

Order

Michigan Supreme Court
Lansing, Michigan

May 5, 2021

Bridget M. McCormack,
Chief Justice

ADM File No. 2018-33

ADM File No. 2019-20

Brian K. Zahra

David F. Viviano

Richard H. Bernstein

Elizabeth T. Clement

Megan K. Cavanagh

Elizabeth M. Welch,
Justices

Amendments of Rules 6.310,
6.429, 6.431, 7.204, 7.205, and
7.305, and Addition of Rule 1.112
of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 6.310, 6.429, 6.431, 7.204, 7.205, and 7.305, and new Rule 1.112 of the Michigan Court Rules are adopted, effective September 1, 2021.

[Additions to the text are indicated in underlining and
deleted text is shown by strikeover.]

[NEW] Rule 1.112 Filings by Incarcerated Individuals

If filed by an unrepresented individual who is incarcerated in a prison or jail, a pleading or other document must be deemed timely filed if it was deposited in the institution's outgoing mail on or before the filing deadline. Proof of timely filing may include a receipt of mailing, a sworn statement setting forth the date of deposit and that postage has been prepaid, or other evidence (such as a postmark or date stamp) showing that the document was timely deposited and that postage was prepaid.

Rule 6.310 Withdrawal or Vacation of Plea

(A)-(B) [Unchanged.]

(C) Motion to Withdraw Plea After Sentence.

(1)-(3) [Unchanged.]

(4) ~~If a motion to withdraw plea is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement filed with~~

~~the motion, which must set forth the date of deposit and state that first class postage has been prepaid. The exception applies to cases in which a plea was accepted on or after the effective date of this amendment. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to withdraw a plea in a Michigan court.~~

(D)-(E) [Unchanged.]

Rule 6.429 Correction and Appeal of Sentence

(A) [Unchanged.]

(B) Time for Filing Motion.

(1)-(4) [Unchanged.]

(5) ~~If a motion to correct an invalid sentence is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement filed with the motion, which must set forth the date of deposit and state that first class postage has been prepaid. The exception applies to cases in which a judgment of conviction and sentence is entered on or after the effective date of this amendment. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to correct an invalid sentence in a Michigan court.~~

(C) [Unchanged.]

Rule 6.431 New Trial

(A) Time for Making Motion.

(1)-(4) [Unchanged.]

(5) ~~If a motion for new trial is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the motion as a pro se party, the motion shall be deemed presented for filing on the date of deposit of the motion in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement filed with~~

~~the motion, which must set forth the date of deposit and state that first class postage has been prepaid. The exception applies to cases in which the trial court rendered its decision on or after the effective date of this amendment. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks a new trial in a Michigan court.~~

(B)-(D) [Unchanged.]

Rule 7.204 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. For purposes of subrules (A)(1) and (A)(2), “entry” means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal’s register of actions.

(1) [Unchanged.]

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

(a)-(d) [Unchanged.]

(e) ~~If a claim of appeal is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the claim as a pro se party, the claim shall be deemed presented for filing on the date of deposit of the claim in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first class postage has been prepaid. The exception applies to claims of appeal from decisions or orders rendered on or after March 1, 2010. This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to appeal in a Michigan court.~~

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- day period.

(3) [Unchanged.]

(B)-(H) [Unchanged.]

Rule 7.205 Application for Leave to Appeal

(A) Time Requirements. The time limit for an application for leave to appeal is jurisdictional. See MCR 7.203(B). The provisions of MCR 1.108 regarding computation of time apply. For purposes of this subrule, “entry” means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal’s register of actions.

(1)-(4) [Unchanged.]

~~(5) In a criminal case, if an inmate in the custody of the Michigan Department of Corrections, or in the custody of another state or federal penal institution, submits an application or delayed application for leave to appeal as a pro per party that is received by the court after the expiration of the periods set forth in this rule, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution where the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first class postage has been prepaid.~~

(6) [Renumbered (5) but otherwise unchanged.]

(B)-(F) [Unchanged.]

Rule 7.305 Application for Leave to Appeal

(A)-(B) [Unchanged.]

(C) When to File.

(1)-(4) [Unchanged.]

~~(5) Late Application, Exception. Late applications will not be accepted except as allowed under this subrule. If an application for leave to appeal in a criminal case is not received within the time periods provided in subrules (C)(1) or (2), and the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the application as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first class postage was prepaid. The exception~~

~~applies to applications from decisions of the Court of Appeals rendered on or after March 1, 2010. This exception also applies to an inmate housed in a federal or other state correctional institution who is acting pro se in a criminal appeal from a Michigan court.~~

(6)-(8) [Renumbered (5)-(7) but otherwise unchanged.]

