



State Appellate Defender Office

645 Griswold, Ste. 3300, Detroit, MI 48226
(Phone) 313.256.9833 (Fax) 313.965.0372
(Client calls) 313.256.9822 www.sado.org

Jonathan Sacks
Director

Marilena David-Martin
Deputy Director

Michael L. Mittlestat
Deputy Director

Bradley R. Hall
MAACS Administrator

Kathryn R. Swedlow
MAACS Deputy Administrator

**Michigan Appellate Assigned
Counsel System (MAACS)**
200 N. Washington Sq., Ste. 250, Lansing, MI 48913
(Phone) 517.334.1200 (Fax) 517.334.1228

July 1, 2020

Ms. Anne M. Boomer
Administrative Counsel, Michigan Supreme Court
Michigan Hall of Justice
P.O. Box 30052
Lansing, MI 48909

Re: ADM File Nos. 2018-33/2019-20/2019-38

Dear Ms. Boomer:

On behalf of the State Appellate Defender Office and its Court Rules Committee, I am writing to thank the Court for publishing our proposed rule amendments for comment and ask the Court to adopt the proposals in full.

These proposals are the product of much hard work by our Committee in consultation with many other stakeholders, a challenging but fruitful process. We hope the Court will agree that these commonsense amendments would help improve access to justice and promote greater fairness and efficiency in the judicial process.

1. Proposed MCR 1.112 (new)

The proposed MCR 1.112 would expand the prison mailbox rule to all types of filings by indigent individuals confined in all types of correctional institutions.

The long-established prison mailbox rule recognizes the unfairness of rejecting time-sensitive filings that were delivered for mailing within jurisdictional filing deadlines by unrepresented prisoners. In *Houston v Lack*, 487 US 266, 276 (1988), the United States Supreme Court held that a notice of appeal filed by an unrepresented prisoner should be deemed “filed at the time [the prisoner] delivered it to the prison authorities for forwarding to the court clerk.” The Court explained that “the lack of control of *pro se* prisoners over delays extends much further than that of the typical civil litigant: *pro se* prisoners have no control over delays between the prison authorities’ receipt of the notice and its filing, and their lack of freedom bars them from delivering the notice to the court clerk personally.” *Id.* at 273–74. Moreover, “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.” *Id.* at 275.

The federal prison mailbox rule is codified at Federal Rules of Appellate Procedure 4(c) and 25(a)(2)(A)(iii). It applies to anyone “confined in an institution,” and covers notices of appeal and other filings in both criminal and civil appeals and has been extended to civil complaints. See *Richard v Ray*, 290 F3d 810, 813 (CA6 2002).

In 2010, the Michigan Supreme Court first adopted the prison mailbox rule with amendments to MCR 7.204(A)(2)(e) and MCR 7.205(A)(3), which set the deadlines for filing a claim of appeal and application for leave to appeal, respectively. In 2015, the Court incorporated the rule into the new MCR 7.305(C)(5), which governs applications for leave to appeal in the Michigan Supreme Court. In 2018, the Court expanded the prison mailbox rule to cover various types of postconviction motions in the trial courts. See MCR 6.310(C)(5); MCR 6.429(B)(5); MCR 6.431(A)(5). But the Court has not extended the rule to requests for appellate counsel under MCR 6.425(G)—the single most important and most common document filed by unrepresented prisoners—or to pleadings filed in civil matters. And while the Michigan rule applies to individuals who are incarcerated in the Michigan Department of Corrections or “penal institution[s] in [] other state[s] or [] federal penal institution[s],” it appears to exclude people who are incarcerated in jails.

Consistent with the important public policy reasons for the prison mailbox rule, as well as the recent expansion of the rule, the proposal calls for a general prison mailbox rule in Chapter 1 of the Michigan Court Rules, which would apply to any civil or criminal filing in the trial or appellate courts of this state, whether the unrepresented filer is in the custody of a prison or jail. The adoption of a general prison mailbox rule in Chapter 1 would allow for the deletion of that provision elsewhere.

2. Proposed amendments to MCR 6.425

The proposed amendments to MCR 6.425 would ensure that criminal defense counsel have a reasonable opportunity to attend presentence interviews with their clients, consistent with Federal Rule of Criminal Procedure 32(c)(2).

The proposed amendments would also help ensure that presentence investigation reports are accurately corrected upon court order, that corrected reports are sent to the Michigan Department of Corrections for classification, programming, and parole decisions, and that appointed appellate counsel are provided copies of both the final corrected report and any earlier report or other information that was presented for the trial court’s consideration at sentencing.

3. Proposed amendments to MCR 6.428

The proposed amendments to MCR 6.428 would expand the restoration of appellate rights provision to ensure that indigent defendants do not lose their rights to appeal or appellate counsel due to errors by courts or counsel, including in guilty plea cases.

The proposed amendments would align the rule with existing practice and eliminate two constitutionally suspect limitations that are frequently—and appropriately—ignored by this Court. First, the text of the rule would no longer exclude cases in which the defendant was convicted by plea rather than trial. See, e.g., *People v Sanchez*, ___ Mich ___; 943 NW2d 116 (2020) (Docket No. 160032) (allowing defendant to seek appellate review where his “previous appellate attorneys allowed the time limits for appellate review to expire without seeking direct review of the defendant’s plea-based convictions.”).

Second, the rule would apply where the defendant has lost the right to appellate review due to errors by trial counsel, the courts, or others. See, e.g., *People v Brown*, 500 Mich 1018; 896 NW2d 797 (2017) (ordering reissuance of the defendant’s judgment of sentence where it was “unclear from the record whether the failure to perfect an appeal of right was solely the fault of the defendant’s trial counsel . . . , or whether trial counsel filed the paperwork and the trial court failed to process it. Regardless, it is clear that the failure to perfect an appeal of right is not attributable to the defendant.”).

The proposed language would better reflect the limited scope and purpose of this rule, which is to serve as a safeguard against the loss of appellate rights due to circumstances outside the defendant’s control.

4. Proposed Amendments to MCR 7.208 and MCR 7.211

The proposed amendments to MCR 7.208 and MCR 7.211 would expand the time for filing postjudgment motions in the trial court until the deadline for filing the appellant’s brief, thereby alleviating the need for motions to remand in most cases. This would foster efficiency and accuracy by giving appellate counsel more time for investigation and alleviating the need to seek leave to conduct evidentiary hearings that would have been available by right on an earlier date. See Hall, *Thinking Outside the Four Corners: How Michigan’s unique criminal appellate process promotes justice through factual development on direct appeal*, 98 Mich B J 36 (Sept 2019).

Additionally, consistent with current practice in remand proceedings, the deadline for deciding postjudgment motions would be expanded to 56 days (subject to adjournment for good cause) and the deadline for filing motions to remand would be eliminated, as the necessity for remand motions would generally only arise after expiration of the existing deadline—presumably due to new evidence or changed circumstances. See, e.g., *People v Conley*, unpublished order of the Court of Appeals, entered Aug. 12, 2019 (Docket No. 339093) (granting an untimely remand motion based on newly discovered evidence, and ordering the trial court to decide the matter within 56 days).

Finally, appeals would be stayed in the Court of Appeals upon the filing of remand motions, rather than upon the granting of such motions. This would save opposing counsel the burden of having to respond simultaneously to both the merits of an appeal and a motion to remand—the latter of which could easily alter or moot the former. The proposal would eliminate some frustrating inefficiency and waste in the existing timelines.

We thank the Court for its consideration of these proposals. Please do not hesitate to contact me if you have any questions.

Sincerely,

s/ Bradley R. Hall
MAACS Administrator