



Connecticut State

Division of Public Defender Services

# Habeas Corpus Appeals: An Overview & Proposed Way Forward

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LEGISLATIVE HABEAS TASK FORCE

OCTOBER 16, 2019

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1. Overview of current process
2. Criticisms of current process
3. Things to consider when making a change
4. **Our proposal** for reliable identification and efficient disposition of frivolous appeals



## Sec. 52-470. Summary disposal of habeas corpus case. Determination of good cause for trial. Appeal by person convicted of crime.

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(g) **No appeal** from the judgment rendered in a habeas corpus proceeding **brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release** may be taken **unless the appellant, within ten days after the case is decided, petitions the judge** before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, **to certify that a question is involved in the decision which ought to be reviewed** by the court having jurisdiction and the judge so certifies.

# A question “which ought to be reviewed”

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Overarching purpose: elimination of **frivolous** appeals

- Non-frivolous (need NOT be winning)
- A colorable claim
- Debatable among jurists of reason
- Court *could* resolve the issue(s) in a different manner
- Questions are adequate to deserve encouragement to proceed further

Interpretation of the statute, and development and application of the standard has come from **decades of consistent and well-established case law.**

# Petition for Certification to Appeal

## “Pet. Cert.” Process

Order is on back/page 2  
of the form

### NOTICE OF APPEAL PROCEDURES (HABEAS CORPUS)

JD-CR-64 Rev. 8-12  
C.G.S. §§ 52-259, 52-259b, 52-470  
Pr. Bk. Sec. 42-30, 63-1, 63-5, 63-6, 63-7, 63-8, 66-1

STATE OF CONNECTICUT  
SUPERIOR COURT  
www.jud.ct.gov



Judicial District of <u>Tolland at Rockville</u>	Date of decision <u>8-14-19</u>	Docket number <u>TBRCV19-00000000-5</u>
Name of petitioner <u>[REDACTED]</u>	Name of respondent <u>Commissioner of Correction</u>	

1. Before you can appeal to the Connecticut Appellate Court from the decision on your habeas corpus petition, you must: **Within 10 days from the date of decision**, file a request with either the judge who decided the case, or if that judge is not available, to the judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the Appellate Court. If you want to appeal, you may use the bottom part of this form (Petition for Certification - Habeas Corpus) to make your request. (Connecticut General Statutes, Section 52-470).
2. **Within 20 (twenty) days from the issuance of the notice to you** on the petition for certification ("date notice issued" on the back or page 2 of this form), you have a right to file an appeal with the clerk of this court. (Connecticut Practice Book Sections 63-1, 80-1). The court rule concerning extensions of this 20-day appeal period is printed on the back/page 2 of this form.
3. You must pay the entry fee of \$250.00 when you appeal; and the court may order that you give security for costs unless the court says that you do not have to under the next section. (Connecticut Practice Book Section 63-5; Connecticut General Statutes Section 52-259).

4. If you want to appeal, but you cannot pay the fees, costs, and expenses listed in item 3 or you cannot afford to pay for a lawyer, you have a right, **before the 20-day period for appeal stated in item 2 is over**, to ask the court to (1) appoint a lawyer for you and (2) allow you to appeal without paying the fees, costs and expenses. Your request must be under oath and state the basis on which you plan to appeal and the facts of your financial situation. You may use the attached form, JD-CR-73, to make this request. (Connecticut Practice Book, Sections 63-6 and 63-7, Connecticut General Statutes, Section 52-259b).

If you ask to not have to pay the fees, costs and expenses, or you ask the court to appoint an attorney for you and the court denies your request, but the judge certifies that a question is involved in the decision which ought to be reviewed by the Appellate Court, you or a lawyer acting for you, must file your appeal and pay the expenses listed in item 3 within 20 days from the issuance of the notice to you that your request for appointment of an attorney or waiver of fees, costs and expenses was denied. (Connecticut Practice Book, Section 63-1).

