STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Murray, P.J., and Whitbeck, and Riordan, JJ.

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No. 145477
Plaintiffs-Appellee,	Court of Appeals No. 304273
v	Monroe Circuit Court No. 06-35599-FH
ALFONZO ANTWON JOHNSON,	
Defendants-Appellant. /	

BRIEF OF ATTORNEY GENERAL BILL SCHUETTE AS *AMICUS CURIAE*

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INTEREST AND STATEMENT OF POSITION OF AMICUS CURIAE

The Attorney General is the chief law enforcement officer for the State of Michigan. One of the Attorney General's most important duties is to protect Michigan citizens from violent repeat offenders. In recognition of the Attorney General's special role in the protection of Michigan citizens, the Court Rules permit the Attorney General to file a brief as *amicus curiae* without seeking permission from this Court. MCR 7.306(D)(2).

STATEMENT OF QUESTIONS PRESENTED

In an order dated May 1, 2013, this Court granted Defendant-Appellant's application for leave to appeal. This Court ordered the parties to address the following questions:

1. Whether the amendment of the supplemental notice of intent to seek to enhance the defendant's sentence was contrary to MCL 769.13, and if so, to what remedy, if any, the defendant is entitled?

   Defendant Johnson answers: Yes.

   The trial court answered: No.

   The Court of Appeals answered: No.

   The People of the State of Michigan answer: No.

   Attorney General Schuette answers: No.

Authority: MCL 769.13

2. Whether, if the original notice was defective and no order was entered allowing the notice to be amended, the trial court had the authority to sentence the defendant as a fourth habitual offender?

   Defendant Johnson answers: No.

   The trial court answered: Yes.

   The Court of Appeals answered: Yes.

   The People of the State of Michigan answer: Yes.

   Attorney General Schuette answers: Yes.

STATUTES AND RULES INVOLVED

MCL 769.13

(1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so 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.

(2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1). The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings. The prosecuting attorney shall file a written proof of service with the clerk of the court.

(3) The prosecuting attorney may file notice of intent to seek an enhanced sentence after the defendant has been convicted of the underlying offense or a lesser offense, upon his or her plea of guilty or nolo contendere if the defendant pleads guilty or nolo contendere at the arraignment on the information charging the underlying offense, or within the time allowed for filing of the notice under subsection (1).

(4) A defendant who has been given notice that the prosecuting attorney will seek to enhance his or her sentence as provided under section 10, 11, or 12 of this chapter, may challenge the accuracy or constitutional validity of 1 or more of the prior convictions listed in the notice by filing a written motion with the court and by serving a copy of the motion upon the prosecuting attorney in accordance with rules of the supreme court.

(5) The existence of the defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing, or at a separate hearing scheduled for that purpose before sentencing. The existence of a prior conviction may be established by any evidence that is relevant for that purpose, including, but not limited to, 1 or more of the following:

(a) A copy of a judgment of conviction.

(b) A transcript of a prior trial or a plea-taking or sentencing proceeding.

(c) A copy of a court register of actions.

(d) Information contained in a presentence report.

(e) A statement of the defendant.

(6) The court shall resolve any challenges to the accuracy or constitutional validity of a prior conviction or convictions that have been raised in a motion filed under subsection (4) at sentencing or at a separate hearing scheduled for that purpose before sentencing. The defendant, or his or her attorney, shall be given an opportunity to deny, explain, or refute any evidence or information pertaining to the defendant's prior conviction or convictions before sentence is imposed, and shall be permitted to present relevant evidence for that purpose. The defendant shall bear the burden of establishing a prima facie showing that an alleged prior conviction is inaccurate or constitutionally invalid. If the defendant establishes a prima facie showing that information or evidence concerning an alleged prior conviction is inaccurate, the prosecuting attorney shall bear the burden of proving, by a preponderance of the evidence, that the information or evidence is accurate. If the defendant establishes a prima facie showing that an alleged prior conviction is constitutionally invalid, the prosecuting attorney shall bear the burden of proving, by a preponderance of the evidence, that the prior conviction is constitutionally valid.

MCL 767.76

No indictment shall be quashed, set aside or dismissed or motion to quash be sustained or any motion for delay of sentence for the purpose of review be granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection to such indictment, specifically stating the defect claimed, be made prior to the commencement of the trial or at such time thereafter as the court shall in its discretion permit. The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. If any amendment be made to the

substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been impaneled and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights will be fully protected by proceeding with the trial or by a postponement thereof to a later day with the same or another jury. In case a jury shall be discharged from further consideration of a case under this section, the accused shall not be deemed to have been in jeopardy. No action of the court in refusing a continuance or postponement under this section shall be reviewable except after motion to and refusal by the trial court to grant a new trial therefor and no writ of error or other appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted.

