Michigan Supreme Court
Lansing, Michigan

OPINION

FILED April 29, 2020

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 158065

KELLY CHRISTOPHER WARREN,

Defendant-Appellant.

BEFORE THE ENTIRE BENCH

MARKMAN, J.

At issue is whether, prior to accepting a guilty or no-contest plea, the trial court, in cases in which such advice is relevant, is required to advise a defendant that the court possesses discretionary consecutive-sentencing authority and to apprise the defendant as to the potential consequences of that authority for his or her sentence. We conclude that the trial court is required to do so under MCR 6.302(B)(2). As a result, the trial court here erred when it denied defendant's motion to withdraw his plea because the court failed to apprise him of both this authority and its potential consequences. We therefore reverse the

judgment of the Court of Appeals and remand to the trial court to allow defendant to either withdraw his guilty plea or to reaffirm this plea. See *People v Brown*, 492 Mich 684, 702; 822 NW2d 208 (2012).

I. FACTS & HISTORY

In November 2014, defendant drove while intoxicated and then did so again the following summer while on bond for the first crime. In each case, he was charged, among other crimes, with operating a vehicle while intoxicated, third offense (OWI-3rd), MCL 257.625, and the prosecutor provided notice that defendant was subject to a sentence enhancement as a fourth-offense habitual offender, MCL 769.12(1)(b). Defendant agreed to plead guilty to one count of OWI-3rd in each case in exchange for dismissal of the remaining charges and the habitual-offender enhancement. At the plea hearing, after the prosecutor informed the trial court of the agreement, the court asked the following:

> *The Court*: All right. And each of the charges carries with it, absent the habitual, a five year maximum charge; is that correct, folks?
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> [*Prosecutor*]: Yes.
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> [*Defense Counsel*]: Yes.

Thereafter, the court questioned defendant to ensure that his plea was understanding, voluntary, and accurate under MCR 6.302. Yet at no point did the court inform defendant that it possessed the discretionary authority to sentence him to consecutive sentences because he had committed a felony (the second OWI-3rd charge) while disposition of another felony (the first OWI-3rd charge) had been pending. MCL 768.7b(2)(a).

The trial court ultimately sentenced defendant to consecutive prison terms of 2 to 5 years. Because these sentences were to be served consecutively, defendant was subject to

a maximum of 10 years' imprisonment, twice the maximum of 5 years' imprisonment had the sentences been imposed concurrently. Defendant filed a timely motion to withdraw his plea based upon the court's failure to have advised him of the possibility of consecutive sentencing. The trial court denied this motion and the Court of Appeals denied leave to appeal. This Court then remanded to the Court of Appeals for consideration as on leave granted with directions to compare *People v Johnson*, 413 Mich 487, 490; 320 NW2d 876 (1982) (holding that the former court rule governing pleas, GCR 1963, 785.7, did not "require advice as to other potential sentence consequences such as consecutive sentencing") with *People v Blanton*, 317 Mich App 107, 119-120; 894 NW2d 613 (2016) (holding that the court was required to inform the defendant that he was subject to a two-year mandatory consecutive sentence for possessing a firearm during the commission of a felony, or "felony-firearm"). *People v Warren*, 500 Mich 1056 (2017).

In a split decision, the Court of Appeals affirmed defendant's convictions and sentences. *People v Warren*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2018 (Docket No. 333997). The majority concluded that Michigan caselaw, including *Johnson* and *Blanton*, was not dispositive of the issue and that neither the Michigan Court Rules nor due process required the court to inform defendant that it possessed the discretion to impose consecutive sentences. *Id*. at 2-5. The dissent would have held that "a possible consecutive sentence is a fact as important as the maximum penalty for each charge, and therefore an integral component of a voluntary and

understanding plea." *Id*. at 1 (GLEICHER, J., dissenting). Defendant sought leave to appeal in this Court and we heard oral argument on the application.[1]

II. STANDARD OF REVIEW

"This Court reviews for an abuse of discretion a trial court's ruling on a motion to withdraw a plea." *Brown*, 492 Mich at 688. An abuse of discretion occurs when the decision falls outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). The interpretation of court rules is reviewed de novo. *People v Lee*, 489 Mich 289, 295; 803 NW2d 165 (2011).

III. ANALYSIS

A defendant has the "right to withdraw any plea until the court accepts it on the record." MCR 6.310(A). Once the trial court has accepted the plea, there is no longer any absolute right to withdraw the plea. *People v Gomer*, 206 Mich App 55, 56; 520 NW2d 360 (1994). Following sentencing, a trial court may withdraw a guilty plea if "there was an error in the plea proceeding that would entitle the defendant to have the plea set

[1] According to the Offender Tracking Information System maintained by the Michigan Department of Corrections (MDOC), defendant was paroled on January 7, 2020, after serving four years of his sentence. However, because defendant is challenging his underlying conviction, his parole does not affect our ability to decide the merits of this case and afford a remedy for any alleged error. Additionally, defendant is under the supervision of MDOC until January 2021 and any parole violation could result in the revocation of his parole, which would then subject him to the remainder of his term of imprisonment. "An issue is moot when an event occurs that renders it impossible for the reviewing court to fashion a remedy to the controversy." *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004). But an issue is not moot "if it will continue to affect a party in some collateral way." *Id*. Because defendant here is challenging his conviction and remains subject to the supervision of MDOC, the instant issue is not moot, and we will decide its merits despite the fact that defendant has recently been paroled.

aside . . . ." MCR 6.310(C)(4). In other words, "[a] defendant seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process." *Brown*, 492 Mich at 693. Thus, the issue here is whether the trial court's failure to inform defendant of the possibility of consecutive sentences constitutes a sufficient defect in the plea-taking process to require judicial relief. To determine whether there is such a defect, we must first give meaning to the relevant court rule, MCR 6.302.

"The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate." MCR 6.302(A). "[T]his requires a defendant to be informed of the consequences of his or her plea and, necessarily, the resultant sentence." *Brown*, 492 Mich at 693 (quotation marks and citation omitted). To ensure that a defendant's plea satisfies these requirements, the trial court, before accepting such a plea, "must place the defendant or defendants under oath and personally carry out subrules (B)–(E)." MCR 6.302(A). Specifically relevant to the instant case are the requirements under Subrule (B), which addresses understanding pleas:

> (B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:
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> * * *
>
> (2) the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c[.] [MCR 6.302(B)(2).]

Defendant argues that a trial court must advise persons in his circumstances when the court possesses the discretion to impose consecutive sentences because such sentences

affect the "maximum possible prison sentence." MCR 6.302(B)(2). That is, if the trial court only advised the defendant that he or she faced a maximum penalty of five years' imprisonment, when, in fact, he or she was facing a maximum penalty of 10 years' imprisonment as a consequence of a consecutive sentence, the trial court would have failed to inform the defendant of the "maximum possible prison sentence" and thus the defendant would not have fully understood the consequences of the plea.[2] Conversely, the prosecutor argues that the court rule does not explicitly require the trial court to inform defendants of discretionary consecutive-sentencing authority. Rather, trial courts are only required to advise a defendant of the "maximum possible prison sentence *for the offense*," meaning that they are only required to inform defendants of the maximum sentence for each separate or discrete conviction. MCR 6.302(B)(2) (emphasis added). And in the instant case, this was done: the trial court properly advised defendant that the maximum possible prison sentence for each of his OWI-3rd convictions was five years' imprisonment. To resolve this matter, we must undertake two related analyses: first, we must determine the extent to which prior caselaw governs the resolution of this issue and, second, if prior caselaw does not do so, we must determine in the first instance the proper understanding of MCR 6.302(B)(2).

