Court of Appeals of Ohio
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY COURT HOUSE
1 LAKESIDE AVENUE
CLEVELAND, OHIO 44113-1085
(216) 443-6350

Kenneth A. Rocco
Judge

July 22, 2014

Commission on the Rules of Practice and Procedure
Supreme Court of Ohio
65 South Front Street, 7th Floor
Columbus, Ohio 43215-3441

Re: Proposed Crim.R. 11(F) Amendment

Dear Rules Commission Member:

I urge the Commission's favorable consideration of proposed Crim.R. 11(F) amendment as recommended by the Criminal Law and Procedure Committee of the Ohio Judicial Conference. The proposed amendment goes a long way to solve two vexing problems that exist in Ohio's criminal justice system and that are created by "naked pleas."

A "naked plea" typically is a plea of either "guilty" or "no contest" entered by a defendant to an amended indictment that is accepted by the trial court without a full enquiry into the facts and circumstances that gave rise to the offenses with which the defendant originally was charged. The "naked plea" can create difficulties related to R.C. 2941.25 and to the trial court's inherent authority to accept a change of plea.

Compliance with R.C. 2941.25

This statute mandates trial courts to determine whether any of multiple offenses brought against a defendant in an indictment are "allied," thus requiring "merger" of the convictions. When a defendant enters a "naked plea" to more than one offense, compliance with the terms of this statute often requires two appeals and two sentencing hearings to resolve.

If promulgated, proposed Crim.R. 11(F) would alert the trial court, the prosecutor, and defense counsel that an allied offense hearing may be required either prior to or as part of the sentencing hearing. This thought was initially proposed by *State v. Kent*, 68 Ohio App.2d 151 (8th Dist.1980); thus, it is one that is hardly original, and its implementation is long overdue. I refer your attention to *State v. Rogers*, 2013-Ohio-3235, 994 N.E.2d 499 (8th Dist, *en banc*), which describes the difficulties inherent in resolving appeals resulting from a "naked plea" to multiple counts stemming from a single incident.

Abdication of the trial court's inherent authority

It is the trial court which bears the ultimate responsibility to decide whether a negotiated plea serves justice and the public interest. Sometimes, the negotiated plea does not. For example, see *State v. Holloway*, 8th Dist. Cuyahoga No. 97906, 2012-Ohio-4936.

In that case, the indictment charged Holloway with single counts of rape, gross sexual imposition, and kidnapping, with sexually violent predator specifications. The alleged victim was his nine-year-old stepdaughter. Holloway faced a sentence that ranged from ten years up to life in prison.

In what appeared to be a "naked plea," the trial court accepted the negotiated plea of guilty to an amended indictment that charged Holloway with one count of aggravated assault. The facts of the case were not discussed in detail until the sentencing hearing, when the prosecutor disclosed that the indictment was based upon the victim's second report of sexual molestation by her stepfather, and physical evidence in the form of Holloway's DNA corroborated the victim's report.

Given a child's reluctance to testify in such a case, especially against her stepfather, a negotiated plea is understandable. Nonetheless, had the factual inquiry occurred during the plea hearing, the trial court may have refused to accept the negotiated plea by relying on *State v. Rohrbach*, 126 Ohio St.3d 421, 2010-Ohio-3286, and then steered the plea to an offense (such as sexual battery or gross sexual imposition) that would have required sexual offender registration. One can argue that Holloway's registration as a sexual offender would have offered the live-in child victim more protection than did his aggravated assault conviction (which indicated she had a provocative role in the incident), and thus would have better served justice and the public interest.

In sum, the amendment to the rule requires of a trial court only a modicum of additional responsibility while, at the same time, the amendment promotes the interests of judicial economy, truth, and justice.

Thank you for your time and attention.

