MICHAEL E. DUGGAN
PROSECUTING ATTORNEY

From the Desk of
TIMOTHY A. BAUGHMAN
CHIEF, RESEARCH, TRAINING, AND APPEALS

COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY
DETROIT, MICHIGAN 48226

FRANK MURPHY HALL OF JUSTICE
1441 ST. ANTOINE STREET
TEL. (313) 224-5792
Fax (313) 224-8224
e-mail: tbaughma@co.wayne.mi.us.

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OFFICE OF
THE CHIEF JUSTICE

Hon. Maura D. Corrigan
Chief Justice
Michigan Supreme Court

and

Justices of the Court:

re: ADM file 2002-34/Speeding up the appellate process

Dear Justices:

I am writing to oppose the proposed amendments to MCR 7.212 that would reduce the time for filing briefs in appeals in the Court of Appeals, as well as to propose an alternative. Especially in criminal cases, the amendments would have the effect of virtually eliminating oral argument, and would not achieve their goal of reducing the time to "process" an appellate case. Because the amendments would not achieve their goal, and would have other negative effects on the process, they should not be adopted.

New Fee Requirements in the Court of Appeals

Before stating my objections to the proposed amendments to MCR 7.212, let me first note the effect of the Court of Appeals decision to charge motion fees to prosecutors proceeding as appellee in cases where the defendant has appointed counsel–something new in my 28 years experience. Given staffing levels, my office, and most prosecutor's offices, rely heavily on stipulations and extensions of time. Even with the current rule allowing stipulations, the new practice of requiring a $75 filing fee for motions to extend from prosecutors who are appellee in indigent-defendant appeals has resulted in an almost uniform practice of prosecutors simply foregoing filing the motions rather than paying the fees, thereby forfeiting oral argument. My practice in my office was that if the attorney could not get the brief in within the stipulation time, a motion to extend time was to be filed. My practice now is that motions to extend time are prohibited, as we cannot afford the filing fees. Indeed, my department is currently being requested to reduce staffing by 10-15%, which will, of course, exacerbate the problem of timely filing, and in these tight budget times paying filing fees for motions to extend time or motions for oral argument is simply out of the question. The new fee charge will greatly reduce the number of oral

arguments–and bring in no more revenue to the Court of Appeals, as we simply aren't going to file the motions–unless that decision is reversed by the legislature, something we are attempting to achieve. And if the *only* extensions allowed will be by motion–as in the proposed amendment–then there will be virtually no oral argument by prosecutors (and rumor has it that the motion fee may also be *increasing*). I would request that the Court give some consideration to reversing this new practice of the Court of Appeals itself.

Proposed Amendments to MCR 7.212

–Wishing will not make it so

The Court has published for comment proposed amendments to reduce the time the parties have for briefing which are designed to speed up the time it takes for a case to proceed from filing to opinion. The rule will *not* have that effect, at least in criminal cases. It will succeed only in almost completely eliminating oral argument, which I do not understand to be the goal of the Court of Appeals, as I am aware that at least some judges both enjoy oral argument and believe it important, at least in some cases. But perhaps I am mistaken and elimination of oral argument is a goal–it will most certainly be the result, particularly on top of the motion fee now charged prosecutors in cases where the defendant-appellant is represented by appointed counsel.

Currently each party may extend the time for filing the brief by 56 days. The court rules permit the parties to stipulate to 28 days, and the practice of the Court of Appeals is to grant a motion for extension of time for another 28 days without a particularly detailed showing of cause, though it will not generally grant a second motion. If the proposal passes and all extensions are by motion for good cause, an extension by motion for 56 days will almost certainly be out of the question. Even *if* in many cases the court might see fit to grant an extension of 14 days, the reduction in briefing time for an appellant will be 56 days–a reduction in time from 56 to 42 days, the loss of the 28 day stipulation, and the halving of the currently granted 28 day motion to extend (and this assumes the Court of Appeals might in many cases grant such a motion, which is speculative at best). The reduction in time for the appellee will be 42 days, again assuming the court might grant a 14-day motion to extend, and it may well not do so.

