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STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant

Supreme Court No. 158065
Court of Appeals No. 333997
Circuit Court No. 15-008431-FH;
14-008297-FH

-v-

KELLY CHRISTOPHER WARREN,

Defendant-Appellant
____/

AMICUS CURIAE BRIEF OF THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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TABLE OF CONTENTS

INDEX OF AUTHORITIES i

STATEMENT OF INTEREST OF AMICUS CURIAE iii

STATEMENT OF QUESTIONS PRESENTED iv

STATEMENT OF FACTS 1

ARGUMENT 2

I. CIRCUIT JUDGES MUST WARN OF AVAILABLE CONSECUTIVE SENTENCING DURING THE PLEA HEARING BECAUSE CONSECUTIVE SENTENCING OPERATES AS ENHANCEMENT OF THE PENALTY AND CONSTITUTES A SIGNIFICANT AND DIRECT CONSEQUENCE OF THE PLEA. 2

RELIEF REQUESTED 14

RECEIVED by MSC 5/23/2019 3:14:38 PM

RECEIVED by MSC 5/23/2019 3:14:38 PM

INDEX OF AUTHORITIES

Cases

Brady v United States, 397 US 742, 90 S Ct 1463; 25 L Ed 2d 747 (1970)................................. 2
In re Lamphere, 61 Mich 105, 108; 27 NW 882 (1886)..11
Oregon v Ice, 555 US 160; 129 S Ct 711; 172 L Ed 2d 517 (2009)..12
Paradiso v United States, 482 F3d 409 (1973)...10
People v Brown, 492 Mich 684; 822 NW2d 208 (2012) 7, 8, 12
People v Burton, 459 Mich 876; 585 NW2d 303 (1998)...6
People v Chambers, 430 Mich 217, 229; 421 NW2d 903 (1988) 7, 8
People v Cole, 491 Mich 325, 817 NW2d 497 (2012) 2, 3, 4, 12
People v Morris, 450 Mich 316, 537 NW2d 842 (1995)...8
People v Sawyer, 410 Mich 531, 302 NW2d 534 (1981) 11
People v Sheridan, 141 Mich App 770, 367 NW2d 450 (1985)...13
People v Smith, 423 Mich 427, 378 NW2d 384 (1995)..8
People v Turner, 459 Mich 928; 589 NW2d 288 (1998)...6
People v Warren, ___ Mich ___; 924 NW2d 237 (2019)... iv
Ralston v Robinson, 454 US 201, 102 S Ct 233, 70 L Ed 2d 345 (1981).....................................8
Setser v United States, 566 US 231, 236; 132 S Ct 1463; 182 l Ed 2d 1455 (2012)....................10
United States v Gaskin, 587 Fed Appx 290 (CA 6, 2014)..11
United States v Hamilton, 568 F 2d 1302 (CA 9, 1978)...10
United States v Myers, 451 F2d 402 (CA 9, 1972)..10
United States v Ospina, 18 F3d 1332 (CA 6, 1994) 10

Constitutions, Statutes, and Court Rules

18 U.S.C. § 3553(a) 9
18 USC 3584(a) 10
Const 1963, art 6, §5 13
Federal Rule of Criminal Procedure 11 ....8, 9, 10
MCL 257.625(9)(c)(i) 3
MCL 333.7401(3) 4, 6
MCL 333.7401c(5) 5
MCL 445.69(4) 5

MCL 750.110a(8) 4, 6
MCL 750.119(3) 5
MCL 750.120a(6) 5
MCL 750.122(11) 5
MCL 750.145d(3) 4
MCL 750.174(12) 5
MCL 750.193(1) 4, 7
MCL 750.195 et seq..4, 13
MCL 750.197 et seq..4, 13
MCL 750.227b(3) 4, 6
MCL 750.227f(1)..4
MCL 750.349a 4
MCL 750.411u(2) 5
MCL 750.411v(4) 5
MCL 750.479b(4) 4
MCL 750.483a(10..5
MCL 750.506a 5
MCL 750.520b(3) 4, 6
MCL 750.520n(4) 5
MCL 750.529a(3) 4, 6
MCL 750.81d(6) 5, 6
MCL 752.797(4) 4
MCL 768.7a et seq..6, 7, 13
MCL 768.7b et seq.. 6, 7
MCL 769.10-13..7
MCL 769.36(1) 7
MCL 771.14(2)(d)..13
MCL 791.234(3) 3
MCR 6.302 et seq. 2, 13, 14

