

Memo

To: Fellow Prosecutors
From: Jeff Rosen, District Attorney
Date: September 14, 2011
Re: Collateral Consequences

INTRODUCTION

As I discussed earlier in team meetings with all of you, the PPM has been modified to allow for the consideration of collateral consequences in appropriate cases. The following memo is designed to assist in the implementation of this policy.

POLICY

Section 5.02(b)(x)(6) Collateral Consequences

The highest duty of the prosecutor is to ensure that both the charges and ensuing punishment fit the crime. Collateral consequences are the inevitable product of criminal behavior. It is not generally the duty of a prosecutor to mitigate the collateral consequences to a defendant of his or her crime. However, in those cases where the collateral consequences are significantly greater than the punishment for the crime itself, it is incumbent upon the prosecutor to consider and, if appropriate, take reasonable steps to mitigate those collateral consequences. If a defendant is charged with a serious or violent felony pursuant to Penal Code §667.5, any modification due to alleged collateral consequences is presumptively inappropriate. In those cases where a prosecutor mitigates either a charge or sentence in order to ensure a just resolution, the prosecutor should ensure that the totality of the resolution remains equitable with that offered to other similarly situated defendants. In other words, the facts of each case must be carefully evaluated to ensure equality and justice. If a significant change is contemplated, this should be discussed with the prosecutor's SuDDa. It is important to note that there are legal restrictions on a prosecutor's right to negotiate certain types of offenses. (Penal Code section 1192.7) We shall act within the bounds of those limitations.

DISCUSSION

The core duty of any prosecutor, the most central mission of our office, is the pursuit of justice. This is not an easy job. We must prosecute the guilty, protect the innocent, and make sure the punishment fits the crime.

One school of thought is that a prosecutor need not concern her or himself with any consequences that are not intrinsic in the statutory punishment itself. In other words, some might argue that if the statutory punishment fits the crime, then our duty is discharged and we can, in fact *should*, ignore the actual consequences of the sentence. Historically this view made some sense for as a practical matter, there were relatively few collateral consequences that resulted from a guilty plea. However, it is now widely acknowledged that collateral consequences have become much more pervasive, burdensome and harder to avoid or mitigate. Collateral consequences can now range, for example, from the loss of educational opportunities, financial assistance from the state, public housing, the ability to practice many trades or professions. Furthermore, collateral consequences often have the greatest impact on the innocent family members and children of a defendant. Of course, the recent U.S. Supreme Court case of *Padilla v. Kentucky* 130 S.Ct. 1473 (2010), ruled that collateral immigration consequences of a conviction for a non-citizen can be profound and warrant direct consideration by both the prosecution and defense.

Accordingly, a dominant paradigm has emerged - prosecutors should *consider* both collateral and direct consequences of a settlement in order to discharge our highest duty to pursue justice.

For example, Supreme Court Justice Anthony Kennedy addressed the ABA in 2003 with these words:

When someone has been judged guilty and the appellate and collateral review process has ended, the legal profession seems to lose all interest. When the prisoner is taken away, our attention turns to the next case. When the door is locked against the prisoner, we do not think what is behind it. *We have a greater responsibility.*¹

Justice Kennedy then went on to address at length the crucial importance of prosecutors in particular considering the practical and real world effects of a given settlement. Less this is mistaken for some overly tender-hearted sentiment; in each case limiting the impact of collateral consequences is reserved for those circumstances where the impact of the collateral consequence is unjustified.

In other words, the goal of limiting the unjust impact of a collateral consequence is not a blanket goal of eliminating collateral consequences in all cases. Frequently, a collateral consequence is perfectly consistent with the just resolution of the case.

Robert Johnson, former president of the National District Attorneys Association, wrote in 2007:

Our job, our duty is to seek justice. How can we ignore a consequence of our prosecution that we know will surely be imposed by the operation of law? These collateral consequences cannot easily be changed or bargained away when justice requires them. But we must consider them if we are to see that justice is done. ... As a prosecutor, you must comprehend this full range of consequences that flow from a crucial conviction. If not, we will suffer the disrespect and lose the confidence of the very society we seek to protect."²

As mentioned earlier, we are all familiar with last years U.S. Supreme Court case of *Padilla v. Kentucky*³. Intrinsic to the *Padilla* decision is the constitutionality of considering collateral consequences when crafting a settlement. In other words, the court ruled that it was IAC for a defense counsel to fail to advise and negotiate on behalf of his client for an immigration neutral outcome. Logically essential to this holding is the view that such negotiations would be legal and proper.⁴

In fact, the Supreme Court reasoned that the consideration of such consequences should serve the interests of both the defendant and the state: "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."⁵ For example, not only would an open and realistic consideration of collateral consequences serve

¹ Speech at the American Bar Association Annual Meeting, August 9th 2003

² NDAA, Message from the President, 2/14/2007.