### PETITION FOR CERTIFICATION (HABEAS CORPUS)

JD-CR-64A Rev. 8-12  
C.G.S. 52-470, Pr. Bk. 80-1

STATE OF CONNECTICUT  
SUPERIOR COURT  
www.jud.ct.gov



Judicial District of <u>Tolland at Rockville</u>	Date of decision <u>8-14-19</u>	Docket number <u>TBRCV19-00000000-5</u>
Name of petitioner <u>[REDACTED]</u>	Name of respondent <u>Commissioner of Correction</u>	

To:  
(fill in the name of  
the trial judge)

Judge John M. Newson, who decided case or, if the judge is not available, to the judge of the Superior Court designated by the Chief Court Administrator to certify this matter,

I request a certification that a question is involved in the decision on my habeas corpus petition which ought to be reviewed by the Connecticut Appellate Court. The grounds for my request for certification are;

- ☒ written in the Application for Waiver of Fees, Costs and Expenses and Appointment of Counsel on Appeal (Form JD-CR-73), which I am submitting with this petition.  
☐ (Specify grounds, attach additional sheets if necessary)

NOTICE: This petition must be made within 10 days from the date of decision and sent to the clerk of the Superior Court for the Judicial District named above.

Signed [REDACTED]

(See back/page 2 for certification)



APPLICATION FOR WAIVER OF  
FEES, COSTS AND EXPENSES AND  
APPOINTMENT OF COUNSEL ON APPEAL

JD-CR-73 Rev. 1-19  
C.G.S. § 52-259b; P.B. §§ 60-9, 63-1, 63-6, 63-7, 80-1

STATE OF CONNECTICUT  
SUPERIOR COURT  
www.jud.ct.gov

FOR COURT USE ONLY

☐ **Appeal From Judgment of Conviction Notice -**  
Unless the court extends the time limit, this application must be completed, signed and filed with the clerk of the Superior Court named below within twenty (20) days from the Date of Judgment. (Show date below.)

☒ **Appeal From Decision in Habeas Corpus Notice -**  
Unless the court extends the time limit, this application must be completed, signed and filed with the clerk of the Superior Court named below within twenty (20) days from the date the notice was issued of the ruling on your request for certification to appeal. (Show date below.)

Date of Judgment

Date notice issued (Granting your request for certification)

**Instructions** → To Applicant: Fill out this form and make 2 copies. File the original and 1 copy with the clerk. Keep 1 copy for your records. Notice: You must sign this form under oath.  
To Clerk: Stamp form on filing. File original as a pending matter and give 1 copy to the Public Defender's Office. Judicial Authority is to assign for hearing within 20 days after filing. Forward written notice of hearing to (1) trial counsel or applicant, if self-represented, (2) Public Defender's Office to which application was sent, and (3) Chief of Legal Services, Public Defender's Office.

Name and address of court  
Rockville Superior Court 20 Park Street Rockville CT 06066

Docket number  
TSRCV19- [REDACTED] -S  
Name of case  
[REDACTED] v. Commissioner of Correction

1. I cannot pay the fees, costs and expenses of an appeal (I am indigent), and I cannot afford to hire an attorney.
2. The grounds on which I propose to appeal are:

[REDACTED]

(If more space is needed, attach an affidavit (a sworn statement) saying the grounds on which you propose to appeal.)

3. The facts about my financial status are:

[REDACTED]

(If more space is needed, attach an affidavit (a sworn statement) saying the facts about your financial status.)

THEREFORE, I ask that the court (1) waive the payment by me of (not require that I pay) the fees specified by statute, taxable costs, and the furnishing of security for costs upon appeal, if security has been ordered under Section 60-9 of the Connecticut Practice Book; (2) appoint counsel to represent me in my appeal without expense to me and permit the withdrawal of the trial attorney's appearance, if any; and (3) order that the necessary expenses of prosecuting the appeal be paid by the State, Sections 63-6 and 63-7 of the Connecticut Practice Book.

Applicant's signature [REDACTED] Subscribed and sworn to before me on (Date) 8-27-19 Signed (Notary Public/Commissioner of the Superior Court) [REDACTED]

Docket number  
TSRCV19- [REDACTED] -S  
Name of case  
[REDACTED] v. Commissioner of Correction

**ORDER**

The court, having found the applicant ☒ Indigent ☐ Not Indigent, hereby orders the application:

☒ **Granted** as follows:

1. The following fees are waived:  
☐ Appellate filing fee (Supreme or Appellate Court) ☐ Cost of the transcript for filing appeal.  
☐ Other (Specify):
2. Taxable costs are ☐ Waived ☐ Not Waived
3. Security for costs is ☐ Waived ☐ Not Waived
4. Necessary expenses of prosecuting the appeal ☐ Shall ☐ Shall not be paid by the State.

If necessary expenses are paid by the State, attorneys in private practice representing the applicant shall obtain the approval of the judicial authority who presided at the trial before incurring any expense in excess of \$100, including the expense of obtaining a transcript. The judicial authority shall authorize a transcript at State expense only of the portions or proceedings or testimony which may be pertinent to the issues on appeal.

