

MICHIGAN SUPREME COURT

PUBLIC HEARING

May 29, 2013

CHIEF JUSTICE YOUNG: Good morning and welcome to our May public administrative conference. We have a number of items that are before us today, but only two of which have engendered enough interest to have speakers come today. We have a number of written comments, but only two of the items - Items 1 and 3 - have endorsed speakers. So we will begin with the first which happens to be the first item on our agenda - 2011-19, a proposed amendment to rule 6.302 and 310 - and it concerns the ability of the defendant to withdraw a plea if the prosecutor only recommends a particular sentence, but the court declines to follow that recommendation, and Mr. Sacks is here to speak to that.

ITEM 1: 2011-19 - MCR 6.302, 6.310

MR. SACKS: Good morning. May it please the Court. Jonathan Sacks from the State Appellate Defender Office speaking in opposition to the court rule proposal. Our position is is this Court got it right about 30 years ago in the *Killebrew* case that the difference such as it is between sentencing recommendations and sentencing agreements is a distinction that is not appreciated by your average defendant when they plea. And as a result, if this rule were adopted we would have a situation where it would be pretty difficult to properly counsel folks before - especially before the most serious offenses as to what sentence they might expect to receive, and also there'd be surprises. People would expect a certain sentence, that sentence would not come to pass, and I think we would expect at SADO a lot more plea withdrawal motions, a lot more trial appeals rather than plea appeals because folks wouldn't be sure what to expect. And -

CHIEF JUSTICE YOUNG: Are you suggesting that defense counsel can't say the prosecutor is only making a recommendation which the court need not accept.

MR. SACKS: Oh, no.

CHIEF JUSTICE YOUNG: And, therefore, the court is free to sentence within the sentence guidelines without an

articulation. Do you think that is too obscure a bit of counsel that lawyers can't give to their criminal defendants?

MR. SACKS: No, I think a good lawyer is absolutely capable of giving (inaudible) -

CHIEF JUSTICE YOUNG: You just think there are a lot of bad criminal defense lawyers.

MR. SACKS: Well, I just think it's - the state system is a high volume system where we do have a problem with indigent defense. We attach to our comment the standard federal plea paperwork and it's about 15 or 20 pages long, full of various consequences and conditions. Your average plea hearing in Wayne County or in some of the other high volume counties might be five minutes long. A lawyer there might have eight other client's and while nothing against an attorney who I think you know could be very conscientious and give the proper advice, I do see a lot of - a lot more falling through the cracks and - And, frankly, a system that's not broken that does not, in this respect, does not need this fixed.

JUSTICE MARKMAN: But I thought you would view this as a good thing. It seems like I've read about 500 articles over the course of the past several months decrying the increasing reliance upon plea bargains in the criminal justice system. If you're correct about this, wouldn't this be one response to that and one step in the right direction?

MR. SACKS: Well, plea bargains are great and often -

JUSTICE MARKMAN: I haven't heard that coming from the criminal defense bar by and large.

MR. SACKS: It's not that plea bargains aren't a good thing, often it's a really, really good result for our clients to have taken a plea bargain. The problem comes with the plea bargain that's not understanding or a plea bargain that's sort of this part of a routine - almost a McJustice sort of situation where somebody really doesn't properly examine a right to a trial and doesn't properly examine their options. When a plea is - when there's a fully understanding plea and an understanding of consequences from a plea, that's - that's exactly what we

want in a plea bargain. I believe that's why this Court might have amended the court rule to make sure that courts advise folks of lifetime electronic monitoring when they plea to criminal sexual conduct. I mean we would expect and we would hope that lawyers give the defendants that piece of advice, but because the reality is some lawyers have not done that and continue not to do that, this Court realized that a judge needs to give that information. By the same token, for a plea to be a good plea - a plea that somebody like me in the defense bar would support - we would want it to be voluntary and understanding and my fear is if this distinction - if suddenly a sentencing recommendation does not need to be followed, that that just might not happen anymore - certainly for some cases.

CHIEF JUSTICE YOUNG: Any further questions? Thank you.

MR. SACKS: Thank you very much.

CHIEF JUSTICE YOUNG: That concludes all of the endorsed speakers on Item 1. There are none on Item 2 so we'll go immediately to Item 3 which is ADM 2012-18, a proposed amendment of Rule 2.512 concerning whether the model jury instructions in criminal cases will become a court function rather than an independent function as it exists now. We have three endorsed speakers. Mr. Vaillencourt.

