March 1, 2013

Mr. Corbin Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48915

Re: Admin File 2011-19 – Proposed Amendments to MCR 6.302 and MCR 6.310.

Dear Mr. Davis and Justices of the Michigan Supreme Court:

We write on behalf of the Michigan/Detroit Chapter of the National Lawyers Guild to comment on Administrative File No. 2010-16, which proposes changes to MCR 6.302 and 6.310. We are a local chapter of the National Lawyers Guild (NLG), a national organization formed in 1937. The NLG was the nation's first racially-integrated voluntary bar association, and was formed to advocate for the protection of rights granted by the United States Constitution, as well as for the promotion of fundamental principles of human and civil rights. The NLG was one of the non-governmental organizations selected to officially represent the American people at the founding of the United Nations in 1945, and NLG members helped draft the Universal Declaration of Human Rights.

The Michigan/Detroit Chapter of the NLG writes to vehemently oppose the proposed changes to MCR 6.302 and 6.310. These proposed rule changes would undermine the fundamental constitutional rights of criminal defendants, and result in increased demand for jury trials.

I. The inability to withdraw from a guilty or nolo contendere plea when the trial court rejects the parties' settlement agreement undermines the voluntariness and intelligence of such pleas, which are vital to the forfeiture of important constitutional rights.

The proposed rule changes would severely undermine the requirement that, in conjunction with relinquishment of the preeminent Constitutional right to a jury trial, and all of its corresponding rights, the defendant is entitled to know what he/she will receive in exchange, and if the defendant will not receive that which he/she was promised, then he/she must be given back that which he/she has lost.

It is long established and deeply entrenched in United States and Michigan jurisprudence that, in order to be valid, guilty pleas must be understanding, intelligent, voluntary and accurate. *Santobello v New York,* 404 US 257, 261-262; 92 S Ct 495; 30 L Ed 2d 427 (1971); *People v Brown,*

492 Mich 684; 822 NW2d 208 (2012); *In re Valle,* 364 Mich 471; 110 NW2d 653 (1961); *People v Cook,* 285 Mich App 420; 776 NW2d 164 (164); MCR 6.302 (A).

Over thirty years ago, in *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982), this Court affirmed the validity of sentence bargaining in the plea negotiation process. There, the Court held that, "the defendant must be given the opportunity to withdraw his guilty plea if the judge rejects the proffered bargain or chooses not to follow the prosecutor's sentence recommendation." *Id.* at 194-195. The Court recognized in *Killebrew* that the requirement that guilty pleas be knowing and voluntary is not met if the judge is allowed to reject the sentencing agreement or recommendation without a concomitant concession that the defendant must be allowed to withdraw the plea once that agreement or recommendation has been rejected:

> This Court recognized more than twenty years ago that the waiver of a jury trial cannot be knowing or voluntary when the waiver was induced by reliance on a total package of concessions by both parties to which one party – the state – is no longer bound. If the judge refuses to agree to the state's concessions, the defendant may refuse to waive his constitutional rights. *In re Valle,* 364 Mich. 471, 476, 110 N.W. 2d 673 (1961). *Killebrew, supra* at 207.

This Court in *Killebrew* acknowledged that the right to withdraw the plea f the judge rejects the sentence recommendation or agreement is appended to the constitutional requirement that the waiver of the right to jury trial be knowing and intelligent:

> The court must then give the defendant the opportunity to affirm or withdraw his guilty plea.
>
> Through this procedure, the defendant will be fully aware of all the consequences of his guilty plea. He will thus be able to make a knowing and intelligent waiver of his right to trial and its companion rights. *Id.* at 210.

The proposed rule changes would eviscerate this long established precedent in Michigan jurisprudence, doing violence to recognized constitutional rights, as well as to the rule of stare decisis.

II. The inability to withdraw a guilty or nolo contendere plea when the trial court rejects the settlement agreement violates basic rules of contract negotiations.

The proposed rule changes would violate basic precepts of contract law. Currently, in the sentence bargaining process, the defendant forfeits his treasured, fundamental constitutional right to a jury trial, in exchange for an expected sentence. Currently the court rule applies to "plea agreements," which may include either a "specific sentence disposition or a prosecutorial sentence recommendation." As components of the 'plea agreement," the *Killebrew* Court recognized that the distinction between sentencing agreements and sentencing recommendations is basically illusory, since "most defendants rely on the prosecutor's ability to secure the sentence when offering a guilty plea." *Id.* at 208. If the court ultimately rejects the bargain, it effectively rescinds the parties' agreement. But, contrary to established contract remedies the defendant then has no recourse and is not restored to his pre-bargaining position ; he/she cannot regain his/her forfeited rights, and he/she must suffer whatever punishment the court decides to mete out. And worse, the court can consider post-bargaining conduct in deciding what sentence to impose. Such a process flies flagrantly in the face of basic concepts of fairness.

III. If this rule is effectuated, the trial courts will be burdened with increased demands for jury trials.

In all likelihood, a competent defense attorney who cannot reasonably assure his/her client that he/she will receive the sentence bargained for and agreed upon will recommend that the client reject the plea offer and go to trial. The resultant increase in jury trials will place an even greater burden on our already overtaxed criminal justice system.

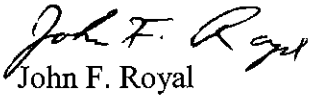
IV. Forfeiture of the plea withdrawal right should be part of the plea agreement.

For all of these same reasons, we oppose amendment to the court rule to eliminate the right to plea withdrawal where the defendant commits post-plea misconduct. Like any other provisions of the bargain, such a stipulation should be part of the original written (or at least oral) plea agreement itself. That way, it becomes part of the defendant's knowing, intelligent, and bargained for plea agreement.

In sum, Michigan/Detroit Chapter of the National Lawyers Guild urges the Court to abandon these proposed changes to the Michigan court rules.

Thank you for your consideration of these comments.

Very truly yours,



John F. Royal
Julie Hurwitz, Vice-President
Elizabeth Cabot, Secretary
Shaun Godwin, Treasurer
Desiree Ferguson, Chairperson
Michigan/Detroit NLG Committee on the
Michigan Court Rules