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## DEFENDER TOOLKIT & PADILLA COMPLIANCE GUIDE: USING KNOWLEDGE OF “ENMESHED PENALTIES” (OR COLLATERAL CONSEQUENCES) TO GET BETTER RESULTS IN THE CRIMINAL CASE\*

### The U.S. Supreme Court Requires Due Consideration of All Actual Penalties

In March 2010, the U.S. Supreme Court in *Padilla v. Kentucky*, 599 U.S. \_\_\_, 130 S.Ct 1473 (2010), ruled that defense counsel **must give affirmative, competent advice** to clients of the risk of **all penalties “enmeshed” with criminal charges** or potential pleas.

- The Court held that the Sixth Amendment does not distinguish between the “direct” and “collateral” consequences of pleas when evaluating the effective assistance of counsel – the relevant inquiry is the extent to which the penalty is *enmeshed* with the criminal process or charges.
- The ruling concerned deportation specifically, but other serious penalties enmeshed with criminal charges include **public housing termination, loss of employment, sex offense registration, disenfranchisement, and student loan ineligibility**. These penalties share with deportation the same unique characteristics outlined by the Supreme Court. Legislatures across the country have “intimately related” these penalties and the availability of these programs or rights to criminal charges and convictions. The penalties are “succinct, clear, and explicit.” Legal changes over the last few decades have made ineligibility for these programs and termination of these rights nearly an automatic result for a broad class of people.
- The Court explicitly encouraged creative pleas to avoid these enmeshed penalties. 130 S.Ct. at 1486.

### State Law Requires the Same

*On June 7, 2006, Penal Law § 1.05(6) was amended to add a new goal, “the promotion of [the convicted person’s] successful and productive reentry and reintegration into society,” to the four traditional sentencing goals of deterrence, rehabilitation, retribution and incapacitation.*

*(2006 N.Y. Laws 98.)*

***Use Padilla and P.L. § 1.05(6) to improve your advocacy skills,  
from bail arguments to plea negotiations to sentencing.***

From the moment of arrest, people are in danger of losing hard-earned jobs, stable housing, basic public benefits, and even their right to live in this country. The steady increase in the scope and severity of the penalties that result from arrests has combined with the nearly universal availability of criminal history data to alter drastically the impact of criminal charges on clients – and the practice for lawyers.

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\* Adapted from McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments As An Advocacy Strategy*, 36 U. TOL. L. REV. 479 (2005) ([www.reentry.net/link.cfm?5373](http://www.reentry.net/link.cfm?5373)).

*A clearinghouse of materials on reentry and the consequences of criminal proceedings.*

[www.reentry.net/ny](http://www.reentry.net/ny)

**By McGregor Smyth**

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As the Supreme Court recognized in *Padilla*, these sanctions, formerly called “collateral consequences,” have become an integral part – and are sometimes the most important part – of the penalty in a criminal case. For many clients, their children, and their families, these consequences are much more severe than any criminal sentence. Because these enmeshed penalties have dramatically raised the stakes of a criminal case, defenders, prosecutors, and judges must incorporate knowledge of them into their daily practice.

The Supreme Court has now endorsed, and in many ways required, a *client-centered, holistic defense practice*. Proper investment in this practice and its strategies will return measurable results.

✦ **The Bronx Defenders’ experience proves that defense counsel can use knowledge of these penalties, or collateral consequences, as a direct advocacy tool to win better dispositions in the criminal case and improved life outcomes for clients.**

## I. IMPROVED CRIMINAL DISPOSITIONS

Experience has taught that defenders can obtain more favorable bail, plea, and sentencing results – and even outright dismissals – when they are able to educate prosecutors and judges on the draconian consequences for the clients and their families.

When raising these consequences with prosecutors and judges, keep in mind that they typically respond best to consequences that offend their basic sense of fairness – those that are absurd, disproportionate, or affect innocent family members.

