

[CAPTION]

**VERIFIED PETITION FOR PERMISSION TO FILE A BELATED NOTICE OF APPEAL
PURSUANT TO POST-CONVICTION RULE 2**

The Defendant, by counsel, respectfully requests this Court for permission to file a belated notice of appeal pursuant to Post-Conviction Rule 2. In support of the Petition, the Defendant states the following:

1. On [insert date], the Defendant was convicted of [insert offense(s)] after a [PICK ONE: guilty plea or trial].
2. On [insert date], the Defendant was sentenced to [insert sentence].
3. The Defendant did not file a timely Notice of Appeal due to no fault of his own. [Insert specific reasons for failure to file a Notice of Appeal. For instance, the Defendant was never advised of his right to appeal the sentence resulting from an open guilty plea OR the trial court failed to appoint pauper counsel in a timely manner after the Defendant made his desire to appeal known].
4. The Defendant has been diligent in requesting permission to file a belated notice of appeal. [Insert facts supporting the Defendant's diligence. For instance, as soon as the Defendant learned of his right to appeal the open sentence resulting from his guilty plea, the Defendant filed this Petition].
5. The Defendant has the right to appeal his conviction and sentence in this case. I.C. 35-38-4-1 specifies a Defendant can appeal "as a matter of right from any judgment in a criminal action." Article VII, Section 6 of the Indiana Constitution provides "an absolute right to one appeal." Due Process as guaranteed by the United States Constitution

requires a Defendant have effective counsel on his first appeal as of right. See Evitts v. Lucey, 469 U.S. 387, 394, 402, 105 S.Ct. 830, 839, 83 L.Ed.2d 821 (1985). Post-Conviction Rule 2 expressly allows a defendant to litigate an appeal, even after the appeal becomes belated.

6. The period of delay in filing the Notice does not prejudice the parties, is not an undue delay, and does not evidence sleeping upon one's rights.

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to schedule a hearing on the Defendant's Request, grant the Defendant permission to file a Belated Notice of Appeal, allow the Defendant's appeal to proceed in a timely fashion, and for all other relief just and proper in the premises.

(Signature)

VERIFICATION

Under penalty of perjury, the foregoing representations are true and accurate to the best of my knowledge and belief.

(Attorney Signature)

NOTE

Attaching an Affidavit of your client stating when he first learned of his right to appeal and why he did not file earlier may help to assure that the Court does not find that your client failed to file with due diligence.

REFERENCES

CASEBANK X.9

Post-Conviction Rule 2(1) (where a defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court where: (a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under the rule).

CASE LAW

Van Meter v. State, 650 N.E.2d 1138 (Ind. 1995) (holding that T.R. 60(B) motion is inappropriate in criminal proceeding where petition for post-conviction relief is available). See also Bolden v. State, 736 N.E.2d 1260 (Ind.Ct.App. 2000) (absent exceptional or extraordinary circumstances, State could not use T.R. 60(B) to revive its expired appeal).

Haluska v. State, 663 N.E.2d 1193 (Ind.Ct.App. 1996) (a juvenile adjudication is not a conviction for purposes of post-conviction relief; TR 60(B) Motion for Relief from Judgment is the proper procedure for raising issues with a juvenile adjudication when the juvenile has missed his or her deadline for filing a notice of appeal).

Neville v. State, 694 N.E.2d 296 (Ind.Ct.App. 1998) (probation revocation is not a conviction for purposes of post-conviction relief; the trial court did not have authority under Post-Conviction Rule 2(1) to grant permission to file belated praecipe for appeal from revocation of probation). See also Impson v. State, 721 N.E.2d 1275 (Ind.Ct.App. the).

Howard v. State, 653 N.E.2d 1389 (Ind. 1995) (specific wording of P-C.R. 2 excludes petition for permission to file belated praecipe for decisions which address post-conviction relief). See also Bailey v. State, 653 N.E.2d 518 (Ind.Ct.App. 1995).

