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Six and a Half Things Every Litigant Needs to Know About 6.500 Motions

At SADO, we receive many calls and questions from attorneys and inmates about post-conviction motions, ranging from very complicated, fact-specific requests to general information. In this concise article, SADO Assistant Defender Chari Grove shares her extensive experience and insight to help with the most critical details that everyone considering a post-conviction trial court motion must know.

The Editor.

Your last chance to raise and exhaust issues in state court is by way of a motion for relief from judgment, or 6.500 motion (Mich. Ct. R. 6.500 *et. seq.*). This motion is for those defendants who have exhausted an appeal by right or by leave and want to raise additional issues, or for those defendants who have missed all the filing deadlines for taking a direct appeal. The court rule governing the motion for relief from judgment is fairly clear as to the basic procedure for filing the motion, detailing specifically what must be included. Mich. Ct. R. 6.501(C). You must file your motion, together with two copies, with the clerk of the court in which the defendant was convicted, and serve a copy and notice of filing on the prosecutor. Mich. Ct. R. 6.503. An indigent defendant can request counsel and, if counsel is appointed, the attorney may file a supplemental motion. Mich. Ct. R. 6.505(A) and (B). The judge can summarily dismiss the motion without oral argument or a response from the prosecutor. Mich. Ct. R. 6.504(B)(2). In fact, the prosecutor does not need to respond at all unless ordered by the trial court. (The judge has to give reasons for summarily dismissing the motion, and a motion for rehearing can be filed therefrom within 21 days. Mich. Ct. R. 6.504 (B)). A supporting brief or memorandum is not required, but it is highly

recommended in order to avoid summary dismissal, particularly in light of the fact that oral argument is not required. Keep in mind that you are allowed to attach off-the-record documents, evidence, and affidavits. Mich. Ct. R. 6.502(E) Expansion of the record or an evidentiary hearing can be ordered at the discretion of the judge. Mich. Ct. R. 6.507(A), 6.508(C). If there is a hearing, counsel must be appointed. Mich. Ct. R. 505.

This is a last-chance motion not particularly favored by the courts, and there are a number of tough procedural hurdles to overcome. Here are six (and a half) crucial points to remember before and after embarking on a 6.500 motion:

1. You only get one chance, so make it good (i.e. complete)!

According to Mich. Ct. R. 6.502(G)(1), "one and only one motion for relief from judgment may be filed with regard to a conviction." There are only two exceptions to this rule. A defendant may file a successive motion based on:

- Newly discovered evidence
- A retroactive change in the law

The Michigan Supreme Court ruled in *Ambrose v. Recorder's Court Judge*, 459 Mich. 884 (1999), that, effective August 1, 1995, a criminal defendant may file one motion for relief from judgment from a conviction under Mich. Ct. R. 6.502(G)(1) even where he or she has filed one or more such motions prior to the rule's effective date, October 1, 1989.

"Good cause and actual prejudice" (*see infra*) do not provide an additional exception to Mich. Ct. R. 6.502(G). Only after the trial court has determined that the successive motion falls within one of the two exceptions do the good cause and actual prejudice requirements become relevant. *People v. Swain*, 288 Mich. App. 609 (2010).

Although the Mich. Ct. R. 6.502(G)(2) itself does not impose a requirement that the newly discovered evidence could not have been reasonably discovered before the second motion, the Court in *Swain, supra,* rejected in *dicta* the defendant's argument that evidence that was not actually - but could have been - discovered previously qualified as newly discovered evidence under the rule.

2. Requirement to Show Cause

You need to explain why your issues were not raised previously, and you must thoroughly establish cause, especially if using "cause" to overcome a procedural default for habeas corpus purposes. There are a few ways to show cause:

a. Ineffective assistance by prior appellate counsel. *People v. Reed*, 449 Mich. 375 (1995); *People v. Edwards*, 465 Mich. 964 (2002); *People v. Kimble*, 470 Mich. 305 669 (2004). This is probably the most common way to attempt to establish cause (*see* Stuart G. Friedman, *Hurdling the 6.500 Barrier: a Guide to Michigan Post-Conviction Remedies*, 14 T.M. Cooley L. Rev 65, 76 (1997)), and it is generally difficult because a high measure of deference is given to appellate counsel's strategic decisions. However, deference is not extended to claims involving counsel's failure to meet state-imposed deadlines. An argument can be made for ineffective appellate counsel if clearly meritorious issues are not investigated or raised. *People v. Brown*, 491 Mich. 914 (2012). Some factors to consider are:

   - Were the omitted issues "significant and obvious?"
   - Was there arguably contrary authority on the omitted issues?
   - Were the omitted issues clearly stronger than those presented?
   - Were the omitted issues objected to at trial?
   - Were the trial court's rulings subject to deference on appeal?
   - Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
   - What was the appellate counsel's level of experience and expertise?
   - Did the petitioner and appellate counsel meet and go over possible issues?
   - Is there evidence that counsel reviewed all the facts?
   - Were the omitted issues dealt with in other assignments of error?

   See Mapes v. Coyle, 171 F.3d 408, 427-28 (CA6, 1999).

b. An objective factor "external to the defense" that impeded counsel's ability to raise the claim. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Examples of "external" factors include the following:

   - Newly discovered evidence. *People v. Grissom,* 492 Mich. 296 (2012). (*Grissom* held, in an appeal of the denial of a 6.500 motion, that newly discovered *impeachment* evidence can justify a new trial.)

- Government suppression of evidence in violation of *Brady v. Maryland,* 373 U.S. 83 (1963). *See Strickler v. Green*, 527 U.S. 263 (1999); *Banks v. Dretke*, 540 U.S. 668 (2004).
- Interference by prison officials. *See Buffalo v. Sunn*, 854 F.2d 1158 (CA9, 1988).
- Mental incompetence of defendant. *See People v. Harrington*, unpublished opinion (#188839, 12-12-95); lv. den. 450 Mich. 1024 (1996).
- Novelty: the principles of law being advanced are so novel that they could not have been raised previously. *Reed v. Ross*, 468 U.S. 1 (1984).
- The ruling in defendant's own case created a new issue. *See Cola v. Reardon*, 787 F.2d 681 (CA1, 1986).

If an issue **was** raised previously, it cannot be raised again in a 6.500 motion and it will be dismissed. *See People v. Garrett,* 495 Mich. 908 (2013).

The cause requirement applies retroactively. In *People v. Jackson*, 465 Mich. 390 (2001), the Court held that there is no due process violation in applying the requirements of Mich. Ct. R. 6.500 to defendants who were convicted before the date the rule was enacted, October 1, 1989. However, the Sixth Circuit has declined to adopt a bright line rule for determining when Mich. Ct. R. 6.508(D) became a "firmly established" procedural rule such that a state court's dismissal for failure to comply is based on an "adequate and independent" procedural rule barring federal habeas review. *Luberda v. Trippett*, 211 F.3d 1004 (CA6, 2000); *Gonzales v. Elo*, 233 F.3d 348 (CA6, 2000); *Rogers v. Howes*, 144 F.3d 990 (CA6, 1998).

3. Exceptions: Actual Innocence and Jurisdictional Defect

Actual innocence or jurisdictional defects are exceptions to the "cause" requirement. If you can show either of these, you do not need to demonstrate cause, but you still have to demonstrate prejudice (*see infra*). The "procedural" or "gateway" actual innocence doctrine comes from the Supreme Court opinion in *Schlup v. Delo*, 513 U.S. 298 (1995). To satisfy the actual innocence standard, a defendant "must show that it is more likely than not that no reasonable juror would have found [the defendant] guilty beyond a reasonable doubt." *People v. Swain, supra* at 638. In *Swain,* the trial court's finding that the defendant would have had a reasonably likely chance of acquittal and that there was a significant possibility that the defendant was innocent did not equate with the "actual innocence" standard.

The Sixth Circuit summarized the standard as follows:

> "If a habeas petitioner 'presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.'" *Souter v. Jones,* 395 F.3d 577, 590 (CA6, 2005) quoting *Schlup* at 316.

However, this standard does not require absolute certainty about the defendant's guilt or innocence. A finding of actual innocence is not the equivalent of a finding of not guilty by a jury or by a court in a bench trial. *Lambert v. Blackwell*, 134 F.3d 506, 509 (CA3, 1997). In fact, the Court in *People v. Schumake*, unpublished opinion (#163993, 9/5/1995), held that the good cause requirement was waived where there was a significant possibility that the defendant was innocent of the charged offense, although not of a lesser charge. The trial court had given a jury instruction which allowed the jurors to convict the defendant of assault with intent to murder without proof of specific intent to kill. *See also People v. Lovett*, unpublished opinion (#212213, 5/18/1999), holding that the trial court properly waived the "good cause" requirement where there was a significant possibility of defendant's innocence because the retractable nightstick he possessed was not a dangerous weapon, and *People v. Jax*, unpublished opinion (#295825, 1/17/12), (the good cause requirement could be satisfied based on actual innocence if the defendant could not be guilty of home invasion of a residence he had the legal right to enter).

