STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Gleicher, P.J., and M.J. Kelly and Cameron, J.J.

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No 158065
Plaintiff-Appellee,	Court of Appeals No 333997
v	Mecosta County Circuit Court Nos 14-8297-FH/15-8431-FH
KELLY WARREN,	
Defendant-Appellant.	

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BRIEF OF AMICUS CURIAE
MICHIGAN ATTORNEY GENERAL DANA NESSEL

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

Christopher M. Allen (P75329)
Assistant Solicitor General

Ann M. Sherman (P67762)
Deputy Solicitor General

P.O. Box 30212
Lansing, MI 48909
(517) 335-7628
AllenC28@michigan.gov

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STATEMENT OF JURISDICTION

Attorney General Nessel agrees with the parties that this Court has jurisdiction over this appeal.

STATEMENT OF QUESTIONS PRESENTED

1. Do principles of due process require a trial court to advise a criminal defendant of the direct consequences of a plea, including the fact that a plea grants the court the discretion to impose consecutive sentencing?

Appellant's answer:	Yes.
Appellee's answer:	No.
Trial court's answer:	No.
Court of Appeals' majority answer:	No.
Court of Appeals' dissent answer:	Yes.
Amicus Curiae's answer:	Yes.

INTEREST OF AMICUS CURIAE

The Attorney General is the constitutionally established officer who serves as the chief law enforcement officer for the State. The Attorney General is charged with defending the state and federal constitution. The Legislature has also authorized the Attorney General to participate in any action in any state court when, in her own judgment, she deems it necessary to participate to protect any right or interest of the State or the People of the State. MCL 14.28; MCL 14.101.

INTRODUCTION

The criminal justice system has become a system of plea bargains—the vast majority of cases end not in a jury verdict but in a defendant's plea. A defendant need not be made aware of every potential consequence that might flow from a plea, but due process requires that the defendant be advised of the direct ones. When someone pleads guilty to a combination of charges that grants the judge discretion to impose a consecutive sentence, that option is a direct consequence of the plea. The due process clause requires the judge to warn the defendant of that fact. The law should not condone misleading or inaccurate information given to a defendant when he waives several of our most sacred constitutional rights, admits to the State's allegations, and agrees to forfeit his own liberty.

When defendant Kelly Warren pled guilty, he was advised that the maximum sentence for each of the two charges was five years. But the court imposed two five-year terms consecutively, resulting in a true maximum sentence of 10 years. The legal fiction that consecutive sentences are simply one served after another breaks down after sentencing. When calculating the length of a sentence, the Department of Corrections combines the sentences "to compute [a] new maximum term." MCL 791.234(3). Today, Warren serves one 10-year maximum sentence.

The court rule governing judicial advice during plea colloquies does not clearly require a judge to warn a defendant of discretionary consecutive sentences. This Court should not only recognize the due process violation, it should amend the applicable court rule to clarify the requirements so the bench and bar have a full understanding of the trial courts' duties.

STATEMENT OF FACTS AND PROCEEDINGS

Amicus adopts the statement of facts of Appellant. (Warren Br at 1–2.)

ARGUMENT

I. Before a defendant pleads guilty to a combination of crimes that permit the judge to impose consecutive sentences, due process requires the judge advise the defendant of that fact and this Court should modify MCR 6.302 to include that requirement.

Because pleas have become the predominant method by which criminal convictions are secured, this Court must ensure that the pleas entered are understanding, voluntary, and accurate. The maximum time of incarceration is one of the most salient aspects of a plea bargain, and the defendant's lack of knowledge about potentially consecutive sentences clouds the transparency necessary to ensure convictions are fairly secured. Due process requires the trial judge warn of the possibility of consecutive sentences, and this Court should revise the court rules to reflect that constitutional guarantee.

