STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

ALFONZO ANTWON JOHNSON,

Defendant-Appellant.
_____/

Supreme Court No. 145477

Court of Appeals No. 304273

Lower Court No. 06-035599-FH (ML)

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DEFENDANT-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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BASIS FOR APPELLATE JURISDICTION

This is an appeal from the decision of the Court of Appeals which affirmed the conviction and sentence of the Defendant. Jurisdiction of the Supreme Court is pursuant to leave granted by the Court as to two questions, pursuant to and as stated in the Order dated May 1, 2013.

Name of Document	Date Signed or Served
Date of Sentence	April 28, 2011
Date of Entry of Judgment of Sentence and Commitment to Department of Corrections	May 25, 2011 (2nd original Judgment, 1st can't be located per Court records)
Defendant's Request for Appointment of Attorney	May 4, 2011
Claim of Appeal and Order Appointing Counsel	May 26, 2011
Claim of Appeal and Order Appointing Counsel (Substitution of Counsel)	July 6, 2011
Unpublished Opinion of the Court of Appeals affirming Defendant's conviction and sentence	June 21, 2012
Application for Leave to Appeal to the Michigan Supreme Court by Defendant in *Pro Per*	July 13, 2012
Order of the Michigan Supreme Court granting leave to appeal to address two issues	May 1, 2013

The jurisdiction of the Michigan Supreme Court is pursuant to *MCR 7.302(H)(1)* because of the Order of the Court granting leave to appeal on two issues as described in its May 1, 2013 Order.

STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER THE AMENDMENT OF THE SUPPLEMENTAL INFORMATIONS AND NOTICE OF INTENT TO SEEK AN ENHANCED SENTENCE WAS CONTRARY TO *MCL 769.13*, AND WHETHER THE REMEDY IS FOR A RESENTENCING UNDER THE STATUTORY GUIDELINES WITHOUT ANY REFERENCE TO THE HABITUAL OFFENDER STATUTES?

Defendant-Appellant says "Yes."
The Court of Appeals said "No."
The trial court said "No."

II.

WHETHER THE ORIGINAL SUPPLEMENTAL INFORMATION, NOTICE OF INTENT TO SEEK TO ENHANCE THE DEFENDANT'S SENTENCE BY PRIOR CONVICTIONS WAS DEFECTIVE AND THERE WAS NO ORDER ENTERED ALLOWING THE NOTICE TO BE AMENDED SO THE TRIAL COURT HAD NO AUTHORITY TO SENTENCE THE DEFENDANT AS A FOURTH HABITUAL OFFENDER?

Defendant-Appellant says "No."
The Court of Appeals said "Yes."
The trial court said "Yes."

STATEMENT OF FACTS

The Defendant, ALFONZO ANTWON JOHNSON, is appealing his jury trial conviction and subsequent sentencing on one count of delivery of less than 50 grams of cocaine contrary to *MCL 333.7401(2)(a)(iv)*. He was sentenced on April 28, 2011 to 3-30 years in prison, with jail credit for 95 days. His sentence was enhanced pursuant to *MCL 769.12*. **(See Judgment of Sentence in Appendix, p 29a.)**

The prosecutor timely filed a Supplemental Information stating that the Defendant had been previously convicted of 3 or more felonies or attempts to commit felonies. This Supplemental Information listed the date and name of several convictions. **(See Supplemental Information in Appendix, p 15a.)**

However, the Defendant had in fact not been convicted on any of the dates listed in the Supplemental Information, nor had he been convicted of the crimes listed in the Supplemental Information - not even one! The prosecutor filed a Motion to "Amend" the Supplemental Information. **(See People's Motion to Amend Supplemental Information in Appendix, p16a-20a.)** There was an objection filed **(See Defendant's Answer to Motion to Amend Supplemental Information in Appendix, p 21a-27a)** and the prosecutor, without getting a Court order merely filed the "Amended" Supplemental Information which listed all new dates and all new convictions, which the prosecution alleged the Defendant had on his record. **(See Amended Supplemental Information dated February 22, 2007 in Appendix, p 28a.)** The judge sentenced the Defendant pursuant to the Amended Supplemental Information. **(See Appendix, p 29a.)**

