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June 29, 2016

Mr. Larry S. Royster, Clerk
Michigan Supreme Court
925 West Ottawa Street
Lansing, MI 48915

Re: ADM File No. 2013-39
Proposed Amendments to MCR 6.112

Dear Mr. Royster:

The State Appellate Defender Office opposes the proposed amendments to MCR 6.112. The 21-day bright line cut-off of the current rule is based on statute, and it has served Michigan well. The prosecutor has easy access to a defendant's prior criminal history. To disturb the bright line cut-off would violate the statute, needlessly endanger defendants' due process rights, create uncertainty, and add another area of appellate litigation to Michigan's jurisprudence. This Honorable Court should retain the current rule.

MCL 769.13(1) provides that in order to seek an enhanced sentence under the habitual offender statutes the prosecutor must file written notice of that intent "within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense." [1] In stark contrast to MCL 767.76, which governs offense Indictments and Informations,[2] MCL 769.13 does not provide an unlimited amendment time nor does it provide a harmless error provision.

Moreover, to allow the prosecutor to amend the habitual offender notice at any time, including after trial, to raise the level of enhancement would unnecessarily open up the possibility of errors in the plea bargaining process. Plea bargaining is a constitutionally critical stage of the process,[3] and it occurs in the vast majority of cases, even those that end in a trial conviction.

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[1] In the unusual event that a defendant has pled guilty or no contest at the arraignment on the information, the prosecutor still has 21 days to file the notice to seek enhanced sentence. MCL 769.13(3). A surprised defendant could move to withdraw his plea prior to sentencing. MCR 6.310(B).

[2] See MCL 767.2 (laws applicable to Indictments are applicable to Informations)

[3] *Missouri v Frye*, 132 SCt 1399 (2012); *Lafler v Cooper*, 132 SCt 1376 (2012).

If the notice of intent to seek an enhanced sentence can be amended at any time to raise the defendant's sentencing exposure, it is far more likely that the defendant will not have made a voluntary, knowing, and intelligent decision regarding any prior plea offer. Likewise, it is far more likely that he will not have received the effective assistance of counsel in evaluating any plea offer made to him prior to going to trial or prior to acceptance. To see the type of appellate/post-conviction litigation the proposed changes to MCR 6.112 will open up see *State v Brothern,* 832 NW2d 187 (Iowa, 2013).

A few examples will illustrate the problems the proposed changes would bring. A defendant who accepted a plea offer to a reduced charge but without a sentence agreement for a specific term of years, believing himself to be exposed to sentencing as a habitual offender – 2nd could find himself suddenly exposed to sentencing as a habitual offender – 3rd. This impacts not only the potential statutory maximum, but also the top end of the sentencing guidelines range. A defendant who turned down a plea offer and instead went to trial, believing himself to be exposed to sentencing as a habitual offender – 3rd if convicted could suddenly be facing a *mandatory* minimum of 25 years under the super habitual offender - 4th provision.

Absent some material fraud on the part of the defendant, i.e. claiming a false identity that is somehow not overcome by routine fingerprinting, the prosecutor is in the best position to ascertain the defendant's prior criminal history through a simple and routine LEIN check. The trial defense bar has no access to LEIN.

Some may mistakenly argue that the proposed changes to this court rule are not unfair because a defendant is personally in a position to know his own prior criminal history. In reality these proposed changes are asking a lot of an ordinary citizen. The number of offenses in Michigan has grown considerably over time as each new legislature seeks to be responsive to the problems of the day. A lay person may not recall whether the offense that he was previously convicted of was a felony versus a misdemeanor particularly if he served probation and/or jail time rather than being sent to prison. Misdemeanors that are attempted felonies, as well as so-called "high court misdemeanors", are counted under the habitual offender act, expanding the categorization possibilities for a defendant to try to keep track of even further. See e.g., *People v Timothy Smith*, 423 Mich. 427 (1985). Shifting standards for which felonies can be counted towards a habitual offender enhancement can also contribute to the confusion. See e.g., *People v Gardner,* 482 Mich 41 (2008) (reversing prior case law and holding that prior convictions arising from the same transaction count as separate felonies under habitual offender act). Importantly, there is no time limit or cut-off on the use of a prior conviction for enhancement under the general habitual offender statutes; a conviction can be used to enhance the same whether it is one year old or forty years old. A defendant's memory regarding exactly what particular offense he was convicted of at some point in his past is not infallible.

The "unfairly surprise or prejudice" standard of MCR 6.112(H) as the amendment seeks to apply it to the notice of intent to seek enhanced sentence is pretty vague and will create uncertainty. See *Brothern, supra*, for example.

For these reasons, we urge this Honorable Court to reject the proposed amendments to MCR 6.112 as they are inconsistent with MCL 769.13, unnecessary, and a danger to the fair administration of justice.

Sincerely,

Dawn Van Hoek
Director

DVH/jjm