[2] We are cognizant that the trial court informed defendant that he faced a maximum of five years' imprisonment on each of his OWI-3rd convictions and therefore that he *could* have assumed that he was subject to the sum total of 10 years' imprisonment. However, we are not prepared to operate upon the assumption that defendant was properly informed here on the basis that he believed, *mistakenly*, that as a general rule his sentences would be imposed consecutively. See *People v Ryan*, 295 Mich App 388, 401; 819 NW2d 55 (2012) ("In Michigan, concurrent sentencing is the norm, and a consecutive sentence may be imposed only if specifically authorized by statute.") (quotation marks and citation omitted).

A. CASELAW

We agree with the Court of Appeals majority that Michigan caselaw has not resolved the determinative question in this case: whether MCR 6.302(B)(2) requires courts to inform defendants of discretionary consecutive-sentencing authority before accepting a guilty or no-contest plea. We first address this Court's decision in *Johnson* and then the Court of Appeals' decision in *Blanton*, because we specifically directed the Court of Appeals on remand to assess these specific decisions to determine what relevance, if any, these bear to the issue at hand.

In *Johnson*, the issue concerned whether the *former* court rule regarding pleas, GCR 1963, 785.7, required trial courts to inform defendants of the consequences of MCL 791.233b, then known as "Proposal B." *Johnson*, 413 Mich at 488. Under this law, a defendant was "not eligible for parole until he or she has served the minimum sentence imposed by the court, undiminished by allowance for good time, special good time, or special parole." *Id*. at 488 n 1. We held that trial courts were not required to inform defendants of the consequences of Proposal B because the court rule did not expressly require trial courts to inform defendants of those consequences. *Id*. at 490. In so holding, we also observed that the prior version of MCR 6.302 had not required trial courts to inform defendants of "other potential sentence consequences such as consecutive sentencing." *Id*. However, the issue in dispute in *Johnson* did not generally involve the consequences of consecutive sentencing, but rather only the specific consequences of Proposal B; thus, its generalized statement on consecutive sentencing effectively constituted dictum because it was unnecessary to the resolution of the issue in *Johnson*. See *People v Peltola*, 489 Mich

174, 190 n 32; 803 NW2d 140 (2011). For that reason, we do not find *Johnson* dispositive of the issue in the present case.

And in *Blanton*, the Court of Appeals held that trial courts must inform a defendant pleading guilty to felony-firearm that "(1) he would be sentenced to a mandatory two-year term of imprisonment, (2) this term of imprisonment would be served first, and (3) the concurrent sentences for [the underlying substantive offenses] would be served consecutively to the felony-firearm sentence." *Blanton*, 317 Mich App at 120. The rationale for this holding was that MCR 6.302(B)(2) required trial courts to advise defendants of "any mandatory minimum sentence required by law," and that "when a defendant carries a firearm during the commission of a felony, he or she is subject to a mandatory two-year term of imprisonment to be served 'consecutively with and preceding any term of imprisonment imposed' for the underlying felony." *Blanton*, 317 Mich App at 119-120 (citations and emphasis omitted). *Blanton* thus relied upon the "mandatory minimum sentence" language of MCR 6.302(B)(2) and not the "maximum possible prison sentence" language of the rule, and therefore is also not dispositive of the issue in this case, which pertains only to whether discretionary consecutive sentencing implicates the "maximum possible prison sentence for the offense." MCR 6.302(B)(2).[3]

[3] We recognize that *Blanton* also asserts, "[A]lthough not explicitly required by MCR 6.302(B), it is well settled that a trial court must inform the defendant of any 'consecutive and/or mandatory sentencing' requirements." *Blanton*, 317 Mich App at 119 (citation omitted). However, because the issue in *Blanton* pertained to *mandatory* consecutive sentencing for a felony-firearm conviction, we do not believe it referred clearly to the matter of whether defendants must be advised as to *discretionary* consecutive-sentencing authority. That said, *Blanton* is consistent with our ruling today that trial courts must advise defendants, when applicable, of even discretionary authority in this regard.

Concluding that neither *Johnson* nor *Blanton* clearly resolves the issue in dispute, we turn to MCR 6.302(B)(2) to assess what course must be followed by the trial court concerning communications to a defendant regarding its discretionary consecutive-sentencing authority and the consequences of that authority for defendant's ultimate sentence.

B. MCR 6.302(B)(2)

When interpreting a court rule, we begin, of course, with its text, reading the individual words and phrases in their context. *People v Traver*, 502 Mich 23, 31; 917 NW2d 260 (2018). In doing so, this Court "must give effect to every word, phrase, and clause" in the court rule. *People v Comer*, 500 Mich 278, 287; 901 NW2d 553 (2017). We examine first the phrase "maximum possible prison sentence" within MCR 6.302(B)(2). The court rule does not specifically define this phrase or the individual words contained within it, but this Court gives undefined terms their plain and ordinary meanings and will often consult dictionary definitions in conferring such meaning. *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013). "Maximum" means "an upper limit allowed (as by a legal authority) or allowable (as by the circumstances of a particular case)." *Merriam-Webster's Collegiate Dictionary* (11th ed). And "possible" describes "something that may or may not occur." *Id*. Therefore, MCR 6.302(B)(2) requires advising defendants of the maximum *allowable* prison sentence under the law, as well as under the particular circumstances of the case, whether that is the actual sentence that eventually transpires. This phrase is further modified by the prepositional phrase "for the offense." MCR 6.302(B)(2). The prosecutor argues, and the dissent would conclude, that this qualifying

language indicates that a court must only advise defendants of the maximum possible prison sentence for each separate or discrete offense-- in this case, five years' imprisonment for each of two OWI-3rd convictions. Respectfully, we do not construe this language so narrowly, but in what we view to be a more reasonable fashion. We believe that the "maximum possible prison sentence for the offense" is additionally and materially affected by the possibility of consecutive sentencing and therefore that defendants must be facilitated in fully understanding the potential consequences of the trial court's discretionary consecutive-sentencing authority. We believe so for the following reasons:

First, in addition to understanding the possible *duration* of each sentence for multiple offenses, the defendant must also understand the possibility that the sentence for an offense may not commence *until* after the defendant has served one or more underlying sentences. This comprehension is critical to a pleading individual fully understanding the "maximum possible prison sentence for the offense." MCR 6.302(B)(2). Consecutive sentences are "served in sequence," while concurrent sentences are "served simultaneously." *Black's Law Dictionary* (11th ed) (emphasis added). As a result, the fact of consecutive-sentencing authority is as integral to a fully understanding plea as the facts of the sheer duration of potential sentences for each offense viewed in splendid isolation. For when the trial court possesses such authority, the defendant's sentences are neither viewed nor imposed in isolation, and for the defendant personally, understanding fully the consequences and implications of a plea is not some academic exercise but an intensely practical and life-altering exercise by which he or she might reasonably compare the wisdom of a guilty or no-contest plea with the merits of proceeding to trial. *Both* of these considerations-- the possible duration of each sentence *and* the possibility that one or more

of these sentences will not commence immediately but only after another has been served--will in the harshest reality determine the defendant's "maximum possible prison sentence for the offense," and defendants are entitled to be made fully aware of this reality so that they might enter into a genuinely "understanding, voluntary, and accurate" plea.