³ 130 S.Ct. 1473 (2010).

⁴ I have omitted from this brief the legal theories arguing that the consideration of collateral consequences in general, and immigration consequences in particular, is legally barred under a separation of powers or equal protection theory. I've chosen not to discuss this position for the simple reason that *Padilla* has dispositively answered this debate.

⁵ *Padilla* at 1486.

the interest of justice, in many cases, a defendant facing a significant collateral consequence would have a powerful incentive to resolve his or her case early for charges that would not trigger the feared collateral consequence.⁶

In sum, a dominant view has emerged that the appropriate consideration of collateral consequences is central to the pursuit of justice. In fact, *Padilla* constitutionally permits just such a consideration. It cannot be stressed enough that we can no more adopt a simplistic, black and white approach to this issue than we can to any other. In many cases, the impact of a collateral consequence will be appropriate and just, but in others it will not. A prosecutor must distinguish between the two.

Currently, in addition to our office, the United States Attorney's Office and the Los Angeles County District Attorney's Office, among others, allow for the consideration of collateral consequences in appropriate cases when negotiating a plea.

FURTHER CONSIDERATIONS

A just settlement is highly fact specific. It requires a careful analysis of all relevant factors. Our jobs are too complicated for a single self-executing rule that will work in every case. It is simply too complicated and case specific. Just as we do not have a policy that outlines the one appropriate consequence for every burglary or assault, or for that matter dictates which defendants should be incarcerated for sixteen months, and which should go to county jail for a year, we don't have a policy that will resolve how collateral consequences should be weighed in each case. Our policy simply requires that we consider collateral consequences in appropriate cases.

The following guidelines are appropriate:

First, collateral consequences are not a relevant or appropriate factor in any case involving a serious or violent felony pursuant to Penal Code §667 and §1170;

Second, in general, the less serious the crime, the more likely a collateral consequence will unjustly impact a settlement;

Third, in general, the shorter the sentence, the more likely a collateral consequence will unjustly impact a settlement;

Fourth, by contrast, a serious felony accompanied by a lengthy sentence will rarely warrant significant consideration of collateral consequences;

Fifth, a prosecutor should determine an appropriate sentence based upon all traditional and appropriate factors, and then if a significant downward departure is appropriate due to a disproportionate collateral consequence, then the prosecutor should insist upon a concession to maintain a concordance between the modified and the original sentence. For example, if the prosecutor decides it is appropriate to

⁶ *Id.*

alter a charge to arrive at an immigration neutral result, and such an alteration results in the loss of priority, then the prosecutor might well decide to insist upon more custody time or a longer period of probation;

Sixth, in general, some collateral consequences are considered a normal and just consequence of a criminal conviction, however, when the collateral consequence is disproportionately heavy compared to the actual sentence, this is usually a signal that justice has not been done.

Seventh, any alteration of a charge in order to arrive at a result that is more collateral consequence neutral must be justified by the facts. These facts, however, do not need to be found in the original police report. They can be generated from subsequent investigation. For example, if in an appropriate case a prosecutor decides to alter a charge, from possession for sale of narcotics to transportation of narcotics, in order to secure an immigration neutral result, the factual basis for the transportation charge can be secured through an admission by the defendant.

Eighth, a prosecutor is obligated to consider the real world consequences of a plea in every case including all apparent collateral consequences. However, such a consideration does not mandate any alteration. Prosecutors must use their discretion to determine when such considerations result in a more just sentence and when they do not.

Ninth, as a practical matter, it is often impossible to verify the truth of the alleged collateral consequence that the defendant claims. For example, if a new mother who has committed a crime claims that she cannot go to county jail because nursing her new born will prove too difficult, we can rarely confirm whether the mother actually intends to nurse the child. In immigration matters, an individual will often allege severe immigration consequences, however, these determinations are sufficiently complicated that they are often difficult to predict. The remedy is to structure the new settlement so that it is comparable to the original offer. For example, if the new offer includes additional custody time to compensate for any shift in charge, then it is very unlikely that anyone would accept the offer unless they were actually facing the claimed collateral consequence. This is a similar to the process we often engage when we give a defendant a choice of fewer counts for more time in custody.

Tenth, a prosecutor's decision concerning collateral consequences should be transparent and when appropriate noted on the record and, always, noted in the case file.

Any questions or concerns about a particular case can be discussed with the appropriate SuDDA or ADA.