“Collateral” No More: The Practical Imperative for Holistic Defense in a Post-Padilla World . . . Or, How to Achieve Consistently Better Results for Clients

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“COLLATERAL” NO MORE: THE PRACTICAL IMPERATIVE FOR HOLISTIC DEFENSE IN A POST-PADILLA WORLD . . . OR, HOW TO ACHIEVE CONSISTENTLY BETTER RESULTS FOR CLIENTS

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INTRODUCTION

One warm night last summer, Terrence was hanging out with some friends on a South Bronx sidewalk when two police officers approached and forced them to empty their pockets. Terrence received a summons for having a marijuana cigarette. A month later he showed up in the criminal courthouse by Yankee Stadium to answer the charge. An attorney from the assigned counsel plan took one look at the summons, negotiated a quick deal, and Terrence pled guilty to a non-criminal marijuana offense and a fine, no jail time and no community service. It was a normal plea on a normal day. It took all of two minutes.

In those two minutes, Terrence, who was home from his first year in college, was effectively sentenced to expulsion from school. It did not matter that he was the first in his family to go to college, or that the immediate loss of his federal student loans for a year meant that his statistical chances of ever returning were virtually nonexistent. His attorney never thought to ask whether he received student loans. He did not know he had a readily-available, safe alternative that the prosecutor routinely offered. A little more than a year ago, this representation was legally acceptable.

The Supreme Court’s seminal decision last term in Padilla v. Kentucky capped over a decade of increasing focus on these so-called “collateral” consequences of criminal proceedings. The Court held that to provide effective assistance of counsel, a criminal defense attorney has an affirmative duty to give specific, accurate advice to noncitizen clients of the deportation risk of potential pleas. The majority’s analysis, however, reaches far beyond advice on immigration penalties, extending to any and all serious and likely penalties intimately related to the criminal charges.

This article begins with Terrence’s story because it illustrates the best motivation for defense work—not a Supreme Court decision or a list of professional standards, but the people we represent. Our high-volume criminal justice system, defined by assembly-line pleas to minor offenses, tries its best to reduce people to defendants and cases and avoid any acknowledgment of the true damage it inflicts daily. The most powerful legacy of the Padilla decision is not its legal analysis of the duties of defense counsel, or even its repudiation of the legal theory of “collateral” consequences, at least in the context of the Sixth Amendment. The key to understanding the decision’s impact is much

1. Names have been changed.
2. N.Y. PENAL LAW § 221.05 (McKinney 2008).
5. Id. at 1486.
more basic—*Jose Padilla is a man, not a case.* Padilla reminds us of the advocate’s most effective strategy: humanizing the person he or she represents. Padilla did not change our clients’ needs. Neither did it change the disturbing, lifetime impact of a single criminal charge. What it gave us is *leverage*—a powerful new constitutional leverage for promoting institutional change, increasing resources, and improving individual advocacy. A previous article laid out the first detailed legal analysis of the application of *Padilla* to a broad set of penalties beyond deportation.7 This Article serves as an advocacy companion, responding to the “embarrassing call to action”8 posed by Justice Alito’s recognition of widespread practice deficiencies.9 In short, this Article outlines a framework for how defenders can and should use *Padilla* as leverage to get better results.

Any discussion of changing defense practices must squarely address why defense attorneys must approach their work in a new way and how they can do it in our high-volume reality. Defenders must know that this approach works for clients, works for their practice or office, and is doable. Part I discusses the constitutional duties mandated by *Padilla v. Kentucky* and how embracing its most important lesson about great advocacy will drive and inspire better defense practice. Recognizing that constitutional mandates never sufficiently motivate change, Part II addresses the why, outlining the devastating impact of criminal charges on families and the measurable, improved outcomes that result from integrating knowledge of this damage into every stage of defense strategy.

Part III tackles the difficult question of how. Building on nearly fifteen years of proven results from an integrated model of defense services, this section details strategies for using knowledge of clients and these “collateral” consequences to obtain better outcomes in criminal cases from bail to plea to sentencing, manage risk, obtain more equitable discovery, and build better relationships with clients. Finally, the Supreme Court’s reminder that the client must be the central focus of defense advocacy lays the foundation for a more robust, holistic vision of the defense function. Part IV discusses the imperative for holistic defense in a post-*Padilla* world and outlines one proven model.

I. *PADILLA V. KENTUCKY:* LEVERAGE AND OPPORTUNITY

The Supreme Court’s seminal decision in *Padilla v. Kentucky* stands as both a clear application of the ineffective assistance standard and a revolutionary shift in perspective that will drive daily practice, if properly

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7. See Smyth, supra note 6.
8. *Id.* at 818.
internalized. Instead of following the tragically common practice of sacrificing individual constitutional rights to the institutional fears of overburdened courts concerned about “finality,” or the presumed inability of defense counsel to learn anything but criminal law, the Supreme Court focused on the man in front of them, recognizing that Mr. Padilla faced serious and measurable penalties as a result of his conviction. The constitutional mandate to inquire, advise, and advocate about so-called “collateral” consequences draws its true power from the Court’s person-centered focus.

A. Beyond Deportation

The Court in Padilla held that to provide effective assistance of counsel, a criminal defense attorney has an affirmative duty to give specific, individualized advice to noncitizen clients of the deportation risk of potential pleas. As detailed at length in a previous article, Padilla’s analysis applies inevitably to a wide range of other consequences similarly enmeshed with criminal charges. At its simplest formulation, when a penalty is serious, enmeshed with the criminal charges, and likely to occur, a defense attorney must both advise the client and seek to avoid or mitigate the penalty, consistent with the individual goals of the client. A host of professional standards have for decades required defense counsel to incorporate knowledge of so-called “collateral” consequences into every stage of their representation. Experienced practitioners understand that the corresponding duties of loyalty, investigation, legal research, counseling, and advocacy meet individualized client needs and win improved outcomes.

10. Smyth, supra note 6, at 802.
11. Id. at 798.
13. Smyth, supra note 6; see Part II.A, infra, for a discussion of the terms “collateral” and “enmeshed.”
15. See Smyth, supra note 6, at 810–11 (detailing the application of these national and local standards); Gabriel J. Chin & Richard W. Holmes, Jr., Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 CORNELL L. REV. 697, 714–23 (2002).
In the real world defined by high-volume guilty pleas to minor offenses, where the so-called “collateral” consequences have eclipsed traditional criminal penalties in scope and severity, the prospect of meeting even the minimum standards of representation appears overwhelming. The Supreme Court itself provided the key.

B. Jose Padilla is a Man, Not a Case

Jose Padilla served with honor as a member of the U.S. Armed Forces during the Vietnam War. He was a long-haul trucker. He has been a lawful permanent resident of the U.S. for more than forty years, but he is now under threat of deportation because of his criminal case. One of the most striking aspects of the Supreme Court’s decision in Mr. Padilla’s case was its explicit recognition that as a result of their involvement in the criminal justice system, our clients suffer devastating consequences that extend well beyond the courthouse walls. In many ways, the Court broke surprising ground by acknowledging Mr. Padilla as a real person, not just a defendant—a step that all players in the criminal justice system must now take. This step opens our eyes to the true scope and depth of the damage wreaked by the criminal justice system—its impact on clients, their families, and their communities.

