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VIA ELECTRONIC MAIL 11-CR-005

February 15, 2011

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

Public Comment on Proposed Amendment to Federal Rule of Criminal Procedure 11

Dear Secretary McCabe:

On behalf of the National Immigration Project of the National Lawyers Guild (National Immigration Project) we submit these comments pursuant to the Committee on Rules of Practice and Procedure's request for public comments relating to the Committee's proposed amendment to Rule 11 of the Federal Rules of Criminal Procedure.

We thank you for considering our comments and hope the Committee finds them helpful.

I. The Advisory Committee Note to the Proposed Amendment to Rule 11 of the Federal Rules of Criminal Procedure Should Contain Language Barring Judges from Providing Specific Immigration Advice or Questioning Defendants Beyond the Proposed Text of Rule 11(b)(1)(O).

The Advisory Committee Note to the Rule 11 amendment currently "mandates a generic warning, and does not require the judge to provide specific advice concerning the defendant's individual situation." The Advisory Committee Note to the 1974 amendment to Rule 11 regarding collateral and other consequences of a plea explains that "the judge is not required to inform a defendant about these matters, though a judge is free to do so if he feels a consequence of a plea of guilty in a particular case is likely to be of real significance to the defendant." Read together, these notes suggest it may be appropriate for judges in specific cases to provide a more detailed immigration warning or to question defendants concerning their individual immigration situation.

The National Immigration Project strongly believes the proposed warning should be a ceiling and not a floor, i.e., that judges should leave to defense counsel the duty to provide specific individualized advice about the actual immigration consequences. It is neither appropriate nor feasible for a court to give specific, individualized

advice to defendants about the immigration consequences of a conviction, which requires investigation of the defendant's specific immigration history and legal analysis.[1] Nevertheless, some federal courts provide specific advice to defendants (and in some cases wrongly) by advising a noncitizen defendant that she *will* be subject to detention and deportation.[2] Such advice is potentially inaccurate, and also may undermine a carefully negotiated plea intended to preserve the possibility of later relief from deportation.

It is also critical that judges provide the Rule 11(b)(1)(O) warning without inquiring into the content of the advice provided by defense counsel. When the court makes such inquiries, defendants may feel pressured to provide a response, regardless of the adequacy of their defense counsel's prior advice. Such an inquiry also may compel a disclosure of communications between a defendant and counsel that potentially violates attorney-client privilege, as discussed below in Point II. Modifying the Committee Note to discourage judges from adding inquiry beyond the proposed text of Rule 11(b)(1)(O) would avoid such inappropriate questioning.

Therefore, the National Immigration Project urges the Committee to modify the language in the Advisory Committee Note to the Rule 11 amendment as follows:

> The amendment mandates a generic warning, and ~~**does not require**~~ the judge ~~**to**~~ **[should not]** provide specific advice concerning the defendant's individual situation **[or add other inquiry beyond the language of the amendment]. This Note supersedes the language relating to collateral consequences in the Advisory Committee Note to the 1974 amendment, as Rule 11(b)(1)(O) now specifically addresses immigration consequences.**

II. The Advisory Committee Note to the Proposed Amendment to Rule 11 of the Federal Rules of Criminal Procedure Should Bar Judges from Inquiring about a Defendant's Citizenship.

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[1] *See, e.g.,* ABA Pleas of Guilty Standard 14-3.2, Commentary (stating that the court's "inquiry is not, of course, any substitute for advice by counsel"); ABA Pleas of Guilty Standard 14-3.2(f) ("[O]nly defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case.").

