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February 15, 2012
via e-mail

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
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**COMMENTS OF THE
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
Concerning Proposed Amendment to Rule 11,
Federal Rules of Criminal Procedure
Published for Comment in August 2011**

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed change to Rule 11 of the Federal Rules of Criminal Procedure. NACDL's comments on the proposed amendments to the Evidence and Appellate Rules have been submitted separately, and our comments on Criminal Rule 12 will be submitted within a few days. (We appreciate the agreement of your office to accept those comments after the deadline.) Our organization has more than 10,000 members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of over 30,000 private and public defenders. NACDL, which celebrated its 50th Anniversary in 2008, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

The Committee proposes that Rule 11 be amended to add a requirement to the guilty plea colloquy of a judicial admonition that a guilty plea "a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission into the United States in the future" as a result of the conviction. This, of course, is inspired by the Supreme Court's recognition in *Padilla v.*

Kentucky, 559 U.S. —, 130 S.Ct. 1473 (2010), that effective assistance of counsel under the Sixth and Fourteenth Amendments requires that defense counsel give correct advice to defendants who are not citizens concerning the “immigration consequences” of the conviction which will result from a guilty plea (including risk of removal, future inadmissibility, and ineligibility for naturalization), at least where those consequences are clear. NACDL enthusiastically supports the holding in *Padilla* as an important step forward in the elevation of standards of criminal defense practice. We therefore begin by emphasizing that the purpose and effect of the amendment to Rule 11 must be to further ensure that the defendant has substantively and effectively received full advice as to the consequences of the plea, and thus to ensure that the many waivers of constitutional rights involved in every guilty plea are genuinely voluntary. The goal cannot be to adjust the plea allocution with an eye merely to insulating the plea from subsequent attack on *Padilla* grounds. NACDL commends the committee for making a proposal which, at least under current law, goes beyond the constitutional minimum (as *Padilla* did not address the judge’s duty, but only that of counsel). With this in mind, NACDL suggests that a more robust amendment to the Rule would be more effective.

There are many cases where a defendant’s possible alienage would potentially be an incriminating fact, with respect to one or more offenses to which the defendant is not presently entering a plea. For this reason, the Rule cannot require either the defendant or defense counsel to address this subject without giving rise to significant Fifth Amendment and attorney-client privilege issues, and we are pleased that the proposed amendment does not do so. However, either as a result of the grand jury investigation or in connection with the bail inquiry, the government in many cases will have concluded that the defendant is not a citizen. Indeed, by the time a case reaches the change-of-plea stage there is no reason the prosecutor should not be expected in every case to have carefully ascertained the defendant’s identity and thus, from available government records, his or her citizenship and immigration status. We believe the rule can and should properly require the prosecutor, therefore, to advise the court accordingly, and if the government believes the defendant not to be a citizen to make an affirmative and informed representation as to what immigration consequences will likely flow from conviction on the tendered plea. (For a non-citizen, these should be required to be included in the terms of any written plea agreement as well.) Where the offense to which the plea is being offered is on its face an “aggravated felony,” on account of which removal will be mandatory and likely without resort to any discretionary relief, it is not too much to expect someone to say so. In other instances, the consequences may depend on what kind of prior convictions, if any, the defendant has, or on what status the non-citizen has in the United States and for how many years, or on what sentence is actually later imposed. In such cases, the prosecutor should at least be required to say that much. As stated previously, the defendant should not be expected to agree or disagree, but only to acknowledge understanding of what is being said on this subject.

Padilla has placed on the defense bar a burden of learning more about immigration law than many of us did before, and we in NACDL have willingly embraced that burden through enhanced professional education efforts. It is

not unreasonable to impose a duty under Rule 11 on United States Attorneys' Offices to acquire the same sort of knowledge and to explicate it – and on federal district or magistrate judges then to affirm or question the legal accuracy of that advice – so that guilty pleas are rendered more likely genuinely knowing and voluntary. The defendant can be required, in tendering his or her plea, to acknowledge understanding this advice, without being required to admit that it applies. For these reasons, NACDL does not support the amendment as drafted, favoring instead a much stronger protection for defendant's rights in light of *Padilla*.