The proposal seems to proceed on the assumption that ordering parties to file briefs faster will make it so. But it is interesting to note that with regard to its *own* internal processes the court understands that wishing something will not make it happen. Chief Judge Whitbeck has stated publicly that a bottleneck in the Court of Appeals attempt to reduce its "warehousing" time for cases is that staff attorneys are working as effectively as possible, so that without an appropriation from the legislature to add more staff attorneys the bottleneck at staff review cannot be solved. See Chief Judge Whitbeck's testimony before the Senate Appropriations Committee, March 18, 2003, and column of Brian Dickerson, Detroit Free Press, March 21, 2003. I am mystified that while the Court of Appeals understands that its staff cannot process more cases, and so an increase in staff is required to speed processing, it does *not* understand that the very *same* principles apply to other departments of government, whose staffing levels of attorneys to brief and argue appeals are diminishing and not increasing. It is certainly understandable that the Court of Appeals not simply order its staff attorneys to handle more cases faster and expect it to happen; ordering the executive branch of

government, as well as institutions such as the State Appellate Defender's Office, and even private attorneys who are scarcely well-paid for indigent appeals, to do that which the Court of Appeals knows its staff attorneys cannot do is both unfair and counterproductive. It simply cannot and will not achieve the goal of reduction of processing time. Again, the briefs will simply be filed late, and oral argument lost in almost every case; and if, at least with respect to the appellee, the court puts cases on the call without the appellee's brief, then the decision-making process will suffer and more work will fall to the court.

Wishing–or commanding–that more briefs be filed in a shorter period of time simply will not make it so. The briefs will be filed in roughly the same amount of time, they will simply be "late faster," causing the routine forfeiture oral argument.

–Approaching the system as a whole

The proposed amendments also do not take a holistic or systemic approach. Why focus only on time for briefing? If a serious effort to reduce the time to process a case is to be undertaken, it is necessary to review the entire process. The approach of the proposed amendment is akin to attempting to produce more cars by doubling the speed of only part of the assembly line and with the same number of workers (or fewer), while ignoring how long it takes to receive supplies, handle shipping, and other parts of the system.

42 days to file a claim of appeal in retained-counsel criminal cases is rather generous, as is 42 days to request the appointment of counsel in appointed-counsel criminal cases. The notice of appeal must be filed in 30 days in the federal system, and I have checked the requirements of some other large states and found that 30 days is a fairly common provision. In keeping with our philosophy–which I believe sound–of using multiples of 7, I would suggest that the time for filing the claim be reduced to 28 days, and the time for requesting the appointment of counsel in indigent-defendant appeals also be reduced to 28 days (and then the circuit judges given the current14 days to file the combined order of appointment/claim of appeal).

The time allowed to produce a transcript is 91 days, irrespective of length. The proposed amendments do nothing with regard to production of transcripts, and I am aware of no other pending rule amendment that would do so. The 1989 rules reduced the time to 56 days, but that change was later rescinded. In the federal system, FRAP 11(b)(1)(B) provides for 30 days for the preparation of the transcript. At least one circuit, and likely others, has rules providing that it will follow the "district court reporter management plans." For example, the 4th Circuit's rule 11(b) provides that

> All of the plans establish a 60-day period for preparation of transcripts, with the following exceptions:
> (1) Special provisions adopted by the Fourth Circuit Judicial Council for appeals by incarcerated criminal defendants.
> *(a) transcripts of 1000 pages or less shall be filed within 30 days of transcript order and completion of satisfactory financial arrangements.*
> (b) transcripts of more than 1000 pages shall be filed within the time ordered by the Clerk of the Court of Appeals.

(2) Special circumstances, such as
(a) bail appeals,
(b) death penalty cases, or
(c) other expedited procedures in which the transcript shall be filed within the time ordered by the Clerk of the Court of Appeals.