In the instant case, the trial court's authority to impose a consecutive sentence derives from MCL 768.7b, which states in relevant part:

> (2) Beginning January 1, 1992, if a person who has been charged with a felony, pending the disposition of the charge, commits a subsequent offense that is a felony, upon conviction of the subsequent offense or acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to the subsequent offense, the following shall apply:
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> (a) Unless the subsequent offense is a major controlled substance offense, the sentences imposed for the prior charged offense and the subsequent offense may run consecutively. [MCL 768.7b(2)(a).]

The effect of MCL 768.7b thus is to postpone the moment at which sentencing for one or more "subsequent offense[s]" will commence, and "[t]he purpose of the statute is to deter persons accused of one crime from committing others by removing the security of concurrent sentences should conviction result on any or all of the crimes so committed." *People v Bonner*, 49 Mich App 153, 158; 211 NW2d 542 (1973). Consequently, the statute differentiates between two classes of persons: "those who have committed subsequent felonies while on bond and those who have not . . . ." *Id*. And the Legislature has thereby provided "different punishments between those classes" wherein the defendant who has committed a felony while on bond is subject to a greater punishment than the defendant who has not. *Id*.

Hence, while consecutive sentencing does not *increase* the maximum duration of a sentence for any single offense, the *postponement* of one or more of the sentences effectively constitutes an enhanced punishment designed to deter persons from committing additional crimes while other charges are already pending by increasing the *total* duration of potential incarceration. In the fullest light of reality, defendant's "maximum possible prison sentence" will be determined by *both* the durations of the sentences for each offense *and* their susceptibility to consecutive sentencing. We find it critical then that a defendant, in order to fully understand the consequences of a plea, and to be fully cognizant of the "maximum possible prison sentence" on each offense, be apprised that a sentence for a subsequent offense to which he or she is pleading guilty may not proceed immediately but rather may be delayed-- this as a part of a purposeful legislative design to punish the defendant with greater severity. In this manner, the fact of consecutive sentencing constitutes highly relevant information that directly implicates the "maximum possible prison sentence for the offense" under MCR 6.302(B)(2).[4]

Second, our court rules require that "[w]ords used in the singular also apply to the plural, where appropriate." MCR 1.107.[5] Accordingly, this Court must also reasonably read MCR 6.302(B)(2) as requiring trial courts to inform defendants of "the maximum

[4] This opinion should not be understood as requiring trial courts to advise defendants of precisely *when* a consecutive sentence will commence. Rather, it is sufficient that defendants be reasonably informed that possible consecutive sentences will have to be served sequentially, i.e., that such sentences will not begin until after other sentences have been served.

[5] In a similar vein, MCL 8.3b states: "Every word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number."

possible prison sentence for the *offenses*." We believe it is "appropriate" to consider "offense" in both the singular and the plural because it is frequently the case that a criminal defendant will be convicted of more than a single crime and it is reasonable that MCR 6.302(B)(2) would be understood as affording its myriad protections to *all* criminal defendants, not merely to those convicted of a single offense, for such a distinction would be odd (if not unprecedented) within our criminal rules and, specifically with regard to MCR 6.302(B)(2), lacking in any apparent purpose. Thus, we conclude that when a trial court advises a defendant of his or her "maximum possible prison sentence," this must encompass not only the "maximum possible prison sentence" for each individual "offense," but also the "maximum possible prison sentence" for the conviction of "offenses" specifically as to which the trial court possesses an authority to impose consecutive sentences.[6]

Defendant here was instructed that each OWI-3rd conviction carried a five-year maximum term of imprisonment, which, if imposed concurrently, would amount to a maximum possible sentence of five years' imprisonment. However, because of the trial court's discretionary consecutive-sentencing authority, defendant *actually* faced, and received, a maximum possible sentence of 10 years' imprisonment. This was, in fact, the "maximum possible prison sentence for the *offenses*." A trial court's failure to advise a

[6] See e.g., *Commonwealth v Persinger*, 532 Pa 317, 323; 615 A2d 1305 (1992) ("In order to understand the consequences of his plea it is clear that a defendant must be informed of the *maximum* punishment that might be imposed for his conduct. To hold that the term 'maximum' does not include the total possible aggregate sentence is clearly incorrect.") (citation omitted); *State v Ricks*, 53 Ohio App 2d 244, 246-247; 372 NE2d 1369 (1977) (holding that in order for a defendant to understand the maximum penalty, he or she must understand "whether defendant is eligible for consecutive or concurrent sentences").

defendant of possible consecutive sentencing in the course of apprising him or her of a "maximum possible prison sentence" disregards the reality that the defendant may face a far-lengthier prison sentence-- a reality that we believe is anticipated, and accommodated, by the most reasonable understanding of MCR 6.302(B)(2).

The dissent maintains that our use of this canon of interpretation is inconsistent because we read only "offense" in the plural while maintaining the singular use of the term "sentence." However, we see no such inconsistency, as certainly a defendant must not only understand the maximum possible "sentence" for each separate offense, but also that for the range of "offenses" of which he or she has been convicted, some of which may be viewed by the law as interconnected in a way that carries independent sentencing consequences. Then, and only then, can a defendant fully apprehend the true *maximum term of incarceration* that he or she faces,[7] i.e., the term of incarceration from its starting date to its release date, i.e., the period during which by force of law a person who has breached the strictures of that law will be segregated from free society and deprived of his or her God-given liberty.[8] That said, our application of the singular/plural canon of

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[7] A defendant's maximum term of incarceration is, in other words, his or her "aggregate sentence," which is defined as "[t]he total sentence imposed for multiple convictions, reflecting appropriate calculations for consecutive as opposed to cumulative periods . . . ." *Black's Law Dictionary* (11th ed).

[8] The Attorney General, appearing as amicus curiae on behalf of defendant, asserted at oral argument that

> no single variable of a sentence [is] more important to a criminal defendant than how much time he will serve. It's more important than knowing if you're going to be on a sex offenders' registry or whether . . . you are pleading to a felony or a misdemeanor, or whether or not that crime may be expungable at some period; maybe later on those things will become

interpretation is not grounded on "advanc[ing] a policy goal," as asserted by the dissent, but on the specific language of MCR 6.302(B)(2) requiring that a defendant understand the "maximum possible prison sentence for the *offenses*." The dissent avers that consistency and the use of "common sense" in applying this canon would require *both* "sentence" and "offense" to be read either in the plural or the singular; in other words, that these terms must travel together. But that is not what is stated in the canon, and for good reason. Rather, the dissent's understanding gives minimal consideration to the guidance of the canon that it should be applied "where appropriate." MCR 1.107. We believe it is altogether "appropriate" here to read *only* "offense" in the plural under MCR 6.302(B)(2), as this optimally ensures that a defendant will come to understand the "maximum possible prison sentence" implicated by a guilty or no-contest plea. *This* purpose, in our judgment, defines the obvious and fundamental purpose served by MCR 6.302(B)(2), and there is no obvious rationale for limiting the purview of this rule to circumstances in which a defendant has been convicted of only a single offense or even of multiple offenses for which there is no possibility of consecutive sentencing. Thus, while professing to rely upon "common sense" in giving meaning to the court rule, the dissent not only errs in its

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> significant. But at the very moment that an individual is deciding whether or not to enter that plea, all they really care about is how much time am I going to do.