In the *Padilla* opinion, the Supreme Court expressed doubt as to the viability and constitutional significance of the heretofore long-accepted distinction between the “direct” and “collateral” consequences of a conviction, recognizing that some “collateral” consequences which flow inevitably from the fact of conviction can be as serious and important, or more so, as some of the elements of the criminal sentence that must be made known to the defendant before a guilty plea will be considered voluntary. Sex offender registration and related requirements and dispossession of firearms are the most obvious and common examples of direct and automatic, but supposedly “collateral” consequences of many convictions entered on guilty pleas in federal court. Others include loss of voting and jury-service rights, loss of public benefits such as pension rights, denial of federal benefits of various kinds, and loss of professional and nonprofessional licenses and eligibility for many forms of employment. We believe that before accepting a guilty plea the court should at least ensure that the defendant has spoken about these potential penalties and disqualifications with counsel, even if the court does not itself give the defendant any specific advisement about them.

In that regard, we call to the committee's attention for further study – without necessarily fully endorsing – the differing approaches of the ABA Standards (“Collateral Sanctions and Discretionary Disqualification,” 2003) and of the Uniform Law Commissioners to this issue, both of which are substantially broader and stronger than the present proposal:

[ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification] Standard 19-2.3 Notification of collateral sanctions before plea of guilty

(a) The rules of procedure should require a court to ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law. Except where notification by the court itself is otherwise required by law or rules of procedure, this requirement may be satisfied by confirming on the record that defense counsel's duty of advisement under Standard 14-3.2(f) has been discharged.

(b) Failure of the court or counsel to inform the defendant of applicable collateral sanctions shall not be a basis for withdrawing the plea of

guilty, except where otherwise provided by law or rules of procedure, or where the failure renders the plea constitutionally invalid.

The Uniform Collateral Consequences of Conviction Act (2010) provides:

SECTION 5. NOTICE OF COLLATERAL CONSEQUENCES IN PRETRIAL PROCEEDING AND AT GUILTY PLEA.

(a) When an individual receives formal notice that the individual is charged with an offense, [the designated governmental agency or official] shall cause information substantially similar to the following to be communicated to the individual:

NOTICE OF ADDITIONAL LEGAL CONSEQUENCES

If you plead guilty or are convicted of an offense you may suffer additional legal consequences beyond jail or prison, [probation] [insert jurisdiction's alternative term for probation], periods of [insert term for post-incarceration supervision], and fines. These consequences may include:

- being unable to get or keep some licenses, permits, or jobs;
- being unable to get or keep benefits such as public housing or education;
- receiving a harsher sentence if you are convicted of another offense in the future;
- having the government take your property; and
- being unable to vote or possess a firearm.

If you are not a United States citizen, a guilty plea or conviction may also result in your deportation, removal, exclusion from admission to the United States, or denial of citizenship.

The law may provide ways to obtain some relief from these consequences.

Further information about the consequences of conviction is available on the Internet at [insert Internet address of the collection of laws published under Section 4(c) and (d)].

(b) Before the court accepts a plea of guilty or *nolo contendere* from an individual, the court shall confirm that the individual received and understands the notice required by subsection (a) and had an opportunity to discuss the notice with counsel.

For these reasons, NACDL suggests that the Committee withdraw the presently proposed amendment for further study, with an eye to affording greater protection to defendants offering to plead guilty than would be conferred by the language published for comment.

The National Association of Criminal Defense Lawyers is grateful for the opportunity to submit its views on this important matter. We look forward to continuing to work with the Committee in the years to come.

Very truly yours,
s/Peter Goldberger

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National Association of Criminal Defense Lawyers
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