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 Ct No.: 145477
Court of Appeals No. 304273
Lower Ct. No. 06-35599-FH

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PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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BASIS OF APPELLATE JURISDICTION

The People hereby adopt the statement of jurisdiction submitted by Defendant-Appellant in his Brief on Appeal.

COUNTER STATEMENT OF ISSUES PRESENTED

I. **WAS THE AMENDMENT OF THE SUPPLEMENTAL NOTICE OF INTENT TO SEEK TO ENHANCE CONTRARY TO MCL 767.13?**

Defendant-Appellant says	"Yes".	
Plaintiff-Appellee says		"No".
Court of Appeals says		"No"
Trial Court says		"No"

II. **DID THE TRIAL COURT HAVE THE AUTHORITY TO SENTENCE THE DEFENDANT AS A FOURTH HABITUAL OFFENDER?**

Defendant-Appellant says		"No".
Plaintiff-Appellee says	"Yes".	
Court of Appeals say	"Yes"	

COUNTER STATEMENT OF FACTS

The Appellant was charged by the Monroe County Prosecuting Attorney on August 17, 2006 with the crime of Controlled Substance Delivery/Manufacture (Cocaine, Heroin or Another Narcotic) Less Than 50 Grams, contrary to MCL 333.7401(2)(a)(iv). The Appellant waived his Preliminary Examination in the First District Court on September 25, 2006 and was bound over to the 38th Circuit Court.

The People filed the original information on September 28, 2006. (See Appendix p. 6a) Also, on September 28, 2006, the People filed a Supplemental Information. *Id.* The Supplemental Information gave notice of the People's intent to seek a sentencing enhancement as a Fourth Habitual Offender. (See Appendix p. 15a). The dates and offenses contained in the Fourth Habitual Offender notice were all incorrect. The Circuit Court arraigned the Defendant on October 13, 2006. (See Appendix p. 6a).

The People filed a Motion to Amend Supplemental Information on February 23, 2007. (See Appendix p. 7a). The Appellant filed a response in opposition to the Motion on February 26, 2007. *Id.* The trial court heard argument on the Motion to Amend Supplemental Information on March 1, 2007 and granted the motion. (See Appendix p. 6b). No order was entered granting the motion. The Court accepted the filing of the Amended Supplemental Information on March 1, 2007. The Amended Supplemental Information contained the correct offenses and dates for the Fourth Habitual Offender Notice. (See Appendix p. 28a).

A jury trial was conducted March 7, 2007 and the Appellant was found guilty as charged. (See Appendix p. 28a-29a). The Appellant failed to appear at his sentencing on April 20, 2007.

(See Appendix, p. 29a). The Appellant's bond was forfeited and a bench warrant for his arrest was issued. *Id.*

The Appellant was sentenced on April 28, 2011 as a Fourth Habitual Offender. (See Appendix p. 9a). The Appellant was sentenced to three to thirty years in prison. The Appellant was found in contempt of court by the sentencing judge for his comments after the sentence was pronounced. (See Appendix p. 18b-20b).

The Appellant appealed to the Michigan Court of Appeals. (See Appendix p. 11a). The Court of Appeal affirmed the conviction and upheld the sentencing of the Appellant as a Fourth Habitual Offender. (See Appendix p. 31a-39a).

The Appellant filed an Application for Leave to Appeal with this Court. The Court granted leave to appeal on two issues: "(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; and (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."

ARGUMENT

I. THE AMENDMENT OF THE SUPPLEMENTAL NOTICE OF INTENT TO SEEK TO ENHANCE WAS NOT CONTRARY TO MCL 767.13 AND THE APPELLANT IS NOT ENTITLED TO ANY REMEDY.