[2] *See, e.g., Mendoza v. United States*, 774 F.Supp.2d 791, 794 (E.D. Va. 2011) (warning the defendant during the Rule 11 plea colloquy that "you *will* also be subject to deportation") (emphasis added); *Marroquin v. United States*, 2011 WL 488985, *8 (S.D. Tex. Feb. 4, 2011) (unpublished) (warning the defendant during the plea colloquy that "if you're not a citizen of this country, then this *would* require that your status here be revoked, and you *would be* deported back to your home country") (emphasis added); *United States v. Bhindar*, 2010 WL 2633858, *2 (S.D.N.Y. June 30, 2010) (unpublished) (warning the defendant during the plea allocution, "do you understand that one of the consequences of your plea, if you are not a citizen of the United States is that, at the conclusion of your sentence, you *will* be removed from the United States and prohibited from ever re-entering the United States?") (emphasis added).

The Advisory Committee should modify the Note to clarify that judges should not require the disclosure of the defendant's citizenship as part of the proposed immigration warning. Any judicial questioning about a defendant's citizenship is not only unnecessary for the administration of the immigration warning, but also inappropriate, and potentially prejudicial and unconstitutional.[3] For example, questioning defendants about immigration status on the record potentially infringes on Fifth Amendment protections against self-incrimination.[4] Such questions may result in oral statements about alienage on the record which the government could use as evidence in support of other criminal charges for offenses in which immigration status is an element, such as the federal crimes of illegal entry[5] and illegal reentry following deportation.[6] To avoid such complications, judges should not ask about alienage on the record.

Further, attorneys need to be able to ask defendants about their immigration status and related issues to provide competent advice regarding the immigration consequences of a plea, making such communications subject to attorney-client privilege. Compelling the disclosure of a defendant's communications with her lawyer in the pursuit of legal advice, where it is not relevant to her criminal proceedings, may violate Federal Rule of Evidence 501.[7] Also, defendants who fear the disclosure of information shared with their attorneys about their immigration status in court may withhold facts that are essential for their attorneys to provide accurate advice.

Recognizing the concerns associated with disclosure of citizenship on the record, at least ten states explicitly prohibit courts from asking about or otherwise requiring disclosure of a defendant's citizenship.[8] For example, Arizona's rule on pleas of

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[3] *See generally* Immigrant Defense Project & New York University School of Law Immigrant Rights Clinic, Judicial Obligations After *Padilla v. Kentucky* (2011), *available at* http://immigrantdefenseproject.org/wpcontent/uploads/2011/05/postpadillaFINALnew2.pdf.

[4] The Fifth Amendment states, "No person shall … be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. An individual's right under the Amendment to avoid self-incrimination applies "to any official questions put to him [or her] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him [or her] in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

[5] 8 U.S.C. § 1325.

[6] 8 U.S.C. § 1326.

[7] Fed. R. Evid. 501 (establishing general rule with regard to privileges); *see also Upjohn Co. v. U.S.*, 449 U.S. 383, 396 (1981); S. Rep. No. 93-1277, at 13 (1974) (emphasizing that "the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis," depending on the facts relevant to a particular case); *Trammel*, 445 U.S. 40, 47 (1980) ("In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis' . . .") (citations omitted).

[8] *See* Ariz. R. Crim. P. 17.2(f); Cal. Penal Code § 1016.5(d); Conn. Gen. Stat. Ann. § 54-1j(b); Md. Rule 4-242(e) (specifying in Committee note that court should not question defendants about citizenship status); Mass. Gen. Laws Ann. ch. 278, § 29D; Neb. Rev. Stat.

guilty and no contest states, "The defendant shall not be required to disclose his or her legal status in the United States to the court."[9] The ABA's *Standards for Criminal Justice Pleas of Guilty* also stipulates that courts should advise defendants as to immigration consequences, but "such a notice should not, however, require the defendant to disclose to the court his or her immigration status."[10]

The National Immigration Project urges the Committee to modify the following language in the Advisory Committee Note to the Rule 11 amendment:

> "The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without ~~first~~ attempting to determine the defendant's citizenship."

III. The Committee Should Include Language in an Advisory Committee Note to Rule 11(b)(1)(D) of the Federal Rules of Criminal Procedure Instructing Judges to Appoint Counsel to Provide Immigration Advice of the Plea for Certain Defendants Denied Court-Appointed Counsel for a Non-Jailable Petty Offense.