A. Pleas are the predominant method of conviction in our criminal justice system.

The criminal justice system in the United States is, for better or worse, a system of plea bargaining. Criminal convictions are, as a rule, the result of pleas. See *Missouri v Frye*, 566 US 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.") Trials have become the exception. As a result, "[i]n today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Frye*, 566 US at 144. Plea bargaining, then, is not some ancillary matter to the justice system; as the Supreme

Court observed, "it *is* the justice system." *Id.*, quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale LJ 1909, 1912 (1992) (*Frye*'s emphasis).

The commonality of plea bargaining does not lessen the gravity of the matter. To the contrary, a plea involves the forfeiture of several fundamental constitutional rights. See *Boykin v Alabama*, 395 US 238, 243 (1969) (listing the rights of confrontation, to trial by jury, and to the privilege against self-incrimination). Combined, the prevalence of plea bargaining and the import of pleas to individual constitutional rights shows "the seriousness of the matter," which in turn justifies the constitution's guarantee that pleas be made voluntarily, knowingly, and intelligently. *United States v Ruiz*, 536 US 622, 629 (2002).

The primary focus of plea bargaining is typically on the length or manner of the sentence the defendant will serve. The prosecutor typically pushes for a more serious sentence, the defendant does his best to secure a more favorable one. But the give-and-take of negotiation is undermined when one important variable remains unknown: whether a defendant may be subject to consecutive sentencing.

B. Due process requires a trial court to advise of the direct consequences of a plea, which includes when the plea grants the court the discretion to impose consecutive sentencing.

Pleas of guilty and no contest are governed by MCR 6.302. That rule requires a trial judge to be convinced that a defendant's plea is "understanding, voluntary, and accurate," which effectively incorporates the Due Process Clause's mandate. *People v Cole*, 491 Mich 325, 332–333 (2012); MCR 6.302(A). Subrules 6.302(B) through (E) then provide more granular requirements that are meant to address

those three signposts.[1] But this Court has recognized that the court rule's specific requirements are not necessarily co-extensive with due process. *Cole*, 491 at 332 ("[T]he requirements of constitutional due process . . . might not be entirely satisfied by compliance with subrules (B) through (D).")

The constitution[2] does not require a defendant possess understanding of "[t]he *full consequences*" of a plea, *Oregon v Elstad*, 470 US 298, 316 (1985) (emphasis added), or make a correct assessment of "*every* relevant factor," *Brady v United States*, 397 US 742, 757 (1970) (emphasis added). The constitution does, however, require a defendant be " 'fully aware of the direct consequences' of the plea." *Cole*, 491 Mich at 333, quoting *Brady*, 397 US at 748. Courts seized on the word "direct" and developed a distinction—though not a bright-line divide—between consequences that are "direct" and those that are merely "collateral." See *Cole*, 491 Mich at 333. The "prevailing distinction" is "whether the result represents a definite, immediate and largely automatic effect on *the range of* the defendant's punishment." *Id*. at 334 (emphasis added; cleaned up). This Court has endorsed, if not adopted, this rubric. *Id*. at 334.

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[1] This Court directed attention to *People v Johnson*, 413 Mich 487 (1982), but that case is unhelpful. Its single-sentence statement about the lack of a requirement to advise of consecutive sentencing is dicta and concerns only a precursor to MCR 6.302. *Id*. at 490; see GCR 1963, 785.7. *Johnson* also makes no mention of the constitution. *Johnson*, 413 Mich at 490.

[2] Warren relies on guarantee of due process in both the federal constitution, US Const, Am XIV, and the constitution of Michigan, Const 1963, art 1, § 17 (Warren Br, p 6). These provisions are typically interpreted coextensively. See *AFT Michigan v State of Michigan*, 497 Mich 197, 245 (2015).

"The most obvious 'direct consequence' of a conviction is the penalty to be imposed." *Id.* (cleaned up). So, if the Legislature intended to impose punishment, that ends the discussion. *Id.* The question, therefore, is whether a defendant's decision to plead guilty to crimes that permit consecutive sentencing is punitive. It does.