Standard of Review

Questions of law pertaining to statutory construction and interpretation are reviewed *de novo. People v Schultz*, 435 Mich 517 (1990). Constitutional issues are reviewed *de novo. People v Dunbar,* 463 Mich 606 (2001)

The Appellant was sentenced by the trial court as a Fourth Habitual Offender pursuant to MCL 767.12. The People filed a Supplemental Information with a Fourth Habitual Offender Notice within twenty-one days of the Appellant's arraignment in Circuit Court. The Habitual Offender Notice contained the wrong offenses and dates for the Appellant's prior convictions.

The People discovered this error prior to trial and filed a Motion to Amend Supplemental Information on February 23, 2007. (See appendix p. 7a). The proposed Amended Supplemental Information contained the correct offenses and dates in the Habitual Offender Notice. This motion was filed six days prior to the final pretrial and thirteen days prior to the jury trial. *Id.* The trial court granted the People's motion on March 1, 2007, but no order was entered. (See Appendix 6b). The People filed the Amended Supplemental Information with the trial court on March 1, 2007.

The Appellant was convicted by a jury and sentenced as a Fourth Habitual Offender to three to thirty years in prison.

This Court has asked the parties to address the following issue:

> "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"

The People will address this issue.

A. THE AMENDMENT OF THE SUPPLEMENTAL INFORMATION DID NOT VIOLATE MCL 769.13 SINCE IT DID NOT INCREASE THE LEVEL OF HABITUAL OFFENDER OR THE SENTENCING PENALTY.

The People filed a Supplemental Information containing a Habitual Offender Fourth Notice timely in conformance with MCL 767.12. However, the offenses and dates contained in the notice were incorrect. The People filed a new Amended Supplemental Information that contained the correct dates and offenses. This Amended Supplemental Information did not change the level of Habitual Offender and did not change the Appellant's possible sentence.

The Michigan Supreme Court has not addressed whether an information containing a Habitual Offender Notice may be amended if it does not change the habitual offender level. The Michigan Court of Appeals has addressed this issue and consistently held that a Prosecuting Attorney may file an Amended Supplemental Information changing the dates or convictions in a Habitual Offender Notice as long as the level of the Habitual Offender Notice does not increase. The Court of Appeals held that following in *People v Manning*:

> "Defendant contends that the filing of the amended supplemental information violated the rule set forth by our Supreme Court in *People v Shelton*, 412 Mich 565; 315 NW2d 537 (1982), that a supplemental information must be filed no more than fourteen days after a defendant is arraigned. The purpose of the *Shelton* fourteen-day rule is to provide a defendant with notice, at an early stage of the proceedings, of the potential consequences should the defendant be convicted of the underlying offense. *Id.*, 569; *People v Norwood*, 146 Mich App 259; 379 NW2d 446 (1985).
>
> Although an amended supplemental information was ultimately filed in the instant case, the original supplemental information, filed within the fourteen-day requirement, provided Manning with the required notice that if he was convicted of the underlying felony he risked a conviction for felony offender, fourth offense. Thus the expressed purpose of the underlying *Shelton* rule has been effectuated."

People v Manning, 163 Mich. App. 641, 644-645 (1987), overruled in part on other grounds in *People v Bailey*, 483 Mich 905 (2009).

The Court of Appeal more recently held the following in *People v Hornsby*:

> "Therefore, contrary to defendant's position on appeal, a recognized difference exists between an amendment of a notice to seek sentence enhancement that attempts to impose more severe adverse consequences to a defendant and one that does not. After reading *Ellis* and *Manning* together, we conclude that *Ellis* does not preclude the amendment of a timely sentence enhancement information to correct a technical defect where the amendment does not otherwise increase the potential sentence consequences.
>
> In this case, the amended information did not increase defendant's potential sentence because the amendment did not change defendant's habitual offender level. Defendant does not dispute that he received timely notice that the prosecutor sought to charge him as a third-offense habitual offender and does not dispute the validity of the underlying offenses supporting his status as a third-offense habitual offender. Apart from claiming a statutory violation, he has not alleged any prejudice arising from the allegedly untimely amendment. Because the amendment did not change in any way the potential consequences of a conviction, of which defendant had received proper notice, we conclude that the trial court properly denied defendant's motion challenging the amendment of the notice to seek sentence enhancement and properly sentenced defendant as a third-offense habitual offender." *People v Hornsby*, 251 Mich App 462, 471-473 (2002).