Tolson v. State, 665 N.E.2d 939 (Ind.Ct.App. 1996) (trial court abused discretion in denying Defendant's motion to file belated praecipe or motion to correct errors).

Kelly v. State, 625 N.E.2d 1278 (Ind.Ct.App. 1993) (after examining the delay and the Defendant's familiarity with legal system, the court determined that 18 year delay between the Defendant's last actions and the filing for permission to file belated praecipe showed failure to exercise necessary diligence under PCR Rule 2 § 1.). See also Beaudry v. State, 763 N.E.2d 487 (Ind.Ct.App. 2002); Land v. State, 640 N.E.2d 106 (Ind.Ct.App. 1994).

Moshenek v. State, 868 N.E.2d (Ind. 2007) (eleven year span without any effort to raise a sentencing claim showed lack of diligence in pursuing a belated appeal).

Collins v. State, 817 N.E.2d 230 (Ind. 2004) (when a defendant has been misinformed about his right to appeal a sentence from an open guilty plea, the proper procedure is for the defendant to file a belated appeal pursuant to Post-Conviction Rule 2). See also Salazar v. State, 854 N.E.2d 1180 (Ind.Ct.App. 2006); Mead v. State, 875 N.E.2d 304 (Ind.Ct.App. 2007).

Baysinger v. State, 835 N.E.2d 223 (Ind.Ct.App. 2005) (the Defendant, who pled guilty in 2001, acted with diligence, when he filed his Request to file a Belated Notice of Appeal within months of learning of his right to appeal his sentence).

Roberts v. State, 854 N.E.2d 1177 (Ind.Ct.App. 2006) (although failure to file timely notice of appeal was not due to Defendant's fault, trial court did not abuse its discretion by concluding that the Defendant was not diligent in petitioning for a belated appeal; Defendant was aware of the Collins, supra, decision when his petition to transfer his PCR claims was denied, but he waited over eight months to file petition for permission to file belated appeal).

Johnson v. State, 898 N.E.2d 290 (Ind. 2008) (defendants who had P-C.R. 1 proceedings pending at the time of Collins that contained challenges to their sentences and pursued prompt efforts to pursue those challenges through a belated appeal once Collins, supra, was decided have been permitted to do so).

Reid v. State, 883 N.E.2d 872 (Ind.Ct.App. 2008) (where Defendant's petition did not present evidence as to why he was not at fault and acted diligently, trial court erroneously granted petition without hearing evidence).

Welches v. State, 844 N.E.2d 559 (Ind.Ct.App. 2006) (trial court erred in denying a petition for leave to file a belated notice of appeal without hearing where Defendant alleged he had not been advised of his right to appeal).

Beatty v. State, 854 N.E.2d 406 (Ind.Ct.App. 2006) (State is authorized to appeal from an order granting a Defendant's petition to file a belated notice of appeal).

Bosley, Jr. v. State, 871 N.E.2d 999 (Ind.Ct.App. 2007) (although post-conviction rules do not directly address successive motions for permission to file a belated appeal, it is clear that rules are not designed to allow unlimited challenges to a conviction or sentence).

Gutermuth v. State, 868 N.E.2d 427 (Ind. 2007) (Blakely does not apply retroactively to belated appeals; however, belated appeals of sentence entered before Blakely v. Washington, 542 U.S. 296 (2004) are not subject to the holding in that case; Defendant's case became "final" for purposes of retroactivity when the time for filing a direct appeal has expired). See also Rogers v. State, 878 N.E.2d 269 (Ind.Ct.App. 2007); Boyle v. State, 868 N.E.2d 435 (Ind. 2007).

Stanley v. State, 849 N.E.2d 626 (Ind.Ct.App. 2006) (because Defendant's appeal challenges the sufficiency of the factual basis for Defendant's habitual offender determination on his guilty plea, the belated appeal must be dismissed without prejudice so the Defendant can properly raise the issue in a post-conviction relief petition).