The Federal Rules of Criminal Procedure entitle misdemeanor defendants to counsel in all cases before a district court judge.[11] A magistrate judge, however, may preside over cases involving certain petty offenses without counsel if the magistrate judge "waives" imprisonment and does not find counsel required in the interests of justice.[12] Although some of these offenses may not carry a risk of incarceration, some may carry severe immigration penalties—penalties that the United States Supreme Court has acknowledged may be of greater concern to a defendant than incarceration.[13] For example, in October of 2011, the most frequently cited charge in magistrate courts

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§29-1819.03 (providing legislative findings and intent); Ohio Rev. Code Ann. (ORC Ann.) § 2943.031(C); R.I. Gen. Laws § 12-12-22(d); Wash. Rev. Code (ARCW) § 10.40.200(1); Wis. Stat. § 971.06(c)(3). Ohio's statute specifies that a defendant must not be required to disclose legal status *except* when the defendant has indicated that he or she is a citizen through his entry of a written guilty plea or an oral statement on the record. *See* ORC ANN. § 2943.031(C).

[9] Ariz. R. Crim. P. 17.2(f).

[10] ABA Criminal Justice Standards Pleas of Guilty, http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pleas_guilty.authcheckdam.pdf at 59).

[11] Fed. R. Crim. P. 44 & Advisory Committee's Note (1966 Amendment).

[12] 18 U.S.C. § 3006A(a)(2) (2006); *see also* Fed. R. Crim. P. 58(a)(2), (b)(2)(C). In *Shelton v. Alabama*, 535 U.S. 654, 662 (2002) the Supreme Court held that whether an offense carries any possibility of incarceration determines if a defendant is entitled to assistance of counsel is. Some courts interpret this as meaning that a charged defendant is not entitled to court-appointed counsel when an offense carries no penalty of jail time.

[13] *See generally* Alice Clapman, *Petty Offenses, Drastic Consequences: Toward A Sixth Amendment Right To Counsel For Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 2011.

was illegal entry under 8 U.S.C. § 1325,[14] a plea which renders permanent residents subject to removal.[15] If the court denies appointed counsel, these permanent residents risk entering pleas without knowledge of the prejudicial immigration effects.

Rule 11(b)(1)(D) appears to allow the court to appoint counsel, if necessary, at the time of the guilty plea. Prior to accepting pleas in such cases, the court, at a minimum, should appoint counsel when the defendant specifically inquires about the immigration consequences of a plea, when alienage is an element of the offense, or when the court has a good faith basis to believe that a defendant could benefit from advice about immigration consequences. Counsel is necessary to provide these defendants with individualized advice about the immigration consequences of a plea or conviction as required by *Padilla v. Kentucky*. Only counsel can provide such advice, since judges are not in a position to conduct the detailed factual investigation and legal analysis required to advise each individual defendant regarding his or her specific case.

The National Immigration Project urges the Committee to add the following proposed language in an Advisory Committee Note to Rule 11(b)(1)(D):

> **For a defendant who has been denied court-appointed counsel on the grounds that he or she is charged with a non-jailable petty offense, the judge should appoint counsel at the time of the plea under Rule 11(b)(1)(D) to provide him or her with advice about the immigration consequences of a plea as required by *Padilla v. Kentucky*, if the defendant specifically inquires about the immigration consequences of the plea, if alienage is an element of the offense, or if the court has a good faith basis to believe that a defendant could benefit from individualized advice about immigration consequences.**

IV. The Advisory Committee Note to the Proposed Amendment to Federal Rule of Criminal Procedure 11 Should Recognize that the Warning Under Federal Rule of Criminal Procedure 11(b)(1)(O) Protects Defendant's Fifth Amendment Rights Whereas Effective Assistance of Counsel is a Sixth Amendment Right.