The Michigan Court of Appeals' holdings have been clear on this issue over the last fifteen years, and the People relied on these cases when we filed an Amended Supplemental Information instead of dismissing the case and reauthorizing the charges.

The Michigan Code of Criminal Procedure allows amendments to indictments and informations to correct defects:

> "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." MCL 767.76

Further, the Michigan Court Rules state: "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." MCR 6.112(H). In this case, the People were correcting a scrivener's error by changing the dates and offenses.

It is clear that the purpose of the habitual offender enhancement statutes is to put a defendant on notice as to what the maximum sentence is for the crime charged. This Court held in *Shelton*:

> "We believe that such a rule allows the prosecutor sufficient time to make a decision concerning supplementation while at the same time providing notice at an early stage of the proceedings to the defendant of the potential consequences of conviction of the underlying felony." *People v Shelton*, 412 Mich 565, 569 (1982)

Errors in the dates and convictions contained in the notice do not affect the ultimate penalty at sentencing. Therefore, the Appellant was aware at the early stage of the proceeding the potential consequences of a conviction.

The Michigan Legislature has clearly spoken on the issue of errors in pleading or procedure in criminal matters. The Criminal Code of Procedure states:

> "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." MCL 769.26

In this case any error that occurred was an error in the pleadings. The Appellant cannot establish that the errors contained in the habitual offender enhancement notice in the original Supplemental Information resulted in a miscarriage of justice. The Appellant was on notice as to the maximum possible penalty for the crime. He clearly knew what his felony convictions were and that he committed at least three prior felonies. Further, he was aware six day prior to the final pretrial and thirteen days prior to the jury trial that the People were correcting the Habitual Offender Notice. The Appellant had sufficient time to decide whether to plead or go to trial. The

Appellant had four years between the filing of Amended Supplemental Information and his sentencing on the charge (due to his failure to appear at sentencing). He had ample time to research his prior convictions in the Habitual Offender Notice to determine if they were correct.

If this Court decides to make a bright line rule that Habitual Offender Notice cannot be amended to correct errors beyond twenty-one days from arraignment even if the penalty does not change, it will have negative consequences for criminal defendants. Prosecuting Attorneys have broad authority to dismiss a case and then reauthorize the same charge. *People v Curtis*, 389 Mich 698, 706 (1973); *People v Reagan*, 395 Mich 306, 312 (1975); MCL 767.29. Such a bright line rule holding will result in Prosecutor Offices dismissing cases where there are any errors in Habitual Offender Notices and then immediately reauthorizing the charges. This will result in defendants have longer waits for trials and result in longer incarcerations awaiting trial.

It is clear from the MCL 769.13 and the case law that the purpose of the Habitual Offender Notice to inform a defendant about the possible penalty. Amending the dates or convictions in the notice is not contrary to that purpose. We ask this Court to adopt the reasoning of the Michigan Court of Appeals on this issue.

B. THE HABITUAL OFFENDER NOTICE STATUTE, MCL 769.13, PROVIDES NO REMEDY FOR THE UNTIMELY FILING OF A NOTICE.

The Habitual Offender Notice statute requires that the Prosecuting Attorney file a notice of intent to seek the enhancement within twenty-one days of a Circuit Court arraignment. MCL 769.13. The statute does not address what the remedy is for failing to file the notice timely. *Id.* It is the position of the People that there is no remedy for a late filing.

The Michigan appellate courts have consistently imposed the dismissal of the sentencing enhancement as the remedy for a late filing of a notice to enhance sentence, despite the lack of a

Legislative remedy. This Court held that a prosecutor must file the Supplemental Information with a Habitual Offender enhancement within the time period specified, and that failure to do so will result in a dismissal of the enhancement. *People v Shelton*, 412 Mich 565, 567-570 (1982). The Michigan Court of Appeals also held that the remedy for a violation of MCL 769.13 was dismissal of the enhancement notice. *People v Morales*, 240 Mich App 571, 586 (2000).