And despite the dissent's assertion that the Attorney General argues only that "due process requires us to amend our court rule," her position at oral argument was to the contrary. Although she did urge the Court to amend its rule to clarify the trial court's consecutive-sentencing obligation, the Attorney General nonetheless adopted the position that MCR 6.302(B)(2), as it *currently* reads, required the trial court here to advise defendant of the court's discretionary consecutive-sentencing authority, apart from any "due process" requirement, precisely because the consequences of consecutive sentencing affect "the actual term of years [a defendant] receive[s]."

construction of the rule, but fails to account for the most fundamentally "common sense" aspect of the plea itself-- that the pleading party accurately comprehend the maximum possible prison sentence to which he or she is pleading. In sum, we do not believe that the dissent's interpretation of the singular and plural terms of MCR 6.302(B)(2) constitutes the most reasonable understanding of its language, the best discernment of the intentions of its framers, or the most appropriate application of the singular/plural canon, and therefore it is "appropriate" that we give the meaning to the rule that we do.

Even, however, if we read "sentence" in the plural as the dissent would have us do, we reach the same conclusion. That is, if a defendant must be apprised of the "maximum possible prison *sentences* for the *offenses*," the trial court would still be required to inform the defendant of the court's discretionary consecutive-sentencing authority because where "sentences" are imposed, and indeed only where "sentences" are imposed, the possibility of a consecutive sentence becomes a possibility affecting the defendant's "maximum possible prison sentence" on such multiple "sentences." And thus to ensure the defendant's full understanding of the plea, he or she must be apprised of the court's discretionary consecutive-sentencing authority.[9]

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[9] The dissent asserts that our "alternative analysis" concerning the singular/plural canon, i.e., where we read both "sentence" and "offense" in the plural, "fails to consider the entire context of MCR 6.302(B)." Specifically, it asserts that the phrase "maximum possible prison sentence[s] for the offense[s]" does not stand alone and must be considered along with MCR 6.302(B)(1), a separate provision requiring trial courts to advise the defendant of "the name[s] of the offense[s] to which the defendant is pleading." And when these provisions are viewed together through the lens of the singular/plural canon, "just as Subsection (1) requires a trial court to inform a defendant of each name of each offense, so [too] Subsection (2) requires a trial court to inform a defendant of each maximum possible sentence, not the maximum possible aggregate sentence." However, we do not believe that (B)(1) has any particular effect on our application of the singular/plural canon to (B)(2).

Our interpretation of MCR 6.302(B)(2) is also consistent with this Court's decision in *Brown*-- a decision the dissent does not address in any meaningful way. There, we held that even though MCR 6.302(B) did not expressly require trial courts to advise defendants of habitual-offender enhancements, MCR 6.302(B)(2) nonetheless required courts to advise "of the maximum possible prison sentence with habitual-offender enhancement because the enhanced maximum becomes the 'maximum possible prison sentence' for the principal offense." *Brown*, 492 Mich at 693-694.[10] We then opined:

> By not telling a defendant the potential maximum sentence because of his or her habitual-offender status, "a trial court is not advising of the 'true' potential maximum sentence." Today's holding accurately reflects the intent of MCR 6.302(B)(2), which is that a defendant be informed beforehand of the maximum sentence that would follow his or her plea of guilty. [*Id*. at 694 (citation omitted).]

Even under the dissent's (correct) understanding of the contextual relationship between (B)(1) and (B)(2)-- that these provisions must be read together-- we are no less persuaded that defendants should be facilitated in their fullest understanding of the implications of the trial court's discretionary consecutive-sentencing authority. Even when reading each noun of these provisions in the plural, as the dissent would have us do, we remain persuaded that MCR 6.302(B) requires courts to advise defendants of their discretionary consecutive-sentencing authority. It truly seems of no consequence that a trial court be required to inform a defendant of the "maximum possible prison sentence[s] for the offense[s]" or where (B)(1) and (B)(2) are read together to inform a defendant of the "maximum possible prison sentence[s] for . . . the name[s] of the offense[s] to which the defendant is pleading." In other words, our understanding of the court rule is not altered at all by consideration of (B)(1) and (B)(2) in tandem. As stated earlier, consecutive sentencing only becomes a possibility affecting a defendant's maximum possible term of incarceration when there are *multiple* "sentences" for the named "offenses," and thus we believe our understanding of the rule to have no less force when (B)(1) and (B)(2) are considered together.

[10] "The habitual-offender statutes, MCL 769.10 *et seq*., provide enhancement of a defendant's sentence on the basis of prior felony convictions," which is intended to have "a deterrent and punitive purpose." *Brown*, 492 Mich at 689 (quotation marks and citation omitted).

> [A]n habitual offender supplement is not a separate offense, and thus it logically follows that it must be linked to, or considered one with, the underlying offense. As such, to comply with MCR 6.302(B)(2), a defendant must be made aware of the consequences of "the offense" including any habitual offender enhancement. [*Id*. at 694 n 35 (quotation marks and citation omitted).]

Ultimately, we are persuaded that requiring the trial court to advise a defendant of the possibility of consecutive sentencing is consistent with "the intent of MCR 6.302(B)(2), which is that a defendant be informed beforehand of the maximum sentence that would follow his or her plea of guilty." *Id*. at 694. When the court does not so inform the defendant, it is "not advising of the 'true' potential maximum sentence" as it pertains to the punishment on the multiple offenses. *Id*. (quotation marks and citation omitted). Moreover, in order to comply with MCR 6.302(B)(2), "a defendant must be fully aware of the consequences" of the plea, *Brown*, 492 Mich at 694 n 35, which includes the fact that the second sentence could be served consecutively to the first sentence, resulting in a longer term of incarceration. That is, as with the habitual-offender enhancement in *Brown*, consecutive sentencing does not give rise to a separate offense, but rather is, for all practical and legal purposes, "linked to," or "considered one with," or interconnected with, underlying "offenses," and thus constitutes an irreducible *aspect* of sentencing for multiple "offenses" in specified circumstances-- that the punishment for one or more of these "offenses" will be postponed in order to lengthen the punishment. Therefore, in accordance with our court rules, the trial court must disclose its consecutive-sentencing authority in order to ensure, as in *Brown*, that the defendant accurately understands his "true potential maximum sentence." *Id*. at 694.[11]

[11] Because we conclude that MCR 6.302(B)(2) requires trial courts to advise defendants of

IV. CONCLUSION

We conclude that MCR 6.302(B)(2) requires the trial court, in cases in which such advice is relevant, to advise a defendant of its discretionary consecutive-sentencing authority and the possible consequences of that authority for the defendant's sentence. This is because such authority clearly affects the defendant's "maximum possible prison sentence for the offense." As a result, the trial court here erred when it denied defendant's motion to withdraw his plea because the court failed to apprise defendant of this authority and its possible consequences for his sentence. We therefore reverse the judgment of the Court of Appeals and remand to the trial court to allow defendant the opportunity to either withdraw his guilty plea or to reaffirm this plea.

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the court's discretionary consecutive-sentencing authority and the reasonable implications of that authority, we do not address defendant's "due process" argument. See *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001) (noting that the Court generally will not address constitutional issues if it is unnecessary to resolve a case).

S T A T E O F M I C H I G A N

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

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Defendant-Appellant.

ZAHRA, J. (*dissenting*).

