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December 17, 2021

Larry Royster
Clerk
Michigan Supreme Court
Re: Adm. File 2018-26

Dear Clerk Royster:

The Court proposes to amend MCR 6.502(G)(2) by adding the underlined language below:

> (2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment was filed, or a claim of new evidence that was not discovered before the first such motion was filed, or a claim of a jurisdictional defect in the trial court when the judgment was entered. The clerk shall refer a successive motion to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

The staff comment, which is of course not an authoritative construction by the Court, says that "The proposed amendment of MCR 6.502 would make the rule consistent with the Court's ruling in *People v Washington*, ___Mich___(2021) by allowing a defendant to file a second or subsequent motion for relief from judgment based on a claim of a jurisdictional defect in the trial court when the judgment was entered. Although the Court's analysis in *Washington* related specifically to subject matter jurisdiction, reference to 'jurisdictional defect' is consistent with MCR 6.508(D)."

PAAM objects to the proposed amendment as written. Respectfully, there are two kinds of jurisdiction, personal and subject matter; "the word 'jurisdictional' is generally reserved for prescriptions delineating *the classes of cases a court may entertain (subject-matter jurisdiction)* and the *persons over whom the court may exercise adjudicatory authority (personal jurisdiction)*." *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843, 1848, 204 L. Ed. 2d 116 (2019). The former is waivable/forfeitable, and the latter is not. See e.g. *People v. Lown*, 488 Mich. 242 (2011). Because there exist two senses of the term "jurisdiction," it does not make sense to take a blinkered approach in the rules by failing to specify the sort of jurisdiction meant, which must be subject-matter jurisdiction, given that subject-matter jurisdiction is not subject to waiver and forfeiture as personal jurisdiction is. Rather than causing further litigation by using the ambiguous term "jurisdiction" simply because that term is used in MCR 6.508(D), if this amendment is to be adopted it should specify that which is meant—subject-matter jurisdiction—and rather than conforming the amendment to MCR 6.508(D), MCR 6.508(D) should be

conformed to the amendment by amending *that* rule to specify subject-matter jurisdiction. Nothing but litigation is to be gained by failing to specify that what is meant is the sort of jurisdiction that is *not* subject to waiver and forfeiture. While PAAM believes the Court in *Washington* unfortunately conflated subject-matter jurisdiction with acts of a trial court in excess of jurisdiction, or in violation of an inflexible claim-processing rule, the question in any future case should be whether subject-matter jurisdiction is involved, not personal jurisdiction, which is clearly subject to waiver and forfeiture.

PAAM thus submits that if the amendment is to be adopted it should read "<u>, or a claim that the trial court lacked subject-matter jurisdiction when the judgment was entered</u>," and that MCR 6.508(D)(3) should be amended concomitantly to read "(3) alleges grounds for relief, other than ~~jurisdictional defects~~ <u>a lack of subject-matter jurisdiction when the judgment was entered</u>, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates ...."

We thank the Court for its consideration of our comments.

Sincerely,

Joseph T. Hubbell

Joseph T. Hubbell
Leelanau County Prosecutor
Chair, Prosecuting Attorneys Association of Michigan Amicus and Court Rule Committee