

Order

Michigan Supreme Court
Lansing, Michigan

July 1, 2010

Marilyn Kelly,
Chief Justice

ADM File No. 2008-39

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

Amendment of Rules 6.425
and 6.610 of the
Michigan Court Rules

On order of the Court, the following amendments are adopted and are effective immediately.

[The present language is amended below with additions indicated in underlining and deletions indicated in strikeover.]

Rule 6.425 Sentencing; Appointment of Appellate Counsel

- (A) [Unchanged.]
- (B) Presentence Report; Disclosure Before Sentencing. The court must provide copies of the presentence report to the prosecutor, and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days, before the day of sentencing. ~~When providing the presentence report to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, the court shall inform them that the presentence report is confidential, and shall instruct them that they are prohibited from making a copy or otherwise creating an image of the report, and must return their single copy of the report to the court before or at the time of sentencing.~~ If the presentence report is not made available to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment of the day of sentencing to enable the moving party to review the presentence report and to prepare any necessary corrections, additions, or deletions to present to the court. The presentence report shall not include the following information about any victim or witness: home address, home telephone number, work address, or work telephone number, unless an address is used to identify the place of the crime. The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that

have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it. The court must have the information exempted from disclosure specifically noted in the report. The court's decision to exempt part of the report from disclosure is subject to appellate review.

(C)-(G) [Unchanged.]

Rule 6.610 Criminal Procedure Generally

(A)-(E) [Unchanged.]

(F) Sentencing.

(1) For sentencing, the court shall:

- (a) require the presence of the defendant's attorney, unless the defendant does not have one or has waived the attorney's presence;
- (b) provide copies of the presentence report (if a presentence report was prepared) to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days before the day of sentencing. ~~When providing the presentence report to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, the court shall inform them that the presentence report is confidential, and shall instruct them that they are prohibited from making a copy or otherwise creating an image of the report, and must return their single copy of the report to the court before or at the time of sentencing.~~ If the presentence report is not made available to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment to enable the moving party to review the presentence report and to prepare any necessary corrections, additions or deletions to

present to the court, or otherwise advise the court of circumstances the prosecutor or defendant believes should be considered in imposing sentence. The presentence report shall not include the following information about any victim or witness: home address, home telephone number, work address, work telephone number, or any other information prohibited from disclosure pursuant to MCL 780.751 *et seq.*, unless an address is used to identify the place of the crime.

- (c) inform the defendant of credit to be given for time served, if any.

(2)-(3) [Unchanged.]

(G)-(H) [Unchanged.]

Upon further order of the Court, if the Legislature does not amend MCL 791.229 (or another act) to clarify the specific circumstances under which parties and other entities may have access to presentence investigation reports, and the scope of their access, and if any such action by the Legislature is not enacted into law, the following amendments will become effective January 1, 2011.

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program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it. The court must have the information exempted from disclosure specifically noted in the report. The court's decision to exempt part of the report from disclosure is subject to appellate review.

(C)-(G) [Unchanged.]

Rule 6.610 Criminal Procedure Generally

(A)-(E) [Unchanged.]

(F) Sentencing.

(1) For sentencing, the court shall:

- (a) require the presence of the defendant's attorney, unless the defendant does not have one or has waived the attorney's presence;
- (b) provide copies of the presentence report (if a presentence report was prepared) to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days before the day of sentencing. The prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, may retain their copies for their records. If the presentence report is not made available to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment to enable the moving party to review the presentence report and to prepare any necessary corrections, additions or deletions to present to the court, or otherwise advise the court of circumstances the prosecutor or defendant believes should be considered in imposing sentence. The presentence report shall not include the following information about any victim or witness: home address, home telephone

number, work address, work telephone number, or any other information prohibited from disclosure pursuant to MCL 780.751 *et seq.*, unless an address is used to identify the place of the crime.

- (c) inform the defendant of credit to be given for time served, if any.

(2)-(3) [Unchanged.]

(G)-(H) [Unchanged.]

