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**DENVER DISTRICT ATTORNEY'S INTERNAL OFFICE POLICY
REGARDING IMMIGRATION COLLATERAL CONSEQUENCES**

TO: All Denver DA Personnel

FROM: Beth McCann, District Attorney

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SUBJECT: Immigration Consequences Policy

The Denver District Attorney's Office seeks to provide equal justice for all involved in the criminal justice system. The office prosecutes criminal cases, seeks justice for victims, works with the community to prevent crime, and protects public safety. Like any prosecutor's office, the ultimate goal in any case we prosecute is to see that justice is served through the selection of appropriate charges and a fair disposition for a criminal act. Different individuals charged with the same crime may face markedly different consequences depending upon various factors, including an individual's immigration status. Indeed, despite efforts to deal with every defendant equitably and to treat like situations similarly, consequences that flow directly from the cumulative effects of a criminal charge or conviction on someone's life can sometimes be inequitable and disproportionate. In some cases, these consequences are appropriate and just; in others, collateral consequences can so negatively affect the defendant that the resulting punishment does not fit the crime.

In the immigration context, consequences may be imposed by federal immigration courts, federal administrative agencies, Executive Orders, Congress, local legislative bodies, local administrative agencies, public and private employers, and housing and service providers. While these consequences are outside the terms of a criminal judgment or sentence, they often flow directly and unavoidably from the fact of a disposition. Unless these immigration effects are taken into consideration by deputy district attorneys in appropriate circumstances, some defendants will be exposed to direct consequences that were not intended by the prosecutor in light of the facts and significance of the criminal offense and the background and history of the defendant. Consideration of the impact of consequences, particularly in the context of immigration consequences, is consistent with the duty of all prosecutors to pursue justice by prosecuting the guilty, protecting the innocent, and ensuring that the punishment fits the crime.

In 1987 the Colorado Supreme Court led the nation when it concluded that the potential deportation consequences of guilty pleas were "material" to critical phases of criminal proceedings in *People v. Pozo*, 746 P.2d 523 (Colo. 1987). After this decision, the American Bar Association Criminal Justice Section developed policies endorsed by the National District

Attorney's Association which stated that prosecutors should be advised of potential immigration or collateral consequences associated with a particular plea.

The United States Supreme Court then recognized the severity of immigration consequences in criminal cases. In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the Court held that, in light of the severity of the deportation consequence, 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. Immigration consequences of criminal justice involvement are viewed as inextricably linked to the criminal justice process itself. More recently the Colorado Supreme Court recognized the requirement that a defense attorney advise a client about immigration consequences in *Kazadi v. People*, 291 P.3d 16 (Colo. 2012).

In *Padilla*, the U. S. Supreme Court recognized that it is in the State's interest to give informed consideration to immigration consequences when seeking to resolve criminal charges or fashion sentences. Indeed, the Supreme Court expressly encouraged the consideration of immigration consequences by both parties in the plea negotiating process. The Court stated 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."¹ The Court encouraged defense and prosecution in appropriate cases to work together "to plea bargain creatively . . . in order to craft a conviction and sentence that reduce the likelihood of deportation."²

Padilla relied on the fact that, for noncitizens, deportation or removal can be an integral part of the penalty imposed for criminal convictions. Deportation may result from serious offenses or a single minor offense even for lawful immigrant residents. It may be by far the most serious penalty flowing from a conviction. While defense counsel, of course, is vested with the primary responsibility of adequately advising the defendant of such consequences, it remains important to the integrity of the criminal case that prosecutors be aware of the possibility of immigration consequences when negotiating pleas, articulating factual bases for convictions, and advocating for particular sentences. Prosecutors do not have a duty to inquire about a defendant's immigration status, but should be cognizant of the responsibility of defense counsel to provide advice regarding immigration consequences and to ensure judges include reference to this requirement in plea advisements.

Accordingly, it is the policy of the Denver District Attorney's Office that chief deputy district attorneys and deputy district attorneys consider the immigration and other consequences to a defendant in recommending dispositions, to the extent they are aware of such, and, if appropriate, take reasonable steps to mitigate these consequences. Factors to consider include:

- a. Crime of conviction
- b. Language used in disposition documents (such as *mens rea* language *i.e.* recklessly vs. knowingly), and

¹ *Padilla*, 559 U.S. at 373.

² *Id.*

- c. Length of any potential sentence or sentence imposed. (The length of both a potential sentence and a total sentence imposed, regardless of time actually served, in some cases determines whether a particular offense triggers specific immigration consequences.)

The following guidelines are appropriate:

- Collateral consequences, including immigration, are generally not a relevant nor appropriate factor in any case involving a violent felony absent exceptional circumstances. These cases may be considered on a case by case basis.
- If a plea to a significantly lower level offense, below a standard offer, is appropriate due to a disproportionate consequence, deputy district attorneys may consider requiring a longer sentence or higher penalty to maintain a relationship between the reduced plea and the original charge. For example, if the deputy district attorney decides it is proper to modify a charge to attain an immigration neutral result, and such a modification results in a less severe charge, then the deputy district attorney might decide to insist upon more custody time, a longer period of supervision, a larger fine or more community service hours.
- A deputy district attorney may also consider a reduced penalty if the appropriate resolution is a plea to a higher level offense than that charged originally. In some circumstances a plea to a different charge may be appropriate rather than a deferred judgment to the original charge.
- A modification of a charge in order to arrive at a result that is more immigration consequence neutral should be related to the underlying crime or an offense of a similar nature to the extent possible, recognizing that there may be exceptions.
- A deputy district attorney's decision concerning immigration consequences should be transparent and always noted in the case file. There may be limited occasions when the reasons for a decision should be noted on the record but such is not required.
- Deputy district attorneys are encouraged to ensure that the judge inquires if a defendant has been advised of immigration consequences when accepting a plea when he or she is aware or suspects that immigration consequences may be an issue.
- As necessary, deputy district attorneys may request that defense counsel provide legal authority or a memo by a reputable immigration attorney analyzing the immigration consequences specific to the defendant.
- To facilitate the communication and information sharing required to promote equity in reaching resolutions, the office will not share immigration status information that is shared during the course of negotiations.

Deputy district attorneys should also consider all consequences in determining whether to oppose a motion to withdraw a prior plea or vacate a prior judgment. When considering motions to withdraw pleas, the following guidelines are appropriate:

- Deputy district attorneys should consider if the nature of the case is one that would have merited the consideration of immigration consequences under this policy if it were filed today.
- Another consideration is the existence of a proposed, alternative disposition that is appropriate under this policy and the facts and circumstances of the case.
- If it appears that defense counsel failed to advise or misadvised the defendant of immigration consequences of the plea, and the defendant filed the motion to withdraw a plea within a reasonable time of discovery that the plea carried immigration consequences, not opposing the withdrawal motion may be appropriate, even if the motion was filed outside of the specified time frame.
- All other equities and circumstances a deputy district attorney normally considers when recommending dispositions are appropriate in this context as well.

In any case involving immigration consequences, the Denver District Attorney's Office and all chief deputy district attorneys and deputy district attorneys retain the discretion and prosecutorial authority to handle cases as they deem appropriate, recognizing that a consideration of the immigration consequences is one of many factors to consider in arriving at a disposition offer and just resolution.