MCR 6.112

(F) Notice of Intent to Seek Enhanced Sentence. A notice of intent to seek an enhanced sentence pursuant to MCL 769.13 must list the prior convictions that may be relied upon for purposes of sentence enhancement. The notice must be filed 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.

(G) Harmless Error. Absent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of an untimely filing or because of an incorrectly cited statute or a variance between the information and proof regarding time, place, the manner in which the offense was committed, or other factual detail relating to the alleged offense. This provision does not apply to the untimely filing of a notice of intent to seek an enhanced sentence.

(H) Amendment of Information. The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant. On motion, the court must strike unnecessary allegations from the information.

INTRODUCTION

Repeat violent offenders imperil the safety of Michigan streets, neighborhoods and schools. A catch-and-release policy is not how the criminal justice system should work. As long as fear of crime persists, no company will create jobs, no student can learn, and no Michigan citizen can walk the streets of his or her own neighborhood without fear. And violent repeat offenders cost Michigan communities over a billion dollars annually.

Given the toll that repeat offenders have on Michigan's citizens and economy, the Legislature created a sentencing scheme that punishes repeat felony offenders with harsher sentences so long as a defendant has notice of the prosecutor's intent to enhance his sentence.

Here, the defendant, who had three prior felony convictions, and had notice that he was being charged as a fourth-habitual offender was not prejudiced by amendments correctly reflecting his prior convictions. This defendant, like all others, cannot claim surprise about his own prior felony record.

The plain language of MCL 769.13 allows amendment of a habitual offender notice that was filed within the 21-day period to correct information contained in the notice. The statute merely requires the prosecutor give notice of the prior convictions that "may" be relied upon. As the clear intent of the statute is to give a defendant notice, amendment is permitted within the constraints of due process. Neither the statute nor due process is offended when a defendant is held accountable for his prior felony convictions after being given timely notice of the penalty he faces and has an opportunity to be heard.

COUNTER-STATEMENT OF FACTS

Attorney General Schuette adopts the People's recitation of facts as accurate and complete.

ARGUMENT

I. Where the People file a timely habitual offender notice containing incorrect information, the plain language of MCL 769.13 permits amendment of that notice.

The intent of the habitual-offender statute is to punish repeat offenders with harsher prison sentences. This intent is advanced by allowing prosecutors to amend the notice of intent to seek an enhanced sentence. The plain statutory language supports allowing amendment, and prohibiting it allows those most deserving of increased sentences to escape the punishment they deserve.

A. Principles of statutory construction

"The cardinal rule of statutory construction is to discern and give effect to the intent of the Legislature." *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011). A court best discerns that intent by reviewing the words of a statute as they have been used by the Legislature. When a statute's language is clear and unambiguous, this Court must enforce that statute as written. *People v Kowalski*, 489 Mich 488, 498; 803 NW2d 200 (2011).

A paramount principle in statutory construction is that this Court reads the statute "as a whole" rather than reading each provision alone. *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010). While individual words and phrases are important, they must be read in context so that the legislative intent is given effect. *Id.* at 790–791. Finally, MCL 760.2 instructs: "This act is hereby declared to be remedial in character and as such shall be liberally construed to effectuate the intents and purposes thereof."

B. The intent of the habitual offender statute, punishing repeat offenders more harshly, is served by allowing amendments to a timely-filed notice.

The primary objective of the habitual offender statutes, MCL 769.10 et seq, is to punish repeat offenders with harsher sentences. When read in context and as a whole, the intent of MCL 769.13 is to put a defendant on notice that he faces an enhanced sentence. Allowing amendment of the document giving notice effectuates both the notice intent of MCL 769.13 and the overarching purpose of the habitual-offender statutes.

1. The statutory framework

MCL 769.13(1) says that the prosecuting attorney "may seek to enhance the sentence of the defendant...by filing a written notice of his or her intent to do so 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." MCL 769.13(2) requires the notice to "list the prior conviction or convictions that will *or may* be relied upon for purposes of sentence enhancement." MCL 769.13(2) (emphasis added).

The remainder of the statute allows the defendant to challenge the accuracy or constitutional validity of his prior convictions by filing a written motion. MCL 769.13(4). And, the existence of the convictions "shall be determined by the court, without a jury, at sentencing, or at a separate hearing scheduled for that purpose before sentencing." MCL 769.13(5). The prior convictions may be proven by a copy of the judgment of conviction, a transcript of a prior trial, plea or sentencing

proceeding, a copy of a court's register of actions, information contained in a presentence report, or a defendant's statement. MCL 769.13(5)(a)-(e).