5. ☒ All fees and costs are waived and the State shall pay all necessary expenses. See paragraph 4 for limits on necessary expenses.

6. Counsel ☒ Is ☐ Is not appointed.

Name of Counsel, if Appointed  
OCPD - LSU

7. Permission for the withdrawal of the trial attorney's appearance is ☐ Granted ☐ Denied.

(The judicial authority must be satisfied that trial counsel has cooperated fully with appellate counsel in the preparation of the defendant's appeal prior to granting permission.)

☐ **Denied.**

☐ **Denied.** The application for the payment of fees, costs and expenses of an appeal is DENIED because the applicant has repeatedly filed actions with respect to the same or similar matters, such filings establish an extended pattern of frivolous filings that have been without merit, the application sought is in connection with an action before the court that is consistent with the applicant's previous pattern of frivolous filings, and the granting of such application would constitute a flagrant misuse of Judicial Branch resources.

By the Court (Print or type name of judge) (Newson, J.) On (Date) 9/23/19 Signed (Judge, Asst. Clerk) Matthew J. Floutie, TAC Date signed 9/23/19

**ADA NOTICE**

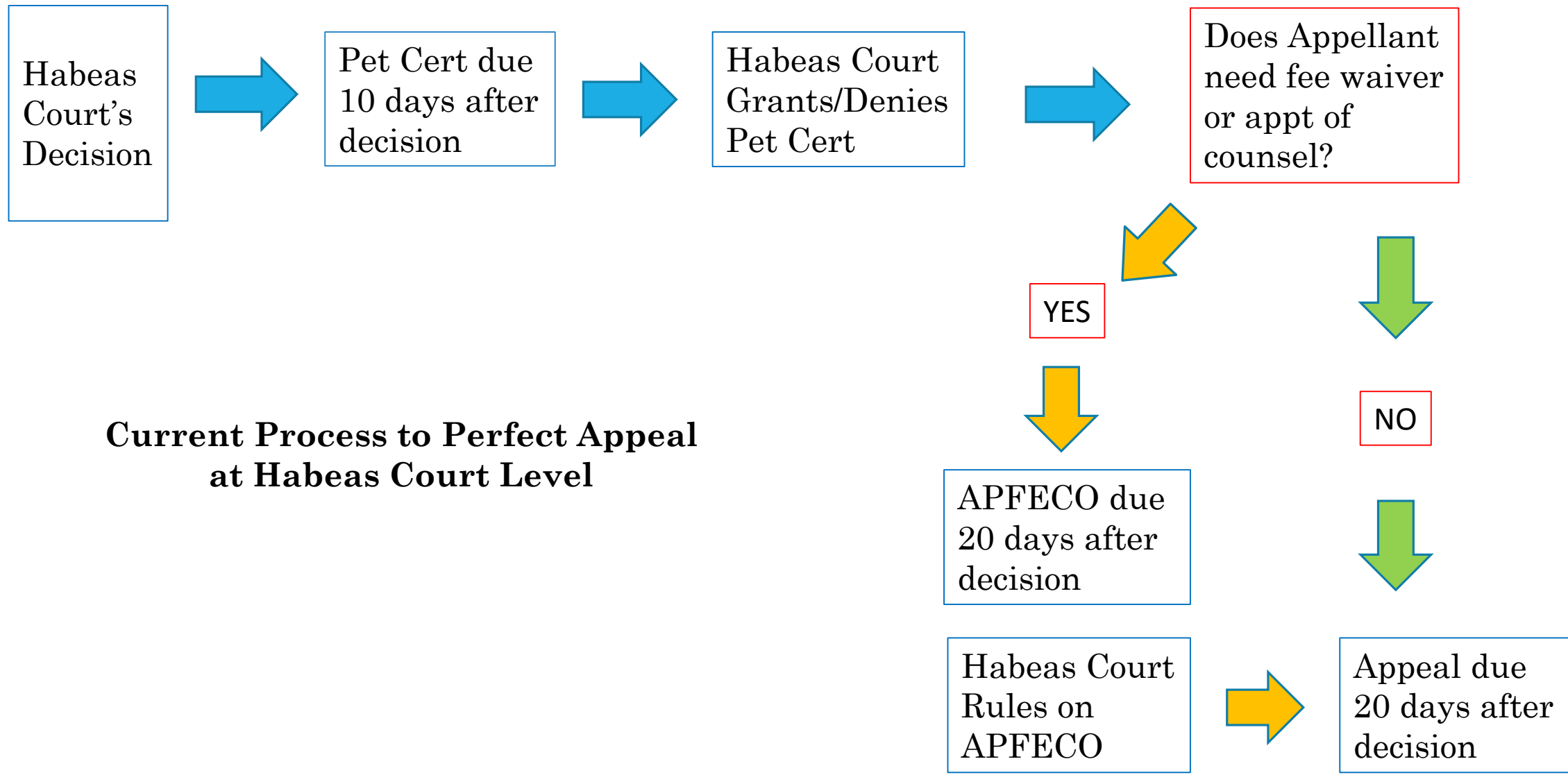
The Judicial Branch of the State of Connecticut complies with the Americans with Disabilities Act (ADA). If you need a reasonable accommodation in accordance with the ADA, contact a court clerk or an ADA contact person listed at www.jud.ct.gov/ADA.

