

Michigan Appellate Assigned Counsel System

MAACS Annual Orientation

October 14, 2015

Knowing Your Appellate Deadlines – Court Rules and Procedure

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Michigan Indigent Defense Commission

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**This training event is supported through a generous grant from the
Michigan Commission on Law Enforcement Standards**

Knowing Your Appellate Deadlines

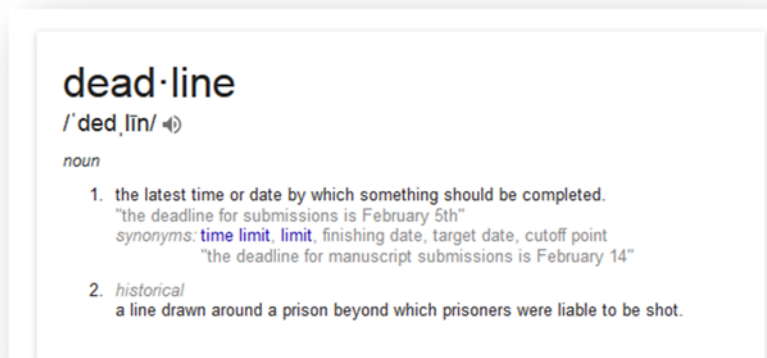
Court Rules and Procedures

Marla R. McCowan

Michigan Indigent Defense Commission

Fall 2015

1. What is a deadline?



2. How do I calculate a deadline [*any* deadline]?

a. Begin with your order/judgment or date on proof of service.

MCR 1.108 Computation of Time

In computing a period of time prescribed or allowed by these rules, by court order, or by statute, the following rules apply:

- (1) The day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order.
- (2) If a period is measured by a number of weeks, the last day of the period is the same day of the week as the day on which the period began.
- (3) If a period is measured by months or years, the last day of the period is the same day of the month as the day on which the period began. If what would otherwise be the final month does not include that day, the last day of the

period is the last day of that month. For example, "2 months" after January 31 is March 31, and "3 months" after January 31 is April 30.

b. You can also check the COA Internal Operating Procedures:

<http://courts.mi.gov/Courts/COA/clerksoffice/Documents/COA%20Clerk%20IOPs.pdf>

IOP 7.202-2 - Time Requirements

The time for filing any time-sensitive document is calculated pursuant to the dictates of MCR 1.108, Computation of Time. While the rule itself should be consulted by anyone making filings in the Court, it may be summarized by noting that (1) the first day of the pertinent time period is the day after the day of the act or event which triggers the time to begin running, and (2) the last day of the pertinent time period is included, unless it is a Saturday, Sunday, legal holiday, or day on which the Court is closed pursuant to court order, in which case the time ends on the next day that the Court is open. Saturdays, Sundays, etc., that fall within the time period (e.g., not on the last day) are counted the same as any other day. Although Lincoln’s Birthday (February 12) and Columbus Day (2nd Monday in October) are not “court holidays” under MCR 8.110(D)(2), any filings/papers due on those days will be considered timely if received the next business day. See MCR 1.108; MCL 435.101. (Revised 10/13.)

When the time for filing runs from the service of another filing, it is important to note that service by mail is complete at the time of mailing under MCR 2.107(C)(3). The clerk’s office will use the date of mailing on the proof of service to calculate the due date for any responsive pleading. (Revised 9/03.)

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Court of Appeals time calculator:

<http://courts.mi.gov/courts/coa/pages/time-calculator.aspx>

c. If you are e-filing, consult the most recent online materials:

http://courts.mi.gov/opinions_orders/e-filing/Documents/TrueFiling%20Frequently%20Asked%20Questions.pdf

By what time does a document need to be e-filed to be considered filed that day?

A filing received by 11:59 pm on a business day is considered filed that business day under MCR 7.202(2). A filing received on a weekend or holiday is considered received on the next business day.

Is technical support available?

