STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RICKY DALE JACK,

Defendant-Appellee.
/

Supreme Court No. 162767

Court of Appeals No. 354524

Ingham County Circuit Court
No. 18-001048-FC

BRIEF OF ATTORNEY GENERAL DANA NESSEL IN SUPPORT OF THE PEOPLE'S EMERGENCY APPLICATION FOR LEAVE AND MOTION TO STAY PRECEDENTIAL EFFECT

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Dated: March 25, 2020

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STATEMENT OF QUESTION PRESENTED

1. Whether the prosecution is bound under the rules of discovery to include the addresses of victims of crime and witnesses where the rules of mandatory disclosure expressly allow an alternative method to avoid their disclosure and the discovery rule itself is silent with regard to them.

The Attorney General's answer: No.

STATEMENT OF INTEREST OF THE ATTORNEY GENERAL AS AMICUS

The Attorney General is the chief law enforcement officer of the State of Michigan, see *Fieger v Cox*, 274 Mich App 449, 451 (2007), and supervises and advises all the prosecutors in the State under MCL 14.30. See *People v Foster*, 377 Mich 233, 234–235 (1966).

The issue of protecting from disclosure the personal information of victims of crime – as well as witnesses more generally – is a matter of critical importance for the law enforcement community. And the importance of victims and their protection is confirmed by the passage of the Crime Victim's Rights Act. See MCL 780.750 *et seq*. For many reasons, victims of crime are often reluctant to come forward and identify their assailants. Often, they fear reprisals from the perpetrator or the perpetrator's family, and one way to reassure victims that they need not be afraid of retaliation is by shielding from disclosure their address, cell phone numbers, or other identifying information that might unnecessarily allow others to track them down. The same is true of witnesses who may be subject to reprisals and intimidation, which Michigan law prohibits.

This amicus brief in support of the Ingham County Prosecutor's emergency application is presented under the Michigan Court Rules. See MCR 7.312(H)(2) (no requirement for Attorney General to file motion for amicus brief).

INTRODUCTION

It is the longstanding practice for prosecutors in Michigan to redact the addresses and other personal information of witnesses, including victims, in providing discovery. It has the virtue of practicality in that the criminal defense bar may then share the documents with their clients without giving them the witnesses' personal information. It has also the virtue of conforming to the court rules on discovery. The published decision below suffers from two basic errors.

First, it overlooks the dynamic between the "mandatory disclosure" provision in MCR 6.201(A) and the discovery provision in MCR 6.201(B). Paragraph A expressly allows a party – both prosecution and criminal defense – to make a witness "available" rather than provide the address of that witness. Paragraph B requires the prosecutor to provide "any written or recorded statements" but is silent about the disclosure of a witness's address, or other personal contact information. Thus, in context, the rules do not require the disclosure of witnesses' addresses.

Second, it overlooks the order of operation in the rules. The rules provide that the prosecution may excise (redact) the information that is not discoverable. See MCR 2.602(D). Such is the case with personal contact information. If the criminal defense bar (or prosecution) needs redacted information, it may ask the court to conduct an in-camera review. This is the way discovery has been operating for more than 20 years, and there is no basis in the rules to change that now.

This Court should grant Ingham County's emergency application, and stay the precedential effect of the Court of Appeals' decision, or alternatively, peremptorily reverse the majority's opinion based on Judge Boonstra's dissent.

ARGUMENT

I. The Michigan Court Rules do not require the prosecution to turn over the witnesses' addresses as a matter of discovery.

The practice has long been established that the prosecution redacts from discovery the address and the other personal information of witnesses and specifically victims in its provision of discovery. For example, this has been the practice of the Wayne County Prosecutor's Office for more than 20 years. And Wayne County is not alone. This redaction has not been a problem. Until now.

The decision below misreads the court rules and reaches a conclusion that is not workable. The routine practice of redacting witness and victim information is a win for all sides. The prosecution wishes to assure victims and other witnesses that their personal information does not fall into the hands of the person charged with a crime, and the criminal defense bar does not want foisted on it the tedious task of redacting the personal information of witnesses when making a copy of discovery for their clients. The same basic rules govern the provision of information under the Crime Victim's Rights Act for victims for the court files. This Court should either grant leave and stay the decision's precedential effect or otherwise peremptorily reverse.

A. The court rules do not require the prosecution to disclose a victim's address or witnesses' addresses.

The primary error of the decision below is its misreading of the court rules. The interplay of the first two subsections of the rules – when read together – make the point clear:

(A) Mandatory Disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a,[1] a party upon request must provide all other parties:

> (1) *the names* ***and addresses*** *of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview*; the witness list may be amended without leave of the court no later than 28 days before trial;
>
> (2) any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant's own statement;
>
> * * *

(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:

> (1) any exculpatory information or evidence known to the prosecuting attorney;
>
> (2) *any police report* and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;
>
> (3) *any written or recorded statements, including electronically recorded statements*, by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial; . . .

[MCR 6.201(A), (B) (emphasis added).]

[1] MCL 767.94a expressly provides for the right of the prosecution to ask for discovery by statute. Administrative Order 1994-10 makes clear that the provision of discovery in criminal cases is governed by the rule, and not by statute. Admin Order 1994-10 ("On order of the Court, effective January 1, 1995, discovery in criminal cases heard in the courts of this state is governed by MCR 6.201 and not by MCL 767.94a; MSA 28.1023(194a). Const 1963, art 6, § 5; MCR 1.104.").

