



OFFICE OF THE DISTRICT ATTORNEY MARIN COUNTY, CALIFORNIA

Prevention ★ Prosecution ★ Protection

Lori E. Frugoli
District Attorney

IMMIGRATION RELIEF POLICY—MAY 2020 EFFECTIVE JUNE 4, 2020

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, by law prosecutors in the Marin 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. California Penal Code section 1016.3(b).

Moreover, prosecutors shall treat defense motions for post-conviction relief (PCR) based on immigration consequences (e.g., Penal Code section 1473.7 motions) with a flexible and open mind, seeking a just resolution of the matter (with PC section 1016.3 principles in mind) and in collaboration with the Marin County DA Immigration specialist (currently Jerry Coleman) to avoid protracted litigation.

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 victim consideration of paramount importance. "With an accurate understanding of immigration consequences, many non-citizen 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." California Penal Code section 1016.2(d).

When appropriate, the prosecutor's consideration and focus should be on attempting to minimize the harsh immigration penalty faced solely by non-citizen defendants, rather than asking if a similar offer would be made to similarly-situated citizen defendants.

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.

This policy is promulgated with transparency and is intended to proactively document our prosecutorial immigration relief efforts. To that end, **all immigration considerations and dispositions must be disclosed to the Immigration Committee, documented in Darwin and reported to the Special Deputy District Attorney for Immigration Matters for data purposes. Failure to comply with these procedures jeopardizes our Immigration Relief program and tarnishes our transparency efforts. It also hinders our opportunity to provide accurate information and data regarding our Immigration Relief Program.**

Governing Law

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

1. Victims' rights must always be prioritized in the plea negotiations process

CA Constitution, Art.1, sec. 28(b) [Marsy's Law] requires, inter alia, these victim rights:

- 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;
- To be notified of and informed before any pretrial disposition of the case;
- To be noticed and present at proceedings;
- To be heard;
- To seek and secure restitution from the persons convicted of the crimes causing the losses they suffer; and
- To a prompt and final conclusion of the case and any related post-judgment proceedings.

In that regard, it is the policy of the Marin County District Attorney's Office that before every Penal Code section 1016.3 immigration relief disposition (whether a current case or post-conviction) which involves a private individual or business victim or victims, the assigned prosecutor should attempt to contact the victim(s) to advise them of the proposed disposition. All discussions and communications with victims and their response to the proposed disposition must be documented in Darwin and disclosed and discussed with the immigration committee.

2. Consideration of immigration consequences during the plea negotiation process (both in pending cases and in considering immigration-safe re-pleas after post-conviction motions) is legally required

Penal Code section 1016.2(b): "In *Padilla v. Kentucky*, (2010) 559 U.S. 356, the United States Supreme Court **encouraged** 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-bargaining 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 section 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 section 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 immigrating consequences in the plea negotiation processes as one factor in an effort to reach a just resolution."

3. Countervailing considerations

Penal Code sections 1192.5 and 1192.7 permit, but limit sentence bargaining in serious and violent felony crimes. Those high priority crimes include **but are not limited to** the following:

- Serious and violent felonies (PC 1192.7 and 667.5(c));
- Cases where strikes (PC 1170.12) are alleged;
- Violent sex crimes (PC 667.61);
- Firearm or deadly weapon allegations that enhance sentence exposure or remove discretion to grant probation;
- Great bodily injury allegations;
- Domestic violence, sexual abuse of a child/adult (e.g., PC 290 crimes/most SVU cases);
- Further, any case involving alcohol/drugs when combined with violence is considered a high-priority crime case.

We have a duty to follow both the sentencing laws noted in the list above, as well as an equal duty to consider immigration consequences in all case dispositions where we are aware of immigration consequences. The above list of high priority crimes requires approval of a Chief or the District Attorney when Penal Code section 1016.3 immigration relief dispositions are contemplated. [See, infra, this policy, section C.1, "pending cases".]

