Order

Michigan Supreme Court
Lansing, Michigan

March 4, 2020

Bridget M. McCormack,
Chief Justice

ADM File No. 2018-23

David F. Viviano,
Chief Justice Pro Tem

Amendment of Rule
6.610 of the Michigan
Court Rules

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

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On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 6.610 of the Michigan Court Rules is adopted, effective May 1, 2020.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 6.610 Criminal Procedure Generally

(A)-(D) [Unchanged.]

(E) Discovery in Misdemeanor Proceedings.

(1) The provisions of MCR 6.201, except for MCR 6.201(A), apply in all misdemeanor proceedings.

(2) MCR 6.201(A) only applies in misdemeanor proceedings, as set forth in this subrule, if a defendant elects to request discovery pursuant to MCR 6.201(A). If a defendant requests discovery pursuant to MCR 6.201(A) and the prosecuting attorney complies, then the defendant must also comply with MCR 6.201(A).

(E)-(H) [Relettered (F)-(I) but otherwise unchanged.]

Staff Comment: The amendment of MCR 6.610 allows discovery in misdemeanor proceedings in the district court by creating a structure similar to the federal rules (FR Crim P 16[b]) in which a defendant's duty to provide certain discovery is triggered only if defense counsel first requests discovery from the prosecution, and the prosecution complies.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

MCCORMACK, C.J. (*concurring*). The rule the Court adopts today will promote efficiency, fairness, and justice in our district courts. Until today there was no required discovery in any misdemeanor cases; whether a defendant could obtain a copy of a police report before deciding to go to trial, for example, was left to the discretion of the prosecutor. Now, discovery will be available for defendants who request it, and those who do request it will provide the same to the prosecution.

The benefits of this change are substantial. Early information helps resolve cases more efficiently, conserving the resources of both the parties and the courts.[1] I suspect this explains, at least in part, why many prosecutor's offices already provide discovery in misdemeanor cases.[2] Earlier resolution of cases means less court time, less attorney time, and, in many cases, less jail time and supervision time. It also will result in less uncertainty for defendants facing prosecution, an unquantifiable yet meaningful benefit. Obtaining discovery is key to determining whether to go to trial or proceed with plea negotiations. Early disclosure of the prosecution's evidence allows a defendant to investigate, formulate a defense, and decide whether to plead guilty without delay.[3] Assuming that a criminal defendant knows enough about the alleged crime to adequately investigate it without discovery from the prosecution "flies in the face of the constitutional right to a presumption of innocence."[4] Although the misdemeanor criminal justice system has operated in Michigan for many years without a regulated discovery process, the benefits that will flow from this new rule are significant and overdue.

Moreover, based on testimony and comments from representatives from the Criminal Defense Attorneys of Michigan (CDAM) and the Prosecuting Attorneys Association of Michigan (PAAM), the system this new rule puts in place will not be a

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[1] See The Justice Project, *Expanded Discovery in Criminal Cases* <https://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf> (accessed January 17, 2020) [https://perma.cc/VV85-EPWB].

[2] It may also explain why prosecutors supported amending the court rules to provide discovery in misdemeanor cases. Although the Prosecuting Attorneys Association of Michigan (PAAM) did not support the rule adopted today, it did submit its own proposal, which also would have provided pretrial discovery. And when asked at the public hearing, the PAAM representative refused to express support for the status quo. I thank PAAM for their proposal and for their work on this important issue.

[3] This is especially important for defendants who are innocent and may have no information at all about the offense.

[4] Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 Fordham Urb L J 1097, 1102 (2004).

drastic change at all. Rather, it seems that many prosecutors across the state are already providing discovery to misdemeanor criminal defendants. For example, a PAAM representative commented at the public hearing that based on "what I have seen in my practice, it wouldn't really change much that we do in Genesee County." This sentiment was echoed by the CDAM representative, who said that in most places where he practiced, discovery in misdemeanor cases has been routine. "But," he explained, "I'm relying on a prosecutor's largesse. . . . In Southeast Michigan, that largesse is more routine than not. I'm told by my colleagues in many parts of the state it's not so routine."

This is the problem with the lack of any required discovery: a defendant's ability to adequately weigh the pros and cons of accepting a plea deal or proceeding to trial should not, in my view, depend on the particular practice of the prosecuting office handling their case. This rule ensures that the misdemeanor discovery process is uniform throughout Michigan, that people charged with crimes in Ann Arbor and Escanaba get the same justice. More equal justice under law is alone an argument in favor of its adoption.