For any technical support issues, you should contact TrueFiling Support at 855-959-8868 or by emailing support@truefiling.com. Technical Support is available Monday through Friday, from 8:00 am to 9:00 pm ET except on US holidays.

3/3/2015

Page 1

3. Ok, but is it REALLY a deadline?

The short answer is, if it is circled in **RED** on the appellate timeline, yes.

If you are still not sure: "Ask dumb questions. Ask them again if necessary. If possible, ask them early."¹ There are some deadlines where you can ask for an extension of time, with the most common example being a brief on appeal in a claim case/appeal of right. See MCR 7.212(A). But in the Court of Appeals, many deadlines are "jurisdictional" in nature, meaning if you do not file by the required deadline, the ability to appeal is over. This is particularly true when seeking something *other than* an appeal of right. See *e.g.* MCR 7.205(G).

4. Why are deadlines on appeal so important to understand?

The constitution provides not only the right to counsel, but also entitles a criminal defendant to the effective assistance of counsel. *Powell v. Alabama*, 287 U.S. 45 (1932);

¹ "An appellate dictionary for non-appellate attorneys", *The Prosecutor*, Texas District & County Attorneys Association, The Prosecutor, May-June 2010, Volume 40, No. 3.

Strickland v. Washington, 466 U.S. 668, 685 (1984). The Sixth Amendment right to the effective assistance of counsel also includes the right to effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387, 395-97 (1985); see also *Halbert v. Michigan*, 545 U.S. 605 (2005) (constitutional right to counsel in first tier appeal by leave). Counsel renders ineffective assistance by failing to file a brief on appeal or application for leave to appeal in a timely manner. See e.g. *Curry v. Stovall*, 2009 WL 1393397 (E.D. Mich. Docket No. 07-14695, May 18, 2009) (appeal of right); *Bridges v. Berghuis*, No. CIV.A. 06-CV-10566, 2009 WL 2488098 (E.D. Mich. Aug. 13, 2009) (appeal by leave). No showing of prejudice is required for such failures and the remedy is to reinstate the appeal. *Benoit v. Bock*, 237 F. Supp. 2d 804, 812 (E.D. Mich. 2003).

5. How do I figure out the deadline in a particular case?

Get out the **appellate timeline**, and ask yourself these questions:

Upon receiving notification of an appellate assignment:

- Q Is it a guilty plea?
Or is it an appeal after a trial?
Or is it an interlocutory appeal?

- Q Am I substitute counsel and/or has a deadline for filing passed?

For trials:

- Q Is it an appeal of right?
Receiving file materials and calculating the due date
 - Q Did you get trial counsel's file?Ordering late transcripts
MCR 7.208 – trial court motions
Brief on Appeal and/or Motion to Remand
Motion for extension of time for filing BOA
Extraordinary extensions of time

- Q Or is it an appeal by leave?
6.428 Rule/Reinstatement possible?
If not, proceed on application (MCR 7.205).
If leave is granted, see MCR 7.211 and 7.212

For guilty plea cases:

- Q What is the date on the judgment of sentence?

- Q Do you need/want to go to the trial court first?

- Q What is the deadline for filing in the COA if you are denied relief (in whole or in part) in the trial court?

For Interlocutory Appeals (appointed on appeal in prosecutor initiated appeal)

- Q Do you *have to* respond to an application? What *should you* do?
And when does the have/should question end?
- Q Is leave granted? See MCR 7.212(A)(2)(a)(i).

6. What if the appellate deadline is blown...

a. and it isn't my fault?

MCR 6.428 Reissuance of Judgment.

If the defendant did not appeal within the time allowed by MCR 7.204(A)(2) and demonstrates that the attorney or attorneys retained or appointed to represent the defendant on direct appeal from the judgment either disregarded the defendant's instruction to perfect a timely appeal of right, or otherwise failed to provide effective assistance, and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right, the trial court shall issue an order restarting the time in which to file an appeal of right.

