

**Public Policy Position
ADM File No. 2018-29**

The Criminal Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 2,405 members. The Criminal Law Section is not the State Bar of Michigan and the position expressed herein is that of the Criminal Law Section only and not the State Bar of Michigan. The State Bar's position on this item is to oppose ADM File No. 2018-29.

The Criminal Law Section has a public policy decision-making body with 26 members. On May 18, 2021, the Section adopted its position after a discussion and vote at a scheduled meeting. 17 members voted in favor of the Section's position, 0 members voted against this position, 2 members abstained, 7 members did not vote.

Oppose

Contact Person: Kahla Crino
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May 19, 2021

Larry Royster
Supreme Court Clerk
P.O. Box 30052
Lansing, MI 48909

Re: *ADM File No. 2018-29, Comment from the Criminal Law Section of the State Bar of Michigan*

Dear Clerk Royster,

The Council for the Criminal Law Section of the State Bar of Michigan is a representative body consisting of 26 elected or appointed council members. Together, we represent over 2000 members of the Criminal Law Section of the State Bar of Michigan. Our section and council consists of defense attorneys, prosecutors, judges, and other professionals who practice or have an interest in criminal law in the State of Michigan.

The Criminal Law Section of the State of Michigan opposes ADM File No. 2018-29 and its proposed amendments to MCR 6.302 and MCR 6.610 to eliminate so called “fictional pleas.” First, like many previous and present commentators, our section views fictional pleas as a valuable tool that allows the parties to reach appropriate plea agreements. However it is more than just a tool to promote efficiency; it is a procedure that allows mutually beneficial and creative plea bargaining between parties. It allows pleas that are just, fair, and lenient. However, rather than expound on this widely held and understood position, our section submits the following comment in response to the Court’s six identified areas of concern.

1. The truth seeking process.

Fictional pleas support the truth seeking process. When a defendant enters a fictional plea, they must, just as during a traditional plea, swear to tell the truth. This does not change simply because the conviction that enters is something less serious or more desirable to the defendant than the original charge. Whether conviction enters for the original charge or for a lesser charge under a fictional plea procedure, the defendant must still tell the truth. Thus fictional pleas support the truth seeking process by allowing a defendant to tell the truth during a plea, but still receive the benefit of a less serious or more desirable conviction.

2. Sentencing goals, including rehabilitation and crime deterrence.

Fictional pleas support sentencing goals in the same manner as traditional pleas. After a fictional plea, the sentencing court must still consider the factors articulated in *People v Snow*, 386 Mich 586, 592 (1972). We trust that sentencing courts will continue to consider the *Snow* factors, just as they always have whether sentencing after a traditional guilty plea, fictional plea, or trial. The *Snow* factors remain applicable regardless of whether a defendant received the benefit of a fictional plea. Thus fictional pleas support sentencing goals in the same manner as traditional guilty pleas.

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3. The scoring of the sentencing guidelines, making of restitution awards, and determining habitual offender status or parole eligibility.

A. Scoring the sentencing guidelines.

There are special sentencing guidelines considerations when the parties choose resolve a case with a fictional plea that includes entering a felony conviction. If a defendant provides a factual basis to a more serious felony in exchange for conviction entering for a less serious felony, the sentencing guidelines would most certainly be scored based on what the defendant admitted during the plea. This must be considered when deciding whether a fictional plea is advantageous for a particular defendant. Defense attorneys in Michigan understand this and advise their clients accordingly. It is up to the defendant, in consultation with his attorney, to decide if a fictional plea is advantageous. The sentencing guidelines are a part of this decision. While there are sentencing guideline considerations when the parties choose to resolve a case with a fictional plea and the conviction that enters is a felony, Michigan defense attorneys remain well equipped to recognize these considerations and advise their clients accordingly.

B. Ordering restitution.

Fictional pleas impact restitution orders in the same manner as traditional pleas because MCL 780.766 applies in the same manner whether sentencing occurs after a fictional plea, a traditional plea, or a trial. For example, if a defendant pleads guilty to larceny \$20,000 or more, the defendant would admit that the stolen property had a value of \$20,000 or more, but the defendant could still have a restitution hearing where the prosecutor would have to prove the actual amount of restitution by a preponderance of evidence. Similarly, if a defendant entered a fictional plea to larceny \$20,000 or more, with conviction to enter for larceny in a building, that defendant could still have a restitution hearing where the prosecutor would have to prove the actual amount of restitution by a preponderance of evidence. The same is true for cases where admission to a particular dollar amount is not required.

