

June 28, 2021

Larry S. Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2018-29 – Proposed Amendments of Rules 6.302 and 6.610 of the Michigan Court Rules

Dear Clerk Royster:

At its June 11, 2021 meeting, the Board of Commissioners of the State Bar of Michigan considered ADM File No. 2018-29. In its review, the Board considered recommendations from the Access to Justice Policy Committee and the Criminal Jurisprudence & Practice Committee. The Board voted to oppose the proposed amendments and adopt the analysis of the Access to Justice Policy Committee, which is enclosed with this letter.

We thank the Court for the opportunity to comment on the proposed amendments.

Sincerely,



Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Robert J. Buchanan, President

Enclosure

Public Policy Position
ADM File No. 2018-29 – Proposed Amendments of
MCR 6.302 and 6.610

Oppose

Explanation

The committee rejects the term “fictional plea” and is unaware of a pervasive problem with negotiated pleas. Prosecutors, defense attorneys, and judges act as safeguards to ensure that when a plea is taken, it is knowingly, freely, and voluntarily made. As such, if a defendant cannot make a factual basis for a plea, the court will not accept that plea and the integrity of the plea process is protected.

The Supreme Court seeks guidance as to the following factors, which the committee answered below:

- (1) the truth-seeking process:** Prosecutors have a duty to constantly review the current state of a case. As any prosecutor can attest, cases change as the investigation deepens: new evidence, including exculpatory evidence is discovered, witnesses refuse to testify or do not appear, or witnesses will recant, changing the fabric of the case. In response, prosecutors are bound by the oath to pursue justice and be flexible in their management of the case—as the evidence changes, so does the prosecutor’s responsibility. This may result in the dismissal of charges, the amendment of charges, or the offering of a plea. Therefore, the truth-seeking process is fluid, and prosecutors must maintain the discretion to offer plea agreements.
- (2) sentencing goals, including rehabilitation and crime deterrence:** Plea agreements are a form of rehabilitation because it offers a chance for a defendant to avoid more severe consequences that may attach to the charged offense. Part of deterring criminal behavior is building respect for the process—if plea bargaining becomes a difficult process because of the court’s reluctance to accept pleas, the defendant takes the brunt of that hurt. The defendant loses the benefit of the reduction and the defendant could begin to see the court of law as a place where the technicalities of the court could trump justice.

Negotiated pleas support sentencing goals in the same manner as traditional pleas. The policy of the state of Michigan favors individualized sentencing for every defendant. A proportionate sentence must be tailored to fit the particular circumstances of the offender and the offense. Further, the sentencing court must always consider the factors articulated in *People v Snow*, 386 Mich 586, 592 (1972). “Individualized sentencing furthers the goal of rehabilitation by respecting the inherent dignity of each person the law deprives of freedom, civil rights, or property.” *People v Heller*, 316 Mich App 314, 2016, citing *People v Triplett*, 407 Mich 510, 515 (1980).

- (3) the scoring of sentencing guidelines, making of restitution awards, and determining habitual offender status or parole eligibility:**
 - (a) the sentencing guidelines

For the most part, the impact of so-called “fictional pleas” on the scoring of the sentencing guidelines is no different than traditional plea bargaining which regularly results in pleas to lesser offenses than originally charged. Offense variables are scored based on the facts of the offense as established by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438 (2013). When an individual provides a factual basis to a more serious crime than the one to which he or she ultimately pleads, the sentencing guidelines will be scored based on what was admitted during the plea.

Additionally, many of the offense variables recognize the existence of plea bargaining and build in additional points for it. For example, dismissed counts are accounted for under offense variable (“OV”) 12 which instructs the court to assess points for contemporaneous felonious acts that will not result in a separate conviction. MCL 777.42. Similarly, the instructions to OV 16 establish that the amount of money or property involved in “admitted but uncharged offenses or in charges dismissed under a plea agreement” may be considered in scoring OV 16. MCL 777.46(2)(c). Still other variables include an instruction to consider the entire criminal transaction as opposed to just for the sentencing offense. See MCL 777.44(2)(a).

(b) restitution awards

Negotiated pleas impact restitution orders in the same manner as traditional pleas or a conviction after a trial. In all circumstances MCL 780.766(2) requires a direct, causal relationship between the conduct underlying the convicted offense and the amount of restitution ordered. This does not mean that when a conviction results from a plea, a defendant must specifically reference each stolen item in order for the prosecution to obtain a restitution order for stolen goods. On the contrary, once an individual is properly convicted, the prosecution is allowed to prove the amount of restitution related to that person’s course of conduct by a preponderance of the evidence and by reference to the Presentence Investigation Report. MCL 780.767(2)

(c) habitual offender status

Negotiated pleas have no impact on habitual offender status. The only relevant consideration for determining habitual offender status is whether an individual has previous felony convictions.

(d) parole eligibility

Negotiated pleas have the same impact on parole eligibility as traditional pleas. In most instances, the plea hearing transcript is not part of the Michigan Department of Corrections file and has no bearing on parole eligibility. Instead, the Parole Board typically looks to the Agent’s Description of the Offense portion the Presentence Investigation Report for an understanding of the criminal conduct at issue. This description customarily is taken from the police reports and reflects the original charges. The defendant, through counsel, has an opportunity to request corrections to the Presentence Investigation Report, including the Agent’s Description of the Offense at sentencing.