Note that this rule generally only applies in appeals of right. Depending upon the circumstances, you may be able to use in a leave case. Consult the MAACS Administrator for guidance.

b. and it IS my fault?

Consult the MAACS Administrator for guidance immediately. Be prepared to file the necessary motion in the trial court to have the judgment re-issued pursuant to MCR 6.428 if applicable. Be prepared to simultaneously seek to withdraw as counsel and have new counsel appointed for the defendant.

7. Is there always a deadline?

Motions to Remand – Pursuant to MCR 7.211(C)(1), a motion to remand is supposed to be filed within the time for filing appellant's brief. This is absolutely best practice, but sometimes evidence comes up after the brief is filed. Note that the Court of Appeals may order remand for an evidentiary hearing at any time. MCR 7.216(A)(5); *see also*

People v LaPlaunt, 217 Mich App 733 (1996); *People v James Edward Walker*, Docket No. 289323, Order of December 22, 2009; *People v Krogol*, 419 Mich 900 (1984); *People v Mayes*, 433 Mich 894 (1989).

8. Are there any deadlines to know that aren't exactly MY deadlines, but....?

MAACS Minimum Standards - Standard 4 in trial (and leave?) cases

Pro Per briefs

Minimum Standards for Indigent Criminal Appellate Defense Services, Admin. Order 2004-6, Standard 4.

"When a defendant insists that a particular claim or claims be raised on appeal against the advice of counsel, counsel shall inform the defendant of the right to present the claim or claims *in propria persona*. Defendant's filing shall consist of one brief filed with or without an appropriate accompanying motion. Counsel shall also provide such procedural advice and clerical assistance as may be required to conform the defendant's filing for acceptability to the court. The defendant's filing *in propria persona* must be received by the Court of Appeals within **84 days after the appellant's brief** is filed by the attorney, but if the case is noticed for submission within that 84-day period, the filing must be received no later than 7 days before the date of submission, or within the 84-day period, whichever is earlier. The 84-day deadline may be extended only by the Court of Appeals on **counsel's motion**, upon a showing of good cause for the failure to file defendant's pleading within the 84-day deadline."