In addition to actual innocence, there is a jurisdictional defect exception to the cause requirement. *People v. Carpentier*, 446 Mich. 19 (1994). A defendant may always challenge whether the state had a right to bring the prosecution in the first place. A jurisdictional defect implicates the very authority of the state to bring a defendant to trial. *See People v. Chambers*, unpublished opinion (#274249, 2/26/08), where the defendant was not required to show cause because he was sentenced without ever having pled guilty to violating probation, a jurisdictional defect.

4. Actual Prejudice

You must show prejudice whether or not you have to show cause. In the case of a trial, the

requirement to show that the error resulted in prejudice means that but for the error, the defendant would have had a reasonably likely chance of acquittal. Prejudice can be shown if the error was "so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case." Mich. Ct. R. 6.508(D)(3)(6)(iii). *See People v. Brown, supra*, where counsel's ineffectiveness in failing to discover exculpatory evidence and in failing to effectively cross examine the sole complainant resulted in actual prejudice to the defendant for purposes of Mich. Ct. R. 6.508(D).

In the case of a plea, the defect must be such that the plea is involuntary "to a degree that it would be manifestly unjust to allow the conviction to stand." Mich. Ct. R. 6.508(D)(3)(6)(ii). *See People v. Fonville*, 291 Mich. App. 363 (2010), where failure to advise the defendant that he would be required to register as a sex offender rendered his plea involuntary and established prejudice as he would not have pled guilty had he known. In challenging a sentence, actual prejudice means that the sentence is invalid. Actual prejudice was established where the defendant's consecutive sentences were not authorized, *People v. Harrison*, unpublished opinion (#279123, 9-16-08), and where the court imposed a prison sentence without departure reasons when the guidelines provided for an intermediate sanction. *People v. Hurly*, 475 Mich. 858 (2006).

Errors to which the "automatic reversal" doctrine applies probably qualify under the actual prejudice standard, including denial of counsel, denial of the right to self-representation, denial of an impartial judge, denial of a public trial, denial of the right to appeal, and racial discrimination in jury selection.

5. No need to re-raise issues already denied

You *do not* need to re-raise the issues already addressed in the direct appeal when filing a 6.500 motion in order to preserve those issues for habeas review. If those claims were raised already, they will be denied under Mich. Ct. R. 6.508(D)(2). However, that sort of denial will not be considered a procedural default barring federal review. "When a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review." *Cone v. Bell*, 556 U.S. 449, 466 (2009). The Supreme Court reasoned that when a state court refuses to readjudicate a claim on the ground that it has been previously decided, it provides strong evidence that the claim has already been given full consideration by the state courts and is therefore ripe for federal review. *See also, Wellons v. Hall*, 558 U.S. 220, 222 (2010).

The statute of limitations for filing a federal habeas corpus petition is tolled during the pendency of a properly filed application for state post-conviction or collateral review. 28 U.S.C. §2244(d)(2). In addition, a federal district court has discretion to stay a "mixed" habeas petition (containing exhausted and unexhausted claims) to allow the petitioner to present his unexhausted claims to the state court in the first instance, and then to return to federal court for review of his perfected petition. *Rhines v. Weber*, 544 U.S. 269, 277 (2005). Stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court and where his unexhausted claims are not plainly meritless. *Id.*

Filing such a habeas petition might be a good idea before proceeding with a 6.500 motion because a motion for relief from judgment tolls the federal habeas clock only when it is "properly filed." It is up to the state court to decide whether the motion was properly filed, and the federal court will generally defer to the state court's determination. *See Vroman v. Brigano*, 346 F.3d 598 (CA6, 2003).

6. Monitor your deadlines!

You must be aware of not only the deadlines for appealing the denial of the 6.500 motion, but also the deadline for filing a petition for writ of habeas corpus. You have six months from the date the trial court denied the motion for relief from judgment to file an application for leave to appeal in the Court of Appeals. Mich. Ct. R. 6.509(A). A motion for reconsideration of the denial will **not** toll the time for filing the delayed application. *People v. Sconious*, 448 Mich. 643 (1995). You have 56 days from the denial of the application to file an application for leave to appeal in the Michigan Supreme Court.

Again, the one-year time limit from the denial of your direct appeal is tolled during the pendency of the motion for relief from judgment and appeals therefrom. You must remember, however, that the time for filing the habeas petition **does not start over** after the collateral appeal is denied. The time that lapsed between the denial of the direct appeal and the time the motion for relief from judgment is filed counts toward the habeas deadline, and begins to run again when the collateral appeal is denied. You must also remember that filing a petition for certiorari seeking review of the denial of state post-conviction relief does **not** toll the time for filing the habeas petition. *Lawrence v. Florida*, 549 U.S. 327 (2007).

Here's an example:

- Mr. Defendant appeals as of right and the Michigan Supreme Court denies leave to appeal on 1-1-13.
- Mr. D files a motion for relief from judgment on 7-1-13.
- The Michigan Supreme Court denies leave from the collateral appeal on 10-1-13.
- The U.S. Supreme Court denies the petition for certiorari from the collateral appeal on 12-1-13.

The six months between 1-1-13 and 7-1-13 count toward the one-year time limit for filing the habeas petition, as do the two months between the denial of the collateral appeal and the denial of certiorari, making the federal habeas petition due - **not** 15 months (the one year plus 90 days under the AEDPA) from 12-1-13, and **not** even 15 months from 10-1-13 - but 9 months from 10-1-13. For more information, *see Defender Habeas Book* Chapter 2-2-a-iv.

6.5. No constitutional right to counsel.

According to Mich. Ct. R. 6.505(A), the court **may** appoint counsel for the defendant at any time during the proceedings, and counsel **must** be appointed if the court directs that oral argument or an evidentiary hearing be held. However, there is no constitutional right to counsel in post-conviction motions, and the defendant therefore cannot claim constitutionally ineffective assistance of counsel during the proceedings. *Coleman v. Thompson*, 501 U.S. 722 (1991); *People v. Walters*, 463 Mich. 717 (2001). In *Walters*, counsel advised the defendant to wait until after the motion for reconsideration of the denial of the 6.500 motion was decided, and, consequently, the defendant's application for leave to appeal was filed untimely in the Court of Appeals. The defendant's claim of ineffective assistance of counsel for his attorney's ignorance of the holding in *People v. Sconious, supra*, was rejected: "Because a defendant has no constitutional right to appointed counsel in filing a motion for relief from judgment…, a defendant cannot claim constitutionally ineffective assistance of counsel by counsel's failure timely to file an application for leave to appeal from the denial of such a motion." *See also Lawrence v. Florida, supra*, where attorney miscalculation was not sufficient to warrant even equitable tolling of the statute of limitations, particularly in the post-conviction context where prisoners have no constitutional right to counsel.

There is a form that has been developed by the State Court Administrative Office and may be used for filing your Motion for Relief from Judgment, but it is not required. The form can be accessed at the following link: (http://courts.mi.gov/Administration/SCAO/Forms/courtforms/felonycriminal/cc257.pdf).

You may also draft your own pleading, and a sample Motion for Relief From Judgment (with Brief in Support) can be found in Chapter 24 of the *Defender Motion Book* (CDRC 2013) pages 532-544. *See also* SADO's complete packet of material on this subject at http://www.sado.org/Page/24/Self-Help.

by Chari K. Grove
Assistant Defender
State Appellate Defender Office

Subchapter 6.500 Postappeal Relief

Rule 6.501 Scope of Subchapter

Unless otherwise specified by these rules, a judgment of conviction and sentence entered by the circuit court not subject to appellate review under subchapters 7.200 or 7.300 may be reviewed only in accordance with the provisions of this subchapter.

Rule 6.502 Motion for Relief From Judgment

(A) Nature of Motion. The request for relief under this subchapter must be in the form of a motion to set aside or modify the judgment. The motion must specify all of the grounds for relief which are available to the defendant and of which the defendant has, or by the exercise of due diligence, should have knowledge.

(B) Limitations on Motion. A motion may seek relief from one judgment only. If the defendant desires to challenge the validity of additional judgments, the defendant must do so by separate motions. For the purpose of this rule, multiple convictions resulting from a single trial or plea proceeding shall be treated as a single judgment.