Our Section is familiar with *People v McKinley*, 496 Mich. 410 (2014) and understands that restitution cannot be based solely on uncharged conduct. This remains true whether the parties utilize a traditional or fictional plea procedure. Thus fictional pleas impact restitution orders in the same manner as traditional pleas or a conviction after a trial.

C. Habitual offender status

Fictional pleas have no impact on habitual offender status. The only relevant consideration for determining habitual offender status is whether a defendant has qualifying previous felony convictions. For example, if a particular fictional plea called for a defendant to enter a factual basis to a charged felony, with conviction to enter for a misdemeanor, that defendant would be guilty of a misdemeanor only. A factual basis to a felony is not a conviction of a felony. Further, if a fictional plea called for a conviction to enter for a felony, it would be appropriate for that felony conviction to be considered a prior felony under the habitual offender statute. The only relevant consideration for habitual offender

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status is whether a defendant has qualifying previous felony convictions. Thus fictional pleas have no more impact on determining habitual offender status than any other plea.

D. Parole eligibility

Fictional pleas have the same impact on parole eligibility as traditional pleas. Regardless of whether the plea is traditional or fictional, the Michigan Department of Corrections does not typically utilize the plea hearing transcript in determining parole eligibility. In most instances the plea hearing transcript is not even a part of the Michigan Department of Corrections file. Instead, the Michigan Department of Corrections relies on the Presentence Investigation Report and interviews with the defendant and victim (if applicable and participating). The Presentence Investigation Report almost always contains information beyond what the defendant admits to as a part of a plea hearing. As to the offense itself, the Presentence Investigation Report contains the “Agent’s Description of the Offense.” This description typically comes from the police report and is directly reflective of the original charged offenses. While it seems possible that a defendant could create an undesirable situation by informing the parole board of something that was inconsistent with their plea hearing statements, this would be true regardless of whether the plea was traditional or fictional, thus fictional pleas have the same impact on parole eligibility as traditional pleas. However, in most instances the plea hearing statements will have no bearing on parole eligibility.

4. Determining the collateral consequences of the conviction, including whether a defendant is subject to deportation or must register as a sex offender.

Fictional pleas have the same impact on collateral consequences as traditional pleas. Defense attorneys in Michigan understand this and advise their clients accordingly. Before entering a traditional plea or a fictional plea, defense attorneys advise their clients about the collateral consequences of the conviction and the sworn statements made during the plea. The difference is that in practice, the fictional plea process is used to allow conviction to enter for a less serious crime than what was charged.

Further, in some instances, fictional pleas help parties resolve cases in a manner that prevents draconian collateral consequences. For example, crimes that include an element of theft or fraud are almost always considered “crimes of moral turpitude” and have serious immigration consequences. Parties who wish to avoid the serious immigration consequences, may wish to utilize a fictional plea to prevent serious immigration consequences for criminal conduct that is comparatively minor. In fact, many prosecutors’ offices now mandate assistant prosecutors to consider all applicable collateral consequences when making plea offers. Fictional pleas help prosecutors, judges, and defense attorneys to reach just outcomes.

Ultimately, because we trust that defense attorneys in Michigan are capable of continuing to advise their clients about the collateral consequences of the conviction itself and statements made at the plea hearing, fictional pleas have the same impact on collateral consequences as traditional pleas.

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5. **Compilation of crime statistics.**

Fictional pleas have no impact or the same impact as traditional pleas on the compilation of statewide crime statistics under MCL 28.251, et seq. Reports under Chapter 28 pertain to crimes reported and processed by police departments each month. Crime statistics under Chapter 28 do not include the charges actually authorized or whether a case proceeds to plea or trial. Instead, it includes only “crimes reported or otherwise processed” by the reporting police agency and “the number and nature of the offenses committed, the disposition of such offenses and such other information as the director of state police shall specify relating to the method, frequency, cause and prevention of crime.” MCL 28.251. Of note here, is that “disposition” does not refer to whether there was a plea resolution, but instead to whether the call was cleared or the investigation completed.