The Defendant timely appealed to the Michigan Court of Appeals, raising a number of issues including arguing that the Defendant could not be properly sentenced pursuant to *MCL 769.12* as described in the "Amended" Supplemental Information. The Court of Appeals considered the issues raised in the Defendant's Brief on Appeal and affirmed the Defendant's convictions. **(See Court of Appeals Unpublished Opinion dated June 21, 2012 in Appendix, p 31a-39a.)**

The Defendant-Appellant filed an in *Pro Per* Application for Leave to Appeal in the Michigan Supreme Court which granted leave to appeal only as to the two issues argued in the questions presented in this brief. **(See Michigan Supreme Court Order dated May 1, 2013 in Appendix, p 40a.)**

I.

THE AMENDMENT OF THE SUPPLEMENTAL INFORMATIONS AND NOTICE OF INTENT TO SEEK AN ENHANCED SENTENCE WAS CONTRARY TO *MCL 769.13*, AND THE REMEDY IS FOR A RESENTENCING UNDER THE STATUTORY GUIDELINES WITHOUT ANY REFERENCE TO THE HABITUAL OFFENDER STATUTES.

Standard of Review

"*De Novo.*" Constitutional rights and questions of law are involved. *People v Pitts,* 222 Mich App 260, 263; 564 NW2d 93 (1997); *Rapistan Corp v Michaels*, 203 Mich App 301, 306; 517 NW2d 518 (1994).

Argument

The Defendant was sentenced under the provisions of *MCL 769.12.* **(See *MCL 769.12* in Appendix, p 1a.)** This statute, by operation of its provisions, extended the potential guideline range for the Defendant's minimum sentence. The Defendant's minimum sentence was within the guideline range if he was sentenced as an habitual offender with 3 or more priors; but would have been outside of the range if he had been sentenced without the application of *MCL 769.12.* The prosecutor filed a timely Supplemental Information **(See Appendix, p 15a.)**, however all of its contents were incorrect as applied to the Defendant. Long after the expiration of the 21 day period required for filing an habitual offender increase sentence notice, the prosecutor requested the court's permission to file an Amended Supplemental Information. This proposed new notice completely changed the dates of all the offenses, and well as the names of all the offenses. (It should be noted that completely changing <u>all</u> of the offense names and dates is <u>not</u> an amendment. It is a new document!) For a variety of reasons discussed below, the Defendant believes this was error.

A. *MCL 769.13(1)* was Violated Because the Amended Supplemental Information was Not Filed within the 21 Days Required by Law and No Amendments Are Allowed After that Period.

MCL 769.13(1) and *(2)* require that when a prosecutor wishes to use the habitual offender statutes he "shall" file notice of his intent to do so and serve it upon the Defendant or his attorney within 21 days after either arraignment on the Information or 21 days after the filing of the Information, if arraignment is waived. **(See *MCL 769.13* in Appendix, p 4a-5a.)**

The statute of course is quite clear, that this "shall" be done by the prosecutor within the 21 day time limit. However, if there was any question *People v Morales*, 240 Mich App 571, 575-576; 618 NW2d 10 (2000) makes it clear that the applicable statute erects a bright line test for the 21 day period. *People v Shelton*, 412 Mich 565, 569; 315 NW2d 537 (1982) states that the purpose for requiring a prosecutor to properly file a Supplemental Information charging a defendant as an habitual offender is to provide the defendant with notice at an early stage of the potential consequences should he be convicted. The notice requirement is explained a bit more by *People v Taylor*, 99 Mich App 613, 616; 299 NW2d 9 (1980) which states that the primary purpose of the rule in *Fountain* requiring the prompt filing of the Supplemental Information is to provide notice and to lessen the appearance of prosecutorial impropriety through a lack of notice.

The law is also clear that no one can suffer the sentencing consequences resulting from the habitual offender acts without the filing of a notice to that effect which lists the prior convictions in detail. *People v Morgan*, 85 Mich App 353, 357; 271 NW2d 233 (1978). Those requirements were obviously not done in this case within the time provided by statute.

