percent of all federal civil cases filed each year are actually tried.

There are two types of trials: jury trials and bench trials. At a jury trial the court instructs the jury about the law. The jury will then apply the law to the facts that they have found to be true and determine who wins the lawsuit. A jury trial occurs when: 1) the lawsuit is a type of case that the law allows to be decided by a jury; and 2) at least one of the parties asked for a jury trial within the right time frame. The time frame is set forth in Rule 38. A party that does not make a jury trial demand on time forfeits that right. At a bench trial, there is no jury. The Judge will determine the law, the facts, and the winner of the lawsuit. A bench trial is held when:

1) none of the parties asked for a jury trial (or did not ask at the right time); or 2) the lawsuit is a type of case that the law does not allow a jury to decide; or 3) the parties have agreed that they do not want a jury trial.

The Judge sets the date that the trial will begin. When the Judge sets the trial date, he or she usually enters an order setting pretrial deadlines for filing or submitting various documents associated with the trial.

Once trial has begun, it usually takes place in the following order: jury selection, opening statements, plaintiff's evidence, defendant's evidence, closing arguments, and jury deliberations.

Jury selection. The purpose of jury selection is to pick a jury that can be fair to both sides. This is done in a process called *voir dire*, during which each potential juror is asked a series of questions by either the parties or the Judge. Potential jurors are eliminated by "strikes." There are two types of strikes–for cause and peremptory. If a juror can be shown to be unsuitable because he or she is not qualified or cannot be fair, then a strike for cause is in order. Each party receives a set number of strikes that can be used to strike jurors for any reason (other than discrimination). These are called peremptory strikes, and they do not have to supported by specific reasons.

Opening statements. After the jury is chosen, each party may present an opening statement. The opening statement is a speech made by each side. The purpose of the opening statement is for each party to describe the issues in the case and state what they expect to prove during the trial. An opening statement is neither evidence nor a legal argument. The purpose of the opening statement is to help the jury understand what to expect and what you consider important.

Presentation of evidence. All evidence that is presented by either party during trial must be admissible. The Federal Rules of Evidence are a very detailed set of rules for the admissibility of evidence. If one party tries to present evidence that is not allowed under the Federal Rules of Evidence or tries to ask improper questions of a witness, the opposing party may object. It is the opposing party's duty to object to evidence that it thinks should not be admitted. If the opposing party does not object, the Judge may allow the improper evidence to be presented. The plaintiff presents proof first, followed by the defendant. Questioning of witnesses is done by direct examination, cross-examination, redirect, and recross. In a jury trial, after the plaintiff has presented all of his or her evidence, the defendant has an opportunity to make a motion for judgment as a matter of law. A motion for judgment as a matter of law is a request to the Judge to decide the outcome of the case. A motion for judgment as a matter of law brought by the defendant after the close of the plaintiff's evidence argues that the plaintiff failed to provide enough evidence for the jury to find in the plaintiff's favor. It is governed by Federal Rule of Civil Procedure 50. Assuming that the Judge does not grant the defendant judgment as a matter of law, after the plaintiff has completed examining each of his/her witnesses, the defendant then presents all of the witnesses that support his/her defenses. In a jury trial, after all evidence has been presented, either party may make a motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure. A motion for judgment as a matter of law at the end of trial argues that there is so little evidence supporting the other side's case that no jury could reasonably decide the case in favor of that party. If the Court grants a motion for judgment as a matter of law, the case is over.

Closing arguments. If the Judge does not grant judgment as a matter of law, or if no party asks for it, then the Court will hear closing arguments. In closing arguments the parties take turns summing up their side to the jury. They argue to the jury why they think the evidence presented shows that they should prevail.

Verdict. In a jury trial the Judge will instruct the jury about the law and the jury's duty, and then the jury will take some time to think and consider the case before coming up with a decision. A federal jury must be unanimous, which means all the jurors must agree on the verdict. When the jury reaches its decision, the jurors will fill out a verdict form and let the Judge know that they have completed their deliberations. The Judge will then bring the jury into the courtroom, where the verdict will be read aloud. The Court then issues a written judgment announcing the verdict and stating the remedies, if any, that will be ordered. The judgment is the official decision of how the case has come out. When the judgment on a jury verdict is issued, the case is usually over unless one of the parties files a post-judgment motion or an appeal to the United States Court of Appeals for the Sixth Circuit.