MCL 769.13(6) mandates that a defendant who has challenged his prior convictions by filing a motion under Section 4 be given an opportunity to "deny, explain, or refute any evidence or information pertaining to the defendant's prior conviction or convictions before sentence is imposed." Section 6 reiterates that once a motion is filed under Section 4, it is the court's duty to resolve any challenges to the prior convictions "at sentencing or at a separate hearing scheduled for that purpose before sentencing." *Id.*

2. The plain statutory language permits amendment.

The statute's plain language allows for amendment of the notice of intent to seek an enhanced sentence. The language in Section 2 requires that the notice list the prior conviction or convictions that will or *may* be relied upon. This Court has held that the word "may" is permissive, not mandatory. *People v Watkins*, 491 Mich 450, 484; 818 NW2d 296 (2012). In the context of Section 2, the word "may" means the prior convictions listed in the notice might be the ones relied upon, but might not. The permissive word chosen by the Legislature evinces its intent to allow prosecutors to change the convictions relied upon when seeking sentence enhancement.

Reading Section 2 in the context of the remainder of MCL 769.13, the Legislature's intent is even clearer. The statute gives *notice* to the defendant that he is facing an enhanced sentence. It also gives him notice of the prior criminal

history that may be relied upon so that he can challenge its accuracy or constitutionality of his prior convictions at a hearing *before or at sentencing.* Allowing amendment of the notice of intent to seek an enhanced sentence up until that time effectuates the intent of the statute—to punish repeat offenders more harshly, while giving notice. To hold otherwise would allow the most serious criminals to escape punishment the Legislature intended prosecutors to pursue.

To err is human, and clerical errors like the one here, will occur. It would be unfair to preclude the prosecution from correcting such errors where the defendant suffers no unfair surprise or prejudice. More importantly, it is unfair to the public to allow habitual offenders to escape the harsher punishment they deserve because of a mere technicality. A defendant is in the best position to know his own criminal history. But a rule prohibiting amendment encourages defendants not to challenge the notice of intent to seek an enhanced sentence. Instead a defendant is wise to remain silent until it is too late for the prosecution to do anything about it. Such a rule would not promote the intent of the habitual offender statute, it would frustrate it.[1]

[1] MCR 6.112(G) eliminates plain-error review for an untimely filed notice of intent to seek an enhanced sentence. A defendant who ignores the deficiencies in the notice of intent need only claim error on appeal to have his sentence as a habitual offender set aside.

3. Allowing amendments to timely-filed notice that does not increase the habitual offender sanction is consistent with previous Court of Appeals case law.

In *People v Manning*, 163 Mich App 641, 644; 415 NW2d 1 (1987), overruled on other grounds as noted in *People v Bailey*, 483 Mich 905; 762 NW2d 161 (2009), the supplemental information charging the defendant as a fourth offender was timely filed, but the prosecutor subsequently determined that it did not accurately reflect the defendant's record because it contained convictions that belonged to another individual who had been using the defendant's name. The prosecution amended the supplemental information to accurately reflect the defendant's record. *Id.* The defendant claimed that the filing of the amended information violated the rule of *People v Shelton*, 412 Mich 565, 569; 315 NW2d 537 (1982), requiring that the information be filed within 14 days of a defendant's arraignment or waiver of arraignment. The Court of Appeals disagreed. Noting that the purpose of the *Shelton* rule was to give the defendant notice at an early stage of the proceedings regarding the penalty he faced if convicted of the underlying offense, the Court decided amendment was proper because the original supplemental information put the defendant on notice that he faced the penalty of a fourth-habitual offender. *Id.* at 644-645.

In *People v Ellis*, 224 Mich App 752, 755; 569 NW2d 917 (1997), the court recognized that although MCL 769.13 contained no specific provision allowing amendment of the notice, MCL 767.76 permitted "amendment of an indictment as a matter of the court's discretion, as long as the defendant does not suffer prejudice." *Ellis*, 224 Mich App at 756.

Construing the "conflicting statutes" the *Ellis* court determined that an amendment *increasing* the habitual-offender level from a second to a fourth was not permitted. The controlling statute, MCL 769.13, requires the prosecutor to give notice within 21 days of arraignment of "the prior convictions *to be relied on* for the purposes of sentence enhancement." *Ellis*, 224 Mich App at 756 (emphasis added). Relying on the pre-amendment *Shelton* case, the court held that amendments were not allowed to increase a defendant's penalty:

> Reading this statute in harmony with MCL 767.76, MSA 28.1016, we hold that the supplemental information may be amended outside the statutory period only to the extent that the proposed amendment does not relate to the specific requirements of MCL 769.13; MSA 28.1085, i.e., the amendment may not relate to additional prior convictions not included in the timely filed supplemental information. To hold otherwise would be to permit prosecutors to avoid making the necessary "prompt" decision regarding the level of supplementation, if any, they wish to pursue and would materially alter the "potential consequences" to the accused of conviction or plea. *Shelton*, *supra* at 569.