B. The "Amended" Supplemental Information was Not Timely Filed and it Was Not an Amendment.

The Information and the original Supplemental Information (which is invalid because it does not accurately list any of the Defendant's prior convictions, either as to the year of conviction or the crime committed) were filed on September 28, 2006. **(See Trial Court Docket Entry Number 3 in Appendix, p 6a .)**

The Defendant was arraigned on October 13, 2006. **(See Trial Court Docket Entry Number 6 in Appendix, p 6a.)** The "Amended" Supplemental Information was filed on March 1, 2007. **(See Trial Court Docket Entry Number 24 in Appendix, p 7a.)** This is obviously months past the 21 day requirement provided in *MCL 769.13(1)*.

The "amendment" of the Supplemental Information by the prosecutor by merely filing it was certainly contrary to *MCL 769.13* for two reasons. First, that statute requires that the Supplemental Information be filed in the requisite 21 day requirement. Secondly, there is no provision anywhere in *MCL 769.13* which allows an "amendment" after the 21 day period. The Legislature knows how to make provision for amendments of certain notices after the required time period. For example, see *MCL 768.20(1)* which requires that a defendant file a notice of alibi not less than 10 days before the trial of the case "or as such other time as the court directs, file and serve upon the prosecuting attorney a notice..." **(See *MCL 768.20* in Appendix, p 41a.)** Likewise the insanity defense provision *MCL 768.20a(1)* requires the defense to file such a notice 30 days before trial set for the case... "or at such other time as the court directs." **(See *MCL 768.20a* in Appendix, p 42a.)** Thus, the Legislature has provided in those statutes clear authority to the courts to the filing deadlines. However, there is no such authority contained in *MCL 769.13(1)*.

C. The Attempted "Amendment" of the Original Supplemental Information is Improper.

It is the Defendant's position that the statute itself prevents any attempted "amendment" of this type of nature, as does *People v Morales, supra* which held that the statutory time limit was a "bright line test" requiring that the notice of intent to seek enhanced sentences based on prior convictions be filed within the time period.

The Defendant is aware of *People v Hornsby*, 251 Mich App 462; 650 NW2d 700 (2002) which upheld that amendments are allowed of a Supplemental Information which do not attempt to impose more severe adverse consequences on a defendant, if the amendment is "to correct a technical defect." (*Hornsby, supra* p 472)

It is the Defendant's position that *Hornsby* does not apply because it is distinguishable on its facts, it does not discuss the rule of lenity or due process which is discussed below, and therefore it is not controlling precedent in this situation. See *Bostrom v Jennings*, 326 Mich 146, 156-157; 40 NW2d 97 (1949)(reversed on other grounds 413 Mich 406) where the court stated that when a question necessarily involved in a case and answered by their holding was neither considered nor discussed in the opinion, the answer is not binding as precedent. See to the same effect, *Chapman v Buder*, 14 Mich App 13, 20; 165 NW2d 436 (1968); *Allen v Duffie*, 43 Mich 1, 11; 4 NW 427 (1880); *Afluni v West Bloomfield School District*, 397 Mich 462, 465; 245 NW2d 49 (1976).

It is also the Defendant's position that what occurred in this case by the prosecutor's attempted "amendment" was far beyond correcting a "technical defect." A copy of the original Supplemental Information is shown **in Appendix, p 15a.**. The Amended Supplemental Information is shown **in Appendix, p 28a.**. From looking at these two documents it is clear that all of the

allegations in the original Supplemental Information have been changed. There is not one year of conviction which remains the same, nor do any of the crimes alleged remain the same between the two. This is a wholesale and complete substitution of one document for another. This is not a "technical defect" by any stretch of the imagination! (Therefore *Hornsby, supra* does not apply in any event.) The courts have held that due process requires that a Supplemental Information against the Defendant contain the dates of convictions and the precise charges so that a defendant can be properly appraised of the charge that is being faced as an habitual offender. *People v King*, 104 Mich App 459, 464 fn2; 304 NW2d 605 (1981); *People v Morgan, supra; People v Shelton, supra.*

1. Statutory Construction would Preclude Allowing the "Amendment."

The statute, *MCL 769.13*, does not by its terms, allow amendments of the prosecution's notice by adding items. In addition, the statute is very clear on its face that this action has to be taken within the 21 days. There is no ambiguity and therefore no construction is needed or permitted.

