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December 20, 2011

Mr. Corbin Davis
Clerk, Michigan Supreme Court
925 W Ottawa Street
Lansing, MI 48915

Re: Admin File 2010-20
Proposed Amendment of MCR 6.302(B)

Dear Mr. Davis:

We write to oppose the proposed amendment of MCR 6.302(B) as the amendment does not cure the perceived problem and would instead create a number of new concerns. We would suggest in the alternative a revised court rule amendment offered at the end of this letter.

For many years now, MCR 6.302(B) has required advice on the "maximum possible prison sentence for the offense." Trial judges understood this court rule to require advice as to the maximum possible sentence with *any* form of enhancement that was available in the particular case. And in practice, as Judges Michael LaBeau and David Hogg have noted, trial judges routinely provided advice regarding the enhanced maximum sentence at the time of the plea. *See also, Marquez v Hatch*, 212 P3d 1110 (NM, 2009) (failure to accurately inform defendant of maximum possible sentencing exposure with enhancement provisions may render plea involuntary).

Although the Court of Appeals in *People v Boatman,* 273 Mich App 405 (2006), found no court rule requirement that the trial judge give advice on the maximum sentence with habitual offender enhancement, four justices of this Court have expressly disagreed with the *Boatman* decision. *People v Kade*, 486 Mich App 978 (2010). The Court denied leave to appeal in *Kade* because of the "unique procedural posture" of the case (the defendant was on parole and close to a

discharge from the sentence), but Justice Marilyn Kelly, joined by Justices Cavanagh, Markman and Hathaway, wrote to express the view that *Boatman* was wrongly decided. In two more recent decisions, this Court has limited the *Boatman* decision. *People v Ruffin*, 488 Mich 891 (2010) (remanding for resentencing or plea withdrawal where trial court gave incorrect advice as to maximum sentence under the habitual offender laws at the time of the guilty plea); *People v Lofton*, 488 Mich 924 (2010) (remanding for plea withdrawal or resentencing where defendant not told of enhanced five-year penalty for felony-firearm, second-offense).

It would appear the proposed amendment of MCR 6.302(B) was meant to put to rest any remaining reliance on the *Boatman* decision (*Boatman* having never been appealed to the Supreme Court as the defendant won relief in the Court of Appeals on other grounds). However, the proposed court rule amendment will not return the practice to a pre-*Boatman* standard and will instead create a number of new problems.

We agree with Judge Hogg that the proposed court rule will provide *less advice* to the pleading defendant. The new rule does not ask the trial judge to give a precise number for the maximum sentence with habitual offender enhancement, but instead requires advice that "the defendant may be charged as an habitual offender and the maximum possible sentence may be increased." This shifts advice of the enhanced maximum sentence to defense counsel and there is no check on that advice because the advice is not required on the record.

We agree with Judge Hogg that the proposed court rule does not convey enough information, although for one additional reason. There are several forms of sentence enhancement on the books, but the proposed court rule refers only to habitual offender enhancement. Nothing is said about enhancement under the drug laws, MCL 333.7413, enhancement of felony-firearm sentences, MCL 750.227b, enhancement of first-degree CSC sentences, MCL 750.520b, and enhancement of other repeat offenses such as domestic violence, drunk driving, etc. The proposed court rule would appear to do away with advice on the enhanced maximum sentence in all of these settings. Again, the defendant is given less information under the proposed court rule.

We agree with Judges LaBeau and Hogg that it would be the rare case, indeed, where the habitual offender notice is filed after the plea (and there is no discussion of this at the time of the plea). We have never seen this happen in the thousands of cases handled by the State Appellate Defender Office. If anything, there appears to be near universal practice on the part of prosecutors to a) address all forms of sentence enhancement at the time of the plea hearing, b) include all forms of potential sentence enhancement – including drug enhancement and other forms of enhancement - in the Felony Information, even if this advice is not required by statute or court rule.

We further agree with the Michigan Judges Association that prosecutors should not be allowed to request habitual offender enhancement at the time of sentencing if the notice was filed after the plea (and enhancement was not discussed at the time of the plea). While at first blush this proposal appears contrary to statute, MCL 769.13, on reflection it is an eminently sound approach. If the prosecutor does not know the defendant's criminal history when negotiating a plea bargain,

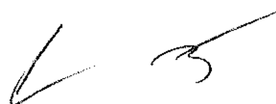
one has to question the wisdom of the bargain. And if the prosecutor knows the criminal history and says nothing about his or her plan to file the habitual offender notice at the time of the plea, one has to question the ethics of the prosecutor. Either way, trial judges have a stake in ensuring voluntary and knowing pleas.

We would instead propose a court rule amendment that requires advice as to "any possible maximum sentence for the offense" or "any possible maximum sentence that may be imposed." This language mimics the federal court rule which requires advice as to "any maximum possible penalty, including imprisonment, fine, and term of supervised release." Fed Rule Crim Pro 11(b)(1)(H).

We believe the goal of any court rule amendment should be to ensure voluntary and knowing pleas, and at the same time discourage motions to withdraw the plea based on lack of awareness of the maximum sentence. We hope this letter will assist the Court in that endeavor.

Sincerely,

Dawn Van Hoek
Director



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