RECEIVED by MSC 5/23/2019 3:14:38 PM

RECEIVED by MSC 5/23/2019 3:14:38 PM

STATEMENT OF INTEREST OF AMICUS CURIAE

The Criminal Defense Attorneys of Michigan (CDAM) is an organization consisting of hundreds of criminal defense attorneys licensed to practice in this state. CDAM was organized for the purposes of: promoting expertise in criminal and constitutional law; providing training for criminal defense attorneys to improve the quality of representation; educating the bench, bar, and public of the need for quality and integrity in defense services; promoting enlightened thought concerning alternatives to an improvements in the criminal justice system; and guarding against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws. *CDAM Constitution and By-laws*, Art 1, sec 2. CDAM was invited to file an amicus brief in this matter. *People v Warren*, ___ Mich ___; 924 NW2d 237 (2019).

RECEIVED by MSC 5/23/2019 3:14:38 PM

STATEMENT OF QUESTION PRESENTED

I. MUST CIRCUIT JUDGES WARN OF AVAILABLE CONSECUTIVE SENTENCING DURING THE PLEA HEARING BECAUSE CONSECUTIVE SENTENCING OPERATES AS ENHANCEMENT OF THE PENALTY AND A SIGNIFICANT AND DIRECT CONSEQUENCE OF THE PLEA?

Trial court answered: No

Court of Appeals answered: No

Appellant answers: Yes

Appelle answers: No

Amicus for CDAM: Yes

STATEMENT OF FACTS

Amicus Curiae Criminal Defense Attorneys of Michigan relies on the Statement of Facts set forth by the parties.

RECEIVED by MSC 5/23/2019 3:14:38 PM

RECEIVED by MSC 5/23/2019 3:14:38 PM

ARGUMENT

I. CIRCUIT JUDGES MUST WARN OF AVAILABLE CONSECUTIVE SENTENCING DURING THE PLEA HEARING BECAUSE CONSECUTIVE SENTENCING OPERATES AS ENHANCEMENT OF THE PENALTY AND CONSTITUTES A SIGNIFICANT AND DIRECT CONSEQUENCE OF THE PLEA.

Amicus Criminal Defense Attorneys of Michigan supports Defendant-Appellant Kelly Warren's argument in favor of required warnings during the plea hearing when a defendant may face consecutive sentencing. Amicus offers additional argument as to why statutory language indicates legislative intent to impose punishment through consecutive sentencing and why Michigan's history of presumptive concurrent sentencing supports required warning of consecutive sentencing during the plea hearing.

The trial court's decision to deny a motion to withdraw the plea is reviewed for an abuse of discretion, although questions of statutory and court rule interpretation are questions of law subject to de novo review; constitutional questions such as the voluntariness of a plea are also subject to de novo review. *People v Cole*, 491 Mich 325, 329-330; 817 NW2d 497 (2012).

Although the Michigan Rules of Court do not require a warning on consecutive sentencing during the plea hearing, the court rules do not establish the limits of due process. In *People v Cole*, *supra*, this Court concluded that "the requirements of constitutional due process . . . might not be entirely satisfied by compliance with subrules (B) through (D) [of MCR 6.302]." *Cole*, at 332. Due process, in fact, requires more: a voluntary and knowing plea where defendant is sufficiently aware of the "relevant circumstances and likely consequences" of the plea. *Cole*, at 333, quoting *Brady v United States*, 397 US 742, 748; 90 S Ct 1463; 25 L Ed 2d 747 (1970).