(C) Form of Motion. The motion may not be noticed for hearing, and must be typed or legibly handwritten and include a verification by the defendant or defendant's lawyer in accordance with MCR 2.114. Except as otherwise ordered by the court, the combined length of the motion and any memorandum of law in support may not exceed 50 pages double-spaced, exclusive of attachments and exhibits. If the court enters an order increasing the page limit for the motion, the same order shall indicate that the page limit for the prosecutor’s response provided for in MCR 6.506(A) is increased by the same amount. The motion must be substantially in the form approved by the State Court Administrative Office, and must include:

(1) The name of the defendant;

(2) The name of the court in which the defendant was convicted and the file number of the defendant's case;

(3) The place where the defendant is confined, or, if not confined, the defendant's current address;

(4) The offenses for which the defendant was convicted and sentenced;

(5) The date on which the defendant was sentenced;

(6) Whether the defendant was convicted by a jury, by a judge without jury, or on a plea of guilty, guilty but mentally ill, or nolo contendere;

(7) The sentence imposed (probation, fine, and/or imprisonment), the length of the sentence imposed, and whether the defendant is now serving that sentence;

(8) The name of the judge who presided at trial and imposed sentence;

(9) The court, title, and file number of any proceeding (including appeals and federal court proceedings) instituted by the defendant to obtain relief from conviction or sentence, specifying whether a proceeding is pending or has been completed;

(10) The name of each lawyer who represented the defendant at any time after arrest, and the stage of the case at which each represented the defendant;

(11) The relief requested;

(12) The grounds for the relief requested;

(13) The facts supporting each ground, stated in summary form;

(14) Whether any of the grounds for the relief requested were raised before; if so, at what stage of the case, and, if not, the reasons they were not raised;

(15) Whether the defendant requests the appointment of counsel, and, if so, information necessary for the court to determine whether the defendant is entitled to appointment of counsel at public expense.

Upon request, the clerk of each court with trial level jurisdiction over felony cases shall make available blank motion forms without charge to any person desiring to file such a motion.

(D) Return of Insufficient Motion. If a motion is not submitted on a form approved by the State Court Administrative Office, or does not substantially comply with the requirements of these rules, the court shall either direct that it be returned to the defendant with a statement of the reasons for its return, along with the appropriate form, or adjudicate the motion under the provisions of these rules. The clerk of the court shall retain a copy of the motion.

(E) Attachments to Motion. The defendant may attach to the motion any affidavit, document, or evidence to support the relief requested.

(F) Amendment and Supplementation of Motion. The court may permit the defendant to amend or supplement the motion at any time.

(G) Successive Motions.

(1) Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. The court shall return without filing any successive motions for relief from judgment. A defendant may not appeal the denial or rejection of a successive motion.

(2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

Rule 6.503 Filing and Service of Motion

(A) Filing; Copies.

(1) A defendant seeking relief under this subchapter must file a motion, and a copy of the motion with the clerk of the court in which the defendant was convicted and sentenced.

(2) Upon receipt of a motion, the clerk shall file it under the same number as the original conviction.

(B) Service. The defendant shall serve a copy of the motion and notice of its filing on the prosecuting attorney. Unless so ordered by the court as provided in this subchapter, the filing and service of the motion does not require a response by the prosecutor.

Rule 6.504 Assignment; Preliminary Consideration by Judge; Summary Denial

(A) Assignment to Judge. The motion shall be presented to the judge to whom the case was assigned at the time of the defendant's conviction. If the appropriate judge is not available, the motion must be assigned to another judge in accordance with the court's procedure for the reassignment of cases. The chief judge may reassign cases in order to correct docket control problems arising from the requirements of this rule.

(B) Initial Consideration by Court.

(1) The court shall promptly examine the motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack. The court may request that the prosecutor provide copies of transcripts, briefs, or other records.

(2) If it plainly appears from the face of the materials described in subrule (B)(1) that the defendant is not entitled to relief, the court shall deny the motion without directing further proceedings. The order must include a concise statement of the reasons for the denial. The clerk shall serve a copy of the order on the defendant and the prosecutor. The court may dismiss some requests for relief or grounds for relief while directing a response or further proceedings with respect to other specified grounds.

(3) If the motion is summarily dismissed under subrule (B)(2), the defendant may move for reconsideration of the dismissal within 21 days after the clerk serves the order. The motion must concisely state why the court's decision was based on a clear error and that a different decision must result from correction of the error. A motion which merely presents the same matters that were considered by the court will not be granted.

(4) If the entire motion is not dismissed under subrule (B)(2), the court shall order the prosecuting attorney to file a response as provided in MCR 6.506, and shall conduct further proceedings as provided in MCR 6.505-6.508.

Rule 6.505 Right to Legal Assistance

(A) Appointment of Counsel. If the defendant has requested appointment of counsel, and the court has determined that the defendant is indigent, the court may appoint counsel for the defendant at any time during the proceedings under this subchapter. Counsel must be appointed if the court directs that oral argument or an evidentiary hearing be held.

(B) Opportunity to Supplement the Motion. If the court appoints counsel to represent the defendant, it shall afford counsel 56 days to amend or supplement the motion. The court may extend the time on a showing that a necessary transcript or record is not available to counsel.

Rule 6.506 Response by Prosecutor

(A) Contents of Response. On direction of the court pursuant to MCR 6.504(B)(4), the prosecutor shall respond in writing to the allegations in the motion. The trial court shall allow the prosecutor a minimum of 56 days to respond. If the response refers to transcripts or briefs that are not in the court's file, the prosecutor shall submit copies of those items with the response. Except as otherwise ordered by the court, the response shall not exceed 50 pages double-spaced, exclusive of attachments and exhibits.

(B) Filing and Service. The prosecutor shall file the response and one copy with the clerk of the court and serve one copy on the defendant.

Rule 6.507 Expansion of Record

(A) Order to Expand Record. If the court does not deny the motion pursuant to MCR 6.504(B)(2), it may direct the parties to expand the record by including any additional materials it deems relevant to the decision on the merits of the motion. The expanded record may include letters, affidavits, documents, exhibits, and answers under oath to interrogatories propounded by the court.

(B) Submission to Opposing Party. Whenever a party submits items to expand the record, the party shall serve copies of the items to the opposing party. The court shall afford the opposing party an opportunity to admit or deny the correctness of the items.

(C) Authentication. The court may require the authentication of any item submitted under this rule.

Rule 6.508 Procedure; Evidentiary Hearing; Determination

(A) Procedure Generally. If the rules in this subchapter do not prescribe the applicable procedure, the court may proceed in any lawful manner. The court may apply the rules applicable to civil or criminal proceedings, as it deems appropriate.

(B) Decision Without Evidentiary Hearing. After reviewing the motion and response, the record, and the expanded record, if any, the court shall determine whether an evidentiary hearing is required. If the court decides that an evidentiary hearing is not required, it may rule on the motion or, in its discretion, afford the parties an opportunity for oral argument.

(C) Evidentiary Hearing. If the court decides that an evidentiary hearing is required, it shall schedule and conduct the hearing as promptly as practicable. At the hearing, the rules of evidence other than those with respect to privilege do not apply. The court shall assure that a verbatim record is made of the hearing.

(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

(iv) in the case of a challenge to the sentence, the sentence is invalid.

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

(E) Ruling. The court, either orally or in writing, shall set forth in the record its findings of fact and its conclusions of law, and enter an appropriate order disposing of the motion.

Rule 6.509 Appeal

(A) Availability of Appeal. Appeals from decisions under this subchapter are by application for leave to appeal to the Court of Appeals pursuant to MCR 7.205. The 6-month time limit provided by MCR 7.205(G)(3), runs from the decision under this

subchapter. Nothing in this subchapter shall be construed as extending the time to appeal from the original judgment.

(B) Responsibility of Appointed Counsel. If the trial court has appointed counsel for the defendant during the proceeding, that appointment authorizes the attorney to represent the defendant in connection with an application for leave to appeal to the Court of Appeals.

(C) Responsibility of the Prosecutor. If the prosecutor has not filed a response to the defendant's application for leave to appeal in the appellate court, the prosecutor must file an appellee's brief if the appellate court grants the defendant's application for leave to appeal. The prosecutor must file an appellee's brief within 56 days after an order directing a response pursuant to subrule (D).

(D) Responsibility of the Appellate Court. If the appellate court grants the defendant's application for leave to appeal and the prosecutor has not filed a response in the appellate court, the appellate court must direct the prosecutor to file an appellee's brief, and give the prosecutor the opportunity to file an appellee's brief pursuant to subrule (C), before granting further relief to the defendant.

