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April 1, 2020

Anne M. Boomer
Administrative Counsel
Michigan Supreme Court
P.O. Box 30052
Lansing, Michigan 48909
Via Email: admcomment@courts.mi.gov

Re: Support for ADM File No. 2019-13

Dear Ms. Boomer:

The State Appellate Defender Office (SADO), through both its Defender Division and the Michigan Appellate Assigned Counsel System (MAACS), supports amending MCR 7.118 to require the appointment of counsel to represent incarcerated individuals in appeals from Parole Board decisions granting parole.

The appeal of the Parole Board release decision is a postconviction proceeding

Under MCL 791.234(11), either the prosecuting attorney or the victim may seek leave to appeal a Parole Board decision granting release. Such an application must be filed in the circuit court where the prisoner was convicted. Prisoners do not have the same right to appeal when their parole is denied.

The procedure is governed by MCR 7.118. It states that the prisoner “shall be the appellee” and that the Parole Board “may move to intervene as an appellee.” Subsection (D)(3)(b) further states:

- (i) the prisoner may respond to the application for leave to appeal through retained counsel or in propria persona, although no response is required, and
- (ii) if an order of parole is issued under MCL 791.236 before the completion of appellate proceedings, a stay may be

granted in the manner provided by MCR 7.108, except that no bond is required.

The Parole Board routinely intervenes, represented by the Office of the Attorney General. But the Attorney General does not represent the interests of incarcerated individuals, few of whom have the resources to retain their own counsel. Individuals' release is routinely stayed, requiring them to remain in prison throughout the pendency of the appeal.

From 2016-2018, none of the 45 prisoners who faced parole appeals had counsel appointed. Eight of those individuals faced two appeals during that time.

This discretionary appeal implicates due process and equal protection

Federal courts recognize that the rights to due process and equal protection may require appointment of counsel for the indigent, even where the Sixth Amendment right to counsel would not. In *Halbert v Michigan*, 545 US 605 (2005), the Supreme Court acknowledged a due process and equal protection right to counsel in a discretionary appeal. And the Court referred to the “unquestionable right to access to counsel” rooted in due process, in a US citizen’s action defending against classification as an enemy combatant. *Hamdi and Hamdi v. Rumsfeld*, 542 US 507 (2004).

Michigan also recognizes a due process right to counsel in parole and probation revocation proceedings, appointing counsel where the individual is indigent. *Shadbolt v Michigan Department of Corrections*, 386 Mich 232 (1971); *People v Belanger*, 227 Mich App 637 (1998).

Generally, when a defendant is the appellee, due process concerns and liberty interests are heightened. Prosecutor appeals are limited by statute. MCL 770.12. In a prosecutor appeal, for example, a defendant “shall be permitted to post bail on his or her own recognizance” unless the court certifies that the character of the offense, the respondent and the questions involved in the appeal necessitate bail. MCL 765.7.

The failure to require the appointment of counsel under MCR 7.118 is an anomaly in our rules that otherwise protect procedural due process. While there is no right to parole in Michigan—and therefore no Sixth Amendment right to counsel in the parole process—once a person has been released, a liberty interest attaches. Since the purpose of the appeal under MCL 791.234(11) is to reverse the grant of release, liberty is at stake and a fair process is due.

Incarcerated individuals must be able to defend against the factual basis or legal assertions that would return them to incarceration for months or years. They require counsel, just as parolees and probationers have the right to appointed counsel prior to a revocation decision. Without counsel, the individuals are denied the most basic due process—an opportunity to be heard.

Prisoner/Defendants should be afforded their own counsel to ensure due process and equal protection

Prisoners must have the right to their own counsel. When counsel from the Attorney General's office appears, they represent the Parole Board and defend the Board's exercise of its discretion. Their involvement cannot cure any due process or equal protection concerns.

The Attorney General does not conduct many of the most basic tenets of adequate criminal appellate representation, including:

- Meeting with the client to discuss the appeal;
- Strategizing about possible outcomes;
- Obtaining or offering mitigation of punishment; or
- Continuing the appeal in many cases.

Information pertinent to the appeal will not be available in the file alone. Prisoners know their own records best, including the strengths and weaknesses of the appeal, efforts to obtain programming not otherwise available, self-help endeavors, and rehabilitation. Contact with individual clients is necessary to protect their rights, and only their own counsel can achieve that.

Adequate advice and information will also allow prisoners to make informed strategic choices about the appeal. Since appeals can be lengthy, a prisoner may be eligible for another parole review prior to the conclusion of the appeal. Counsel can provide advice about whether to continue an appeal of an old parole decision, which may stay implementation of a subsequent favorable decision.

The prisoner knows the facts that should support release. Both the Parole Board and the Attorney General rely largely on the records of the Department of Corrections. A prisoner has information about whether the summaries in the records adequately reflect the strength of community ties, the support needs of family upon release, and the available employment options. An attorney representing the individual can gather this information to support an appeal or a future review.