When construing statutes the cardinal rule is to give effect to the intention of the Legislature. When reading the statutes one must use the plain and ordinary meaning of the language if it is clear and unambiguous. In addition, effect should be given to every phrase, clause and word in the statute as far as possible. *Nelson v Associated Financial Services Company of Indiana, Inc*, 253 Mich App 580, 589; 659 NW2d 653 (2002); *Sun Valley Foods Company v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). It is also presumed that every word has some meaning, so the courts must avoid any construction which would render any part of the statute surplusage or nugatory. *People v Borchard-Ruhland*, 460 Mich 278, 284-285; 597 NW2d 1 (1999).

> "The rule is no less elementary that effect must be given, if possible, to every word, sentence, and section." *City of Grand Rapids v Crocker*, 219 Mich 178, 182; 189 NW 221 (1922); *Michigan Ex Rel Wayne County Prosecutor v Bennis*, 447 Mich

719, 732; 527 NW2d 483 (1994).

To discover Legislative intent, provisions of a statute must be read in the context of the entire statute to produce, if possible, a harmonious and consistent whole. *Michigan Ex Rel Wayne County Prosecutor v Bennis, supra.* What governs is the fair and natural import of the statute's terms, in view of the subject matter of the law. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). "[T]he Legislature is presumed to have intended the meaning expressed in the statute. The words of a statute provide the most reliable evidence of the Legislature's intent, and as far as possible, effect should be given to every phrase, clause, and word in the statute." *Petersen v Magna Corp.*, 484 Mich 300, 307; 773 NW2d 364 (2009). The United States courts also use this same rule of statutory interpretation - that every clause and word of a statute should, if possible be given effect. See *The United States v Menasche*, 348 US 528, 538-539; 75 S Ct 513; 99 L Ed 615 (1955). In that case the United States Supreme Court held that the government's contention that a particular clause did not apply would have defeated and destroyed the plain meaning of that clause and it was the court's duty to give effect if possible to every clause and word of a statute.

Applying these principles to the statute shows that it would be changing the wording of the Legislature to in effect read into the statute the ability to amendment by holding that "amendments" such as those in this case would be proper. A holding that there can be no amendments, such as was done in this case, which as is argued above, is not really an "amendment" since there is a whole sale replacement of all of the specifics in such notice. However, if there were a typographical error or a transposition of numbers or something which is fairly obvious on its face, this would not necessarily mean that the notice was defective because it could still give notice. A misspelled word or transposed number, etc. would not be sufficient to take away notice to the Defendant and those

kind of slight errors would not be sufficient to prevent the operation of the habitual offender acts. However, that type of situation is not involved in the case at bar. Here we are talking about the changing of the notice by complete substitution of the named crimes and dates of those crimes.

2. Due Process Would Prohibit Such "Amendment."

Due process is required by both the Michigan and Federal Constitutions. *Const 1963, art 1, § 17; US Const, Am V, XIV.* Due process applies during all criminal proceedings. Due process requires fundamental fairness as the basis for justice. *Lisenba v California*, 314 US 219, 236; 62 S Ct 280; 86 L Ed 166 (1944); *Dodge v Detroit Trust Co.*, 300 Mich 575, 618; 2 NW2d 509 (1942); *Building Owners Association v PSC*, 131 Mich App 504, 513; 346 NW2d 581 (1984). Fundamental fairness is a flexible concept which calls for the procedural protections that a particular situation demands. *Hilliard v Schmidt*, 231 Mich App 316, 319; 586 NW2d 263 (1988)(overruled on another point); *Matthews v Eldridge*, 424 US 319, 334; 96 S Ct 893; 47 L Ed 2d 18 (1976).