MCR 6.302(B) requires trial courts to advise a defendant of "the name of the offense to which the defendant is pleading," MCR 6.302(B)(1), and "the maximum possible prison sentence for the offense," MCR 6.302(B)(2). If, as in this case, a defendant pleads guilty or no contest to more than one offense, MCR 6.302(B) requires only that trial courts advise defendants of "the name[s] of the offense[s] to which the defendant is pleading" and "the maximum possible prison sentence[s] for the offense[s]." The majority holds that MCR 6.302(B) requires, in cases involving potential consecutive sentences, that trial courts "advise a defendant of its discretionary consecutive-sentencing authority and the possible consequences of that authority for the defendant's sentence." The construction embraced by the majority opinion is overly broad and imposes on trial courts a requirement I do not find in MCR 6.302(B). The language of MCR 6.302(B) simply does not require trial courts

to calculate a defendant's potential aggregate maximum possible prison sentence[1] resulting from the imposition of consecutive sentences. Further, this Court has at least twice previously declined to amend the court rules to expressly provide that trial courts advise defendants of a possible aggregate maximum sentence resulting from the imposition of consecutive sentences. Because I do not agree with the majority's decision to read into MCR 2.306(B) that which this Court has twice declined to expressly add to our court rules, I must respectfully dissent.[2] I would affirm the lower courts.

I. BASIC FACTS AND PROCEEDINGS

In late 2014, defendant was caught operating a motor vehicle while intoxicated. Six months later, while free on bond awaiting trial, he was again caught operating a motor vehicle while intoxicated. In each case, the prosecution charged defendant with operating a vehicle while intoxicated, third offense,[3] in addition to attendant misdemeanors related to the offense, and provided defendant notice that he was subject to sentence enhancement

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[1] An "aggregate sentence" is defined as "[t]he total sentence imposed for multiple convictions, reflecting appropriate calculations for consecutive as opposed to cumulative periods, reductions for time already served, and statutory limitations." *Black's Law Dictionary* (11th ed).

[2] Because I conclude that MCR 6.302(B) provides no relief to defendant, I must also address defendant's constitutional argument: whether his due-process rights were violated by the trial court's failure to inform him of the possibility of consecutive sentences. For reasons fully developed in this dissenting opinion, I conclude that defendant's due-process rights were not violated by the trial court's failure to inform defendant of the possibility he could be sentenced consecutively under MCL 768.7b.

[3] MCL 257.625.

as a fourth-offense habitual offender.[4] Defendant's prior criminal record is extensive, including nine felony convictions and eleven misdemeanor convictions.

Defendant agreed to plead guilty to both drunk-driving charges in exchange for the dismissal of the remaining charges and the habitual-offender enhancement. At defendant's plea hearing, the trial court informed him of the maximum sentence for each drunk-driving offense (five years). Specifically, the court stated that "each of the charges carries with it, absent the habitual, . . . a five year maximum charge; is that correct, folks?" Both the prosecution and counsel for defendant agreed. After determining that defendant was voluntarily pleading guilty to the offenses, the court elicited from defendant a factual basis for the 2014 offense and accepted defendant's plea to that offense. The court then elicited a factual basis for the 2015 offense and accepted defendant's plea to that offense.

Before defendant's sentencing hearing, the probation department prepared a presentence investigation report (PSIR). In it, the probation department informed the trial court that it had the discretionary authority to impose consecutive sentences because defendant committed the second offense while on bond for the first.[5] The PSIR provided the probation agent's "Description of the Offense" in which each offense was separately delineated. Within the PSIR, the agent included a "Sentencing Information Report" (SIR) for each offense and assessed defendant's prior record variables and offense variables for each offense. Each SIR scored defendant's sentencing guidelines, and each recommended a minimum sentence of 12 to 24 months' imprisonment. The PSIR recommended that

[4] MCL 769.12(1)(b).

[5] See MCL 768.7b.

"defendant be sentenced to the Michigan Department of Corrections for a period of 24 months to 60 months for both Dockets, to run consecutively, with credit for 3 days served."

Following the probation department's recommendation, the trial court exercised its discretion and imposed consecutive sentences of 24 to 60 months' imprisonment, citing defendant's lengthy criminal history, the fact that the offense committed on bond was the very same offense for which bond had been granted, and his proclivity for alcohol-related offenses as documented in his PSIR.

Several months later, with the assistance of new counsel, defendant moved to withdraw his plea, arguing that the plea-taking process was constitutionally defective because he had not been specifically advised that the trial court had the discretionary authority to impose consecutive sentences. The trial court denied the motion, and the Court of Appeals denied the ensuing application for leave to appeal for lack of merit in the grounds presented.[6]

Defendant appealed in this Court, and in lieu of granting leave to appeal, we remanded the case for consideration as on leave granted.[7] The Court of Appeals, in a split decision, rejected defendant's claim that the trial court had a duty to inform him of the possibility of consecutive sentencing before accepting his plea.[8] Defendant again applied

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[6] *People v Warren*, unpublished order of the Michigan Court of Appeals, entered November 1, 2016 (Docket No. 333997).

[7] *People v Warren*, 500 Mich 1056 (2017).

[8] *People v Warren*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2018 (Docket No. 333997), unpub op at 1. The majority held that the plain language of MCR 6.302 did not require advice about the possibility of discretionary consecutive sentencing. The majority also concluded that due process did not require the trial court to

for leave to appeal in this Court, and we ordered oral argument on the application, directing the parties to file supplemental briefs addressing whether, when a defendant's plea of guilty or no contest will subject him to the court's discretion to impose consecutive sentences, the court must advise the defendant of that possibility before the court may accept the plea.[9]

II. APPLICABLE STANDARDS OF REVIEW

The interpretation of court rules presents a question of law that we review de novo.[10] Questions of constitutional law involving waiving constitutional rights by entering a guilty plea are reviewed de novo.[11] Violations of the Michigan Rules of Court are nonconstitutional errors, and violations of due-process rights are constitutional errors, but when unpreserved, both are subject to plain-error review.[12]

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advise defendant that it had discretion to impose consecutive sentences because it was not a "direct consequence" of pleading guilty. *Id*. at 5. Judge GLEICHER dissented, contending that both MCR 6.302(B) and due process required trial courts to inform defendants about the possibility of consecutive sentences because, like habitual-offender enhancements, consecutive sentences affect a defendant's "true potential maximum sentence." *Id*. at 3 (GLEICHER, J., dissenting) (quotation marks and citation omitted).

[9] *People v Warren*, 503 Mich 988 (2019).

[10] *People v Lee*, 489 Mich 289, 295; 803 NW2d 165 (2011).

[11] *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

[12] *People v Carines*, 460 Mich 750, 767; 597 NW2d 130 (1999).

III. ANALYSIS

A. THE PLAIN LANGUAGE OF MCR 6.302(B) DOES NOT CONTEMPLATE CONSECUTIVE SENTENCES

MCR 6.302(B) concerns an "An Understanding Plea," and it requires the trial court to "advise the defendant or defendants of the following and determine that each defendant understands:"

> (1) the name of the offense to which the defendant is pleading; the court is not obliged to explain the elements of the offense, or possible defenses;
>
> (2) the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c.