(D)-(I) [Unchanged.]

Staff comment: These amendments relate to expansion of the prison mailbox rule. Under the new MCR 1.112, the prison mailbox rule applies to any pleading or other document deposited in a prison or jail's mail system (i.e., not limited only to claims under criminal proceedings). The specific references to situations where that rule now applies (MCR 6.310, 6.429, 6.431, 7.204, 7.205 and 7.305) are eliminated.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

VIVIANO, J. (*dissenting*). This amendment significantly expands the scope of the "prison mailbox rule." While I am not unsympathetic to the challenges unrepresented inmates face when filing legal pleadings, I dissent from the Court's decision because I believe that it is unnecessary and will impair the efficient and effective administration of justice in our courts.

As the United States Supreme Court has observed, "[f]iling deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced." *United States v Locke*, 471 US 84, 101 (1985).

In general, the prison mailbox rule provides that "a pro se inmate's motion is considered filed on the date he or she provides it to prison officials for mailing." 86 CJS, Time, § 15, pp 564-565. In other words, the motion "is deemed filed at the moment in time when the inmate loses control over the document by entrusting its further delivery or processing to agents of the state." 5 Am Jur 2d, Appellate Review, § 302, p 122. See also 39A CJS, Habeas Corpus, § 484, p 233. The traditional rationale for the rule is that it is unfair to hold such pro se prisoners accountable for mail delays not attributable to them and that an inmate's punctual filing should not be rejected simply because of the tardiness of prison officials who may have an incentive to delay. 5 Am Jur 2d, Appellate Review, § 302, p 122; see also 3 Mushlin, Rights of Prisoners (5th ed), § 12:38.

Until today, application of the prison mailbox rule in our state was limited to claims of appeal and applications for leave to appeal in criminal cases, see MCR 7.204(A)(2)(e), MCR 7.205(A)(5), and MCR 7.305(C)(5), and other postjudgment motions in criminal

matters, see MCR 6.310(C)(4), MCR 6.429(B)(5), and MCR 6.431(A)(5). And it was limited to prisoners in the custody of the Michigan Department of Corrections (MDOC). The court rule changes reflected in today’s order expand the prison mailbox rule in two significant ways. First, the rule is expanded to cover all pleadings submitted by pro se inmates, not just criminal claims of appeal, applications for leave to appeal, and postjudgment motions. Second, the rule is no longer limited to pleadings submitted by individuals in the custody of the MDOC, but now also encompasses pleadings submitted by inmates lodged in county jails.

These changes may appear simple and straightforward, but they will create a host of practical problems—none of which the amendment attempts to address. Perhaps most glaringly, it appears that most if not all county jails do not have a system in place to log prisoner mail.¹ *Houston v Lack*, 487 US 266, 275-276 (1988), the seminal case recognizing the prison mailbox rule, relied heavily on the existence of such a system in adopting what it described as a “bright-line rule”:

[T]he rejection of the mailbox rule in other contexts has been based in part on concerns that it would increase disputes and uncertainty over when a filing occurred and that it would put all the evidence about the date of filing in the hands of one party. See, e. g., *United States v. Lombardo*, 241 U.S. 73, 78 (1916). These administrative concerns lead to the opposite conclusion here. The *pro se* prisoner does not anonymously drop his notice of appeal in a public mailbox—he hands it over to prison authorities *who have well-developed procedures for recording the date and time at which they receive papers for mailing and who can readily dispute a prisoner’s assertions that he delivered the paper on a different date*. Because reference to prison mail logs will generally be a straightforward inquiry, making filing turn on the date the *pro se* prisoner delivers the notice to prison authorities for mailing is a bright-line rule, not an uncertain one. [*Id.* at 275 (emphasis added).]

In *Lombardo*, in the context of a venue challenge, the Court described the problems that would arise with a regime like the one our new rule creates:

A court is constrained by the meaning of the words of a statute. They mark the extent of its power, and our attention has not been called to any case which decides that the requirement of a statute, whether to secure or preserve a right or to avoid the guilt of a crime, that a paper shall be filed with a particular officer, is satisfied by a deposit in the post office at some distant place. To so hold would create revolutions in the procedure of the law and the regulation of rights. In instances it might, indeed, be convenient; in others, and most others,

¹ The Michigan Sheriffs’ Association reported to the Court that outgoing mail in jails is not logged or time-stamped, and the State Appellate Defender Office recognized this practical limitation as well.

it would result in confusion and controversies; and we would have the clash of oral testimonies for the certain evidence of the paper in the files. We hesitate, in order to accommodate the venue of a particular offense, to introduce such confusion. And would it not, besides, in particular cases preclude the possibility of a conviction, putting evidence entirely in the hands of the defendant? [*Lombardo*, 241 US at 78.]

