

**PADILLA CHECKLIST FOR JUDGES:
Proper Consideration of “Enmeshed Penalties”
(or Collateral Consequences) in a Criminal Case¹**

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 Court recognized that preserving rights such as immigration status may be more important to the person charged with a criminal offense than any jail sentence. *Padilla*, 130 S.Ct. at 1483.
- 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.)

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 people – and the practice for lawyers and judges.

¹ Thanks to Benita Jain, JoJo Annobil, Peter Markowitz, Anita Marton, Ward Oliver, Laurie Parise, Martha Rayner, Alan Rosenthal, and Manny Vargas for their suggestions in preparing this checklist.

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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.

GENERAL PRINCIPLES

- *Do not ask* a person charged with a criminal offense or that person’s defense counsel to disclose his or her citizenship or immigration status, either directly or implicitly.
- *At every stage of the proceeding* (and as early as possible), encourage defense counsel to take seriously their responsibility to provide competent advice regarding enmeshed penalties, including immigration consequences.
- Inform defense counsel about *resources available* to assist in this counseling (see below).
- Ensure that the person charged has had *appropriate time to consult* with his or her attorney, and adjourn proceedings when defense attorney or person charged need time to research and discuss these penalties. ♦ Keep in mind that a judicial colloquy on these penalties does not supplant a defense attorney’s duties under *Padilla*. A judicial colloquy also cannot provide the full, individualized advice, based on specific facts, that a defense attorney is obligated to provide, and therefore cannot fully insulate a plea from an ineffective assistance of counsel claim.
- Create an atmosphere that *promotes creative pleas* by encouraging the prosecution to factor any specific enmeshed penalties, such as deportation or forfeiture of an employment license, into their plea negotiation and sentencing recommendations as these penalties cannot be divorced from the conviction.²
- Request that any *presentence investigation or report* include a discussion of those enmeshed penalties, *except* immigration penalties,³ where in practical effect it is difficult to “divorce the penalty from the conviction.” *Padilla*, 130 S.Ct at 1481. ♦ Without adequate consideration of the full penalties, a court cannot determine a sentence truly consistent with justice or public safety. ♦ These penalties can be disproportionate to the offense and counterproductive, forming substantial barriers to successful reentry and leading to recidivism.

* * *

The Supreme Court has now recognized that people charged with crimes (and their families) suffer significant and predictable penalties enmeshed with their criminal charges, and that all such penalties should be included in the calculus of justice, regardless of their label as “collateral” or “direct.”

² The Supreme Court has explicitly encouraged the defense and prosecution to reach creative resolutions during the plea bargaining process, noting 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.” The Court noted approvingly that counsel could “plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation.” *Padilla*, 130 S.Ct. at 1486.

³ Because of potential Fifth Amendment issues, *do not permit* probation to inquire about immigration status. However, if the defendant, upon advice of counsel, offers proof of immigration penalties for the purpose of the presentence report, judges should consider those penalties appropriately.

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Focus on the measured risk of *identifiable* penalties for *specific* people. If setting bail will result in the loss of a stable job for a breadwinner, or a particular plea or sentence will lead to the loss of permanent, affordable housing or the right to live in this country with the charged person’s citizen children, ask whether it really serves public safety – or achieves just outcomes – to insist on that disposition. Consider, for example, the unquestioned research that has shown that access to stable housing and employment proves critical to reducing recidivism.

Proper consideration of these penalties for individuals does not create any special treatment for certain classes of people. Rather, it embraces the Supreme Court’s recognition that some people charged with the same offenses 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.

IMMIGRATION

- At arraignment and before entering any guilty plea, **advise all people charged** (since the Court *should not inquire* about specific citizenship/immigration status) that certain convictions, even of a petty offense, violation, or misdemeanor, could result in mandatory deportation or other negative immigration consequences for some non-citizens (including lawful residents).⁴
 - ◆ Adjourn proceedings to allow people to explore immigration consequences. ◆ Allow convicted persons to withdraw guilty pleas entered without immigration counseling.
- For young people charged with criminal offenses:
 - ▶ Consider giving non-citizens a **juvenile** disposition (such as a **Youthful Offender adjudication**) that does not constitute a “conviction” for immigration purposes and will generally not make an immigrant deportable.⁵
 - ▶ Consider **transfer to Family Court or other appropriate juvenile court** for underage immigrants. ◆ A juvenile delinquency adjudication will generally not make an immigrant deportable, although it may have other adverse immigration consequences.
- Exercise **judicial flexibility** in sentencing. ◆ For example, several grounds of *mandatory* deportation are triggered by sentences of one year or more. In such situations, consider a sentence of *no more than 364 days*.
- Allow non-citizens to enter **drug treatment and domestic violence** programs **without** requiring an “up-front” guilty plea or admission. ◆ Otherwise, such a person may be deportable because immigration law does not recognize rehabilitative vacatur.
- Suggest that defense attorneys call the **Immigrant Defense Project hotline** (212.725.6422) for information on the immigration consequences of criminal dispositions.

