

ADJUSTING PROSECUTOR FILING AND DISPOSITION (FAD) STANDARDS TO RECOGNIZE DISPROPORTIONATE CONSEQUENCES FOR NON-CITIZENS¹

The ultimate goal of any prosecution is to see that justice is served by the selection of an appropriate charge and disposition for a criminal act. Despite prosecutors' efforts to act in a fashion that is fair, equitable and treats like situations similarly, collateral consequences that flow directly from the fact of a criminal filing or disposition can render the cumulative effects of a criminal charge on someone's life inequitable and disproportionate. Such collateral consequences may be imposed by federal Executive agencies or Executive Orders, Congress, local legislative bodies and administrative agencies, public and private employers and housing and service providers. While they are outside the terms of a judgment or sentence, they often flow directly and unavoidably from the fact of a filing or disposition. Unless these collateral effects are taken into consideration by prosecutors, many defendants will inevitably be exposed to direct consequences that were not intended by, and seem disproportionate and unfair to, the prosecutor in light of the facts and significance of the criminal offense.²

While the filing and disposition (FAD) standards adjustments recommended here can be used for other collateral effects of justice system involvement, this memo focuses on FAD adjustments to engage the current reality of immigration penalties for even minor criminal involvement. The reality is that prosecutors have now become the gatekeeper to nearly automatic and grave immigration measures with lifelong consequences for defendants and their families. In many cases, a noncitizen's only chance to avoid removal is to negotiate a disposition in upstream criminal proceedings³ that avoids deportation in downstream removal proceedings.⁴ To ensure against nearly inevitable disproportionate outcomes, which in turn can deter noncitizens' use of law enforcement services and the courts, the impact of immigration and other significant collateral consequences should be considered in making filing decisions and disposition offers.

¹ This memo was prepared by Angie Junck of the [Immigrant Legal Resource Center](#), Annie Benson of the [Washington Defender Association](#), and Lisa Dugaard of the [Public Defender Association's LEAD National Support Bureau](#).

² Immigration consequences not only affect a defendant, but that person's innocent (and often U.S. citizen) children and families are affected by the deportation or removal from the U.S. of a parent or family member, or the denial of immigration benefits, such as US citizenship and lawful permanent resident status to which a defendant would otherwise be eligible to receive.

³ Police diversion approaches to offenses that can be addressed without a filing or court involvement provide greater insulation from disproportionate immigration sanctions, though even these must be managed in such a way that mere receipt of community based services does not become a proxy for grounds for removal in immigration proceedings. Contact the LEAD National Support Bureau, www.leadbureau.org, for more information.

⁴ *De Facto Immigration Courts*, S. Lee, California Law Review Vol. 101:553 (2013).

The U.S. Supreme Court held in *Padilla v. Kentucky*⁵ that, in light of the severity of the deportation consequence, the Sixth Amendment duty to provide effective assistance of counsel requires a criminal defense attorney to affirmatively and accurately advise the defendant about the immigration consequences of a guilty plea. Immigration consequences of criminal justice involvement are no longer, in an important sense, viewed as a collateral, but as inextricably linked to the criminal justice process itself. In so holding, the Court recognized that it is in the State's interest to give informed consideration to immigration consequences when seeking to resolve criminal charges or fashioning sentences.⁶

In *Padilla*, the Supreme Court expressly encouraged the consideration of immigration consequences by both parties in the plea negotiating process. The court stated that "informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties."

Padilla turned on the fact that, for noncitizens, deportation or removal is an integral part of the penalty imposed for criminal convictions. Deportation may result from serious offenses or a single minor offense. It may be by far the most serious penalty flowing from the conviction. With an accurate understanding of immigration consequences, many noncitizen defendants will make an informed choice to resolve a criminal charge in a way that satisfies the prosecution and court, but that has no, or fewer, adverse immigration consequences than the original charge. Many prosecutors will find such a resolution better serves the constellation of interests that includes equity and proportionality toward individuals, as well as community safety and trust in the justice system and public institutions such as law enforcement.

Defendants who are misadvised or not advised at all of the immigration consequences of criminal charges often suffer irreparable damage to their current or potential lawful immigration status, damage that cannot be rectified later even if legal counsel is available

⁵ 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). The California, Washington, and Massachusetts Supreme Courts have also held that defense counsel must investigate and advise regarding the immigration consequences of the available dispositions, and should, when consistent with the goals of and informed consent of the defendant, and as consistent with professional standards, defend against adverse immigration consequences. These jurisdictions have also held through statute or caselaw, that *Padilla* obligations are retroactive and defendants who did not receive constitutionally-sufficient advice can seek post-conviction relief. See *People v. Soriano*, 194 Cal.App.3d 1470 (1987); *People v. Barocio*, 216 Cal.App.3d 99 (1989); *People v. Bautista*, 115 Cal.App.4th 229 (2004); *State v. Sandoval*, 171 Wn. 2d 163 (2011); *In Re Tsai*, 180 Wn.2d 1014 (2015); *Commonweath v. Sylvain*, 995 N.E. 2d 760 (2013).