MCR 6.302(B)(2) refers not just to any "maximum possible prison sentence," but to "the maximum possible prison sentence for *the offense*." Reading (B)(1) and (B)(2) together, the court must advise a defendant as to the name of each discrete offense to which a defendant is pleading, as well as to each discrete corresponding maximum possible prison sentence. There is nothing in the court rule suggesting that "sentence" should be read as "aggregate sentence."[13] The plain language of MCR 6.302(B) simply does not require a trial court to advise a defendant at the plea hearing of the maximum possible *aggregate* prison sentence for the offenses to which the defendant is pleading. Therefore, it cannot be said, as the majority claims, that the phrase "maximum possible prison sentence for the offense" within MCR 6.302(B)(2) is "additionally and materially affected by the possibility of consecutive sentencing . . . ." Of course the trial court, within its discretion, may offer

[13] See note 1 of this opinion. If this Court had wanted to use the term "aggregate sentence" to clarify that a defendant must be informed of the maximum possible total sentence for multiple convictions, it could have done so.

an opinion about a maximum possible aggregate prison sentence to assist *the parties* in facilitating a plea agreement, see, e.g., *People v Cobbs*,[14] but neither our caselaw nor our court rules currently require the trial court to provide *defendant* with such assistance.

I agree with the majority that "Michigan caselaw has not resolved the determinative question in this case: whether MCR 6.302(B)(2) requires courts to inform defendants of discretionary consecutive-sentencing authority before accepting a guilty or no-contest plea."[15] Nonetheless, there is persuasive federal authority interpreting the analogous federal rule, which is broader in scope than the Michigan rule.[16] Specifically, FR Crim P 11(b)(1)(H) requires a defendant pleading guilty to be informed of "any maximum possible

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[14] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

[15] As the majority points out, *People v Johnson*, 413 Mich 487, 490; 320 NW2d 876 (1982), stated that the former court rule did not require trial courts to inform a defendant of "other potential sentence consequences such as consecutive sentencing." I recognize, however, that this statement is dicta. Further, in my view, *Johnson* is distinguishable because it did not address a defendant's "maximum possible prison sentence" for any particular offense, but only a lack of parole eligibility for that offense. Parole eligibility does not relate to a "maximum possible prison sentence"; indeed, a paroled prisoner has necessarily not served a "maximum possible prison sentence." I also agree with the majority that *People v Blanton*, 317 Mich App 107, 119; 894 NW2d 613 (2016), "relied upon the 'mandatory minimum sentence' language of MCR 6.302(B)(2) and not the 'maximum possible prison sentence' language of the rule" and is thus not on point.

[16] Though not binding, federal precedent may be persuasive when interpreting analogous text. See, e.g., *Tobin v Mich Civil Serv Comm*, 416 Mich 661, 671; 331 NW2d 184 (1982) (reasoning that the Michigan Freedom of Information Act, MCL 15.231 *et seq*., was patterned after the federal law and, thus, "decisions under the federal law are often instructive and, in this instance, persuasive"); *Gumma v D & T Constr Co*, 235 Mich App 210, 223-224; 597 NW2d 207 (1999) (noting that, because the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*., and its federal counterpart are similar, "it is appropriate to examine federal case law interpreting similar issues").

penalty." In *United States v General*,[17] the United States Court of Appeals for the Fourth Circuit held, "Rule 11 . . . does not require a district court to inform the defendant of mandatory consecutive sentencing." Other federal cases have concluded the same.[18]

The majority supports its construction of MCR 6.302(B)(2) with an interpretive court rule commonly known as the "number canon" of construction, which provides that "[w]ords used in the singular also apply to the plural, where appropriate."[19] This principle is also codified in Michigan law[20] and has common-law roots.[21] But this canon of construction does not alter my understanding of this court rule.

Applying the number canon to MCR 6.302(B), the rule would read:

> (1) the name[s] of the offense[s] to which the defendant is pleading; the court is not obliged to explain the elements of the offense[s], or possible defenses;
>
> (2) the maximum possible prison sentence[s] for the offense[s] and any mandatory minimum sentence[s] required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c[.]

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[17] *United States v General*, 278 F3d 389, 395 (CA 4, 2002).

[18] See *United States v Henry*, 702 F3d 377, 381 (CA 7, 2012) ("[Th]e district court was not required to advise Henry that his federal sentence might be imposed to run consecutive to his undischarged state sentence."); *United States v Ospina*, 18 F3d 1332, 1334 (CA 6, 1994) ("[T]here is no requirement in [FR Crim P 11] that the court explicitly admonish a defendant that a sentence may be imposed consecutively.").

[19] MCR 1.107. The majority refers to this rule as the "singular/plural canon."

[20] MCL 8.3b.

[21] See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), pp 129-130.

Consistent application of the number canon supports the conclusion that the trial court is not required to inform defendant of the possibility of consecutive sentences. Here, defendant pleaded guilty to two offenses and, consistent with the number canon, was advised of the maximum possible prison sentences for each of those two offenses. But the majority does not apply the number canon in a consistent manner throughout the court rule. Rather, the majority reaches its conclusion by using the number canon to make plural every term that is shown in brackets above, *except* the word "sentence" in the phrase "the maximum possible prison sentence." But the number canon should apply to each noun in MCR 6.302(B). As stated, the canon dictates that singular nouns may be made plural "where appropriate,"[22] and I see no textual reason why it is inappropriate to read "sentence" as "sentences" when applying the canon to read "offense" as "offenses." Instead of using "common sense and everyday linguistic experience"[23] to apply the number canon, the majority's usage drastically changes the meaning of the very object it purports to interpret. This application of the number canon introduces an entirely new concept—"the maximum possible [aggregate] prison sentence"—in order to advance a policy goal.

The majority attempts to justify its application of the number canon on the basis that

> a defendant must not only understand the maximum possible "sentence" for each separate offense, but also that for the range of "offenses" of which he or she has been convicted, some of which may be viewed by the law as interconnected in a way that carries independent sentencing consequences. Then, and only then, can a defendant fully apprehend the true *maximum term of incarceration* that he or she faces . . . .

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[22] MCR 1.107.

[23] *Reading Law*, p 130.

This may well be a laudable aim, but it is not a ground upon which to base the application of a canon of construction.

The majority opinion also states:

> Even, however, if we read "sentence" in the plural as the dissent would have us do, we reach the same conclusion. That is, if a defendant must be apprised of the "maximum possible prison *sentences* for the *offenses*," the trial court would still be required to inform the defendant of the court's discretionary consecutive-sentencing authority because where "sentences" are imposed, and indeed only where "sentences" are imposed, the possibility of a consecutive sentence becomes a possibility affecting the defendant's "maximum possible prison sentence" on such multiple "sentences." And thus to ensure the defendant's full understanding of the plea, he or she must be apprised of the court's discretionary consecutive-sentencing authority.

But this alternative construction of MCR 6.302 imposes on trial courts an obligation that is not expressed in the court rule: the extrapolation of a maximum possible aggregate prison sentence when a defendant pleads guilty or no contest to multiple offenses. Further, in positing its alternative analysis, the majority fails to consider the entire context of MCR 6.302(B). The phrase—as construed using the number canon—"maximum possible prison sentence[s] for the offense[s]" within MCR 6.302(B)(2) does not stand alone and, in context, must be considered along with MCR 6.302(B)(1), which, when likewise construed using the number canon, speaks to "name[s] of the offense[s]." As stated, just as Subsection (1) requires a trial court to inform a defendant of each name of each offense, so Subsection (2) requires a trial court to inform a defendant of each maximum possible sentence, not the maximum possible aggregate sentence.

I will not dispute the notion that information in regard to consecutive sentences is "critical to a pleading individual" and "integral to a fully understanding plea." Nor do I dismiss the majority's assertion that a "defendant's [consecutive] sentences are neither

viewed nor imposed in isolation, and for the defendant personally, understanding fully the consequences and implications of a plea is not some academic exercise but an intensely practical and life-altering exercise by which he or she might reasonably compare the wisdom of a guilty or no-contest plea with the merits of proceeding to trial." These concerns may justify amending the court rules to require a trial court to advise a defendant under MCR 6.302(B) of:

> (2) the maximum possible prison sentence for the offense[, including, if applicable, whether the law permits or requires consecutive sentences,] and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c.