A "radical defect in jurisdiction," for habeas corpus purposes, contemplates an act or omission by state authorities that clearly contravenes an express legal requirement in existence at the time of the act or omission. *People v. Price*, above.

A "reverse writ" of habeas corpus, by which a defendant is held in jail, absent probable cause and without a warrant, is a nullity and cannot be used for a person's detention. *People v. Casey*, 102 Mich. App. 595 (1980), *aff'd* 411 Mich. 179 (1981).

Petitions for habeas corpus are to be liberally construed. *People v. Wendt*, 107 Mich. App. 269 (1981).

Denial of a habeas petition is not appealable as of right. However, the petition may be renewed by filing an original complaint in the Court of Appeals. *Parshay v. Warden of Marquette Prison*, 30 Mich. App. 556 (1971); *Triplett v. Deputy Warden*, 142 Mich. App. 774 (1985).

Where the basis for relief depends on choosing between two plausible constructions of the relevant statute, and a novel question of law is involved, no "radical jurisdictional defect" which would justify a grant of habeas is present. *Hinton v. Michigan Parole Board*, 148 Mich. App. 235 (1986).

The MDOC's failure to hold a parole violation hearing within 45 days of plaintiff's return to custody, a violation of M.C.L. 791.240a, does not entitle plaintiff to habeas relief. A violation of M.C.L. 791.240a does not operate to deprive the parole board of jurisdiction to revoke parole, nor does it require discharge of the parolee. A violation of the 45-day rule is properly remedied by an action for mandamus. *Jones v. Michigan Department of Corrections*, 468 Mich. 646 (2003).

POST-TRIAL MOTIONS AND APPEALS--Habeas Corpus--State --To Testify or to Stand Trial

Under Mich. Ct. R. 3.304, a court may issue a writ to bring a prisoner to court to testify or for prosecution.

POST-TRIAL MOTIONS AND APPEALS--Motions for Relief from Judgment (Mich. Ct. R. 6.500)

NOTE: Mich. Ct. R. 6.502 as amended effective 09-01-06 sets a 50-page limit to a motion for relief from judgment and brief in support.

NOTE: Mich. Ct. R. 6.500 et seq establishes a procedure for challenge of criminal convictions by defendants who have had an appeal by right or by leave, who have unsuccessfully sought leave to appeal, or have been unable to file an application for leave to appeal in the Court of Appeals because more than6 months have elapsed since the judgment.

Unless otherwise specified in the rules, a case not subject to appellate review under subchapters 7.200 or 7.300 may be reviewed only in accordance with the provisions of this subchapter. Mich. Ct. R. 6.501.

The court may appoint counsel for an indigent defendant at any time during the proceedings under this subchapter. If the court orders oral argument or an evidentiary hearing, counsel must be appointed. Mich. Ct. R. 6.505(A). The court is not required to afford oral argument or an evidentiary hearing before ruling on a motion for relief from judgment. Mich. Ct. R. 6.508(B). If the court appoints counsel to represent the defendant, it must afford counsel 56 days to amend or supplement the defendant's previously filed motion, and may extend that time upon a showing that a necessary transcript or record is not available to counsel. Mich. Ct. R. 6.505(B).

The defendant has the burden of establishing entitlement to relief. Mich. Ct. R. 6.508(D).

Appeals from decisions under this subchapter are by application for leave to appeal to the Court of Appeals under Mich. Ct. R. 7.205.

Mich. Ct. R. 6.502(G) limits criminal defendants to filing one motion for relief from judgment with respect to a conviction, except where the motion is based on retroactive change in the law or newly discovered evidence.

Mich. Ct. R. 6.509(A) states that the 6-month time limit for filing an application for leave to appeal to the Court of Appeals runs from the date of decision under this subchapter.

Mich. Ct. R. 6.429(C) precludes a party from challenging on appeal the accuracy of the presentence report or the scoring of the sentencing guidelines unless the party has raised the issue at or before sentencing, in a timely motion for resentencing, or a proper motion for remand or demonstrates that the challenge was brought as soon as the inaccuracy could reasonably have been discovered. Any other challenge may be brought only by motion for relief from judgment under subchapter 6.500.

The trial court erred in concluding that the defendant received the effective assistance of trial counsel. Counsel was ineffective for failing to specifically request staff activity logs before trial, as those logs supported the defendant's claim that he did not have as many individual counseling sessions with the complainants as they alleged. Trial counsel was also ineffective for failing to effectively cross-examine the sole complainant whose testimony resulted in the defendant's convictions. Counsel failed to point out any of the inconsistencies in that complainant's trial testimony, and also failed to develop the point that her trial testimony was inconsistent in some respects with her preliminary examination testimony and with her initial statement to the police. Because the defendant's former appellate counsel was ineffective for failing to raise these issues on the defendant's direct appeal, and the defendant was prejudiced thereby, he has met the burden of establishing entitlement to relief under MCR 6.508(D). *People v. Brown*, 491 Mich. 914 (2012).

The defendant's successive motion for relief from judgment was barred by Mich. Ct. R. 6.502(G). The only two exceptions are a retroactive change in the law that occurred after the first motion or new evidence that was not discovered before the first motion. Assuming there is an "actual innocence" exception rooted in the constitution, the defendant must make a requisite gateway showing of actual innocence, that "it is more likely than not that no reasonable juror would have found [defendant] guilty beyond a reasonable doubt." The trial court's finding that the defendant "would have had a reasonably likely chance of acquittal" and that there was a "significant possibility" that the defendant is innocent," does not equate with the "actual innocence" standard. *People v. Swain*, 288 Mich. App. 609 (2010).

The "good cause" and "actual prejudice" requirements of Mich. Ct. R. 6.508(D)(3) do not provide an additional exception to the rule prohibiting successive motions for relief from judgment, in addition to the two exceptions contained in that latter rule, Mich. Ct. R. 6.502(G)(2). *People v. Swain*, *supra*.

The standards for determining whether a defendant is entitled to relief in Mich. Ct. R. 6.508(D) apply retroactively to those convictions and appeals concluded prior to the 10-01-89 effective date of the rule. Retroactive application of this procedural rule does not violate due process or the Ex Post Facto Clause where, prior to its promulgation, a criminal defendant had no vested right in the procedures for bringing a delayed challenge to his conviction. *People v. Jackson*, 465 Mich. 390 (2001).

Effective 08-01-95, a criminal defendant may file one motion for relief from judgment from a conviction under Mich. Ct. R. 6.502(G)(1) even where he has filed one or more such motions prior to the rule's effective date. *Ambrose v. Recorder's Court Judge*, 459 Mich. 884 (1999).

A defendant filing a successive motion for relief from judgment must demonstrate good cause for failing to raise the issue on appeal and in his prior motions for relief from judgment. The fact that the defendant filed his prior motions for relief from judgment in *pro per* does not relieve him of the good cause requirement as there is no exception for defendants who have chosen to represent themselves previously. *People v. Clark*, 274 Mich. App. 248 (2007).

In a *habeas corpus* action brought under 28 U.S.C. §2254, the petitioner did not show good cause for his failure to raise a claim of ineffective assistance of counsel in his direct appeal, particularly considered that he filed two supplemental briefs in *pro per* and offered no explanation for his own failure to raise a claim of ineffective assistance of counsel at the same time. *Rockwell v. Palmer*, 559 F.Supp.2d. 817 (W.D. Mich. 2008).

The trial court erred in denying the motion for relief from judgment and the defendant is entitled to withdraw his guilty plea to child enticement because his attorney failed to inform him that he would be required to register as a sex offender. Based on the reasoning of the U.S. Supreme Court decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), similar to the risk of deportation, sex offender registration is, because of its close connection to the criminal process, difficult to classify as either a direct or a collateral consequence and this distinction is "ill suited to evaluate a Strickland claim." Like deportation, sex offender registration is not a criminal sanction, but it is a particularly severe penalty. Therefore, defense counsel must advise a defendant that registration as a sex offender is a consequence of a guilty plea. Failure to so advise defendant rendered his plea involuntary and prejudiced him, as he would not have pled guilty had he known he would be required to register as a sex offender. *People v. Fonville,* ___ Mich. App. ___ (2011)(#294554, 01-25-11).

CAUTION: Padilla, supra, itself has been found not to be retroactive. Chaidez v. U.S., __ U.S. ___; 133 S.Ct 1103 (02-20-13).

The defendant is entitled to relief from judgment where he was sentenced to consecutive terms of imprisonment for felony-firearm and reckless use of a firearm causing death, but consecutive sentencing was not authorized. The sentence is invalid, which constitutes "actual prejudice" pursuant to Mich. Ct. R. 6.508, and the failure to appellate counsel to raise this plain error on direct appeal was ineffective and substantiates good cause. *People v. Harrison*, unpublished opinion of 09-16-08 (Court of Appeals #279123).