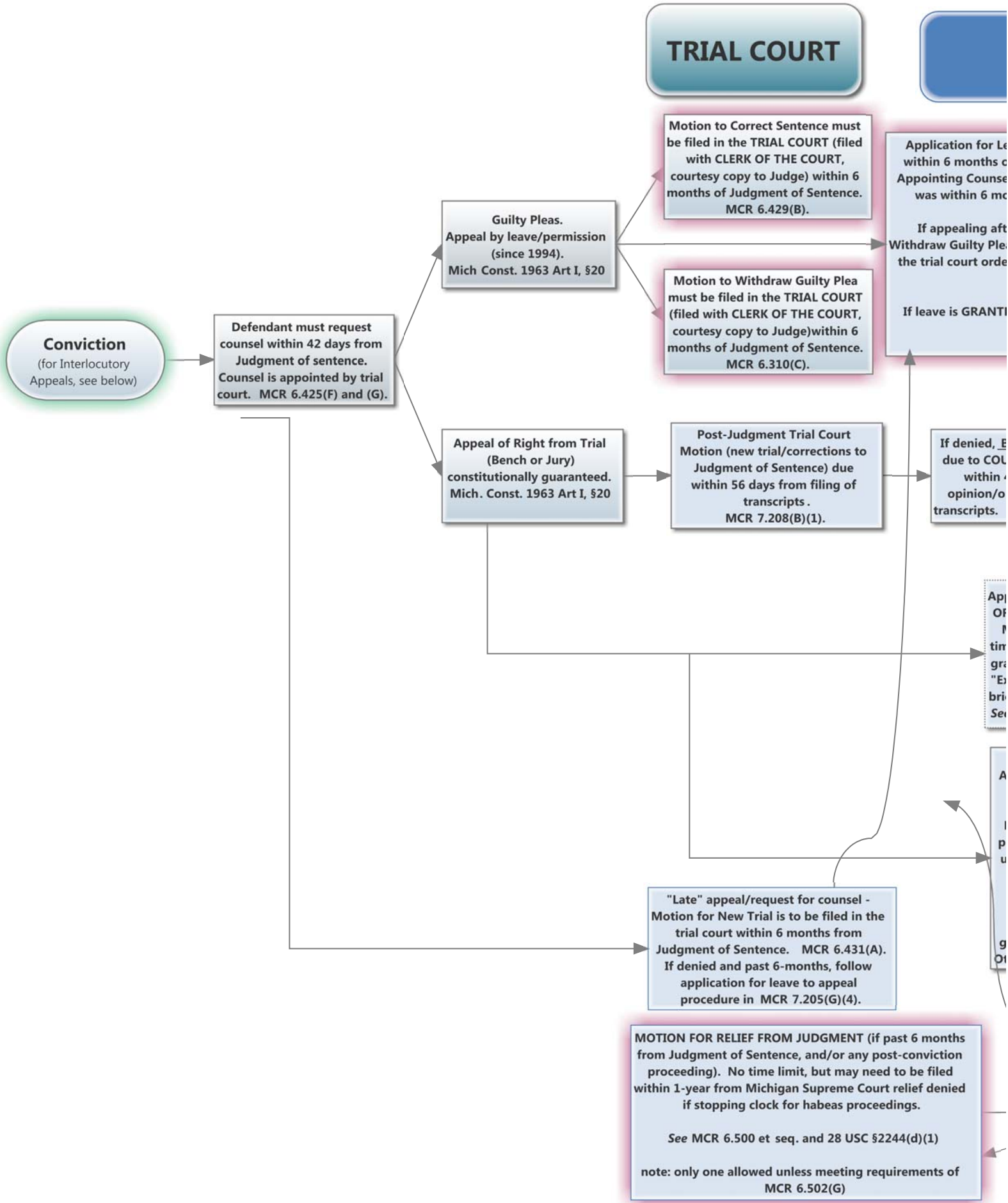
Prison Mailbox Rule

Houston v Lack, 487 US 266 (1988) (filed at moment of delivery to prison authorities)

MCR 7.204(A)(2)(e)

MCR 7.205(A) (3)

If an application for leave to appeal in a criminal case is received by the court after the expiration of the periods set forth above or the period set forth in MCR 7.205(G), and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the application as a *pro se* party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to applications for leave to appeal from decisions or orders rendered on or after March 1, 2010. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to appeal in a Michigan court.



Interlocutory appeals are governed by leave rules, MCR 7.205, with 21 days to respond per 7.212(A)(2)(a)(i),

MICHIGAN COURT OF APPEALS

leave to Appeal must be filed in the COURT OF APPEALS within 6 months from the Judgment of Sentence, or 42 days from the Order of the trial court (whichever is later) if the request is made within 6 months from the Judgment of Sentence. MCR 7.205(G).

For denial of Motion to Correct Sentence or Motion to Vacate Sentence, the application is due within 21 days from the date of the trial court's order (assuming after 6 month timeframe from Judgment of Sentence). MCR 7.205(G)(4).

For all other appeals, follow MCR 7.212 timing (appeal of right, described below). MCR 7.205 (D)(3).

Brief on Appeal is due in the COURT OF APPEALS 56 days from the date of the trial court's order or filing of the judgment. MCR 7.208 (B)(5).

Appellant's **Brief on Appeal** is due in the COURT OF APPEALS 56 days from filing of transcripts. MCR 7.212(A)(1). Motions for extension of time for filing the Brief on Appeal are routinely granted for an additional 56 days. Motions for "Extraordinary Extension" of time for filing the Brief on Appeal are frowned upon, but possible. See generally Michigan COA IOP 7.212(A)(1)-2.

Motion to Remand is due in the COURT OF APPEALS within the time for filing the brief on appeal. MCR 7.211(C)(1).

