

# ***THE HABEAS ONE-YEAR CLOCK***

*Materials prepared by:*

*David Nathanson, Wood & Nathanson, LLP  
dnathanson@woodnathanson.com*

**28 U.S.C. § 2244(d): You have one year to file a habeas petition upon the completion of “direct review or the expiration of the time for seeking such review”.**

**Direct Appeals:**

Under federal law, a conviction is final upon direct review when the U.S. Supreme Court denies certiorari or the time for seeking certiorari expires. That time is 90 days.

Therefore: **YOU HAVE ONE YEAR AND 90 DAYS FROM THE SJC’S OPINION OR DENIAL OF FAR** to file the habeas petition.<sup>1</sup>

Note: If you *timely* file a petition for rehearing, the time for certiorari runs from the denial of rehearing, rather than the date of the opinion.<sup>2</sup> Therefore, you would have one year and 90 days from the date of the denial of the petition for rehearing.

Note: The 90 days does *not* run from the issuance of the “rescript” or mandate.<sup>3</sup> The date of the rescript is totally irrelevant.

Note: You do *not* get an additional 90 days for seeking certiorari from the SJC’s affirmance of the denial of a post-conviction motion because post-direct appeal proceedings are, by definition, not “direct review”.<sup>4</sup>

Note: A reinstated or late direct appeal is treated exactly the same as a timely-perfected direct appeal. That is, the habeas clock begins running when the reinstated appeal has been denied by the state’s court of last resort and the time for certiorari expires.<sup>5</sup>

**Guilty pleas:**

The **ONE YEAR BEGINS TO RUN ON THE DATE OF TRIAL COURT SENTENCING.**

Note: You do *not* get an additional 90 days from a Massachusetts state guilty plea because the conviction is final upon direct review as soon as the judgment is pronounced.<sup>6</sup> If you file a direct appeal from the guilty plea (e.g., the judge made error of law at sentencing),<sup>7</sup> the normal direct appeal rules recited above apply. Obviously, this is rare in Massachusetts state court and common in the federal system.

---

<sup>1</sup> *Clay v. United States*, 537 U.S. 522, 525 (2003).

<sup>2</sup> Supreme Court Rule 13; *Young v. Harper*, 520 U.S. 143, 147 (U.S. 1997)

<sup>3</sup> Supreme Court Rule 13.

<sup>4</sup> *Lawrence v. Florida*, 127 S. Ct. 1079 (2007).

<sup>5</sup> *Jimenez v. Quarterman*, 555 U.S. 113, 120 (2009)

<sup>6</sup> *Holmes v. Spencer*, 685 F.3d 51, 59 (1<sup>st</sup> Cir. 2012); *but see Mack v. Dickhaut*, 770 F.Supp.2d 429 (D.Mass. 2011).

<sup>7</sup> *Commonwealth v. Henriquez*, 440 Mass. 1015 (2003).

### **Stopping or “tolling” the one-year clock:**

28 U.S.C. § 2244(d)(2): “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.”

What stops the clock:

- Rule 30
- Rule 25(b)(2)
- *Likely* a properly filed Rule 29 that both specifies the grounds and includes an affidavit (this stands on tenuous ground and probably stops the clock only during the time it is brought forward and is “pending” i.e., under consideration)<sup>8</sup>
- *Maybe* a timely filed sentence appeal (again very iffy, but arguable if you need to find time somewhere).

**THESE MOTIONS DO NOT RESET THE CLOCK!** They only pause it.<sup>9</sup>

What does *not* stop the clock

- Motions that are not “properly filed”,<sup>10</sup> for example: motions filed in the wrong court (e.g. filing a Rule 30 in the appeals court) or motions that are barred as untimely<sup>11</sup>
- Motions for appointment of counsel<sup>12</sup>
- Motions for discovery
- Motions for funds
- A petition under M.G.L. c. 211, § 3 (normally)<sup>13</sup>
- A pending CPCS “screening”<sup>14</sup>
- A federal habeas petition<sup>15</sup> (consider the “stay and abeyance” procedure<sup>16</sup>)

Why do some post-conviction motions stop the clock and others do not? In order to satisfy the statute, the motion must challenge the “judgment”. Therefore, motions such as a motion for discovery are simply preliminary to challenging the judgment and do not actually challenge the judgment.

---

<sup>8</sup> *Wall v. Kholi*, 562 U.S. 545, 555-56 (2011); *Commonwealth v. DeJesus*, 440 Mass. 147, 795 N.E.2d 547, 552 (2003); *Holmes v. Spencer*, 685 F.3d 51, 61 (1st Cir. 2012).

<sup>9</sup> *Cordle v. Guarino*, 428 F.3d 46, 48 (1st Cir. 2005).

<sup>10</sup> *Artuz v. Bennett*, 531 U.S. 4 (2000); *Pace v. DiGuglielmo*, 125 S. Ct. 1807 (2005); *Carey v. Saffold*, 536 U.S. 214 (2002).