If the trial is a bench trial, the Judge will end (adjourn) the trial after closing arguments. The Judge will then review the evidence and write findings of facts and conclusions of law, which is a document that explains what facts he or she found to be true and what the legal consequences of those facts are. In addition to that document, the Court will then issue a written judgment stating the remedies, if any, that will be ordered. The Court's findings of fact and conclusions of law and judgment usually are mailed to the parties. When the judgment is issued, the case is over, unless one of the parties takes makes a post-judgment motion or takes an appeal to the United States Court of Appeals for the Sixth Circuit.

10. Motions after a final judgment

There are some motions that can be filed after a final judgment has been entered in your case. Under Federal Rule of Civil Procedure 59 you can file a motion for a new trial or to alter or amend judgment. Under Federal Rule of Civil Procedure 60 you can file a motion for relief from judgment or order.

11. Appeal

A comprehensive discussion of the appellate process is beyond the scope of this handbook. However, a few points are discussed below.

Final Judgment

Any party to a formal court action has a right to file an appeal to the jurisdictional appellate court from an appealable order entered by the district court. Appeals from cases in the Western District of Kentucky are heard by the United States Court of Appeals for the Sixth Circuit.

In general, only final orders or judgments from the district court may be appealed. 28 U.S.C. § 1291. This kind of appeal is called an appeal as of right. In most cases, a final order or

judgment is entered when all issues in the case have been resolved in favor of either the plaintiff or the defendant. In order to appeal, a final order or judgment should be entered on the docket of your case. A final order or judgment is the document which announces the final decision with respect to your case (that is, whether you won or lost) and closes the case with the district court.

You have thirty days (or sixty days if the case involves a party who is the United States, a federal agency or federal employee) from the date that the final order or judgment was entered on the docket to file a Notice of Appeal. The Notice of Appeal is filed in the district court where the judgment you are appealing was entered. If you miss the deadline, you may file a motion for extension of time. There is no guarantee your motion will be granted so you should make every effort to meet the deadline.

A Notice of Appeal is a one-page document containing your name, a description of the final order or judgment (or part thereof) being appealed, and the name of the court to which the appeal is taken (the Sixth Circuit).

The fee for filing a Notice of Appeal is $505.00. If you cannot afford to pay the fee all at once, you may file a prisoner application to proceed without prepayment of the fee. Remember that the "Three Strikes Rule" applies to appeals as well.

Once you file a Notice of Appeal, the District Court no longer has jurisdiction over your case, and all questions regarding the case should be addressed to the Clerk of the Sixth Circuit.

Interlocutory appeals

In some limited circumstances, you may appeal a non-final decision while your case is ongoing. These types of appeals are called *interlocutory appeals*. The limited circumstances in which you may seek an interlocutory appeal are set forth in 28 U.S.C. § 1292. If you choose to file an interlocutory appeal, your Notice of Appeal is filed in the district court where the decision you are appealing was filed.

HABEAS ACTIONS UNDER 28 U.S.C. § 2254

If you are in jail or otherwise "in custody" as a result of a conviction in a state court, you may ask the federal district court to set aside your state court conviction if it violated the Constitution or laws of the United States. This challenge is brought as a petition for writ of habeas corpus under 28 U.S.C. § 2254. You should exhaust your claims in state court before filing a § 2254 petition. You should state all your claims in your petition. If you previously filed a petition under 28 U.S.C. § 2254 challenging the same judgment, which was dismissed or denied with prejudice, you will need to seek permission from the Sixth Circuit Court of Appeals before filing another § 2254 action in this Court. *See* 28 U.S.C. § 2244(b)(3) and (4).

This Court has a form for filing a habeas corpus petition under § 2254. Your institution may have a copy of this form or you may request one from the Clerk's Office. The Court's form has a detailed set of instructions explaining how to fill it out. Those instructions will not be

repeated here. Local Rule 5.2(a) requires *pro se* litigants to use the Court's form. Failure to use the proper form after having been requested to do so by the Court could result in the dismissal of your petition.

The fee for filing a habeas petition under § 2254 is $5.00. Your petition should be accompanied by either the fee or a fully completed prisoner application to proceed without prepayment of the fee.

Actions under § 2254 are governed by the Rules Governing Section 2254 Cases in the United States District Courts and the Federal Rules of Civil Procedure, to the extent that they are not inconsistent with the Rules Governing Section 2254 Cases or any statutory provisions.

What happens after my 28 U.S.C. § 2254 petition has been filed?

1. You will receive a case number.

Your case will be assigned a civil action number. After you receive your case number, you should put it on all documents you send to the Court that relate to your action. Do not presume that the Clerk of Court will know what action you want your papers filed in. It is your responsibility to put your case number on your filings.

