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October 28, 2011

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

Re: ADM File No. 2010-14
Proposed Adoption of New Rule 6.202 of the Michigan Court Rules

Dear Mr. Davis:

I write regarding the proposed adoption of MCR 6.202 in ADM File 2010-14, which institutes a “notice and demand” rule in Michigan. First, I question whether such an amendment is necessary in Michigan. Second, even if necessary, the proposed rule as written is problematic. Finally, as a discovery proposal, the mandatory disclosure section of the proposal is a strong one.

First, although the United States Supreme Court has favorably cited “notice and demand” rules as a process for regulating testimony of laboratory analysts under the Confrontation Clause, it is not a procedure that appears necessary in Michigan. In spite of current requirements for lab analysts to testify in Michigan, there has not been an undue burden on laboratories, and in 2010, analysts testified in only 1% of cases. *See Bullcoming v New Mexico*, __ US __; 131 S Ct 2705, 2719, fn 10 (2011). In Michigan, defendants and the prosecution generally stipulate to laboratory analyst testimony with little controversy.

Second, the proposal as written contains three serious problems – the discretion of the judge to rule on the Confrontation Clause demand, the focus on the rules of evidence rather than the Confrontation Clause, and the timing of the procedure:

- Proposed MCR 6.202(B)(2), the demand provision, requires the trial court to “determine the admissibility of the evidence” upon defense demand. By allowing the court to make the decision, this provision negates the entire purpose of the notice and demand rule. Instead of a rule governing assertion of Confrontation Clause rights by the defense, it operates as a discretionary rule allowing the judge to make the ultimate decision. To properly work, the defendant must have absolute right to demand laboratory analyst testimony. *See e.g.* 725 ILCS 5 § 115-15(c) (Illinois Notice and Demand Provision: “The report shall not be prima facie evidence if the accused or his or her attorney demands the testimony of the person signing the report by serving the demand ...”).

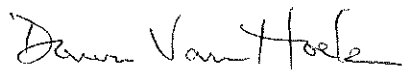
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- Although proposed MCR 6.202(B) is formulated to create a notice and demand rule to govern assertion of a defendant's right to confront laboratory analysts, the rule as written ignores this consideration. Instead, the trial court is required to "determine the admissibility of the evidence by use of the appropriate *rules of evidence*." Proposed MCR 6.202(B)(2) (*emphasis added*). The United States Supreme Court favorably views notice and demand rules as a way to regulate an assertion of a Confrontation Clause right, *not* as an exception to the rules of evidence.
- Proposed MCR 6.202(B)(2) sets up a 14-day limit for demand of live laboratory analyst testimony. This time limit is unrealistic, where plea bargaining, defense investigation, and other factors mean that a defendant's trial strategy is not finalized 14 days after provision of analyst's reports. Prosecutors can even distort the process by deciding when to supply the laboratory reports. Similarly, Michigan State Police laboratory backlogs make the 28-day disclosure requirement of MCR 6.202(A) unworkable in many cases. Trial courts should have discretion to decide when it is appropriate to adjourn cases if laboratory reports are provided sooner than 28 days before trial.

Finally, the State Appellate Defender Office fully supports MCR 6.202(A), which creates a mandatory disclosure requirement for any laboratory analyst reports in a criminal prosecution.

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

Sincerely,



Dawn Van Hoek
Director
State Appellate Defender Office