The discussion in these cases highlights the problems with our new mailbox rule: at least as it relates to county jails that do not maintain prisoner mail logs, it is not a bright-line rule and risks “putting evidence entirely in the hands of the defendant.” *Id.* The new rule states: “Proof of timely filing may include a receipt of mailing, a sworn statement setting forth the date of deposit and that postage has been prepaid, or other evidence (such as a postmark or date stamp) showing that the document was timely deposited and that postage was prepaid.” Left unsaid is whether a litigant is entitled to an evidentiary hearing to contest a clerical determination of untimeliness, where the burden of proof lies in such circumstances, whether there is a presumption in favor of one party or the other, and, if so, what amount of evidence is needed to overcome it. Much confusion, and litigation, will ensue to answer these questions. And where no log is maintained, only the pro se inmate (i.e., the person presumably with the most at stake in the outcome) will be in a position to validate his or her own filing—an outcome our new rule appears to invite by allowing a defendant’s sworn statement to be submitted as proof of filing. How is a trial judge to know whether to credit the defendant’s testimony or to rely on the file stamp on the pleading?²

² Some courts have applied the prison mailbox rule even in the absence of a prison mail log. See *Setala v JC Penney Co*, 97 Hawaii 484, 488 (2002) (“[T]he absence of a prison log detailing when mail was received is not fatal to ‘constructive filing.’ ”), and cases cited. But those cases do not provide satisfactory answers to these questions when the jail lacks standard procedures for processing legal mail that could ensure an objective determination of timeliness. Cf. *Caldwell v Amend*, 30 F3d 1199, 1202 (CA 9, 1994) (noting the prison’s standard procedure for collecting legal mail, which allowed the court to determine that the defendant’s filing was timely if that procedure was followed). Instead, they suggest a roadmap for defendants who wish to avoid filing deadlines: simply indicate on the filing that it was submitted timely and make a similar claim in an affidavit. See *Veteto v Yocum*, 793 So 2d 814, 816 (Ala Civ App, 2001). See also *Commonwealth v Jones*, 549 Pa 58, 64 (1997) (discussing that a prisoner need only provide “reasonably verifiable evidence” of the date of filing, including an “affidavit attesting to the date of deposit with the prison officials”). But this seems only to validate the concerns raised over 100 years ago in *Lombardo*.

That this new rule now applies to all pleadings will only multiply these practical concerns.³ Now, it seems, there will be at least the potential for litigation every time a pro se inmate misses a filing deadline. One might wonder whether it is worth having deadlines at all if they are so easily trifled with.

I certainly do not mean to suggest that county jailers should be permitted to purposely or even negligently impede an inmate's ability to file pleadings with the courts. It is important to emphasize that even without the Court's far-reaching extension of our rule, inmates are not without recourse if the jail staff fails to process the mail in a timely manner. For example, the United States Supreme Court has established that access to the courts is a constitutional right applicable to prisoners. See *Christopher v Harbury*, 536 US 403, 412-414 (2002). Such a claim can be brought to challenge either a current bar to accessing the courts or to seek redress for past "specific cases that cannot now be tried (or tried with all material evidence)" as the result of state interference with access. *Id.* at 413-414. Other arguments might also be available to criminal defendant inmates in these circumstances. See, e.g., *Houston*, 487 US at 281 (Scalia, J., dissenting) (noting caselaw permitting equitable tolling for prisoners, although rejecting its application in the civil context). I believe that, in the absence of evidence of frequent or widespread abuses of an inmate's right to access the courts by county jailers—evidence not present here—the existing safeguards are adequate.

Because I believe this amendment is a solution in search of a problem and will impair the administration of justice in our courts, I dissent.

ZAHRA, J., joins the statement of VIVIANO, J.

³ See, e.g., MCR 2.108(A)(1) (requiring an answer to a pleading to be filed within 21 days after service); MCR 2.508(B)(1) (requiring a demand for a jury trial to be filed within 28 days after the filing of the answer to the complaint); MCR 2.611(B) (requiring a motion for a new trial to be filed and served within 21 days after the entry of judgment); MCR 2.003(D)(1)(a) and (b) (requiring motions for disqualification of a judge to be filed within 14 days after discovery of the grounds for disqualification); MCR 6.429(B) (requiring motions to correct a sentence to be filed within a specific time depending on the appeal taken); MCR 7.104(A)(1) (requiring appeals to circuit courts to be taken within 21 days after the entry of judgment).



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 5, 2021

Clerk