

CRIMINAL ISSUES INITIATIVE
Respectfully submits the following position on:

*
ADM File No. 2010-16

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The Criminal Issues Initiative is comprised of members appointed by the President of the State Bar of Michigan.

The position expressed is that of the Criminal Issues Initiative only and is not an official position of the State Bar of Michigan, nor does it necessarily reflect the views of all members of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter but is authorizing the Criminal Issues Initiative to advocate their position.

The total membership of the Criminal Issues Initiative is 16.

The position was adopted after a workgroup recommendation and subsequent electronic discussion and vote. The number of members in the decision-making body is 16. The number who voted in favor to this position was 10. The number who voted opposed to this position was 0.

CRIMINAL ISSUES INITIATIVE

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October 7, 2010

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

**RE: ADM File No. 2010-16
Proposed Amendments of Rules 6.302 and 6.610 of the Michigan Court Rules**

Dear Clerk Davis:

At its September 29, 2010 meeting, the Board of Commissioners of the State Bar of Michigan considered the above rule amendments published for comment. The Board voted to authorize the Criminal Issues Initiative (CII) to advocate its position, contained herein.

In forming this response, the CII assembled a workgroup of judges, criminal defense trial and appeal attorneys, immigration attorneys, the Region 1 SCAO Administrator, and a prosecutor. The workgroup reviewed plea-taking provisions in other states to determine what requirements other states have in place to ensure that non-citizens are aware of the deportation consequences of pleas of guilty or nolo contendere, and discussed both Alternatives A and B proposed by the Court.

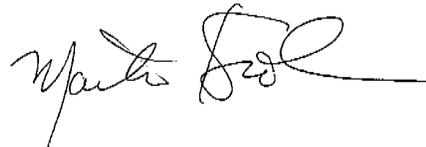
The Criminal Issues Initiative subsequently recommends the Court adopt Alternative B of ADM 2010-16 for amendment to Court Rules 6.302 and 6.610, with proposed recommended changes. These changes, along with additional rationale for the adoption of these recommendations, are outlined in the attached documents.

We thank the Court for its publication of the proposed amendments. Please contact us with any further questions.

Sincerely,



Frank D. Eaman
Co-chair, Criminal Issues Initiative



Martin P. Krohner
Co-chair, Criminal Issues Initiative

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
W. Anthony Jenkins, President

PROPOSAL ON ADM FILE NO. 2010-16
PROPOSED AMENDMENTS OF RULES 6.302 AND 6.610 OF THE MICHIGAN COURT RULES

Rule 6.302 Pleas of Guilty and Nolo Contendere

(A) Plea Requirements. The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant or defendants under oath and personally carry out subrules (B)-(E).

¹(B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:

(1) the name of the offense to which the defendant is pleading; the court is not obliged to explain the elements of the offense, or possible defenses;

(2) the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law;

²(3) a plea of guilty or nolo contendere by someone who is not a citizen may result in deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States;

~~(34)~~-~~(45)~~ [Renumbered but unchanged.]

¹ The Criminal Issues Initiative (CII) recommends that the suggested advice to the defendant concerning deportation consequences occur before the plea colloquy with the defendant. In a guilty plea, the colloquy between the court and the defendant results in admissions of the defendant as to the facts which form the basis of the defendant's guilt. In a nolo contendere plea, the colloquy consists of stipulated facts or factual findings of the judge that there is a basis for the defendant's guilt.

The immigration attorneys in the CII workgroup have confirmed that the admission of a defendant alone, or factual findings of the court, even without any adjudication of guilt, may result in deportation. CII makes the recommendation to move the advice of deportation consequences to the beginning of the plea because *before* a non-citizen defendant makes an admission of guilt that could subject him or her to deportation consequences, the court should inquire into the defendant's awareness of deportation consequences.

If the suggested advice to a defendant about the deportation consequences of the plea is moved to a new subsection (3) of 6.302(B), then the advice about the consequences comes before any admission that may result in deportation consequences.

² CII proposes that the language suggested by the Court in Alternative B be added to subsection (B) as (B)(3) and be modified as presented above. This group recommends that the last sentence of Alternative B be omitted, because (1) in felony pleas defendants are usually represented by counsel and (2) because of this workgroup's suggestion for an addition to subsection (E); *see, footnote 4.*

(~~5~~6) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right;

The requirements of subrules ³(B)(3), (B)(4) and (B)(6) may be satisfied by a writing on a form approved by the State Court Administrative Office. If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(C) - (D) [Unchanged.]

