

# FEDERAL SENTENCING & COLLATERAL CONSEQUENCES

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Federal courts are frequently asked to take into account the collateral consequences of conviction in determining what sentence to impose under the criteria in 18 U.S.C. § 3553(a). It is generally permissible for them to do so, and in line with current proposals of national law reform organizations. At the same time, courts must guard against the risk of socioeconomic bias favoring more privileged defendants who have the most to lose in the civil sphere, and who are likely to enjoy more vigorous and effective advocacy around collateral consequences.

The following discussion first reviews a federal court's general obligation to understand the collateral consequences that apply in a particular case, and to ensure that a defendant considering a guilty plea has been adequately advised about them. It then reviews post-*Booker* case law approving below-guideline sentences based on the severe collateral penalties applicable to a particular defendant, such as loss of employment, extraordinary family circumstances, sex offender registration, and even reputational harm ("the stigma of conviction"). Finally, it discusses cases in which courts of appeal have refused to approve deep sentencing discounts based on collateral consequences in circumstances suggesting a bias favoring middle-class defendants.

## **I. Understanding applicable collateral consequences and ensuring that the defendant has been advised about them**

In general, the constitutional obligation of advisement is defense counsel's under the Sixth Amendment, not the court's.<sup>1</sup> The one situation in which judicial advisement is required under the Federal Rules of Criminal Procedure is where a defendant considering a guilty plea is not a citizen. See FRCrP 11(b)(1)(O). That said, a federal court is permitted (even if not required) to inform itself about the collateral consequences that may apply in a particular case in order to decide whether to take such consequences into account when fashioning a sentence. See Part II, *infra*. In a few recent cases, collateral consequences have been the basis for judicial [expungement](#) of a conviction record. The court may ask the probation office, which is part of the judicial branch, for information about collateral consequences, and probation ought to be informed about collateral consequences in any event so that it can assist defendants with reentry and reintegration.

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<sup>1</sup> While courts have no constitutional obligation to advise a defendant about collateral consequences as a matter of due process, in a few recent federal cases a court's specific and unequivocal advisement about immigration consequences was held to "cure" deficient advice of counsel. See *U.S. v. Fazio*, 795 F.3d 421 (3d Cir. 2015); *U.S. v. Hernandez-Monreal*, 404 Fed. Appx. 714 (4th Cir. 2010). This issue is discussed in Love et al., *Collateral Consequences of Criminal Conviction: Law Policy and Practice* § 4:14 (West/NACDL, 2016 ed.).

It would also be appropriate for a federal court to ask defense counsel to advise it about the collateral consequences that may apply to a particular defendant, since they may be relevant to the overall sentence. Similarly, the court may ask defense counsel for reassurance that counsel has advised the defendant about applicable collateral consequences before accepting a guilty plea or imposing a sentence, if only as a prophylactic measure to guard against subsequent claims of ineffective assistance.

The court's authority to direct probation and defense counsel to inform it about collateral consequences stems both from its inherent power to manage its proceedings and from its authority under 18 U.S.C. § 3553(a) to craft a just and appropriate sentence.

In state court the judicial advisement obligation may be more robust, both under the state constitution and applicable court rule, such as where sex offender registration or firearms dispossession may result from conviction. However, such notice has generally not been required in the federal system. Case law developments, notably in the past few years since the Supreme Court's decision in *Padilla v. Kentucky*, are described in Chapters 4 and 8 of Love et al., *Collateral Consequences of Criminal Conviction: Law Policy and Practice* (West/NACDL, 2016 ed.).

While notice about collateral consequences may not be mandated in the federal system beyond the immigration context, either by counsel or court, such notice has been recognized as sound practice by the major national law reform and professional organizations of lawyers. The Uniform Law Commission and the American Law Institute have both proposed that sentencing courts should ensure that a defendant has been informed about collateral consequences that might affect willingness to plead, and at sentencing. See Uniform Collateral Consequences of Conviction Act §§ 5, 6 (2010) (UCCCA); Model Penal Code: Sentencing, Tentative Draft No. 3, § 6x.04(1) (2014). The ABA Standards for Criminal Justice also impose this requirement. See *Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, Standards 19-2.3, 19-2.4(b) (2003).

