

I. INTRODUCTION AND LEGAL BACKGROUND

A. Introduction

The Multnomah County District Attorney's Office seeks to provide equal justice for all involved in the criminal justice system. This office prosecutes criminal cases, seeks justice for victims, works with the community to prevent crime, and advances public safety. Like any district attorney's office, the ultimate goal in any case is to seek justice, not merely to obtain a conviction. Despite efforts to treat every defendant equitably, the consequences that flow directly from the cumulative effects of a criminal charge or conviction can be starkly inequitable and disproportionate.

These disparities often fall particularly heavily on non-citizens accused of a crime, many of whom have resided in the United States for most or all of their lives and who can be sent back to their native countries for even non-violent offenses. Many deportation orders carry long-term or even lifetime removal from the United States. These consequences are frequently devastating on the individual and their family, resulting in the loss of contact with family members, jobs, schools and communities, and forced relocation to what can be a completely foreign and unfamiliar country, all for conduct which would often not result in any term of incarceration if carried out by a United States citizen.

The impact of deportations more broadly across communities and the implication for community safety is also considerable. Deportations frequently target sole breadwinners in low-income families with children. The impact of a parent's deportation can cause serious harm to children's mental health and school performance. These impacts and the additional economic hardship and associated barriers facing immigrant families means that a deportation can destabilize an entire family. Families destabilized across an entire community can decrease community safety and increase the risk of violence and harm.

B. Governing Federal Law

The United States Supreme Court has recognized the severity of immigration consequences in criminal cases. In *Padilla v Kentucky*, 559 US 356 (2010), the Court held that, in light of the severity of the deportation consequences, the Sixth Amendment duty to provide effective assistance of counsel requires a criminal defense attorney to advise the defendant, affirmatively and accurately, about the immigration consequences of a guilty plea. The Court recognized that

the immigration consequences of criminal justice involvement are inextricably linked to the criminal justice process itself, [1] and may be by far the most serious penalty flowing from a conviction.[2] The Court recognized that the possibility of removal was so closely connected the criminal process, it would be “uniquely difficult” to classify immigration consequences as a mere “collateral consequence.”[3]

The Court also recognized that it is in the interest of both parties to give informed consideration to immigration consequences in plea negotiations, stating 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.”[4] The Court further stated, that when appropriate, understanding of deportation consequences may inform crafting convictions and sentences that reduce likelihood of deportation, while also highlighting for the defendant the incentive to plead guilty to an offense that does not carry such penalties. [5]

II. POLICY DIRECTIVE

Accordingly, it is the policy of the Multnomah County District Attorney's Office that Deputy District Attorneys are to consider the immigration consequences to a defendant in charging and disposing of cases, to the extent they are aware of them, and, if appropriate, take reasonable steps to seek an immigration-neutral resolution once informed that such consequences may exist. This policy is intended to reflect our Office's commitment to the safety and dignity of all our community members, regardless of immigration status, and to help us earn the trust of immigrant communities.

This policy is not meant to convey that non-citizens should be given more lenient sentences, but instead that prosecutors should strive to avoid the imposition of disproportionate consequences whenever possible to the extent consistent with public safety and the safety of the victim.

A. Charging and Plea Bargaining Practice

1. General Policy

Deputy District Attorneys (DDA) shall conduct their duties with an immigration-informed approach. After any point in which the DDA becomes aware that immigration consequences are a potential risk in a case, the case DDA should request information from defense to equip

the DDA with the information needed to exercise discretion in achieving immigration-neutral results whenever possible. The full range of punitive consequences--both direct and nondirect--should be roughly equivalent for citizen and noncitizen offenders whenever consistent with public safety.

It is incumbent on the case DDA to consider any reliable information provided by the defense to ensure that disparate immigration consequences are avoided whenever possible and appropriate. If the defense raises the issue of immigration consequences, or a DDA has knowledge that there are immigration consequences, a DDA may confer with defense counsel before proceeding or request further explanation of the consequences in writing. However, specific documentary evidence shall not be required. Any information received from defense counsel or the defendant will not be shared with federal immigration officials except as required by a judicial subpoena or other official court action, and should not be released to any other party without the consent of the defendant except as is required by law or for a specific investigative purpose with approval of the unit SDDA. The information conveyed by defense counsel may not be used for the purposes of impeachment on the basis of motive or bias. Specific information regarding a defendant's immigration status should generally not be disclosed, including to the victim in the case.

