STATE OF MICHIGAN

IN THE LENAWEE COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff,

-vs-

JAMES MATTHEW WHORTON

Defendant.
_____/

Court of Appeals No.

Circuit Court No. 11-15285 FH

Honorable Margaret M. S. Noe

MOTION TO WITHDRAW GUILTY PLEA

NOW COMES Defendant **JAMES MATTHEW WHORTON**, by and through his attorney, the **STATE APPELLATE DEFENDER OFFICE**, by **ANNE YANTUS (P 39445)**, and in support of his motion for plea withdrawal says as follows:

1. Defendant James Whorton pled guilty to assault on a prison employee, MCL 750.197c, on April 27, 2011 in the Lenawee County Circuit Court.

2. On September 14, 2011, the Honorable Maragaret M. S. Noe sentenced Mr. Whorton to a term of 24 to 60 months imprisonment, to be served consecutively to "any cases currently being served." *Judgment of Sentence*, Appendix A.

3. The State Appellate Defender Office was appointed to perfect an appeal and/or pursue post-conviction remedies on November 1, 2011.

3. This motion is properly filed within six months of the sentencing date. MCR 6.310(C).

5. Mr. Whorton entered an involuntary guilty plea in violation of the state and federal due process clauses where the Court did not advise him of the requirement of mandatory consecutive

sentencing at the time of the plea hearing. US Const Amends V & XIV; Const 1963, art 1, § 17. *See Supporting Brief.*

WHEREFORE, Defendant respectfully requests that this Honorable Court allow him to withdraw his plea of guilty.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

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Date: March 9, 2012

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Honorable Margaret M. S. Noe

LENAWEE COUNTY PROSECUTOR

Attorney for Plaintiff
_____

ANNE YANTUS (P 39445)
Attorney for Defendant
_____

BRIEF IN SUPPORT OF MOTION TO WITHDRAW GUILTY PLEA

STATE APPELLATE DEFENDER OFFICE

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STATEMENT OF FACTS

Defendant James Matthew Whorton pled guilty to assault on a prison employee, MCL 750.197c, on April 27, 2011 in the Lenawee County Circuit Court. On September 14, 2011, the Honorable Margaret Noe sentenced Mr. Whorton to a term of two to five years imprisonment, with zero days jail credit. The sentence was ordered to run consecutively to the sentences Mr. Whorton was already serving.

The plea bargain provided for dismissal of the fourth habitual offender notice and Mr. Whorton's agreement to pay restitution, if applicable, for two other charges of assaulting a prison employee that were to be dismissed as part of the plea bargain (4/27/11 T 6, 10-11).

In support of the guilty plea, Mr. Whorton admitted throwing urine on a prison guard (4/27/11 T 13-14). According to the presentence report, he threw a "bowl of watered-down fecal matter through his door slot" at an officer (PSI 2).

At sentencing, defense counsel asked if the sentence could run concurrently with prior sentences, but the Court and probation officer responded that the sentence was "mandatorily consecutive" to previous sentences (9/14/11 T 10).

I. MR. WHORTON IS ENTITLED TO PLEA WITHDRAWAL WHERE THE PLEA WAS NOT VOLUNTARILY MADE WITH A FULL UNDERSTANDING OF THE DIRECT CONSEQUENCE OF CONSECUTIVE SENTENCING, IN VIOLATION OF THE STATE AND FEDERAL DUE PROCESS CLAUSES.

The trial court has discretion to grant a post-sentence motion to withdraw the plea. *People v Ovalle*, 222 Mich App 463, 465; 564 NW2d 167 (1997). This motion is properly filed within six months of the sentencing date. MCR 6.310(C).

The Court should grant plea withdrawal as no advice was given to Mr. Whorton regarding consecutive sentencing at the time of the plea hearing, and defense counsel indicated a lack of awareness of the mandatory nature of consecutive sentencing at the time of sentencing. For these reasons, and because consecutive sentencing should be considered a *direct* consequence of the plea, Mr. Whorton's guilty plea was involuntarily entered as he did not have a full understanding of the sentencing consequences of pleading guilty to the instant offense.

A guilty plea is voluntary only if the defendant understands the direct consequences of the plea. *Brady v United States*, 397 US 742, 755; 90 S Ct 1463; 25 L Ed 2d 747 (1970). An involuntary plea violates the state and federal due process clauses. *McCarthy v United States*, 394 US 459; 89 S Ct 1166; 22 L Ed 2d 418 (1969); *People v Schluter*, 204 Mich App 60, 66; 514 NW2d 489 (1994); US Const Amends V & XIV; Const 1963, art 1, § 17.

While the court rules aid in the determination of voluntariness, due process requires advice on the direct consequences of the plea even when the advice is not required by court rule. "Aside from the requirements of Rule 11 [Fed R Crim Proc 11], a guilty plea must be voluntarily entered with a full understanding of the direct consequences of the law." *United States v Ferguson*, 918 F2d 627, 630 (CA 6, 1990). See also *United States v Littlejohn*, 224 F3d

960, 965 (CA 9, 2000) (due process requires advice on direct consequence of plea in addition to the warnings required by Fed Rule Crim Proc 11).