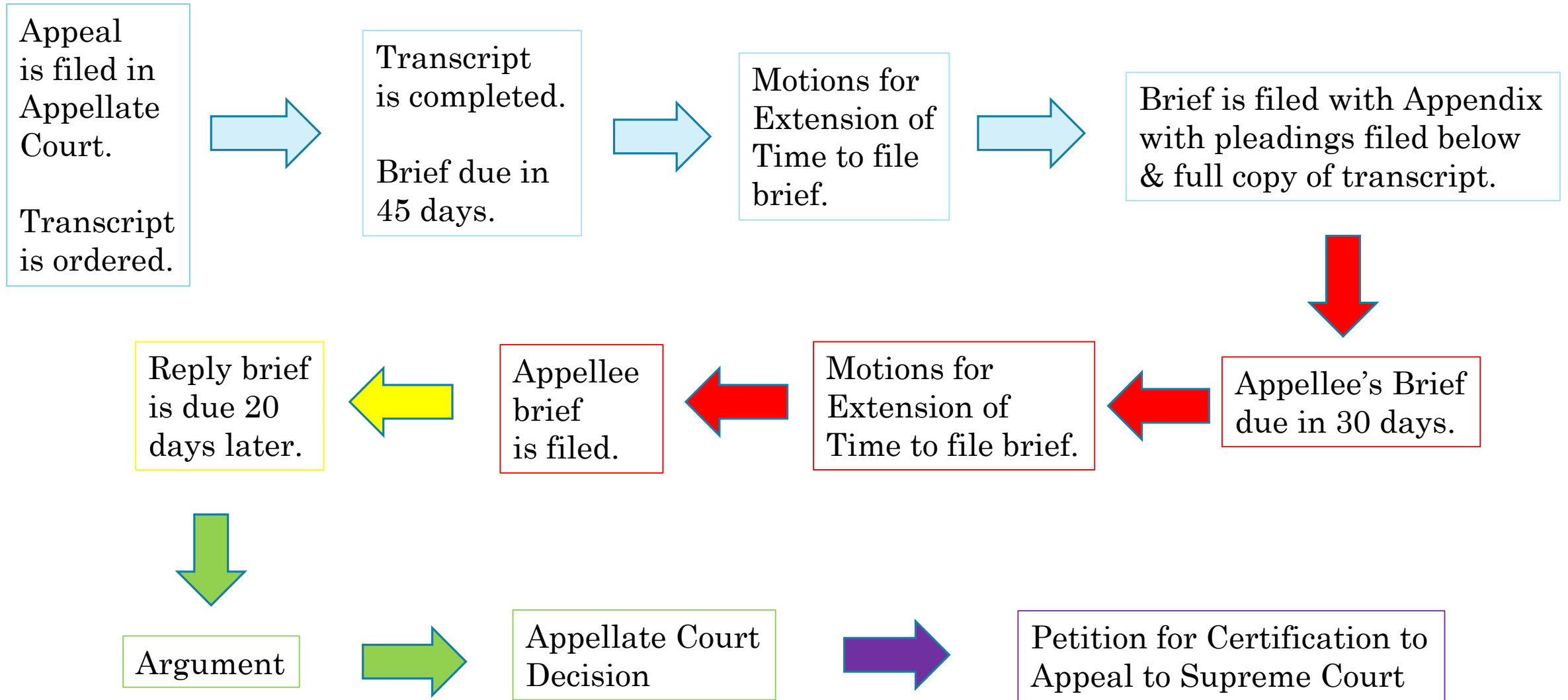
Copies sent to:

Scanned and emailed to:

Jennifer Bourn  
Tina Nelson

9/23/19  
m2B





## Overview of Current Appellate Process



# What does the pet cert ruling mean?

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## IF IT'S DENIED...