A judge's obligation to ensure that a defendant's plea is voluntary stems from the Fifth Amendment's Due Process Clause.[16] It almost needs no mention that a judge's

[14] This was the lead charge for 72 percent of all magistrate convictions in October 2011. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION CONVICTIONS FOR OCTOBER 2011 (2012), http://trac.syr.edu/tracreports/bulletins/immigration/monthlyoct11/gui.

[15] 8 U.S.C. § 1182(a)(6)(A); *see also Leal-Rodriguez v. INS*, 990 F.2d 939, 946-947 (7th Cir. 1993).

[16] *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969).

role is to serve as a neutral arbiter,[17] while counsel's role is to serve as the defendant's advocate.[18] Effective assistance of counsel requires counsel to provide competent advice to the defendant. In addition, the Sixth Amendment requires a criminal defense practitioner to advise her client regarding the immigration consequences of a guilty plea.[19]

Since the Supreme Court's decision in Padilla, several courts seemingly have conflated the respective roles of judge and defense counsel in assessing the significance of an immigration warning during the plea colloquy. The proposed amendment to Federal Rule of Civil Procedure 11 should help to reduce that problem. However, the National Immigration Project respectfully suggests that adding additional language to the Advisory Committee Note would avoid potential confusion regarding the important distinction between (1) the Court's obligation to protect a defendant's Fifth Amendment rights and (2) defense counsel's obligation to provide effective assistance of counsel.

In the time since the Court decided *Padilla*, this confusion already has arisen in at least one federal court. In *Marroquin v. United States*,[20] the district court told the defendant that she would be deported if she were a noncitizen. Moreover, the court used its warning as its basis for precluding post-conviction relief under the *Padilla* decision. That the district court conflated its role with defense counsel's role is evident from the court's statement that: "[T]he Court finds that an unequivocal admonition by the Court regarding the risk of deportation was sufficient for Petitioner to decide whether or not to enter a guilty plea." [21]

The National Immigration Project urges the Committee to add the following proposed language to Advisory Committee Note to the Rule 11 amendment:

> **The role of the court is to ensure that all defendants understand that the plea that they are entering may have adverse immigration consequences. This role is distinct from the role of counsel, which is to provide effective legal advice as required by the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). Thus, provision of the 11 (b)(1)(O) immigration warning does not cure a *Strickland* violation.**

The National Immigration Project believes that including the language above would provide important guidance to judges in applying the rule as intended.

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[17] *See Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 129 S. Ct. 2252, 2259 (2009); ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004).

[18] *United States v. Cronic*, 466 U.S. 648, 656 (1984).

[19] *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010).

[20] 2011 WL 488985, *8 (S.D. Tex. Feb. 4, 2011) (unpublished).

[21] *Id*.

V. The Advisory Committee Note to the Proposed Amendment to Rule 11 of the Federal Rules of Criminal Procedure Should Recognize that a Court Generally Should Permit a Defendant to Withdraw her or his Plea if the Defendant Demonstrates that Defense Counsel Failed to Provide the Immigration Advice Required under *Padilla* v. *Kentucky.*

The two-pronged test under *Strickland v. Washington* for ineffective assistance of counsel requires a petitioner to establish both that (1) the attorney's representation was objectively inadequate; and (2) petitioner suffered prejudice as a result of defense counsel's inadequacy.[22] In *Padilla v. Kentucky*, the Court held that counsel's failure to give advice about immigration consequences satisfies the first prong's requirement; that counsel's representation fell short of accepted standards.[23] If a defendant seeks to withdraw a plea and satisfies the court that defense counsel failed to give necessary immigration advice, then a defendant satisfies the first prong of *Strickland.*