RECEIVED by MSC 5/23/2019 3:14:38 PM

Consecutive sentencing is a significant, relevant and direct consequence of the plea. As demonstrated by Mr. Warren's case, MCL 768.7b(2)(a) authorized consecutive sentencing for a felony offense committed while on bond for another felony offense, and the trial judge utilized this statute to impose consecutive sentences. Consecutive sentencing flowed from Mr. Warren's guilty plea because the two convictions provided the sentencing judge with statutory authority to order discretionary consecutive sentences at sentencing. The judge imposed this penalty, and the record suggests that the judge intended to impose additional punishment through consecutive sentencing.[1] This additional penalty is also included on the judgment of sentence (in file 15-8431-FH). All told, once Mr. Warren admitted both offenses, he no longer faced presumptively concurrent sentences with a minimum term of one year of imprisonment and a maximum penalty of five years' imprisonment for each offense. See MCL 257.625(9)(c)(i). Instead, through the force of consecutive sentencing, Mr. Warren was exposed to a minimum of two years' imprisonment and maximum of ten years' imprisonment. See MCL 791.234(3). He faced enhanced sentences (and served them).

According to the *Cole* decision, when the legislature intends punishment, includes the additional punishment in the penalty section of the statute and directs or authorizes the additional punishment as part of the sentence, the punishment (in that case lifetime electronic monitoring) becomes a direct consequence of the plea. *Cole*, 491 Mich at 335-336. "Because lifetime electronic monitoring is part of the sentence itself, it is a direct consequence of a guilty or no-contest plea . . . ." 491 Mich at 335.

[1] The trial judge was concerned with Mr. Warren's prior record and spoke twice about one of the offenses being committed while on bond. Joint Appendix 19a-20a. The judge rejected a jail sentence because he wanted to impose a more "proportional" sentence for "these two cases." He "adopted" the recommendation of the presentence investigator who recommended consecutive sentences of two to five years imprisonment. Joint Appendix 21a; PSI coverpage 2. The presentence investigator explained that she was recommending consecutive sentences because defendant "repeatedly put the public at risk by drinking and driving." PSI p. 1.

Here, although the analysis is complicated by the Legislature's failure to use standard, uniform language when authorizing consecutive sentencing, a review of the various consecutive sentencing statutes reflects legislative intent to create an additional penalty that will serve as punishment, be imposed at sentencing and constitute a component of the sentence. Under the *Cole* test, consecutive sentencing must be viewed as a part of the sentence and thus a direct consequence of the plea.

As an initial matter, most consecutive sentencing statutes reside in the Penal Code (or penal statutes within other codes). The authorization for consecutive sentencing is placed after the description of the offense and with or after the statutory maximum penalty for the crime. See e.g., MCL 750.227b(3) (mandatory consecutive sentencing for felony-firearm and underlying felony offense); MCL 750.193(1) (mandatory consecutive sentencing for prison escape); MCL 750.195 (mandatory consecutive sentencing for jail escape while serving sentence); MCL 750.197 (2) (mandatory consecutive sentencing for jail escape while detained); MCL 750.349a (mandatory consecutive sentencing for prisoner taking hostage); MCL 333.7401(3) (discretionary consecutive sentencing for some drug offenses); MCL 750.110a(8) (discretionary consecutive sentencing for home invasion first degree and any other offense arising out of the same transaction); MCL 750.529a (3) (discretionary consecutive sentencing for carjacking and any other offense arising out of the same transaction); MCL 750.520b(3) (discretionary consecutive sentencing for first-degree criminal sexual conduct and any other offense arising out of the same transaction) ; MCL 750.479b (4) (discretionary consecutive sentencing for taking weapon from police officer and any other violation arising out of the same transaction); MCL 750.227f(1) (discretionary consecutive sentencing for offense committed with body armor and the underlying offense); MCL 752.797(4) (discretionary consecutive sentencing for use of computer and underlying crime); MCL