- **Be specific.** Focus on the measured risk of *identifiable* penalties for *specific* clients and challenge prosecutors and judges to justify those consequences when they have the power to change them with alternative dispositions. If you know that bail will result in the loss of a stable job for a breadwinner, or that a particular plea or sentence will lead to the loss of permanent, affordable housing or the right to live in this country with your client’s citizen children, ask whether prosecutors and judges are really serving public safety – or achieving just outcomes – by insisting on that disposition. Ask them to consider the unquestioned research which has shown that access to stable housing and employment proves critical to reducing recidivism.
- **Pursue creative dispositions.** Remind prosecutors and judges that the U.S. Supreme Court has explicitly encouraged creative dispositions, endorsing “informed consideration” of these enmeshed penalties by the defense, prosecution, and courts during plea bargaining. *Padilla v. Kentucky*, 599 U.S. at \_\_\_, 130 S. Ct at 1486.
- **Demonstrate true equity, not special treatment.** Assure prosecutors and judges that proper consideration of these penalties for individual clients does not create any special treatment for certain classes of clients. Rather, it embraces the Supreme Court’s recognition that some people charged with the same crimes suffer far greater penalties than others in predictable (but often hidden) ways. A fair and just process entails a proper and complete consideration of all penalties that cannot be divorced from a particular conviction.

We have found these four categories of penalties most powerful in advocating for alternative dispositions:

- (1) **Immigration**
  - Deportability, inadmissibility, or ineligibility for a waiver as the result of a plea
- (2) **Housing**
  - Loss of public housing or Section 8 as the result of a plea
- (3) **Employment & Military Service**
  - Loss of a job or employment license, particularly for a breadwinner
- (4) **Student Loans**
  - Loss of a federal student loan eligibility and educational opportunity

Other serious penalties “intimately related” to criminal charges include sex offense registration and its attendant consequences, loss of voting rights, ineligibility for government benefits, and prohibition on firearms possession.

### **Improved Dispositions - Using Collateral Consequences in Practice**

- Juan R. was charged with a drug crime, and the prosecutor refused any plea below a misdemeanor. Juan, however, was disabled and lived in public housing, and a misdemeanor would result in his eviction. The defense attorney used this knowledge to convince the prosecutor to offer a non-criminal disposition, and Juan kept his home.
  - Joanne F. had worked hard to get a steady job as a security guard. In a domestic incident with her boyfriend, she was charged with Assault and Harassment. The initial plea offer would have resulted in the loss of her security guard license and her job. The defense attorney used this knowledge to convince the DA to offer an adjournment in contemplation of dismissal. Joanne kept her job.
  - Max S. was 18 years old and charged with possession of a marijuana cigarette. The prosecutor would only offer a plea to a marijuana violation, defined by New York law as a non-criminal offense. Max, however, was enrolled in college and was receiving student loans. Under draconian federal law, even a non-criminal plea to a drug offense would render Max ineligible for student loans and thus unable to attend college. Using her knowledge of this sanction, the defense attorney persuaded the DA to offer an adjournment in contemplation of dismissal. Max remains in college pursuing his degree.
- Defense counsel, however, bears the burden for good reason. Sometimes the appropriate client-centered strategy involves *avoiding* a discussion of certain penalties with prosecutors and judges, when raising these issues would actually increase the risk of those enmeshed penalties. Give clear, specific, individualized advice to the client of these risks and make strategy decisions consistent with the client’s priorities.

## II. RISK MANAGEMENT

- Knowledge of enmeshed penalties, or “collateral” consequences, is a key risk management tool for defenders. Clients facing criminal charges will often have to face ancillary civil or administrative proceedings in housing court, in family court, or with employment licensing agencies.
- Clients will often testify or give written statements as part of these ancillary proceedings (they are penalized for invoking their right to remain silent) about the underlying facts, with or without their defense attorney.
- Defense attorneys have to be familiar with the collateral consequences so that they can anticipate these proceedings and properly advise clients of the impact of those proceedings on their criminal case.