The defendant has established good cause and prejudice entitling him to relief from his sentence pursuant to Mich. Ct. R. 6.508(D) where the sentencing guidelines provided for an intermediate sanction and the court imposed a prison sentence without articulating substantial and compelling reasons for the sentence departure, which renders the sentence imposed invalid. *People v. Hurley,* 475 Mich. 858 (2006).

For purposes of a motion for relief from judgment, a trial court's failure to comply with the procedural mandates in Mich. Ct. R. 6.402(B) concerning waiver of a jury trial does not warrant automatic reversal in the absence of a showing of prejudice. To establish actual prejudice defendant was required to prove that the waiver was not understandingly nor voluntarily made, not merely that the court failed to comply with the court rule. *People v. Mosly*, 259 Mich. App. 90 (2003).

An appellate court reviewing a trial court's decision granting a motion for relief from judgment reviews the trial court's findings of fact for clear error and then reviews its ultimate decision for an

abuse of discretion. The trial court clearly erred in determining that there was a substantial likelihood that defendant was suffering from a psychiatric disorder at the time of trial where there was no direct evidence to support the decision and the opinion testimony of defendant's experts was "at best speculative." The trial court abused its discretion in granting the motion for relief from judgment where an unprejudiced person considering the facts on which the trial court relied would find no justification or excuse for the ruling. *People v. McSwain*, 259 Mich. App. 654 (2003).

A trial court may not avoid the plain language of Mich. Ct. R. 6.508(D) by labeling a 6.500 motion "collateral." Vacating the lower court's denial of relief, the Supreme Court remanded for consideration on the merits. *People v. Edwards*, 465 Mich. 961 (2002).

A defendant has no constitutional right to appointed counsel in filing a motion for relief from judgment under Mich. Ct. R. 6.500 and thus cannot claim that counsel's failure to timely file an application for leave to appeal from the denial of such a motion denied him the constitutional right to the effective assistance of counsel. *People v. David Walters*, 463 Mich. 717 (2001).

A majority of the court agreed that effective assistance of appellate counsel does not require counsel to raise every arguable meritorious issue on appeal, but failed to agree on the interpretation of the "good cause and prejudice" standard of Mich. Ct. R. 6.508. Defendant, whose conviction had been affirmed on direct appeal, claimed in his post-conviction motion that appellate counsel's failure to raise the issue of trial counsel's ineffectiveness was itself ineffective assistance that constituted "good cause" for defendant's failure to raise the issue on direct appeal. *People v. Reed*, 449 Mich. 375 (1995).

The trial court was without authority to fine defendant, an inmate proceeding in pro per, for filing an allegedly frivolous motion for relief from judgment after denial of his motion for a hearing on ineffective assistance of counsel and his motion for reconsideration of the denial. Mich. Ct. R. 2.114 (E) and (F), as amended April 1, 1991, clarify that a court cannot assess punitive damages against the signer of legal pleadings. *People v. Herrera (On Remand),* 204 Mich. App. 333 (1994). *Compare*, *Wells v. Department of Corrections*, *et al*, 447 Mich. 415 (1994), where the Michigan Supreme Court held that while it is proper to waive fees and costs to allow an indigent plaintiff to litigate a dispute, that party must bear any resulting adverse judgment, together with appropriate taxed costs under Mich. Ct. R. 2.625, if she or he does not prevail.

A defendant alleging a violation of the right to counsel in a prior conviction, now being used for repeat offender sentencing purposes, satisfies the "good cause" and "actual prejudice" requirement of Mich. Ct. R. 6.508(D)(3), as a violation of the right to counsel is a jurisdictional defect. *People v. Carpentier*, 446 Mich. 19 (1994).

Where defendant's appeal of right was resolved by an opinion which did not remand or leave open any issues for resolution on remand, defendant's subsequent motions for new trial on claims of ineffective assistance of counsel were reviewable only as a motion for relief from judgment, Mich. Ct. R. 6.501, and not as continuations of the appeal of right. As defendant could appeal denial of the motions by leave only, he was not entitled to appointed counsel. However, since the trial court appointed counsel to handle a hearing on the ineffective assistance claim, the order of appointment authorized, but did not require, that attorney to represent defendant on an application for leave to the Court of Appeals. Mich. Ct. R. 6.509(B). *People v. Kincade (On Remand),* 206 Mich. App. 477 (1994).

After an unsuccessful appeal of right, defendant filed a motion for relief from judgment, which the trial court granted on all three counts, finding an instructional error as to one of the charges. Since the motion claimed errors which could have been raised in defendant's appeal of right, but were not, he failed to show good cause why he had not raised the issues earlier and that actual prejudice resulted from the errors; thus, the motion was improperly granted. *People v. Brown*, 196 Mich. App. 153 (1992).

Where defendant absconded on appeal bond, resulting in a no-progress dismissal for his appeal of right, he could not subsequently withdraw his no contest plea on the basis of an allegedly illusory plea agreement, since he failed to demonstrate either good cause for failing to raise the issue earlier or actual prejudice from the alleged error. Mich. Ct. R. 6.508(D)(3), *People v. Watroba*, 193 Mich. App. 124 (1992).

Because the statutory sentencing guidelines apply in a case of first-degree criminal sexual conduct where the defendant was also subject to a mandatory minimum sentence of 5 years as a second sexual offender, the trial court erred in not using the guidelines in determining the minimum sentence. The failure of appellate counsel to raise the claim on direct appeal may satisfy the good cause requirement of Mich. Ct. R. 6.500 *et seq*, and imposition of an invalid sentence can satisfy the actual prejudice requirement. The record is unclear whether the actual sentence imposed is a departure from the guidelines or within the guidelines. If it is a departure, then the defendant has established good cause and prejudice and the trial court erred in denying his motion for relief from judgment. On remand, the trial court shall make that determination and resentence the defendant if the sentence constitutes a departure. *People v. Walton*, unpublished opinion of 06-03-08 (Court of Appeals #276161).

The trial court abused its discretion in denying the defendant's motion for relief from judgment where the record reflected that he was sentenced without every having pled guilty to violating probation which is a jurisdictional defect because the trial court exceeded its authority as a matter of jurisdiction, and the defendant is therefore not required to demonstrate good cause. *People v. Chambers*, unpublished opinion of 02-26-08 (Court of Appeals #274249).

POST-TRIAL MOTIONS AND APPEALS--New Trial

NOTE: M.C.L. 770.16 provides for post-conviction DNA testing for a prisoner convicted at trial prior to the Act's effective date of January 08, 2001. A prisoner's petition for DNA testing and a new trial must be filed in the sentencing court by January 1, 2012. The Act requires investigating law enforcement agencies to preserve any identified biological material for which a petition could be filed under the Act.

The court must order DNA testing if the defendant presents prima proof that the biological evidence is material to the identity of the perpetrator of the crime and the defendant establishes by clear and convincing evidence that;

- ***a sample of biological evidence is available for testing, and***

- ***the sample was not previously tested for DNA or if it was, that it will be subject to a test not available when the defendant was convicted, and***

- ***that the defendant's identity as the perpetrator was in issue at trial.***

If the court grants the petition for testing, the biological material must be subjected to testing by a laboratory approved by the court. If the defendant is found to be indigent, the State bears the cost of DNA testing. The court must deny the motion for new trial if test results are inconclusive or show that defendant is the source of the biological material.

If test results show that defendant is not the source of the biological material, the court is required to appoint counsel pursuant to Mich. Ct. R. 6.505(A) and hold a hearing to determine by clear and convincing evidence all of the following;

outcome, and instead found that "the district court erred when it construed Petitioner's letter as a Rule 60(b) motion and denied it. Rather than bar Petitioner from all federal habeas review despite his timely filings, the district court should have construed the letter as a re-filed habeas petition," and should have permitted the consideration of all exhausted claims.

iv) Tolling the Clock with a 6.500 Motion

Subsection 28 U.S.C. 2244(d)(2) provides that 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." In Michigan, this means that a properly-filed 6.500 motion will stop the habeas clock from running. For any attorney planning to file a habeas petition after exhausting a 6.500 motion, there are five critical points to remember.

First, filing a 6.500 motion will **stop** the one-year clock, but will not **reset** it. Unfortunately, many prisoners and some attorneys have misread subsection (d)(2) as providing one year to file the petition after the final denial of a state post-conviction appeal. The filing of a 6.500 motion will stop the clock, and it will remain stopped as long as the 6.500 motion is pending in the Michigan courts, but the clock will begin to run again as soon as the motion is finally denied. *See Allen v. Yukins*, 366 F.3d. 396 (6th Cir. 2004).