Respectfully submitted,

Kenneth A. Rocco
Judge, Ohio 8th District
Court of Appeals

Ohio Judicial Conference

Serving Ohio Judges – Enhancing Judicial Leadership

Commission on the Rules of Practice & Procedure
Supreme Court of Ohio
65 South Front Street, 7th Floor
Columbus, Ohio 43215-3431

July 31, 2014

Re: Criminal Rule 11

Dear Rules Commission Members:

After considerable research and consideration, the Criminal Law and Procedure Committee of the Ohio Judicial Conference recommends that Criminal Rule 11 be amended to establish the uniform policy that all negotiated pleas must have a factual basis.

The proposed amendment is:

Crim. R. 11(F) Negotiated pleas

All negotiated pleas must have a factual basis. When a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the following rules shall apply:

(1) In felony cases the underlying agreement upon which the plea is based shall be stated on the record in open court and the prosecutor shall represent in open court that to the best of the prosecutor's knowledge, information, and belief, there are facts to support the elements of the offense or offenses that are the subject of the negotiated plea.

(2) In all misdemeanor cases, except original charges for a minor misdemeanor, the prosecutor shall make a written representation or a representation in open court that to the best of the prosecutor's knowledge, information, and belief, there are facts to support the elements of the offense or offenses that are the subject of the negotiated plea.

(3) In all cases the Court, at its discretion, may conduct inquiry on the record to establish the existence of the factual basis of negotiated plea agreements and to address issues including but not limited to allied offenses and merger relevant for sentencing purposes.

(4) In the event the Court does not accept a negotiated plea agreement the court shall state on the record, either in open court or in writing, the reasons for the rejection of the negotiated plea agreement.

(5) Alford pleas – In any case in which the parties present the court with a plea agreement for acceptance pursuant to U.S. v. Alford where the defendant will enter a plea of guilty while maintaining his/her innocence, the court shall conduct a hearing on the record and require the prosecutor to summarize the evidence which would be presented if the matter were to proceed to trial. The court must determine the existence of a strong factual basis supporting the charges prior to accepting the plea agreement.

This change to Criminal Rule 11 is modest, but would provide trial courts with guidance in examining proposed plea agreements and determining whether an agreement is consistent with the principles of truth and justice. Though well-intentioned and often convenient, factually baseless plea agreements are contrary to the objectives of the justice system. If a defendant is guilty, a factually baseless plea may prevent justice and create a risk to public safety; on the other hand, if a defendant is innocent, a factually baseless plea that only serves to avoid trial amounts to a wrongful conviction. The consequence of allowing these types of pleas is a threat to the public's confidence in the justice system. Ohio citizens are entitled to a judicial system that provides a forum where disputes are resolved in an honest, fair and transparent manner.

Based on the recommendation of the Criminal Law and Procedure Committee, the Ohio Judicial Conference submits to you the suggested change to Criminal Rule 11. Thank you for your consideration.

Sincerely,

Retired Judge Mark R. Schweikert
Executive Director

Cline, Jo Ellen

From: John Murphy [murphyj@ohiopa.org]
Sent: Friday, August 22, 2014 11:49 AM
To: Cline, Jo Ellen
Cc: 'Ed Pierce'
Subject: Cr.R. 11

Jo Ellen - This is in response to an email we received from Andrea Kulikowski in the office of the administrative director of the court, concerning proposed changes to Criminal Rule 11 concerning negotiated pleas. The main change would require that all negotiated pleas have a factual basis.

We will oppose this change. It is basically impractical. It should come as no surprise to anyone knowledgeable in criminal law that we sometimes negotiate pleas that we are willing to accept as a resolution of the case and defendant is willing to plead to in order to get the benefit of the plea, even though the facts of the case may not exactly match the elements of the offense to which the defendant will plead guilty. This is not uncommon, and to require that in every single case the facts must match the elements of the offense will substantially complicate life for both prosecutors and defense counsel and will contribute little if anything to the integrity of the process.