RECEIVED by MSC 5/23/2019 3:14:38 PM

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750.145d(3) (discretionary consecutive sentencing for use of internet or computer to commit certain crimes and the underlying crimes); MCL 333.7401c(5) (discretionary consecutive sentencing for structures used to manufacture controlled substance and any other violation arising out of the same transaction); MCL 750.119(3) (discretionary consecutive sentencing for corruption of appraisers and any other crime); MCL 750.120a(6) (discretionary consecutive sentencing for influencing a juror and any other violation); MCL 750.122(11) (discretionary consecutive sentencing for witness bribery/intimidation and any other crime); MCL 750.483a(10) (discretionary consecutive sentencing for obstructing criminal investigation and any other crime); MCL 750.81d (6)(discretionary consecutive sentencing for assaulting or resisting a police officer and another violation arising out of same transaction); MCL 750.506a (discretionary consecutive sentencing for assault while lawfully detained or jailed and sentence for prior offense); MCL 445.69(4) (discretionary consecutive sentencing for identity theft and any violation using the information); MCL 750.174(12) (discretionary consecutive sentencing for some felony embezzlement offenses and any other criminal offense); MCL 750.520n(4) (discretionary consecutive sentencing for lifetime monitoring violations and any violation arising out of the same transaction); MCL 750.411u(2) (discretionary consecutive sentencing for gang membership felony and underlying felony conviction); MCL 750.411v (4) (discretionary consecutive sentencing for gang recruitment/retaliation and felony arising out of same transaction).

Several of the above consecutive sentencing statutes refer to the trial judge's authority to "order" or "impose" a consecutive sentence, while others rely on a more passive construction that directs how the sentence will be "served" or how it will "run." Despite these wording differences, when read together the statutes lead to the inexorable conclusion that only the sentencing judge imposes consecutive sentences and the judge exercises that discretion (or imposes *mandatory*

consecutive sentencing) at the time of sentencing. See e.g., MCL 750.227b(3) ("A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony . . . and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony . . . .:); MCL 750.520b(3) ("The court may order a term of imprisonment imposed . . . to be served consecutively . . . ."); MCL 750.110a(8) ("The court may order a term of imprisonment imposed . . . to be served consecutively . . . ."); MCL 750.529a(3) ("A sentence imposed . . . may be imposed to run consecutively . . . ."); MCL 333.7401(3) ("A sentence imposed . . . may be imposed to run consecutively . . . ."); MCL 750.81d(6) ("A term of imprisonment imposed for a violation of this section may run consecutively . . . ."); MCL 768.7a(1)&(2) ("A person incarcerated in a penal or reformatory institution . . . who commits a crime during that incarceration or escape . . . shall be sentenced as provided by law. The term of imprisonment imposed for the crime shall begin to run at the expiration of the term of terms of imprisonment which the person is serving . . . .").[2]

Should the Court harbor any lingering doubts, it need only look to the felony bond statute that was used in Mr. Warren's case to support the imposition of consecutives sentences. A fair reading of MCL 768.7b does not suggest that anyone other than the sentencing judge would impose the consecutive sentences or determine whether the sentences would or should be served consecutively. Subsection one provides that when a felony offense is committed while on bond for another felony offense between April 1, 1988 and December 31, 1991, "upon conviction of the subsequent offense or acceptance of a plea . . . to the subsequent offense, the sentences imposed for the prior charged offense and the subsequent offense shall run consecutively." Subsection two

[2] Case law is in accord. See *People v Turner*, 459 Mich 928; 589 NW2d 288 (1998) ("It is improper to change concurrent sentences to consecutive ones without a resentencing hearing."); *People v Burton*, 459 Mich 876; 585 NW2d 303 (1998) (Court of Appeals erred to the extent it ordered the imposition of consecutive sentences without a resentencing).

RECEIVED by MSC 5/23/2019 3:14:38 PM

similarly provides that when a felony offense is committed while on bond for another felony offense on or after January 1, 1992, "upon conviction of the subsequent offense or acceptance of a plea . . . to the subsequent offense, the sentences imposed . . . may run consecutively . . . ." This Court recognized in *People v Chambers, supra*, that "MCL 768.7b accords the prerogative of consecutive sentencing solely to the court last in time to impose sentence." 430 Mich at 219.