Sanctions for failing to meet the deadlines include reduction in the fee paid. Our rules expedite the transcript preparation on interlocutory appeals in criminal cases from orders granting or denying a motion to suppress evidence, in guilty plea cases, and in other interlocutory criminal or child-custody applications, but otherwise the time for filing is 91 days. MCR 7.210. This seems excessive to me, at least for transcripts of under 1000 pages. At the least some review of this time frame should accompany any attempt to reduce the briefing time. I would suggest adoption of rules based on transcript length, much like the federal system, and providing the sanction of reduction of fee for violation. 42 days for a transcript of 1000 pages or less in length seems fair–the court reporters will vehemently disagree–with the Clerk of the Court to set the time for filing upon notice from the reporter or recorder that the transcript will exceed 1000 pages, accompanied by an estimate of its length, retaining also the possibility of an extension in any case for good cause (and I would keep the provisions in MCR 7.210 that expedite in the circumstances above mentioned).

Conclusion: Alternative Proposal

Just as the judiciary tends to be the stepchild of state government in terms of resources allocated from the state budget, so appellate prosecutors are the stepchildren in most prosecutor's offices. The appellate departments in prosecutors offices–and I dare say this is true of SADO as well–live on stipulations to extend time, and the essentially automatic 28-day motion to extend time. Thus, in Michigan the appellant actually has 112 days to file the brief (56 + 28 + 28), and the appellee has 91 (35 + 28 + 28). And, figuring in a standard criminal case, 42 days to request counsel, 14 days for the trial court to appoint counsel, 91 days for the court reporter to prepare the transcript (which begins to run from the order for transcript, which occurs with the appointment of counsel), 112 days for the appellant to file the brief, and 91 days for the appellee to file the answering brief, ***350 days***–essentially one year–passes just to get the case to the court. And even this time period may be greatly extended by motions to extend the time to file the transcript, reply briefs, hearings in the trial court on motions to remand granted, and hearings in the trial court on postconviction motions filed within the time for filing the appellant's brief, which do not require the granting of a motion to remand by the Court of Appeals, and which can stay the appeal almost indefinitely. A holistic approach to reduction of this time frame can achieve the same sort of reductions as the proposed amendment without placing the entire load on the backs of the attorneys by the proposed drastic shortening of briefing time.

Though I make no guarantee that *any* reduction in briefing time will result in briefs being filed more quickly, the blow to both sides might be softened if the stipulation were not eliminated but instead *reduced* from 28 to 21 days (and I would note that elimination of the stipulation for extension of time in favor of a motion to extend for good cause would seem to me a headache for the court in ruling on these motions, if good cause is taken seriously, adding a great deal of work to the court). Any further extension would be by motion, presumptively not to exceed 21 days, with

the court having the discretion to allow greater time on a proper showing–such as a "box case" involving a massive transcript. I have attached a Rule 7.212 counterproposal that includes language achieving this result.

These suggestions would reduce the time in a "normal" criminal appeal with appointed counsel, where all extensions are employed, from 350 days, to 252 days: 28 days to request counsel, 14 days for the trial court to appoint counsel/file the claim, 42 days for the court reporter to prepare the transcript (assuming a transcript of 1000 pages or less), 91 days for the appellant to file the brief (49–rather than the proposed 42–+21 +21), and 77 days for the appellee to file the answering brief (35 + 21 + 21). This achieves the same 98 day reduction as does the Court's proposed amendment.

Again, the problem is whether SADO and other defense counsel, and prosecutors offices, can handle even my suggested reductions. But I believe there is no question that as severe a reduction as the proposal suggests would create an impossible situation in criminal appeals.

One further point, and I will desist. Keeping track of appeals when a motion to remand is granted has to be headache enough–circuit judges hear the matters on their motion day, as they should, particularly given justifiable pressures to try more cases, and thus evidentiary hearings on such matters as ineffective assistance can stretch out for months before all testimony is taken, a ruling made, and the transcript prepared. But this pales to what must be the court's administrative difficulty in keeping track of appeals where a postconviction motion is filed within 56 days after the transcript is filed where no motion to remand is required. I would suggest *eliminating* any trial court proceedings after the claim is filed without the grant of a motion to remand, which is a return to former practice.