By restoring the person facing criminal charges to the center of defense representation, Padilla lays the foundation for implementing a more comprehensive, client-centered vision of defense practice. It reminds us to look beyond the case to the full consequences of criminal justice involvement. If a penalty or consequence is likely and related to our client’s criminal charges, we should know about it, tell our client about it, and work to avoid or mitigate it. And then we do what any good advocate does: we tell our client’s story, with a specific goal of getting a better result.

The personal is powerful. As noted recently:

[A]mple psychological research shows the greater moral difficulty we have inflicting harm on others whose faces we can see, whose presence we can feel. If we know the person socially or otherwise, inflicting harm on him, absent reasons for a vendetta, can be all the harder. This observation is true the more we learn about them in ways that reflect their ordinary humanity. It is far

and experience from integrated criminal and civil practice, this Article attempts to describe and address these barriers with the goal of improving defense practice and outcomes for clients.

17. Padilla, 130 S. Ct. at 1477.
18. Id.
19. Id.
20. Id. at 1481–82; Smyth, supra note 6, at 807 (“The Court opened its decision with an unusually personal description of Mr. Padilla and ended it with an invocation of the devastating impact of enmeshed penalties on families.” (footnotes omitted)).
21. See Padilla, 130 S. Ct. at 1486.
harder to harm someone else whom you think of as a father, a son, a husband, or a church member than as a nameless individual.”

These concepts are not new. Many defenders already build strong relationships with clients and use personal information to tell a powerful story and advocate more effectively, particularly in trial advocacy. Padilla serves as a reminder of the critical importance of this approach as both a core function of lawyering from the first client meeting and as functional leverage to get better results by broadening the scope of negotiation and trial advocacy.

II. THE WHY: TURNING “COLLATERAL” INTO “INTEGRAL”

Under-resourced defenders. High caseloads, high-volume guilty pleas, and high stakes. The challenges of embracing and implementing even the constitutional minimum set by Padilla are legion. These practical barriers range from the legal to the institutional, from the traditional defender in denial to the willing practitioner overwhelmed by the apparent challenge. We must be honest about the first significant challenge—convincing a generation of defenders, prosecutors, and judges that an overwhelming set of consequences and penalties habitually dismissed as “collateral” are in fact integral to criminal practice.

Constitutional minimum standards and professional norms, without more, are insufficient to create the change our clients need. Justice Alito’s concurrence in Padilla noted a disturbing disconnect between these standards of practice and their execution for many defense attorneys. Bridging this divide requires an understanding of what motivates or excuses substandard practice in the context of a constitutional mandate for a more robust model of representation. Real change will not come until defenders understand and internalize why client-centered, holistic practice makes them better lawyers and advocates.

The prospect of developing and incorporating a working knowledge of enmeshed penalties, given their breadth, can be daunting. A number of common questions and challenges have emerged during my trainings of thousands of defenders, from managers of large offices to solo practitioners. Defenders have reasonably asked, “How is this relevant to my daily work?” or “How does this help my clients?” Or maybe less helpfully, “My clients care


23. Id. at 515–21; see also Tyrone C. Moncriffe, Storytelling and the Art of Persuasion, CHAMPION, Nov. 2011, at 26. The importance of humanizing clients in the most dire of circumstances is one critical lesson we have learned from capital defenders.

more about jail,” “I’m a lawyer, not a social worker,” “I don’t have time to learn a new area of law,” and “There’s nothing I can do about it anyway.”

Daily experience from across the country proves that defense counsel can use knowledge of these penalties, so-called “collateral” consequences, as a direct advocacy tool to win better dispositions in the criminal case and improved life outcomes for clients. This knowledge translates into concrete strategies for daily practice. These hidden punishments actually outline the structure that traps low-income clients in recurring encounters with the criminal and family justice systems. It is that reentry perspective, woven into the client’s story, which provides critical leverage and common ground in negotiation by invoking the public safety theme. But these strategies require identifying the problem early enough to make a difference.

A. Understanding the True Impact of “Collateral” Consequences

Defenders will not look beyond the traditional four corners of the criminal case—the liberty interest—unless they appreciate the measurable, disproportionate, and predictable damage inflicted on their own clients and their families. Understanding a number of pervasive themes that characterize the true consequences of criminal charges can motivate and frame both individual advocacy and the responses of defender offices.

1. A New Normal

As a starting point, particularly for experienced practitioners and managers, defenders must understand that the far-reaching impact of the criminal justice system on clients and their families has changed dramatically even in the last ten years. The steady accumulation of these consequences, significant increases in arrest and incarceration rates, and the exponential increase in the availability of criminal history data have combined to create a new normal—a web of punitive sanctions on a scale that no one anticipated and many want to ignore.25

The criminal justice system has long operated in a bubble, studiously ignoring the real-life penalties it inflicts far beyond the criminal case. Because these penalties have dramatically raised the stakes of a criminal case, defenders, prosecutors, and judges must incorporate knowledge of them into their daily practice. Padilla removes any remaining excuse. More important, as I will describe in the next section, Padilla provides the leverage for improved results in light of this newly-recognized but ever-present backdrop. We have to adjust our practice to reflect the new reality.

2. “Collateral” No More

Second, as was clear before Padilla v. Kentucky, the term “collateral consequences” is not only inaccurate, but also lays a trap for the unwary advocate. Courts invented the label, and the doctrine that followed, to purposefully remove the process imposing a wide range of penalties from the well-established constitutional protections incorporated into the criminal law, including effective assistance of counsel, voluntariness of pleas, proportionality of punishment, adequacy of notice, and retroactivity of application.\(^\text{26}\)

Unpacking the “collateral” label reveals the deeply-embedded institutional and personal incentives to ignore these devastating penalties.\(^\text{27}\) The real problem lies in the word “collateral”—in a fait accompli, it summarily excuses any attention to what follows. Almost by definition, the term invites ignorance and absolves judges, prosecutors, and defense attorneys of responsibility.\(^\text{28}\) The term is both a symptom of and vehicle for a self-deception that perhaps serves as a coping mechanism to block out the true magnitude of harm inflicted daily by the criminal justice system on families and communities.\(^\text{29}\) When advocates use the term “collateral,” they unwittingly depersonalize the very harm they seek to highlight in negotiations and cede their argument before it begins.

The experiences of millions of people charged with crimes, and now Padilla’s analysis, reveal the bankruptcy of the term. These consequences are in fact integral to the proceedings and criminal defense representation and are often the client’s primary concern. For many clients, their children, and their families, these consequences are much more severe than any criminal sentence. Our clients, and our criminal defense practice, will benefit when attorneys weave knowledge of these consequences into defense strategy at every stage of representation. In the context of advocating for improved defense practice,

\(^{26}\) See Smyth, supra note 6, at 803–07; Chin & Holmes, supra note 15, at 704–08.