This Court held that the remedy for violating a statute "is a question of statutory interpretation and thus one of legislative intent." *People v Stevens*, 460 Mich 626, 643 (1999). In the *Stevens* case the police searched a home with a search warrant but failed to knock and announce when executing the warrant as required by MCL 780.565. This Court stated in *Stevens*:

> "The Legislature has not chosen to specifically mandate the sanction of excluding evidence seized as a result of the violation of MCL 780.656; MSA 28.1259(6). Nothing in the wording of the statute would suggest that it was the legislators' intent that the exclusionary rule be applied to violations of the "knock and announce" statute. Therefore, we decline to infer such a legislative intent. To do otherwise would be an exercise of WILL rather than JUDGMENT." *Id.* at 645.

This principle has been consistently upheld by this Court. In *People v. Hamilton*, this Court held that when police officers arrest individuals outside of their jurisdiction in violation of a statute and the statute provided for no remedy, the evidence obtained during the arrest would not be excluded. *People v Hamilton,* 465 Mich 526 (2002). Further, this Court refused to provide a remedy where police violated a statute by failing to provide a defendant with a copy of the affidavit in support of a search warrant during the execution of the search warrant. *People v Sobczak-Obetts*, 463 Mich 689 (2001). This Court also held that there was no remedy to a Defendant for a search warrant issued in violation of a Michigan statute. *People v Hawkins*, 468 Mich 488 (2003). None of the statutes in the above cases provided for a remedy and this Court refused to construct a judicial remedy for the violations.

There are other criminal procedure statutes that require an action to take place within a certain time period and provide no remedy for violations. The Criminal Code of Procedure requires that a preliminary examination be held within 14 days of arraignment. MCL 766.4. Further, MCL 766.7 provides that a preliminary examination may only be adjourned beyond 14 days for good cause shown. However, the Code of Criminal Procedure does not specify any remedy for a violation of this "14 day rule." The Michigan Court Rules specifically provide that a "violation of this subrule [requiring a preliminary examination within 14 days] is deemed to be harmless error unless the defendant demonstrates actual prejudice" MCR 6.110(B).

This Court has decided to impose a restrictive approach to habitual offender notices. This is not consistent with the Court's failure to impose a remedy for other statutory violations in *Stevens*, *Sobczak-Obetts*, *Hamilton*, and *Hawkins*. However, there is nothing unique or different about MCL 769.13 from the other statutes that fail to provide for a remedy for a violation. It is the position of the People that *People v Shelton* was wrongly decided. We ask the Court to overturn *People v Shelton* and hold that there is no remedy for violations of MCL 769.13

C. MCR 6.112(G) CONFLICTS WITH MCL 769.26 AND IS UNCONSTITUTIONAL.

The Criminal Code of Procedure allows for the amendment of indictments and informations at any time:

> "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." MCL 767.76 (emphasis added)

Further, MCR 6.112(H) allows for the amendment of an information "before, during or after a trial" absent unfair surprise or prejudice. However, MCR 6.112(G) states:

> "Absent a timely object 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 the 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 and enhanced sentence."** *Empahsis added.*

This Court Rule barring the filing of late Habitual Offender notices is not supported by statute and violates the policy enacted by the Legislature. Therefore, to the extent that MCR 6.112(G) conflicts with MCL 769.29, it is unconstitutional.