Moreover, the ABA Standards specifically permit a sentencing court to take into account collateral consequences in shaping a sentence. See *id.*, Standard 19-2.4(a) ("The legislature should authorize the sentencing court, and the court should consider, applicable collateral consequences in determining an offender's overall sentence."). The ABA Standards also require the sentencing court to ensure that the overall penalty (presumably including collateral consequences) is not unduly severe. See *Sentencing*, Standards 18-6.1, 18-6.2, 18-3.12(e) (1993).

Both the UCCCA and the Model Penal Code: Sentencing recommend giving the court authority to dispense with mandatory collateral penalties at the time of sentencing, which is a more direct way of approaching the problem of unduly severe collateral consequences, although it necessarily reaches only mandatory legal consequences. See UCCCA §§ 10, 11; Model Penal Code: Sentencing, Tentative Draft No. 3, § 6x.04 (2) (2014). These proposals are included in the Appendix of Love, *et al.*, *supra*.

State courts may also be permitted to take into account collateral consequences in crafting a sentence. A number of state legislatures have anticipated this approach, authorizing their sentencing courts to dispense with collateral consequences at the time of sentencing. See Colo. Rev. Stat. §§ 18-1.3-107, 18-1.3-213, 18-1.3-303; 730 Ill. Comp. Stat. Ann. § 5/5-5.5-15(b); N.J. Stat. Ann. § 2A:168A-7; N.Y. Correct. Law §§ 700-706. These provisions are discussed in § 7:23 of Love *et al.*, *supra*.

## II. Factoring collateral consequences into a federal sentence

A number of federal courts of appeal have upheld the relevance of collateral consequences to a determination of “just punishment” and the need for deterrence under 18 U.S.C. § 3553(a), allowing them as a basis for varying downwards from the guidelines range.

- Second Circuit: Approved as reasonable a variance from guidelines of 78-97 months to 20 months, because the defendant’s conviction for violating rules against communicating with a prisoner “made it ‘doubtful that [he] could pursue’ his career as an academic or translator.” *United States v. Stewart*, 590 F.3d 93, 141 (2d Cir. 2009). The court commented that “[i]t is difficult to see how a court can properly calibrate a ‘just punishment’ if it does not consider the collateral effects of a particular sentence.”
- Fourth Circuit: Affirmed a 36-month variance for a child pornography defendant, based in part on the fact that he lost his teaching certificate and state pension as a result of his conduct: “Consideration of these facts is consistent with § 3553(a)’s directive that the sentence reflect the need for ‘just punishment’ and ‘adequate deterrence.’” *United States Pauley*, 511 F.3d 468, 474 (4th Cir. 2007).
- Seventh Circuit: Affirmed 50-month variance from guidelines of 121-151 in child pornography case, in part because conviction ruined 24-year-old music student’s future career as a teacher and church musician, and imposed lifelong stigma. *United States v. Wachowiak*, 496 F.3d 744 (7th Cir. 2007). *See also United States v. Owens*, 145 F.3d 923 (7th Cir. 1998) (affirming downward departure based on extraordinary family circumstances, including that defendant’s wife and three young children might have to move to public housing and receive welfare benefits if defendant received a prison sentence).
- Eighth Circuit: Affirmed a 7-month variance for a defendant convicted of insider trading and money laundering, based in part on how the defendant “suffered atypical punishment such as the loss of his reputation and his company.” *United States v. Anderson*, 533 F.3d 623, 633 (8th Cir. 2008). *See also United States v. Garate*, 543 F.3d 1026 (8th Cir. 2008) (court properly considered lasting effects of registering as a sex offender in deciding to impose below-guideline sentence).

A research memorandum prepared in 2010 by the Federal Defender’s Sentencing Resource Counsel collects a number of district court cases, from these circuits and others, in which post-*Booker* variances (or, in a few cases, pre-*Booker* departures) were based on collateral consequences such as loss of employment or professional license, extraordinary family circumstances, and other unusual collateral effects of conviction/imprisonment. Sex offender registration and even reputational harm (“the stigma of conviction”) have also been cited as collateral consequences warranting a variance.

There are limits, however. Recent court of appeals cases from the 6th and 10th Circuits evidence a reluctance to approve deep sentencing discounts based on collateral consequences, largely because of the resulting risk of socioeconomic bias in favor of more privileged defendants who have the most to lose in the civil sphere. *See* § 3553(a)(6) (need to avoid unwarranted disparity). Such defendants will also, with the benefit of better lawyers, be more likely to advocate effectively for sentence reductions based on actual or potential collateral consequences, including reputational harm, and may even be able to avoid prison entirely.