Appeal is filed.

Briefs are filed, addressing [whether habeas court abused its discretion in denying the pet cert](#) and also whether habeas court erred in deciding merits below.

[Claims raised on appeal limited](#) to issues raised in the pet cert itself.

After argument, [appeal may be dismissed if court affirms ruling denying pet cert](#).

Or court may find abuse of discretion on pet cert, but affirm denial of habeas on merits.

Or court may find abuse of discretion on pet cert, and reverse habeas decision on merits.

## IF IT'S GRANTED...

Appeal is filed.

Briefs are filed, addressing merits of habeas claims and whether court erred in deciding merits below.

No limitation on issues that may be raised in the appeal.

After argument, appellate decision will affirm or reverse habeas court's decision on merits.

# Criticism of Current Process

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Pet Cert process doesn't reduce number of frivolous appeals.

Everyone gets an appeal.

Everyone gets full appellate briefing (though not everyone will get full merits review and decision on the merits).

Everyone gets oral argument.

We are wasting resources on frivolous appeals.

No way under current law to truncate the full appellate process for appeals that have been determined to be frivolous.

# Considering Change to Process?

Some points and  
concerns to keep in mind

- Federal exhaustion requirement
- Federal habeas review of state court's decision
- Habeas court gets pet cert ruling wrong with some frequency
- Habeas judge may or may not be best final decision-maker as to whether there is an issue worthy of appellate review
- But a different decision-maker would need a lot of information about the case in order to know whether there is a non-frivolous issue
- Wrongful conviction/accuracy and reliability of ruling denying relief
- Creating need for future litigation about scope and application of new rules and continuing validity of old case law
- Unintended consequences/changes to existing law or procedure
- Reviving writ of error as means of appellate review
- Future IAC claims where attorney's performance or error is reason client did not get full appellate review

# Ideas for more accurate identification and efficient disposition of frivolous appeals

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1. MAKE THE APPELLANT BRIEF THE PET CERT.
  2. CHANGE *ANDERS* RULE TO ALLOW DISMISSAL OF APPEAL.