The statutory scheme as a whole supports the conclusion that the sentencing judge determines whether to impose consecutive sentencing and makes that determination when imposing the sentences. The prison escape statute also expresses what is sometimes only implicit in other consecutive sentencing statutes, that consecutive sentencing is an *additional* penalty: "The term of the *further* imprisonment shall be served after the termination . . . of the sentence or sentences then being served. MCL 750.193(1) (emphasis added).

Amicus acknowledges there are a very few consecutive sentencing statutes located in the Code of Criminal Procedure, rather than the Penal Code (or a penal statute). In these settings, the punishment of consecutive sentencing is no longer found in the statute setting forth the crime and its applicable penalty. See e.g., MCL 769.36(1) (discretionary consecutive sentencing for multiple deaths involving operation of motor vehicle); MCL 768.7a (mandatory consecutive sentencing for crimes committed while on escape status or parole); MCL 768.7b(2) (mandatory and discretionary consecutive sentencing for felony offense committed while on bond for another felony). Nevertheless, placement of these statutes in the Code of Criminal Procedure, ostensibly to offer broader application of these statutes, does not diminish the need for a warning about consecutive sentencing during the plea hearing.

In *People v Brown*, 492 Mich 684; 822 NW2d 208 (2012), this Court addressed sentence enhancement for habitual offenders as set forth in the Code of Criminal Procedure. See MCL

RECEIVED by MSC 5/23/2019 3:14:38 PM

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769.10-13. The *Brown* Court held that "before pleading guilty a defendant must be advised of the maximum possible prison sentence with habitual-offender enhancement because the enhanced maximum becomes the "maximum possible prison sentence" for the principal offense." *Id.*, at 693-694. In effect, the *Brown* Court recognized that available sentence enhancement, whether found in the Penal Code or Code of Criminal Procedure, increases the sentence and thus deserves a distinct warning during the plea hearing.

If the statutory language and *Brown* were not enough, this Court has repeatedly acknowledged that consecutive sentencing is a form of sentence enhancement. 'The enhancement of punishment through consecutive sentencing is a legislative action taken for the ostensible purpose of deterring certain criminal behavior." *People v Morris*, 450 Mich 316, 327; 537 NW2d 842 (1995). "The purpose of consecutive sentencing is to '*enhance* the punishment imposed on those who have been found guilty of more serious crimes and who repeatedly engage in criminal acts.'" *People v Chambers*, 430 Mich 217, 229; 421 NW2d 903 (1988), quoting *People v Smith*, 423 Mich 427, 445; 378 NW2d 384 (1995) (emphasis supplied by *Chambers* Court). Consecutive sentencing is "strong medicine." *Chambers*, 430 Mich at 231. See also *Ralston v Robinson*, 454 US 201, 216 n 9; 102 S Ct 233, 243; 70 L Ed 2d 345 (1981) ("[A] concurrent sentence is traditionally imposed as a less severe sanction than a consecutive sentence.").

Mr. Warren, in his brief, has set forth the many jurisdictions that require a warning on consecutive sentencing during the plea hearing. Amicus would note that the federal rule does not require this, but the lack of presumptive concurrent sentencing in the federal system apparently explains this. Federal Rule of Criminal Procedure 11 requires advisement by the trial court of many things, including the maximum possible fine, any term of supervised release, applicable forfeiture, mandatory assessments and the court's authority to order restitution, but it does not

require a warning of consecutive sentencing. [3] In the federal system, however, the sentencing judge traditionally possesses inherent discretion to impose concurrent or consecutive sentences for

[3] FR Crim P 11 provides in relevant part:

> (b) Considering and Accepting a Guilty or Nolo Contendere Plea.
>
> (1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:
>
> (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
>
> (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
>
> (C) the right to a jury trial;
>
> (D) the right to be represented by counsel--and if necessary have the court appoint counsel--at trial and at every other stage of the proceeding;
>
> (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
>
> (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
>
> (G) the nature of each charge to which the defendant is pleading;
>
> (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
>
> (I) any mandatory minimum penalty;
>
> (J) any applicable forfeiture;
>
> (K) the court's authority to order restitution;
>
> (L) the court's obligation to impose a special assessment;
>
> (M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a);
>
> (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and
>
> (O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

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multiple convictions. *Setser v United* States, 566 US 231, 236; 132 S Ct 1463; 182 l Ed 2d 1455 (2012). See also 18 USC 3584(a) (multiple terms of imprisonment imposed at the same time may run concurrently or consecutively, with a few exceptions).