In a recent decision involving the conviction of a state legislator for bribery, the Tenth Circuit invalidated a sentence in which the sentencing court had varied from a guideline range of 41-51 months to probation, citing the adverse effects on the defendant of “publicity, loss of law license, and deterioration of physical and financial health.” *United States v. Morgan*, 2015 U.S. App. LEXIS 19402, \*62 (10th Cir. 2015). The

court commented that “it is impermissible for a court to impose a lighter sentence on white-collar defendants than on blue-collar defendants because it reasons that white-collar offenders suffer greater reputational harm or have more to lose by conviction.” *Id.* at \*68 (citing *United States v. Prosperi*, 686 F.3d 32, 47 (1st Cir. 2012)). *See also United States v. Stall*, 581 F.3d 276, 286 (6th Cir. 2009) (affirming variance to probation in child pornography case based in part on collateral consequences, but commenting that “We do not believe criminals with privileged backgrounds are more entitled to leniency than those who have nothing left to lose”).<sup>2</sup>

Like the Tenth Circuit in *Morgan*, the Sixth Circuit has recently invalidated as substantively unreasonable sentences in three cases where the court relied upon the claimed severity of collateral consequences to justify large variances resulting in probation or token prison sentences. In *United States v. Bistline*, the court of appeals reversed as substantively unreasonable a child pornography defendant’s sentence to a single night’s confinement in the court lock-up where the guideline range was 63-78 months, finding insufficient deterrence in the requirement of registration and “the publication of that registration to the community and to his friend and neighbors.” 665 F.3d 758, 765 (6th Cir. 2012).<sup>3</sup>

More recently, in a bank and wire fraud case, the Sixth Circuit held squarely that “[t]he collateral consequences of the defendant’s prosecution and conviction are ‘impermissible factors’ when fashioning a sentence that complies with [§ 3553(a)].” *United States v. Musgrave*, 761 F.3d 602, 608 (6th Cir. 2014). In *Musgrave* the court invalidated a variance from a guideline range of 57-71 months to one day’s confinement, based on the defendant’s having “already ‘been punished extraordinarily’ by four years of legal proceedings, legal fees, the likely loss of his CPA license, and felony convictions that would follow him for the rest of his life.” *Id.* The court of appeals stated categorically that “when a district court varies downward on the basis of the collateral consequences of the defendant’s prosecution and conviction, the defendant’s sentence will not reflect the seriousness of the offense, nor will it provide just punishment.” *Id.* *See also United States v. Peppel*, 707 F.3d 627, 641 (6th Cir. 2013) (district court improperly relied in securities fraud case on CEO defendant’s “chosen profession and status in the community” to impose a 7-day sentence, varying from a guidelines range of 97-121 months).

The 11th Circuit also rejected a substantial variance based on personal characteristics of the defendant on a “no middle class discount” theory, without specifically mentioning collateral consequences. *See United States v. Kuhlman*, 711 F.3d 1321 (11th Cir. 2013) (20-level variance avoiding prison time for a chiropractor convicted of \$3 million health care fraud substantively unreasonable).

The extent of the variances in these cases, resulting in no more than a token prison term, seems to distinguish them from cases cited earlier in this memo, in which collateral consequences were properly given some weight in reducing a prison sentence but not effectively eliminating it entirely.

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<sup>2</sup> In *Stall* the court suggested that the sentence there was attributable in significant part to “the failure of prosecutors to defend their sentencing recommendations vigorously.” *Id.* at 286. In *United States v. Bistline*, discussed in text, the court characterized *Stall* as “more a cautionary tale about prosecutorial neglect, than . . . a precedent important to our decision here.” 665 F.3d 758, 768 (6th Cir. 2012).

<sup>3</sup> On remand, the sentencing court imposed essentially the same sentence, and the court of appeals again reversed, remanding for reassignment. *United States v. Bistline*, 720 F.3d 631 (6th Cir. 2013). On the third sentencing, the court imposed a sentence of 366 days, which the court of appeals affirmed though it was an 80% reduction from the low end of the guidelines. *See United States v. Bistline*, 605 Fed. Appx. 529 (6th Cir. 2015), *cert denied*, 136 S. Ct. 169 (2015).