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July 30, 2010

Mr. Corbin Davis
Supreme Court Clerk
PO Box 30052
Lansing, MI 48909

RE: ADM File No. 2009-19
Proposed Amendment of Rules 6.425, 7.204, and 7.205

Dear Mr. Davis,

I write to categorically oppose the proposed court rule amendments, which eliminate late appeals and in doing so violate a defendant's constitutional right to appeal a guilty plea case. Const. 1963, art. 1, § 20. The proposals fail to appreciate the reality of appellate practice for guilty plea cases in Michigan, where appellate deadlines are based on an application on the merits, rather than a simple notice of appeal.

This letter serves to outline both this basic objection and other concerns with the proposal:

1. The proposals deny the constitutional right to appeal in guilty plea cases.

In appeals after a trial, the filing deadline refers to the claim of appeal filed by the trial court after a defendant timely requests counsel and an appeal. The time for filing briefs on appeal on the merits then runs from production of the transcripts. In contrast, guilty plea appeals must be filed through an application on the merits prior to the expiration of a jurisdictional deadline. The new proposal eliminates the provisions for a late appeal in guilty plea cases. This change means that by the time a circuit court appoints counsel and transcripts are produced, both the initial deadline and the proposed extension for "excusable neglect" will have run.

MCR 7.205 establishes a 21-day deadline for filing an application for leave to appeal after entry of a final order. The rule, as currently written, also allows a one year filing of a delayed application for leave to appeal. The alternative "excusable neglect" extensions in the proposal provide an additional 21 or 35 days. Under the proposed rule, the maximum time for filing an appeal in a guilty plea case will be 56 days – 21 days plus a 35-day excusable neglect extension.

In the 2009 calendar year, the State Appellate Defender Office received a total of 249 guilty plea appeal appointments. In 131 or 53% of these cases, transcripts were filed more than 56 days after sentencing. Assuming that the lack of transcripts would constitute “excusable neglect,” **over half of all SADO guilty plea clients in 2009 could not file an application for leave on the merits prior to the expiration of the new deadlines.**

The provision to run the deadline 21 days from entry of an order deciding a motion to withdraw a plea, per MCR 6.310(C), or motion for resentencing, per MCR 6.429(B)(3), does not cure this problem. Six month trial court motions are improper in a large number of cases. Where the defendant properly preserved a motion for plea withdrawal prior to sentencing or a guidelines challenge at sentencing, this claim should not be repeated in a trial court post-conviction motion in the same forum. Similarly, a challenge to the proportionality of a trial court’s sentence must be made in the Court of Appeals. *See People v Wybrecht*, 222 Mich App 160; 564 NW2d 903 (1997).

In 2008 at SADO, approximately 20% of all guilty plea appointments resolved in leave applications filed in the Court of Appeals rather than filing of trial court motions for plea withdrawal or resentencing. All of these defendants therefore properly preserved challenges to plea withdrawal or sentencing prior to their appeal. Michigan establishes a constitutional right to appeal, which this proposal eliminates for all guilty plea defendants who properly preserved plea withdrawal or sentencing issues in the trial court.

2. The proposals establish an appellate system radically different from other jurisdictions.

In evaluating this proposal, SADO researched appellate deadlines in other jurisdictions. Any comparison should take into account the fact that other states generally do not have a constitutional right for guilty plea appeals based upon an application for leave to appeal. Const. 1963, art. 1, § 20. Deadlines in other states for briefs on the merits run from the production of transcripts, just as with appeals by right in Michigan.

According to our research, the majority of states have an initial deadline for direct appeal, where the appellant is only required to file a notice of intent to appeal. The range of these deadlines is 10-90 days. Transcripts are then produced and the appeal is docketed. The deadline for the brief tolls from the later of the docketing of the appeal or the receipt of the transcripts. This process is completely consistent with Michigan’s deadlines for trial appeals, where deadlines for the brief on appeal run from production of transcripts.

With few exceptions, the deadline for filing the merits brief is determined by production of the transcripts. The Amendments propose a novel system where merit briefs in guilty plea cases will need to be filed prior to production of transcripts. The new proposal sets up a process where appeals must be taken before transcripts are available for a significant percentage of all criminal cases.

