To: Criminal Issues Initiative and Committee on Justice Initiatives

Re: ADM File No. 2010-16 -- Arguments in Favor of Criminal Issues Initiative Proposal

A workgroup of the Criminal Issues Initiative reviewed the Michigan Supreme Court's proposed plea-taking rule changes in light of the U.S. Supreme Court's ruling in Padilla v. Kentucky. The Michigan Supreme Court requested comment on proposed Alternative A (requiring a judge to determine if a defendant and defendant's attorney have discussed the risk of deportation) and Alternative B (requiring a judge to advise a defendant that a plea may have deportation or other immigration consequences and allowing a defendant additional time to consider such consequences). The workgroup proposed a hybrid approach, encompassing both Alternatives A and B, and reflecting the presence of unrepresented defendants in district courts and the order in which judges should advise defendants of immigration consequences and ensure defense counsel's compliance with Padilla. The following information is intended to explain the basis for the CII workgroup's proposal.

- **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, a defendant may attempt to reopen the conviction – even years after it was entered – and have it set aside as Constitutionally-defective. 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 they did, that the information obtained from their attorney in that conversation was incomplete or inaccurate. In short, 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. 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. Justice Stevens, writing for the majority in Padilla, noted that it is not enough for a defense attorney to inform a defendant regarding immigration consequences but that information must be accurate. The CII proposal covers both directives as well as ensuring that district court defendants, many of whom are unrepresented, acknowledge in writing they are aware that a plea could 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 and allows the judge to grant additional time for defendants to explore such consequences. In addition, 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. 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, in order to ensure that a defendant does not admit elements of an offense, which may – even absent a conviction – trigger immigration consequences solely based on the admission of certain conduct.

- **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 save judges and prosecutors time and effort in the long run by ensuring that pleas are not subject to attack for noncompliance with Padilla.

- **Does Not Let Defense Attorneys Off the Hook**

The CII proposal affirms the obligation under Padilla for defense attorneys to advise their clients of deportation consequences, as required by Alternative A. Yet, if Alternative A is the sole requirement, then defense counsel can merely provide vague advisals of potential deportation consequences rather than information tailored to the unique facts of each defendant's immigration

status and potential criminal record. The CII proposal's adoption of Alternative A and B ensures that defendants are aware or have an opportunity to become aware that a plea may have immigration consequences. The CII proposal puts both defense counsel and defendants on notice that immigration consequences may exist and ensures that Padilla is fully respected.

- **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 and 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, such as writing bad checks or shoplifting, 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.

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

The CII proposal most closely adheres to the approach taken by a majority of states. Of the 19 states which require courts to confirm that a defendant is aware of immigration consequences prior to acceptance of a plea, 15 states include deportation, exclusion from admission, and denial of naturalization within the ambit of such consequences.