



**OFFICE OF THE RAMSEY COUNTY ATTORNEY**

John J. Choi

**TO:** All Assistant Ramsey County Attorneys and Law Clerks in the Criminal Division; Victim, Witness and Community Services Division; and Juvenile Division

**FROM:** John J. Choi, County Attorney *J.C.*

**DATE:** January 31, 2019

**RE:** *Prosecution Policy Regarding the Consideration of Collateral Consequences in Plea Negotiations and Sentencings*

**I. BACKGROUND**

“How we treat those who have made mistakes speaks to who we are as a society and is a statement about our values – about our dedication to fairness, equality, and justice....”<sup>1</sup> Ensuring ours is a justice system that provides parity in consequences for similar offenses and is not disproportionately onerous to any given segment of our community is critical to our ability, as prosecutors, to carry out our duties as ministers of justice, protect public safety, and maintain the public’s trust and confidence.

Minnesota enacted its Criminal Code in 1963. At that time, the primary consequence of a criminal conviction was typically a fine, probation, or a period of incarceration. Collateral consequences were limited in most cases to a temporary loss of the right to vote, hold public office, serve on a jury, and testify in court.

In fact, the consideration of collateral consequences, even in their relatively limited impact, was given significant thought by influential criminal justice policymakers decades ago. In 1967, the President’s Crime Commission called for the wholesale reform of the “system of disabilities and disqualifications” because it interfered with the rehabilitative goal of criminal sentencing.<sup>2</sup> In 1981, the American Bar Association (ABA) also confidently predicted that “collateral consequences” were on their way to extinction, stating, “[a]s the number of disabilities

<sup>1</sup> President Barack Obama, Commentary, The President’s Role in Advancing Criminal Justice Reform, 130 Harvard Law Review 812, 866 (2017).

<sup>2</sup> The President’s Comm’n. On Law Enforcement & Admin. Justice, Task Force Report: Corrections 88 (1967).

diminishes and their imposition becomes more rationally-based and more restricted in coverage, the need for expungement and nullification statutes decreases.”<sup>3</sup> Ultimately, however, that did not happen.

The trend of mass incarceration that began in the mid-1980s was a stark reversal of the forgiving spirit of the earlier period. Retribution outweighed rehabilitation as the goal of corrections. Collateral consequences were promulgated by legislatures and administrative agencies, mandating exclusion of people with a criminal record from a wide range of benefits and opportunities.

The proliferation of collateral consequences now often includes the loss of access to public housing and benefits, financial aid eligibility and other educational opportunities, as well as occupational licensing restrictions and mandatory deportation. Some of these are lifelong consequences and, in many instances, have a greater adverse impact on a person’s life than the underlying criminal sentence itself.<sup>4</sup>

Not only do collateral consequences impact individual people in our community, but they restrain their families and our community, as well. Because people of color and those who are under-resourced are disproportionately involved in the justice system, these impacts unjustly burden those segments of our population. It stands to reason that our community is best served when people can leave confinement and transition to a productive life in which they can pursue their educational goals, attain meaningful work and find a safe place to live. Inhibiting people’s progress through unnecessary constraints prevents them from reaching their full potential, increases the likelihood of recidivism, and does a disservice to them and to our entire community.

In 2003, then U.S. Supreme Court Justice Anthony Kennedy, in a speech to the American Bar Association, challenged the legal profession, including prosecutors, to consider what happens after “the door is locked against the prisoner,” remarking that “[e]ven those of us who have specific professional responsibilities for the criminal justice system can be neglectful when it comes to the subject of corrections” and asserting that “[w]e have a greater responsibility.”

In 2007, then President of the National District Attorneys Association (NDAA) and since-retired Anoka County Attorney, Robert M.A. Johnson wrote the following in an article in the NDAA’s *Prosecutor* magazine about why it is important for prosecutors to consider collateral consequences:

“Our job, our duty, is to seek justice. (See NDAA *National Prosecution Standards* 1.1.) How can we ignore a consequence of our prosecution that we know will surely be imposed by the operation of law? These collateral consequences are simply a new form of mandated sentences. Prosecutors have often favored mandated sentences to counter the tendencies of some judges who seem incapable

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<sup>3</sup> Am. Bar Ass’n., ABA Standards for Criminal Justice: Legal Status of Prisoners §23-8.2 cmt. at 143 (2 ed. 1983).

<sup>4</sup> A 2011 study by the National Employment Law Project (NELP) estimated that there are now as many as sixty-five million Americans with a criminal record.

of giving serious consequences for serious crimes. With mandatory sentencing, however, we can still seek justice in how we charge or bargain a particular case. These collateral consequences cannot easily be charged 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.” *[Emphasis added]*

Those who have argued against consideration have made the case that prosecutors, unlike defense attorneys in the immigration context for example, have no legal obligation to do so. However, since the immigration consequences of a conviction are “intimately related” to the criminal process<sup>5</sup> and can render a given disposition or sentence unjust and disproportional, it is incumbent upon us, as prosecutors, to be as well-informed as possible about how collateral consequences may unfairly impact a defendant.