NOTE: if the Motion to Remand is GRANTED, proceedings in the Court of Appeals are stayed until the trial court issues an order concluding the remand proceedings. The initiating pleading (Motion for New Trial/Evidentiary Hearing, etc...) must be filed in the TRIAL COURT within 14 days of the COA Order granting a remand AND SERVED ON THE COA. Other deadlines are set out in the remand order.

Relief denied in the trial court, follow application for leave to appeal process in 7.205(G) by filing within 6 months from trial court order.

Note: reconsideration is possible, but it will NOT likely toll the time for filing an application for leave to appeal in the Court of Appeals. See MCR 6.509(A). See also *People v Sconious*, 448 Mich 643 (1995).

For any issue involving the defendant's sentence, you must send a copy of the PSIR to the COA (not part of public record). MCR 7.212(C)(7).

Motions for "Permission to Order Late Transcripts" should be filed asap and must explain necessity if you want the time for filing the brief on appeal to be re-set. MI COA IOP 7.210(B)(1)-2.

A "Motion to Exceed Page Limits" (longer than standard 50-page Brief on Appeal) MUST be filed 21 days *before* the brief is due (off MXT is ok). MCR 7.212(B).

A "Motion to Expedite" a decision on the merits of an appeal can be filed. This is typically done with the merits brief. For policy, see MI COA IOP 7.211(C)(6)-2.

Defendant's Pro Per Supplemental Brief on Appeal pursuant to Std 4 is due 84 days from the date that the BOA is filed in the COA

Appellee's Brief is due 35 days after service (motions for extension of time are possible). MCR 7.212(A)(2). (This same provision would govern a criminal defendant's filing in a prosecutor's appeal)

Appellant's Reply, if any, is due 21 days after Appellee's brief is filed. MCR 7.212(G).

Oral Arguments
Will receive notice 21 days before case call.
If NOT endorsed for argument, can file a motion to participate in oral argument. MI COA IOP 7.214(A) (and see timing indicated on case call notification)

