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February 18, 2013

Via Email: MSC_clerk@courts.mi.gov.

Hon. Robert Young
Chief Justice
Michigan Supreme Court
925 Ottawa
Lansing, MI 48933

Adm No. 2011-19

Mr. Chief Justice and Associate Justices:

I am writing to oppose the proposed court rule change regarding procedures when judges do not accept a proposed plea. Criminal defendants plead guilty with the expectation that sentencing recommendations will be honored. If the judge in good conscious cannot honor the agreement, the defendant should be permitted to withdraw the plea.

As budgets have decreased, defense counsel and defendants who insist on trials are viewed as obstructionists, “not team players,” etc. The pressure to take a deal is already very high. Prosecutors can raise charges and file additional charge.¹ Judges can consider the Defendant’s prompt admission of guilt as a mitigating factor.² In my opinion, this proposed rule goes one step too far.

¹ See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (the defendant was sentenced to life imprisonment after rejecting an offer to recommend a five-year sentence in return for a guilty plea).

²*People v Wesley*, 428 Mich 708; 411 NW2d 159 (1987).

The one thing that a negotiated settlement brings is certainty. Like a civil settlement, both sides may have vastly different perspectives about the case, the likelihood of a defense succeeding, and the collateral emotional casualties that a trial may bring.

Defense counsel is required to convey all offers to a criminal defendant and the defense bar is limited in their ability to ethically refuse to convey an offer because they are concerned that it has too much “wiggle room.” This proposal injects precisely this problem into the deal.

A criminal defendant is pleading guilty to a non-binding prosecutorial recommendation for sentencing in the hope that the prosecutor’s recommendation will “carry the day.” They know in tendering these agreements that the judge is likely to go along with the agreement. While trial judges may occasionally feel somewhat pressured to honor such a deal they are not fully satisfied with, this pressure pails into insignificance when compared to the pressure that a criminal defendant faces.³

I seriously question whether any civil practitioner would ever sign a stipulated settlement agreement where the trial judge was allowed to increase the damages as the judge may deem is equitable to properly compensate a civil plaintiff. Despite the verbal warning, a defendant will be taking this deal only because he or she believes it will be accepted. *This Court has previously recognized that this is how criminal defendants will perceive this.*⁴ In fact

³ As one judge noted:

The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. One facing a prison term, whether of longer or shorter duration, is easily influenced to accept what appears the more preferable choice. Intentionally or otherwise, and no matter how well motivated the judge may be, the accused is subjected to a subtle but powerful influence

United States ex rel Elksnis v Gilligan, 256 F Supp 244 (SD NY, 1966).

⁴ In 1982, this Court wrote:

many years ago, our courts recognized that defendants were regularly reciting on the record that there was no consideration for deals in courts where there an institutionalized history of giving such deals.⁵

People have not changed and the discredited legal fiction that the warning will be sufficient protection will only bury the problem in Jackson Prison. Defendants who have their recommendations vetoed will be bitter, make ineffective assistance of counsel challenges, and will not be capable of respecting a judicial system which engaged in a legal fictions that would have made common law litigators proud. The simpler solution is to allow the defendant to withdraw from the plea at that point in time and face the original charges.

To most defendants, the distinction between a sentence agreement and a sentence recommendation is little more than a variation in nomenclature.

A full understanding of the consequences of a plea is impossible where the defendant, believing that he has negotiated a specific length of sentence, tenders his guilty plea, only to find that he is bound by the act of self-conviction, but the trial judge is free to impose any sentence within the statutory range.

People v Killebrew, 416 Mich 189, 209; 330 NW2d 834, 842 (1982). There are no studies that prove this court's assumption in error.

⁵ As retired Justice Levin wrote when he was still on the Court of Appeals:

To keep the record unblemished by that which precedes the plea, the defendant who pleads guilty is expected to deny any promises have been made to him, even though he has been promised concessions and has been told the prosecutor will not grant such concessions unless he pleads guilty. It is, therefore, far from clear whether a particular defendant, such as the defendant here, answers truthfully or untruthfully when he denies such concessions have been promised.

People v Byrd, 12 Mich App 186, 211-12; 162 NW2d 777, 790 (1968).

This proposal creates in a number of problems and should be rejected.

Yours very truly,

/s/Stuart G. Friedman

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