To take a concrete example, assume that a prisoner filed a 6.500 motion in the trial court eight months after the conclusion of his direct review (which occurred, as discussed above, 90 days after the Michigan Supreme Court denies his appeal if he does not file a certiorari petition). His one-year habeas clock will remain stopped at eight months while the trial court, the Michigan Court of Appeals, and the Michigan Supreme Court consider the 6.500 motion. That habeas clock will begin running again the day that the Michigan Supreme Court finally denies the 6.500 motion. (A motion for rehearing from the Michigan Supreme Court decision will toll the time for filing the habeas petition. *Sherwood v. Prelesnik*, 579 F.3d. 581 (6th Cir. 2009)). The Sixth Circuit had held in *Abela v. Martin*, 348 F.3d. 164 (6th Cir. 2003), that the prisoner would have an extra 90 days after the denial

of the 6.500 motion before the clock would start running again, but the Supreme Court rejected that view in *Lawrence v. Florida*, 127 S. Ct. 1079 (2007). In *Lawrence*, the Court held that the habeas clock immediately begins running after the state supreme court denies a post-conviction motion, even if the prisoner files a certiorari petition from that denial.

NOTE: The Sixth Circuit found equitable tolling was warranted where a petitioner had timely filed a petition under the terms of Abela prior to the decision in Lawrence. Henderson v. Luoma, 6th Cir. Docket No. 05-2542 (Nov. 26, 2008); see also Sherwood, supra (same). Equitable tolling is discussed in section 2-2-a(v), infra.

In other words, if the prisoner wishes to file a certiorari petition to challenge the Michigan courts' decision on his or her 6.500 motion, he or she cannot wait for the Supreme Court's decision on that certiorari petition to also file a habeas petition, even if the habeas and certiorari petitions will raise the exact same issue. The one-year habeas clock, which was stopped when the 6.500 motion was filed in the trial court, begins running again the day the Michigan Supreme court denies the motion, and *Lawrence* confirms that filing a certiorari petition will not stop it again.

Second, a 6.500 motion will toll the clock even if it only involves issues that will not be raised in the future habeas petition. *Cowherd v. Million*, 380 F.3d. 909 (6th Cir. 2004) (en banc). Therefore, a petitioner who may have strong state-law grounds for relief is not forced to file a habeas corpus petition before exhausting those state-law grounds for relief in a 6.500 motion. Instead, the petitioner can now file a 6.500 motion on any grounds relating to the original judgment of conviction and sentence, and the habeas clock will remain tolled as long as the 6.500 motion is pending in state court.

Third, a 6.500 motion tolls the clock only when it is "properly filed." Fortunately, the United States Supreme Court has given a broad interpretation to that term:

> An application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the

> document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee . . . . But in common usage, the question whether an application has been "properly filed" is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar.

Artuz v. Bennett, 531 U.S. 4 (2000). After *Artuz*, a 6.500 motion will be deemed not "properly filed" only if it is sent to the wrong court, is untimely, or is so defective on its face that the clerk will not file it. In such situations, the attempted filing of the 6.500 motion will not stop the habeas clock. The clock will be stopped, of course, when the defects are cured and the motion is successfully filed.

Of the defects that would render a 6.500 motion not "properly filed" after *Artuz*, the most troublesome is timeliness. For example, a finding that the state post-conviction motion for relief from judgment was not properly filed due to untimeliness will not toll the statute of limitations for the habeas clock. This is true even if the untimeliness is not a jurisdictional basis for the dismissal in the state court. *Allen v. Siebert*, 552 U.S. 3 (2007). In *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), the Court held that the habeas clock was not tolled during the pendency of a state post-conviction motion that the state appellate court eventually determined was untimely even though it took the state courts nearly two years to reach that conclusion. In other words, it is not enough that a clerk accepts a 6.500 motion for filing; if the state courts eventually determine that the 6.500 motion is untimely, the habeas clock was never stopped. In *Pace*, that meant that the petitioner could not file a habeas petition because his entire habeas clock had expired by the time the state appellate court concluded that his state post-conviction motion was untimely.

A second Michigan 6.500 motion also would not generally be "properly filed," since Michigan law allows the filing of only one 6.500 motion in the absence of certain circumstances. In *Williams v. Birkett*, 670 F.3d. 729 (6th Cir. 2012), the court found that because a second 6.500 motion "cannot even be initiated or

considered" by the Michigan courts, this situation is controlled by *Pace* rather than *Artuz*. (The court remanded for a finding on equitable tolling, and the district court later found that equitable tolling was appropriate because the petitioner suffered from learning disabilities misunderstood the state postconviction review process. 895 F. Supp. 2d 864 (E.D. Mich. 2012)).

The Court in *Pace* did suggest a course of action that a petitioner might follow to avoid such a harsh result. A petitioner who wishes to file a state post-conviction motion that might ultimately be ruled untimely could protect himself by filing a "protective" habeas petition in federal district court and then asking the federal court to "stay and abey" the habeas petition while the state post-conviction motion proceeds. *See also Rhines v. Weber*, 544 U.S. 269 (2005) (describing when such relief is appropriate).

Filing such a "protective" habeas petition in federal court might be a very good idea before proceeding with a 6.500 motion because the petitioner is almost entirely at the mercy of the state court as to whether the 6.500 motion is timely or otherwise "properly filed." In deciding whether a 6.500 motion was "properly filed," the federal courts will generally defer to the state court's determination that the motion was or not properly filed. *See Vroman v. Brigano*, 346 F.3d. 598 (6th Cir. 2003) (refusing to review Ohio court's conclusion that state post-conviction motion was untimely); *but see Walker v. Smith*, 360 F.3d. 561 (6th Cir. 2004) (concluding 6.500 motion must have been properly filed despite absence of docket entry indicating filing, since state court actually decided motion).

Fourth, only a 6.500 motion or other *state* collateral relief proceeding will stop the habeas clock. Collateral review is defined as "judicial reexamination of a judgment or claim in a proceeding outside of the direct review process." *Wall v. Kholi*, 562 U.S. ___; 131 S. Ct. 1278 (2011). For example, a post-conviction motion to reduce a sentence will toll the time for filing a habeas petition. *Id*.

A prior federal habeas petition, however, will not toll the time. *Duncan v. Walker*, 533 U.S. 167 (2001). Thus, if a prisoner filed a federal habeas petition which was later dismissed for failure to exhaust a claim in state court, the time the habeas

petition was pending in federal court *will count* against the prisoner's one-year clock. *See Palmer v. Carlton*, 276 F.3d. 777 (6th Cir. 2002); *Griffin v. Rogers*, 308 F.3d. 647 (6th Cir. 2002).

However, the Sixth Circuit has mitigated the harshness of this rule by recognizing that "equitable tolling" may be appropriate under these circumstances. In *Palmer* and *Griffin*, the court held that a district court should apply equitable tolling to accept a habeas petition that would have been timely but for the time lost while an earlier unexhausted petition was pending in federal court before dismissal, but only if the petitioner either: (1) re-filed the petition with the unexhausted claims omitted within 30 days of the dismissal; or (2) filed a state post-conviction motion on the unexhausted claims within 30 days of the dismissal and re-filed the petition in federal court within 30 days of the denial of state post-conviction relief on the unexhausted claims.

Griffin and *Palmer* give hope to petitioners whose habeas clocks expired while their unexhausted petitions were pending in federal court. However, those cases make clear that such petitioners must move very quickly after the dismissal to either exhaust the unexhausted claims or re-file the petition without the unexhausted claims.

Fifth, the habeas clock will remain tolled as long as the defendant is pursuing his or her post-conviction motion through the state courts. In *Carey v. Saffold*, 536 U.S. 214 (2002), the Court held that the habeas clock remained tolled during the time gaps between a lower state court's denial of the defendant's post-conviction motion and his timely filing of an appeal to the next highest state court. The Sixth Circuit applied *Carey* to the Michigan post-conviction system in *Matthews v. Abramajtys*, 319 F.3d. 780 (6th Cir. 2003), and held that the gap between the trial court's denial of the defendant's 6.500 motion and his filing of an application for leave to appeal to the Michigan Court of Appeals did not count against his one-year habeas clock. *See also Spytma v. Howes*, 313 F.3d. 363 (6th Cir. 2002).

