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

Re: proposed amendments to MCR 6.302 and MCR 6.310.

Dear Mr Davis:

I write in support of the proposed amendments to MCR 6.302 and MCR 6.310. The amendment to MCR 6.302 would provide that "The court shall not participate in discussions between the prosecutor and the defendant's lawyer or the defendant, if the defendant is proceeding pro se, concerning a plea agreement." Further amendments in that rule and in MCR 6.310 would provide that where an agreement for a sentence *recommendation* by the prosecutor is reached, the defendant would be informed that the court need not follow that recommendation, and, if the court does not do so, withdrawal of the plea would no longer be required. I write to support these amendments.

I have read with interest the several comments that have been posted by far, particularly that of Judge Michael Warren, a fine and learned judge from the Sixth Judicial Circuit. Part of Judge Warren's view is that because the staff comment to the proposal states—accurately—that the amendment to MCR 6.302 would make the Michigan practice consistent with the federal practice, that this undermines federalism, for any "desire to implement a reform simply for the sake of consistency undermines federalism—a key of American liberty."

First, the staff comment is not authoritative and does not speak for the court. Second, the observation that the Michigan rule would become consistent with the federal rule is not, as I read it, a statement of motivation or purpose for the proposed change, but an accurate observation of that which would result. And finally—on this point—to achieve consistency with a federal rule (most of our rules of evidence are consistent with the parallel federal rules, as are many of the provisions of Article I of our State Constitution), opening up a large body of informative—though not

binding—interpretative case law, is no threat to federalism. Federalism does not demand that the states and the federal government have different rules of procedure, it demands that they be *permitted* to. There is no suggestion that I can see that some force of law mandates the proposed change. The question is not, in the end, whether the proposal(s) are consistent with the federal rule(s), but whether they make good sense. That another "sovereign"—the federal system—has chosen to go the way it has may be instructive, as it was for many of our rules of evidence, but so long as we are free to reject the path chosen by the federal system there is no threat to federalism. I support the proposals not "simply for the sake of consistency" with the federal rule, but because I believe them to be sound.

It is scarcely only the federal system in FRCP 11(c) that has chosen to bar judicial participation in plea bargaining. This is the "model" view. The ABA Standards on Criminal Justice: Pleas of Guilty, provide at 14–3.3(c) that

> (c) The judge should not through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.

And more directly paragraph (d) provides that

> (d) A judge should not ordinarily participate in plea negotiation discussions among the parties. Upon the request of the parties, a judge may be presented with a proposed plea agreement negotiated by the parties and may indicate whether the court would accept the terms as proposed and if relevant, indicate what sentence would be imposed. Discussions relating to plea negotiations at which the judge is present need not be recorded verbatim, so long as an appropriate record is made at the earliest opportunity. For good cause, the judge may order the record or transcript of any such discussions to be sealed.

The Commentary to this Standard emphasizes that "direct judicial involvement in plea discussions with the parties tends to be coercive and *should not be allowed*" (emphasis supplied). Thus, the federal rule is consistent with the ABA Standards' view on appropriate procedure, and the proposal would align Michigan with the ABA Standard.

Also, and importantly, the Michigan Constitution in Article 1, § 24 gives to the victim in a criminal case "The right to make a statement to the court at sentencing." And the legislature by statute has provided in MCL 780.764 that "The victim has the right to submit or make a written or oral impact statement to the probation officer for use by that officer in preparing a presentence investigation report concerning the defendant.....," and in MCL 780.765 that "The victim has the right to appear and make an oral impact statement at the sentencing of the defendant." These are not

simply psychological exercises, but may be considered by the judge in setting sentence. If we are to take victims' rights seriously, judicial involvement in sentence bargaining should not occur.

In *People v. Killebrew*, 416 Mich. 189 (1982) the court essentially adopted the federal rule precluding judicial involvement in plea negotiations other than to accept (or reject) a sentence agreement reached by the parties. Without *any* showing that this system was broken,[1] in *People v. Cobbs*, 443 Mich 276 (1993) the court modified *Killebrew* to permit judicial involvement in the plea-bargaining process by allowing the trial judge, at the request of a party, to "state on the record the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense." The court said that "this preliminary evaluation does not bind the judge's sentencing discretion," bur if the court determines not to follow the evaluation the defendant must be given the opportunity to withdraw the plea. See also *People v. Williams,* 464 Mich. 174, 176-177 (2001).

Cobbs thus permits the judge to become involved in plea bargaining and to make a "preliminary" assessment of sentence—one which rarely stays "preliminary"—without the input of the victim provided for by our Constitution and our legislature, and a plea in hand will rarely be foregone by a trial judge in order to take account of that said by the victim in a written inpact statement or at orally sentencing. This is counter to the rights provided the victims in this State. Michigan should amend its rule to comport with the ABA Standard.

As to the proposal regarding agreements including sentence recommendations, agreements for sentence recommendations by the prosecuting attorney and agreements for specific sentences (when ratified by the trial judge) should not be treated the same if the trial judge determines that he or she cannot follow them. An agreement for a specific sentence, if not followed, should result in the opportunity for plea withdrawal, but an agreement for a *recommendation* is just that, and, so long as the defendant is informed at the time of the plea that a recommendation by the prosecutor need not be followed, withdrawal of the plea if it is not should not result.

For these reasons, the proposed rule changes should be adopted. These views are my own and not intended as an expression of those of my Office.

Sincerely,

TIMOTHY A. BAUGHMAN
Chief of Research, Training, and Appeals

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[1] And indeed, I believe a statistical analysis would demonstrate that ban on judicial involvement on plea bargaining caused no appreciable reduction on the number of pleas compared to trials conducted as compared to before the decision in *Killebrew*