

# Order

Michigan Supreme Court  
Lansing, Michigan

March 25, 2021

Bridget M. McCormack,  
Chief Justice

ADM File No. 2018-29

Proposed Amendments of  
Rule 6.302 and Rule 6.610  
of the Michigan Court Rules

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Justices

The Court, having given an opportunity for comment in writing and at a public hearing, again seeks public comment regarding proposed amendments of Rule 6.302 and Rule 6.610 of the Michigan Court Rules to eliminate the ability for a court to establish support for a finding that defendant is guilty of the offense charged as opposed to the offense to which defendant is pleading guilty or nolo contendere. During the initial comment period, the Court received comments opposed to the proposal, generally noting that the current procedure moves cases along and promotes efficiency for all concerned. But the Court is interested in comment that also addresses the propriety and effectiveness of such a system. Some commentators have characterized a plea in which a defendant provides a factual basis to a crime other than the one to which he or she ultimately pleads guilty or nolo contendere as a “fictional plea” and have raised concerns about courts accepting such pleas. See, e.g., Johnson, *Fictional Pleas*, 94 Ind LJ 855 (2019). In particular, the Court is interested in receiving additional comments addressing the impacts, if any, of so-called fictional pleas on (1) the truth-seeking process; (2) sentencing goals, including rehabilitation and crime deterrence; (3) the scoring of sentencing guidelines, making of restitution awards, and determining habitual offender status or parole eligibility; (4) determining collateral consequences of the conviction, including whether a defendant is subject to deportation or must register as a sex offender; (5) compilation of crime statistics; and (6) the constitutional separation of powers, i.e., whether fictional pleas violate the separation of powers by allowing the parties and the trial court to disregard the penalties prescribed by the Legislature for a particular crime.

On order of the Court, this is to advise that the Court is again considering amendments of Rule 6.302 and Rule 6.610 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also may be considered at a public hearing. The notices and agendas for public hearings are posted at [Administrative Matters & Court Rules page](#).

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining  
and deleted text is shown by strikeover.]

#### Rule 6.302 Pleas of Guilty and Nolo Contendere

(A)-(C) [Unchanged.]

(D) An Accurate Plea.

- (1) If the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of ~~the offense charged~~ or the offense to which the defendant is pleading.
- (2) If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. The court must:
  - (a) [Unchanged.]
  - (b) hold a hearing, unless there has been one, that establishes support for a finding that the defendant is guilty of ~~the offense charged~~ or the offense to which the defendant is pleading.

(E)-(F) [Unchanged.]

#### Rule 6.610 Criminal Procedure Generally

(A)-(E) [Unchanged.]

(F) 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.

- (1) 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) [Unchanged.]

(2)-(6) [Unchanged.]

- (7) A plea of guilty or nolo 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)-(c) [Unchanged.]

A “writing” includes digital communications, transmitted through electronic means, which are capable of being stored and printed.

(8)-(9) [Unchanged.]

(G)-(I) [Unchanged.]

*Staff Comment:* The proposed amendments of MCR 6.302 and MCR 6.610 would eliminate the ability for a court to establish support for a finding that defendant is guilty of the offense charged as opposed to an offense to which defendant is pleading guilty or nolo contendere. The sentencing guidelines make clear that offense variables are to be scored on the basis of the “sentencing offense alone,” not the charged offense. Further, an “offense to which defendant is pleading” would include the charged offense (if defendant is pleading to the charged offense) as well as any other offense that may have been offered by the prosecutor, so the “charged offense” clause may well be unnecessary.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or [ADMcomment@courts.mi.gov](mailto:ADMcomment@courts.mi.gov). When filing a comment, please refer to ADM File No. 2018-29. Your comments and the comments of others will be posted under the chapter affected by this proposal at [Proposed & Recently Adopted Orders on Admin Matters page](#).



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 25, 2021

Clerk