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PROSECUTORS SHOULD CONSIDER COLLATERAL CONSEQUENCES

by Robert Johnson

The primary goal of a prosecutor, as outlined in the *National Prosecution Standards* published by the National District Attorneys Association (NDAA), is to seek justice¹. In an effort to seek justice, a prosecutor will consider the likely sentence that the offender will receive. In doing so, a prosecutor makes a judgment of whether the consequences deriving from the sentence are appropriate and just.

In *Padilla v. Kentucky*, the United States Supreme Court recognized that the collateral consequence of deportation is difficult to distinguish from other aspects of a criminal sentence.² The Court reversed Mr. Padilla's conviction because he was not informed, before he entered his plea, that his conviction would result in his deportation. In his concurrence, Justice Alito recognized the "wide variety of consequences to a criminal conviction."³ NDAA's *National Prosecution Standards* provide "Prior to negotiating a plea agreement, the prosecution should consider . . . the probable sentence if the defendant is convicted . . ."⁴ With collateral consequences becoming recognized as a part of the sentence, prosecutors should consider them in their search for justice.

An example of this is when a police

1 National District Attorneys Association, Commentary, *National Prosecution Standards* 3rd Edition 12 (2012).

2 *Padilla v. Kentucky*, 559 U.S. 356, 357 (2010).

3 *Id.* at 376.

4 National District Attorneys Association, Commentary, *National Prosecution Standards*, 3rd Edition, 5-3.1.

officer or member of the military is accused of committing domestic assault.⁵ A domestic assault conviction could carry a collateral consequence of barring the offender from carrying a firearm, which would likely terminate his police or military employment. Losing the ability to carry a firearm is a consequence the prosecutor should consider in an attempt to seek justice. Even if it is ultimately unclear whether the individual circumstance will warrant such a serious result, the risk of such consequences requires the issue to be considered. Other collateral consequences that prosecutors should consider in seeking justice include professional license revocation and disqualification, loss of a driver's license, disqualification from public housing and food stamps, predatory offender registration, and other similar consequences. Most of these collateral consequences can last for years, or even a lifetime.

Another reason that prosecutors should know and understand collateral consequences is that the judges who accept pleas may determine the collateral consequences stemming from sentencing to be unreasonable. Some judges are known to invoke creative sentencing options to avoid certain consequences. If a prosecutor is pursuing a charge that the judge believes is unjust in the consequences of a conviction, the prosecutor may face unreasonable evidentiary rulings or sentencing.⁶

5 18 U.S.C. §821 (a)(3) (33).

6 *State v. Selyukov*, Nos. C5-00-1617, C9-00-1619, 2001 Minn. App. LEXIS 144, at *1-3 (Minn. Ct. App. Feb. 6, 2001).



To be an effective advocate, the prosecutor must know and understand the collateral consequences of the pursued conviction.

Beyond the overarching goal of seeking justice, the American Prosecutors Research Institute identified public safety as a significant goal of a prosecutor.⁷ Prosecutors adopt a number of strategies in working to increase public safety. Intuitively, prosecutors often seek significant sentences of imprisonment for offenders as a way to increase public safety. Prosecutors justify this strategy by arguing that some offenders will not commit further crimes if they are in prison, and others will be deterred by the consequences of committing crimes. Research has demonstrated that this strategy is not fully successful.⁸

A more productive strategy to increase public safety is to reduce recidivism, which by definition increases public safety by reducing crime.⁹ America undertook considerable work when it transitioned from a rehabilitative model to a retributive incapacitation model as a way to deal with increasing crime rates in the 1970's. As a result, prison populations, together with the fiscal and human costs, greatly increased. A significant contribution to the increased incarceration was probationers and parolees committing new crimes, also known as recidivating. For both public safety and fiscal reasons, there was a need to determine how society might work with offenders to reduce the likelihood that they would reoffend. Hundreds of studies were undertaken to search for guidance in reducing crime.¹⁰

7 See Steve Dillingham et al, *American Prosecutors Research Institute, Prosecution in the 21st Century: Goals, Objectives, and Performance Measures v* (2004), available at http://www.ndaa.org/pdf/prosecution_21st_century.pdf.

8 See Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* 6 (2010), available at [www.sentencingproject.org/doc/Deterrence%20 Briefing%20.pdf](http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf).

9 See *Recidivism*, Nat'l Inst. of Justice, www.nij.gov/topics/corrections/recidivism (last visited Apr. 13, 2015).

10 The Crime and Justice Institute and the National Institute of Corrections Community Corrections Division, *Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries* (2007), available at <https://www.washingtoncollegeoflaw.edu/clp/vol2/iss2/9>.

From all of this work, evolved the concept of applying evidence-based practices to reduce recidivism. The term evidence-based practices (EBP) was taken from work in the medical profession to improve health results in hospitals. EBPs refer to practices supported by research evidence rather than intuitive thought that may have no research supporting the practice."

The EBP approach establishes a risk level for an offender and determines the criminogenic needs for that offender that would reduce recidivism. While there will always be a punishment component in sentencing, if the offender's needs are also properly addressed in sentencing, the likelihood that the offender will engage in criminal conduct is reduced. Furthermore, the goal of a prosecutor to increase public safety is achieved.

Collateral consequences pose significant barriers in addressing the needs of offenders to reduce recidivism. If a prosecutor wants to increase the likelihood that an offender will not reoffend, he must work with corrections' officials to identify which of the offender's needs should be addressed. These needs involve employment and housing, which are often the subject of collateral consequences.¹¹ If the offender's employment is barred by a particular collateral consequence, the circumstances might permit the prosecutor to consider a plea that does not carry such a serious collateral consequence. In *Padilla*, the Court stated, "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. As in this case, a criminal episode may provide the basis for

wicourts.gov/courts/programs/docs/cjjudicialpaperfinal.pdf.

11 *Id.*

12 Ohio Department of Rehabilitation and Correction IPP – Criminogenic Needs, www.drc.ohio.gov/web/ipp_criminogenic.htm; National Institute of Justice Journal No. 272, "Beyond the Sentence – Understanding Collateral Consequences," www.nij.gov/journals/272/Pages/collateral-consequences.aspx; Latessa, E.J. & Lowenkamp, C.T. (2005), *What are Criminogenic Needs and Why are They Important*, For the Record 4th Quarter 2005: 15-16, www.ojj.la.gov/ojj/files/What_Are_Criminogenic_Needs.pdf.



multiple charges, of which only a subset mandate deportation”¹³ The same reasoning would apply to avoiding collateral consequences that would also impede rehabilitation.

If a prosecutor is committed to the goal of increasing public safety and reducing crime, the prosecutor should understand the application of collateral consequences to a conviction. They should also determine whether those consequences are more important than the criminogenic needs of the offender.¹⁴

circumstances, an effort to find an offense to impose an appropriate punishment but avoid an inappropriate collateral consequence may not be possible. It may also significantly mischaracterize the offense as to be improper. In the absence of plea-bargaining, eliminating a counterproductive collateral consequence, or authorizing a judge to provide relief, a prosecutor should consider creating a diversion or deferred prosecution program. Such program could avoid a conviction that will automatically impose a consequence that will impede rehabilitation.

IN THE ABSENCE OF PLEA-BARGAINING, ELIMINATING A COUNTERPRODUCTIVE COLLATERAL CONSEQUENCE, OR AUTHORIZING A JUDGE TO PROVIDE RELIEF, A PROSECUTOR SHOULD CONSIDER CREATING A DIVERSION OR DEFERRED PROSECUTION PROGRAM.

The determination of whether a collateral consequence creates a barrier to addressing the criminogenic need of an offender is not always easy. There may be hundreds of collateral consequences in a particular state. The National Inventory of Collateral Consequences created by the Criminal Justice Section of the American Bar Association under grant from the National Institute of Justice will be helpful in this undertaking.¹⁵

Avoiding a collateral consequence that affects an offender successfully reentering society can be awkward. Corrections officials, judges, and prosecutors may all agree that a certain employment bar makes no sense and can be counterproductive. In these

The National Conference of Commissioners on Uniform State Laws has proposed “The Uniform Collateral Consequences of Conviction Act,” which is a law that solves this problem. The proposed law would permit a judge to relieve an offender from a specific consequence, either at the time of sentencing or after a number of years. At the very least, legislatures should authorize judges to relieve an offender from consequences that impede the offender from successfully reentering society. A judge could authorize relief upon a corrections official’s recommendation based on that official’s knowledge of the circumstances of the offender. Corrections officials currently ask the court, from time to time, to modify probation or parole conditions as they would in this proposal.

On several levels then, a prosecutor should understand and consider the collateral consequences of the conviction being pursued. First, these consequences are an aspect of a prosecutor seeking justice. Second, increasing public safety requires a prosecutor, if appropriate, to mitigate consequences that make it more difficult for an offender to remain law abiding.

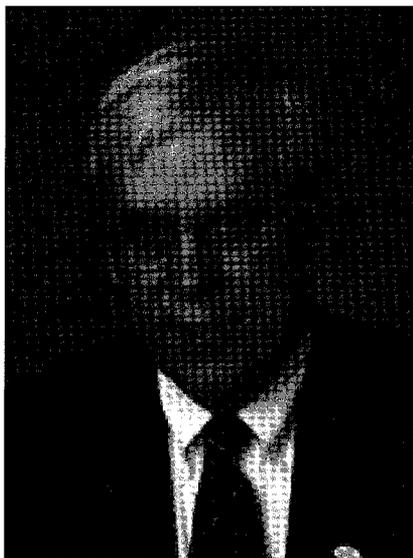
¹³ *Padilla*, 130 S.Ct. at 373.

¹⁴ The Crime and Justice Institute and the National Institute of Corrections Community Corrections Division, *Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries* (2007), available at <https://www.wicourts.gov/courts/programs/docs/cjjudicialpaperfinal.pdf>.

¹⁵ ABA, National Inventory of the Collateral Consequences of Conviction, <http://www.abacollateralconsequences.org> (last visited Apr. 10, 2015).



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About the AUTHOR
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Robert M.A. Johnson began work as a prosecutor in 1968 and was the elected Anoka County Attorney from 1983 through 2010. He is past-president of the National District Attorneys Association, the Minnesota County Attorneys Association, the Anoka County Bar Association, and served as chair of the Minnesota Financial Crimes Task Force. He is past chair of the Criminal Justice Section of the American Bar Association. He was a member of the Board of Governors of the Minnesota State Bar Association and served in the Minnesota National Guard from 1968 to 2003. He served on the boards of the University of Minnesota Foundation, the Council on Crime and Justice, and the International Society for the Reform of Criminal Law, and serves on the Judicial Selection Commission for the Tenth Judicial District. He has worked on projects with ALI, Vera, NCCUSL, CSG, NIC, BJA and other organizations. Mr. Johnson was

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