This Court has already concluded that an habitual-offender sentence enhancement is punitive, and therefore is a "direct" consequence of a plea, necessitating judicial warning of the consequent increased maximum sentence at a plea colloquy. *People v Brown*, 492 Mich 684, 694 n 35 (2012). Recognizing that habitual-offender enhancements carry a punitive purpose, they therefore "constitute[ ] a 'direct' consequence of a guilty or no-contest plea and thus require notice before a plea is taken." *Id.*

On this point, there is little if any light between an habitual-offender sentencing enhancement and discretionary consecutive sentencing, especially where this Court has noted the obvious: consecutive sentencing is also punishment. See *People v Smith*, 423 Mich 427, 445 (1985) (finding the "general purpose" of the consecutive sentencing statute at issue in this case, MCL 768.7b, is "to enhance the punishment imposed upon those who have been found guilty of more serious crimes and who repeatedly engage in criminal acts").

Much like the habitual offender enhancement that increased Mr. Brown's maximum sentence exposure, the possibility of consecutive sentencing increases Warren's maximum sentence exposure. These concepts are even more alike when

considering that both are within the trial court's discretion. Compare MCL 769.10(1)(a) (the court "may" impose imprisonment up to one and one-half times the statutory maximum "or for a lesser term") and MCL 769.11 (up to twice the statutory maximum) with MCL 768.7b (the sentences "may run consecutively"). With an habitual offender enhancement or a discretionary consecutive sentence, the functional result is the same: a defendant's plea raises the "true potential maximum sentence." *Brown*, 492 Mich at 694.

It is the defendant's own confession to a set of crimes that activates the judge's discretion and expands the true potential maximum sentence. That the judge may decide not to impose the sentences consecutively is something only the judge may know at the time of sentencing. But as soon as the defendant pleads to some combination of charges that yields discretionary consecutive sentencing, the judge "definite[ly], immediate[ly], and automatic[ally]," *Cole*, 491 Mich at 334, has the right and the discretion to sentence the defendant to consecutive terms. Whether or not the judge decides to impose consecutive sentencing (or, for that matter, an increased maximum under an habitual sentencing enhancement, see, e.g., MCL 769.10), the decision is placed in the judge's hands.

Moreover, the operation of consecutive sentences is not quite as simple as "plac[ing] end to end" two discrete sentences. *People v Harden*, 434 Mich 196, 202 (1990). In fact, the Department of Corrections calculates a defendant's sentence not as two sentences, but as one "new maximum term." MCL 791.234(3) ("The maximum terms of the sentences must be added to compute the new maximum

term . . . ."). Thus, the technical fiction that one sentence comes after another disappears once the defendant is housed with the Department of Corrections. The sentences are combined to form a new, indivisible sentence. Similarly, the parole board lacks jurisdiction over a prisoner until "the prisoner has served the total time of the added minimum terms." *Id*. These provisions reflect the practical reality that a defendant serving consecutive terms is truly serving one lengthier sentence, not simply one after the other. Given this practical reality, requiring the plea-taking court to advise only of the *statutory* maximum term—where the defendant's *actual* maximum term might well be higher—means that the court might well be providing inaccurate, or at best misleading, information.

According to the People's brief, the provision of information that sentences may run consecutively is "not concrete information about what *will* happen as result of pleading guilty—only what *might* happen." (People's Br at 16.) This is true in a sense, but misapprehends what Warren seeks. He asks not for specific and detailed information about what his sentence *will be*, but only the minimal warning that his plea opens the door to consecutive sentences. And again, as discussed above, when a defendant serves consecutive sentences in MDOC, "[t]he maximum terms of the sentences must be added to compute the *new* maximum term." MCL 791.234(3) (emphasis added).