4. Every felony plea must have a factual basis, which may be satisfied by various means

Penal Code section 1192.5: When taking a felony 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. Note, however, that there is no need for a factual basis inquiry by the court on a misdemeanor disposition. See, *People v. Ballard* (1978) 84 Cal. App. 3d 885, 894. 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. See, *People v. Holmes* (2004) 32 Cal. 4th 432. The trial court's acceptance of a stipulation from counsel that the factual basis for the plea may be satisfied "without also requiring counsel to recite facts or refer to a document in the record." See, *People v. Palmer* (2013) 58 Cal.4th 110, 118. Because inclusion in the record of a specific document, such as a police report or preliminary hearing transcript, may provide post-state-conviction federal immigration authorities a basis to deny discretionary relief, it is the policy of the Marin

District Attorney's Office that in any Penal Code section 1016.3 felony disposition, the prosecutor stipulate simply to a factual basis "upon investigation of counsel".

Other options that may be followed by a Deputy District Attorney that satisfy Penal Code 1192.5 are:

- Stipulations by both parties to a factual basis without the recitation of facts or referral to documents.
- The court may inquire of defendant that he/she has discussed the elements of the crime and any defenses with his/her counsel and is satisfied with counsel's advice.

Any questions or concerns regarding this issue or how to phrase a factual basis should be discussed with the Immigration committee or the Marin County DA Immigration specialist (currently Jerry Coleman) before the plea is entered.

Further, Penal Code sections 1016.3(c), 1016.5(d) state: no defendant shall be required to disclose his or her immigration or legal status to the court.

5. Adherence to this policy promotes post-conviction integrity

Penal Code section 1473.7(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:

Legally invalid sentence.

The conviction or sentence is legally invalid due to prejudicial error damaging the party's ability to:

- meaningfully understand;
- defend against; or
- knowingly accept the actual or potential adverse immigration consequences of their plea;
- prejudicial error may include a finding of ineffective assistance of counsel

Newly discovered evidence.

Newly discovered evidence of actual innocence exists that requires a conviction or sentence be vacated as a matter of law or in the interests of justice."

Penal Code section 1473.7(e): 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). For a motion made pursuant to paragraph (1) of subdivision (a), the moving party shall also establish that the conviction or

sentence being challenged is currently causing or has the potential to cause removal or the denial of an application for an immigration benefit, lawful status, or naturalization."

Based upon this newly added language, a PC 1473.7 motion does not require a formal removal order, as a pre-condition of relief.

B. Implementation

1. Pending Cases

- a. 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; however, if a prosecutor is aware of information from any source that leads him/her to believe a pending case may have adverse immigration consequences (even absent a request from the defense), the prosecutor may consult the Marin District Attorney's Special Deputy DA for Immigration Relief, or may inquire of the defense if it has considered any potential immigration consequences pursuant to the defense duty noted in Penal Code section 1016.3(a).

Upon first notice that a case may have potential adverse immigration consequences, the assigned prosecutor (or the charging deputy/expediter, if known to him/her) shall check the "immigration consideration review" box in new (orange) Darwin, located in the Stat Info tab, under "miscellaneous".

- b. Prosecutors shall notify the defense that no consideration or decision regarding immigration consequences will be considered by the People, until we are provided in writing with the SCORE factors [formally the "five questions"] information noted below:
 - i. Receipt of the SCORE factors (noted below)
 - ii. In the case of a defendant represented by the Public Defender, written confirmation is received confirming the attorney seeking an immigration safe disposition has consulted with Rachael Keast or any designated Public Defender Immigration Specialist.
 - iii. No immigration dispositions will be offered by the People, in court or otherwise without documentation of the above factors and compliance with the policies and procedures set forth below. The only exception to the rules herein regarding consultation with the immigration relief committee concerns DUI's that would fall squarely within the wet reckless policy that would allow a wet reckless disposition irrespective of immigration consequences; but even in that

instance, DDA's must check the immigration consideration review box in Darwin, and must give notice of the disposition to the special Deputy DA for immigration matters, for statistical record-keeping purposes.

c. SCORE FACTORS:

- Status: The defendant's current citizenship status (e.g., Legal Permanent Resident (LPR-green card holder), asylee, refugee, Temporary Protected Status, undocumented or Entered Without Inspection).
- Consequences: The actual adverse consequences that will or could potentially result from a criminal conviction in the charged case/plea to the offered disposition, as well as the basis for that conclusion (more than mere citation to the federal Immigration Naturalization Act). (For example, removal, denial of LPR status by family member petition, denial of naturalization, denial of cancellation of removal consideration; charged crime is a Crime Involving Moral Turpitude, aggravated felony, etc.) Although it may be helpful, there is no requirement that the defense attorney provide copies of documents that reflect the defendant's immigration status or pending decisions from federal immigration authorities. Any information received from defense counsel will not be shared with federal immigration officials.
 - Additionally, for transparency purposes, no one from this office should contact or speak to ICE (Immigration and Customs Enforcement) without first notifying the District Attorney and any such contact must be documented in Darwin (notes).
- Offer: What is the defense immigration-safe (or less adverse) offer/proposal for settlement, both in terms of plea(s) and proposed sentence terms.
- Reward: Why that offer/proposal meets or exceeds prosecution goals/protects public safety compared to the prosecution's offered disposition. The defense should discuss the offer in the context of defendant's entire criminal history.
- Equity: Equitable factors as to defendant's background and community connection, including:
 - The country of origin (for Office statistical purposes only);
 - When the defendant first arrived in the United States and under what status originally, even if now different;
 - Family members currently residing in the United States, who are citizens or LPR status, including spouses, children, elderly parents, siblings,

- grandchildren (and if any such family rely on defendant for financial support or assisting with medical care);
 - Defendant's work history (including, if aware, years of taxes paid) or status as a student;
 - Defendant's community service or religious organization activities;
 - Any letters of recommendation concerning defendant's character, from family, employer, or community members;
 - Any current or recent past treatment or vocational program certificates awarded to defendant;
 - Whether defendant has suffered prior convictions, is currently on probation and (if known) whether the defendant follows probation conditions.
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- d. Upon receipt of the above SCORE information from the defense, the prosecutor shall take the following steps:
- i. In writing, acknowledge receipt of the information and advise the defense attorney that we will consider the information provided when evaluating the case. If the issue arose in court, the prosecutor shall send a follow-up email to the defense attorney memorializing the SCORE information/request and advising them that no disposition or plea negotiations will occur without compliance with the criteria set forth above and throughout this policy.
 - ii. Any correspondence or conversations regarding this disposition shall be included in Darwin attorney notes. If hard copies of this correspondence exist, please scan and place those into the physical file.
 - iii. All Marin District Attorney hard copy files and electronic information stored on emails or the new Darwin system or by other means regarding immigration dispositions are confidential (subject only to state criminal discovery laws and federal Brady obligations), and may not be shared with federal immigration officials at any time. (Note: U-Visa policies are covered in a separate policy document.)
 - iv. Receive and review the SCORE and any other relevant information.
 - v. Comply with all factors noted in the IMMIGRATION CHECKLIST (attached).
 - vi. **Specifically, your recommendation to the Committee must include the case facts, defendant's criminal history, prior immigration requests (if any), the original offer, your recommendation (if any) for or against modification of the offer, your**

reasoning behind the recommendation, and any due date for review (i.e., next court date).

vii. Considerations and factors relevant to jury trial preparation should be considered in evaluating a case for immigration relief.

viii. The case should be presented/sent to the Immigration Relief Committee [See Topic C.1.d. *infra*] as soon as practicable before the next court date.

e. The Immigration Relief Committee procedures:

i. The committee consists of (1) the Special DDA for Immigration Relief (2) a Chief DDA preferably the Chief who is supervising that caseload, (3) the Coordinator of the department where the case is assigned, (4) the charging DDA/case expediter, and (5) the DDA assigned any given case being considered for Penal Code section 1016.3 relief.

ii. The committee should meet physically in the office, or, if not practicable, remotely or by email. If the latter, they shall share all relevant emails from defense, from prosecutors connected to the case, and from Darwin attorney notes. These email chains shall not be communicated outside of the Marin County District Attorney's office.

The committee shall meet as expeditiously as possible to avoid unnecessarily delaying the case beyond its next COP/set date; however if any delay is due to the defense failure to provide the required SCORE material, the DDA assigned the case will advise the court of the source of the delay and when the defense was advised of our compliance requirements.

Not all members of the committee must meet on each case, given vacations/time constraints; however, a Chief and the Special DDA for Immigration Relief must always be included in committee deliberations.

iii. The committee shall decide each case under the Guidelines noted in section c (SCORE factors) *infra*. If the committee is unanimous in its recommendation to grant or deny the requested PC 1016.3 relief, it shall communicate its decision promptly to the DDA assigned to the case, who shall promptly communicate that decision to the defense attorney in writing. If the committee is not unanimous in its grant/deny decision, the Special DDA for immigration relief may bring the matter to the District Attorney for a final review and decision, which will be communicated to the assigned DDA who shall promptly communicate that decision to the defense attorney in writing*.