<sup>11</sup> *Holmes*, 685 F.3d at 61.

<sup>12</sup> *Voravongsa v. Wall*, 349 F.3d 1 (1st Cir. 2003); *cf. Woodford v. Garceau*, 538 U.S. 202, 209 (2003).

<sup>13</sup> *Rodriguez v. Spencer*, 412 F.3d 29, 37 (2005).

<sup>14</sup> *Dunker v. Bissonnette*, 154 F. Supp. 2d 95 (D. Mass. 2001)

<sup>15</sup> *Duncan v. Walker*, 533 U.S. 167 (2001).

<sup>16</sup> *Rhines v. Weber*, 544 U.S. 269 (2005)

### **Innocence**

Proof of innocence can excuse a late petition.<sup>17</sup>

### **Equitable tolling:**

Equitable tolling is almost always hopeless. It truly has to be an extraordinary case, such as a case where the attorneys are not qualified to practice, where they suffer from an obvious conflict of interest or where they completely abandon the client.<sup>18</sup>

### **Newly discovered evidence:**

You get one year to file from the date you could reasonably have discovered new evidence. Not the date you actually discovered it (if that date is later).

### **BEWARE: Newly announced retroactive law:**

You get one year from the date from the Supreme Court's announcement of the new rule, *not* from the date the new rule was made retroactive.<sup>19</sup>

This can have outrageous consequences. For example, juvenile life without parole was held unconstitutional by the Supreme Court on June 25, 2012.<sup>20</sup> But it was not made retroactive until January 25, 2016.<sup>21</sup> So a juvenile defendant sentenced to life without parole would have been required to file their habeas petition by June 24, 2013, i.e. within one year of the announcement of the rule. But unless that juvenile was able to keep his habeas alive for 2 ½ years, he would have necessarily lost his petition because the prohibition on juvenile life without parole had not been made retroactive. If the juvenile waited for the Supreme Court to make it retroactive, he would have been time-barred.

Note, that the Attorney General does have the authority to waive time-bar defenses. Where the law is so obviously perverse, counsel should attempt to persuade the attorney general to do so.<sup>22</sup>

---

<sup>17</sup> *McQuiggin v. Perkins*, 133 S.Ct. 1924 (2013).

<sup>18</sup> *Christeson v. Roper*, 135 S. Ct. 891, 895 (2015); *Lawrence v. Florida*, 127 S. Ct. 1079 (2007); *Cordle v. Guarino*, 428 F.3d 46, 48 (1st Cir. 2005); *cf. Maples v. Thomas*, 132 S. Ct. 912, 927 (2012) (same as to cause and prejudice for procedural default).

<sup>19</sup> *Dodd v. United States*, 125 S. Ct. 2478 (2005).

<sup>20</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012)

<sup>21</sup> *Montgomery v. Louisiana*, No. 14-280, 2016 WL 280758, at \*1 (U.S. Jan. 25, 2016), *as revised* (Jan. 27, 2016).

<sup>22</sup> *Wood v. Milyard*, 132 S. Ct. 1826, 1834 (2012)

### **Practical example.**

1/3/2014: At the end of the defendant's direct appeal, the SJC denies the FAR petition. The time for certiorari begins running.

4/3/2014: 90 days later, the time for seeking certiorari expires. The habeas one-year clock begins ticking

6/1/2014: The defendant's motion for a new trial is docketed in the Superior Court. The habeas clock is now stopped. 59 days have run off the habeas clock and 306 days remain.

12/22/2014: The defendant's motion languishes, unnoticed until the trial judge summarily denies it with a one-word endorsement ("DENIED"). The clock is still stopped.

1/5/2015: A timely notice of appeal (or gatekeeper petition)<sup>23</sup> is docketed in less than thirty days. The clock is still stopped.

9/13/2015: The Appeals Court affirms in an unpublished opinion. The clock is still stopped. (If this is a first-degree murder case, the SJC Single Justice issues the opinion. There is no appeal from such an order. Therefore, the clock immediately begins running again. But for purposes of this example, use 10/5/2015 as the date the clock begins running again for both types of appeals.)

10/2/2015: A timely FAR petition is filed in the SJC. (This step is obviously irrelevant to first-degree murder cases). The clock is still stopped.

10/5/2015: The FAR petition is summarily denied. The clock begins to run again.

10/3/2016: The federal habeas petition is docketed. You are too late! You only had 306 days left to file the petition. You waited 364 days. Note 2016 is a leap year.

### **ALTERNATE ENDING**

8/4/2016: Panting and sweating, you timely file the habeas petition in-hand with one day remaining. A supremely wise federal judge summarily grants the petition, immediately discharges your innocent client, and Commonwealth is so scared by your obvious brilliance that they do not appeal!

---

<sup>23</sup> *Mains v. Commonwealth*, 433 Mass. 30, 37 n.10 (2000).