



## **Immigration Policy: Consideration of Immigration Consequences In Review & Charging cases, in Plea Negotiations and Post-Conviction Review**

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### **INTRODUCTION**

Within the Policies and Guidelines of this Office, Prosecutors have discretion and authority in determining whether to file charges or not, to negotiate fair and equitable dispositions where appropriate, and advocating for a just outcome that promotes public safety. Prosecutors have historically incorporated questions of equity and equality when considering the consequences of a particular plea. In 2011, an internal working group of Prosecutors was formed to examine, research, review and to recommend a Policy to integrate consideration of potential immigration consequences of criminal charges and/or a criminal conviction. Evolution of current federal policies has resulted in extensive, inflexible and significantly harsh collateral consequences when compared to the gravity of some charged offenses.

The United States Supreme Court noted in *Padilla v. Kentucky*, 559 U.S. 356 (2010), that immigration consequences resulting from criminal convictions can be substantial and warrant consideration by both the prosecution and the defense. The Court held that it was *inadequate assistance of counsel* for a defense attorney to neglect to advise a criminal defendant of the potential for deportation as the result of a guilty plea. The opinion clearly anticipates that this immigration consequence will be considered during plea negotiations, noting:

... [I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does. (559 U.S. at 373.)

As a Policy, the Alameda County District Attorney's Office concurs with the Supreme Court's opinion to recognize and indeed encourage the consideration of immigration consequences. The Court's ruling puts to rest earlier arguments that this would be somehow illegal or improper (e.g., a violation of separation of powers or equal protection principles). In fact, the ruling validates the longstanding practice of this Office in exercising prosecutorial discretion based on principles of equality while incorporating equity, such as considering unique circumstances and/or background of the accused, as well as the collateral consequences of the outcome.

In January 2017, the legislature added Penal Code Section 1473.7, expanding the jurisdiction of the court to hear motions to vacate a conviction or sentence. As related to immigration, section 1473.7(a)(1) states:

(a) A person who is no longer in criminal custody may file a motion to vacate a conviction or sentence for either of the following reasons:

(1) The conviction or sentence is legally invalid due to 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. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel. Section 1473.7(a)(1) thus allows prosecutors and courts to review post-conviction cases where immigration consequences are implicated, even if the individual is no longer in actual or constructive custody.

## **GUIDELINES**

As the law has evolved in this area, it has become apparent that it is appropriate and legally mandated to consider immigration consequences associated with a conviction when seeking to arrive at a just resolution of a criminal case. It is also appropriate to evaluate post-conviction cases where such consequences were not considered at the time of plea. To that end, these broad guidelines are offered as a guide to what is appropriate for individual prosecutors to consider when conducting plea negotiations and when reviewing cases post-conviction in order to comply with Office Policy.

- 1) These guidelines are not intended to create a new procedural right in favor of criminal defendants or be enforceable in a court of law.
- 2) If there are any questions regarding whether these guidelines are applicable to any specific situation or how they should be applied, the prosecutor handling the case should consult with his or her supervisor, the District Attorney or the Chief Assistant District Attorney.

### **Charging Determinations**

- 3) Generally speaking, law enforcement provides police reports to the prosecutor for review to determine whether charges should be filed or not. It is very rare that at the time of charging, the prosecutor knows the immigration status of the individual. However, if the

immigration status is known to the prosecutor, that status shall be taken into consideration when evaluating if charges will be filed. The prosecutor shall consider if there are alternatives to filing charges to which the individual can be referred. Prosecutors will weigh many factors in making charging decisions, including the nature of the crime, the impact on the victim, whether the crime involved a firearm, etc. This policy shall not preclude or interfere with prosecutor's consideration of all factors. This policy shall not preclude or interfere with the decision of the prosecutor for those cases that are serious, involve a victim, involve firearms or other crimes that impact the safety of the community or others.

### Plea Negotiations

- 3) When brought to this office's attention, it is appropriate and just to consider the potential immigration consequences of a criminal conviction during the plea negotiation process. This sort of analysis will necessarily be fact specific and require consideration of a variety of relevant factors. There is no specific formula that can be applied in every case. It is also our responsibility to ensure safety to the public, consideration of the impact of the crime and outcome on the victim(s) as well as the seriousness and/or violent nature of the crime.
- 4) If the immigration consequences are disproportionate to the crime and sentence under the law, it is generally considered appropriate and just to consider a negotiated offer and disposition. However, it is our responsibility to ensure safety to the public, consideration of the impact of the crime and outcome on the victim(s) as well as the seriousness and/or violent nature of the crime. The negotiated offer and disposition should be proportionate to the original offense, and bear fewer or no immigration consequences. The negotiated offer and disposition should also not create any collateral consequences or burdens unrelated and disproportionate to the original offense.
- 5) It is incumbent on the prosecutor to consider any viable and reliable information provided by the defendant's attorney or the defendant if he or she is self-represented, to assure that justice is achieved in the outcome of the case. Specific documentary evidence will be considered in evaluating the immigration consequences of charges and/or a criminal conviction.
  - a) Any information received from defense counsel or the defendant will not be shared with federal immigration officials.
- 6) These guidelines are not intended to limit the discretion of individual prosecutors. However, it is the policy of this Office to give appropriate consideration of immigration consequences.
- 8) The decision to factor in immigration consequences should be openly made and noted in the file.
  - a) A corollary of this is that when collateral consequences are considered and any modification of an offer is rejected, that fact should be made part of the record.

## Post-Conviction Review

- 9) In those limited cases where it is clear in the moving papers that there was “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 of nolo contendere,” it is appropriate to respond swiftly, conceding the motion.
- 10) In cases where prejudicial error may exist, but it is not clear on the moving papers, it is appropriate to individually review each case and make a decision whether to oppose the motion.
- 11) When reviewing a post-conviction motion to vacate a plea under Section 1473.7, it is appropriate to consider how a negotiation might have been conducted if the above guidelines were in place at the time of the plea negotiation.
- 12) A fully briefed motion under Section 1473.7 can be lengthy and time consuming. When just, it is appropriate to take action to streamline the process including, but not limited to, informal discussions with counsel about our position on a motion before it is written and prompt response conceding motions when warranted. A collaborative approach is encouraged when possible.
- 13) When considering whether to oppose a motion, it is appropriate to consider numerous factors including but not limited to, the charge for which he was convicted, the facts of the underlying crime, victim impact, defendant’s post-conviction conduct, the defendant’s family situation, the date of the conviction, outstanding fines, fees, or restitution, immigration status, previous petitions, and other just considerations. There is no specific formula that can be applied in each case.
- 14) If a conviction is vacated pursuant to Section 1473.7, the case is reinstated. The guidelines in this policy should be used in negotiating the disposition of the reinstated case.
- 15) In order to assure uniformity in approach, all motions brought under Section 1473.7 should be routed to the Conviction Integrity Division.

## **ANCILLARY ISSUES:**

### **ASSISTANCE TO VICTIMS WHO HAVE IMMIGRATION CONSIDERATIONS**

Federal Law provides for a pathway for remaining in the United States if that victim is here without documentation and is a victim of violent or serious crime(s), including domestic violence, sexual assault, human trafficking and the like. This Office, by and through the Alameda County Family Justice Center (ACFJC), assists victims of crime to complete the application to obtain a U-Visa or a T-Visa. Any case involving a victim without legal documentation to be in the United States who has become a victim of a violent or serious crime, should be referred to the ACFJC for review, referral to our contract Immigration Law Practice, or completion of the paperwork for

submission.