\(^{27}\) See Smyth, supra note 6, at 815–18 (using recent cases to describe how the functionalist fears of courts and practitioners can bolster resistance and warp reality). This critical period after Padilla provides a leadership moment to elevate client experience over an outdated legal fiction. The curious resistance of even some academics and policy advocates to seize this moment to jettison the “collateral” label demonstrates the strength of these institutional traps. See Gabriel J. Chin, Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea, 54 HOW. L.J. 675, 678–81 (2011); Margaret Colgate Love, Collateral Consequences after Padilla v. Kentucky: From Punishment to Regulation, 31 ST. LOUIS U. PUB. L. REV. 87 (2011).

\(^{28}\) See Taslitz, supra note 22, at 515–17 (“[M]any in the criminal justice system are aware that some sort of ill effects other than the precise sentence imposed will occur, but they are so practiced at avoiding knowledge that they do not know what all those effects are or how they will impact a specific individual.”).

\(^{29}\) Id. at 514–16.
either as a manager or a professional community, we set ourselves up for failure by urging practitioners oxymoronically to “prioritize the collateral.”

After Padilla, we have the critical opportunity to create a new, more realistic terminology and legal analysis for this wide range of penalties. I use “enmeshed penalties” or “enmeshed consequences” as possible terms to encompass all so-called “collateral consequences” because the terms evoke the intimate relationship with criminal charges, directly reference the opinion, and have the benefit of being short, albeit not very catchy. These penalties are, in fact, intimately related to criminal charges. They are serious, often draconian, and lifelong. It is imperative that our language reflects these realities that our clients face every day. The existing terminology of “collateral consequences” has the opposite purpose and effect, and indeed was designed explicitly to dismiss these penalties from any consideration within a criminal case.

3. Disproportionality

Felony charges tend to draw the most individual focus from criminal practitioners as these cases pend for longer periods of time and appear to result in more severe and immediate penalties for clients. The focus on felonies misses the much greater damage inflicted by the minor criminal charges that define the vast majority of cases in the criminal justice system. Indeed, many of the most draconian penalties result from misdemeanors and petty offenses. A plea to disorderly conduct makes a person ineligible for Milwaukee subsidized housing for five years or New York City public housing for three years. Two convictions for turnstile jumping make a lawful permanent resident, a “green card” holder, deportable. A conviction for any crime in New York bars a person from being a barber, boxer, or bingo operator.

30. See Smyth, supra note 6, at 822–27.
31. Id. at 802.
32. Id.
33. Id. at 802–03.
34. Id. at 836.
35. Id. at 835.
and%20annual%20reports/Section%208%20Admin%20Plan%20v9-21-05.pdf.
Simple possession of a marijuana cigarette, a non-criminal offense in New
York and other states,40 cuts off federal student loans for a year and can
independently bar admission to college.41

As discussed later, advocates can use this disproportionality as a core
advocacy tool to get better results in individual criminal cases. Focusing only
on traditional penalties misses the most critical opportunities for leveraging
better outcomes. The number and disparate impact of “minor” cases demand
that defense counsel and managers devote increased institutional resources to
litigate them.42

4. No Criminal Convictions Required

From the loss of a job to the immediate removal of one’s children,
significant consequences flow from an arrest alone. Much of this damage is
casted by the widespread availability of criminal history data.43 Data sharing
among government agencies has increased exponentially in this age of

technology. Licensing agencies and other authorities often receive automatic
notification of arrests and suspend or revoke the ability to work within days of
an arrest.44 An arrest often triggers termination proceedings in publicly-
subsidized housing, even if the criminal case is dismissed.45 Many penalties
are imposed in administrative proceedings with lower burdens of proof, no
rules of evidence, and virtually unlimited discretion by the fact-finder.46

40. N.Y. PENAL LAW § 221.05 (McKinney 2008).
41. 20 U.S.C. § 1091(r)(1) (2006); see also MARSHA WEISSMAN ET AL., CTR. FOR CMTY.
ALTS., THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS RECONSIDERED
lege-admissions.pdf.
42. Smyth, supra note 6, at 836.
43. See, e.g., Michelle Natividad Rodriguez & Maurice Emsellem, NAT’L EMP’T LAW
PROJECT, 65 MILLION “NEED NOT APPLY” THE CASE FOR REFORMING CRIMINAL BACKGROUND
CHECKS FOR EMPLOYMENT (2011); SEARCH, NAT’L CONSORTIUM FOR JUSTICE INFO. &
STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL
JUSTICE RECORD INFORMATION (2005); MARY ELIZABETH BURKE, SOC’Y FOR HUMAN RES.
MGMT., 2004 REFERENCE & BACKGROUND CHECKING SURVEY REPORT 7 tbl.7 (2004); Jon
Bonne, Most Firms Now Use Background Checks, MSNBC (Jan. 21, 2004, 6:41 PM), http://to
day.msnbc.msn.com/id/4018280/ns/today-today_news/t/most-firms-now-use-background-checks/
#.TqY_nD481GR.
44. McGregor Smyth, From Arrest to Reintegration: A Model for Mitigating Collateral
housing, a Public Housing Authority may terminate assistance “regardless of whether the covered
person has been arrested or convicted for such activity and without satisfying the standard of
proof used for a criminal conviction”); id. § 982.553(c) (stating an analogous policy for Section 8
voucher).
46. See Margareta E. Homsey, Note, Procedural Due Process and Hearsay Evidence in
5. From Consequences to Causes: Finding Common Ground for Advocacy

Ostensibly intended to improve public safety, these penalties ultimately trap individuals in the revolving door of incarceration and poverty. By blocking the path to stable employment, housing, and family connections, these barriers actually contribute to recidivism and undermine the struggle for self-sufficiency. The damage hits much deeper than the individuals in court—entire families suffer the consequences.

When the harsh consequences of criminal charges morph into counter-productive causes of criminal justice involvement, it can build a bridge across the adversarial or political divide. For defenders, a focus on both causes and consequences, whether framed as treatment, mitigation, rehabilitation, reintegration, or reentry, can provide fertile ground for negotiation and lead to measurably improved criminal case outcomes and life outcomes for the client.

B. Obtaining Measurable, Improved Outcomes

Defenders will allocate scarce resources only when they see real outcomes. An understanding of the breadth of penalties resulting from arrest and a renewed focus on clients sets the stage for the ultimate question—does it work? The answer is a resounding yes from nearly fifteen years of experience at a high-volume public defender. Defense attorneys can use knowledge of these enmeshed penalties, so-called “collateral” consequences, as a direct advocacy tool to win better dispositions in the criminal case and improved life outcomes for clients. An investment in these strategies will return measurable results in four major areas: improved criminal dispositions; risk management; better discovery; and improved life outcomes for clients.