In *Paradiso v United* States, 482 F3d 409, 415 (1973), the Third Circuit concluded that under a version of FR Crim P 11 that was less complex at the time, the court was required to find a voluntary plea but Rule 11 did not require "an explicit admonition by the court that sentences may be imposed consecutively." The court reasoned that the power to impose a consecutive sentence was *implicit* in the lower court's explanation of the maximum penalty for each offense:

> We do not think rule 11 requires an explicit admonition by the court that sentences may be imposed consecutively. This power is *implicit* in the separate explanation of the possible sentence on each count. To avoid any possible misunderstanding and to minimize unnecessary appeals, it would be advisable for district courts to explicitly state that sentences can be consecutive; but we will not impose any rigid rule to that effect. [*Paradiso*, 482 F2d at 415; emphasis added.]

The Ninth Circuit reached the same result in *United States v Hamilton*, 568 F 2d 1302, 3026 (CA 9, 1978) (explanation of maximum sentence for each count "implicitly alerted Hamilton to the possibility of consecutive sentencing.") The Ninth Circuit made a similar observation in *United States v Myers*, 451 F2d 402, 405 (CA 9, 1972) ("[i]n normal sentencing practice the defendant will expect the court to have the discretion to impose either concurrent or consecutive sentences.")

The Sixth Circuit agrees that no warning is required, and follows the Third Circuit's decision in *Paradiso*. See *United States v Ospina*, 18 F3d 1332, 1334 (CA 6, 1994) (relying on *Paradiso* to find no error where the judge discussed discretionary rather than mandatory consecutive sentencing during the plea hearing because no warning is required). In a case released after *Ospina*, the Sixth Circuit again rejected the call for warning on consecutive sentencing

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because no rule required the warning and the plea form "did not imply in any way that the sentences would run concurrently." *United States v Gaskin*, 587 Fed Appx 290, 297 (CA 6, 2014).

In the Michigan system, there can be no implicit understanding that consecutive sentencing rests within the trial court's sentencing discretion when sentencing for multiple convictions. Michigan operates under a unique and long standing tradition of concurrent sentencing. Consecutive sentences are not authorized absent express statutory authority. *People v Sawyer*, 410 Mich 531, 534; 302 NW2d 534 (1981).

Michigan, unlike many other states, did not import the common law tradition of discretionary consecutive sentencing into its jurisprudence. This Court explained the historical anomaly in *In re Lamphere*, 61 Mich 105, 108; 27 NW 882 (1886), in a case where it rejected the sentencing court's presumed inherent authority to order a consecutive sentence without statutory authority:

> The relations of this commonwealth to the common law are not altogether conformed to the holdings of some other states. In many of the states, statutes of parliament passed before or during the early days of the American colonies, as well as old colonial statutes and usages, have been recognized as part of the local common law, and have been construed and applied by the courts. But Michigan was never a common-law colony, and while we have recognized the common law as adopted into our jurisprudence, it is the English common law, unaffected by statute. In 1810 an act was passed putting an end to all the written law of England, France, Canada, and the Northwest and Indiana territories, as well as the French and Canadian customs, leaving no statute or code law in force except that of Michigan territory and the United States. 1 Terr.Laws, 900. And while we have kept in our statute books a general statute resorting to the common law for all non-enumerated crimes, there has always been a purpose in our legislation to have the whole ground of criminal law defined, as far as possible, by statute. There is no crime whatever punishable by our laws except by virtue of a statutory provision. The punishment of all undefined offenses is fixed within named limits, and beyond the unregulated discretion of the courts. While we refer with profit to the rulings of other courts, there are many cases where we cannot regard them as binding.
>
> * * *
>
> If cumulative sentences can be imposed in all cases, the results may be very singular. The imprisonment may begin in one jail, and one next sentence may be in another, and practical difficulties may easily be suggested that can only be solved by legislation. As we

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> have no statutes on the subject, we must, in our opinion, wait until the legislature shall see fit to devise adequate means to avoid these difficulties.

