U.S. Department of Homeland Security
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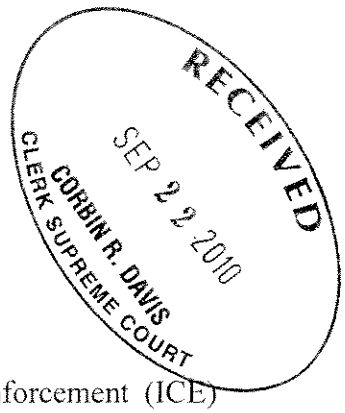
Detroit, MI 48207

U.S. Immigration and Customs Enforcement

September 21, 2010

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



RE: Administrative File No. 2010-16

Dear Mr. Davis:

On behalf of the United States Immigration and Customs Enforcement (ICE) office in Detroit, Michigan, I am writing to express my view of the proposed amendments to MCR 6.302 and 6.610. An amendment to the Michigan Court Rules in light of the recent United States Supreme Court decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) is both wise and necessary. In my opinion, Alternative B is the better of the two choices.

I believe that the implementation of Alternative A would create a number of concerns. First, limiting the requirement to inform only those who are not citizens of the United States would put courts in the position of having to determine citizenship. This is problematic as defendants may be reluctant to divulge their immigration status in open court. Further, defendants may falsify their status in criminal court in an attempt to avoid contact with immigration authorities subsequent to their conviction. In either circumstance, these defendants may later attempt to claim they were not advised of adverse immigration consequences to pleading guilty. Additionally, the legal determination of whether someone is a citizen of the United States can be extremely complex; in some cases a defendant's citizenship may depend upon whether he or she derived or acquired citizenship based upon their parents' (or grandparents') activities decades prior. State court judges are neither equipped nor trained to conduct a complex citizenship analysis, nor do they have statutory authority or jurisdiction to determine if an individual is a United States citizen.

Additionally, Alternative A requires a trial court to ask the lawyer and the defendant if they have had a discussion about the risk of deportation. Besides potentially implicating the attorney/client privilege, this requirement limits the discussion to the risk of deportation. Such an advisal may not fully address the procedural complexities raised

by *Padilla*. The courts have not yet determined the reach of the *Padilla* opinion. An alien's conviction can carry immigration consequences that encompass more than removal, i.e. deportation[1], to include, among others, eligibility for naturalization and other immigration benefits.[2] For example, under proposal A, individuals who have applications pending for immigration benefits may – or may not - have been advised that their convictions may preclude their eligibility for that benefit. This may lead to subsequent attacks by alien defendants if DHS denies their applications as a result of their prior pleas. While ICE is not herein taking the position that *Padilla* extends to applications for relief, we recognize that courts may so construe *Padilla*. *See, e.g., William Rene Diaz v. DHS, et al.*, Civ. No. H-10-2173, (S.D. Tex. June 25, 2010) (unpublished oral decision granting temporary injunction premised on the finding that a defendant would likely succeed on a state court habeas claim challenging his underlying conviction under *Padilla* because he had not been informed the impact that conviction would have on his temporary status under 8 U.S.C. § 1254a(a)(1)(A)).

In sum, Alternative A places an unnecessary burden on judicial decision-making and resources, by requiring the trial court to make a citizenship determination of every criminal defendant. It would also require a colloquy between the lawyer, defendant, and the court as to the nature of their discussions regarding immigration; and it would presumably result in a number of cases having to be delayed to correct the deficiency.

Alternative B, on the other hand, is more closely related to the plea procedures set forth in the Michigan General Court Rules (GCR). Pursuant to GCR 1963 785.7(1)(c), Michigan trial court judges advise defendants that, if they are on probation or parole, a plea of guilt or nolo contendre may affect the defendant's probation or parole status. Alternative B would provide similar protection to defendants who may be unaware of the immigration consequences of their pleas. Alternative B also resolves the complications associated with *pro se* defendants who may not have the benefit of advice of counsel during their criminal proceedings.

While Justices Markman and Corrigan are understandably reluctant to further expand the rights outlined in the *Padilla* decision, because it cannot be known how courts will interpret *Padilla* in the future, the broader advisement provided by Alternative B appears to be the more thorough and efficient of the two proposed options. Further, Justices Markman and Corrigan express a concern over the waste of judicial resources; in my opinion implementing the procedures as outlined in Alternative B would reduce the risk of unwarranted and meritless challenges post plea agreement premised upon *Padilla*.

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[1] If the court decides to adopt Alternative B, ICE recommends that the word "removal" be substituted for "deportation." See generally *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 33 n.1 (2006). Similarly, ICE recommends that the phrase "denial of admission" be substituted for "exclusion from admission." See generally *Chi Thon Ngo v. I.N.S.*, , 394 n. 4 (3d Cir. 1999).

[2] If the court decides to adopt Alternative B, ICE recommends that the phrase "denial of naturalization" be expanded to read as "denial of naturalization or other immigration benefits."

This is an important issue and I thank you for the opportunity to express my opinions. Should anyone desire to discuss the issue with me, please do not hesitate to contact my office.

Sincerely,

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