

DEMING & MAURER, P.L.L.C.

ATTORNEYS AND COUNSELORS AT LAW

316 Taylor Street
Grand Ledge, Michigan 48837
TELEPHONE 517.627.2174
FAX 517.627.2245

JOHN H. DEMING
JOHN D. MAURER

Lansing—Clinton County Office

SHEILA R. DEMING
OF COUNSEL

2050 Glenn, Ste. A
Lansing, Michigan 48906
TELEPHONE 517.627.6198
FAX 517.484.9971

February 28, 2013

Mr. Corbin Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2011-19

Dear Mr. Davis,

I write in opposition to the proposed amendments to MCR 6.302 and MCR 6.310.

I have a great deal of experience with guilty plea and sentencing cases, having reviewed at least 100 of such transcripts each year from 1980 to 2004, when I retired as Deputy Defender of the State Appellate Defender Office to go into private practice. I was the research attorney for the Supreme Court briefing on behalf of Mr. Briggs in *People v Killebrew and Briggs*, 415 Mich 189 (1982) and defense counsel of record in the Supreme Court in *People v Cobbs*, 443 Mich 276 (1993).

The proposed amendments are confusing as to what enforceable sentence agreement may be entered into between the parties. Proposed MCR 6.302(C) (3) begins by using the term "a specific sentence disposition", then in 6.302(C) (3) (b) uses the phrase "the sentence agreed to", and then in the final paragraph uses the phrase "the sentence disposition". Proposed MCR 6.310(B) (2) (a) refers to "an agreement for a specific sentence", and 6.310(B) (2) (b) refers to a *Cobbs* evaluation for a sentence to "a specified term or within a specified range."

Obviously, overruling the recommendation aspect of *Killebrew* as to enforceability will be the end of sentence recommendations as a method of disposition of criminal cases, because no competent criminal defense attorney would advise a defendant to plead guilty and waive all of his or her constitutional rights in exchange for an unenforceable promise.

Mr. Corbin Davis
February 28, 2013
Page Two

The proposed language in 6.302 suggests that the only enforceable agreement between the prosecution would be for a specific sentence or disposition, as proposed 6.302 does not use the "specified range" phrase found in proposed 6.310(B)(2)(b) with respect to *Cobbs* preliminary evaluations of sentence length. It therefore appears to eliminate the ability of the parties to agree to a sentence range, for example, a "sentence within the guidelines". An enforceable agreement for a "specific sentence", if accepted, eliminates judicial sentencing discretion as well as renders the sentencing guidelines irrelevant. On the other hand, the most typical agreed-upon sentence recommendation is for a "specified range": either a "guidelines" sentence or a "cap" on the highest minimum sentence: both of which provide continued viability of the sentencing guidelines as well as offering wider judicial discretion.

If the Court is simply intending to move the parties to sentence "agreements", I would recommend clarifying the language throughout the proposed changes to allow for an enforceable sentence agreement between the parties for a specified range or a specific sentence.

The use of the term "disposition" in proposed 6.302(C)(3) suggests to me that the parties may agree to either a prison sentence or an intermediate sanction which would be enforceable, but I am not clear if that is the intent in using that term.

Killebrew and *Cobbs* have become part of Michigan's legal lexicon; and their holdings have worked well in the day-to-day administration of justice in our trial courts for many years. In my opinion, overruling the "recommendation" aspect of the *Killebrew* decision by court rule amendment serves no useful purpose, circumvents *stare decisis*, and practically has the potential to affect the balance of power between the defense, the prosecution, the court, and frankly even the Legislature by weakening the sentencing guidelines.

Thank you for your consideration.

Very truly yours,

/s/

Sheila Robertson Deming