But the current language of MCR 6.302(B) does not require that a trial court advise a defendant of the possibility that the sentence for the offense may be imposed consecutively to another sentence. Defendant's supplemental brief and the amicus briefs presented on defendant's behalf all but concede the point. Defendant's supplemental brief does not rely on the actual text of MCR 6.302(B) to support his interpretation. Rather, he only argues under caselaw that he was "not advised of [the] 'true sentence' he could receive."[24] The amicus brief of the Criminal Defense Attorneys of Michigan admits that "the Michigan Rules of Court do not require a warning on consecutive sentencing during the plea hearing . . . ." Our Attorney General has taken the very unusual position of filing an amicus brief against the position of her office. In so doing, she does not argue that MCR

[24] In support of this argument, defendant cites *People v Brown*, 492 Mich 684, 702; 822 NW2d 208 (2012). The majority opinion does not embrace defendant's position, concluding instead that "[o]ur interpretation of MCR 6.302(B)(2) is . . . consistent with this Court's decision in *Brown*[.]"

6.302(B) requires a trial court to extrapolate the maximum possible sentence that can be imposed when a defendant pleads guilty or no contest to multiple offenses. Instead she argues that due process requires us to amend our court rule.

Last, the language mentioned above as a suggestion to amending MCR 6.302(B) is the exact language that this Court declined to adopt in 1985.[25] As the prosecution highlights, this Court has twice before considered amending the court rules to expressly provide that trial courts advise defendants of the possible effect on the maximum aggregate sentence resulting from the imposition of consecutive sentences, but the Court has declined to do so. First, in the early 1970s this Court created the Supreme Court Guilty Plea Standards Committee.[26] The Court offered Suggested Guilty Plea Taking Guidelines as a starting point for the committee's work and suggested that the new rule require trial courts to "personally inform defendant of the maximum sentence prescribed by law and, if there is a mandatory minimum sentence, the minimum sentence prescribed by law . . . [.]"[27] Yet, in a footnote attached to that suggested rule, this Court drew the committee's attention to Section 1.4(c)(i) of the American Bar Association (ABA) Standards Relating to Pleas of Guilty, which provided that the trial court must inform the defendant "of the maximum possible sentence on the charge *including that possible from consecutive sentences*[.]"[28]

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[25] Proposed Rules of Criminal Procedure, 422A Mich 1, 113 (1985).

[26] *People v Williams*, 386 Mich 277, 293-295; 192 NW2d 466 (1971).

[27] *Id*. at 303.

[28] *Id*. at 303 n 9 (emphasis added).

Several months later, the committee proposed a rule that required the trial court to inform the defendant of "the maximum sentence and the mandatory minimum sentence, if any, for the offense to which the plea is offered[.]"[29] Missing from the committee's proposal was the ABA's consecutive-sentence language that the Court highlighted for the committee. The Court adopted the committee's proposed rule without change.[30]

Then, on November 4, 1981, the Court issued a proposed amendment to the court rules that would require that trial courts inform defendants of "the maximum possible prison sentence for the offense, including that possible from consecutive sentences[.]"[31] This Court never adopted the proposed additional language.

In addition, as highlighted by amicus Prosecuting Attorneys Association of Michigan, a Criminal Procedure Rules Committee submitted Proposed Rules of Criminal Procedure on August 5, 1985, which were published for comment by the Court.[32] The version of MCR 6.302(A)(2) drafted by the committee required that when taking a plea the trial court inform the defendant of "the mandatory minimum penalty, if any, and the maximum possible penalty for the offense, *including, if applicable, whether the law permits or requires consecutive sentences or precludes probation or parole*."[33] The Court,

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[29] *In the Matter of the Amendment of GCR 1963, 785*, unpublished order of the Michigan Supreme Court, entered May 15, 1972, p 3 (publishing proposal for public comment).

[30] GCR 1963, 785, 389 Mich *lv* (promulgating revised court rule).

[31] Proposed amendment to GCR 1963, 785, unpublished order of the Michigan Supreme Court, entered November 4, 1981, p 1.

[32] 422A Mich at 115.

[33] *Id*. (emphasis added).

however, in adopting and modifying the committee proposals, removed the provision that a defendant pleading guilty be advised of the consecutive-sentence ramifications of the plea.[34] While the crux of my analysis is based on the text of the court rule, that these amendments were proposed and rejected provides further indication that the common understanding of the court rule was that it did not require defendants to be notified of the possibility of consecutive sentencing.

B. DUE PROCESS DOES NOT REQUIRE THAT TRIAL COURTS INFORM DEFENDANTS OF POTENTIAL CONSECUTIVE SENTENCES

Both the Michigan Constitution and the United States Constitution preclude the government from depriving a person of life, liberty, or property without due process of law.[35] Due process requires that a criminal defendant pleading guilty do so (1) competently, (2) voluntarily, (3) knowingly, and (4) with the benefit of effective assistance

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[34] Perhaps one reason the Court declined to adopt these amendments is because it may be difficult, as a practical matter, for the trial court to know at the time of the plea hearing that a statute allowing for consecutive sentencing applies to the defendant. As the prosecution explained in its brief, in some situations, such as if a second offense occurs in another county, the trial court may not be aware that consecutive sentencing is a possibility at the time the defendant pleads guilty. The growing number of statutes allowing for consecutive sentences only makes it more difficult for a trial court to know at the plea hearing whether such a statute applies. Yantus, *Sentence Creep: Increasing Penalties in Michigan and the Need for Sentencing Reform*, 47 U Mich J L Reform 645, 681 (2014) ("Before 1990, there were thirteen consecutive sentencing statutes in Michigan. From 1990 to 2013, the Legislature added twenty-nine new consecutive sentencing provisions."). Nevertheless, as stated, I am open to considering amending the court rules to require that defendants be informed of the possibility of consecutive sentences, but I believe that the administrative process would be a better avenue through which to flesh out these kinds of practical concerns.

[35] US Const, Am XIV; Const 1963, art 1, § 17.

of counsel.[36] This Court has previously acknowledged that "the requirements of constitutional due process . . . might not be entirely satisfied by compliance with subrules (B) through (D) [of MCR 6.302]."[37]

Here, only the third constitutional requirement is at issue. To satisfy this requirement, a defendant must have sufficient information to ensure that his or her decision is an "intelligent choice among the alternative courses of action open to the defendant."[38] The defendant must also have some understanding of the option he or she is choosing. That is, the defendant must be aware of "the true nature of the charge" against him or her[39] as well as "the direct consequences" of entering a guilty plea.[40]

Defendant first argues that the "possibility of consecutive sentencing violates Due Process because consecutive sentencing is 'part of the sentence itself,' and would be a 'direct' rather than 'collateral' consequence." Defendant relies on this Court's decision in *People v Cole*,[41] which considered whether constitutional due process requires a trial court to inform a defendant pleading guilty or no contest to first-degree criminal sexual conduct

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[36] See, e.g., *Kercheval v United States*, 274 US 220, 223; 47 S Ct 582; 71 L Ed 1009 (1927).

[37] *People v Cole*, 491 Mich 325, 332; 817 NW2d 497 (2012).