*In the event the District Attorney is unavailable, the ultimate decision will be made by the Chief Deputy District Attorneys and The Special DDA for Immigration Relief.

f. Immigration Relief Committee Guidelines

- i. The committee shall make its determination based upon the totality of the circumstances in each individual case. No numerical score will be utilized for evaluation purposes. A disposition should not jeopardize community safety but also should not lead to disproportionate immigration consequences. These two factors may not balance evenly. When in doubt, community safety prevails. In considering and reaching an appropriate plea offer or an appropriate sentencing recommendation, every case must be evaluated on its merits so that justice is served. Some (but not all) factors that should be considered are:
 - the severity of the crime;
 - the defendant's prior criminal history;
 - the crime's impact on the victim and the community;
 - the history and character of the defendant (including any recent and/or prior case immigration relief given);
 - the impact of the disposition upon the defendant's present and potential future immigration consequences.
- ii. During the analysis, the committee shall not compare the requested immigration relief result to cases involving citizens; but the committee may take into consideration additional sentencing terms (incarceration, rehabilitation programs, community based service/education, pre-plea risk assessment, front-loaded restitution, etc.) that would not normally be imposed on citizens who are not asking for a changed plea because they are not facing the serious adverse immigration consequences faced by non-citizens. Examples of alternative considerations by the committee include, but are not limited to, the following:
 - (a) Devising an alternative plea agreement that is of similar nature and consequence to the originally charged offense, but which minimizes the defendant's exposure to adverse immigration consequences (e.g. amending a Penal Code section 273.5 misdemeanor [domestic violence] to Penal Code section 243(e) misdemeanor [battery of a spouse/cohabitant], so long as the same 52 week string of counseling programs is imposed); **NOTE: the use of this example is not intended to convey a policy that any or all 273.5 misdemeanors may always be modified to 243(e) charges. In matters of crimes of violence and DUI's, or the combination of violence and alcohol/drug abuse, special care must be taken to evaluate the public safety impacts.**
 - (b) allowing language to be stricken from a charging document.

- (c) a plea colloquy which maintains the essential truthfulness of the remaining charging language (e.g., replacing "sale of methamphetamine" with "offer to distribute a controlled substance classified in schedule III, IV, or V"). **The Marin County Major Crimes Task Force DDA should be advised and consulted before any such language change dispositions occur to ensure we are fully aware of the defendant's drug involvement.**
- (d) Restitution can be addressed by referring to dismissed count(s). The assigned DDA should avoid the term "Harvey waiver" in any case offer concerning a case involving immigration relief. Instead state that "charged but unadmitted conduct is being included in the offer and sentencing terms, such as restitution, other conditions, etc., as appropriate." **Such language determinations should be discussed and reviewed by the committee or the current Marin County DA Immigration specialist (currently Jerry Coleman).**
- iii. **Every prior discussion, verbal or otherwise, implications or indications that immigration relief has been considered or will be offered must be disclosed to the immigration committee and documented in new Darwin.**
- iv. It is the sole responsibility of the assigned DDA to note the committee's (or District Attorney's decision) in new Darwin under "attorney notes", and to communicate the committee's decision in writing to the defense.
If the decision is in favor of relief, the new offer and specific terms added by the committee (or District Attorney) shall be communicated in writing to the **defense** and noted in new Darwin (under "offer").
- If the decision is to deny relief, an explanation of the considerations made shall be conveyed to the defense attorney in writing.
- It is the sole responsibility of the assigned DDA to comply with all Marsy's Law provisions including:
- communication of the committee's position;
 - future court dates;
 - determination of restitution owed to the victim, etc.
- v. **Data:** The Special DDA for Immigration Relief shall keep written statistics of all committee decisions. This will provide continuity, transparency, and

accountability in addition to the ability to provide statistical information as needed to the District Attorney and the Board of Supervisors or the Marin County CAO.