47. See Michael Pinard, An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals, 86 B.U. L. REV. 623, 633 (2006) (describing so-called “collateral” consequences and reentry as interwoven components); Anthony C. Thompson, Navigating the Hidden Obstacles to Ex-Offender Reentry, 45 B.C. L. REV. 255, 273 (2004) (“These social exclusions not only further complicate ex-offenders’ participation in the life of their communities, but they also quite effectively relegate ex-offenders to the margins of legitimate society, stigmatizing them and further highlighting their separation from law-abiding members of society.”).

48. See, e.g., K. Babe Howell, Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 292 (2009) (“Many of these costs are externalized, born by individual arrestees, their families, their communities, and the larger community of taxpayers to the extent that arrests and criminal records lead to further arrests, incarceration, or un(der)employment. Other costs are borne directly by the system.”).

1. Improved Criminal Dispositions

Experience has taught that defenders can obtain more favorable bail, plea, and sentencing results—and even outright dismissals—when they are able to educate prosecutors and judges on specific and severe consequences for the clients and their families.50 When raising these consequences with prosecutors and judges, keep in mind that they typically respond best to consequences that offend their basic sense of fairness—those that are absurd, disproportionate, or harm innocent family members.

We have found these four categories of penalties most powerful in advocating for alternative dispositions:

- **Immigration.** Deportability, inadmissibility, or ineligibility for a waiver as the result of a plea.

  Mr. J came to the U.S. from West Africa in the 1980s on a visa and stayed beyond the authorized period. He married a woman from his country here and together they have five U.S. citizen children. Two years before we met him, Mr. J was awarded his green card by an immigration judge because the judge found that Mr. J’s daughters would be subject to female genital mutilation in their country of origin, as their mother had been before them. Unfortunately, Mr. J’s marriage fell apart, and Mr. J landed in jail as a result of two arrests for violating family court orders of protection when he went to the family’s home to visit his children. Even one conviction for violating an order of protection would have made Mr. J deportable. Early intervention and extensive negotiation with the prosecutor resulted in redrafting the criminal complaint to add safe plea alternatives of trespass violations, to which Mr. J ultimately pled. As the only parent who had legal status in the country, it was essential to his daughter’s health and happy future that he avoid deportation.

- **Housing.** Loss of public housing or Section 8 as the result of a plea.

  Jake was wheelchair-bound and suffering the degenerative effects of cerebral palsy. A victim of a home invasion in his public housing development, he got an illegal handgun for protection. One day soon after, he was handling the gun and it accidentally fired—straight through the wall into his neighbor’s apartment. Jake faced years of prison time from multiple felony charges. Even a felony plea with a non-incarceratory sentence would have triggered an eviction from public housing and rendered Jake homeless. His defense attorney found critical leverage by describing Jake’s personal circumstances, and by demonstrating the devastating impact of not only incarceration but any felony plea on Jake’s permanent, affordable housing.

50. See id. at 494–95.
After significant advocacy, the defender convinced the prosecutor to offer a misdemeanor plea with no jail time, preserving Jake’s home in the process.

- **Employment & Military Service.** Loss of a job or employment license, particularly for a breadwinner.

  Harold was a security guard who had suffered from drug addiction in his past. When his marriage fell apart and his mother became seriously ill in the same year, he returned to using PCP. One night he was arrested while buying drugs, and he was charged with felony drug possession. The defender explained to the judge and the district attorney that even an indictment would result in a revocation of his security guard license. Harold agreed to plead guilty to a misdemeanor drug charge and, upon successful completion of a three-month inpatient addiction program, his plea was downgraded to a petty offense. He kept his license active while he was in recovery and found a stable job when he graduated from his program, which helped him stay clean and get his life together.

- **Student Loans.** Loss of a federal student loan eligibility and educational opportunity.

  This Article opens with Terrence’s story—a two-minute decision resulting in a lifetime of lost educational opportunities. Charged with minor marijuana possession, not even defined as a crime in New York, Terrence took the advice of counsel and pled guilty. As a drug offense, it made him ineligible for his federal student loans and unable to return to college. Even for a student not dependent on student loans, any drug conviction can bar admission to or result in expulsion from higher education. With knowledge of this sanction, his defense attorney could have persuaded the Bronx ADA to offer two readily-available alternatives—an adjournment in contemplation of dismissal, a form of deferred prosecution, or a plea to disorderly conduct—neither of which would have done the educational damage of the marijuana plea.

  Other serious penalties intimately related to criminal charges include sex offense registration and its attendant consequences, civil commitment, loss of voting rights, ineligibility for government benefits, and prohibition on firearms possession.

  Incorporating these penalties into negotiation strategy gets consistently improved results even by traditional criminal justice measures. An analysis of this model of defense strategy in one high-volume defender office proves that it works. An evaluation of one year of case and outcome data found that The Bronx Defenders “win dismissals and acquittals almost twice as often as other providers practicing before the same Bronx courts. Three-quarters of [their] clients who are convicted of crimes are sentenced to non-incarceratory
programs and Bronx Defenders’ clients serve, on average, twenty percent less jail time.”51 As one example, more than half (54%) of the immigration plea consults last year at The Bronx Defenders resulted in either reduced pleas or sentences or dismissed criminal cases.52

2. Risk Management

Knowledge of so-called “collateral” consequences is also a key risk management tool for defenders. Clients facing criminal charges will often have to face ancillary civil or administrative proceedings in housing court, family court, or with employment licensing agencies. Defense alarms should sound when “a client lives in subsidized housing, is accused of endangering the welfare of a child, is a public employee or has an employment license, has a driver’s license and is accused of a drug or driving offense, or is a non-citizen.”53 In each situation, clients will likely be dragged into parallel civil proceedings while the criminal charges are still pending.

Why should defenders care? Clients will often testify or give written statements as part of these ancillary proceedings about the underlying facts of the pending criminal case, or they are penalized for invoking their right to remain silent, usually without ever telling their defense attorney. When agencies suspend employment licenses after an arrest, they usually require licensees to provide additional information about the charges and offer a procedure for challenging the suspension.54 Most people jump at any opportunity to keep their jobs and give extended explanations, in writing or on the record, of the events that led to the charges. Prosecutors in New York City routinely force landlords to initiate eviction proceedings while the related drug charges remain pending, and then send Assistant District Attorneys to Housing Court to observe and record.55 Defense attorneys must be familiar with these civil consequences so they can anticipate these proceedings, plan for them, and properly advise clients of the impact on their criminal case.

51. We Zealously Defend the Accused, THE BRONX DEFENDERS, http://www.bronxdefenders.org/our-work/we-zealously-defend-accused (last visited January 31, 2012). The Bronx Defenders’ caseload comprises a representative sample of all criminal cases filed in Bronx County, a high-volume urban court. Absent conflict of interest, the office represents all people who cannot afford an attorney arraigned on criminal charges of all levels of severity certain days of the week. The author has worked at The Bronx Defenders for the past twelve years.
54. See, e.g., Nnebe v. Daus, 644 F.3d 147, 158–59 (2d Cir. 2011) (holding that city not required to provide hearing before suspending taxi licenses immediately after arrests).
3. More Equitable Discovery

Proper risk management has another significant benefit: as a result of being prepared for these ancillary proceedings, defense attorneys can use them for additional discovery not available in the criminal case. Eviction cases, employment licensing proceedings, DMV hearings, school suspension hearings—these are all venues where important witnesses might testify and where an administrative or lower court judge, or even an attorney, is likely to have subpoena power, allowing defenders to obtain a wide range of documents or testimony otherwise unavailable in the criminal case. With proper planning, a defense attorney can cross-examine an arresting officer or complaining witness.