A few lessons emerge from these rules. First, if it is necessary to file a 6.500 motion in order to exhaust a federal issue, the motion should be filed as soon as possible after the conclusion of direct review. If, for example, a prisoner waits

eleven months from the conclusion of direct review before filing a 6.500 motion in the trial court, the habeas petition will have to be written and filed within one month of the Michigan Supreme Court's denial of the 6.500 motion. Even worse, if such a 6.500 motion is fatally defective or untimely, the one-year habeas clock may expire completely before a corrected motion can be filed or even before the untimely motion is dismissed. Second, if a prisoner does file a 6.500 motion within the one-year habeas period, it is critical that he or she keep track of the 6.500 motion's progress through the Michigan courts, timely appeal all the way to the Michigan Supreme Court, and recognize that the habeas clock will start running again the day the Michigan Supreme Court denies relief. Third, the habeas petition itself should be filed as soon as practicable during the one-year period so that if the petition is dismissed for lack of exhaustion or another defect, it may still be possible to refile within the one-year limit.

v) Equitable Tolling

If the habeas petition is untimely, the petitioner may argue that it should nevertheless be considered under the doctrine of "equitable tolling."

Because the AEDPA statute of limitations is not jurisdictional, *Day v. McDonough*, 547 U.S. 198 (2006), the Supreme Court has explicitly held that it allows for equitable tolling in appropriate circumstances. *Holland v. Florida*, 560 U.S. 631 (2010).

Also because the statute of limitations is not jurisdictional, it is not "an inflexible rule requiring dismissal whenever" its "clock has run," and can be waived by the state. *Day, supra*. Even though it can be waived by the state, it need not be in order for a district court to dismiss an untimely petition on its own initiative. Federal courts are "permitted, but not obliged, to consider, sua sponte, the timeliness of a state prisoner's habeas petition," such as where a state has miscalculated the statute. *Id*. But a federal court may only do so where the state *forfeits* the argument (i.e., fails to raise it); the federal court cannot dismiss an untimely petition where the state has *acknowledged* the untimeliness and indicated its desire to knowingly *waive* the issue. *Wood v. Milyard*, ___ U.S. ___; 132 S. Ct. 1826 (2012) (holding that the Tenth Circuit abused its discretion by dismissing a

While filing a motion to remand under Mich. Ct. R. 7.211(C)(1) is an alternative, such motions are often denied. However, once the 56 days have elapsed, the motion to remand becomes the only way to bring the motion for new trial before the trial court.

A claim that the verdict is against the great weight of evidence must be addressed first at the trial court level. *People v. Turner*, 62 Mich. App. 467 (1975). A judge may grant a new trial on the claim only where there exists overwhelming evidence against the verdict which will result in a miscarriage of justice, such as where a real concern exists that an innocent person has been convicted or where the testimony contradicts indisputable physical facts or law. *People v. Lemmon*, 456 Mich. 625 (1998). A sample motion is provided at the end of this chapter.

(2) Motion for Relief from Judgment (Mich. Ct. R. 6.500 *et seq*)

The "6.500 Motion" offers a procedure for post-appeal challenges of criminal convictions or sentences. This mechanism is designed for those who have exhausted an appeal of right or by leave, or who have missed filing deadlines. Because with limited exceptions only one motion for relief from judgment may be filed, such a motion should never be filed until an appeal of right or by leave has been exhausted or not taken in a timely manner. No timing deadline is specified for the filing of a motion for relief from judgment, but petitioners and counsel must take care to avoid a procedural default in any future federal court proceeding. The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) requires that a federal action be filed within one year of the case being final on appeal in a state court. For guidance, practitioners should consult the *Defender Habeas Book* (CDRC, 2013).

After August 1, 1995, only one motion for relief from judgment may be filed by any defendant, subject to two exceptions set out in Mich. Ct. R. 6.502(G)(2) for retroactive changes in the law and newly discovered evidence [**Note**: the courts have differentiated between "newly-discovered" evidence and "newly-available" evidence. *See People v. Terrell*, 289 Mich. App. 553 (2010) (the Court of Appeals -- in a involving belated exculpatory of a codefendant -- held, consistent with the majority of federal circuits, that "a codefendant's posttrial or postconviction testimony does not constitute newly discovered evidence sufficient to warrant a new trial when the defendant was aware of the evidence before trial").,

Counsel must make sure to raise all possible issues in the client's single filing. Mich. Ct. R. 6.502 and 6.508 prescribe the procedural requirements and grounds for filing and for succeeding in a motion for relief from judgment.

The combined length of a defendant's motion and memorandum may not exceed 50 pages. Mich. Ct. R. 6.502 (amended eff. 9-1-06). There is no hearing on the motion, unless so ordered by the court.

The issues you are most likely to encounter upon reinvestigation of the case, which will be framed in your 6.500 motion will be violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and ineffective assistance of counsel. The Michigan standard of substantive review for the withholding of exculpatory material is the same as the federal standard. *United States v. Agurs*, 427 U.S. 97 (1976); *Kyles v. Whitley*, 514 U.S. 419 (1995); *People v. Losey*, 98 Mich. App. 189 (1980), *rev'd on other grds* 413 Mich. 346 (1982).

The Michigan substantive standard of review for ineffective assistance of counsel is the same as the federal standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Harris*, 201 Mich. App. 147, 154 (1993); *People v. Pickens*, 446 Mich. 298 (1994). Ineffective assistance of counsel should be litigated in the trial court in post-conviction proceedings (6.500) so that a record can be developed on this issue, either by affidavits or testimony at a hearing.

Ineffective assistance of prior appellate counsel must also be litigated in most cases to meet the "good cause" requirement of Mich. Ct. R. 6.508, for not having raised the substantive issues in a prior appeal. *See e.g.*, *People v. Swain*, 288 Mich. App. 609, 631 (2010), and *People v. Gardner*, 482 Mich. 41, 50 n 11 (2008).

Two sample 6.500 motions accompany this chapter; the format of the first motion is somewhat generic, and the second sample is a more-detailed and fact-specific SADO pleading. This sample motion references a separate memorandum of law and a set of exhibits, but due to space constraints, those are not reproduced in this manual. Because there is no "right" to a hearing, the only facts there may be in the record are those that entered through your exhibits and all affidavits. The State Court Administrative Office has also published a form motion for relief from judgment; a copy of the form is provided in this chapter. **Note**: that if appeal is required from a

denial of a motion for relief from judgment, the procedure is an application for leave to appeal, filed in the Court of Appeals, and there is a six month time-limit for filing the application from the denial of the motion. M.C.R. 6.509(A) and M.C.R. 7.205(F)(3).

(3) Motion to Remand

A motion to remand may be appropriate once jurisdiction has vested in the Court of Appeals (remember, filing a motion for new trial within 56 days after the time for filing a brief has begun to run is generally preferable). Motions to Remand present issues which should first be decided by the trial judge, such as newly discovered evidence, or issues which require development of an evidentiary record, such as ineffective assistance of counsel.

Remand motions must be accompanied by an affidavit or offer of proof of facts, clearly and with specificity supporting the issue(s) to be explored on remand. Mich. Ct. R. 7.211(C)(1)(a). Motions for Remand must be filed within the time provided for filing the appellant's brief. Mich. Ct. R. 7.211(C)(1)(a).

Jurisdiction is retained by the Court of Appeals, but appellate counsel may still request a new trial at the trial court level if supported by the record established on remand. If the trial court indicates it would grant a new trial, counsel may stipulate to dismissal of the appeal.

24-2-c Removal from SORA, or for Alternate Registration

Although the registration requirements of the Sex Offenders Registration Act (SORA), are broad in scope, and contain a catch-all provision [*see* M.C.L. 28.723, M.C.L. 28.722(e)(i)-(xiv)], there is some support for a constitutional challenge to the registration requirements. In *People v. DiPiazza*, 286 Mich. App. 137 (2009), the Court of Appeals held that it was cruel and unusual punishment for a defendant, who had been sentenced before October 1, 2004, under the Holmes Youthful Trainee Act for attempted third-degree CSC, to be required to register on the SORA, where the defendant had engaged in consensual sexual relations in the course of a "Romeo and Juliet" relationship. The SORA generally requires a twenty-five year registration, but for those required to be registered under HYTA prior to October 1, 2004, there are statutory provisions allowing for an alternative ten-year registration period. *See* M.C.L. 28.728c(1) and M.C.L. 28.728d. Such

24.2.b.3 Motion for Relief From Judgment (6.500 Motion)

STATE OF MICHIGAN
IN THE DISTRICT OR CIRCUIT COURT FOR THE COUNTY OF NAME OF COUNTY

_____

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs **No. docket number**
Hon. judge's name

DEFENDANT'S NAME,

Defendant.
_____/

MOTION FOR RELIEF FROM JUDGMENT

The Defendant, defendant's name, by his or her counsel, moves this Court to set aside or modify the judgment in this case pursuant to Michigan Court Rule 6.500 and the following:

1. Defendant's name was convicted of offense following a jury or bench trial in criminal case number docket number. The trial was held in the district or circuit for the County of name of county, the Honorable judge's name presiding.

