



OFFICE OF THE DISTRICT ATTORNEY  
CONTRA COSTA COUNTY

*Diana Becton*  
DISTRICT ATTORNEY

**TO: District Attorney's Office, All Staff**

**FROM: Diana Becton, District Attorney**

**DATE: May 8, 2019**

**SUBJECT: Immigration Policy**

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**A. Introduction**

It is the duty of a prosecutor to seek and administer justice fairly and equitably, to protect victims of crime, and to uphold the law. As such, prosecutors in the Contra Costa County District Attorney's Office shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor when seeking to arrive at a just resolution to a criminal case. Cal. Pen. C. 1016.3(b).

There is no specific formula or one-size-fits-all approach that can be applied to every case or to certain categories of crimes. Decisions are to be made on a case-by-case basis giving individualized attention and consideration to the facts and circumstances presented. "With an accurate understanding of immigration consequences, many noncitizen defendants are able to plead to a conviction and sentence that satisfy the prosecution and court, but that have no, or fewer, adverse immigration consequences than the original charge." Cal. Pen. C. 1016.2(d).

Attorneys are also permitted, to employ similar reasoning and discretion in non-immigration related cases, when appropriate, to avoid consequences related, but not limited to, housing, employment, education, and licensing. The remainder of this policy specifically addresses adverse immigration consequences.

**B. Governing Law**

The following laws and principles govern the office's implementation of this policy:

**1. Consideration of immigration consequences during the plea negotiation process is mandatory.**

Penal Code § 1016.2 (b): "In *Padilla v. Kentucky*, (2010) 559 U.S. 356, the United States Supreme Court sanctioned the consideration of immigration consequences by both parties in the plea negotiating process. The court stated that informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-barging process. By bringing

deportation consequences into the process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.”

Penal Code § 1016.2(c): “In *Padilla v. Kentucky*, the United States Supreme Court found that for noncitizens, deportation is an integral part of the penalty imposed for criminal convictions. Deportation may result from serious offenses or a single minor offense. It may be by far the most serious penalty flowing from the conviction.”

Penal Code § 1016.3(b): “The prosecution, in the interests of justice, and in furtherance of the findings and declarations of Section 1016.2, shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution.”

## **2. Victim’s rights must also be included and considered in the plea negotiation process.**

CA Const. Ar. 1, Sec. 28(b) [*Marsy’s Law*]: Among the relevant victims’ rights enumerated in the California Constitution are the following:

- 1) To reasonable notice of and to reasonably confer with the prosecuting agency, upon request, regarding, the arrest of the defendant if known by the prosecutor;
- 2) To be notified of and informed before any pretrial disposition of the case;
- 3) To be noticed and present at proceedings;
- 4) To be heard; and
- 5) To a prompt and final conclusion of the case and any related post-judgment proceedings.

## **3. Every plea must have a factual basis, which may be satisfied by various means.**

Penal Code § 1192.5: When taking a plea, the trial court is required to make an inquiry of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.

*People v. Holmes* (2004) 32 Cal.4th 432: Although section 1192.5 requires an “inquiry to be made of the defendant,” a stipulation by counsel to the plea’s factual basis is consistent with the legislative purpose of the statute. A “better approach in this circumstance is for counsel’s stipulation to include reference to a particular document that provides an adequate factual basis, ... [although] the trial court may satisfy its statutory duty by accepting a stipulation from counsel that the factual basis for the plea exists without also requiring counsel to recite facts or refer to a document in the record.” (*People v. Palmer* (2013) 58 Cal. 4<sup>th</sup> 110, 118.

Penal Code §§ 1016.3(c), 1016.5(d): At the time of the plea, no defendant shall be required to disclose his or her immigration status or legal status to the court.

#### **4. Adherence to this policy promotes post-conviction integrity.**

Penal Code section 1473.7(a): Post-Conviction, an individual who is no longer in criminal custody may file a motion to vacate a conviction or sentence for either of the following: “(1) The conviction or sentence is legally invalid due to a prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere (“no contest”), or (2) Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice.”

Penal Code section 1473.7(e)(1)b: “The court shall grant the motion to vacate the conviction or sentence if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a).”