Cases cited above held that one of the reasons for the 21 day requirement is to give proper notice to a defendant and prevent an appearance of impropriety of the prosecutor's actions. In this case it does not give proper notice when there is a complete substitution of one document for another. While the prosecutor might argue that the penalty remains the same, that is the only thing which does. The notice, as required by statute and many of the cases cited above, is to the dates and specific convictions of which the prosecutor alleges the Defendant has on his record. The Defendant upon receiving the original incorrect Supplemental Information knows he can't be convicted for having those prior convictions, because in fact such convictions do not exists! This is not a "technical defect" which the prosecutor is attempting, nor is there an obvious transposition of dates or typographical error involved, etc. This is a whole sale changing of all the dates of convictions and

all of the nature of the convictions. For this reason there is no proper notice given!

3. The Rule of Lenity Would Prohibit Such Interpretation.

The rule of lenity would also require ruling in the Defendant's favor. Courts have held that any ambiguity regarding the scope of criminal statutes must be resolved in favor of lenity. *Huddleston v United States*, 415 US 814, 830-831; 94 S Ct 1262; 39 L Ed2d 782 (1974). This rule requires that if a criminal statue is open to more than one legitimate interpretation it should be construed strictly, which means construed in favor of the defendant. This rule makes it clear what the law requires, and thus provides constitutional fair warning. *United States v Lanier*, 520 US 259, 265; 117 S Ct 1219; 137 L Ed2d 432 (1997). "It may fairly be said to be a presumption of our law to resolve doubts in the enforcement of the penal code against the imposition of a harsher punishment." *Bell v United States*, 349 US 81, 83; 75 S Ct 620; 99 L Ed 905 (1955). See also *People v Bergevin*, 406 Mich 307, 312; 279 NW2d 528 (1979); *People v Gilbert*, 414 Mich 191, 211; 324 NW2d 834 (1982); *People v Johnson*, 195 Mich App 571, 491 NW2d 622 (1992). Interpreting the statute the way the prosecution does results in harsher punishment when it is not at all clear that the Legislature intended this result in this type of situation. This concept is also applicable as are the statutory construction and due process concepts discussed above.

D. The Remedy in this Case Should be Resentencing Within the Guidelines Scored Without Reference to any Habitual Offender Enhancement.

It is up to the Legislature to define crimes and to determine punishment for a conviction of those crimes. This is a function of the Legislature. In *People v Hanrahan*, 75 Mich 611, 620; 42 NW 1124 (1889) the court said:

> "To declare what shall constitute a crime, and how it shall be punished, is an exercise of the sovereign power of a state, and it inherent in the legislative

department of the government. Unless authorized by the Constitution, this power cannot be delegated by the legislature to any other body or agency."

Courts are prohibited by the double jeopardy clauses of the Michigan and U.S. Constitutions from imposing more punishment than intended by the Legislature. *US Const, Am V, XIV; Const 1963, art 1, § 15; North Carolina v Pierce*, 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1969). See *People v Kulpinski*, 243 Mich App 8, 24; 620 NW2d 537 (2000) to the effect that the Legislature has the authority to define a criminal offense and the double jeopardy clauses restrict the courts from imposing more punishment than that intended by the Legislature. In accord see *Brown v Ohio*, 432 US 161, 165; 97 S Ct 2221, 2225; 53 L Ed 2d 187, 193-194 (1977).

Therefore, if *MCL 769.13(1)* and *(2)* are not complied with, then the court has no authority to sentence in accordance with the provisions of *MCL 769.12*. In such a case this court should remand to the trial court for sentencing within the guideline range, which is calculated without reference to the habitual offender provision of the Michigan statutes. (*MCL 769.12.*)

E. To Allow such an Amendment is a Violation of Separation of Powers.

In this case the Legislature said that a proper notice requires a list of the prior conviction or convictions which will be relied upon for the sentence enhancement. *MCL 769.13(2)*. For the court now to basically say that the Legislature didn't mean 21 days, or that there are circumstances other than a "technical defect" which is not involved in this case, which allow this to be filed months later is a violation of separation of powers.