⁴(E) Additional Inquiries. On completing the colloquy with the defendant, the court must

- (1) ask the prosecutor and the defendant's lawyer whether either is aware of any promises, threats, or inducements other than those already disclosed on the record, and whether the court has complied with subrules (B)-(D). If it appears to the court that it has failed to comply with subrules (B)-(D), the court may not accept the defendant's plea until the deficiency is corrected.
- (2) ask whether the defendant's lawyer and the defendant have discussed the possible risk of deportation that may be caused by the conviction if the defendant is not a citizen.

(F) [Unchanged.]

Rule 6.610 Criminal Procedure Generally

(A) - (D) [Unchanged.]

³ This group proposes that the language at the end of subsection (B), be changed in two ways; first, so it conforms to renumbering, and second, to add the advice of deportation consequences to the plea form.

This change will not require new separate forms from SCAO, but it will require a change to the existing form. Adding the advice of deportation consequences to the form means that forms currently prepared in different languages will contain the advice about deportation consequences.

⁴ This group also recommends that, at the end of the plea, the court inquire of counsel whether he or she has discussed deportation consequences with the defendant. *Padilla v Kentucky* places the burden on defense counsel to know the deportation consequences of any conviction of his or her client and to advise the client correctly. The court should inquire of defense counsel at the end of the plea to ascertain that defense counsel has fulfilled his or her duty under *Padilla*. This can be accomplished by a revision to Subsection (E) similar to that proposed in ADM 2010-16. Subsection (E) should be broken into subsections (1) and (2), with (1) as proposed in ADM 2010-16, but subsection (2) modified as presented above.

⁵(E) Pleas of Guilty and Nolo Contendere. Before accepting a plea of guilty or nolo contendere, the court shall in all cases comply with this rule.

(~~2~~1) The court shall inform the defendant of the right to the assistance of an attorney. If the offense charged requires on conviction a minimum term in jail, the court shall inform the defendant that if the defendant is indigent the defendant has the right to an appointed attorney. The court shall also give such advice if it determines that it might sentence to a term of incarceration, even if suspended.

(~~3~~2) The court shall advise the defendant of the following:

(a) the mandatory minimum jail sentence, if any, and the maximum possible penalty for the offense,

⁶(b) a noncitizen defendant who offers a plea of guilty or nolo contendere risks deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States. Upon request, the court shall allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of the advisement.

(~~b~~c) [Relettered but unchanged.]

(~~4~~3) The court shall determine that the plea is understanding, voluntary, and accurate. In determining the accuracy of the plea,

(a) if the defendant pleads guilty, the court, by questioning the defendant, shall establish support for a finding that defendant is guilty of the offense charged or the offense to which the defendant is pleading, or

(b) if the defendant pleads nolo contendere, the court shall not question the defendant about the defendant's participation in the crime, but shall make the determination on the basis of other available information.

⁵ As with Rule 6.302, this group recommends that the advice of deportation consequences should occur before the colloquy with the defendant establishing the factual basis for the plea. Otherwise, the defendant may admit to an offense that requires deportation before he or she has been advised that those consequences exist. The subsections of (E) in this proposal have been rearranged so that the advice of deportation consequences precedes the admissions of the defendant.

⁶ Because many defendants in district court are not represented, this group recommends that the second sentence here remains in 6.610.

(4) A defendant or defendants may be informed of the trial rights listed in subrule ⁷(2)(b) and (2)(c) ...[remaining unchanged.]

(5) - (6) [Unchanged.]

⁸(7) A plea of guilty or no contendere in writing is permissible without a personal appearance of the defendant and without support for a finding that defendant is guilty of the offense charged or the offense to which the defendant is pleading if

(a) the court decides that the combination of the circumstances and the range of possible sentences makes the situation proper for a plea of guilty or nolo contendere;

(b) the defendant acknowledges guilt or nolo contendere, in a writing to be placed in the district court file, and waives in writing the rights enumerated in subrule (3)(b); and

(c)the defendant acknowledges in writing that he is aware that a noncitizen defendant who offers a plea of guilty or nolo contendere to the court risks deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States.

(~~e~~d) [Relettered but unchanged.]

(8) [Unchanged.]

(9) The State Court Administrator shall develop and approve forms to be used under subrules (E)(4)(b) and (c) and (E)(7)(b) ⁹and (c).

(F) - (H) [Unchanged.]

⁷ This will not require a new form from SCAO, but will require the addition of the deportation advice to the existing form. As with 6.302, this will also permit forms in different languages to be available that will clearly advise a pleading defendant of the deportation consequences.

⁸ This group recommends that subsection (E)(7), which permits a plea in writing without a personal appearance of the defendant, be amended with new subsection (c) to ensure that any defendant who presents a plea in writing will do so with knowledge that the plea could have deportation consequences.

⁹ This group does not propose a separate new form be developed, but rather that the current form used for written pleas, where the defendant is absent, be amended to include the advice of deportation consequences.

