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Office of Administrative Counsel
PO Box 30052
Lansing, MI 48909

Dear Administrative Counsel:

Re: **ADM File 2015-27**
Michigan Indigent Defense Commission's
Proposed Standards for Appointed Counsel

As an immigration attorney in private practice, I wish to comment on an item missing from the Proposed Standards submitted to the Court by the Michigan Indigent Defense Commission. I appreciate that the goal of these Proposed Standards is an attempt to set baseline expectations for appointed criminal defense counsel; nonetheless, these Standards should, at some point, recognize the unique problems that arise at the intersection of criminal law and immigration law.

On behalf of indigent criminal defendants who are not U.S. citizens, AND on behalf of criminal defense attorneys who do not practice immigration law, I respectfully suggest that the Standards recognize and incorporate the holding of the U.S. Supreme Court in Padilla v Kentucky.¹ In Padilla, the U.S. Supreme Court held that it is ineffective assistance of counsel for a criminal defense attorney to not advise, or to misadvise, his or her client on the immigration consequences of a criminal plea.

The focus for the non-citizen defendant and their counsel in considering a plea is no longer just how to reduce a jail or prison sentence but also how to reduce or avoid immigration consequences. As this Commission and Court consider how best to provide effective criminal defense services to an indigent population, those who are both non-citizen and indigent deserve attention.

¹ Padilla v Kentucky, 559 U.S. 356 (2010).

Effective legal consultation on the immigration consequences of criminal activity is too specialized, too detailed, too particularized to a specific individual's immigration circumstances, too varied across the federal circuits, and too flux to expect of a criminal defense attorney who does not regularly practice in this area.

Standard One (education/training requirement) and How Immigration Law Fits:

It is likely that some criminal defense attorneys do still need an introduction to Padilla and its progeny under Standard One – Education and Training of Defense Counsel.

Padilla v Kentucky² was decided by the U.S. Supreme Court in 2010 and established a constitutional minimum for criminal defense attorneys who must advise their non-citizen criminal defendants on the immigration consequences to their criminal pleas. Chaidez v US³ was decided by the U.S. Supreme Court in 2013 and found the rule in Padilla was prospective in nature and not to be given retroactive effect.

Nonetheless, immigration attorneys still consult with many clients who have criminal convictions that occurred after 2010 and whom were never advised of the immigration consequences to their pleas. Many times, a great result was obtained by the criminal defense attorney from a criminal perspective, but a tragic result arises later from an immigration perspective.

Standards Two (prompt initial interview) and Three (funds appropriate for the defense) and How Immigration Law Fits:

The Third Circuit Court, Criminal Division operates a “pilot project” within which a court-appointed criminal defense attorney may motion the court to appoint an immigration attorney to consult on the particular immigration consequences to a particular plea. As stated earlier, the focus for the non-citizen defendant and their counsel in considering a plea is no longer just how to reduce a jail or prison sentence but also how to reduce or avoid immigration consequences.

When this writer is appointed on such matters, a jail visit or office appointment must be made in order to obtain a full and complete immigration history. Information and documents from the criminal defense attorney, such as police reports, preliminary hearing transcripts, charging documents, and criminal history records complete the investigation. Legal research on the present immigration consequences for a myriad of charges and potential pleas is completed. Updates on legal research for various offenses must be done regularly as the law expands or changes quickly. The ultimate legal immigration advice is communicated to criminal defense counsel and the defendant verbally or in writing. At times, this writer is requested to appear in court for any last minute negotiations that may arise or to appease the court.

² Id.

³ 568 U.S. ___, 133 S. Ct. 1103 (2013).

In other states, public defender offices have hired immigration attorneys on to their staff to ensure the effective assistance of counsel to their non-citizen clients. Some states have non-profit organizations that specialize and advise criminal defense attorneys in these matters.

Standard Four (timing of appointment of counsel) and How Immigration Law Fits:

Furthermore, I see many clients in my office who were convicted of an offense in district court and never even had an attorney. The criminal defendant works out a great deal with the local prosecutor, makes a plea before the district court judge, gets probation or minimal jail time or delayed sentence, and thinks they caught a break. Until they are in my office and I advise them that the conviction makes them ineligible to become a U.S. citizen . . . or places them in violation of their nonimmigrant status and suspect for visa revocation . . . or affords them no relief from removal now that they are in removal/deportation proceedings or . . . and the list goes on.

A non-U.S. citizen has not made a knowing, intelligent, and voluntary waiver of their right to defense counsel when that person is unaware of the complexities hidden beyond their district court matter and unaware of the potential for dire consequences to their immigration status. This dilemma should give even stronger impetus to assign criminal defense counsel to defendants early on in any criminal proceeding and before any plea is taken from anyone who is not a U.S. citizen.

Please do not hesitate to contact me should any questions or request for further clarification arise.

Sincerely,

/s/ Cynthia M. Nunez
Cynthia M. Nunez (P49780)
Attorney