ITEM 2: 2012-18 - MCR 2.512

MR. VAILLENCOURT: Good morning. May it please the Court. William Vaillencourt, Prosecuting Attorney from Livingston County. I've served on the criminal jury instructions committee since 2004. I am not speaking on behalf of the committee nor the State Bar; I'm here on my own behalf. There are, however, a number of members of the committee who share some of the concerns about the proposed rule. My primary concern about the proposed rule is the provision mandating the use of the instructions. My concern is how that directive will actually function in practice. One of the frustrations that the committee has always faced is that we recognize that the instructions are generally drafted for the typical criminal case. Oftentimes, however, there are unusual factual scenarios or legal issues about how a statute should be translated into an instruction that might differ from the typical case. And, quite frankly,

sometimes we might be wrong. The members of the committee know that the instructions are not mandatory and that this Court and the Court of Appeals has repeatedly emphasized that the instructions do not have the force of law. The problem is that despite that admonition the jury instructions are treated by the trial courts as holy writ - never to be changed or modified or tweaked. By actually making them mandatory, my concern is that as a practical matter the trial courts will be even more reluctant to modify the instructions in an appropriate case. Even though the proposed rule contains the warning that the instruction should only be used so long as they accurately state the law, my fear is that that limitation will be of little practical effect. The jury instructions committee is a tremendous group of prosecutors, defense attorneys, judges and academics. It is a very collegial group that is dedicated to getting the instructions right. But the process of drafting jury instructions isn't always one of deciding the right answer and putting it in an instruction. There are bona fide disputes over what the law is, what is requires, or how a jury should be instructed. Our discussions can sometimes resemble a legislative process of give and take. While I think we do a good job, it is drafting by committee, and it may not be the best or even the most accurate at times. The parties trying the specific case will often see issues that lurk in the instructions that the committee just didn't see. And it's important that the parties and the trial court recognize that the instructions might be imperfect. My concern is that under the proposed rule the trial courts will simply say the Supreme Court says we have to use these - something, frankly, that happens now - and dismiss out of hand any proposed change. One alternative I would suggest that the Court consider in these circumstances is how the Court dealt with the judicial sentencing guidelines. Don't make them mandatory, but make them advisory. The trial courts will have the benefit of the instructions, would have to at least consider them, but would have the benefit of the parties' arguments about how best a jury should be instructed in that particular case. Thank you for your consideration. I'd take any questions.

CHIEF JUSTICE YOUNG: There appear to be none. Thank you.

MR. VAILLENCOURT: Thank you.

CHIEF JUSTICE YOUNG: Ms. David-Martin.

MS. DAVID-MARTIN: Good morning. May it please the Court. My name is Marilena David-Martin from the State Appellate Defender Office speaking in support of this rule proposal. The factor that underlies SADO's support of this rule proposal is accessibility. Right now criminal jury instructions are accessible through ICLE for a subscription fee of \$135 to \$210 yearly for individual attorneys. I have not done a formal survey, but from speaking to colleagues and others it seems to me as if most criminal defense attorneys that do court appointed work do not have this ICLE subscription. They're oftentimes getting jury instructions from prosecutors or judges. They often come to SADO's criminal defense resource center and ask that center for you know accessibility - or help in getting these instructions - does an instruction on this exist or can you help me find a particular instruction for my case. And for the - every attorney that comes to SADO to ask for help, there are many others I imagine that don't know that they can you know come and get jury instructions in that way.

CHIEF JUSTICE YOUNG: If you assume that question has been answered by the Court - we don't think that a criminal jury instruction should be a proprietary item owned by an entity that it should be in the public domain - do you have any other concerns that - Mr. Vaillencourt before spoke about the - his anxiety that the instructions would be made mandatory in much the same way that the civil jury instructions are to be given unless the court or the parties persuade the court that some modification would be made. Does that concern you?

MS. DAVID-MARTIN: I don't have concern with the mandatory nature of - what this rule would propose. I think that having jury instructions that are mandatory would increase consistency in cases and would actually help the problem.

CHIEF JUSTICE YOUNG: Okay. Any other concerns?

MS. DAVID-MARTIN: Yeah, I just also wanted to highlight that the diversity of the committee as it stands now is something that we think should continue. SADO does have one member that's on the committee and we would welcome the opportunity to continue our involvement in the committee.

CHIEF JUSTICE YOUNG: Thank you very much.

JUSTICE MARKMAN: Are you volunteering?

MS. DAVID-MARTIN: I think the - my colleague would like to continue his involvement. Thank you.

CHIEF JUSTICE YOUNG: Thank you very much. Judge Caprathe.

