



11-CR-006

February 14, 2012

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

Dear Mr. McCabe:

We write on behalf of the Immigrant Defense Project (IDP) and the Immigrant Legal Resource Center (ILRC) to comment on the proposed amendment to F.R.C.P. 11, requiring judges to inform every defendant entering a plea of guilty or nolo contendere “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.” IDP and ILRC educate defense attorneys, judges, non-citizen defendants, and other actors in the criminal justice system about *Padilla v. Kentucky* and the immigration consequences of criminal convictions. IDP, ILRC, and thirteen other criminal justice and immigration nonprofit organizations submitted an *amicus curiae* brief in *Padilla v. Kentucky*. See Brief of *Amici Curiae* National Association of Criminal Defense Lawyers et al. in support of Petitioner, in *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010). The first section of comments pertains to the text of the proposed amendment, and the second section pertains to the amendment to the Committee Note to F.R.C.P. 11.

1. Comments directed to the text of the proposed amendment to F.R.C.P. 11

IDP and ILRC recommend that the Committee expand the amendment to include the following language:

If you are not a citizen of the United States, whether or not you have lawful immigration status, your plea or admission of guilt [or no contest/nolo contendere] may result in detention, deportation, exclusion from the United States, or denial of naturalization or other immigration benefits pursuant to federal law, depending on the specific facts and circumstances of your case. In some cases, detention and deportation will be required. Your lawyer must investigate and advise you about these issues before you take a plea or admit guilt to any offense. Upon request, the court will allow you and your lawyer additional time to consider the appropriateness of the plea in light of this advisal. You should tell your lawyer if you need more time. You are not required to disclose your immigration or citizenship status to the court.

See Immigrant Defense Project & New York University School of Law Immigrant Rights Clinic, *Judicial Obligations after Padilla v. Kentucky: The Role of Judges in Upholding Defendants' Rights to Advice about the Immigration Consequences of Criminal Convictions* (Oct. 2011), p. 38, <http://immigrantdefenseproject.org/wp-content/uploads/2011/11/postpadillaFINALNov2011.pdf>

(explaining that this proposed language is based largely on the text of existing court advisals, modified in light of *Padilla*). For an example of an existing court advisal, see Appendix A.

IDP and ILRC recommend that the Committee expand the first sentence of the amendment to F.R.C.P. 11 to include “depending on the specific facts and circumstances of your case” to increase its accuracy. The language “may be removed from the United States, denied citizenship, and denied admission,” standing alone, is accurate in some cases, but inaccurate in others, such as in the case of a defendant pleading guilty to an aggravated felony, a conviction that renders a defendant with legal status deportable with virtually no remedy, as in *Padilla*. The phrase “whether or not you have legal status” is equally important in clarifying that legal non-citizens, many of whom have resided lawfully in the United States for decades, also risk losing that legal status due to a conviction.

IDP and ILRC recommend that the amendment to F.R.C.P. 11 specify that defendants are not required to disclose citizenship or immigration status, unless such status is an element of the offense, as recommended by the American Bar Association’s *Standards for Criminal Justice Pleas of Guilty*, 3d ed., Commentary to Standard 14-1.4(c), p. 59 (1999) (*hereinafter* ABA Standards). See also *Judicial Obligations after Padilla v. Kentucky*, p. 34-35. In recognition of the concerns associated with this practice, at least ten states currently prohibit judicial inquiry into citizenship or immigration status. See Immigrant Defense Project, *Ensuring Compliance with Padilla v. Kentucky Without Compromising Judicial Obligations: Why Judges Should Not Ask Criminal Defendants About Their Citizenship/Immigration Status* (Nov. 2010), p. 3, http://immigrantdefenseproject.org/wp-content/uploads/2011/11/IDP_Judicial_Inquiry_Into_Status_Jan20111.pdf. Furthermore, such an inquiry may violate judicial ethics. See Maryland Judicial Ethics Committee, Op. Request No. 2008-43, at 2-3 (January 30, 2009) (“At Sentencing or Bail Hearing, Judge May Not Ask Criminal Defendant, Who is Represented by Counsel and Requesting Probation/Bail, to Divulge Defendant’s Immigration Status”), http://www.courts.state.md.us/ethics/opinions/2000s/2008_43.pdf. The proposed amendment to the Committee Note states that it is more “effective and efficient” to issue the advisal to all defendants without attempting to determine citizenship; given the ethical and other concerns with this practice the Committee should clarify that the defendant shall not be required to disclose citizenship status.

