



**THE RESTORATION OF APPELLATE RIGHTS
PURSUANT TO MCR 6.428**

**A MAACS SELF-HELP GUIDE FOR TRIAL
CONVICTIONS**

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THE RESTORATION OF APPELLATE RIGHTS PURSUANT TO MCR 6.428

Michigan law requires the trial court to advise you of your right to appeal a conviction as well as the right to have counsel appointed to represent you if you cannot afford an attorney. If you were convicted following a **trial**, you are entitled to a claim of right. If you were convicted after entering a **guilty or no contest plea**, then an application for leave to appeal may be filed. If you cannot afford an attorney, then the court will appoint a lawyer to represent you. The court must give you an opportunity to submit the completed request for counsel form to the court at the sentencing hearing. MCR 6.425(F)(3). The court must enter an order appointing a lawyer if the request for a lawyer is filed within six months after the entry of the judgment of sentence.

You might have been inadvertently denied the right to appellate counsel. For example, the proper form may not have been given to you at the end of the sentencing hearing. Defense counsel may have forgotten to submit the form once signed. If the proper paperwork is completed, it may not get to the courtroom to be processed. Or, even if the paperwork is received by the court, it may not be processed correctly. If you believe that you requested appointed appellate counsel, but the appointment was not made, MCR 6.428 allows you to file a motion requesting that your appellate rights be restored.

The motion should include the following information:

- The date you were sentenced and whether the conviction was following a trial or plea hearing;
- Specific facts indicating that errors were committed, either by your attorney, the court, or anyone else, that denied you the appointment of appointed appellate counsel;
- Factors which impacted your ability to submit your request timely. For example, were you scheduled via Zoom and not present in the courtroom? Did you give the Request for Appointed Counsel to someone else to send to the circuit court? Were you being transported to different facilities within the MDOC impacting your access to mail?

Attached is a sample motion pleading to use. Also included is the Request for Counsel form which you should sign and include with the motion for restoration of appellate rights. If the trial court grants your motion, your request will be processed.

STATE OF MICHIGAN

IN THE _____ COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-vs-

LC No. _____

Honorable _____

Defendant-Appellant.

IN PRO PER MOTION FOR RESTORATION OF APPELLATE RIGHTS

Defendant's Name, moves this Court to restore his or her appellate rights pursuant to MCR 6.428.

1. I was convicted after **pleading guilty** or **a trial** on _____. On _____, I was sentenced by this Court to serve _____. The sentencing was **held in person or via Zoom**.

2. At the end of the sentencing hearing, I remember:

State here all of the facts you remember about receiving the Notice of Appellate Rights and Request for the Appointment of Counsel. Did you receive a Notice of Right to Court Appointed Counsel on Appeal and a Request for the Appointment of Counsel on appeal? If you did, did you hand the signed Request to your attorney to give to the court clerk? If you gave it to your attorney after the sentencing hearing, did they say they would hand it in to the court for you? Or did you give the request to someone else to hand in to the court? If you were sentenced by Zoom, did you hand the signed

document to jail personnel after the hearing? Did you mail it into the court on a later date? If so, please state the date or period after the sentencing hearing as best as you can remember.

3. MCR 6.428 states:

If the defendant, whether convicted by plea or at trial, was denied the right to appellate review or the appointment of appellate counsel due to errors by the defendant's prior attorney or the court, or other factors outside the defendant's control, the trial court shall issue an order restarting the time in which to file an appeal or request counsel.

4. Because I lost my rights due to reasons beyond my control, I am requesting that this Court issue an order restarting the time in which to file an appeal and appoint counsel to represent me.

For these reasons, I ask the Court to grant this motion, order the restoration of my appellate rights and appoint an attorney to represent me.

Respectfully submitted,

BY: _____
Name
Address
Phone Number

Date: _____

STATE OF MICHIGAN

IN THE _____ COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-vs-

LC No. _____

Honorable _____

Defendant-Appellant.

**BRIEF IN SUPPORT OF MOTION TO RESTORE APPELLATE RIGHTS IF
CONVICTED BY TRIAL**

Defendant-Appellant, **(name)**, hereby requests that the Court restore **(his/her)** appellate rights pursuant to MCR 6.428.

(Procedural history/applicable facts here).

A defendant who is convicted following a trial is entitled to an appeal of right. MCR 7.204. An appeal of right is a first-tier direct review in the Michigan Court of Appeals. The purpose of first-tier appellate review is to correct errors in the lower court. *Halbert v Michigan*, 545 US 605, 618, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005). At the time that sentence is imposed, the trial court must inform an individual that they are entitled to appellate review of the conviction and sentence. If the individual cannot afford an attorney to pursue an appeal of right, the trial court will appoint one. MCR 6.425 (F).

NAME was denied the right to appellate review through no fault of their own and requests that the time to file an appeal or to request counsel be restarted in **(his/her)** case. The U.S. Supreme Court has emphasized the importance of the first-tier review.

A first-tier review entails adjudication on the merits and differs from other post-conviction appellate stages “at which the claims have once been presented by a lawyer and passed upon by an appellate court.” *Douglas v California*, 372 U.S. 353, 356057, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). The policies underlying these distinctions between first-tier and second-tier appeals “do not support substituting a discretionary appeal, with tougher procedural hurdles, in place of an appeal of right.” *Hardaway v Robinson*, 655 F.3d 445, 450 (6th Cir 2011).