In addition to the constitutional question *Cole* addressed, the unanimous Court noted the "practical rationale" supporting the requirement of a knowing and voluntary plea. 491 Mich at 337. Without "the critical information" of the potential

sentencing contingencies, a defendant cannot "accurately assess the benefits of the bargain being considered." *Id.* Put another way, if you are bargaining with a seller for a crate of widgets, and the seller tells you the maximum cost is five dollars, you will be expecting a crate of widgets for, at most, five dollars. What you cannot be expected to anticipate is that without warning the price could jump to ten dollars. Knowing in full that potentiality is meaningful—indeed integral—to whether you have intelligently decided to sign on the dotted line. So too here, where Warren was advised only that the charges carry a "five year maximum," (Sentencing Tr, p 3), and he ultimately received a ten-year maximum.

C. Advising about consecutive sentences is more appropriate under the general due-process balancing test.

Omitting the consequence of discretionary consecutive sentences also fails the more general balancing test applicable to procedural due process claims. This Court must consider (1) the private interest implicated, (2) the value of the additional safeguard, and (3) the burden on the government. *Ruiz*, 536 US at 631, citing *Ake v Oklahoma*, 470 US 68, 77 (1985).

Applying that test here, the private interest at issue is the decidedly "grave and solemn act" of waiving several constitutional rights and pleading guilty to multiple crimes. *Brady*, 397 US at 748; see also *Ruiz*, 536 US at 629 (emphasizing "the seriousness of the matter"). Without a comprehensive understanding of the bargain, and of arguably the most salient aspect of the bargain, a defendant is making a monumental choice without requisite notice.

As to the second factor, warning by the court about its discretion to impose consecutive sentences would benefit individual defendants who will be apprised of the full value of the bargain for their plea. It may be the case that neither the prosecutor nor the defendant's counsel knew of the prospect of a consecutive sentence, and the court is well-positioned to provide that information at the crucial time of the plea hearing.

In this way, the minimal requirement would bolster confidence in the judiciary as the impartial administrator of justice, not a mere passive participant in the criminal justice system. See *Frye*, 566 US at 143–144 (recognizing that pleas are the predominant route to conviction); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 Am J Crim L 223, 224 (2006) ("Some scholars have argued that prosecutors have become the primary adjudicators of the American criminal justice system.").

And given the adversarial nature of plea bargaining, "the possibility of a misunderstanding on the part of the participants as to possible consequences of a guilty plea" is "inherent" in the process. *Cardenas v Meacham*, 545 P2d 632, 639–40 (Wyo, 1976). Therefore, the courts are best positioned to provide a modicum of information to ensure that the pertinent terms of the bargain are well known. See *United States v Williams*, 407 F2d 940, 948–949 (CA 4, 1969) ("We think that plea bargaining serves a useful purpose both for society and the prisoner and is a

permanent part of the criminal courtroom scene, but we think that it ought to be brought out into the open.").

Any burden on trial courts would be minimal. The universe of consecutive sentencing provisions is not boundless. (See, e.g, Amicus Br of CDAM, pp 4–6) (listing several discretionary consecutive sentencing statutes). Requiring a judge to advise a defendant about the possibility of consecutive sentencing is no more a burden than requiring the judge to advise of the statutory maximum, MCR 6.302(B)(2), or the consequence of an habitual-offender enhancement to the maximum, see *Brown*, 492 Mich at 693–694.[3]

The People's brief states that a line-item of advice about the possibility of consecutive sentences would constitute a "dramatic change," creating an "unreasonable" and "significant burden" on trial courts. (People's Br, pp 16–17.) But their argument is limited to the specific statute under which Warren was sentenced, MCL 768.7b(2), contending that the trial court may not yet know of an opportunity to impose a consecutive sentence because it may lack knowledge of a prior offense for which the defendant was on bond during commission of the subsequent offense. But a judge can impose only a consecutive sentence—both logically and statutorily—upon commission of a subsequent offense. MCL 768.7b(2) ("upon conviction of the subsequent offense or acceptance of a plea . . . to the

