



11-CR-001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

HAYDEN HEAD
SENIOR U.S. DISTRICT JUDGE

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January 31, 2012

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Members of the Committee on Rules of Practice and Procedure:

Thank you for the opportunity to comment on the proposed amendment to the Federal Rules of Criminal Procedure, Rule 11, which adds the admonition that "if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future." Fed.R.Crim.P. 11. For this change, the Committee relies on a Sixth Amendment ineffective assistance of counsel case, *Padilla v. Kentucky*, --- U.S. ---, 130 S.Ct. 1473 (2010). The *Padilla* majority held that an attorney gave ineffective assistance to a permanent resident alien when the attorney provided improper immigration advice that Padilla would not be deported if convicted by his plea of guilty to a drug charge. Hopefully the Committee will conclude that *Padilla* is not a sufficient basis to amend, and that *Padilla* certainly does not justify broadly applying the amendment to all non-citizens.

The Supreme Court addresses the failed duty of counsel, not an error of the court. Without precedent, the proposed amendment, not *Padilla*, would create a due process duty to judicially admonish a defendant of adverse immigration consequences. Indeed, precedent is to the contrary. See *United States v. Delgado-Ramos*, 635 F.3d 1237 (9th Cir. 2011) (rejecting *Padilla* as a reason to find the present Rule 11 inadequate to protect an undocumented alien's due process rights).

Rule 11 has served well by wisely excluding collateral consequences from its admonitions. Adverse consequences not addressed by Rule 11 include, but are not limited to, loss of federal benefits, exclusion from health care programs, loss of eligibility for student grants and loans, loss of eligibility for housing benefits, negative effects on employment and professional licenses, potential effects on parental and custodial rights, loss of right to possess firearms, loss of certain voting rights, exclusion from jury service, ineligibility to acquire a commercial driver's license, and exclusion from military service. See, e.g., 21 U.S.C. § 862 (federal benefits); 42 U.S.C. § 1320a-7 (health care programs); 20 U.S.C. § 1091 (student grants and loans); 42 U.S.C. §§

13661, 13662, 13663, 1437f(d)(1)(B)(iii) (housing benefits); 42 U.S.C. §§ 675 (parental rights); 18 U.S.C. §§ 922(g), 921(a)(20) (firearms); 10 U.S.C. § 504 (military). Loss of one or a combination of these significant benefits may have the same, or even greater, adverse effect on an American citizen as would removal of a non-citizen to his own homeland. *Padilla* provides no justification to disrupt the policy embedded in Rule 11 that it is a procedure to be followed to protect due process rights, not a practice guide for attorneys.

If the Committee does choose to proceed to amend, it should narrow its scope to the facts of *Padilla*. As written, the amendment extends *Padilla* beyond its facts to include undocumented aliens, i.e. persons without any lawful right to be in the United States, not just ones like Padilla who held a documented right to be within the United States. Nothing is achieved by a judge warning a defendant who claims no right to be present within the United States that he risks deportation by pleading guilty. Conviction or not, such a defendant is subject to deportation.

Respectfully,

A handwritten signature in cursive script, appearing to read "Hayden Head".

Hayden Head
Senior United States District Judge
Southern District of Texas, Corpus Christi Division