And some of this is pretty de minimus stuff. Theft offenses, for example. Defendant steals property worth $10,000. We indict for theft at the F4 level, value of $7,500 to $150,000. We offer a plea to the F5 level, value $1,000 to $7,500. Defendant agrees, but we can't do it because there is no factual bases. The value of the property is not between $1,000 and $7,500.

With respect to *Alford* pleas, we see little reason for the change proposed. The court can require a summary of the facts if it desires under current law, and we see no reason to require the court to determine a **strong** factual basis for the plea. And what is the difference between a factual basis and a **strong** factual basis? Incidentally, someone should advise whoever wrote the draft of the proposed changes that the relevant case is *North Carolina v. Alford*, not *U.S. v. Alford.*

John

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August 28, 2014

Chief Magistrate Mark Huberman
Chair, Commission on the Rules of Practice and Procedure
c/o Jo Ellen Cline
65 South Front Street, 7th Floor
Columbus, Ohio 43215
(by email: j.cline@sc.ohio.gov)

Re: Proposed Amendment to Criminal Rule 11

Dear Judge Huberman:

Judge Michael P. Donnelly has suggested that I present my views to the Commission regarding the proposed amendment of Criminal Rule 11 to require that all negotiated guilty pleas have a factual basis and that the prosecutor represent that there are facts to support the elements of the offenses. Among the practical and intended effects of the proposed amendment, as I understand them, would be to preclude courts from accepting guilty pleas to fictitious or baseless charges. This would end the practice, which I understand is common in some jurisdictions, whereby prosecutors agree to accept a guilty plea to an offense that the defendant did not in fact commit – that is, a factually baseless plea – in exchange for an agreement not to initiate, or to drop, more serious charges for which there *is* a factual basis. This practice is typically employed when the prosecutor believes leniency in exchange for a guilty plea is warranted but no offense for which there is a factual basis would afford a sufficiently lenient result. As discussed below, I believe the practice is unethical and should not be allowed.

By way of introduction, I am a former federal prosecutor and, as a legal academic, have spent much of the past 27 years studying questions of legal, judicial, prosecutorial and government ethics. I served as an Assistant U.S. Attorney in the Southern District of New York from 1983 to 1987, and then began teaching full-time at Fordham Law School, where I now direct the Stein Center for Law and Ethics. I teach courses relating to legal ethics and criminal law and procedure, including a seminar on "Ethics in Criminal Advocacy." I have also engaged in various part-time professional and public service which has included chairing the ABA Criminal Justice Section and that Section's ethics committee, chairing the New York State Bar Association's ethics committee, and serving for more than a decade on the committee that drafts the national bar examination on lawyers' professional responsibility (the MPRE).

I first began considering the problem of factually baseless pleas when the Iowa Supreme Court published a decision, *Iowa Supreme Court Atty. Disciplinary Bd. v. Howe*, 706 N.W.2d 360 (Iowa 2005), sanctioning a part-time prosecutor who routinely allowed defendants charged with misdemeanor moving traffic offenses and other offenses (e.g., public intoxication) to plead guilty under an archaic

statute that made it a simple misdemeanor to drive an automobile that is not equipped with "two side cowl or fender lamps." Although there was no probable cause to believe that the defendants had violated this law, Howe's view was that "as long as the charging police officer agreed to the deal and the reduction benefitted the defendant, the plea bargains were consistent with his obligation as a prosecutor to see that justice was done." The state Supreme Court disagreed, finding that the prosecutor's practice violated a state professional conduct rule corresponding to Rule 3.8(a) of the Ohio Rules of Professional Conduct[1] which prohibited a prosecutor from instituting criminal charges that are not supported by probable cause.