[3] Moreover, the information is often already contained in the felony information. Many county prosecutors use the Prosecuting Attorneys Coordinating Council's electronic warrant manual, a computer program, to generate charging documents like the complaint and information. The charging documents generated often automatically include the possibility of consecutive sentences.

subsequent offense," the sentences may "run consecutively"). It is difficult, if not impossible, to imagine a circumstance in which the plea-taking judge does not know of the prior offense yet *imposes a consecutive sentence anyway*. If the judge did not know, and the record does not include, the prior offense for which the defendant was on bond, the judge could not impose a consecutive sentence because of it. This supposed "unreasonable" burden is no burden at all.

Insofar as the People suggest a different "constitutional solution"—to impose a duty only on defense counsel, (People's Br, pp 28–29)—the Court should resist. First, although counsel should also be properly advising their clients, the due process guarantees of the State should not be outsourced to counsel where the trial court is best positioned to not only have the pertinent information but to solidify the public record about the consequences of a plea. Second, on a practical level, a line-item of advice from the judge is preferable to avoid unnecessary proceedings. A brief judicial warning would obviate the need for post hoc *Ginther* proceedings (People's Br, p 29) because there would be plain record evidence that the defendant was fully advised at the time the plea was taken.

D. This Court should amend its rules to plainly reflect this constitutional requirement.

The People and amicus Criminal Defense Attorneys of Michigan appear to agree that a change to the court rules would be wise. (People's Br, pp 1, 28–29; Amicus CDAM Br, p 13.) The Attorney General concurs. Whatever its ruling, the

Court should amend MCR 6.302(B) to include advisement of consecutive sentencing through its rule-making authority.

Doing so in conjunction with issuing an opinion in this case would not be novel. Just last Term, the Court did that precise thing. Overruling an earlier decision in a case concerning the termination of parental rights, this Court held that a respondent parent may challenge on appeal defects in the proceedings prior to a court's dispositional order following adjudication. *In re Ferranti*, ___ Mich ___, ___ issued June 12, 2019 (Docket No. 157907),[4] slip op at 4. Pertinent here, the same day the *In re Ferranti* opinion came down, the Court issued an order, effective immediately, that effectuated aspects of the Court's decision. See Mich Sup Ct Order, issued June 12, 2019 (ADM File 2015-21); *In re Ferranti*, ___ Mich ___, ___, slip op at 5 n 1. The Court should do the same here—hold that defendant Warren's due process rights were violated and simultaneously issue an order modifying the court rules to effectuate the constitutional holding.

This route makes sense. First, MCR 6.302 is intended to reflect basic due process mandates, *Cole*, 491 Mich 325, 332–333, and advice about discretionary consecutive sentences would slot neatly with the other advice that a trial court provides to a defendant any time the court takes a plea. MCR 6.302(B) already takes the form of a list, and simply adding an item to the list would assist many

[4] Though the parties agreed that the parents' due process rights were violated when they pled without advice of their rights, *id.*, slip op at 10, this Court's decision turned on whether the parents could raise that constitutional challenge in an appeal of the termination of parental rights where the error occurred in an earlier adjudicative phase. *Id.*, slip op at 4.

trial courts in the seamless adjustment of their process by which they take pleas. Second, issuing a simultaneous order would put the bench and bar on immediate notice and would minimize any unnecessary litigation on the issue.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Attorney General Dana Nessel respectfully requests this Court grant Warren the relief he seeks and amend the MCR 6.302 to require advice of the existence of discretionary consecutive sentences.

Respectfully submitted,

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

/s/ Christopher M. Allen
Christopher M. Allen (P75329)
Assistant Solicitor General
AllenC28@michigan.gov

Ann M. Sherman (P67762)
Deputy Solicitor General

P.O. Box 30212
Lansing, MI 48909
(517) 335-7628

Dated: July 8, 2019