#### **C. Implementation**

*Note: These internal guidelines are not intended to create any new procedural rights in favor of criminal defendants or to be enforceable in a court of law. Nor shall these guidelines be construed to create any presumptions that a previously sentenced defendant would have received any offer other than that which has already been extended and accepted.*

#### **Upon Being Notified of Adverse Immigration Consequences by the Defense**

1. Prosecutors shall consider adverse immigration consequences presented by the defense. Prosecutors do not have an obligation to independently research or investigate the adverse immigration consequences that may result from a plea or criminal conviction.
  - a. The defense attorney should provide, in writing, a clear representation of the defendant’s current citizenship status and the adverse consequences that will or could potentially result from a criminal conviction in the charged case and the basis for that conclusion. There is no requirement that the defense attorney provide copies of documents that reflect the defendant’s immigration statuses (i.e. Visa, Green Card, etc.).
  - b. Any information received from defense counsel will not be shared with federal immigration officials.
2. Upon receipt of the above information, a prosecutor in our office should do the following:
  - a. In writing, acknowledge receipt of the information and let the defense attorney know that we will consider the information when evaluating the case. If the plea negotiations and/or resolution of a case occur in real time in court, the prosecutor shall send a follow-up email to the defense attorney memorializing the plea negotiations and resolution of the case.
  - b. Put a copy of the complete correspondence in the hard copy file as well as the PbK notes section;
  - c. Alert his or her supervisor of the communication and discuss the case and the information with her/him.

### **Guidelines for Crafting a Plea**

To promote consistency and fairness, any plea agreement proposed pursuant to this policy shall be approved by a supervising prosecutor in consultation with the attorney assigned to handle the case.

1. Once a supervising prosecutor obtains the adverse immigration consequences information the supervising prosecutor shall review and consider the information carefully in consultation with the attorney assigned to handle the case.
  - a. The supervising prosecutor shall determine based upon the totality of the circumstances if an appropriate disposition can be reached that neither jeopardizes public safety nor leads to disproportionate immigration consequences based on the information provided by the defense.
  - b. In determining an appropriate plea offer or an appropriate sentencing recommendation after trial, every case must be evaluated on its merits so that justice is served. Among the factors that should be considered are the severity of the crime, the crime's impact on the victim and on the community, the history and character of the defendant, and the impact of the disposition upon the defendant's present and potential future immigration consequences. The supervising prosecutor should rely on the factors in aggravation and mitigation set forth in the CA Rules of Court for sentencing in felony cases (CRC 4.410, 4.421, 4.423).
  - c. If such a disposition can be reached, pursuant to this policy, an offer shall be conveyed to the defense attorney in writing.
  - d. If a disposition cannot be reached, pursuant to this policy, an explanation of the considerations made shall be conveyed to the defense attorney in writing.
2. Examples of alternative considerations include, but are not limited to:
  - a. Devising an alternative plea agreement that is factually honest and of a similar nature and consequence to the originally charged offense, but minimizes the defendant's exposure to adverse immigration consequences;
  - b. Allowing language to be stricken from a charging document or plea colloquy while maintaining the truthfulness of the remaining charging language;
  - c. Community service hours;
  - d. Successful completion of rehabilitative program or programs to address underlying issues behind the problematic conduct as an additional condition of probation not in lieu of jail time;
  - e. Stipulating to a motion to vacate in post-conviction proceedings, if it is determined that, had the consequences been raised affirmatively in the initial proceedings, a different resolution would have been reached pursuant to this policy.

### **At the Time of the Plea**

1. Any prosecutor appearing at the time of a plea shall check the hard copy file notes as well as the PbK notes to ensure that all known extrinsic consequences have been considered prior to the plea in order to protect the record from future claims of error and assure crime victims' rights to finality in criminal proceedings.

#### **D. Resource for Prosecutors**

1. Immigrant Legal Resource Center – Quick Reference Chart for Determining Key Immigration Consequences of Selected California Offenses:  
[https://www.ilrc.org/sites/default/files/resources/select\\_immig\\_defs\\_ca\\_crimes-20180904v2.pdf](https://www.ilrc.org/sites/default/files/resources/select_immig_defs_ca_crimes-20180904v2.pdf).