JUDGE CAPRATHE: Good morning. May it please the Court. I'm Bill Caprathe; I chair the criminal jury instructions committee at this time and I'm speaking on behalf of the committee. These aren't necessarily my personal comments. But there are three comments that I wanted to highlight that I'd like to make. One is the frequency of change that occurs and the urgency of addressing those changes for the bench and the bar. The second thing would be the importance of the commentary - and you mentioned earlier Chief that the proprietary interest shouldn't be in the instructions themselves. I want to comment about possibly keeping a proprietary interest in the commentary to make it - to keep it efficient as it's been. And the third thing would be the - as already been mentioned here - the diversity of the committee and the maintaining that has been what has led to a consensus of decision making and making - sharing a very easy process. As far as the urgency is concerned, one of the problems we had previously when we published the instructions that were proposed was getting them into the State Bar Journal on a timely fashion before the publication deadline. If we missed that, we had to wait an entire month then to get them into the next one.

CHIEF JUSTICE YOUNG: We're in - we're in a wholly different age, we're in an electronic age. These will be posted.

JUDGE CAPRATHE: Okay, so -

CHIEF JUSTICE YOUNG: I don't understand the print era concern about timeliness. And as a matter of fact, if you have a proposed rule that hasn't yet been subject to comment, you can do what we do which is to put something out subject to later comment.

JUDGE CAPRATHE: That was gonna be my recommendation was if - to bifurcate them so that it could be - continued to be as it is now with it being published for recommended use and then after the commentary period and the Supreme Court's had an opportunity to make a decision on it then it could then turn into the mandatory or - it's not really mandatory I think, I don't think you're really looking at mandatory instructions, you're looking at presumptive I'm assuming -

CHIEF JUSTICE YOUNG: Correct.

JUDGE CAPRATHE: as the civil -

CHIEF JUSTICE YOUNG: That's what the civil is presumptive -

JUDGE CAPRATHE: Yeah.

CHIEF JUSTICE YOUNG: it's used presumptively unless there is reason not to.

JUDGE CAPRATHE: Yeah. So that - then that answers my concerns as far as the urgency is concerned because what we've done is we've met like three times a year at a minimum and then if there's an - when the Supreme Court, for example, passed the court rule regarding the use of information from - through the electronic age by jurors - we passed a new instruction to address that and we did it by way of a phone conference and then published that right away so there would be something out there for courts and lawyers to use in that respect. So that concern then would be taken care of. The second one was the commentary and that has been crucial over the years and that - if that proprietary interest could be maintained, it would be helpful because ICLE has done that for us over the years - provided us with research, provided us with assistance whenever we needed it. We have a court - we have a reporter that is paid for by ICLE that keeps us up on the law, that keeps us up on reasoning, and it really is helpful to the bench and bar to have that commentary - to know what's behind those instructions.

CHIEF JUSTICE YOUNG: I don't understand what you mean by maintaining the proprietary character of those.

JUDGE CAPRATHE: Well, I'm assuming that you've already made the decision that it's not gonna be proprietary as far as the instructions themselves are concerned - those would be free access. But if there could be a commentary that could be purchased, it might induce ICLE to continue then providing us with that assistance -

CHIEF JUSTICE YOUNG: In my expectation, I - we have a proposal from ICLE that they would claw out of the existing commentary what they thought was protected by their copyright, but it would be certainly my expectation that the new reporter and the new committee would begin to replicate the commentary. I - the life - shelf life of ICLE's proprietary commentary would be relatively short I would think as the committee and its reporter begin to replace the commentaries that had been clawed out by ICLE.

JUDGE CAPRATHE: And what was the proposal regarding paying the reporter? Right now they're paid by ICLE. Would that mean the Supreme -

CHIEF JUSTICE YOUNG: The Court will supply -

JUDGE CAPRATHE: The Court will be supplying that at this time, okay. And the last thing would be the diversity and that's been spoken to. With geographical diversity, with ethnic diversity, with professional background diversity, we have our meetings and we discuss almost every possible consideration and perspective and we come up with a consensus 99 percent of the time that is - at least in our perspective - is fair and reasonable and usually withstands appeal. Now there are certain areas that we are working on right now as a matter of fact that we're trying to sort out, but that's the ongoing nature of the committee. So did you have any questions that you wanted to ask?

CHIEF JUSTICE YOUNG: I've done it.

JUSTICE MARKMAN: Well, you've tended to have consensus because the members that have been appointed to the committee in your experience have been those who've understood their responsibilities attempting to discern what the law is as opposed to simply representing one interest or another, is that fair to say?

JUDGE CAPRATHE: That's fair to say, and that's -

JUSTICE MARKMAN: And that would be characteristic of a good appointee to the committee I take it in your judgment.

JUDGE CAPRATHE: Excellent. That's well spoken. That's exactly what I would be looking for.

JUSTICE MARKMAN: Thank you.

CHIEF JUSTICE YOUNG: Thank you very much.

JUDGE CAPRATHE: Thank you.

CHIEF JUSTICE YOUNG: That concludes all the endorsed speakers and our hearing. Thank you for your attention.