Expansive use of these entirely legal litigation tools provides an obvious benefit in the criminal case, but it can also create positive pressure that avoids or mitigates the civil penalty or suspension for the client. A prepared defense attorney can have significant impact in these venues that are not used to dealing with represented parties. More indirectly, a prosecutor who sees the criminal case litigated and advanced outside of his or her control will exert significant pressure on agency and private actors to lift suspensions or otherwise benefit the client simply to remove the defense discovery tool. We have seen both outcomes routinely in our defense practice. Either way, the client benefits.

4. Improved Life Outcomes for Clients

Life outcomes. Implementing these strategies quite literally preserves homes, saves jobs, and keeps families together. At The Bronx Defenders, we track every result for every case so that we can measure and report the impact on our clients and constantly improve the quality of our services. Last year, for example, 87% of the hundreds of plea consults given by our immigration attorneys resulted in an immigration-positive outcome in the criminal case. In the same period, the integrated advocacy, outlined within, prevented over one hundred evictions and over one hundred deportations.

Better relationship with counsel. Learning the penalties enmeshed with our client’s criminal cases and advising our clients of those consequences helps us build better relationships with our clients. An important goal in itself, it also fundamentally improves advocacy, with counsel able to present more personal, compelling, and persuasive narratives during negotiations and at trial.

56. Smyth, supra note 49, at 496.
57. Id.
58. Smyth, supra note 52.
59. See infra Part III.
60. Smyth, supra note 52.
Empowerment. It also empowers clients to choose outcomes based on their own priorities. Help clients think about these long-term hidden effects of strategy or plea decisions before they make them. Give clear, specific, individualized advice about these penalties and, as described above, work to avoid or mitigate them in light of the client’s priorities. After Padilla, silence, the failure to advise a client of these risks, a practice previously judicially condoned in many jurisdictions, is per se ineffective assistance of counsel.61

What is more important—jail or prison time (the liberty interest)? Custody of children? Immigration status? Housing or a job? There is no universal answer; only each client can decide for herself. The collateral damage of being arrested often falls most heavily on family members. When given the option, our clients will often choose the outcome that minimizes the impact on their families. This is where we start to find meaning in being “client-centered” rather than “case-centered.”

III. THE HOW: PRACTICAL STEPS TOWARD HOLISTIC DEFENSE

Defenders know that the calculations of good criminal justice strategy involve far more than the weight of the evidence, including a wide range of variables, as prioritized by the client, such as likely penalties and punishments, the collateral damage for family members, and rehabilitative goals.62 Padilla pushes us to broaden this set of variables and be consistent in using them. The motivation to inquire into, investigate, advise about, and tactically leverage all serious, enmeshed, and likely consequences of criminal charges is particularly important in “minor” cases that so frequently suffer from a lack of focused attention because of intense docket pressures and the appearance of low stakes for clients.63 For both defenders and clients, understanding the full range of consequences of charges can shift this equation at every stage of representation.

Take full advantage of the door that Padilla opens—the creative opportunities for better outcomes. Defense attorneys must work to identify client needs and goals as early as possible, engage in adequate investigation and legal research, and weave this knowledge into defense strategy and advocacy at every stage of criminal defense representation.

This client-centered representation requires fierce and zealous advocacy with the clients’ goals as the compass. It requires creativity, focus, and commitment. Negotiation, as always, provides one critical tool of advocacy,


62. See, e.g., N.Y. PENAL LAW § 1.05(6) (McKinney 2009) (including the goal of “the promotion of [the convicted person’s] successful and productive reentry and reintegration into society,” along with the four traditional sentencing goals of deterrence, rehabilitation, retribution and incapacitation); Smyth, supra note 6, at 808.

63. See Smyth, supra note 6, at 820.
but in the end the right to a trial remains the defender’s best enforcement tool. Clients informed about the full consequences of final plea offers may choose to go to trial, where the chance of avoiding all consequences outweighs the certain harm of the plea. 64 For these clients, “the consequences of conviction may be so devastating that even the faintest ray of hope offered by a trial is magnified in significance.” 65 The proven willingness to go to trial then benefits future clients of the defender in negotiations.

Consideration of the full range of consequences for clients and their families should be a critical part of defense inquiry and strategy at every stage of representation, from the first client meeting to sentencing. Weaving knowledge of these consequences into the full scope of defense representation predictably results in better criminal case outcomes, more discovery, and improved client life outcomes. 66

The concrete steps of defense advocacy should be familiar. Investigate the client’s individual facts and circumstances. Figure out the client’s goals and wishes. Analyze the real-life impact of key strategy decisions and so advise the client. Finally, defend the case, including negotiation or trial, according to the client’s priorities.

A. Early and Effective Inquiry, Investigation, and Advice

The foundation for powerful advocacy begins with the first client meeting. It sets the tone for the relationship and builds trust and confidence in the attorney. It opens the channel for the critical exchange of information and advice central to the lawyer-client relationship. Clients must share information so that attorneys can fully assess their case and craft the all-important personal narrative. Lawyers must fully inform clients so that they can make the best decisions for themselves and minimize the harm resulting from an arrest or conviction. Focusing narrowly on the “facts” of the criminal allegations can have counter-productive results and miss critical opportunities for better outcomes.

To build this relationship and adequately prepare, most defenders already ask clients about a range of factors relevant to the criminal charges, pretrial

64. “Preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” INS v. St. Cyr, 533 U.S. 289, 322 (2001) (quoting 3 MATTHEW BENDER, CRIMINAL DEFENSE TECHNIQUES §§ 60A.01, 60A.02[2] (1999)).
65. ANTHONY G. AMSTERDAM, 1 TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 204 (5th ed. 1988). This risk calculus can also create perverse incentives to plead guilty to a “safe” deal: “It can readily be imagined that some resident aliens might prefer to avoid even the risk of deportation rather than stand trial for crimes of which they believed themselves innocent.” United States v. Russell, 686 F.2d 35, 41 (D.C. Cir. 1982).
release, and potential penalties, including residence, criminal history, immigration status, employment, education, family and community ties, and financial condition. Certain additional topics flag critical risk-related factors for potential enmeshed penalties or so-called “collateral” consequences, such as immigration status and receipt of or pending applications for federally-assisted housing or other government benefits, public employment or licenses including pending applications, and student loans. Make sure to identify social services, mental health, or treatment needs as well, particularly those that may have contributed to the criminal justice contact. Briefly explain the reasons behind the questions and the paramount goal of protecting the client. This demonstration of genuine interest in the client as a person will help to elicit their important goals and priorities that will inform every defense strategy decision and humanize the “defendant” to the impersonal justice system.