OPINION/ORDER ISSUED

Application for Leave to Appeal MICHIGAN 56 days from issued by the trial court

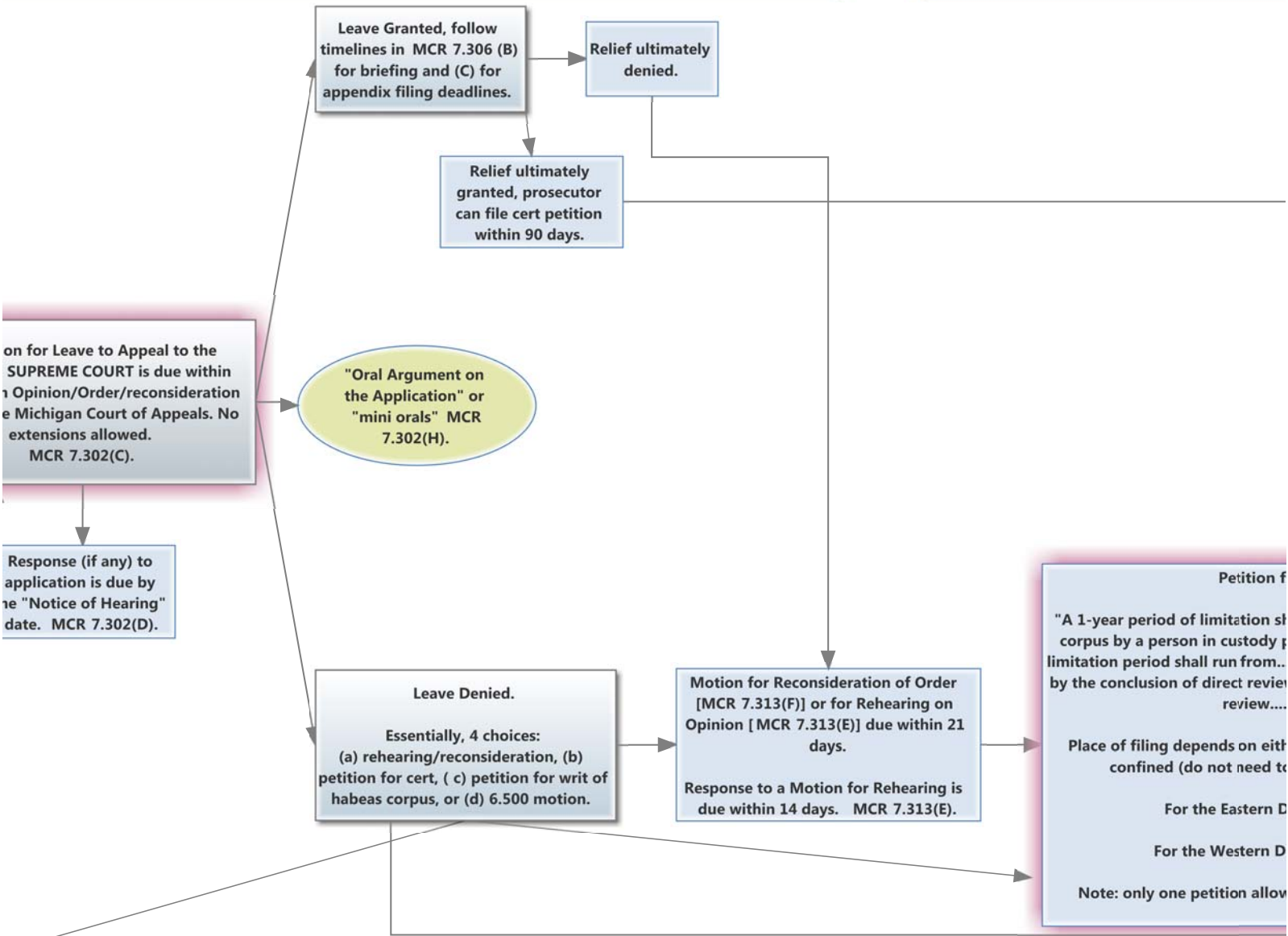
Motion for Rehearing/Reconsideration is due within 21 days from Opinion/Order. MCR 7.215(I).

Motion for Publication due within 21 days. MCR 7.215(D). Response due within 14 days. MCR 7.215(D)(2).

Motion for Conflict Resolution Panel, typically within 28 days, see MCR 7.215(J).