The Michigan Constitution divides the powers of the Government into three separate and distinct branches: the executive; judicial; and legislative. It also explicitly prohibits the exercise of one branch's power by either of the other two branches. *Const 1963, art 3, § 2*. This constitutional

division of Governmental powers forbids the extension, unless by explicit language or necessary implication of the powers of one department to another, and if there is any ambiguity then doubt should be resolved in favor of the traditional separation of Governmental powers. *Civil Service Commission of Michigan v Auditor General*, 302 Mich 675, 683; 5 NW2d 536 (1942). (The law is the same after the 1963 New Michigan Constitution. See *Schwartz v City of Flint*, 426 Mich 295, 306; 395 NW2d 678 (1986).)

The court *In Re: Manufacturer's Freight Forwarding Co.*, 294 Mich 57, 64; 292 NW 678 (1940) stated:

> "Our government is one whose powers have been carefully apportioned between three distinct departments which emanate alike from the people, have their powers alike limited and defined by the Constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws and contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties."

Yet what is forbidden is precisely what would be done in this case. It is a violation of the separation of powers for the prosecutor to be able to file a notice of intent to seek an enhanced sentence by means of the "Amended" Supplemental Information filed months past the 21 days allowed by the Legislature, and he has no power to do so under the circumstances of this case.

Likewise the courts cannot extend the time period allowed by the Legislature. In *Detroit v Circuit Judge*, 79 Mich 384, 387-388; 44 NW 622 (1890) the court stated that it was a necessary and fundamental rule of law that judicial power cannot interfere with legitimate discretion of any other department of Government so long as they do no illegal act. See also *Wayne Prosecutor v Wayne*

County, 93 Mich App 114, 121; 286 NW2d 62 (1979); *Genesee County Prosecutor v Genesee County Circuit Judge*, 391 Mich 115, 121-122; 215 NW2d 145 (1974); *United States v Batchelder*, 442 US 114; 99 S Ct 2198; 60 L Ed2d 755 (1979); *People v Ford*, 417 Mich 66, 87-88; 331 NW2d 878 (1982). Thus, this type of action would violate separation of powers, both by the prosecutor and by this court if it allows the prosecutor's actions to stand and in effect, to sentence a Defendant on an improperly filed Supplemental Information contrary to the Legislatures direction. See *People v Gunsel*, 331 Mich 105, 112; 49 NW2d 83 (1951) where a defendant could not be sentenced as a third felony offender under a defective Supplemental Information and any sentence thus imposed was a nullity.

II.

THE ORIGINAL SUPPLEMENTAL INFORMATION, NOTICE OF INTENT TO SEEK TO ENHANCE THE DEFENDANT'S SENTENCE BY PRIOR CONVICTIONS WAS DEFECTIVE AND THERE WAS NO ORDER ENTERED ALLOWING THE NOTICE TO BE AMENDED SO THE TRIAL COURT HAD NO AUTHORITY TO SENTENCE THE DEFENDANT AS A FOURTH HABITUAL OFFENDER.

Standard of Review

"*De Novo*." Constitutional rights and questions of law are involved. *People v Pitts, supra*; *Rapistan Corp v Michaels, supra.*

Argument

The prosecution has acknowledged that the dates and crimes listed in the original Supplemental Information are not correct. **(See Appendix, p 16a-20a; as well as Appendices, p 15a and p 28a.)** Since there was no proper notice given, the sentencing pursuant to *MCL 769.12* was improper.

A. There was Not a Proper Amendment of the Originally Filed Improper Supplemental Information.

The prosecutor on February 23, 2007 **(See Trial Court Docket Entry Number 22 in Appendix, p 7a)** filed a motion to amend the originally filed Supplement Information on the basis that it incorrectly listed the dates of the conviction and the actual convictions themselves. **(See Appendix, p 16a-20a.)** The prosecutor argued there was merely a defect in the originally filed Supplemental Information which he was trying to correct. The defense objected to the filing of an Amended Supplemental Information for a number of reasons, including that this was not merely a correction of typographical errors, the prosecutor should have known the correct information because they had already filed a Supplemental Information against the Defendant in a different case in the

Summer of 2006 and therefore this attempt to amend was far too late, and he pointed out other improprieties with the prosecutor's actions. **(See Appendix, p 21a-27a.)**

There was no order allowing the amendment of the Supplemental Information. **(See Trial Court Docket Entries Number 22 thru 24 in Appendix, p 7a.)** However, the Amended Supplemental Information was filed anyway on March 1, 2007.

