Bradley R. Hall
Administrator

Patricia A. Maceroni
Litigation Support Counsel

Michigan Appellate Assigned Counsel System
200 N. Washington Square, Suite 250 Lansing, MI 48913
(Phone) 517.334.1200
(Fax) 517.334.1228 www.sado.org/maacs

A division of the State Appellate Defender Office
Jonathan Sacks, Director

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

Re: ADM File No. 2020-13; Proposed amendments to MCR 6.005(H)

Dear Ms. Boomer:

On behalf of the Michigan Appellate Assigned Counsel System (MAACS) and the State Appellate Defender Office (SADO), I am writing in support of the proposed amendments to MCR 6.005(H). The amendments would align the rule with controlling precedent from this Court and help protect the right to counsel during preconviction appeals.

In *People v Murphy*, 477 Mich 1019 (2007), this Court made clear that "in all cases involving preconviction appeals by the prosecution," the Court of Appeals must "inform defense counsel in writing that they must file a timely response to the application," or "[i]n the alternative, defense counsel may promptly communicate to the Court of Appeals in writing that the client has directed defense counsel not to respond to the prosecution's interlocutory appeal."

Notwithstanding *Murphy*, the existing MCR 6.005(H)(3)(ii) allows counsel simply to "notify the Court of Appeals that the lawyer will not be filing a brief in response to the application." Thus, until recently, Court of Appeals policy has been to contact trial counsel and ask whether counsel intends to file a brief. If the answer is no, the court would—at least sometimes—render a decision based only on argument from the prosecution, and without a knowing waiver by the defendant.

That is precisely what happened in two recent cases decided by this Court—*People v Haywood*, 505 Mich. 1067 (2020), and *People v Nino*, 505 Mich 1067 (2020). In both cases, the original Court of Appeals opinions were vacated, and the cases reargued with defense counsel, only after MAACS intervened and this Court granted relief.

The Court of Appeals has since changed its policy to align with these decisions. Now, whenever trial counsel indicates that they do not intend to file a brief in response to a prosecutor's preconviction appeal, the Court of Appeals will remand for a determination of indigency and the appointment of appellate counsel. This has been a welcome development.

The proposed amendments to MCR 6.005(H) would align the rule with the cases cited above and the current practice of the Court of Appeals. Implicit in the phrase "[u]nless an appellate lawyer has been appointed or retained"—which is borrowed directly from the first sentences of the existing MCR 6.005(H)(4) and (5)—trial counsel has three choices when faced with a preconviction appeal by the prosecutor. First, under (H)(1)(c)(i), trial counsel can file a response. Second, under (H)(1)(c)(ii), trial counsel can notify the Court of Appeals in writing that the defendant has knowingly elected not to file a response. And finally, under (H)(1)(c), trial counsel can help ensure that an appellate lawyer is appointed or retained. This may sometimes require a motion or other efforts, or it might be as simple as informing the Court of Appeals that the case should be remanded for the appointment of appellate counsel, consistent with current practice.

While expressing agreement in the need for a new rule, Justice Welch raises four legitimate questions about the proposed language and what it means for trial counsel. The first, third, and fourth questions involve trial counsel's obligations when a client chooses not to pay additional fees or retain another lawyer for purposes of appellate representation. If a non-indigent client has knowingly made such a decision, that client has "knowingly elected not to file a response." So long as they are fully advised of the rights and interests at stake, non-indigent clients may rationally decide not to spend the funds necessary to defend preconviction appeals by the prosecutor—such as where the prosecutor's position is frivolous and/or inconsequential to the defense. And if a client is indigent or partially indigent under one of these scenarios, they should have access to appointed appellate counsel.

Justice Welch's second question asks what happens if a trial court denies extra funding to handle an appeal for a retained but poor client. While this scenario could cause financial hardship to retained counsel in some circumstances, it is preferable to the alternative and unlikely to become a widespread concern. First, an attorney may seek review of a decision to deny funding for appellate representation.[1] Second, the market for private criminal defense counsel can adjust to such uncertainties—such as with retainer agreements or fee structures that contemplate this scenario. Again, these adjustments are preferable to perpetuating a system of appellate review without any advocacy on behalf of the accused.

[1] Effective January 1, 2022, the responsibility to screen for indigency and appoint counsel in this scenario will generally fall to a local indigent criminal defense system's independent appointing authority, and not the trial court itself. See ADM File No. 2021-12. Presumably, these decisions will remain subject to judicial review.

In conclusion, while we appreciate the need to go even further in ensuring ready access to capable appellate counsel for preconviction appeals—and while we will continue to work toward more ambitious reforms—the proposed amendments will align the court rule with controlling law and help protect the right to appellate representation for people accused of crimes.

Thank you for your consideration.

Sincerely,

s/ Bradley R. Hall
MAACS Administrator