The amendment to F.R.C.P. 11 should contain language clarifying that, pursuant to *Padilla*, the defendant’s counsel in the criminal case is responsible for providing advice about clear immigration consequences of the conviction.¹ The judge should transmit this message to defendants, many of whom are not aware of their attorneys’ obligations in light of *Padilla*, to ensure that non-citizen defendants’ Sixth Amendment rights are respected; this will help to ensure that the plea meets the

¹ This is consistent with ABA Standard 14-1.4(c), which states: “Before accepting a plea of guilty or nolo contendere, the court should also advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to ... if the defendant is not a United States citizen, a change in the defendant’s immigration status. The court should advise the defendant to consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea.”

knowing and voluntary requirements of F.R.C.P.11. Adding this language to the amendment to F.R.C.P. 11 also furthers the judicial goal of finality; failure to do so risks convictions that are susceptible to post-conviction challenges for Sixth Amendment violations.

The amendment to F.R.C.P. 11 should state that if the defendant, as a result of the advisal, requests time to confer with his attorney about possible immigration consequences, the judge will allow time for this consultation. *See Judicial Obligations after Padilla v. Kentucky*, p. 35-36 (explaining that five states, including California, Connecticut, District of Columbia, Nebraska, and Rhode Island mandate that courts should afford defendants additional time if they require advice from counsel regarding immigration consequences of their plea or conviction or further negotiations with the prosecution in light of those potential consequence).

2. Comments directed to the amendment to the Committee Note following F.R.C.P. 11

IDP and ILRC recommend that the Committee Note suggest that judges explain to defendants proceeding *pro se* that the lack of advice regarding immigration consequences is a risk inherent in going forward without an attorney. *See Judicial Obligations after Padilla v. Kentucky*, p. 36-37. IDP and ILRC also recommend that the Committee Note should indicate that a judge's failure to provide the immigration advisal may provide a basis for plea withdrawal prior to sentencing.

Finally, IDP & ILRC recommend that the Committee Note indicate that judges should assume that any criminal charge has potential immigration consequences, but 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, in place of counsel, about the immigration consequences of a conviction. *See Judicial Obligations after Padilla v. Kentucky*, p. 36-37. The Committee Note should emphasize that judges must refrain from inquiring into the content of the advice given regarding immigration consequences, as such an inquiry would violate the attorney-client privilege. *See id.* at 17.

IDP and ILRC appreciate the Committee's willingness to consider their comments. We endorse the proposed amendment, provided the above suggested steps are taken to ensure its accuracy, and provided that the immigration advisal is administered in accordance with the above suggestions, with the goal of protecting the non-citizen defendant's Fifth and Sixth Amendment rights. If IDP or ILRC can be of further assistance to the Committee, please contact Dawn Seibert at 937-342-3781 or dseibert@immigrantdefenseproject.org.

Respectfully submitted,



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Appendix A

R.I. Gen. Laws § 12-12-22(a) – 1984 (subsections (b), (c) and (d) added by 2000 R.I. ALS 500 in 2000)

12-12-22. Arraignments and Pleas -- Notices to aliens

(a) At the time of criminal arraignment in the district or superior court, each defendant shall be informed that if he or she is an alien in the United States, a plea of guilty or nolo contendere may affect his or her immigration status. Failure to so inform the defendant at the arraignment shall not invalidate any action subsequently taken by the court.

(b) Prior to accepting a plea of guilty or nolo contendere in the district or superior court, the court shall inform the defendant that if he or she is not a citizen of the United States, a plea of guilty or nolo contendere may have immigration consequences, including deportation, exclusion of admission to the United States, or denial of naturalization pursuant to the laws of the United States. Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of this advisement.

(c) If the court fails to so inform the defendant as required by this section, and the defendant later shows that his plea and conviction may have immigration consequences, the defendant shall be entitled, upon a proper petition for post-conviction relief, to have the plea vacated. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not have received the advisement.

(d) The defendant shall not be required at the time of the plea to disclose to the court his or her legal status in the United States.