## III. DISCOVERY

- Proper risk management has another significant benefit: as a result of being prepared for these ancillary proceedings, defense attorneys can use them for additional discovery not available in the criminal case.
- Eviction cases, employment licensing proceedings, DMV hearings, school suspension hearings, Family Court – these are all venues where important witness might testify and where an administrative or lower court judge (or even an attorney) is likely to have subpoena power allowing you to obtain documents otherwise unavailable to you.

## IV. CLIENT BENEFITS

- Learning the penalties enmeshed with your client’s criminal case and advising your clients of those consequences helps you build better relationships with your clients.
- It also empowers clients to choose outcomes based their *own* priorities. The collateral damage of being arrested often falls most heavily on family members. When given the option, your clients will often choose the outcome that minimizes the impact on their families.
- Help your client think about these long-term hidden effects of a plea before he accepts it. Give clear, specific, individualized advice about these penalties. Under *Padilla*, silence (the failure to advise a client of these risks) is *per se* ineffective assistance of counsel.

Attorneys who ignore these enmeshed penalties are not only not doing their job, they are *actively doing harm*. These penalties can be disproportionate to the offense and counterproductive, forming substantial barriers to successful reentry. Proper advocacy within the criminal case can mitigate or avoid them entirely and win better case outcomes. By redefining “reentry” as a process that begins at arrest and continues through community reintegration, we highlight the substantial role that criminal defense attorneys can play. Quite simply, incorporating knowledge of the broad range of enmeshed penalties into your daily defense work will make you a better lawyer.

GENERAL PRACTICE TIPS

- **Always advise your clients to attend a relevant treatment program - immediately. Such “evidence of rehabilitation” will prove invaluable for obtaining or keeping a job, housing, or immigration status.**
- **Always apply for a Certificate of Relief from Disabilities at sentencing if your client has one or fewer felony convictions.**
- **Talk to your clients. There is a good chance that they are making statements on the record about relevant facts in ancillary civil proceedings.**
- **Broaden your strategy: Consider using these ancillary civil proceedings as a way of getting discovery for the criminal case.**

ADVOCATE RESOURCES

- ❖ **ABA Adult Collateral Consequences Survey** (every jurisdiction, forthcoming)
- ❖ **Reentry Net ([www.reentry.net](http://www.reentry.net)) & Reentry Net/NY ([www.reentry.net/ny](http://www.reentry.net/ny))** - comprehensive information clearinghouse on reentry and enmeshed penalties
- ❖ **Immigrant Defense Project ([www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org); 212-725-6422)** - written resources, individual consultations and technical assistance on the immigration consequences of criminal cases
- ❖ **Defending Immigrants Partnership ([www.defendingimmigrants.org](http://www.defendingimmigrants.org))** - practical resources for public defenders
- ❖ **Survey of Federal Enmeshed Penalties - *Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations*** (The ABA Commission on Effective Criminal Sanctions and the Public Defender Service for the District of Columbia, January 2009) ([www.reentry.net/search/item.232200](http://www.reentry.net/search/item.232200))
- ❖ **The Center for Holistic Defense at The Bronx Defenders ([www.holisticdefense.org](http://www.holisticdefense.org))** - practical resources and technical assistance to support client-centered, interdisciplinary advocacy
- ❖ ***Relief From The Collateral Consequences Of A Criminal Conviction: A State-By-State Resource Guide*** (by Margaret Colgate Love, 2008) ([www.reentry.net/library/attachment.114643](http://www.reentry.net/library/attachment.114643))
- ❖ For an extensive New York practice guide, see *The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys and Other Advocates for Persons with Criminal Records* (The Bronx Defenders, February 2010) ([www.reentry.net/ny/library/attachment.172234](http://www.reentry.net/ny/library/attachment.172234))