Together, a prisoner and an attorney know best when to continue or end an appeal. Too often, the Attorney General does not continue the Board's defense of the appeal beyond the circuit court. At present, individuals are proceeding pro se in the Court of Appeals and this Court. The Board often stays any further decision during the appeal.

In at least two recent cases, after the circuit court overturned the Board's decision, the individual sought leave pro se in both Court of Appeals and this Court, which ultimately remanded for the appointment of counsel. In each case, the Court of Appeals then reversed the circuit court.¹ Without counsel, these appeals took years. These delays, failures to advise, and failures to pursue legitimate appeals do not comport with due process.

The indigent appellate system, through SADO/MAACS, is positioned to assist

SADO exists to provide representation to indigent criminal defendants in appeals and "other postconviction remedies." MCL 780.716(a). The Legislature's inclusion of these two alternative functions has meaning. While not a criminal proceeding, a prosecutor's appeal of a Parole Board release decision is a postconviction appeal, where appointed counsel should assist.

SADO has represented individual prisoners in prosecutor parole appeals for at least a decade. Though once rare, the need for assistance has grown. Prior to 2009, SADO sought permission from the Appellate Defender Commission to represent prisoners in these actions. Then the Commission voted to authorize the Defender Division to take these appointments without prior approval.

The first case SADO accepted was *In re Elias*, 294 Mich App 507 (2011). SADO's advocacy resulted in a comprehensive published opinion setting parameters and standards of a prosecutor parole appeal. In almost every prosecutor parole appeal decision since, appellate courts cite the *Elias* decision.

The volume of appointments would not overwhelm SADO/MAACS if MCR 7.118 were amended. Between 2016 and 2018, prosecutors or victims took only 53² appeals, involving 45 prisoners. Of the 53, only 14 circuit court decisions were appealed to the Court of Appeals. The MAACS system, under MCL 780.712(6), could absorb this load and direct cases to either SADO or sufficiently trained roster attorneys.

¹ Ronald Irwin, COA No. 342963, and Charles Lee, COA No. 347539.

² Data compiled by the Prisons and Correction Section in its Appendix A.

In 2018, there were 3238 total appellate assignments, of which 2760 were referred to MAACS and 478 to SADO. Between 2016 and 2018, there were an average of about 17 prosecutor appeals per year.³ This represents less than one percent of all appeals annually, and about 3.5% of the annual Defender Division workload.

The Court should require appointment of counsel under the Appellate Defender Act

As drafted, the proposed amendments include a new subsection (d) which would provide, “If a prosecutor or victim files an application for leave to appeal, the circuit court shall appoint counsel for a prisoner who is indigent.” While this reform would mark a significant improvement over the status quo, a slight modification would make it even stronger.

Under the Michigan Appellate Defender Act, “[t]he appointment of criminal appellate defense services for indigents shall be made by the trial court from the roster provided by the [Appellate Defender C]ommission or shall be referred to the office of the state appellate defender.” MCL 780.712(6). Since 1978, this statute has ensured the independent appointment of appellate criminal defense counsel from SADO or the MAACS roster, while shielding counsel from many of the political or economic influences from trial courts that might otherwise impede quality representation. But it has not been applied to the appointment of counsel in parole appeals—because the appointment of counsel has never been required. With these proposed amendments, that would change.

Arguably, “criminal appellate defense services” includes appointed representation in parole appeals. If so, the trial courts have no choice but to appoint counsel in parole appeals just as they do in direct appeals after felony conviction. It would be prudent for the amended court rule to provide that guidance more clearly.

But even assuming that parole appeals fall outside the intended scope of the Appellate Defender Act, this Court should impose the same requirement as a matter of public policy. As explained above, SADO is well positioned to accept most if not all parole appeal assignments statewide, and has a long history of successfully representing indigent prisoners in these matters. And where SADO cannot accept an assignment due to conflicts or capacity, approved MAACS roster attorneys would be available. Either way, counsel would be selected independent of trial court influence and subject to appropriate training and oversight.

³ $53/3 = 17.66$.

Indeed, it appears that appointment under the Appellate Defender Act is the only way to achieve these goals, as the Michigan Indigent Defense Commission Act would not apply to such proceedings. Under MCL 780.983(f)(i), that statute applies only where “the defendant is being prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction”

Thus, if trial courts are not explicitly required to appoint counsel under the Appellate Defender Act, they may consider themselves free to appoint whomever they wish, based on whatever considerations they deem appropriate, and without any eligibility, training, or oversight standards.

For these reasons, the Court should slightly modify the proposed MCR 7.118(d) so it reads as follows (our changes in **bold and double-underlined**):

(d) If a prosecutor or victim files an application for leave to appeal, the circuit court shall appoint counsel for an indigent prisoner who is indigent through the Michigan Appellate Assigned Counsel System.

These amendments to MCR 7.118, which would require the independent appointment of counsel for indigent prisoners, present a workable solution to protect constitutional rights. The Court should adopt the proposed amendments as indicated.

Sincerely,



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Assistant Defender

Jonathan Sacks
Director

Bradley Hall
MAACS Administrator