I respectfully disagree with my dissenting colleagues' assessment that the costs of this rule outweigh its benefits. In my view, my colleagues undervalue the benefits and overstate the burdens this rule will impose, given that discovery will not be required in every misdemeanor prosecution. The Court considered a proposal that would have made disclosure mandatory, whether the defendant wanted it or not. We declined to adopt that rule in light of opposition from both sides of the bar. Instead, the new rule only triggers the disclosure requirements upon request from the defense.

My dissenting colleagues believe that this rule will be costly in terms of the time and resources to prosecutors. But for the reasons outlined above, I question the direction the costs will go. And as most evidence—for example, the police report—can be produced electronically and can therefore be e-mailed to the opposing party, disclosure can be accomplished with minimal time and effort. It is true that this new rule will require defense attorneys to spend more time advising their clients whether to request discovery. And when the defendant decides that discovery is necessary, I do not doubt that more resources will be spent analyzing the disclosed evidence. But that information will allow defense counsel to advocate for their clients more efficiently and effectively.[5]

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[5] As CDAM explained in its comment, "discovery in the modern age oftentimes is just as important in misdemeanor cases as it is in felony cases, where the trial frequency is similar." I agree with CDAM that the rule as adopted "strikes the proper balance between cases where the defense may not need discovery, and it is not requested, and where the defense believes discovery is important, and agrees to provide it reciprocally under the court rule."

I do not agree that this rule will lead to a "more contentious criminal justice process." In many cases the opposite will be true: early information will lead to early resolution. For the subset of cases for which there is more process, I see no reason why more information will lead to contentiousness or more process will lead to contentiousness. The Michigan bar is a collegial body, even when involved in the adversary system.

The criminal justice system, like all of the justice system, was designed to be adversarial because an adversarial system produces better justice. When a defendant is armed with the tools to decide whether to plead or face trial and require the prosecution's case "to survive the crucible of meaningful adversarial testing," *United States v Cronic*, 466 US 648, 656 (1984), we can be more confident that the outcome is truly just. I see no reason to expect or accept less justice in misdemeanor prosecutions than felonies. Misdemeanor convictions can expose people to fines, jail time, and serious collateral consequences—some that last a lifetime.

I am puzzled that this modest rule change triggers my dissenting colleagues' concern about the slippery slope of providing more process. All this rule does is give people accused of a crime the right to basic information possessed by the government so they can make informed decisions about how to proceed. This is especially important today in light of the fact that our criminal justice system has evolved from one based on trials to one based on pleas in the name of efficiency. See Neily, *Our Broken Criminal Justice System*, 41 Cato Pol Rep 7, 8 (May/June 2019), available at <https://www.cato.org/sites/cato.org/files/serials/files/policy-report/2019/6/cpr-v41n3-1.pdf> (accessed February 6, 2020) [https://perma.cc/L88Q-CXU8] ("[P]lea bargaining arose in response to the need to process a rapidly increasing number of criminal defendants through a system that was consciously designed to promote fairness and transparency rather than mere efficiency.") If the Founders beamed into any criminal courtroom in America, they would not recognize the criminal justice system; the least we can do is make that system of pleas one that is slightly more fair.

Criminal procedure is not just a balance of dollars and cents. After all, it would be more efficient to do away with pleas and trials too, and instead send all accused persons straight to sentencing. Due process, fairness, and, maybe most of all, public confidence in the criminal justice system are difficult to quantify. But they are worth a whole lot.

VIVIANO, J., joins the statement of MCCORMACK, C.J.

MARKMAN, J. (*dissenting*). The majority here adopts an amendment to our court rules that grants a right to discovery to misdemeanor defendants equivalent to that of felony defendants (although with fewer obligations on the part of the former). This amendment will affect an estimated 490,000 criminal defendants in Michigan each year. While I have no quarrel with the good intentions of my colleagues in the majority, I do respectfully take issue with the Court's assessment of the costs and benefits of this proposal, an assessment that necessarily lies at the heart of all prudent public decision-making.