2. Plea Bargaining

If potential immigration consequences are disproportionate to the crime of conviction, when resolving a case via plea or global resolution the DDA should consider an immigration neutral alternative whenever possible consistent with public safety and the safety of the victim. Any offer renegotiated in order to avoid immigration consequences should be proportionate to the severity of the conduct alleged.

Potential immigration consequences vary based on a number of factors, including but not limited to the person's current immigration status, length of presence in the U.S., family ties, and prior criminal history. DDA should be aware that a disposition that may be acceptable to all parties in one case may be severely damaging in another, depending on differences in the above factors, and that even small details in the specific language of an indictment can carry significant consequences. DDA's should not assume that a disposition that is immigration neutral in one case will be immigration neutral in another.

Examples of alternative considerations include, but are not limited to:

- i. Devising an alternative plea agreement that is of a similar nature and consequence to the originally charged offense which is also established by the underlying evidence, including amending the charging document if necessary;
- ii. Allowing a plea to a different charge within the same indictment, provided that the overall penalty is roughly comparable;
- iii. Eliminating multiple counts of the same charge, where appropriate and consistent with public safety, to avoid immigration consequences that may attach to multiple convictions (particularly of “crimes of moral turpitude”);
- iv. Allowing language to be amended in a charging document, plea agreement, or plea colloquy while maintaining the truthfulness of the remaining charging language (such as *mens rea* language, *i.e.* recklessly vs. knowingly; specifying particular weapons, *i.e.* ballistic knife; specifying particular controlled substances or omitting such information);
- v. Allowing for flexibility in sentencing within a proportionate or agreed upon range, such as allowing defendants to waive credit for time served, or imposing any custodial or prison terms on specific counts.
- vi. Allowing for flexibility in sentencing at the time of probation violation to charge a new count rather than requiring a sentence on the violation;
- vii. Allowing for flexibility in contempt proceedings to charge a criminal offense in lieu of a finding of contempt if established by the underlying facts;
- viii. Allowing time for successful completion of rehabilitative program or programs, including community service, to address underlying issues behind the problematic conduct as an additional condition of probation not in lieu of jail time;

If a DDA is considering whether to pursue additional charges in an ongoing case, immigration consequences should be taken into consideration.

The DDA should allow a defendant a reasonable opportunity to determine the immigration consequences of any proposed plea offer. If a DDA is unable to provide an offer that limits potential immigration consequences in the manner requested, the reasons underlying that decision should be conveyed to and explained to the defense.

B. Access to the Court

This Office acknowledges the need for defendants to be able to attend court appearances without fear of being detained by federal law enforcement on immigration violations. If defendants fear they may be detained for immigration issues, they may refuse to attend court dates and comply with the terms of their probation, which decreases their odds of success and increases recidivism. Similarly, victims, witnesses, and community members who face a fear of immigration consequences for coming to court should not be denied the ability to participate in the court system.

In order to increase access to justice, DDAs may modify court dates and allow for waivers of appearance or appearance by telephone with the agreement of the court and the defendant, when otherwise permitted by law and when consistent with public safety.

Victims should be consulted regarding court dates to ensure they are available to attend. Victims should also be consulted about any plans for a defendant to waive appearance or appear remotely.

C. Reference to Immigration Status during Trial or Other Proceedings

DDAs should avoid language during a plea colloquy or other in-court appearance that could unintentionally trigger immigration consequences, including making any referral to a defendant's immigration status or foreign place of birth, unless it is demonstrably relevant and necessary to the matter at hand. Immigration status can be raised by the DDA when it is necessary for the purposes of impeachment for bias, motive or any other legally permissible reason. The mere fact that a person faces a theoretical immigration consequence, without more, does not constitute motive or bias. If it is necessary to provide the court or jury with such information, including during a trial or other court appearance, the DDA should provide notice to the court and defense counsel ahead of time whenever possible. The furnishing of this notice should be documented in CRIMES, and the DDA should notify their SDDA that the issue exists and may be raised in court.

FOOTNOTES

[1] "We have long recognized that deportation is a particularly severe penalty [and is] intimately related to the criminal process. . . . Thus we find it most difficult to divorce the penalty from the

conviction in the deportation context.” *Padilla*, 559 U.S. at 365-366 (internal quotations and citations omitted).

[2] “[D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” *Padilla*, 559 U.S. at 364.

[3] *Padilla*, 559 U.S. at 366.

[4] *Padilla*, 559 U.S. at 373.

[5] “[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.” *Ibid.*