⁶ *Padilla*, *supra* at 1486.

for the removal proceedings. The unintended but inevitable consequences of filings and dispositions handled without regard to immigration effects include mandatory detention, deportation, and permanent separation from close family, including citizen children and spouses. In some cases, these consequences could have been avoided had counsel provided informed advice and attempted to defend against such consequences, and had prosecutors been aware of the full impact of their proposed charge or disposition.

Many criminal offenses trigger mandatory detention once the person is in removal proceedings. In immigration proceedings, there is no court-appointed right to counsel and as a result, the majority of detained immigrants go unrepresented. Even with counsel, immigration judges often lack the power to consider whether the person should remain in the US in light of equitable factors such as serious hardship to U.S. citizen family members, length of time living in the US, or rehabilitation. Thus, immigration consequences of criminal convictions have a strong, often disproportionate, and often unavoidable impact on noncitizens defendants and their spouses and children, many of whom are US citizens.

In light of this reality of dire, nearly unavoidable immigration (and other collateral) consequences of a criminal filing and/or disposition, it should be a best practice to instruct Deputy Prosecuting Attorneys to consider the identified⁷ significant immigration (and other civil) consequences to a defendant in:

- making filing decisions (whether to file and what to charge);
- recommending dispositions, including
 - crime of conviction
 - terms of judgment
 - language used in disposition documents, and
 - length of any sentence imposed (the length of total sentence, regardless of time actually served, in some cases determines whether a misdemeanor offense is deemed an aggravated felony for immigration purposes and whether a low level offense is deemed a crime of moral turpitude) .⁸

Prosecutors should make specialized training available to their deputies to increase their awareness of the immigration consequences of various criminal charges and

⁷ Of course, prosecutors will not typically be aware of a defendant's immigration status at the time of filing, but when counsel or others are able to make a deputy prosecutor aware of the potential issue before filing, alternatives to filing (prosecutorial deferral on certain conditions), filing an immigration-safe charge, or non-filing in the interests of justice are options available to the deputy prosecutor.

⁸ Robert M. A. Johnson, *A Prosecutor's Expanded Responsibilities Under Padilla*, 31 St. Louis U. Pub. L. Rev. 129 (2011).

dispositions, and should encourage deputy prosecutors to seek and receive technical advice on such topics from specialists in their local communities or from organizations such as the [Immigrant Legal Resource Center](http://www.ilrc.org). In some communities, the defense bar has access to resource attorneys who consult on “immigration-safe” dispositions; where this is not the case, prosecutors can develop a comparable resource for in-house use or to share with the defense bar.

This is a modest proposal that ties no one’s hands and will not prevent a just outcome in any case. It allows prosecutors to minimize fear in immigrant communities of using police and court services, and thereby to support healthier, safer communities. Consideration of both direct and “collateral” consequences does not necessarily require that the plea or sentence recommendation be adjusted if the facts and circumstances of a case do not warrant making such an adjustment. Rather, these consequences should be considered when attempting craft a just resolution.

Broadening this approach to include consideration of collateral/civil consequences outside the immigration context – such as housing, employment, and social services impacts -- also makes sense. It prevents any sense that only non-citizens are being given special or more lenient treatment. (By the same token, practices that generate fair outcomes for non-citizens, e.g., shorter total sentences for misdemeanors, may prove to be better default practices for the entire population.)

Prosecutors may want to use the following guidelines instructing deputies to weigh collateral consequences in charging decisions, plea offers, and sentence recommendations:

- 1) Depending on the facts of a particular case, it may not be appropriate or relevant to consider collateral consequences in serious violent felonies or felony sex offenses;
- 2) In general, the less serious the crime, or the shorter the standard range, the more likely a collateral consequence will unjustly impact the fairness of a resolution;

- 3) Prosecutors should consider the real world consequences, collateral or otherwise, to a defendant from a proposed resolution. Consideration of these consequences, however, does not require or mandate any alteration of the resolution. Appropriate resolutions are highly fact-specific, and deputies must exercise their judgment when determining a just outcome to a case.

- 4) In crafting a resolution to criminal charges, the prosecutor's consideration of collateral consequences should be thoroughly described in the case file. When it results in a departure from other PAO policies or standards, it should be approved by a supervisor.