Thank you for you attention; I attach a chart comparing the current rule, the proposal, and my alternative (and I do not suggest prosecutors can meet even my alternative), as well as the text of an alternative amendment to Rule 7.212 to that proposed, and amendments to other court rules so as to achieve a holistic approach to reduction in the time to process an appeal.

Sincerely,

TIMOTHY A. BAUGHMAN
Chief of Research,
Training, and Appeals
1441 St. Antoine
Detroit, MI 48226
313 224-5792

COMPARISON CHART

Current			
Appointed	**Retained**	**Proposed**	**Alternative**
Request for appointment of counsel: 42 days		No change	Request for appointment of counsel: 28 days (14-day reduction)
Appoint counsel/ Claim: 14 days	Claim: 42 days	No change	Appoint counsel/Claim: 14 days Retained Claim: 28 days
Transcript filing: 91 days (extensions possible)	Transcript filing: 91 days (extensions possible)	No change	Transcript filing: 42 days 1000 pages or less (extensions possible for larger transcripts) 49-day reduction)
Appellant's Brief: 56 days	Appellant's Brief: 56 days	reduction of 14 days to 42 days	Appellant's Brief: 49 days (reduction of 7 days)
Stipulation: 28 days	Stipulation: 28 days	Elimination	Stipulation: 21 days (reduction of 7 days)
Extension: one 28 day extension generally permitted	Extension: one 28 day extension generally permitted	Elimination except on good cause justifying specific number of days requested	Extension: one 21-day extension generally permitted (reduction of 7 days)
Appellee's Brief: 35 days	Appellee's Brief: 35 days	No change	No change
Stipulation: 28 days	Stipulation: 28 days	Elimination	Stipulation: 21 days (reduction of 7 days)
Extension: one 28 day extension generally permitted	Extension: one 28 day extension generally permitted	Elimination except on good cause justifying specific number of days requested	Extension: one 21-day extension generally permitted (reduction of 7 days)
Total: 350 days	**Total: 336 days**	**Reduction of 98 days, assuming the grant of one 14-day extension in many cases**	**Reduction of 98 days assuming the grant of one 21 day extension in many cases**

Holistic Alternative to Published Proposal

Rule 6.425 Sentencing; Appointment of Appellate Counsel

(A)-(D) [Unchanged.]

E) Advice Concerning the Right to Appeal; Appointment of Counsel.

(1) In a case involving a conviction following a trial, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a) the defendant is entitled to appellate review of the conviction and sentence,

(b) if the defendant is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal, and

(c) the request for a lawyer must be made within ~~42~~ 28 days after sentencing.

(2) (a)-(c) [Unchanged.]

(d) the request for a lawyer must be made with ~~42~~ 28 after sentencing, unless the entitlement to counsel arises under (b)(iii or (iv).

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(3) The court also must give the defendant a request for counsel form containing an instruction informing the defendant that the form must be completed and returned to the court within ~~42~~ 28 days after sentencing if the defendant wants the court to appoint a lawyer. The ~~42~~-28day time limit does not apply if the entitlement to counsel arises under subrule (2)(b)(iii) or (iv).

(4) [Unchanged.]

(F) Appointment of Lawyer; Trial Court Responsibilities in Connection with Appeal.

(1) Appointment of Lawyer.

(a) Unless there is a postjudgment motion pending, the court must rule on a defendant's request for a lawyer within 14 days after receiving it. If there is a postjudgment motion pending, the court must rule on the request after the court's disposition of the pending motion and within 14 days after that disposition.

(b) In a case involving a conviction following a trial, if the defendant is indigent, the court must enter an order appointing a lawyer if the request is filed within ~~42~~ 28 days after sentencing or within the time for filing an appeal of right. The court should

liberally grant an untimely request as long as the defendant may file an application for leave to appeal.

(c) [Unchanged.]

(2) and (3) [Unchanged.]

Rule 7.205 Filing Appeal of Right; Appearance

(A) Time Requirements. The time limit for an appeal of right is jurisdictional See MCR 7.203(A). The provisions of MCR 1.108 regarding computation of time apply.