The Michigan Constitution gives this Court exclusive authority for matters of practice and procedure. However, this authority does not extend to establishing, abrogating or modifying substantive law. This Court held the following in *McDougall v Schanz*:

> "This exclusive rule-making authority in matters of practice and procedure is further reinforced by separation of powers principles. See Const 1963, art 3, § 2; *In re 1976 PA 267*, 400 Mich. 660; 255 N.W.2d 635 (1977). Thus, in *Perin v Peuler (On Rehearing)*, 373 Mich. 531, 541; 130 N.W.2d 4 (1964), we properly

> emphasized that "the function of enacting and amending judicial rules or practice and procedure has been committed exclusively to this Court . . .; a function with which the legislature may not meddle or interfere save as the Court may acquiesce and adopt for retention at judicial will."
>
> At the same time, it cannot be gainsaid that this Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law. *Shannon v Ottawa Circuit Judge*, 245 Mich. 220, 223; 222 N.W. 168 (1928). Rather, as is evident from the plain language of art 6, § 5, this Court's constitutional rule-making authority extends *only* to matters of practice and procedure. *Shannon*, 245 Mich. at 222-223. Accordingly, in order to assess the constitutionality of MCL 600.2169; MSA 27A.2169, we must determine whether the statute addresses purely procedural matters or substantive law." *McDougal v Schanz*, 461 Mich 15, 16-17 (1999).

This Court reiterated this holding recently in *People v Watkins.* 491 Mich 450, 471(2012).

The language of MCR 6.112(G) modifies a substantive law passed by the Legislature, MCL 769.26. The court rule bars the amendment of Habitual Offender Notices contained in an information despite MCL 769.26 allowing the amendment of informations and indictments.

The People ask this Court to find that MCR 6.112(G) is unconstitutional to the extent that it conflicts with MCL 769.26

D. THE APPELLANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED.

The Appellant is arguing that his constitution right to due process was violated by the trial court allowing the Amended Supplement Information that corrected Habitual Offender Notice to be filed. The People disagree.

The Appellant cannot establish that his Fourteenth Amendment due process rights were violated by the trial court. The Appellant cannot show that he was unfairly surprised by the amendment to the Supplement Information. The Appellant had prior notice that the People were seeking a Habitual Offender – Fourth sentencing enhancement. Further, the Amended Supplemental Information was filed on March 1, 2007 and the Defendant was not sentenced till

April 28, 2011 (due to the Defendant absconding while on bond). The Appellant had more than ample time to gather information to challenge the dates and offense convictions contained in the Habitual Offender Notice at sentencing pursuant to MCL 769.13(4-5). The Appellant did not object to the sentencing enhancement during sentencing.

The Appellant cannot establish that he was unfairly surprised by the convictions contained in the Amended Supplement Information. Any person, including the Appellant, knows what felonies he has been convicted of. The possible argument that he was not aware of his own criminal convictions and therefore unfairly surprised is not credible.

It is clear that purpose of MCL 769.13 is to give a Appellant adequate notice that the People are intending to seek an enhanced sentence based on prior convictions. The People's amendments to the Supplemental Information gave the Appellant adequate notice and did not unfairly surprise him. The Appellant was sentenced as a Fourth Habitual Offender which he was aware of at his arraignment in Circuit Court. The Defendant's argument is without merit.

E. THE APPELLANT IS NOT ENTITLED TO ANY REMEDY

It is the position of the People that the Appellant is not entitled to any remedy. There was no violation of the MCL 767.13. The Appellant's argument that he is entitled to resentencing without the Habitual Offender Notice is not support by the case law or by Criminal Code of Procedure.

II. THE TRIAL COURT HAD THE AUTHORITY TO SENTENCE THE DEFENDANT AS A FOURTH HABITUAL OFFENDER?

Standard of Review
Question of law pertaining to statutory construction and interpretation are reviewed *de novo. People v Schultz,* 435 Mich 517 (1990). Constitutional issues are reviewed *de novo. People v Dunbar,* 463 Mich 606 (2001)

The Appellant was sentenced by the trial court as a Fourth Habitual Offender pursuant to MCL 767.12. The People filed a Supplemental Information with a Fourth Habitual Offender Notice within twenty-one days of the Appellant's arraignment in Circuit Court. The Habitual Offender Notice contained the wrong offenses and dates for the Appellant's prior convictions.