In my view, *Howe* is a straightforward application of Rule 3.8(a). It is no answer that, although the defendant did not commit the offense to which he pled guilty, he committed some other offense. *See, e.g.*, ABA Model Rules of Professional Conduct, Rule 3.8(h) (requiring a prosecutor to seek to remedy a conviction "[w]hen the prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit"). I assumed when I first read the *Howe* decision that the practice it described was highly unusual. I had certainly never heard of the practice when I was a federal prosecutor and knew that it would not be allowed in a federal proceeding. I recalled various occasions in the context of plea negotiations when I pored over the federal criminal code in search of a low-level offense for which there was a factual basis so that the defendant could legitimately plead guilty to a less serious charge than was initially brought. As I later came to learn, however, this practice is employed in state prosecutions in various locales but kept largely sub rosa.

I examined this practice more closely in 2009-10, when I supervised a seminar student, Mari Byrne, who wrote a paper on this topic and subsequently published it. *See* Mari Byrne, Note, *Baseless Pleas: A Mockery of Justice*, 78 FORDHAM L. REV. 2961 (2010). Ms. Byrne's writing acknowledged that "fictitious" or "baseless" pleas could be mutually beneficial for the prosecution and defendant and could promote judicial efficiency, but she concluded that the practice is nevertheless improper not only because it is contrary to the prosecutorial ethics rule but because, as the New Jersey courts previously had found, it undermines judicial integrity as well as the fairness and integrity of the criminal justice system more generally.

I find Ms. Byrne's discussion persuasive and commend it to your Committee for its consideration. Our criminal justice system presupposes that defendants will not knowingly and intentionally be convicted of crimes that they did not commit. Consequently, when defendants are convicted of crimes, whether following trials or guilty pleas, the public assumes that the defendants committed the crimes of which they were convicted. Although one might think that everyone benefits when defendants are allowed to plead guilty to fictitious charges as a form of leniency, the practice undermines public confidence in the fairness and integrity of the criminal justice system.

Very truly yours,

Bruce A. Green

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[1] Ohio's Rule 3.8(a) provides that "[t]he prosecutor in a criminal case shall not . . . pursue or prosecute a charge that the prosecutor knows is not supported by probable cause."

February 9, 2015

Chief Magistrate Mark Huberman
Chair, Commission on the Rules of Practice and Procedure
c/o Jo Ellen Cline
65 South Front Street, 7th Floor
Columbus, Ohio 43215

Re: Proposed Criminal Rule 11(F) Amendment

Dear Judge Huberman:

The Honorable Michael P. Donnelly recently brought to my attention a proposed amendment to Criminal Rule 11 that would require judges to ensure that all negotiated pleas have a factual basis. The amendment calls for the prosecutor to represent on the record in open court that the facts support the elements of the offense. Crim. R. 11(F)(1) & (2). I support the adoption of the amendment.

By way of introduction, I am a Professor of Law at the University of Akron where I also serve as the Faculty Director of the Miller-Becker Center for Professional Responsibility. I have taught a variety of law school courses over a 35-year period, but my primary teaching responsibilities are in the Professional Responsibility and Evidence fields. I have taught at least one section of both courses almost every year for the past 25 years. Most of my scholarship involves these two fields.

In addition to teaching Professional Responsibility, I am active in the Professional Responsibility Section of the American Association of Law Schools and served last year as its Past Chair. I am Chair of the Publications Board of Editors for the ABA Center for Professional Responsibility and serve on the Center's Coordinating Council and the Center's Michael Frank Professional Responsibility Award Selection Committee. I served on two subcommittees of the ABA Ethics 20/20 Commission and on the ABA's Standing Committee on Professional Discipline. In Ohio, I have served on the Ohio State Bar Association's (OSBA) Legal Ethics and Professional Conduct Committee for approximately twenty years and presently serve on the OSBA's Professionalism Committee where, among other efforts, I assist in drafting Ethics Advisory Opinions. I also served a three-year term on the Ohio Supreme Court's Unauthorized Practice of Law Board. Finally, I am a longstanding member of the Cleveland Metropolitan Bar Associations Legal Ethics and Professionalism Committee.

