



School of Law

July 1, 2016

Larry S. Royster  
Michigan Supreme Court  
Hall of Justice  
925 W. Ottawa St.  
Lansing, MI 48913

Re: Adm File No. 2013-39

Dear Mr. Royster:

The Court should not adopt the proposed changes to MCR 6.112.

Before this Court took up the question of habitual offender notice in a recent trio of cases, see *People v Siterlet*, 495 Mich 919 (2013), *People v Johnson*, 495 Mich 919 (2013), and *People v Muhammad*, 498 Mich 909 (2015), the well-understood rule was a mandatory 21-day deadline for the filing of the habitual offender notice. MCL 769.13. The 21-day period extended from the date of arraignment on the felony information or the date the felony information was filed, if arraignment was waived. *Id.* The Court of Appeals recognized only one exception for a filing outside the 21-day period: amendments that were merely clerical or technical could be made beyond the 21-day period so long as they did not elevate the level of enhancement. *People v Hornsby*, 251 Mich App 462 (2002).

This combined rule worked exceedingly well for the vast majority of cases because judges, prosecutors and defense attorneys knew what to expect. The system also worked well as it provided timely notice to defendants and avoided the appearance of impropriety. Prosecutors could no longer wait until post-verdict or post-sentence to decide whether to request sentence enhancement (or elevate the level of enhancement).

The Court's current proposal, if adopted, would undo 76 years of progress. This Court spent forty-three years from 1940 to 1983 grappling with a number of cases that involved habitual offender charges brought at the start of trial, post-trial, at sentencing, post-sentence and in one case in apparent response to the filing of a claim of appeal. The Court recognized the

element of surprise in late filings and also the appearance of impropriety. In response, the Court issued a series of decisions that set forth increasingly tighter time limits for the filing of the habitual offender information with only limited exceptions.<sup>1</sup>

The Michigan Legislature – perhaps frustrated with 43 years’ worth of litigation – made its own changes to the habitual offender statutes in 1994. The Legislature eliminated the right to jury trial and also set forth a bright-line rule of 21 days for the filing of the habitual offender notice. 1994 PA 110, amending MCL 769.13.

The 1994 amendments have been in place for more than twenty years. They reflect a considered and measured policy decision of the Legislature. While there are procedural aspects to the amendments, they ultimately reflect the sentencing policy of this state. In Michigan, the Legislature possesses the constitutional sentencing authority. *People v Hegwood*, 465 Mich 432 (2001).

The current proposal will return Michigan to a system reminiscent of the pre-1994 period. Under the current proposal, prosecutors may amend the habitual offender notice to increase the level of enhancement at trial, post-trial or even post-sentence, and each claim must be scrutinized

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<sup>1</sup> See *In re Bazel*, 293 Mich 632, 639-640 (1940) (interpreting an earlier version of the habitual offender statute that permitted the filing of the habitual offender charge after trial or sentencing and concluding that the prosecutor may file the charge with the felony information when it has knowledge of the prior convictions or may file it by post-trial supplemental information when it gains knowledge of the prior convictions after trial); *In re Stone*, 295 Mich 207, 210 (1940) (habitual offender supplemental information that failed to state name and location of court for prior convictions could have been corrected by amendment); *People v Stratton*, 13 Mich App 350, 356 (1968) (where prosecutor has knowledge of prior convictions before trial, he must file the habitual offender information before trial; where knowledge of the prior convictions is gained after trial, he may file a supplemental information after-trial); *People v Hatt*, 384 Mich 302, 309 (1970) (approving procedure set forth in *Stratton*); *People v Hendrick*, 398 Mich 410, 421 (1976) (prosecutor acted properly in filing supplemental information immediately after sentencing where it first learned of several out of state convictions one week before trial and it “would be foolish to rely solely on a rap sheet for information.”); *People v Fountain*, 407 Mich 96, 99 (1979) (prosecutor must proceed “promptly” in filing habitual offender information and must file it before trial when it has knowledge of prior convictions before trial; “the only recognized exception is to this rule is when the delay is due to the need to verify out-of-state felony convictions based on the ‘rap sheet.’”); *People v Young*, 410 Mich 363 (1981) (providing limited retroactivity of *Fountain* rule); *People v Shelton*, 412 Mich 565 (1982) (the prosecutor must “promptly” file the supplemental information within 14 days of arraignment in the circuit court or before trial if tried within the 14-day period; recognizing two exceptions, one where the prosecutor does not have knowledge of the prior record before trial/conviction and one where there is a need to verify out-of-state convictions listed on rap sheet); *People v Crawford*, 417 Mich 607, 613 n 13 (1983) (prosecutor may not delay filing supplemental information until he confirms validity of prior convictions by review of transcript).

for unfair surprise or prejudice. This creates an ad hoc system that defeats the continuing work of this Court from 1940 to 1983, and defeats the work of the Legislature in 1994.

The reasons that supported this Court's decisions from 1940 to 1983 apply equally well to the current rule that does not allow late amendments. Although the earlier case law dealt with the actual filing date of the habitual offender information, the same reasons support the current rule that forbids untimely amendments that change the level of enhancement. See *People v Hendrick*, 398 Mich 410, 424 (1976) (Levin, J., dissenting) (pre-trial notice is critical for a defendant because the "nature of the accused's response, the care with which he prepares to defend himself, will often depend on the severity of the potential punishment."); *People v Young*, 410 Mich 363, 375 (1981) (Levin, J., concurring in part and dissenting in part) (noting the "substantial possibility of prejudice" with post-trial filings and concluding that tardy filings were unwise because "[t]he potential disadvantage to the defendant, who may lose the ability to make fully informed decisions, is considerably greater than the disadvantage to the prosecutor in being required to make an early decision."); *People v Fountain*, 407 Mich 96, 99 (1979) (Court recognizes the need to provide "fair notice to the accused" and also "avoid an appearance of prosecutorial impropriety."); *People v Shelton*, 412 Mich 565, 569 (1982) (need "to provide the accused with notice, at an early stage of the proceedings, of the potential consequences should the accused be convicted of the underlying offense."); *People v Young*, 410 Mich 363, 366-367 (1981) (the "primary purpose of the rule [the 14-day time limitation] in *People v Fountain* is to provide fair notice to the accused of the supplemental charge so as to avoid the appearance of prosecutorial impropriety.")

With the Court's current proposal, litigation is bound to increase as each case is reviewed on its merits. In effect, the Court will turn back the clock by 76 years.

For these reasons, the Court should not adopt the proposed amendment of MCR 6.112.

Sincerely,



Anne Yantus  
Director of Clinical Programs