Consecutive sentencing should be considered a direct consequence of the guilty plea because it is a form of sentence enhancement. 'The enhancement of punishment through consecutive sentencing is a legislative action taken for the ostensible purpose of deterring certain criminal behavior." *People v Morris*, 450 Mich 316, 327; 537 NW2d 842 (1995). "The purpose of consecutive sentencing is to '*enhance* the punishment imposed on those who have been found guilty of more serious crimes and who repeatedly engage in criminal acts.'" *People v Chambers*, 430 Mich 217, 229; 421 NW2d 903 (1988), quoting *People v Smith*, 423 Mich 427, 445; 378 NW2d 384 (1995) (emphasis supplied by *Chambers* decision).

"The right to know the possible sentence one faces encompasses the right to know that the circuit court may order multiple sentences to run concurrently or consecutively." *Hatfield v State*, 29 So 3d 241, 243 (Ala App, 2009). "Such an understanding [of the maximum penalty for the crime] should include information as to whether defendant is eligible for consecutive or concurrent sentences." *State v Ricks*, 53 Oh App 244, 246-247; 372 NE2d 1369 (1978). "[T]he possibility of a consecutive sentence is a direct consequence of which a defendant must be informed before a guilty plea is accepted." *State v Shook*, 144 Idaho 858, 861; 172 P3d 1133 (Idaho App, 2007). Failure to advise a defendant of consecutive sentencing renders the plea involuntary. *Taylor v State*, 846 So2d 1111, 1113 (Ala App, 2022). *See also, People v Peters*, 738 P2d 395 (Colo App, 1987) (relying on ABA standards, finding trial court must give advice on consecutive sentencing for plea to be voluntary); *West v State*, 480 NE2d 221 (Ind, 1985) (recognizing Indiana court rules require advice on consecutive sentencing); IL CS S Ct Rule 402(a)(2) (Illinois court rule requires advice on the "maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of

prior convictions or consecutive sentences."); Ga Uniform Superior Court Rule 33.8(C)(3) (Georgia court rule requires advice on "the maximum possible sentence on the charge, including that possible from consecutive sentences and enhanced sentences where provided by law. . . .")

For several years, the Michigan Court of Appeals was split on whether the trial court must give advice on consecutive sentencing at the time of the plea hearing, with one decision noting that "it is a better practice for the trial judge to advise the defendant of all the consequences of his plea, including, where applicable, the consecutive nature of the sentences to be imposed." *People v Woeltje*, 112 Mich App 699, 703; 317 NW2d 230 (1982).

In 1982, the Michigan Supreme Court concluded: "GCR 1963, 785.7 does not require advice as to the consequences of Proposal B. *Nor does the rule presently require advice as to other potential sentence consequences such as consecutive sentencing.* Since that is the case, the trial judge can scarcely be found to have failed to comply with GCR 1963, 785." *People v Johnson*, 413 Mich 487, 490; 320 NW2d 876 (1982) (emphasis added).

The *Johnson* decision does not control this Court's decision for two reasons. First, the statement regarding consecutive sentencing was dicta. The question posed in *Johnson* was whether the trial court was obligated to advise on the effects of Proposal B, not whether there was error in failing to advise of consecutive sentencing. "Obiter dicta, or "dicta," are not binding precedent. Rather, they are statements that are not essential to determination of the case at hand and, therefore, 'lack the force of an adjudication.'" *People v Lown*, 488 Mich 242, 267 n 46; 794 NW2d 9 (2011), quoting *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n. 3; 713 NW2d 750 (2006).[1]

[1] In two decisions that followed *Johnson*, the Court of Appeals concluded advice on consecutive sentencing was not required by the court rules. *People v Shabazz*, 121 Mich App 320, 322; 328 NW2d 379 (1982); *People v Brooks*, 135 Mich App 193, 194; 353 NW2d 118 (1984). But neither decision is controlling as both were issued before November 1, 1990. MCR 7.215(J)

Second, the *Johnson* Court addressed the requirements of the court rule, but did not address the requirements of due process. Due process requires advice on the direct consequences of the plea even where the advice is not required by court rule. *United States v Ferguson*, 918 F2d at 630; *United States v Littlejohn*, 224 F3d at 965; US Const Amends V & XIV; Const 1963 art 1, § 17.

This Court should conclude that advice on consecutive sentencing is required because the defendant must understand what is undoubtedly relevant information concerning the length of the possible sentence:

> In order for a plea of guilty to be constitutionally valid, it must be "Equally voluntary and knowing . . . it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." (Emphasis added.) *McCarthy v United States*, 394 US 459, 466; 89 S Ct 1166, 1171; 22 L Ed 2d 418 (1969); *Boykin v Alabama*, 395 US 238, 242, 89 S Ct 1709, 23 L Ed 274 (1969); *State v Marra*, 175 Conn 338; 340; 387 A2d 550 (1978); *Consiglio v Warden*, 160 Conn 151, 162; 276 A2d 773 (1970). An understanding of the law in relation to the facts must include all relevant information concerning the sentence. The length of time a defendant may have to spend in prison is clearly crucial to a decision of whether or not to plead guilty. At the time that the defendant entered his plea of guilty, however, there was no discussion of whether the agreed-upon sentence would run consecutively to or concurrently with any outstanding sentence. Therefore, when the defendant responded at the plea hearing that he had been informed of the maximum penalty provided by law for the offense charged, it is clear that he had not, in fact, been fully apprised of the consequences of his plea. He did not know, nor could he have been expected to know, whether federal and state sentences run concurrently or consecutively. The plea was manifestly not intelligently made, and it was a denial of due process to refuse to allow the defendant to withdraw it. [*State v Collins*, 404 A2d 871, 872-873; 176 Conn 7 (Conn, 1978).]