Michigan's system of presumptive concurrent sentencing makes Mr. Warren's situation unique and also at odds with the historical tradition followed in other states as discussed in *Oregon v Ice*, 555 US 160; 129 S Ct 711; 172 L Ed 2d 517 (2009). In *Ice*, the United States Supreme Court concluded that the Sixth Amendment right to jury trial does not apply to factual findings made in support of consecutive sentencing because (1) the jury traditionally played no role in the determination of consecutive sentencing at common law, and (2) respect for state sovereignty was important to the administration of state criminal statutes. 555 US at 164. The majority never stated or implied that consecutive sentencing did not operate to increase the maximum penalty. Instead, the Court relied on the "common law tradition" of leaving to judges the "unfettered discretion" to impose a consecutive sentence. *Id.*, 555 US at 163.

Michigan never followed this historical tradition. The majority opinion in *Ice* thus offers nothing of value to the present argument. But the view of the four dissenting justices is readily on point: "There is no doubt that consecutive sentences are a 'greater punishment' than concurrent sentences . . . ." 555 US at 174 (internal citation omitted). [4]

In sum, the statutory language and its placement in Michigan's consecutive sentencing statutes, the presumption of concurrent sentencing in Michigan and the decisions in *Cole* and *Brown* all support the conclusion that a trial judge must warn of available consecutive sentencing during the plea hearing because consecutive sentencing *is part of the sentence*. Consecutive sentencing is therefore a significant, relevant and direct consequence of the plea. A defendant cannot enter an "understanding, voluntary and accurate" plea under MCR 6.302(A) or as a matter

[4] Chief Justice Roberts and Justices Souter and Thomas joined the dissent of Justice Scalia in *Ice*.

of due process without first understanding the penalty for the crime including the possibility of a substantially increased sentence due to consecutive sentencing.

Amicus would suggest amendment of the court rules to include warning of consecutive sentencing under MCR 6.302(B) pursuant to this Court authority to "establish, modify, amend and simplify the practice and procedure" in Michigan courts under Const 1963, art 6, §5. Amendment of the court rules will impose no onerous obligation on state trial judges. The decision should have little to no impact on state district judges as consecutive sentencing rarely applies to misdemeanor offenses.[5] Circuit judges should be able to rely on the prosecutor's office during the plea hearing, as prosecutors already have an obligation to notify the presentence investigator of all available consecutive sentencing before the presentence report is prepared. MCL 771.14(2)(d) (the presentence report shall include, "A statement prepared by the prosecuting attorney as to whether consecutive sentencing is required or authorized by law.")

For all the above reasons, Amicus CDAM supports Mr. Warren's request for an offer of plea withdrawal and would further support amendment of the court rules.

---

[5] The Legislature has not authorized consecutive sentencing when a jail inmate attempts to escape while incarcerated for a misdemeanor offense/sentence, MCL 750.195(1); MCL 750.197(1), but has mandated consecutive sentencing for the same offense committed while in jail for a felony offense/sentence. MCL 750.195(2); MCL 750.197(2). Similarly, only felony offenses committed while on parole trigger the requirement of consecutive sentencing. MCL 768.7a(2). Of the many consecutive sentencing statutes mentioned earlier in this brief, nearly all involve felony offenses. But one notable exception exists: the Legislature has mandated consecutive sentencing for offenders serving a sentence in jail or prison who escape and commit a new crime that is punishable by incarceration in a jail or prison. MCL 768.7a(1); *People v Sheridan*, 141 Mich App 770, 773; 367 NW2d 450 (1985) (county jail, when utilized in the execution of a sentence, is a penal institution for purposes of MCL 768.7a(1)).

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RELIEF REQUESTED

WHEREFORE, this Court should reverse and remand to the trial court for an offer of plea withdrawal and should amend MCR 6.302(B) to include advisement of consecutive sentencing, where applicable.

Respectfully submitted,

/s/ Anne Yantus
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