



Considering collateral consequences of conviction

By: Barbara L. Jones February 21, 2019 0

According to the National Inventory of Collateral Consequences of Conviction, part of the National Institute of Justice, there are 1,611 collateral consequences attached to criminal convictions in Minnesota, including those under federal law.

Prosecutors do take collateral consequences into account in resolving criminal charges, but may look at each case individually, leading to disparate results. They are ministers of justice and not simply advocates, according to the Minnesota Rules of Professional Conduct, and many believe justice should be tailored to an individual.

Collateral consequences frequently are deportation but can also mean loss of driving privileges, unemployment, loss of a professional or trade license, eviction and homelessness, which all made a defendant's eventual rehabilitation problematic at best.

Last month, Ramsey County Attorney John Choi issued a prosecution policy regarding consideration of collateral consequences. He told his staff that that prosecutors must "consider collateral consequences to inform your discretion as you administer justice" and "[w]henver possible, without adversely impacting public safety, your goal should be to reach dispositions that don't lead to deportation or other disproportionate consequences."



John Choi

Choi also said that the policy is not intended to resolve how collateral consequences are weighed in every case because a just settlement is highly fact specific. Some of the factors that should inform the decision are whether the collateral consequence is disproportionately heavy, whether the crime is a serious felony, and what multiple options can be used to arrive at a solution. Attorneys are directed to move up the chain of command in the office for guidance on how to proceed.

"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," he stated in his memo.

Creative resolution

Choi said that he has been moving in this direction for several years and also said that prosecutors within and without Minnesota are finding different ways to address collateral consequences.

He has added an attorney to his staff, Jorge Saavedra, the former director of Centro Legal, to work with the other prosecutors on collateral consequences including immigration. The effort also requires contributions from defense lawyers, Choi said.

"It's going to be very difficult for the prosecutors to be aware [of collateral consequences] unless the defense counsel makes us aware. The system has to bring it to our attention. The policy contemplates that the situation is brought to them."

The policy does not apply in charging decisions, Choi said. "It's not practical that the charging attorney will have this information. [We're looking at] resolution of the charge in a creative way that doesn't offend our notions of justice and there are many ways to accomplish that."

The U.S. Supreme Court has ruled that the collateral consequence of deportation must be considered. In 2010, the U.S. Supreme Court explicitly placed a burden on criminal defense counsel to communicate with non-citizen clients about immigration consequences and advise them when deportation may or will result.

In *Padilla v. Kentucky*, Justice John Paul Stevens wrote for the court, “While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation.”

Justice implies a reasonable sentence

Choi does not claim to have invented the idea of dealing with the consequences of crime. In his staff memo he credits former Anoka County Attorney Robert M.A. Johnson, who is also the former president of the National District Attorneys Association. When he was president, in 2007, Johnson wrote, “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.”

Collateral consequences had a number of impacts on a defendant who was sentenced and later couldn't get a job and become a real member of society, Johnson told Minnesota Lawyer. That made recidivism more likely. “You don't need a license to practice burglary,” he said. Deportation would tear families apart, and that wasn't justice, Johnson continued.

Johnson said creative resolutions included prosecuting an offender for fifth-degree criminal sexual conduct instead of third-degree. That avoided a young man who had sex with a younger girl having to register as a sex offender, Johnson said. And a kid with a clean record stole a car out of a garage that was attached to a house, and that charge got dropped to tampering instead of first-degree burglary.

“There is a duty to seek justice and justice implies a reasonable sentence. I congratulate John on taking this on,” Johnson said.

Other county attorneys in the metropolitan area say they consider collateral consequences and work-arounds when the case merits it. Washington County Attorney Peter Orput said his office doesn't require a codified policy to express its values. The office recently fashioned a deal to prevent the father of four from being deported to India, he said. The lawyers approach each case individually, he said, but “we're not scalp collectors.”

Orput also pointed to the veterans court, which addresses the defendant's circumstances, and a driving diversion program to help people get their licenses back, which means they can get insurance, get work and support their children, he said. So many people drove without a license, which just resulted in a longer revocation and they couldn't break the cycle, he said. “We were chasing them on a hamster wheel.”

Hennepin County Attorney Michael Freeman said his office has considered collateral consequences as long as he's been in the job, which was from 1990 to 1999 and again from 2007 to the present.

“Our discussions have become more urgent because profound consequences have become more common,” Freeman told Minnesota Lawyer. “Deportation makes it that much more difficult. We've been struggling with what is just and how we make exceptions,” he said. Usually the considerations are the facts of the crime and, in sentencing, the criminal history, he said.

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