(1) [Unchanged.]

(2) An appeal of right in a criminal case must be taken

(a) in accordance with MCR 6.425(F)(3);

(b) within ~~42~~ 28 days after entry of an order denying a timely motion for the appointment of a lawyer pursuant to MCR 6.425(F)(1);

(c) within ~~42~~ 28 days after entry of the judgment or order appealed from; or

(d) within ~~42~~ 28 days after the entry of an order denying a motion for a new trial, for judgment of acquittal, or for resentencing, if the motion was filed within the time provided by 6.419(B), 6.429(B)(1), or 6.431(A)(1), as the case may be.

A motion for rehearing or reconsideration of a motion mentioned in subrules (A)(1)(b) or (A)(2)(d) does not extend the time for filing a claim of appeal, unless the motion for rehearing or reconsideration was itself filed within the 21- or ~~42~~-28day period.

(B)-(H) [Unchanged.]

Rule 7.208 Authority of Court or Tribunal Appealed From

(A) Limitations. After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except

(1)-(3) [Unchanged.]

~~In a criminal case, the filing of the claim of appeal does not preclude the trial court from granting a timely motion under subrule (B).~~

~~(B) Postjudgment Motions in Criminal cases.~~

Delete entire provision.

Rule 7.210 Record On Appeal

(A) [Unchanged.]

(B)(1)-(2) [Unchanged.]

(3) Duties of Court Reporter or Recorder.

(a) [Unchanged.]

(b) Time for Filing. The court reporter or recorder shall give precedent to transcripts necessary for interlocutory criminal appeals and custody cases. The court reporter or recorder shall file the transcript with the trial court or tribunal clerk within

(i)-(iii) [Unchanged.]

(iv) ~~91 days after it is ordered in other cases~~. 42 days after it is ordered for transcripts of 1000 pages or less; transcripts of greater than 1000 pages shall be filed within the time ordered by the Clerk of the Court of Appeals upon notice by the reporter or recorder that the transcript will exceed 1000 pages, accompanied by an estimate of the length of the transcript.

Rule 7.212 Briefs

(A) Time for Filing and Service.

(1) Appellant's Brief.

(a) Filing. The appellant shall file 5 typewritten, xerographic, or printed copies of a brief with the Court of Appeals within

(i)-(ii) [Unchanged.]

(iii) ~~56~~ 49 days after the claim of appeal is filed, the order granting leave is certified, or the transcript is filed with the trial court or tribunal, whichever is later, in all other cases. In a criminal case in which substitute counsel is appointed for the defendant, the time runs from the date substitute counsel is appointed or the transcript is filed, whichever is later. The parties may extend the time within which the brief must be filed for ~~28~~ 21 days by signed stipulation filed with the Court of Appeals. The Court of Appeals may extend the time on motion; a request for an extension of greater than 21 days is not favored and must be supported by a showing of extraordinary circumstances.

(b) [Unchanged.]

(2) Appellee's Brief.

(a) Filing. The appellee shall file 5 typewritten, xerographic, or printed copies of a brief with the Court of Appeals within

(i) [Unchanged.];

(ii) 35 days after the appellant's brief is served on the appellee, in all other cases. The parties may extend the time within which the brief must be filed for ~~28~~ 21 days by signed stipulation filed with the Court of Appeals. The Court of Appeals may extend the time on motion; a request for an extension of greater than 21 days is not favored and must be supported by a showing of extraordinary circumstances

(B)-(F) [Unchanged.]

(G) Reply Briefs. An appellant or a cross-appellant may reply to the brief of an appellee or cross-appellee within ~~21~~ 14 days after service of the brief of the appellee or cross-appellee. Reply briefs must be confined to rebuttal of the arguments in the appellee's or cross-appellee's brief and must be limited to 10 pages, exclusive of tables, indexes, and appendices, and must include a table of contents and an index of authorities. No additional or supplemental briefs may be filed except as provided by subrule (F) or by leave of the Court.