The People discovered this error prior to trial and filed a Motion to Amend Supplemental Information on February 23, 2007. (See Appendix p. 7a). The proposed Amended Supplemental Information contained the correct offenses and dates in the Habitual Offender Notice. *Id.* The trial court orally granted the People's motion on March 1, 2007, but no order was entered. (See Appendix 6b). However, the Amended Supplemental Information was filed with the Court and served on the Appellant.

This Court has asked the parties to address the following issue:

> "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"

The People will address this issue.

A. THE TRIAL COURT HAD THE AUTHORITY TO SENTENCE THE DEFENDANT AS A FOURTH HABITUAL OFFENDER.

The People filed a Motion to Amend Supplement Information upon discovery that the Habitual Offender Notice contained the wrong dates and offenses. The Appellant filed a response in opposition to the motion. The Honorable Michael W. LaBeau held argument on this issue at

the final pretrial. The trial court stated the following:

> "...MCR 6.112(g) provides that the Court during - - before, during or after trial may permit a prosecutor to amend an information unless the proposed amendment will unfairly surprise or prejudice the defendant
>
> This is - - this supplemental information is a sentence enhancement issue. It has really nothing to do with the trial or any prejudice that this Court can see.
>
> The Defendant, if he doesn't know he should know if - - if he has prior conviction or not. So he certainly can't say he's surprised.
>
> I don't see any prejudice, so I'm going to grant the amendment" (See Appendix p. 6b)

The Assistant Prosecuting Attorney then served defense counsel with the Amended Supplement Information on the record and he acknowledged receipt. *Id.* No order was entered on the motion. The Appellant was subsequently found guilty by a jury. He was sentenced over four years later and did not object at the sentencing hearing to being sentenced as a fourth habitual offender. (See Appendix p. 11b-22b). However, the Appellant did have some interesting commentary about the appropriateness of his sentence, which resulted in him being found in contempt of court. (See Appendix p. p 18b-20b).

It is the position of the People that a written order was not necessary to allow the Prosecutor's Office to file the Amended Supplemental Information containing the Habitual Offender Notice. The Michigan Court Rules state:

> "(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." MCR 6.112(H)

The court rule does not require the People to file a motion to allow the filing of an amendment of an information, and places the burden on the defendant to file a motion to strike the amendment.

Further, Criminal Code of Procedure does not require the People to file a motion to amend an information. MCL 767.76. The trial court's acceptance of the filing of the Amended Supplemental Information is sufficient to give the court jurisdiction to sentence the Defendant as a Fourth Habitual Offender.

If it is the position of this Court that an order must be entered to allow a Circuit Court to sentence a defendant as a Fourth Habitual Offender on an Amended Supplemental Information, this defect is easily curable by the entry of a *nunc pro tunc* oder. The Michigan Court Rules allow for the correction of errors that resulted from oversights or omissions. MCR 6.435. Further, the Michigan Court of Appeals held that it was proper for a sentencing court to correct an improper sentence by the entry of *nunc pro tunc* order. *People v Smith*, 35 Mich App 349, 351-352 (1971).

The sentencing court had jurisdiction to sentence the Appellant as a Fourth Habitual Offender pursuant to MCL 769.12 and MCL 767.13. There is no requirement by the Michigan Court Rules or the Criminal Code of Procedure for the entry of an order allowing the People to file a Amended Supplement Information. If the Court believes such an order is necessary it is easily curable by the entry of *nunc pro tunc* order by the Circuit Court that reflects its oral decision on the filing of the Amended Supplement Information.

STATEMENT OF RELIEF REQUESTED

FOR ALL THE REASONS STATED ABOVE, the People of the State of Michigan respectfully request that this Honorable Court affirm the Appellant's conviction and sentence.

Dated: July 26, 2013

Michael C. Brown (P 64169)
Assistant Prosecuting Attorney