The amendment addresses a questionable practice in Ohio in which judges, prosecutors and defendants enter into negotiated plea agreements for offenses that did not occur – i.e., offenses that are not factually supported by the facts. The amendment does not preclude negotiated pleas to lesser offenses that are necessarily included in the greater offense charged and supported by the facts. The amendment does require however that judges and prosecutors show on the record a sufficient factual basis for any negotiated plea to an offense.

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Although it may be more efficient for prosecutors, defense counsel and the courts to accept factually baseless pleas, these negotiated plea agreements are problematic for several reasons. First, the Ohio Rules of Professional Conduct (ORPC) expressly prohibit a prosecutor from negotiating a plea to a factually unsupported offense. Rule 3.8 provides that "[t]he prosecutor in a criminal case shall not . . . pursue or prosecute a charge that the prosecutor *knows* is not supported by probable cause." *See* ORPC Rule 3.8(a) (emphasis in the original). Thus, prosecutors are precluded from arguing that probable cause exists for a crime and to negotiate a plea for it when the prosecutor already knows that the crime is factually baseless.

Second, and as some commentators note, factually baseless pleas constitute misrepresentations because they assume the existence of crimes that in fact never occurred. *See* Mari Byrne, *Baseless Pleas: A Mockery of Justice*, 78 FORDHAM L. REV. 2961 (2010) (providing an excellent discussion about the benefits and risks of knowingly permitting "defendants to plead guilty to 'bogus' charges" and arguing that the integrity costs to the courts and the justice system are too high, *id.* at 3005) [hereinafter Byrne]. ORPC Rule 4.1 prohibits a lawyer from knowingly making a false statement of fact to third parties, here representing to others that the defendant committed a crime that is factually baseless. Similarly, ORPC Rule 8.4 bars lawyers from engaging in fraudulent conduct such as representing that the defendant committed a particular crime that is unsupported by the facts. *Id.* at 2999.

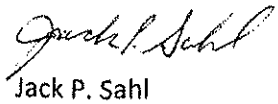
Third, in addition to the misrepresentation aspect of factually baseless pleas for lawyers and judges, the public may be at risk because of such pleas. Downstream third parties may rely on these factually baseless pleas to their detriment when dealing with defendants. For example, a potential employer may investigate an employee differently had the employer known the true facts surrounding the defendant's case instead of relying on a negotiated downward plea that is factually baseless. Permitting defendants to plead guilty to downgraded crimes that are factually baseless also weakens the deterrence effect of criminal law and may threaten public safety. Deterrence is enhanced when the law and courts hold persons culpable for their actual conduct instead of imposing random punishment tethered to fictitious offenses. *Id.* at 2992.

Fourth, a prosecutor is a "minister of justice and not simply an advocate." ORPC R.3.8, CMT 1. This special responsibility includes the "obligation[] to see that the defendant['s] guilt is decided upon the basis of sufficient evidence." ORPC R.3.8, CMT 1. The failure of prosecutors to honor this special responsibility by ensuring that defendants plead guilty only to offenses that occurred threatens to undermine public trust in the criminal justice system. The public will question not only the factual legitimacy and fairness of convictions based on negotiated pleas but also wonder about the accuracy and legitimacy of other prosecutorial and judicial action.

Finally, judges have a special responsibility to promote the public interest in a fair and accurate criminal justice system that is ideally designed to find the truth. Judges need to protect the integrity of this system and the courts. Judges are held to a very high ethical standard, which includes following the ethical code governing lawyers. *See* Byrne at 3001. When judges accept factually baseless pleas they, like lawyers, further misrepresentations about the criminal conduct of defendants. Judicial cooperation in this charade promises to undermine both the integrity of the courts and criminal justice system.

I urge the Commission to adopt the amendment to Criminal Rule 11.