1. Take Prompt Action

Arrests alone can trigger many penalties and consequences enmeshed with criminal charges, such as immigration detainers, deportation, or the suspension of an employment license, that will rival or overshadow the potential criminal sanctions. An inquiry targeted at high-risk consequences at the first client meeting is critical for timely investigation, advice, and consideration of enmeshed penalties and other needs such as addiction or mental illness. Counsel can avoid or mitigate many penalties or sanctions, and meet other important client needs, only by early advocacy during plea negotiations. Be active rather than passive, taking the initiative rather than waiting for questions from the client, “who will frequently have little appreciation of the full range of consequences that may follow from a . . . plea” or other strategic decisions in a criminal case. Client interviews should explore “what [so-called] collateral consequences are likely to be important to a client given the client’s particular personal circumstances and the charges the client faces.”

67. Criminal background checks have become routine for employment, housing, and public benefits applicants. See, e.g., 24 CFR §§ 960.203(b), 960.204 (2011). Although background checks are now routine, they often return inaccurate information, with disastrous results for clients and their families. Defense counsels receive copies of clients’ criminal histories during the course of representation. By making the review and correction of clients’ rap sheets routine, defense counsel can improve rap sheet accuracy and thereby reduce widespread barriers to employment and housing. See Smyth, supra note 49, at 492.

68. See Smyth, supra note 49, at 498–99 (outlining sample checklists and triage questions); Chin, supra note 27, at 690 (same).


70. Id.
Protect and preserve the rights of the client in the pending criminal matter, but also take prompt legal action, where appropriate, to protect the rights of the client in any civil penalty or proceeding of a civil nature that may result from the criminal matter. Prompt action and advocacy, which can include working with an appropriate civil legal expert or social services provider, can preserve clients’ rights and garner better results in the criminal case. As detailed above, defender involvement in proceedings, such as DMV hearings and license suspension actions, reap significant benefits in discovery and risk management of client statements, and can create positive pressure to avoid certain penalties altogether. Too late comes too soon.

2. Focus on the Client, Not Narrow Legal Definitions

In this context, defense attorneys must focus on the actual and likely impact on their clients. As described above, any serious and likely consequence of a criminal charge can reveal a powerful advocacy tool, and any person affected by these penalties would certainly want to know about them. Some commentators, however, appear to limit the role of defense counsel to legal penalties imposed automatically after convictions. They rely on an old distinction drawn between “collateral sanctions,” imposed automatically by law upon conviction, and “discretionary disqualifications,” authorized but not required by law. The American Bar Association and Uniform Law Commission created these categories to recommend different levels of procedural and substantive limitations on these consequences from the perspective of courts and policy makers, not to inform defense practice or prioritize various penalties for clients.

71. See supra Part II.B.
72. See, e.g., Chin, supra note 27, at 676; Love, supra note 27, at 107–09.
74. See UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT §2 (2009). The Court Security Improvement Act of 2007 adopted these categories without substantive effect when creating funding for a jurisdiction-by-jurisdiction survey of enmeshed penalties. Pub. L. No. 110-177, § 510(d), 121 Stat. 2534, 2543–44 (2008). Funded by the National Institutes of Justice, the American Bar Association is currently conducting this survey through its Adult Collateral Consequences Project. See id. § 510(a), Stat. at 2543.
Limiting defense advocacy to collateral sanctions would not even meet the constitutional minimum set by the Court in Padilla.\textsuperscript{76} In defining counsel’s Sixth Amendment duties, the Court did not require a legally mandatory penalty, but rather focused on the realistic impact of a conviction on a client.\textsuperscript{77} While of some use to policy makers and academics, the distinction between collateral sanctions and discretionary disqualifications lacks the client-centered focus required by Sixth Amendment duties and professional standards.\textsuperscript{78} Most immigration, public housing, and employment penalties require the intervening decision of an independent court, agency, or official. Many damaging and predictable consequences are triggered not by a conviction, but rather by proof of criminal activity.\textsuperscript{79} Moreover, even the time it takes to avoid or waive a discretionary disqualification can cause significant damage in lost wages or lost job or housing opportunities filled in the interim. These penalties would not fall into the collateral sanction definition, yet they clearly are sufficiently serious and likely to warrant consideration and advocacy by defense counsel. A focus on collateral sanctions sets the bar far too low, ignoring the true life impact important to clients. It also squanders many critical opportunities for leveraging better results. Resist the lawyerly temptation, driven by the breadth of penalties for clients, to impose a top-down interpretation of Padilla—you will miss the individualized essence of the decision and its greatest lesson.

B. Advocating for Plea and Sentencing Alternatives

In a system defined by pleas rather than trial and charges for minor offenses rather than major felonies, the question of whether to plead guilty or go to trial is ordinarily the most important single decision in a criminal case.\textsuperscript{80} In accordance with client goals and needs determined after appropriate inquiry and advice, seek dispositions and sentences that avoid or minimize all penalties and consequences, traditional and enmeshed. Establish the likelihood of the

\textsuperscript{76} See Smyth, supra note 6, at 826–27.

\textsuperscript{77} Padilla v. Kentucky, 130 S. Ct. 1473, 1480, 1483 (2010) (discussing the preservation of the possibility of discretionary relief from deportation).

\textsuperscript{78} See Smyth, supra note 6, at 826–27. As a short rule of decision, meeting the definition of “collateral sanction” is a sufficient, but not necessary, condition to trigger the duty to advise and advocate.

\textsuperscript{79} The Shriver Center recently released a report entitled “When Discretion Means Denial” examining admissions policies for people with criminal records in the three major subsidized housing programs in Illinois: public housing, Housing Choice Voucher, and project-based Section 8. MARIE CLAIRE TRAN-LEUNG, SHRIVER CTR., WHEN DISCRETION MEANS DENIAL: THE USE OF CRIMINAL RECORDS TO DENY LOW-INCOME PEOPLE ACCESS TO FEDERALLY SUBSIDIZED HOUSING IN ILLINOIS (2011), available at www.povertylaw.org/advocacy/housing/when-discretion-means-denial.pdf. The report uncovered major barriers, including (1) unreasonably long look back periods; (2) use of arrests as proof of criminal activity; (3) use of vague standards with no basis in federal law; and (4) underuse of mitigating circumstances. Id.

\textsuperscript{80} Boria v. Keane, 99 F.3d 492, 496–97 (2d Cir. 1996).
specific enmeshed penalty, then convince the prosecutor and judge that they should factor it into their decision making. Include consideration of all penalties and consequences, consistent with client goals and priorities, in negotiations with the prosecutor at every step of the criminal process, including applications for bail or bond, charging or indictment decisions, choices of particular criminal dispositions and sentences, and communications with the court or probation regarding the appropriate sentence or conditions to be imposed. Be mindful that these consequences often adversely affect family members, if identified as a client priority, and serve as counter-productive barriers to clients’ successful and productive reentry and reintegration into their communities, a useful point for negotiations.