**ADDITIONAL RATIONALE FOR
CRIMINAL ISSUES INITIATIVE PROPOSAL ON ADM FILE NO. 2010-16**

The following information is intended to further explain the basis for the Criminal Issues Initiative (CII) proposal.

• **Conforms to Majority and Reasoned Approach in Other States**

The CII proposal most closely adheres to the approach taken by a majority of states in its recommendation to expand the advice to other immigration consequences, such as exclusion from admission and denial of naturalization. Of the nineteen states which require courts to confirm that a defendant is aware of immigration consequences prior to acceptance of a plea, fifteen states include deportation, exclusion from admission, and denial of naturalization within the ambit of such consequences.

• **Promotes Judicial Efficiency**

The CII proposal ensures that defense attorneys comply with their duties under *Padilla* and that immigrant defendants are aware of the implications of a conviction entered pursuant to a guilty or no contest plea. This hybrid proposal tracks Alternatives A and B and ensures that pleas will not be subject to challenge.

Under *Padilla*, if a defendant was not advised of potential immigration consequences from a guilty plea, he or she may attempt to reopen the conviction and have it set aside as constitutionally defective, even if it has been years since the plea was entered. This process takes time and resources away from courts and prosecutors.

Absent the additional protections afforded by Alternative B, Alternative A alone invites further litigation and drains judicial resources by allowing defendants to claim that they did not, in fact, have a conversation with their attorney regarding immigration consequences or, if the conversation did occur, that the information obtained from their attorney was incomplete or inaccurate.

Alternative A and Alternative B work best together so that pleas are respected.

• **Adheres to Language and Meaning of *Padilla***

The U.S. Supreme Court was explicit in its ruling in *Padilla* that the Sixth Amendment requires immigrant defendants to be correctly advised regarding immigration consequences of a guilty plea. Justice Stevens, writing for the majority in *Padilla*, noted that it is not enough for a defense attorney to simply inform a defendant regarding immigration consequences, but that information must be also be accurate.

It is not enough for a judge to question, as required by Alternative A, whether a defendant had a conversation with his or her attorney regarding deportation consequences from a plea. The CII proposal fully complies with *Padilla* by ensuring that defense attorneys and their clients have spoken regarding immigration consequences and defendants have an opportunity to consider those consequences prior to offering a plea.

The CII proposal covers both directives and also ensures that district court defendants, many of whom are unrepresented, acknowledge in writing they are aware that a plea may have deportation and other immigration consequences.

- **Protects Individual Rights**

The CII proposal provides greater protection of individual rights because it both ensures communication regarding immigration consequences between defense counsel and defendants and requires a judge to affirmatively state that a contemplated plea may have immigration consequences, allowing the judge to grant additional time for defendants to explore such consequences if needed.

Alternative A alone merely requires that the “risk of deportation” be discussed while the CII proposal places a defendant on notice regarding other consequences, including exclusion from admission and denial of naturalization. Again, this recommendation conforms to the majority of states that currently require courts to confirm a defendant is aware of immigration consequences before accepting a plea.

The CII proposal also requires that a judge advise a defendant regarding potential immigration consequences prior to the colloquy stage of a plea, at which a defendant affirms the factual basis for a plea. This ensures that a defendant does not admit elements of an offense that may trigger immigration consequences solely based on the admission of certain conduct, even absent a conviction.

- **Does Not Burden Judges or Prosecutors**

The CII proposal does not place any undue burden on judges or prosecutors other than that judges would merely be required to, first, confirm that a defendant is aware of any immigration consequences prior to accepting a plea agreement and, second, verify that defense counsel spoke with a defendant regarding deportation consequences. If a defendant then decides not to take a plea and proceed to trial, the defendant is simply exercising a right enshrined in the U.S. Constitution. In fact, the minimal effort required of judges under the CII proposal will ultimately save judges and prosecutors time and effort by ensuring that pleas are not subject to attack for noncompliance with *Padilla*.

- **Criminal Immigrants Will Still Be Deported**

The CII proposal is not a “Get Out of Jail Free” card for immigrant defendants. In fact, the amendments to the plea-taking rules will likely have a small effect on how many immigrant defendants are deported because the immigration laws are very strict; nearly all felonies and many misdemeanors under Michigan law are classified as “aggravated felonies” subject to mandatory deportation or constitute “crimes involving moral turpitude,” which may trigger deportation or other serious consequences. The CII proposal simply allows immigrant defendants charged with less serious crimes time to carefully consider their options.

In contrast, Alternative A, if enacted alone, invites immigrant defendants who have committed deportable offenses to try to delay their deportation by claiming that any conversation with their defense attorney regarding deportation consequences was not complete or accurate and, on that basis, their criminal conviction should be reopened.