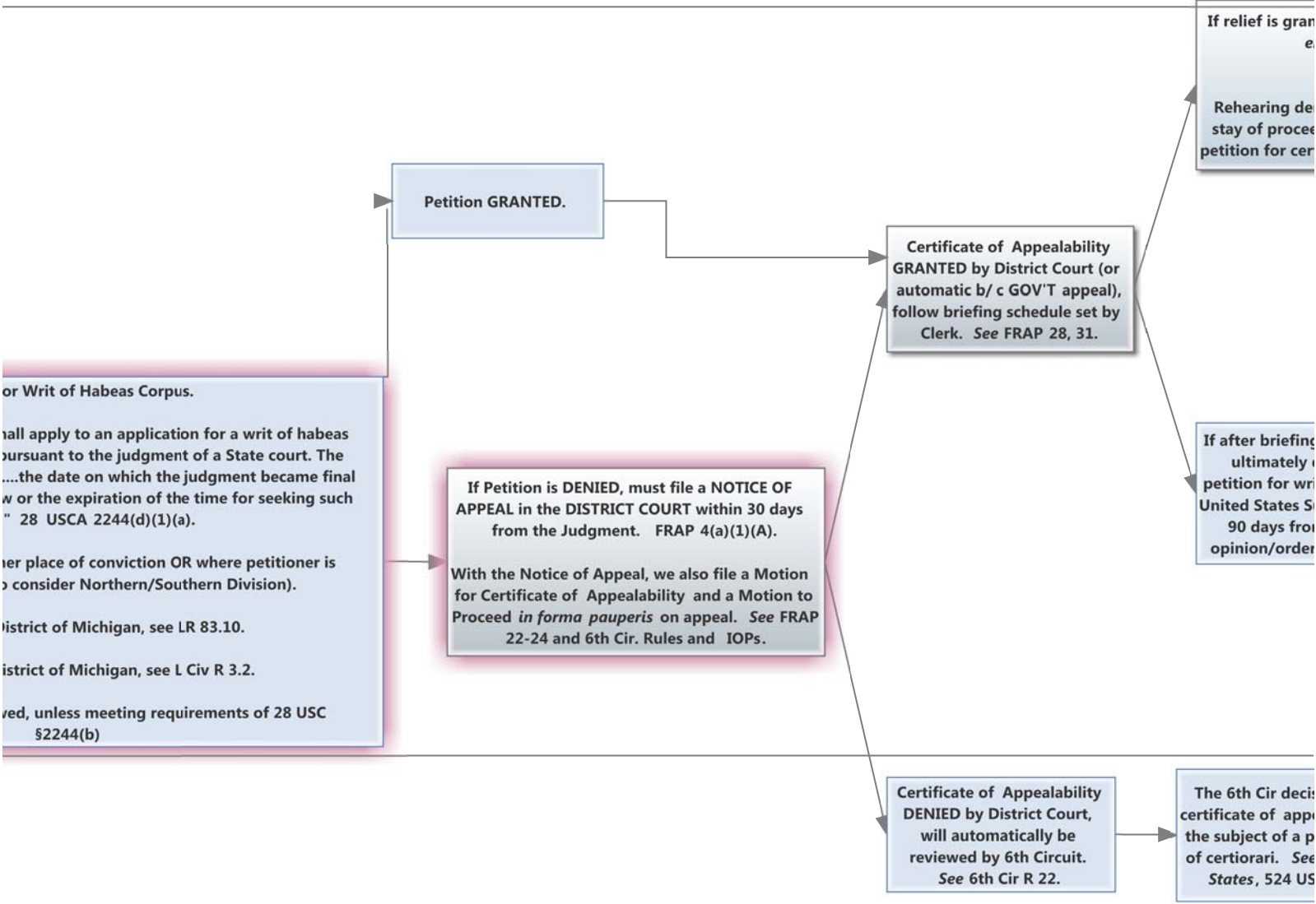
MICHIGAN SUPREME COURT

UNITED STATES DISTRICT COURT



DISTRICT COURT

UNITED STATES COURT OF APPEALS



or Writ of Habeas Corpus.

shall apply to an application for a writ of habeas pursuant to the judgment of a State court. The ...the date on which the judgment became final w or the expiration of the time for seeking such " 28 USCA 2244(d)(1)(a).

er place of conviction OR where petitioner is o consider Northern/Southern Division).

istrict of Michigan, see LR 83.10.

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ved, unless meeting requirements of 28 USC §2244(b)

UNITED STATES SUPREME COURT

...ted, Petition for Rehearing
...n banc is likely.
See FRAP 35.

...nied means a request for a
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...236 (1998).

PETITION FOR CERTIORARI.
Due within 90 days from the Order/Judgment below.
See Rule 13 of the *Rules of the Supreme Court of the United States*.
See also 28 USC §2101(C).

Petition granted, follow
briefing schedule and Rules
24-28 of the *Rules of the
Supreme Court of the United
States*.

Relief granted,
celebrate as you see fit.

Relief denied, see
below.

Petition denied from habeas
proceedings, no further action likely
(unless 6.500 is a possibility).
Petition denied from direct appeal,
follow path for habeas and/or 6.500
proceedings.

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Michigan State Appellate Defender Office
Criminal Defense Resource Center
www.SADO.org
(313)-256-9833
Prepared by: Marla McCowan, former CDRC Administrator
& Jonathan Sacks, former SADO Deputy Director