[38] *North Carolina v Alford*, 400 US 25, 31; 91 S Ct 160; 27 L Ed 2d 162 (1970).

[39] *Smith v O'Grady*, 312 US 329, 334; 61 S Ct 572; 85 L Ed 859 (1941).

[40] *Brady v United States*, 397 US 742, 755; 90 S Ct 146; 325 L Ed 2d 747 (1970) (quotation marks and citation omitted).

[41] *Cole*, 491 Mich 325.

(CSC-I)[42] or second-degree criminal sexual conduct (CSC-II)[43] that he or she will be sentenced to mandatory lifetime electronic monitoring (LEM).[44] When *Cole* was decided, MCR 6.302(B) did not explicitly mandate that the trial court notify a defendant that he or she would be subject to mandatory LEM under MCL 750.520c(2)(b).[45] Central to *Cole*'s conclusion that due process required the trial court to inform a defendant of the LEM requirement is that the "Legislature chose to include the mandatory [LEM] requirement in the penalty sections of the CSC-I and CSC-II statutes, and that both statutes can be found in the Michigan Penal Code, which describes criminal offenses and prescribes penalties."[46] Further, the *Cole* Court noted that "both [LEM] provisions provide that 'the court *shall sentence* the defendant to [LEM] . . . .' " Last, the *Cole* Court observed that the CSC-II statute provides that the sentence of [LEM] is "[i]n addition to the penalty specified in subdivision (a)," MCL 750.520c(2)(b), and the CSC-I statute provides similarly that LEM is "[i]n addition to any other penalty imposed under subdivision (a) or (b)," MCL 520b(2)(d).[47] The *Cole* Court concluded that "the Legislature intended mandatory [LEM]

[42] MCL 750.520b(2)(d).

[43] MCL 750.520c(2)(b).

[44] *Cole*, 491 Mich at 327.

[45] See *id*. at 330 n 4.

[46] *Id*. at 335.

[47] *Id*. at 335-336.

to be an additional punishment and part of the sentence itself when required by the CSC-I or CSC-II statutes."[48]

Cole is simply inapplicable to the instant case because the provision allowing for the imposition of a consecutive sentence, MCL 768.7b, is not part of the sentence itself. Unlike the provision at issue in *Cole*, MCL 768.7b is not found in the statute setting forth the crimes and the applicable penalty, MCL 257.625, but is found in the Code of Criminal Procedure. Further, and more substantively, MCL 768.7b is not potential punishment that relates to the offenses to which a defendant pleads guilty. MCL 768.7b is offense-neutral, and it broadly applies "if a person who has been charged with a felony, pending the disposition of the charge, commits a subsequent offense that is a felony." In other words, MCL 768.7b does not authorize additional punishment for conduct that gave rise to offenses; it only authorizes punishment because a defendant brazenly committed a second felony in the relatively short period of time during which a previous felony charge against that defendant was pending. In contrast, the LEM requirement considered in *Cole* was clearly intended by the Legislature to punish the defendant for the very offense to which he pleaded guilty. In this sense, a potential consecutive sentence under MCL 768.7b is a "collateral" consequence of pleading guilty to the offenses.

With that said, I will not dispute that the imposition of consecutive sentences is "a particularly severe 'penalty.' "[49] But due process does not require that trial courts advise

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[48] *Id*. at 336.

[49] *Padilla v Kentucky*, 559 US 356, 365; 130 S Ct 147; 3176 L Ed 2d 28 (2010) (citation omitted).

defendants in regard to all severe penalties.[50] Rather, this advisory responsibility lies primarily with defense counsel, whose effective assistance is guaranteed to all criminal defendants by the United States and Michigan Constitutions.[51]

Defendant next argues that consecutive sentencing is a direct consequence because the Legislature intended to impose punishment. Again, I will not dispute that the imposition of consecutive sentences is "a particularly severe 'penalty.' "[52] Nor will I dispute that the general purpose of consecutive sentencing is to "enhance the punishment imposed upon those who have been found guilty of more serious crimes and who repeatedly engage in criminal acts."[53] More specific to this case, I agree with defendant that

> [t]he intended effect of § 7b can best be seen by analyzing the deterrence situation that exists before and after a felony has been charged. In general, once a criminal defendant has been charged with a felony, the level of deterrence against his commission of a second felony drops. Section 7b restores the level of deterrence to its pre-charge plateau.[54]

The fact nonetheless remains that consecutive sentencing was merely a possibility at the plea hearing. The discretionary authority to impose consecutive sentences does not

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[50] *Id*.

[51] 5 LaFave, Criminal Procedure (4th ed), § 21.4(d) (noting that a common thread among the cases rejecting due-process challenges "is that defense counsel should be expected to discuss with his client the range of risks attendant his plea").

[52] *Padilla*, 559 US at 365 (citation omitted).

[53] *People v Smith*, 423 Mich 427, 445; 378 NW2d 384 (1995).

[54] *People v Williams*, 89 Mich App 633, 637; 280 NW2d 617 (1979).

represent a definite, immediate, or automatic effect because it depends on the trial court's later exercise of discretion.[55] Only after the court considers the PSIR and the particular circumstances of a defendant's personal and criminal history can the court fashion an individualized sentence that, in the court's discretion, may merit consecutive sentences.

This is not an unusual practice. Many of the decisions a trial court makes following a defendant's entry of a guilty plea have a substantial influence on a defendant's ultimate sentence. For instance, a court's sentencing guidelines scoring decisions later inform a defendant's ultimate sentence. Likewise, the trial court may exercise discretion by sentencing a defendant within or perhaps outside the sentencing guidelines. In my view, the possibility of consecutive sentences pursuant to MCL 768.7b is a "collateral" consequence of defendant's guilty pleas, not a "direct result" of the guilty pleas, because the trial court had discretion whether to impose consecutive sentences.

IV. CONCLUSION

The plain language of MCR 6.302(B) does not support the conclusion that trial courts must advise criminal defendants that sentences may potentially be imposed consecutively to one another. Further, I disagree with the majority's decision to add by judicial construction that which this Court has repeatedly declined to add in drafting MCR

[55] A solid majority of federal circuit courts agrees. See, e.g., *United States v Ocasio-Cancel*, 727 F3d 85, 90 (CA 1, 2013); *Wilson v McGinnis*, 413 F3d 196, 200 (CA 2, 2005); *Paradiso v United States*, 482 F2d 409, 415 (CA 3, 1973); *United States v Fentress*, 792 F2d 461, 465 (CA 4, 1986); *United States v Saldana*, 505 F2d 628, 629 (CA 5, 1974); *United States v Gaskin*, 587 F Appx 290, 297-298 (CA 6, 2014); *Faulisi v Daggett*, 527 F2d 305, 309 (CA 7, 1975); *Clemmons v United States*, 721 F2d 235, 238 (CA 8, 1983); *United States v Rubalcaba*, 811 F2d 491, 494 (CA 9, 1987); *United States v Hurlich*, 293 F3d 1223, 1231 (CA 10, 2002); *United States v Humphrey*, 164 F3d 585, 587-588 (CA 11, 1999).

6.302(B). Lastly, the possibility of consecutive sentences pursuant to MCL 768.7b is a "collateral" consequence of defendant's guilty pleas, not a "direct result" of the guilty pleas, because the trial court had discretion whether to impose consecutive sentences. Accordingly, due process did not require that the trial court inform defendant that he was subject to consecutive sentencing. I respectfully dissent.

Brian K. Zahra
David F. Viviano