2. The Clerk of Court will review your petition for any deficiencies.

The Clerk of Court will review your petition to make sure you have properly submitted it to the Court. For example, the Clerk of Court will make sure you filed an original, signed petition, that you paid the filing fee or filed a prisoner application to proceed without prepayment of fees, and that your petition has been filed on a court-approved form. If your petition was not properly submitted, you may receive a "deficiency notice" from the Clerk's Office. The notice will tell you if there was something wrong with your filing and provide you with a period of time to correct the deficiency. Failure to respond to a deficiency notice from the Clerk's Office could lead to dismissal of your petition.

3. If you are seeking permission to proceed without prepayment of fees, the Court will rule on your application.

If the Court grants your application, you do not owe anything for the filing fee. If the Court denies your application, you will be provided with a period of time to pay the filing fee. Failure to pay the $5.00 filing fee in the time provided by the Court could result in dismissal of your action.

4. The Court must conduct a preliminary review of your petition.

Under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, after a habeas petition has been filed, "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."

5. If the Court does not dismiss your petition on preliminary review, it will direct that it be served.

If the petition is not dismissed, the Judge will enter an order directing that the petition be served on the respondent and the Attorney General for the Commonwealth of Kentucky. The order will set out a time period for the respondent to answer and will provide another period for you to file a reply. Under Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts, "[t]he answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations."

6. Discovery is not automatic.

Leave of court is required for a party to take discovery in a § 2254 action. A party requesting discovery must provide the reasons for the request and identify the discovery sought. 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.[2] *See* Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts.

7. The Court may expand the record.

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 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. The Judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness. *See* Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts.

8. The Court will decide whether to hold an evidentiary 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. *See* Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts.

9. If an evidentiary hearing is granted, the Court must appoint an attorney to represent a qualified petitioner.

If an evidentiary hearing is warranted, the Judge must appoint an attorney to represent a petitioner who qualifies under 18 U.S.C. § 3006A.[3] *See* Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts.

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[2]The standard under this section is financial inability.

[3]The standard under this section is financial inability.

10. The hearing must take place as soon as practicable.

The Judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts.

11. The matter may be referred 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. 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.

12. The Judge will issue a final decision granting or denying relief.

If the district court enters a decision adverse to the petitioner, it must issue or deny a certificate of appealability. If the Court issues a certificate, the Court must state the specific issue or issues that meet the showing required by 28 U.S.C. § 2253(c)(2).[4]

13. Appeal

If the Court denies you a certificate of appealability, you may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.[5] Federal Rule of Appellate Procedure (4)(a) governs appeal. You have thirty days (or sixty days if the case involves a party who is the United States, a federal agency or federal employee) from the date that the final order or judgment was entered on the docket to file a Notice of Appeal. A timely notice of appeal must be filed even if the district court issues a certificate of appealability. The fee to file an appeal is **$505.00**. You must either pay the fee or submit a prisoner application to proceed without prepayment of the fee.

HABEAS ACTIONS UNDER 28 U.S.C. § 2241

Federal habeas corpus relief under 28 U.S.C. § 2241(c)(3) is available to anyone held "in custody in violation of the Constitution, laws or treaties of the United States." However, by law, the § 2241 remedy is limited to situations which are not covered by either 28 U.S.C. § 2254 (state prisoner challenging state conviction) or § 2255 (federal prisoner challenging conviction or sentence). Section 2241 is also used to obtain review of forms of official custody not resulting from convictions, such as detained aliens and military members seeking discharge.

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[4]This section provides that "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."

[5]In relevant part, Rule 22 provides, "[i]f the district judge has denied the certificate, the applicant may request a circuit judge to issue it. . . . [I]f no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals."

This Court has a form for filing a habeas corpus petition under § 2241. Your institution may have a copy of this form or you may request one from the Clerk's Office. The Court's form has a detailed set of instructions explaining how to fill it out. Those instructions will not be repeated here. Local Rule 5.2(a) requires *pro se* litigants to use the Court's form. Failure to use the proper form after having been requested to do so by the Court could result in the dismissal of your petition.

The fee for filing a habeas petition under § 2241 is $5.00. Your petition should be accompanied by either the fee or a fully completed prisoner application to proceed without prepayment of the fee.

Your action under § 2241 will proceed much like the process described on the pages 15-18 for habeas actions under § 2254. However, you do not need to obtain a certificate of appealability to appeal the denial of a § 2241 petition.