MCR 6.428 provides:

If the defendant, whether convicted by plea or at trial, was denied the right to appellate review or the appointment of appellate counsel due to errors by the defendant’s prior attorney or the court, or other factors outside the defendant’s control, the trial court shall issue an order restarting the time in which to file an appeal or request counsel.

Outline reason(s) you were denied the right to appellate review or the appointment of appellate counsel due to errors by your prior attorney or the court, or other factors outside of your control.

In *Hardaway, supra*, the United States Court of Appeals for the Sixth Circuit held that an appeal through the Michigan court system by way of a delayed application for leave to appeal was not a sufficient substitute for proceeding on direct appeal. The direct appeal would have allowed the defendant’s attorney to file a timely brief in the Court of Appeals and hold oral argument before a panel of the Court. In *Hardaway*, the defendant timely filed a claim of appeal after his trial conviction and sentence, but his appellate attorney failed to file an appellate brief. The Sixth Circuit held that Mr. Hardaway’s appellate counsel was ineffective in failing to file a brief on appeal, which

deprived Mr. Hardaway of his right to a direct appeal. The court held that the absence of a direct appeal “deprived [Mr. Hardaway] of the appellate proceeding altogether,” and rendered it “entirely nonexistent.” *Id.* at 449 quoting *Roe v Flores-Ortega*, 528 US 470; 120 S Ct 1029; 145 L Ed 2d 985 (2000) (internal quotations omitted). The Sixth Circuit Court ordered that Mr. Hardaway’s right to direct appeal be reinstated. (*See also Glover v Birkett*, 679 F 3d 936 (6th Cir 2012) holding that proceeding through an application for leave to appeal was not a sufficient substitute for proceeding on direct appeal where defendant was deprived of his right to direct appeal due to counsel’s failure to file a notice of appeal); *People v Henderson*, 485 Mich 1037 (2010) (remanding the case to the Court of Appeals for consideration as on leave granted where defendant’s right to a direct appeal was denied by the ineffective assistance of appointed appellate counsel, who failed to timely file pleadings in the Court of Appeals); *People v Mills*, 485 Mich 960 (2009) (same); *People v Thomas*, 490 Mich 856 (2011) (remanding the case to the Court of Appeals for consideration of application for leave to appeal where deadline for filing application was not timely filed due to the ineffective assistance of appointed counsel).

In *People v Johnson*, 485 Mich 915 (2009), the Michigan Supreme Court remanded the defendant’s case to the circuit court for the appointment of appellate counsel where the record indicated that the trial court twice denied the defendant’s requests for the appointment of appellate counsel pursuant to his no contest plea. Citing *Halbert, supra*, the Court held that the defendant was entitled to appellate counsel to pursue an appeal of his no contest plea. The Court found that the two year “delay in

appointing counsel prevented the defendant from filing any timely, appropriate post-conviction motions” and ordered that the defendant’s time for filing any post-conviction motions be restarted from the time of appointment of counsel and filing of transcripts.

While **Name** could now file a motion for relief from judgment under MCR 6.500 *et seq.*, **(he/she)** should not be required to meet the significantly more stringent standards for relief under that procedure because of errors made unbeknown to **(him/her)**. The court in *Hardaway* recognized this problem and held that the deprivation to the defendant in losing his right to appeal was not alleviated by his ability to appeal through the state’s collateral appellate proceedings by way of a delayed application for leave to appeal. The court found that the differences between Michigan’s collateral motion for relief from judgment post-conviction appeal process was “too unlike an appeal of right to constitute a sufficient substitute.” *Hardaway* 655 F3d at 450.

The Michigan Supreme Court has consistently ordered cases remanded to the trial court for the appointment of appellate counsel if counsel has not been appointed through no fault of the convicted individual. See *People v Dewey*, MSC Order #156968 issued 10/17/2018, (defendant made a timely request for the appointment of counsel, but through no fault of his own, counsel was not appointed); *People v Reid*, MSC Order #157147 issued 07/27/2018 and *People v Anthony*, MSC Order #148687, issued 7/29/2014, (defendant filed a timely request for counsel but the trial court failed to timely respond to the request); *People v Stead*, MSC Order #160284, issued 12/23/2020, (appellate counsel’s mistake denied defendant appellate review).

WHEREFORE, Name respectfully requests that this Honorable Court grant the Motion to Restore Appellate Rights to restart the time in which I can seek appellate review to pursue appropriate review and timely challenges to my conviction and/or sentence.

Respectfully submitted,

BY: _____
Name
Address
Phone number

Date: _____

STATE OF MICHIGAN

IN THE _____ COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-vs-

LC No. _____

Honorable _____

Defendant-Appellant.

PROOF OF SERVICE

I declare that on **month, day, year**, I served the Motion for Restoration of Appellate Rights with Brief in Support **(and other supporting documents)** on the following:

Court Clerk
Street Address
City, MI Zip

County Prosecuting Attorney
Street Address
City, MI Zip

Respectfully submitted,

BY: _____
Name
Address
Phone Number