3. The proposals will create an inefficient appellate system.

SADO has identified a number of areas where the new proposals will increase inefficiency in both the trial courts and the Court of Appeals:

- A significant amount of guilty plea appeals end in voluntary dismissal of the appeal after proper consultation between the defendant and counsel. For example, in 2008, about 20% of SADO plea appointments resulted in dismissal. The proposals instead force counsel to file appeals on the merits based only on communications with their clients, prior to production of the plea and sentencing records. Proper client counseling before filing will be impossible and voluntary dismissals will decrease.
- The result will also be a number of frivolous applications for leave to appeal. Attorneys will need to file appeals based on incomplete information, rather than risk forfeiture of the appeal. An appellate attorney can simply not presume that a six month trial court motion for plea withdrawal or resentencing can be filed after production of transcripts, because the only legitimate issues for appeal might have already been preserved by trial counsel. **As a result, in order to preserve their clients' rights, SADO attorneys would need to file incomplete and potentially frivolous leave applications prior to the production of transcripts in every single guilty plea appeal.**
- At a minimum, attorneys would need to file for extensions of time based upon "excusable neglect," in almost all guilty plea cases to get beyond the 21-day deadline. Either trial courts or the Court of Appeals would need to resolve these motions and develop an entirely new area of law.
- Although the Antiterrorism and Effective Death Penalty Act of 1996 established more restrictive procedural and time requirements for filing of habeas petitions, non-partisan study of the changes show that federal courts have actually become less efficient. The number of issues per filings has increased, and a significant amount of litigation is spent on interpreting procedural default, exhaustion, and timing requirements.¹ I expect the establishment of a short deadline prior to production of the record with an "excusable neglect" extension to have a similar result.

¹ See *Final Technical Report: Habeas Litigation in US District Courts*, Vanderbilt University Law School, National Council for State Courts, pp. 54-62, available at <http://law.vanderbilt.edu/article-search/article-detail/download.aspx?id=1639>; House of Representatives Committee on the Judiciary, Hearing before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, *Impact of Federal Habeas Corpus Limitations on Death Penalty Appeals*, December 8, 2009, prepared statement of Honorable Gerald Kogan, pp. 6-8; available at http://judiciary.house.gov/hearings/printers/111th/111-66_53944.PDF.

- Appellate courts have streamlined cases and procedures to create a successful system of caseload management. The majority of appeals are now disposed by the Court of Appeals within about a year. According to the 2006 Court of Appeals annual report, from 2001 to 2006, the average time from Court of Appeals filing to disposition was reduced from 653 days to 423 days.² Strict deadlines will shift the burden of resolving appellate issues from the Court of Appeals to the trial courts, because there will be a significant increase in motions for relief from judgment. The proposed rules create an appellate caseload management problem when one does not exist.
- Frivolous trial court filings could also increase because appellants will be forced to file for plea withdrawal or sentencing per MCR 6.310(C) or MCR 6.429(B)(3), even though the issues have already been preserved at sentencing.

4. The proposals create new and irresolvable ethical challenges for trial and appellate attorneys.

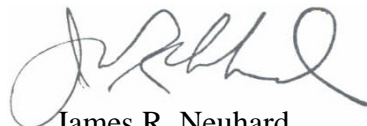
Ironically, the new proposal eliminates guilty plea appeals where a defendant properly preserved challenges to the sentence or plea withdrawal. A six month trial court motion for plea withdrawal or resentencing would be improper and transcripts would be unavailable for a timely application for leave to appeal. The result is that trial counsel would have an incentive **not** to raise colorable plea or sentencing challenges that might fail, because preserving the issue would foreclose proper appellate review. Similarly, where sentencing and plea withdrawal issues are properly preserved, appellate attorneys would have to either forfeit appeals, or file a frivolous trial court motion, contrary to MRPC 3.1, because the same judge has already resolved the identical issue.

The result is a situation where in order to properly appeal a guilty plea case and avoid forfeiture, trial lawyers have an incentive to ignore colorable issues, while appellate lawyers would be required to raise frivolous claims.

Michigan defendants have a constitutional right to guilty plea appeals by leave. These proposals restrict that right for no apparent reason, other than a misguided effort to confront an efficiency problem that does not exist.

Thank you for your consideration.

Sincerely,



James R. Neuhard

Director

State Appellate Defender Office

² Court of Appeals Annual Report, 2006, page 7, available at http://coa.courts.mi.gov/pdf/Annual_Report_2006.pdf