Here, consecutive sentencing was required by law, MCL 768.7a(1), and therefore the present sentence must be added to all previous sentences. *Id.* The Court advised Mr. Whorton that "the maximum penalty for assault of a prison employee is five years," but said nothing about

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(published decision issued before November 1, 1990 is not binding on other panels of Court of

consecutive sentencing (4/27/11 T 7). As consecutive sentencing necessarily enhanced the amount of time Mr. Whorton would serve in prison, he should have been advised of this important aspect of the sentence when pleading guilty.

Failure to provide advice on consecutive sentencing should be considered *per se* reversible error. Under MCR 6.302(B)(2), the trial court "shall" give advice to the defendant of the "maximum possible prison sentence" and "any mandatory minimum sentence" before accepting the guilty plea. Failure to give advice on the maximum possible prison sentence and/or the mandatory minimum sentence is considered reversible error unless the defendant is sentenced pursuant to a sentence bargain. *People v Jones*, 410 Mich 407; 301 NW2d 822 (1981); *People v Jackson*, 417 Mich 243; 334 NW2d 371 (1983).[2]

Appeals).

[2]In *Guilty Plea Cases*, 395 Mich 96, 118-119, 120-125; 235 NW2d 132 (1972), the Supreme Court adopted a "substantial compliance" standard for errors in the plea proceeding, although retaining a rule of automatic reversal for failure to failure to provide advice concerning the *Jaworski* rights [*People v Jaworski*, 387 Mich 21; 194 NW2d 868 (1972)], the presumption of innocence, the mandatory minimum term, the maximum possible sentence, and the consequences to a previous probation or parole term. In *People v Jones, supra*, the Supreme Court re-affirmed the rule that reversal is required for failure to provide advice of the mandatory minimum term and maximum possible sentence. In *People v Jackson, supra*, the Court cut back on *Jones* to the extent that automatic reversal is not required for failure to give advice on the mandatory minimum term and maximum sentence if there is a sentence bargain. Sometime after *Jones* and *Jackson*, the court rule was amended to delete the requirement of advice on the plea's possible effect on a probation or parole term. In 2001, the Supreme Court held that a failure to provide advice on the presumption of innocence does not require reversal. *People v Saffold*, 465 Mich 268; 631 NW2d 320 (2001).

While the *Saffold* opinion contains language that automatic reversal is required only for error in imparting the *Jaworski* rights, it is clear the statement relates only to the relief required when there is a failure related to *trial* rights. In *Guilty Plea Cases*, the Supreme Court separated its discussion of trial rights from sentencing consequences, and in *Saffold* the Court discussed only trial rights. Likewise, the court rule distinguishes between trial rights and direct consequences and allows written waiver of the former but not the latter. MCR 6.302(B)(5). The federal courts have concluded knowledge of the maximum possible sentence and any mandatory minimum term is required for a voluntary plea. See *Jamison v Flem, supra* (involuntary plea where no advice on mandatory minimum term); *King v Dutton, supra* at 154 ("[F]or a defendant's plea of guilty to be voluntary, the defendant must be aware of the maximum sentence that could be imposed.")

Moreover, we cannot assume Mr. Whorton necessarily understood the mandatory nature of consecutive sentencing when his defense counsel indicated a lack of awareness of this very fact at the time of sentencing:

> MR. JAMESON: Your Honor, if I may direct the Court's attention to the sentencing guidelines page, my client might be sentenced accordingly to the concurrent sentence as indicated on the final page of the—as opposed to consecutive. Would he be approved for concurrent sentence, your Honor?
>
> MR. STEVENSON: Your Honor?
>
> THE COURT: I don't think I can do that.
>
> MR. STEVENSON: That should be a consec—it's a mandatory consecutive sentence.
>
> THE COURT: I think it's a mandatorily consecutive, Mr. Jameson.
>
> MR. JAMESON: I'm just going by what the form said there.
>
> THE COURT: I appreciate you pointing out that I should make the record clear on that. Unfortunately, I can't give you—you're asking for that. I don't have the authority to do that. There is no credit for time served. [9/14/11 T 10.]

In addition, what a defendant has learned from previous cases does not excuse the Court from providing the appropriate advice on the record in the instant case. *Guilty Plea Cases*, 395 Mich 96, 122; 235 NW 132 (1975).

For the above reasons, Mr. Whorton is entitled to plea withdrawal.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, Defendant respectfully requests that this Honorable Court allow him to withdraw his plea of guilty.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

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