As we well know, prosecutors are ministers of justice whose core duty is the pursuit of justice. We must guard the rights of those who are accused as well as enforce the rights of the public. We must see that justice is done on behalf of both the person harmed and the person who committed the harm and ensure the consequences are fair, just, and proportionate. In my view, considering the impact of collateral consequences is fully consistent with a prosecutor’s role as a minister of justice and of our vocation that relies on the trust and confidence of the public we serve.

Because prosecutors decide what to charge and set the terms at the negotiating table, and collateral consequences often represent “civil” efforts by the state to punish for crimes, prosecutors must take more responsibility in mitigating the effects of those consequences when their impact bears little or no relevance to the severity of the underlying criminal offense. Such consideration will only help us understand our own obligations to core principles of justice, proportionality and fairness – principles I believe must now be understood to apply not just to the court-imposed sentence, but also to the collateral consequences that may otherwise last a lifetime.

## **II. POLICY GUIDELINES**

To-date, our consideration of collateral consequences has occurred on an ad-hoc basis in the absence of any formal office policy. In furtherance of the interest of justice and based on the rationale articulated above, this policy is intended to make it clear that we require you, as prosecutors, to consider collateral consequences to inform your discretion as you administer justice. Whenever possible, without adversely impacting public safety, your goal should be to reach dispositions that don’t lead to deportation or other disproportionate consequences.

For the same reasons we do not have a policy that mandates a single specific consequence for every crime we prosecute, this policy is not intended to resolve how collateral consequences should be weighed in every case. A just settlement is highly fact-specific, requiring a careful analysis of all relevant factors in the case. There is no one-size-fits-all approach that can be taken

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<sup>5</sup> Padilla v. Kentucky, 559 U.S. 356, 365 (2010).

in every case. Again, our policy simply requires that we consider collateral consequences when they arise and seek to mitigate them in appropriate situations. Saying it is not my responsibility, as a prosecutor, is no longer an option.

To assist you in determining whether collateral consequences should be mitigated, please use the following guidelines:

- Some collateral consequences are a normal and just consequence of a criminal conviction. However, when the collateral consequence is disproportionately heavy compared to the underlying criminal sentence, this is usually a sign that justice has not been done.
- A serious felony accompanied by a lengthy prison sentence will rarely warrant significant consideration of collateral consequences. By contrast, less serious crimes, those with presumptive probation or shorter sentences, likely warrant the mitigation of unfair and disproportionate collateral consequences.
- As a practical matter, it may often be impossible to verify with certainty the likelihood of the potential collateral consequence. One remedy may be to structure the new plea offer so it is comparable to the original offer. For example, if the new offer includes additional supervision or custody time to compensate for a significant change, it is very unlikely anyone would accept the offer unless the collateral consequence was likely to occur.
- In mitigating a disproportionate collateral consequence, you should consider multiple options. For example, if you determine justice requires altering a charge to arrive at an immigration-neutral result, you may choose an alternate plea similar in level of offense and length of sentence, but of a different nature. In other circumstances, justice may require a plea to a lesser offense with a still-meaningful sanction, given the disproportionate consequences s/he may be facing. If a significant change is appropriate, you may consider seeking more custody time or a longer probation period than would otherwise be sought absent the collateral consequences.

Typically, an attorney representing a defendant or a *pro se* defendant<sup>6</sup> may raise the issue during plea or sentencing negotiations. In response:

- You should consider the request or situation presented and seek relevant information to inform your discretion.
- To the extent you need to verify the potential impact of collateral consequences on someone accused of a crime, please consult the Assistant County Attorney assigned to collateral consequences.

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<sup>6</sup> When dealing with a *pro se* defendant, we will not allow a guilty plea to move forward until the judge has advised the defendant of the possibility of immigration consequences and has further advised the defendant about the option and importance of consulting with an attorney.

- After verifying unfair or disproportionate collateral consequences could occur and determining that mitigation may be appropriate, please bring any request to mitigate them to your supervisor for discussion.
- The supervisor will bring your request to my attention to discuss and determine how best to proceed.

Any decision involving collateral consequences should be transparent, noted on the record when appropriate, and always clearly documented in the case file.<sup>7</sup>

### III. CONCLUSION

As we formalize our work in this important measure of justice, I want to thank those of you who have already spent considerable time and thoughtful effort addressing these issues when they've arisen in your cases. Your concern for these situations and your careful analysis has helped formulate a clearer path for all of us to fully realize our office mission statement<sup>8</sup> and fulfill our role as effective, responsible ministers of justice.

A handwritten signature in black ink, appearing to be 'M. W.', written in a cursive style.

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<sup>7</sup> By case file, we are referring to the PBK case file. The Assistant County Attorney assigned to collateral consequences will develop a process with our PBK staff to memorialize these decisions in PBK. As soon as they have determined the best way to do so, we will share that new process with you.

<sup>8</sup> The mission of the Ramsey County Attorney's Office is to serve the residents of Ramsey County by pursuing justice and public safety, protecting the vulnerable, delivering quality legal services and providing leadership to achieve positive outcomes for our community.