Ellis, 224 Mich App at 757. As an increase in the penalty would "materially alter the 'potential consequences' to the accused of conviction or plea." *Id.* (citing, *Shelton*.) The court rejected as justification the fact that the prosecutor did not initially know about the additional convictions. *Ellis*, 224 Mich App 757, fn 1.

Likewise, in *People v Morales*, 240 Mich App 571, 583; 618 NW2d 10 (2000), the Court of Appeals held that the lower court improperly granted the prosecution's request to amend the supplemental information from a second to a fourth. *Id.* at 573-574, 586.

The Court of Appeals then clarified that amendments to a timely-filed notice of intent to seek enhanced sentence are permissible so long as any amendment does not increase the defendant's potential sentence. *People v Hornsby*, 251 Mich App 462, 472; 650 NW2d 700 (2002). In *Hornsby*, the defendant contested imposition of sentence as a third-habitual offender where the prosecution timely filed a notice of intent to seek an enhanced sentence and later filed an untimely amendment to the notice correcting the prior felonies listed. *Id.* at 469. The Court recognized that a "difference exists between an amendment of a notice to seek sentence enhancement that attempts to impose more severe adverse consequences than one that does not." *Id.* at 472. Reading *Ellis* and *Manning* together, the Court of Appeals concluded "that *Ellis* does not preclude the amendment of a timely sentence enhancement to correct a technical defect where the amendment does not otherwise increase the potential sentence consequences." *Id.* at 472.

Because the amendment in *Hornsby* did not change the defendant's habitual-offender level and, therefore, did not increase his sentence, the Court of Appeals concluded the defendant had not been prejudiced. Further, the defendant did not dispute the validity of his underlying offenses; so, apart from "claiming a statutory violation, he has not alleged any prejudice arising from the untimely amendment." *Id.* at 473.

This history shows Michigan courts have consistently recognized the Legislature's intent to punish habitual offenders more harshly than those who break the law for the first time by permitting amendment of a timely filed notice.

C. Due process permits amendment of a felony information at any time unless the defendant is unfairly surprised or prejudiced.

Due process simply requires that a defendant be given notice and an opportunity to respond to the charges against him. It is clear that the law permits amendment of the felony information charging the underling crime, so long as the defendant is not given inadequate notice and is not unfairly surprised. The same rationale applies to amending the notice of intent to seek an enhanced sentence.

1. Amendments of felony informations are permitted.

It is well settled that a trial court may amend a felony information at any time, subject only to the limitation that amendment cannot cause a defendant prejudice "because of unfair surprise, inadequate notice, or insufficient opportunity to defend." *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). This is based upon a defendant's due process right to "'reasonable notice of a charge against him, and an opportunity to be heard in his defense.'" *People v McGee*, 258 Mich App 683, 699; 672 NW2d 191 (2003) (quoting *In Re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682 (1948)). The constitutional notice requirement "'is a practical requirement that gives effect to a defendant's right to know and respond to the charges against him.'" *McGee*, 258 Mich App at 699-700 (quoting *People v Darden*, 230 Mich App 597, 601; 585 NW2d 27 (1998)). Thus, in the context of amending the underlying charge, to establish a due process violation, a defendant must show his defense was prejudiced. *McGee*, 258 Mich App at 700.

2. The same due-process rationale applies to the notice of intent to seek enhanced sentence.

The same due process rationale applies to the notice of intent to seek an enhanced sentence. It would make little sense that an amendment to the underlying crime, the one the defendant is typically the most interested in disputing, could be made at any time, but that the habitual-offender notice could never be amended—even in the absence of prejudice.

Earlier court opinions shifted the focus of the prejudice analysis, or left it out altogether. When it comes to a due-process claim, the focus regarding prejudice is not whether the defendant faces a harsher penalty. Rather, as when amendments are made to the underlying crime, the question is whether the defendant had sufficient notice that he was facing an enhanced sentence to allow him to challenge his prior convictions.

Any prejudice analysis must also keep in mind that the defendant is in the best position to know the details of his own prior criminal history. The primary purpose of the notice provision contained in MCL 769.13 is to provide notice that the defendant faces an enhanced sentence, not to provide the defendant a detailed list of his own criminal history.

