§ 460.30 Extension of time for taking appeal.

1. Upon motion to an intermediate appellate court of a defendant who desires to take an appeal to such court from a judgment, sentence or order of a criminal court but has failed to file a notice of appeal, an application for leave to appeal, or, as the case may be, an affidavit of errors, with such criminal court within the prescribed period, or upon motion to the court of appeals of a defendant who desires to take an appeal to such court from an order of a superior court or of an intermediate appellate court, but has failed to make an application for a certificate granting leave to appeal to the court of appeals, or has failed to file a notice of appeal with the intermediate appellate court, within the prescribed period, such intermediate appellate court or the court of appeals, as the case may be, may order that the time for the taking of such appeal or applying for leave to appeal be extended to a date not more than thirty days subsequent to the determination of such motion, upon the ground that the failure to so file or make application in timely fashion resulted from (a) improper conduct of a public servant or improper conduct, death or disability of the defendant's attorney, or (b) inability of the defendant and his attorney to have communicated, in person or by mail, concerning whether an appeal should be taken, prior to the expiration of the time within which to take an appeal due to defendant's incarceration in an institution and through no lack of due diligence or fault of the attorney or defendant. Such motion must be made with due diligence after the time for the taking of such appeal has expired, and in any case not more than one year thereafter.

2. The motion must be in writing and upon reasonable notice to the people and with opportunity to be heard. The motion papers must contain sworn allegations of facts claimed to establish the improper conduct, inability to communicate, or other facts essential to support the motion, and the people may file papers in opposition thereto. After all papers have been filed, the court must consider the same for the purpose of ascertaining whether the motion is determinable without a hearing to resolve issues of fact.

3. If the motion papers allege facts constituting a legal basis for

the motion, and if the essential allegations are either conclusively substantiated by unquestionable documentary proof or are conceded by the people to be true, the court must grant the motion.

4. If the motion papers do not allege facts constituting a legal basis for the motion, or if an essential allegation is conclusively refuted by unquestionable documentary proof, the court may deny the motion.

5. If the court does not determine the motion pursuant to subdivision three or four, it must order the criminal court which entered or imposed the judgment, sentence or order sought to be appealed to conduct a hearing and to make and report findings of fact essential to the determination of such motion. Upon receipt of such report, the intermediate appellate court or the court of appeals, as the case may be, must determine the motion.

6. An order of an intermediate appellate court granting or denying a motion made pursuant to this section is appealable to the court of appeals if (a) such order states that the determination was made upon the law alone, and (b) a judge of the court of appeals, pursuant to procedure provided in section 460.20, of this chapter, issues a certificate granting leave to the appellant to appeal to the court of appeals.