⁴ *Padilla* requires individualized advice by counsel based on specific facts that the court is not in a position to adduce. A judicial colloquy on these penalties does not supplant a defense attorney’s duties under *Padilla*.

⁵ The definitions of qualifying adjudications vary by jurisdiction. *See, e.g.,* www.nilc.org/immlawpolicy/removcrim/removcrim046.htm.

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CRIMINAL RECORD ACCURACY PROBLEMS

- Criminal history data is increasingly available from a range of sources, and serious questions have arisen about reliability. ♦ While more research is needed, existing studies suggest error rates over 60%.⁶ ♦ Common errors include missing disposition information, unsealed records, and unrecorded vacated warrants. ♦ Each of these errors can lead to automatic denial of employment, housing, and benefits applications.
- While a criminal case is pending, a rap sheet error can significantly impact bail, plea, and sentencing decisions. ♦ Knowing the serious incidence of inaccuracy and the severe consequences, prosecutors, defenders, and judges have a duty to find and root out the error patterns present in their own jurisdiction.
- Advise every person who pleads guilty to a **violation** that the court records of the conviction are **not sealed** and remain publicly available (the OCA policy change in July 2007 governed only statewide electronic searches).
- Consider sealing the court records of violation convictions at sentencing – judges have inherent authority to seal court records.⁷

ORDERS OF PROTECTION

- Closely consider whether a full Temporary Order of Protection is really warranted, or whether a **limited TOP** would suffice. ♦ TOPs can render people homeless and separate them from their children, and violations of certain portions of a TOP can render them deportable. ♦ Always issue TOPs “*subject to Family Court Order of Visitation.*”
- Avoid issuing a full TOP that will prevent a **teenager** from attending school (when the arrest was at a school and a teacher/student is the complaining witness). ♦ The school will be conducting a parallel disciplinary proceeding that will determine if suspension is necessary, and the courts should defer to the expertise of the schools in these issues.

EMPLOYMENT & HOUSING

- Advise people accused of criminal offenses that their government-issued employment licenses (such as Security Guard or Taxi & Limousine licenses) may be automatically and permanently revoked due to a criminal conviction. ♦ Similarly, advise people that a conviction for even a petty offense (or violation) can result in their eviction from publicly-subsidized housing (public housing or Section 8).
- Encourage creative plea dispositions to avoid the automatic forfeiture of a job or employment license or of publicly-subsidized housing.
- Grant Certificates of Relief from Disabilities (CRDs) at sentencing for eligible convictions (see below).

⁶ See Craig N. Winston, *The National Crime Information Center: A Review and Evaluation* (August 3, 2005) (finding that of 174 million arrests on file with the FBI, only 45 percent have dispositions). In 2007, the Bronx Defenders partnered with a major New York law firm in a pilot project to review and correct rap sheets. Fully 62 percent of the random sample of official state rap sheets contained at least one significant error; 32 percent had multiple errors.

⁷ Memo from then-Chief Administrative Judge Jonathan Lippman (Sept. 9, 2003) (available on www.reentry.net/ny).

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FINANCIAL CONSEQUENCES

- Prior to accepting a plea, review with person charged the financial consequences of the conviction, including fines, fees and surcharges. ♦ Where applicable, review other financial consequences such as probation supervision and other probation fees, driver’s license fees, and civil penalties. ♦ Explain whether the person can apply for a waiver of any fees for indigence.
- Prior to accepting a plea, explain how these financial penalties are collected (from bail, from inmate account, and civil judgments) and that the person’s credit report might be affected.

RESTORATION OF RIGHTS

CERTIFICATES OF RELIEF FROM DISABILITIES

- Grant Certificates of Relief from Disabilities (CRDs) at sentencing for convictions for any **violation** and most **misdemeanors**. ♦ CRDs are invaluable tools that promote rehabilitation by removing automatic civil disabilities, allowing people to seek job and housing opportunities – or to preserve existing jobs or employment licenses – on their own merit. ♦ Sentencing judges have complete discretion to grant them. ♦ While CRDs generally will not avoid deportability or inadmissibility for non-citizens, a CRD may have a positive effect on some forms of discretionary relief. ♦ The sentencing judge simply signs a one-page CRD order, and the clerk enters it into docket, giving the original order to the Certificate recipient.
- Section 200.9 of the Uniform Rules for NYS Trial Courts **requires** that courts **either** grant a CRD at sentencing **or** advise the convicted person of his or her eligibility to apply later. 22 NYCRR § 200.9.

RESOURCES FOR PRACTICE

- ❖ **ABA Adult Collateral Consequences Survey** (every jurisdiction, forthcoming)
- ❖ **Reentry Net (www.reentry.net) & Reentry Net/NY (www.reentry.net/ny)** - comprehensive information clearinghouse on reentry and enmeshed penalties
- ❖ **Immigrant Defense Project (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)** - 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)
- ❖ **The Center for Holistic Defense at The Bronx Defenders (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)
- ❖ 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)