Similarly, Michigan Incident Crime Reporting does not include information on the charges actually authorized or whether the case proceeds to plea or trial. Instead, it includes the file class, number of incidents, number of offenses, number of victims/property impacted, and number of arrests.

Our Section is mindful of HB 4174, a bill that our section supports, but we believe that because this data collection system does not yet exist (and might not ever exist), this is perhaps an issue for another day. However, we do believe that even in a system that keeps track of charges and final dispositions, it would still be accurate and helpful for fictional pleas to be tracked as a plea to a lesser offense. After all, when parties choose to utilize the fictional plea process, the prosecutor is offering an opportunity for a conviction to enter for a lesser offense and the defendant is accepting a lesser offense. Thus fictional pleas have no impact or the same impact as traditional pleas on the compilation of crime statistics under present systems, and would still be recorded accurately under the HB 4174 (or a similar) data collection framework.

6. **Constitutional separation of powers, i.e., whether fictional pleas violate the separation of powers by allowing the parties and the trial court to disregard the penalties prescribed by the Legislature for a particular crime.**

Fictional pleas do not violate separation of powers. A fictional plea does not disregard the penalty prescribed by law any more than a traditional plea to a reduced charge. “The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” Const. 1963, art. 3, § 2. “This does not mean, however, that all three branches must be kept completely separate, with no overlap of functions or powers. Rather, the evil to be avoided is the accumulation in one branch of the powers belonging to another.” *People v Conat*, 238 Mich App 134, 146 (1999) (internal citations omitted). In the context of a criminal defendant entering a guilty plea, there is a “commonplace interaction between all three branches of government in determining what punishment is given to criminal offenders; namely, that the Legislature defines the sentences, the court fashions and imposes individual sentences within the legislatively defined parameters, and the prosecutor brings charges against defendants that inevitably affect which sentences are available for the court to impose.” *Id.* at 147.

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Prosecutors also have the discretion to extend a plea offer to a lesser charge. It is well settled that this authority does not violate separation of powers. *See Lafler v Cooper*, 566 US 156, 168; 132 S. Ct. 1399, 1388; 182 L. Ed.2d 398 (2012). Fictional pleas are no different. In practice, they are used so that a defendant can simultaneously be truthful with the trial court and have options beyond the binary choice of pleading guilty or proceeding to trial. Take for example, a defendant who is charged with felonious assault for holding up a baseball bat and threatening to hit someone. A prosecutor might be willing to offer an aggravated assault under these circumstances. The fictional plea procedure makes this possible because this defendant would not be able to provide a truthful factual basis to all elements of aggravated assault. After a fictional plea, the trial court would continue to have its range of sentencing options for the aggravated assault conviction. The fictional plea does not usurp the legislature's discretion to set the penalty parameters for felonious assault or aggravated assault.

Compare this to a traditional plea offer that includes a charge reduction. Take for example, a defendant who commits an armed robbery and is charged with armed robbery. Regardless of the legislature's assigned penalty for the crime of armed robbery, a prosecutor would be free to offer a plea to unarmed robbery. After a defendant accepts this plea offer, the trial court's sentencing options are limited to those provided for the crime of unarmed robbery. The plea offer did not usurp the legislature's ability to set the penalties for these crimes, and similarly the offer to plead guilty to unarmed robbery, even if the defendant clearly committed an armed robbery does not violate separation of powers. Neither fictional pleas nor traditional pleas violate separation of powers. Both traditional and fictional pleas are valid, constitutional plea bargaining options that allow each branch of government to interact in determining the punishment applicable to particular defendants and crimes.

The Criminal Law Section of the State Bar of Michigan appreciates the Court's attention to this important matter. We urge this Court to continue to allow parties to use fictional pleas to reach mutually beneficial plea agreements that are just and fair. For the reasons articulated in this comment, we urge this Court not to adopt the changes proposed in ADM 2019-29. If the Court has questions regarding this comment, please contact Christina Hines at hinesc@washtenaw.org and Kahla Crino at kcrino@ingham.org.

Respectfully Submitted,

Christina Hines

Christina Hines
Chair of the Criminal Law Section of the State Bar of Michigan

Kahla D. Crino

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