2. Post-Conviction Relief -- Penal Code sections 1018 and 1473.7

i. Post-conviction relief within 6 months of a disposition (Penal Code section 1018)

When a DDA becomes aware within 6 months of any disposition that immigration consequences should have been considered, but weren't, defense counsel should be advised to present a Penal Code section 1018 motion to withdraw the previous plea and to contact the DA Immigration specialist. Upon receipt of the motion, the DA Immigration specialist shall request the SCORE information, follow the post-conviction relief procedures noted, and then present the case to the Immigration Relief Committee. If the Committee's decision is not unanimous, the District Attorney will make the final decision*.

ii. Post-conviction relief after 6 months, when defendant is still on probation:

If counsel is seeing immigration relief to change a plea and the defendant is still on probation, the assigned DDA shall:

Advise counsel to contact the Special DDA for Immigration Relief and:

- (1) Provide the SCORE information noted supra, as well as
- (2) Follow the post-conviction relief procedures set forth in this policy.

If the PC1018 motion is filed concurrently with another motion such as a motion to terminate probation, or a Penal Code section 1473.7; the Special DDA for Immigration Relief shall convene the Immigration Relief Committee for its input on the motion. If the Committee is not unanimous, the District Attorney will make the final decision. *

*In the event the District Attorney is unavailable, the ultimate decision will be made by the Chief Deputy District Attorneys and The Special DDA for Immigration Relief.

3. Relief when an individual (post-conviction) is no longer in custody or on probation (Penal Code section 1473.7):

All post-conviction motions brought properly under Penal Code section 1473.7 shall fall within the exclusive province of the Special DDA for Immigration Relief, subject to review in every case by the District Attorney.

- Defense counsel seeking to file a PC 1473.7 motion shall be advised by the Special DDA for Immigration Relief to send a DRAFT motion by email with the Special DDA for Immigration Relief, prior to filing any formal motion in court. The motion must include all SCORE information noted supra and the legal grounds for meeting the PC 1473.7 standard.
 - A declaration (including email(s)) from former counsel is not required but is encouraged and may be referred to in the current counsel's declaration.
 - A declaration from the defendant is required.
 - A declaration from immigration counsel is not required but may be helpful in the unusual/obscure/changing areas of "crim-imm" law.

If the basis for relief concerns IAC by former counsel, defense counsel shall be encouraged by the Special DDA for Immigration Relief to include the circumstantial evidence relied on by counsel to demonstrate prejudicial error on the part of defendant; see, e.g., *People v. Mejia* (2019) 36 Cal. App. 5th 859; *People v. Camacho* (2019) 32 Cal. App. 5th 998.

- The Special DDA for Immigration Relief shall prepare a case worksheet on each PC 1473.7 motion (even if in the draft stage) for presentation to and discussion with the District Attorney to consider whether to accept/reject/modify the defense request for immigration relief. The Special DDA will attempt to contact and seek the opinion of the formerly assigned case DDA (if still a member of the District Attorney's office).

In all cases The Special DDA for Immigration Relief shall seek to achieve accommodation with the defense, rather than aggressive oppositional litigation against the defense. The options are: (1) an immigration-safe re-plea (after any non-opposition), or (2) dismissal of all the remaining counts without a new plea, or (3) no immigration relief.

Considerations favoring no new plea include: (1) the minor nature of the original charge or changes in the law since the conviction. i.e. H&S 11350(a) possession of narcotic, once deemed a felony, is now a diversion-eligible misdemeanor, (2) Years of a crime-free life, and (3) exceptional equities favoring the defendant. The Special DDA for Immigration Relief shall present

his/her analysis and opinion to the District Attorney for a final decision whether to oppose or not to oppose a PC 1473.7 motion.

The Special DDA for Immigration Relief will communicate the District Attorney's position on the case, including any modifications to the defense counsel seeking PC 1473.7 relief.

C. Evolving Court Procedure

Since the adoption of this policy Court resolutions of section 1473.7 motions are evolving. In order to allow the courts to efficiently handle the matters for the benefit of all parties, the Special DDA for Immigration Relief shall:

- attempt to seek stipulated non-oppositions and court vacatur orders,
- file non-opposition motion(s) and be prepared to file amended complaints with previously agreed to immigration-safe charges.
- If a court wants to impose new probations and conditions (to the immigration safe charge), the Special DDA for Immigration Relief should inform the counsel of that possibility.

The Special DDA for Immigration Relief shall be responsible for all Marsy's Law obligations involving cases with private individual victims and may seek the assistance of the investigations division to locate victims.

- Data: The Special DDA for Immigration Relief shall keep and compile written statistics of all immigration relief requests and results (both current and PCR cases). Such data may be requested by the District Attorney at any time.