Courts have erred imposing dismissal of the notice of intent to seek an enhanced sentence as the remedy for technical violations of the habitual-offender statute. Amendment is permitted, even if it increases the habitual-offender level so long as the defendant is not unfairly surprised by the amendment and not prejudiced because he has a fair opportunity to respond.

II. As the original notice of enhanced sentence was timely filed, a subsequent amendment did not render it defective. A written order allowing the amendment was not required where the trial court unequivocally granted the amendment.

A. Analysis

After the original habitual-offender notice was timely filed, it was properly amended. Defendant had proper notice of the offenses that were to be used to enhance his sentence and he was not prejudiced. The fact that a written order allowing the amendment was inadvertently admitted does not alter this result.

1. The habitual-offender notice was timely filed.

There is no dispute that the original notice of intent to seek an enhanced sentence was timely filed and listed the correct habitual-offender level—fourth. The notice also listed the offenses that the prosecutor "may" have relied on. As the prosecution complied with the statutory notice requirements of MCL 769.13(1) and (2), the notice was not defective. Even if the notice was viewed as defective, any defect was cured by the proper amendment.

2. A written order was not required.

Though MCR 2.602(A) requires orders to be in writing, this Court has recognized that an oral ruling on the record detailing the reasons for granting or denying a motion can be sufficient. *People v Vincent*, 455 Mich 110, 112; 565 NW2d 629 (1997). In *Vincent*, this Court considered whether the trial court had granted a motion for directed verdict by statements made on the record. While acknowledging that a trial court speaks through its written orders, this Court also considered

whether the judge's oral comments were sufficient to grant the motion. *Id.* at 119-120. This Court concluded that the judge's comments were insufficient because "he [did not] render a statement of sufficient clarity and finality that could be construed as an order." *Id.* at 120. This Court ultimately held that a general inconclusive statement tantamount to a judge thinking out loud was inadequate. A detailed analysis on the record of the evidence and reasoning that forms the basis of the decision as well as a clear statement as to whether the motion was granted or denied is necessary. *Id.* at 123. Accord: *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996), citing *McClure v HK Porter Co, Inc*, 174 Mich App 499, 503; 436 NW2d 677 (1988) (A trial court's oral denial of a motion has the same weight and effect as a written order.).

MCR 6.112(H) does not require a written order to effectuate amendment of an information. Likewise, MCL 767.76 does not require a written order.

Here, the trial court orally granted the amendment to the notice. The judge noted that the court rules allow amendment of an information unless the defendant is unfairly surprised or prejudiced and ruled that Johnson was not prejudiced. The judge specifically stated, "I don't see any prejudice, so I'm going to grant the amendment." (March 1, 2001, p 6.) That was a clear statement that the motion to amend was granted. The amended notice was immediately served upon Johnson's attorney, who acknowledged receipt.

Any failure to file a written order can be cured by entry of an order nunc pro tunc. "'[T]he purpose of a *nunc pro tunc* order is not to change or alter an order or

judgment actually made. In other words its function is not to make an order now for then, but to enter now for then an order previously made.'" *Sleboede v Sleboede*, 384 Mich 555, 559; 184 NW2d 923 (1971).

Because the amendment was properly ordered, on the record and the amended information filed with the court and personally served upon defendant's attorney, (March 1, 2007, p.6.), a written order permitting the amendment was not required. The trial court had the authority to sentence Johnson as a fourth-felony habitual offender.

CONCLUSION AND RELIEF REQUESTED

Allowing amendment of a timely filed notice of intent to seek enhanced sentence under MCL 769.13 is consistent with its plain language. As the Legislature provided no remedy provision within the statute, even if the provisions of the statute are violated, a defendant is not entitled to relief in the form of resentencing as a first offender unless he can demonstrate he was unfairly prejudiced by the amendment. As Johnson has made no such showing, he cannot be granted the relief he seeks.

Because the trial court properly allowed the prosecution to amend the timely filed notice of intent to seek an enhanced sentence by orally granting its motion, the trial court had the authority to sentence Johnson as a fourth habitual offender.

This Court should affirm Johnson's habitual offender sentence.

Respectfully submitted,

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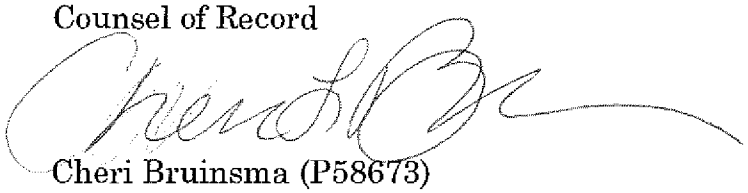

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