# Proposal #1: The Appellant's Brief as a Pet Cert

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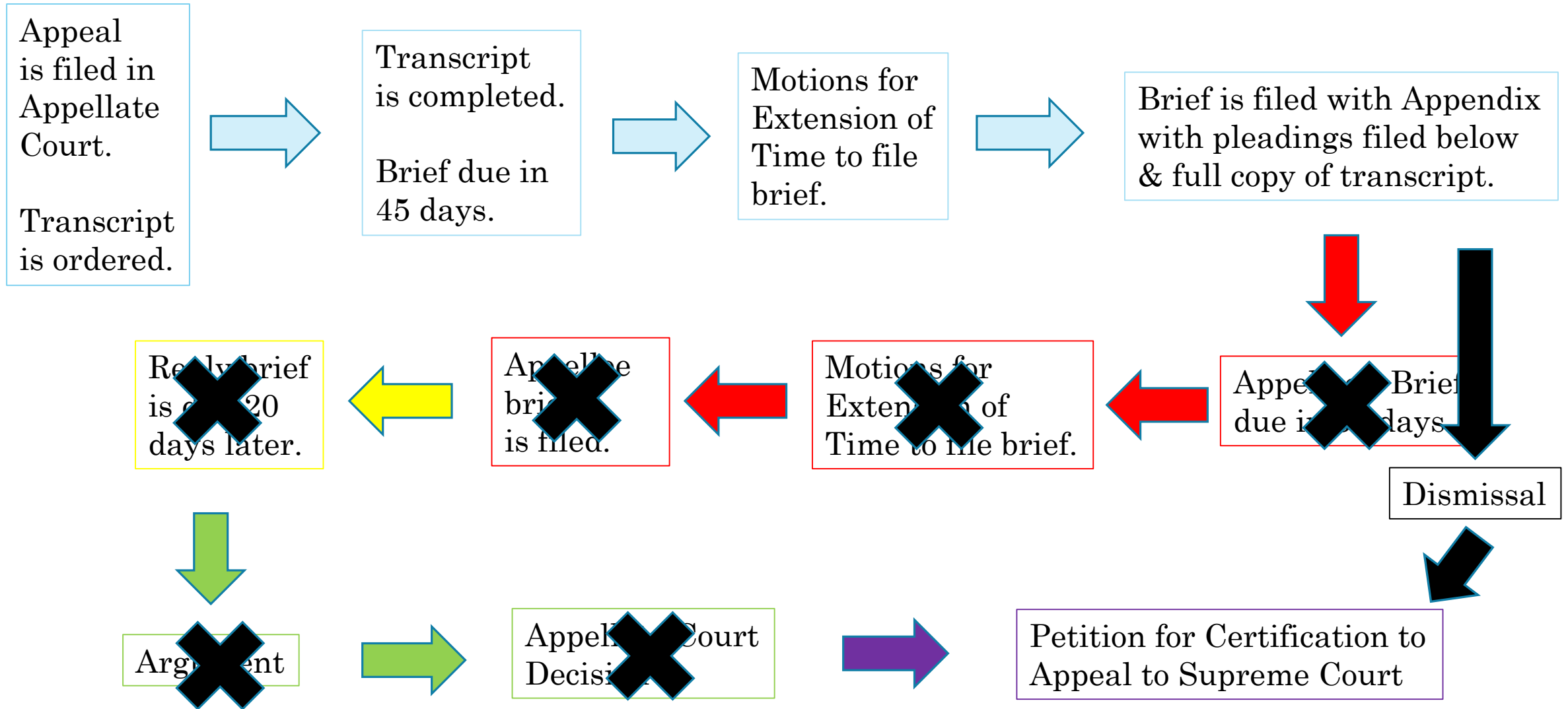
1. Eliminate current pet cert process in habeas court.
2. Continue to allow all aggrieved parties to file an appeal.
3. Appellate Court treats the appellant's brief as the pet cert. After the brief is filed, the court decides whether to certify that there is a question that ought to be reviewed, using current the current standard.
4. If there is such a question, the court will issue an order to that effect and order the appellee to file a brief/order the parties to proceed with the appeal.
5. If there is not such a question, the court will issue an order to that effect and dismiss the appeal. The appellant may file a petition for certification to appeal asking the Supreme Court to hear the case.



## Sec. 52-470 could look something like...

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(g) ~~No appeal~~ **An appeal** from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken ~~unless the appellant, within ten~~ **twenty** days after the case is decided ~~or after the court, petitions the judge before~~ **rules on an application for waiver of fees and costs and for appointment of counsel on appeal, whichever is later.** ~~or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator,~~ **After the filing of the appellant's brief, the Appellate Court shall review the brief to determine if it will** ~~to~~ certify that a question is involved in the decision which ought to be reviewed. **If the court does not so certify, then the court may dismiss the appeal and decline to allow further briefing or argument.** ~~by the court having jurisdiction and the judge so certifies.~~



**Proposed Process for Appeal Determined to Be Frivolous**

# Proposal #2: Dismiss appeal if there is a finding that the case is frivolous after *Anders* motion

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## CURRENT PROCESS, PB § 43-34

1. Appointed counsel files M/Withdraw and memorandum in support under seal, “outlining anything in the record that might arguably support the appeal and the factual and legal basis for the conclusion that an appeal would be wholly frivolous.”
2. Client can file a response.
3. If, after review of the transcripts and filings, the presiding judge finds that the appeal is wholly frivolous, court grants m/withdraw **and permits party to proceed as self-represented party.**

## PROPOSED CHANGE TO § 43-36

(earlier steps remain the same where counsel must move to withdraw instead of filing an appellant brief)

3. If, after review of the transcripts and filings, the presiding judge finds that the appeal is wholly frivolous, **the court may dismiss the appeal.**

# How Criticism of Current Process Is Addressed By These Proposals

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Pet Cert process doesn't reduce number of frivolous appeals.

Everyone gets an appeal.

Everyone gets full appellate briefing (though not everyone will get full merits review and decision on the merits).

Everyone gets oral argument.

We are wasting resources on frivolous appeals.

No way under current law to truncate the full appellate process for appeals that have been determined to be frivolous.

New Pet Cert process allows App Ct to truncate & dismiss frivolous appeals.

Not everyone will get a full appeal.

Frivolous appeals do not get full briefing or review.

Frivolous appeals do not get oral argument.

We will no longer be wasting resources on appeals that the court deems frivolous.

There is a way to more efficiently dispose of frivolous appeals.