1. Be Specific

Focus on the measured risk of identifiable penalties for specific clients. This concept proves fundamental for both clients and advocacy. Clients will not benefit from “advisal” of a laundry list of potential consequences or a handbook detailing how many laws will limit their life opportunities. They need specific advice about measurable risk to be able to participate in key strategy decisions and weigh their priorities. For the purposes of targeted advocacy and negotiation, the penalty must be serious, likely for that client, and something the prosecutor or judge has the power to change. Focus on a significant right or opportunity, such as housing, a job, or life-sustaining benefits for a family, that the person will lose, or a pending application for an opportunity otherwise likely to be granted. A legal penalty that has no immediacy for a client will get no traction.

2. Be Persistent

Defense attorneys must often begin by proving that these consequences are real and enforced. Many prosecutors, judges, and even defenders simply do not want to believe that so many irrational and draconian punishments exist. Breaking this new ground in any particular courthouse or jurisdiction will require a surprising amount of time simply printing out various statutes, regulations, and policy statements as evidence of a penalty, or having a civil attorney or expert make appearances or phone calls. It will take time and effort, but persistence and humanizing every penalty will gradually shift the baseline to the benefit of your clients.

3. Be Creative

Remind prosecutors and judges that the U.S. Supreme Court has explicitly encouraged creative dispositions, endorsing “informed consideration” of these enmeshed penalties by the defense, prosecution, and courts during plea
bargaining. Work towards a shared understanding of both proportionality of penalty and rehabilitative goals in light of the client’s story, which can form a productive ground for negotiation at every stage in individual cases, from bail applications to pleas to sentencing. Then offer real solutions that build on this common ground. Proven methods to consider in specific circumstances include alternative mandates or side agreements that avoid convictions, carefully crafted allocutions, replacing misdemeanor pleas accompanied by fines alone with petty offense pleas accompanied by short jail sentences, and voluntary engagement in programs or treatment that otherwise would be mandated.

4. Be Direct

Challenge prosecutors and judges to justify those consequences when they have the power to change them with alternative dispositions. If bail will result in the loss of a stable job for a breadwinner, or a particular plea or sentence will lead to the loss of permanent, affordable housing or a client’s ability to live in this country with her U.S. citizen children, ask whether prosecutors and judges are really serving public safety—or achieving just outcomes—by insisting on that disposition.

In first attempts, many prosecutors and judges will respond with a version of “That’s unfortunate, but I can’t consider it because it’s outside of the criminal case.” Padilla provides the critical legal leverage to work past this response. Never let them use the discredited collateral/direct distinction as an excuse. Of course, working past “I can’t consider” may unmask an “I don’t care.” Then the real work of advocacy begins.

Weave the person, the law, and the research together for best results. Start with the real-life impact on real people. Show the legal and practical likelihood and use Padilla to explain the legal relevance. Then turn to the research that relates to “law and order” goals. Many serious enmeshed penalties undermine major goals of the criminal justice system and destroy any notion of sentencing equity. Approach it like a problem with forensic science and use the significant research showing that access to stable housing and employment proves critical to reducing recidivism. Convince these decision makers that ignoring these penalties leads only to a self-defeating cycle of recidivism, and that the loss often falls most heavily on innocent family members.

81. Padilla, 130 S. Ct at 1486.
82. Smyth, supra note 44, at 50.
83. Id. at 47.
5. Demonstrate True Equity, Not Special Treatment

Assure prosecutors and judges that proper consideration of these penalties for individual clients does not create any special treatment for certain classes of defendants. Rather, it embraces the Supreme Court’s recognition that some people charged with the same crimes suffer far greater penalties in predictable, but often hidden, ways. Some prosecutors will also argue that legislatures have made separate policy decisions to impose these penalties that they should not disrupt. Remind them that they make charging and plea decisions every day that manipulate or even avoid mandatory minimums and strict sentencing regimes passed by these same legislatures. A fair and just process entails a proper and complete consideration of all penalties that cannot be divorced from a particular conviction. Since they enjoy nearly unfettered discretion, prosecutors must acknowledge that the decision to impose, mitigate, or avoid many of these penalties on people charged with crimes and their families lies in their power.

6. Fast Is Not Always Bad

Legitimate strategic legal decisions can lead to pleas at first appearances that measurably benefit clients, particularly in cases charging minor offenses. In many situations where employment or military service is at issue, a quick resolution of a criminal case to a disposition with known minimal consequences can serve client goals more appropriately than an adjournment. Quick resolutions of cases for some non-citizens can provide similar benefits and can at times be the only way to avoid immigration penalties. Make sure to recommend a first appearance plea only when able to provide full and adequate advice on and consideration of the client’s priorities and the full range of penalties and consequences—a realistic possibility with sufficient training proven by years of practice in many defender offices.

7. Use Discretion

Defense counsel, however, bears the burden for good reason. Sometimes the appropriate client-centered strategy involves avoiding a discussion of certain penalties with prosecutors and judges, when raising these issues would actually increase the risk of those enmeshed penalties. This risk will vary and shift by jurisdiction, judge, and prosecutor. Defense advocacy remains local and personal; give clear, specific, individualized advice to the client of these risks and make strategy decisions consistent with professional judgment and the client’s priorities.

C. Developing a Menu of Strategies

A client-centered commitment to defense advocacy recognizes that to be effective, defense counsel must attempt to address both the causes and the
consequences of criminal justice involvement. By identifying the full range of a client’s legal and social services needs, defenders can build better client relationships, identify concrete client goals, and improve criminal case results and client life outcomes. After analyzing the real-life penalties and consequences related to pending cases, advocates work with clients to make key strategy decisions in light of these goals and to provide seamless access to services.

Advocacy is local and personal. It depends on the law and practice of the courthouse, the community and jury pool, and the circumstances of the person charged with the crime and their family. It also depends on the goals, priorities, and preconceptions of the individual prosecutor and judge. In the context of your own local practice, you will develop a menu of proven strategies based on your knowledge of the law and your clients.

From lessons of daily practice in New York and training defenders across the country, the number of strategies for avoiding or mitigating enmeshed penalties continues to grow. They include obvious and traditional targets and counter-intuitive approaches. Begin leveraging these consequences in the bail application, recognizing that even short-term detention not only creates inordinate pressures to plead guilty but can have drastic immigration and employment outcomes84, and continue by manipulating short or long adjourn dates. Adequate research and investigation of enmeshed penalties sometimes requires longer adjourn dates or waivers of appearances,85 as does strategic use of voluntary social services programs (treatment, job training, educational, and more) or a record of successful employment that can avoid actual mandates and harsher sentences, bolster mitigation or establish diagnoses, and establish a record of rehabilitation.86 Note that any record of rehabilitation proves critical in ancillary civil and administrative proceedings for avoiding or mitigating many significant penalties, including housing, employment, and immigration. Conversely, long dates can hurt clients suspended without pay during the pendency of criminal charges.