B. The Supplemental Information Should Not be Allowed Because there is No Order of the Court Granting the Prosecutor Permission.

As can be seen from examination of the court file and an examination of trial court docket entry numbers 22-24 **in Appendix, p 7a**, there was no order allowing the prosecutor's request to amend the Supplemental Information. For this reason also, the Defendant cannot be sentenced based on the Amended Supplemental Information, since there is no court order allowing the amendment; even if such an amendment were permitted by statute.

C. Statutory Interpretation, Due Process, Rule of Lenity, and Separation of Powers would all Prevent the Amendment by the Prosecutor.

Section C in question presented I above discusses statutory construction (why the statute does not permit an amendment), as well as discussion of due process and the rule of lenity. In addition, Section E in question presented I above discusses separation of powers arguments showing that the courts do not have the ability to change statutes, which are plain on their face. (This also would apply to the executive branch of government.) All of these arguments are applicable here too.) Even if the statute *MCL 769.13(1)* and *(2)* are construed as to allowing an amendment; this complete substitution may <u>not</u> be considered an "amendment," since this action takes place after the 21 day period, there is no court order which would be required, and it is not an amendment but is a substitution.

D. Other Defense Arguments.

The Defendant in the answer to amend the Supplemental Information argued that the amendment should not be made because of *MCR 2.114(D)* which would require that the prosecuting attorney read the document and to the best of his knowledge, information and belief formed after a reasonable inquiry thought the document, was well grounded in fact. Counsel pointed out that the prosecutor did in fact file an Information against the Defendant in another case in August of 2006, which apparently contained the proper dates and charges so there was no reason why he should file an improper Information in this case in September of 2006. While the prosecutor argued in his motion that the Defendant would not be prejudiced, this is not true. If the original Supplemental Information was used, the Defendant could not have been convicted as an habitual offender because he had not been convicted of any of the crimes charged on the dates alleged. (Not even in the years alleged.) Therefore, he would have to be sentenced as a first offender. On the other hand, if the Amended Supplemental Information was allowed he could be sentenced to a higher sentence, and in fact he was. This is prejudice to the defense and would be a consideration during plea bargaining, for example. For all of these reasons the Defendant believes this "amendment" cannot be allowed and therefore the Defendant's sentencing as an habitual offender was fatally defective.

Throughout questions presented I and arguments made above in question presented II the defense has argued there was no authority to amend the Supplemental Information, but even if there were such authority, the court did not issue an order allowing that to be done. So since the original notice was obviously defective, since the Defendant had not been convicted of any of the crimes on the dates alleged, the trial court would have no authority to sentence under the provision of the habitual offender law.

If this court agrees with Defendant that the Amended Supplemental Information was improper, then the Defendant would drop from a guideline range of 5-46 months (PRV score of 45 yielding a PRV level of D - an OV score of 10 yielding an OV level of II - on the "class D" sentencing grid) which was used at the time of sentencing, to a guideline range of 5-23 months. Since the Defendant's minimum sentence was 3 years, or 36 months, this would be beyond the permitted guideline range in a situation when there were no facts given which would have justified a deviation from the guidelines, and a deviation wasn't even considered by the trial court. Because of a change in the guideline range, a resentencing is required.

People v Francisco, 474 Mich 82; 713 NW2d 44 (2006) requires such resentencing by its holding that incorrectly scored guidelines, which change the recommended range, require a resentencing because courts must sentence based on accurate information. In accord, *Williams v United States*, 503 US 193, 202, 203; 112 S Ct 1112; 117 L Ed2d 341 (1992); *United States v LaVoie*, 19 F3d 1102, 1104 (CA 6, 1994).

RELIEF REQUESTED

WHEREFORE, Defendant-Appellant respectfully requests this Honorable Court to hold that there was no proper Supplemental Information filed for all of the reasons argued above and that the case be remanded to the trial court for resentencing of the Defendant to a sentence within the guidelines as scored without reference to the habitual offender acts.

Respectfully submitted,

SMITH & BROOKER, P.C.

Dated: 6-24-13

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