2. Defendant's name was sentenced on date, to sentence. Defendant's name is presently serving that sentence at the name correctional facility in the State of Michigan.

3. A timely notice of appeal was filed, and the Michigan Court of Appeals affirmed Defendant's name conviction on date. Defendant's name was represented by defense attorney's name, indicate if appointed or retained.

4. At this time, defendant's name moves this Court to set aside or modify the judgment, and to grant a new trial in the case.

5. None of the bars against relief from judgment are present:

(a) Defendant can no longer proceed directly by appeal by leave since more than 12 months have elapsed from judgment. Mich. Ct. R. 6.508(D)(1). The judgment may only be reviewed in accordance with Mich. Ct. R. 6.500 *et seq*. Mich. Ct. R. 6.502 authorizes a motion for relief from judgment.

(b) Defendant has not previously raised these claims in post-conviction proceedings, and the grounds for relief have never been decided against him on the merits. Mich. Ct. R. 6.508(D)(2).

(c) These issues could have been raised on appeal, Mich. Ct. R. 6.508(D)(3), but Defendant submits that he is entitled to relief because he had good cause for failure to "properly" raise these issues on appeal, Mich. Ct. R. 6.508(D)(3)(a); namely, ineffective assistance of appellate counsel. *See e.g., People v. Reed*, 449 Mich. 375 (1995); *People v. Hardaway*, 459 Mich. 878 (1998); *People v. Kimble*, 470 Mich. 305 (2004).

6. This motion is based upon numerous violations of defendant's name Constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Sections Seventeen and Twenty of the Michigan Constitution. Specifically, defendant's name rights were impermissibly infringed where the prosecution:

State grounds for relief, such as:

a. Failed to properly disclose, and then destroyed, exculpatory physical evidence (see Section I, accompanying Memorandum);

b. Failed to properly disclose exculpatory evidence regarding prior arrests and convictions of the decedent, and (see Section I, accompanying Memorandum);

c. Engaged in prosecutorial misconduct by suggesting that the jurors conduct their own investigation (see Section II, accompanying Memorandum).

7. Moreover, Defendant's name rights were impermissibly infringed where:

a. Court-appointed trial counsel provided ineffective assistance by failing to request a jury instruction which corresponded to the evidence presented by the defense (see, Section III, accompanying Memorandum);

b. Court-appointed trial counsel provided ineffective assistance by failing to make timely objections to repeated prosecutorial misconduct (*see*, Section III, accompanying Memorandum);

c. Court-appointed trial counsel provided ineffective assistance by failing to conduct basic pre-trial investigation (*see*, Section III, accompanying Memorandum), and;

d. Court-appointed appellate counsel provided ineffective assistance by neglecting to raise on direct appeal the ineffectiveness of trial counsel. (*See*, Section III, accompanying Memorandum)

8. The factual and legal basis behind each of these claims is set forth in the accompanying Memorandum of Law. Defendant submits that he has demonstrated "actual prejudice" in that but for the alleged errors, he would have had a reasonably likely chance of acquittal. Mich. Ct. R. 6.508(D)(b)(i).

For these reasons and those set forth in the accompanying Memorandum, defendant's name asks that this Court grant relief from judgment and set aside or modify the judgment in this case.

Respectfully submitted,

By: _____
Defense attorney's name (bar number)
Attorney for Defendant
Address
Address
Telephone

Date: filing date

Approved, SCAO

Original - Court
1st copy - Prosecutor

2nd copy - Defendant
3rd copy - Defendant attorney

STATE OF MICHIGAN JUDICIAL CIRCUIT COUNTY	MOTION FOR RELIEF FROM JUDGMENT	CASE NO.

ORI
MI-

Court address

Court telephone no.

THE PEOPLE OF THE STATE OF MICHIGAN

v

Defendant name, address, and inmate no.

To be completed by the court.

CTN/TCN	SID	DOB

INSTRUCTIONS: Answer each question as completely as you can. If you need more space to answer any question, you may attach extra pages. You may also attach documents, affidavits, or a brief, if you wish. Only one motion for relief may be filed, except as indicated in MCR 6.502(G)(2). Information for items 1 and 2 is on both your judgment of sentence and basic information sheet, which are available at the prison record office.

1. I was found guilty on _____ (Date) of the crime(s) stated below.

Count	CONVICTED BY Plea*	CONVICTED BY Court	CONVICTED BY Jury	DISMISSED BY*	CRIME	CHARGE CODE(S) MCL citation/PACC Code

*For plea: insert "G" for guilty plea, "NC" for nolo contendere, or "MI" for guilty but mentally ill. For dismissal: insert "D" for dismissed by court or "NP" for dismissed by prosecutor/plaintiff.

2. I was sentenced as stated below by Hon. _____ (Name of judge) .

Count	SENTENCE DATE	MINIMUM Years	MINIMUM Mos.	MINIMUM Days	MAXIMUM Years	MAXIMUM Mos.	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	JAIL CREDIT Days	OTHER INFORMATION

3. Fill in the charts below with the information requested about the court proceedings in your case and the names of the attorneys who represented you.

a. **Trial Level - All Proceedings.** From arrest to sentencing, including lineups and other proceedings.

NAME OF PROCEEDING	NAME OF ATTORNEY

NAME OF PROCEEDING	NAME OF ATTORNEY

b. **Postconviction - All Proceedings.** State and federal, including appeals, posttrial motions, and habeas petitions.

COURT	DOCKET NO.	NAME OF PROCEEDING	NAME OF ATTORNEY	RESULT	DATE OF RESULT

(Continued on the other side.)

4. **Appointment of Counsel.** Do you want an attorney appointed? ☐ Yes ☐ No If yes, complete and attach a financial schedule.

5. **Grounds and Relief.**

a. What action do you want the court to take? _____

_____

b. What are the legal grounds for the relief you want? **You must raise all the issues you know about.** You may not be allowed to raise additional issues in the future. Use extra sheets of paper, if necessary.

ISSUE ONE: _____

_____

Supporting facts: _____

_____

ISSUE TWO: _____

_____

Supporting facts: _____

_____

ISSUE THREE: _____

_____

Supporting facts: _____

_____

ISSUE FOUR: _____

_____

Supporting facts: _____

_____

I declare that the statements above are true to the best of my information, knowledge, and belief.

_____ _____

Date Signature

PROOF OF SERVICE

I certify that on this date I served a copy of this motion upon the prosecutor by ☐ personal service. ☐ first-class mail.

_____ _____

Date Signature

Approved, SCAO

Original - Court
1st copy - Defendant
2nd copy - Appointed attorney

STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT	REQUEST FOR COURT-APPOINTED ATTORNEY AND ORDER	CASE NO.

ORI
MI-

Court address

Court telephone no.

THE PEOPLE OF
☐ The State of Michigan
☐ _____

v

Defendant name, address, and telephone no.

CTN	SID	DOB

REQUEST

The defendant requests a court-appointed attorney and submits the following information.

1. **CHARGE** ☐ Misdemeanor ☐ Felony ☐ Paternity
Next hearing: _____ Date
Bail amount: $ _____ ☐ Bond posted

2. **RESIDENCE** ☐ Rent ☐ Own ☐ Live with parents ☐ Room/Board

3. **MARITAL STATUS** ☐ Single ☐ Married ☐ Divorced ☐ Separated ☐ Dependents: _____ Number

4. **INCOME** Employer name and address

Length of employment

Average take-home pay $ _____
☐ weekly ☐ monthly ☐ every two weeks

Other Income State monthly amount and source (DSS, VA, rent, pensions, spouse, unemployment, etc.).

5. **ASSETS*** State value of car, home, bank deposits, inmate accounts, bonds, stocks, etc.

6. **OBLIGATIONS*** Itemize monthly rent, installment payments, mortgage payments, child support, etc.

7. **CONTRIBUTION TOWARD ATTORNEY COSTS**

I understand that I may be required to contribute to the cost of an attorney.

Date: _____ Signature: _____

*Use reverse side for additional information/comments.

ORDER

☐ 8. _____ is appointed to represent the defendant.
Name Bar no.

☐ 9. The petition is denied because: _____

District Court Endorsement (felony cases only)

_____
Date

_____
Judge Bar no.

_____
Date

_____
Judge Bar no.