In *Hill*, the Supreme Court recognized that, to demonstrate prejudice, a petitioner must demonstrate that he or she would have been willing to go to trial but for counsel's error.[24] Post-conviction relief often is the preferred forum to raise a claim of ineffective assistance of counsel,[25] and in this context, a petitioner must convince the factfinder that a decision not to plead guilty would have been rational under the facts of the case.[26] Where a defendant affirmatively renounces a plea by seeking to withdraw it, however, a factfinder need not engage in speculation about the reasonableness of a defendant's after-the-fact statement about rejecting the plea. Consequently, by seeking to withdraw the plea, the defendant meets the test under *Hill* and satisfies the second prong of *Strickland*.[27]

The National Immigration Project urges the Committee to include in the Advisory Committee Note to the proposed Rule 11 amendment the following language:

> **A defendant who demonstrates that her or his attorney failed to provide immigration advice required under *Padilla* v. *Kentucky* and seeks to withdraw her or his plea before sentencing has established a "fair and just" reason to withdraw the plea pursuant to Federal Rules of Criminal Procedure 11(d)(2)(B).**

As shown above, a defendant who demonstrates that counsel failed to advise prior to the guilty plea and who affirmatively rejects the plea by seeking to withdraw it,

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[22] *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

[23] *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010).

[24] *Hill v. Lockhart*, 474 U.S. 52, 54-60 **(**1985).

[25] *See generally Massaro v. United States*, 538 U.S. 500 (2003).

[26] *Roe* v. *Flores-Ortega*, 528 U.S. 470, 480, 486 (2000).

[27] *See, e.g., United States v. Toothman*, 137 F.3d 1393, 1400-01 (9th Cir.1998) (holding that defense counsel's mistake constitutes a fair and just reason to withdraw a plea for purposes of Rule 11 because the defendant was not "equipped intelligently to accept the plea offer made to him").

satisfies both prongs of the *Strickland* test. Therefore, having established a Sixth Amendment violation under Supreme Court case law, a court should allow find that the defendant has raised a "fair and just" reason sufficient to withdraw her or his plea.

VI. The Advisory Committee Note to the Proposed Amendment to the Federal Rule of Criminal Procedure 11 Should Recognize that the Court's Failure to Give the Immigration Warning under Federal Rule of Criminal Procedure 11(b)(1)(O) May Constitute a "Fair and Just" Reason to Withdraw a Guilty Plea Before the Court Imposes Sentence.

The National Immigration Project strongly believes a court may underestimate the legal significance of its failure to comply with the proposed amendment unless the Committee adds language addressing this issue to the Advisory Committee Note. Our concern stems, in part, from a widespread confusion regarding direct and collateral consequences of a plea.

On the one hand, the Court in *Padilla* determined that the distinction between direct and collateral review was not a useful framework for determining whether defense counsel must provide advice regarding the immigration consequence of a defendant's plea under the Sixth Amendment.[28] On the other hand, the Court in *Boykin* conditions the voluntariness of a plea on the defendant's understanding of the direct consequences of it.[29] The plea colloquy in Federal Rule of Criminal Procedure 11 implements the requirements in *Boykin*.[30] In light of this history, a court may incorrectly believe that its obligation to give the proposed immigration consequences warning (which does not relate to a direct consequence of the plea) is less important than the other parts of the colloquy. This potential confusion could prevent a court from considering its failure to give the immigration warning under Federal Rule of Criminal Procedure 11(b)(1)(O) as a sufficient basis to permit a defendant to withdraw a plea.

The National Immigration Project suggests that the Advisory Note include the following language to prevent such confusion:

> **Subject to a harmless error analysis in Federal Rule of Criminal Procedure 11(h), the court's failure to give the immigration warning under Federal Rule of Criminal Procedure 11(b)(1)(O) may constitute a "fair and just" reason to withdraw a guilty plea before the court imposes sentence.**

The National Immigration Project believes that the inclusion of the proposed language would increase a judge's understanding of the rule, reduce unnecessary appeals, and promote fairness.

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[28] *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010).

[29] *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969).

[30] Notes of Conference Committee, House Report No. 94-414; 1975 Amendment.

Thank you for considering our views. We are grateful for the opportunity to submit comments.

Sincerely,

s/Sejal Zota

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