MOTIONS TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255

Generally, 28 U.S.C. § 2255 may be used by a person in custody pursuant to a judgment by a federal court or who in the future will be in custody pursuant to a judgment by a federal court to seek a determination that the custody is in violation of the Constitution or laws of the United States, or that the court did not have jurisdiction to impose the judgment, or that the sentence exceeds the maximum permitted by law, or is otherwise subject to collateral attack. It limits the jurisdiction of a federal district court to one motion per judgment, unless permission to consider a second or successive motion is given by the United States Court of Appeals for the Circuit in which the court is located. If you previously filed a motion under 28 U.S.C. § 2255 challenging the same judgment, which was dismissed or denied with prejudice, you will need to seek permission from the Sixth Circuit Court of Appeals before filing another § 2255 motion in this Court.

This Court has a form for filing a motion under § 2255. Your institution may have a copy of this form or you may request one from the Clerk's Office. The Court's form has a detailed set of instructions explaining how to fill it out. Those instructions will not be repeated here. Local Rule 5.2(a) requires *pro se* litigants to use the Court's form. Failure to use the proper form after having been requested to do so by the Court could result in the dismissal of your motion.

There is no fee for filing a motion under § 2255.

Actions under § 2255 are governed by the Rules Governing Section 2255 Cases in the United States District Courts and the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with the Rules Governing Section 2255 Cases or any statutory provisions.

What happens after my 28 U.S.C. § 2255 motion has been filed?

1. Your motion will be referred to a Judge.

The Clerk must promptly forward your motion to the Judge who conducted your trial and imposed your sentence or, if the Judge who imposed the sentence was not the trial judge, to the Judge who conducted the proceedings being challenged. If the appropriate Judge is not available, the Clerk must forward the motion to a Judge under the Court's assignment procedure. *See* Rule 4 of the Rules Governing Section 2255 Proceedings in the United States District Courts.

2. The Judge who receives the referral will review your motion.

The Judge who receives the motion must examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the Judge must dismiss the motion and direct the Clerk to notify you. *See* Rule 4 of the Rules Governing Section 2255 Proceedings in the United States District Courts.

3. If the Court does not dismiss your motion on preliminary review, it will direct the United States to file a response.

If your motion is not dismissed, the Judge will enter an order directing the United States to respond to your motion. The order will set out a time period for the United States to file its response and a period of time for you to file a reply. If required, the answer must address the allegations in the motion. In addition, it must state whether the moving party has used any other federal remedies, including any prior post-conviction motions. *See* Rule 5 of the Rules Governing Section 2255 Proceedings in the United States District Courts.

4. Discovery is not automatic.

Leave of court is required for a party to take discovery in a § 2255 proceeding. A party requesting discovery must provide the reasons for the request and identify the proposed discovery. If necessary for effective discovery, the Judge must appoint an attorney for a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A.[6] *See* Rule 6 of the Rules Governing Section 2255 Proceedings in the United States District Courts.

5. The Court may expand the record.

If the motion is not dismissed, the Judge may direct the parties to expand the record by submitting additional materials relating to the motion. 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. The Judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness. *See* Rule 7 of the Rules Governing Section 2255 Proceedings in the United States District Courts.

[6]The standard under this section is financial inability.

6. The Court will decide whether to hold an evidentiary hearing.

If the motion is not dismissed, the Judge must review the response, any transcripts and records of the prior proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted. *See* Rule 8 of the Rules Governing Section 2255 Proceedings in the United States District Courts.

7. If an evidentiary hearing is granted, the Court must appoint an attorney to represent a qualified movant.

If an evidentiary hearing is warranted, the Judge must appoint an attorney to represent a movant who qualifies under 18 U.S.C. § 3006A.[7] Rule 8 of the Rules Governing Section 2255 Proceedings in the United States District Courts.

8. The hearing must take place as soon as practicable.

The Judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. *See* Rule 8 of the Rules Governing Section 2255 Proceedings in the United States District Courts.

9. The matter may be referred 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. 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. Rule 8 of the Rules Governing Section 2255 Proceedings in the United States District Courts.

10. The Judge will issue a final decision granting or denying relief.

If the district court enters a decision adverse to the movant, it must issue or deny a certificate of appealability. If the Court issues a certificate, the Court must state the specific issue or issues that meet the showing required by 28 U.S.C. § 2253(c)(2).[8]

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[7]The standard under this section is financial inability.

[8]This section provides that "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."

11. Appeal

If the Court denies you a certificate of appealability, you may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.[9] Federal Rule of Appellate Procedure (4)(a) governs appeal. You have sixty days from the date that the final order or judgment was entered on the docket to file a Notice of Appeal. A timely notice of appeal must be filed even if the district court issues a certificate of appealability. The fee to file an appeal is $505.00. You must either pay the fee or submit a prisoner application to proceed without prepayment of the fee.

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[9]In relevant part, Rule 22 provides, "[i]f the district judge has denied the certificate, the applicant may request a circuit judge to issue it. . . . [I]f no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals."