



## **Guidelines Regarding the Consideration of Collateral Immigration Consequences During Plea Negotiations**

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### **INTRODUCTION**

Many prosecutors have not historically considered the potential immigration consequences of a criminal conviction when engaging in plea negotiations. Over the past few years, however, such collateral consequences have become more extensive, inflexible and potentially harsh when compared to the gravity of some charged offenses.

The United States Supreme Court has recently noted in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), that immigration consequences resulting from criminal convictions can be substantial and warrant consideration by both the prosecution and the defense. The Court held that it was inadequate assistance of counsel for a defense attorney to neglect to advise a criminal defendant of the potential for deportation as the result of a guilty plea. The opinion clearly anticipates that this immigration consequence will be considered during plea negotiations, noting:

... [I]nformed 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. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does. (130 S.Ct. at 1486.)

Because the Supreme Court recognized and indeed encourages the consideration of collateral consequences, this ruling puts to rest earlier arguments that this would be somehow illegal or improper (e.g., a violation of separation of powers or equal protection principles).

## GUIDELINES

As the law has evolved in this area, it has become apparent that it is appropriate to consider collateral consequences associated with a conviction when seeking to arrive at a just resolution of a criminal case. To that end, these broad guidelines are offered as a guide to what might be appropriate for individual prosecutors to consider when conducting plea negotiations.

- 1) When it would be just to do so, it is appropriate to consider the collateral consequences (including potential immigration consequences) of a criminal conviction during the plea negotiation process. This sort of analysis will necessarily be fact specific and require consideration of a variety of relevant factors. There is no specific formula that can be applied in every case.
- 2) It is generally considered appropriate to offer an accommodation if the collateral consequences are disproportionate to the crime and sentence being discussed.
  - a) In other words, consideration of collateral consequences is not typically appropriate in serious or violent felony cases (especially those resulting in a lengthy sentence).
  - b) On the other hand, it would be typically appropriate to consider collateral consequences when dealing with less serious crimes (with shorter sentences).
- 3) If the consideration of collateral consequences is deemed appropriate and some mitigating modification of an offered plea agreement is suggested, it is also appropriate to require some form of concession by the defendant (to make the resolution roughly equivalent to an offer made to a U.S. citizen). Examples would include more custody time or a longer period of probation.
- 4) Given the complexity and evolving nature of immigration law, it is difficult for any individual prosecutor to determine the truth of defense assertions regarding potential collateral consequences. It can be assumed, however, that if a defendant is willing to endure a more onerous sentence in return for a modification of the offered plea agreement, then the feared consequence is authentic.
- 5) These guidelines are not intended to limit the discretion of individual prosecutors.
- 6) The decision to factor in collateral consequences should be openly made and noted in the file.

- a) A corollary of this is that when collateral consequences are considered and any modification of an offer is rejected as inappropriate, that fact should be made part of the record.
- 7) These guidelines are not intended to create a new procedural right in favor of criminal defendants or be enforceable in a court of law.
- 8) If there are any questions regarding whether these guidelines are applicable to any specific situation or how they should be applied, the prosecutor handling the case should consult with his or her supervisor.