Staff comment: By order dated February 5, 2010, the Court adopted various amendments of MCR 6.425 and MCR 6.610 to require prosecutors and defendants to have access to the presentence investigation report at least two days before sentencing and allow adjournment if the parties do not receive the report in that time, to ensure the confidentiality of the PSI report, and to limit the victim or witness information that may be included in a PSI report. Following entry of the February order and shortly after its May 1, 2010, effective date, the Court considered the matter further, specifically with regard to mandatory confidentiality provisions that not only represented a significant change in current practice, but, also, underscored a fundamental tension between the explicit provisions of MCL 791.229, which describes who may have a copy of the report and for what purposes, and subsequent caselaw, which has expanded access of PSI reports in certain circumstances. In light of this tension, the Court has invited interested associations that oppose the language as adopted by the Court to approach the Legislature to resolve the conflict. However, if legislation on this subject is not enacted and effective by the end of this calendar year, an amendment to allow prosecutors, defense counsel, and defendants to retain a copy of the presentence investigation report will automatically go into effect on January 1, 2011.

The staff comment is not an authoritative construction by the Court.

CORRIGAN, J. (*dissenting*). I oppose the contingency aspect of the Court's order, which will amend MCR 6.425 and 6.610 by judicial fiat beginning January 1, 2011, if the Legislature fails to amend MCL 791.229 or enact other legislation clarifying the circumstances under which parties may retain copies of presentence reports in the interim. Not only is the contingency provision adopted by this Court unprecedented and illogical, but it also amounts to improper ultimatum to the Legislature. Accordingly, I object to its inclusion in the order.

On February 5, 2010, the Court entered an order adopting amendments of MCR 6.425 and 6.610, which became effective on May 1, 2010. After the order entered, the Prosecuting Attorneys Association of Michigan (PAAM) submitted a letter, opposing the

identical confidentiality provisions that appear in MCR 6.425(B) and 6.610(F)(1)(b). PAAM requested that the Court delay the effective date of the adopted amendments and republish the language for public comment. In light of PAAM's letter, Justice MARKMAN requested that the Court reconsider its previous action at an upcoming administrative conference. During the June 3, 2010 administrative conference, the Court considered the concerns expressed by PAAM and others about the confidentiality provisions. Rather than delaying the effective date of the amendments and republishing the language for public comment consistent with PAAM's request, however, the Court struck the offending provisions effective immediately. The Court also adopted an additional contingency, stating that "if the Legislature does not amend MCL 791.229 (or another act) to clarify the specific circumstances under which parties and other entities may have access to presentence investigation reports, and the scope of their access, and if any such action by the Legislature is not enacted into law, the following amendments will become effective January 1, 2011." The language that the contingency aspect of the order would automatically incorporate in both MCR 6.425(B) and 6.610(F)(1)(b) effective January 1, 2011, states "[t]he prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, may retain their [presentence report] copies for their records."

I strenuously object to the contingency aspect of the Court's order. Although the Court acknowledges the "fundamental tension" between the existing statutes governing confidentiality, see e.g., MCL 791.229, and the apparent practice of prosecutors and defense attorneys, the Court would resolve that tension by urging the Legislature to enact clarifying legislation by January 1, 2011. If the Legislature does not act by that date, the Court will intervene and enact its own preferred solution *sua sponte*. In so doing, the Court would automatically enact rule amendments that arguably conflict with existing statutory provisions merely because the Legislature failed to enact satisfactory "clarifying" legislation in the circumscribed period decreed by a bare majority of this Court. I question whether the Court has the authority to resolve the identified tension in this manner. Indeed, I cannot recall any administrative file in which this Court imposed, by ultimatum, a similar contingency on a separate but coequal branch of government through an administrative order.

The lack of precedent notwithstanding, today the Court prods the Legislature to enact an undisputedly legislative solution by the end of the calendar year or risk the Court imposing its own legislative solution by judicial fiat. Threatening to invade the province of the Legislature in this manner demonstrates a troubling lack of regard for the separation of powers. Additionally, insofar as the Court adopted the contingency provision to give PAAM and similar organizations sufficient time to seek relief from the Legislature, I emphasize that the stated rationale is wholly illogical. PAAM and similar organizations have no incentive to seek a legislative fix when their preferred solution remains inevitable so long as the Legislature does not act. Further, I am concerned that

the Court is especially ill-suited to adopt this contingency when we have neither consulted victims' rights groups or other groups potentially impacted by the contingency aspect of the order nor have we carefully deliberated about the possible repercussions of permitting criminal defendants to retain copies of presentence reports.

Consequently, I respectfully object to the inclusion of the contingency aspect in the Court's order.

YOUNG and MARKMAN, JJ., concur with CORRIGAN, J.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 1, 2010

Corbin R. Davis

Clerk