The mandatory disclosure governing addresses of witnesses expressly provides for an alternative mechanism – other than disclosing the addresses of witnesses – to make available a witness to the other party. MCR 6.302(A)(1). This is not an accident. It is designed to ensure that the parties do not needlessly provide the contact information of witnesses – including victims – to the other party.

Nothing in paragraph (B) overturns this balance. Instead, it requires that the prosecuting attorney provides "police reports" and "written or recorded statements" but is silent regarding the provision of addresses. See slip op (Boonstra, J., dissenting), p 4 ("it may also excise witness address information (for those witnesses whose addresses are withheld under MCR 6.201(A)(1)"). But see slip op (majority opinion), p 4 ("redaction of police reports and interrogation records is permitted only when the information relates to an ongoing investigation, MCR 6.201(B)(2)"). The disclosure of a victim's address or a witness's address is not a small matter as it raises concerns about the ability to "[p]rotect[] victims from possible intimidation." Cf. *Criminal Procedure (4th ed),* LaFave and Israel, § 1.5(k) "Addressing the concerns of the victim" ("Many states also have created a presumption against requiring a victim to testify in court as to his or her address, telephone number, place of employment or other locating information.").

Consistent with the court rules, prosecutors across Michigan have for years routinely redacted witness addresses in their provision of discovery, with the apparent acceptance by the Michigan appellate courts. See Ex A, *People v Jones*, an unpublished per curiam opinion (No. 273576) (2008), 2008 WL 2744285, at *3

("Here, defendant never requested the addresses of the prosecution's witnesses. He requested the police reports from which the addresses and phone numbers were redacted, but never objected to receiving the redacted reports. *Because the witness contact information was not itself exculpatory,* ***there was no discovery violation regarding the failure to provide the witness contact information absent a request***.") (emphasis added). This is a reflection that the address itself, just like other contact information, is *not* discoverable. It ordinarily has no probative value. Cf. *People v Elston*, 462 Mich 751, 762–763 (2000) (the expert's "personal observations of sperm were not otherwise discoverable because evidence of sperm recovered from the victim was not 'exculpatory' under MCR 6.201(B)(1)"). The same is true of the victim's social security number.

There is good reason why the redacting of personal contact information has been the prevailing, accepted practice in the criminal justice community: it protects victims and witnesses of crime and leaves open the defendant's access to relevant information on a case-by-case basis. As explained by Judge Boonstra in his dissent, see slip op, pp 3–4, the reason that the status quo is a workable process is that the court rules themselves provide that a party may "excise" the non-discoverable portions and, if contested, the court may hold an in-camera review. See MCR 6.201(D). The decision below is a solution in a search of a problem. In fact, its new solution of prophylactic motions by the prosecution under MCR 6.201(E) (protective orders) and (I) (modifications of requirements), see majority opinion, slip op, pp 4–5, is cumbersome and unworkable.

A motion and hearing for a protected order would become the norm – and create another time-consuming step unnecessarily – for the initiation of every criminal case in the State. Many prosecutors and criminal defense attorneys are already overloaded. Adding another procedure like this would not serve either party or the criminal justice system writ large. But more to the point, this process is not required by the rules. This is a very important issue for prosecutors and merits this Court's immediate attention.

B. The current practice of redacting victim's contact information is consistent with the Crime Victim's Rights Act.

While the Crime Victim's Rights Act does not expressly govern this issue, nor could it since the issue is one of procedure governed by court rule, it nonetheless provides a helpful background principle that confirms the wisdom of Michigan's court rules. The Act precludes that a victim's "work address" shall land in the court's files, and the same with regard to victims' phone numbers:

> (2) The work address and address of the victim shall not be in the court file or ordinary court documents unless contained in a transcript of the trial or it is used to identify the place of the crime. The work telephone number and telephone number of the victim shall not be in the court file or ordinary court documents except as contained in a transcript of the trial. [MCL 780.758(2).]

The same considerations that govern this rule apply with greater force to discovery of non-exculpatory, non-relevant contact information of victims. That is also why this information is shielded from disclosure under FOIA. See MCL 780.758(3)(a) (exempting from FOIA the victim's home address, home telephone number, and work address "unless . . . used to identify the place of the crime").

And it is worth reiterating that the same considerations that give rise to the protection of victims applies to witnesses, who may fear coming forward. That is why Michigan criminalizes threats against witnesses that discourage them from testifying. See MCL 750.122(3) (a felony to "by threat or intimidation" discourage or attempt to discourage any individual from attending a proceeding as a witness). See also Ex B, *People v Carter*, an unpublished per curiam opinion (No. 266550) (February 13, 2007), 2007 WL 466352, at *2 ("The undisputed evidence established that defendant had an assault with intent to commit murder case pending against him in which he could receive life imprisonment or imprisonment for a lesser term of years. *Defendant wrote a letter to his friend [] advising [him] to make sure that the complainant in that case did not come to court and testify*.") (emphasis added). Anyone familiar with effective prosecution is exquisitely aware of the importance of protecting the contact information of victims and witnesses. This matter merits this Court's immediate attention.

CONCLUSION AND RELIEF REQUESTED

This Court should grant the Ingham County Prosecutor's emergency application for leave and stay the precedential effect of the majority's decision, or, alternatively, peremptorily reverse the decision below and adopt the dissent as the controlling opinion.

Respectfully submitted,

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Dated: March 25, 2020