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September 26, 2011

Corbin Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, Michigan 48090

Re: ADM File No. 2008-36
Proposed Amendment of Rule 7.202 of the Michigan Court Rules or
Proposed Adoption of Administrative Order No. 2011-XX

Dear Mr. Davis:

I write in opposition to the proposed amendment of MCR 7.202 in ADM File 2008-36. The proposed rule would give prosecutors an appeal of right from orders suppressing evidence deemed to be “substantial and material.” This proposal—a departure from the existing rule limiting prosecutors to an interlocutory appeal by leave from such orders—would do much more harm than good. In fact, it would create several problems of a constitutional dimension while offering little real benefit.

Proposed MCR 7.202 is a response to the hypothetical scenario mentioned in *People v Richmond*, 486 Mich 29, 40 fn 10; 782 NW2d 187 (2010), mod 486 Mich 1041; 783 NW2d 703 (2010). In that hypothetical, a trial court suppresses key evidence and then refuses to stay the proceedings so that the prosecutor could seek leave to appeal. *Id.* If the prosecutor goes to trial without the suppressed evidence, jeopardy attaches and any subsequent acquittal cannot be appealed. If the prosecutor voluntarily dismisses the case, any subsequent appeal is held to be moot. *Id.* at 41. Either way, the trial court’s refusal to stay the proceedings has prevented the prosecutor from appealing its suppression ruling. To prevent this from happening, the proposed rule obviates any need for a stay by declaring the suppression ruling to be a “final order” which is appealable by right by operation of MCR 7.203(A)(1).

The need for such a rule is questionable. It is doubtful that this hypothetical scenario has arisen in real courtrooms. Even if the trial court declines to stay the proceedings, the Court of Appeals retains the discretion to do so “on the terms it deems just.” MCR 7.209(D). At any rate, nothing in the existing rule inhibits prosecutors from obtaining appellate review of suppression rulings. Indeed, the *Richmond* Court recognized that “[a]lthough interlocutory appeals are granted by leave of the Court of Appeals . . . we note that the prosecution should be able to meet the requirements of the court rule in cases such as this with little difficulty.” *Id.* at 40, fn 12.

Further, proposed MCR 7.202 poses a threat to the constitutional doctrine of separation of powers. The Michigan Constitution does not guarantee prosecutors a right to appeal; rather, “[t]he people may appeal only to the extent provided by statute.” *People v Cooke*, 419 Mich 420, 424-425; 355 NW2d 88 (1984). This principle is reflected in the existing court rules, which provide that “[a]ppeals by the prosecution in criminal cases are governed by MCL 770.12, except as provided by MCL 770.3.” MCR 7.203(E). Accordingly, it is for the Legislature to determine the scope of a prosecutor’s ability to appeal, not this Court.

The Legislature has provided prosecutors with an appeal by right only from “[a] final judgment or order of a court or tribunal from which appeal of right has been established by law.” As a matter of statutory construction, this Court has held that a judgment is “final” only “when it terminates the litigation . . . on the merits and leaves nothing to be done but to enforce by execution what has been determined.” *People v Pickett*, 391 Mich 305, 313, 215 NW2d 695 (1974) (construing MCL 600.308, the general statute outlining the jurisdiction of the Court of Appeals) (citations and quotations omitted). Suppression orders do not fit within this statutory definition of “final order,” and that legislation should not be judicially rewritten.

Lastly, by requiring prosecutors to apply for leave to appeal a suppression ruling, the existing rules allow the Court of Appeals to quickly filter out meritless claims. The Court of Appeals typically grants or denies leave to appeal within a few months of docketing the application. If leave to appeal is granted, the case is fast-tracked in accord with MCR 7.213(C)(1). This allows for a much speedier resolution of the suppression issue.

Proposed MCR 7.202, on the other hand, would slow things down considerably. The Court of Appeals generally takes about a year to dispose of appeals by right, with no filtering process at the outset. Moreover, if suppression rulings are deemed to be “final orders,” the fast-tracking provisions of MCR 7.213(C)(1) would no longer be applicable, since they are limited to “interlocutory criminal appeals[.]”

The proposal thus implicates a defendant’s constitutional interest in “minimiz[ing] anxiety and concern accompanying public accusation[.]” *United States v Ewell*, 383 US 116, 120; 86 S Ct 773; 15 L Ed 2d 627 (1966) (analyzing the speedy trial guarantee of the Sixth Amendment). It also affects the constitutional protection against “undue and oppressive incarceration prior to trial[.]” *Id.* When the prosecutor appeals a suppression ruling, the trial court retains the discretion to require the defendant to post bond, depending on the offense and the offender. *See* MCL 765.7. Consequently, some defendants—especially those who are indigent—will remain incarcerated throughout the appellate process. Slowing down that process would have a detrimental effect on those individuals.

The alternative proposal—proposed Administrative Order No. 2011-XX—provides a much more palatable solution. It would require a mandatory stay of cases in which the prosecutor is pursuing an interlocutory appeal by leave of an order suppressing evidence. The proposal also mandates that the prosecutor pursue the appeal as quickly as possible.

Mr. Corbin Davis
September 26, 2011

There is, however, one troubling aspect of this proposed order. Specifically, its provision that “[i]f the defendant is incarcerated, the defendant may request that the trial court reconsider whether pretrial release is appropriate” would seem to conflict with MCL 765.7, which provides:

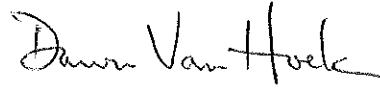
If an appeal is taken by or on behalf of the people of the state of Michigan from a court of record, the defendant shall be permitted to post bail on his or her own recognizance, pending the prosecution and determination of the appeal, unless the trial court determines and certifies that the character of the offense, the respondent, and the questions involved in the appeal, render it advisable that bail be required. [MCL 765.7].

This language presumes that the defendant will be released on his own recognizance unless the trial court deems bond appropriate. Proposed Administrative Order No. 2011-XX inappropriately undercuts this statutory presumption.

In sum, not only is the proposed amendment to MCR 7.202 unnecessary, but it also creates several problems of a constitutional dimension. While the alternative proposal avoids these problems, it must be reworded so as not to conflict with MCL 765.7.

Thank you for this opportunity to comment and for your consideration.

Sincerely,



Dawn Van Hoek
Director
State Appellate Defender Office