Sincerely yours,



Jack P. Sahl

Judge Thomas A. Januzzi
P.O. Box 179
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OBERLIN MUNICIPAL COURT

Chief Magistrate Mark Huberman
Chair of the Commission on the Rules of Practice and Procedure
C/O Jo Ellen Klein
65 South Front St. 7th floor
Columbus, OH 43215

March 25, 2015

Re: Proposed Criminal Rule 11(F) Amendment

Dear Chief Magistrate Huberman:

The Honorable Michael P. Donnelly asked that I write a letter regarding my experience with requiring a factual basis for pleas in the Oberlin Municipal Court. I have been the sitting judge in the Oberlin Municipal Court since January 2002. Oberlin Municipal Court is a single judge court.

I am in favor of the Rule amendment requiring a factual basis for pleas. I am aware that there are other Municipal and County Court Judges that are not in favor of the proposal and some that even are strongly opposed.

For some time I have personally struggled with the ethical dilemma of permitting plea bargains to offenses that are not supported by probable cause. Rule 3.8 of the Ohio Rules of Professional Conduct prohibit a prosecutor from pursuing or prosecuting a charge that the prosecutor knows is not supported by probable cause. Participating in a plea bargain that is contrary to the ethical rule and in violation of the law appears to be a violation of a judge's duty to follow the law. In addition, many times a person charged with a crime who is confident that they were not guilty accepts a plea to a crime that was not supported by the facts just to finish the case even though they many times are [visibly] unhappy and disturbed with entering a plea. Persons are convicted of crimes that they clearly did not commit and/or for which there was no evidence to support.

After a period of time of presiding over cases such as these the practice of accepting plea bargains just for the sake of a plea bargain has been all but abandoned. If a prosecutor presents a plea bargain we require that the factual basis for the plea bargain be set forth either in writing or in open court so that the judge can determine if the plea bargain is appropriate under the circumstances. When the concept was first introduced in the Oberlin Municipal Court there was an adverse reaction both by [some] defense attorneys and prosecutors. There was great concern by some that not accepting plea bargains for offenses where no evidence supported the charge would result in a backlogged docket.

When I took the bench on January 1, 2002 there were 1920 cases pending according to the year-end report by the previous judge. The cases pending at year end over the past 5 years have averaged 695.

Admittedly I was somewhat intimidated by the predictions of a backlog when we first instituted the practice but it seems that the practice may be paying dividends. Fewer cases are being filed, more cases are being vetted at the beginning of the case, more cases are being dismissed that cannot be prosecuted, and persons that are found guilty are being held accountable. In addition, because persons are not being pressured to plea to an offense for which there is no evidence, confidence in the system is fostered both for those accused of crimes, victims and the public.

A statistical analysis for the past 10 years shows a steady decrease in criminal and OVI cases filed in the Oberlin Municipal Court. It also appears that recidivism is down for crimes such as Domestic Violence and OVI.

A word of caution is in order. Even though this has worked in the Oberlin Municipal Court it may not work in every court. All participants in the process must accept the concept - especially the judge. If a judge is not committed to this change then it will fail.

One of the benefits of the rule change may be to a judge who may need a tool to help that judge commit to the process and convince others to do so. By requiring the process by rule the judge can simply cite the rule to attorneys and other participants in the process.

Lastly, if this rule is not adopted to misdemeanors perhaps there should be an amendment to both the Ohio Rules of Professional Conduct and the Ohio Rules of Judicial Conduct to specifically permit prosecutors to prosecute misdemeanor cases where there is no probable cause and to allow judges to accept plea bargains in misdemeanor cases even though there is no probable cause to support the charge. If the ethical rules were changed to specifically permit pleas with no factual basis, then each individual judge could choose whether to permit pleas where there is no probable cause.

In any event we at the Oberlin Municipal Court will continue to endeavor to only accept plea bargains for charges where there is probable cause.

Sincerely yours,

Thomas A. Januzzi – Judge Oberlin Municipal Court

Copy: Honorable Michael Donnelly