(4) determining collateral consequences of the conviction, including whether a defendant is subject to deportation or must register as a sex offender: There are literally hundreds

of collateral consequences of any conviction on multiple levels: state, federal, immigration, civil, employment, etc. Defendants should be advised of the existence of such consequences at the time of the plea even if no court can reasonably list all of them or even know or predict what they all are. In some cases, these consequences are obvious and glaring such as in cases where a non-citizen is pleading guilty (especially to a felony) or when a defendant pleads guilty to a sex offense. Courts typically specify the consequences in these cases. The collateral consequences are there and should be mentioned whether the defendant pleads guilty to the original charge or to another offense upon plea bargaining. In most situations, these consequences depend on the charge of conviction as opposed to the detailed factual basis. In cases where the factual basis matters (e.g., potential civil liability), defendants typically plead NOLO to avoid admitting to any facts on the record. Therefore, there should be no impact of the negotiated pleas on this factor.

(5) compilation of crime statistics: Crime statistics are a very important tool in helping prevent crime and improve the operation of the courts. To have reliable crime statistics, we need better data collection. The problem our criminal justice system currently faces is the difficulty in gathering data from the different courts and law enforcement agencies because they use different methods and systems, and they are not consistent when it comes to what is being kept track of. But regardless of how data is collected and what method is used, the details of the factual basis provided by the defendant at the time of the plea are not and cannot be included in statistics. At most, the court (or the prosecutor’s office) will keep track of the original charge(s) and the charge(s) the defendant pleads guilty to because these items are more easily quantifiable, can be described with accuracy, and can be used to produce statistics and conduct comparisons, unlike a factual basis. Therefore, there should be no impact of the negotiated pleas on this factor.

(6) the constitutional separation of powers, i.e., whether fictional pleas violate the separation of powers by allowing the parties and the trial court to disregard the penalties prescribed by the Legislature for a particular crime. There is a difference between the separation of powers and control of one branch of government over another. While the branches of government have power to check one another, a circuit court (the judiciary) does not have control over prosecuting attorneys (who act on behalf of the executive branch of government). *People v Curtis*, 389 Mich 698, 702–703; 209 NW2d 243 (1973); *Genesee Co Prosecutor v Genesee Co Circuit Judge*, 386 Mich 672, 683; 194 NW2d 693 (1972). Rather, the prosecutor is the sole authority regarding whom to prosecute, and the trial court violates the separation of powers when it interferes with prosecutorial authority. *People of the State of Michigan v Selesky* (consolidated), unpublished per curiam opinion of the Court of Appeals, issued [May 27, 2021] (Docket Nos. 352414–352417 and 352475 – 352477) (Beckering, J., concurring and Stephens, P.J., dissenting), p. 1, citing *People v Williams*, 244 Mich App 249, 251 – 252; 625 NW2d 132 (2001).

To elaborate, “[a] circuit judge does not enjoy supervisory power over a prosecuting attorney,” nor does “a trial court... have authority to review the prosecuting attorney’s decision outside [the] narrow scope of judicial function.” *People v Cobbs*, 433 Mich 276, 505 NW2d 208 (1993); *People v Williams*, 186 Mich App 606, 612; 564 NW2d 376 (1990). A trial court’s authority over prosecutorial duties, then, is limited only to a prosecutor’s acts or decisions that are unconstitutional, illegal, or ultra vires. *People v Muniz*, 259 Mich App 176, 675 NW2d 597

(2003); *People v Williams*, 186 Mich App 606, 608–613; 564 NW2d 376 (1990). Plea negotiations do not fall within these limitations – rather, they are well within the bounds of prosecutorial discretion.

Furthermore, the Constitution does not “[contemplate] a complete division of authority between the three branches [of government].” *Nixon v Administrator of General Services*, 433 US 425, 443; 53 LEd2d 867 (1977). Rather, the government is structured so as to “[divide and allocate] the sovereign power among three coequal branches...not intended to operate with absolute independence.” *Id.* Separation of powers is a political doctrine – not an official rule of law. Felix Frankfurter and James M. Landis, *Power of Congress over Procedure in Criminal Contempts in “Inferior” Federal Courts – A Study in Separation of Powers*. 37 *Harvard Law Review* 1010, 1014 (1924). That is, the separation of powers doctrine has failed to be treated as law in that the Court recognizes the interplay among the branches as necessary; the branches’ interaction would be limited, therefore, by analytical divisions set by the Court. *Id.* An example of the necessary interplay among branches can be found in *Mistretta v US*, 488 US 361; 102 LEd2d 714 (1989), where the unique role of judges is discussed. This role allows judges to fashion sentences and other remedies not readily foreseeable by legislature, some of which may or may not deviate from statutory sentencing guidelines. *Id.* Judges, then, can deviate from the guidelines because of their unique role and experience in sentencing, and are well within their power to do so. *Id.*

Position Vote:

Voted For position: 20

Voted against position: 0

Abstained from vote: 0

Did not vote (absence): 8

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