Plea negotiation involves a range of strategic variables relevant to enmeshed penalties. Offense class is an obvious first target. Negotiating down (from felony to misdemeanor, or more serious criminal charge to petty offense, deferred prosecution, or dismissal) often holds the solution to avoiding or mitigating additional penalties, but sometimes a plea to a higher offense class paired with a creative sentence avoids more significant immigration and

85. This calculus changes radically if the client is detained on bail or bond during the pendency of the criminal case.
86. Smyth, supra note 44, at 55 (explaining importance of rehabilitation evidence and crafting “redemption” narratives in reentry advocacy).
housing penalties. Be aware of all sealing or expungement laws applicable in your jurisdiction and the various case dispositions that trigger them. Because these laws often protect clients from some enmeshed penalties, target dispositions that provide eligibility for sealing or expungement or accelerate the timeline. If the client does plead guilty, craft the plea allocation carefully to avoid specific admissions that would cause further damage outside the criminal case.

Use mitigation techniques that incorporate specific, serious, and likely enmeshed penalties and describe their life impact on clients and their families. Have social workers, sentencing advocates, and experts weave these discussions into their reports and recommendations. Use civil legal experts to consult on penalties and solutions, and if counsel is court-appointed, apply for reimbursement for expert costs as a required defense function under Padilla. Other tools and targets include shortened or creative sentences, deferred prosecution periods and shortened conditional sentences, or time-served sentences. Finally, advise and assist clients on potential relief from any enmeshed penalties, restoration of rights, sealing, expungement, or pardon mechanisms, if available.

IV. “HOLISTIC” IS NOT A BAD WORD

For well over a decade, a movement has been working to rewrite Terrence’s all-too-common story and change the fundamental nature of public defense. It works with clients not as cases, but as people, who often struggle with many issues other than the current criminal case and who suffer devastating and disproportionate penalties from their involvement with the criminal justice system. It recognizes that these sanctions—these so-called “collateral” consequences—degrade the institutions that implement them, exacerbate the causes of criminal justice involvement, and undermine the fabric of whole communities.

One could imagine a world in which this concept was as obvious as a sunrise. But in our fractured, Balkanized legal world of public defenders buried under heavy caseloads, civil legal aid lawyers bound by funding restrictions, and government agencies providing piecemeal, uncoordinated services for the poor, it is tragically revolutionary.

87. See id.
89. Smyth, supra note 44, at 42.
This growing movement in criminal defense has for years called for a more expansive and proactive vision of the defense function. Structuring comprehensive or holistic services around client needs, these models promote client-centered services without sacrificing aggressive trial practice. The Supreme Court in Padilla has now taken a step in the direction of this movement, giving us new constitutional leverage for promoting institutional change, increasing resources, and improving individual advocacy.

The Center for Holistic Defense provides the leading comprehensive conception of this movement, particularly useful in the context of Padilla because it has been implemented in a high-volume practice at The Bronx Defenders, a public defender in New York City. Holistic defense merges aggressive legal advocacy with a client-centered approach that works to address both the causes and consequences of involvement with the criminal justice system. This approach requires interdisciplinary advocacy and comprehensive services from a variety of people, including defense attorneys, civil advocates, sentencing advocates, and social workers.

Four core commitments define this model of holistic defense, which can be implemented using a mix of in-house staff and service partners. Holistic defense begins with seamless access to services that meet clients' legal and social support needs. Padilla's focus on the client as a person suffering real consequences leads naturally to a motivation to address the causes. Advocates identify the range of their clients' needs and analyze the real-life penalties and consequences related to pending cases. Advocates then work with clients to make key strategy decisions in light of these goals and to provide seamless access to services. These needs and services vary by client and community and require the most fundamental commitment to respect for and responsiveness to the client.

Second, to be responsive to clients' goals and needs, holistic defense requires a dynamic and interdisciplinary exchange of information, ideas, and


strategy. Defense attorneys must work effectively with advocates from different disciplines to develop and implement the most productive strategies to meet the clients’ priorities. The timing and content of court appearances, service placements, and ancillary civil proceedings form critical strategic building blocks or obstacles. Open, frequent, and meaningful communication within ad hoc teams of advocates, including the defense attorney, social worker or service provider, and civil legal specialist, results in more effective defense advocacy and better outcomes for clients.

Even in the most holistic organization, all the players with whom defenders need to collaborate and communicate will not be in the same physical office. Defenders must build these relationships and the ability to speak each other’s professional language, whether the social worker, civil attorney, or other partner sits in the next office or on the other side of the county. The client witnesses the character of this communication and dedication of her advocacy team, resulting in a better client relationship and more personalized and effective advocacy.

This broader conception of client needs and priorities opens up more creative advocacy solutions and highlights the importance of the third “pillar” of holistic advocacy—an interdisciplinary skill set. Advocates use the skills and knowledge of other disciplines to achieve better results in their cases and better life outcomes for clients. These skills in turn enhance traditional courtroom skills, leading to strong, creative, persistent, and persuasive advocacy.

These skills are critical for turning a mere referral into a strategic partnership. Attorneys work with other advocates to create a strong and dynamic advocacy theory that integrates client goals and other disciplines to achieve better outcomes. Holistic advocates also proactively identify cross-practice risks to prevent harmful outcomes. Staff must actively learn new advocacy skills from interdisciplinary resources and perspectives, integrating criminal defense, family defense, civil legal, investigative, and social service dimensions into representation.

Finally, holistic defense requires a robust understanding of, and connection to, the community served. An advocate who is better able to relate to her client because she has spent time in his neighborhood and with members of his community will be more likely to provide authentic and effective representation. Knowledge of community and family form a persuasive basis

94. Id.
95. Id.
for humanizing clients to impersonal systems, either in criminal court or to other decision makers imposing penalties.

On an organizational level, community engagement helps a holistic defender office earn the respect and trust of the community, which pays dividends in building trust with individual clients and in helping to build a community-based network of support services for clients and their families and in improved individual case investigations and mitigation advocacy. Community engagement forms the critical basis for the service partnerships that help drive the holistic model, and the resulting insight into community needs can inform decisions about resource allocation and future targets for capacity building.

CONCLUSION

We operate in a system where government, embodied in either the Commissioner of Social Services or the District Attorney, strives to strip people who live in poverty of their ability to make meaningful choices. The criminal justice system, by permitting the imposition of disproportionate penalties on people charged with crimes and their families, without notice, retroactively, and without the assistance of counsel, has been one of the worst culprits. The Supreme Court’s decision in Padilla stands as both a stark reminder of this systemic failure and an advocacy handbook, providing instructions and leverage for defenders to get consistently better results for their clients.

At the heart of holistic advocacy is a commitment to client-centered representation, defining a client not by her case but by the needs she identifies. To do this, holistic advocates listen to clients about when, where, and how they need support. If a penalty or consequence is likely and related to our client’s criminal charges, we should know about it, tell our client about it, and work to avoid or mitigate it. Turn this apparent challenge into an opportunity, and begin with the next client you see. Padilla has created a practical imperative for holistic defense, reminding us that knowing our clients makes us better advocates.