Concerning its costs, the following seem quite certain: the proposal will be costly both in terms of private legal expenses and public spending; it will lead to a lengthier and more contentious criminal justice process; it will produce more procedural disputes and hence more appeals; it will impose greater obligations upon defense counsel and lead to more claims of ineffective assistance of counsel; it will result in growing burdens upon the state judiciary and thus a need for greater judicial resources; it will produce countless additional numbers of pleadings and hearings and motions and reconsiderations; and it will divert prosecutorial resources and effort from criminal cases of the highest priority. Yet concerning its benefits, these seem considerably more vague: no compelling case has been made for why this change, described as "drastic" by the state prosecutor association, should be adopted today after 180 years of experience in Michigan with a more informal and relaxed misdemeanor discovery process; no compelling case has been made for why the present case-by-case treatment of misdemeanors-- in which accommodations are readily and routinely made by prosecutors, trial courts, and defense counsel-- has not sufficed to ensure due process and fairness for defendants; and no testimony or public comments have identified an instance or illustration in which a real prosecutor or a real judge has refused to provide a real misdemeanor defendant information necessary for trial.

In other words, the costs of the present proposal are clear and straightforward-- there will be "more" of a great many things as to which "more" is hurtful to the justice system-- while the benefits of the proposal are nebulous and uncertain, in particular concerning the single "more" proposition most compelling in its support: will it secure "more" fairness and justice under law? While good intentions certainly commend this proposal, an estimation of its real-world impact, as well as its practical dislocations, does not. It is a "drastic" and unsettling solution in search of a problem. It is the replacement in our state of a customary and traditional process by which generations of persons of good will and professionalism have labored, successfully, to secure justice for generations of misdemeanor defendants, many of them unrepresented, with a panoply of new rules, procedures, rights, entitlements, and formalisms, which, if ever equivalently successful, will have done so at a considerably greater expense. Ours is an exercise in which the judgments of all past generations of bench and bar in Michigan, none any less committed to fair treatment for misdemeanor defendants, will have been supplanted.

In response to the concurring statement, I offer the following:

(1) My colleague asserts that I am "overstat[ing] the burdens this rule will impose"-- that "[a]ll this rule does is give people accused of a crime the right to basic information . . . ." However, I remain comfortable in the conclusion that establishing new rights and entitlements and procedures for as many as half-a-million criminal cases each year in Michigan will affect substantially the budgets and resources of prosecutors, law enforcement agencies, legal services providers, court clerks, and the judiciary itself, throughout our state. Indeed, even before final enactment, the State Bar has "urge[d]

additional funding to help prosecutors meet their new responsibilities," and the Criminal Defense Attorneys of Michigan have asserted that an increased financial burden is "inescapable." All of which alone suggest why the new rule would be far better considered by the legislative branch, which might be inclined and equipped to give greater consideration to *both* the benefits *and* the burdens of the new rule.

(2) My colleagues, while asserting that I "undervalue the benefits" of the new rule, state further that it "will not be a drastic change at all," that "many prosecutors across the state are already providing [such] discovery," that the system of pleas will become "slightly more fair," and that, in the words of one prosecutor, "it wouldn't really change much that we do . . . ." If all this is so, why doesn't this Court simply maintain the status quo of the past 180 years and spare the taxpayers the additional financial burdens, the prosecutors the dilution of their resources, the criminal justice system the delays and dislocations, and the judiciary the transformation of their dockets?

(3) My colleagues invoke "due process" as a justification for imposing these new burdens upon the criminal justice system. But this is a formless and rhetorical "due process," lacking any context in the historical or traditional judicial practices of our state. There is no end to such a notion of "due process," for it is always possible to impose additional rights and entitlements and procedures upon the criminal justice system. And there is no end to the argument that "due process" requires something "more," particularly when "due process" is removed from the realm of "costs and benefits" and the need to balance competing considerations. While my colleagues are correct in the assertion that criminal procedure cannot be dictated entirely on the "balance of dollars and cents," it also cannot be dictated entirely on the basis of "due process," for there is never any stopping point, and never any relevant standards, for when more process is "due" when this principle is fashioned out of whole cloth. There is always "more" process that can be given, and "more" procedure that can be attached, yet neither offers "more" guarantee of justice under law.

(4) And finally, just to make clear if it is not already, the Prosecuting Attorneys Association of Michigan does *not* support this proposal and has testified against it in the administrative processes of this Court.

I respectfully dissent.

ZAHRA, J., joins the statement of MARKMAN, J.

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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 4, 2020

Clerk