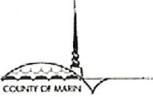


*Handouts
talk to ASB
(this is PP copies
were available)*

**Galvanizing Gatekeepers:
Prosecution & Defense Roles
in the Current Immigration Landscape**

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Goals of Immigration Training

- Understand the immigration consequences that flow from criminal convictions, and the important role the prosecutor plays as the gatekeeper to the federal immigration system.
- Discuss the evolving constitutional and state legal protections that have opened up opportunities for prosecutors to improve public safety and deepen trust in immigrant communities.
- Discuss evolving Marin County protocols and practices

Agenda

- DA's Role, Immigration Stats, Fortifying Trust
- Legal Duties of Prosecutors & Defense Counsel
- Immigration Consequences of Criminal Convictions
- Charges & Immigration-Neutral Alternatives
- Post-Conviction Relief
- Resources

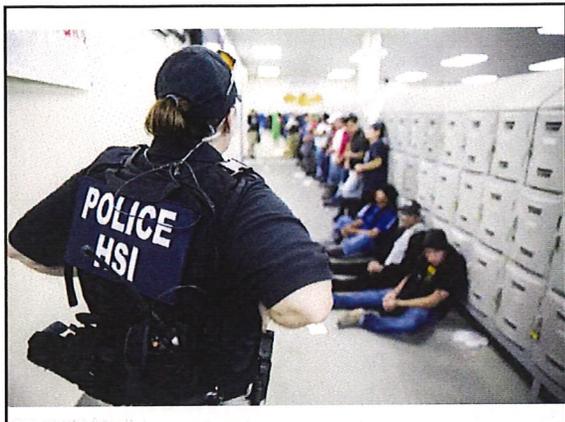
California's Immigrants

- **One out of four persons** living in California was born in another country
- **One out of two children** living in California lives in a household headed by at least one foreign-born person



Criminal Justice System → Immigration System

- 95% of interior (not at the border) deportations, ICE got the person through contact with the criminal justice system
- Criminal justice system and immigration penalties are sufficiently entwined to trigger Sixth Amendment protection. - *Padilla v. Kentucky* (2010) 559 U.S. 356. See also Cal Pen C §§ 1016.2, 1016.3



Concerns Are Not Hypothetical

- 71% of law enforcement officers—police and prosecutors—said lack of trust has had an adverse impact on law enforcement.
- 70% of undocumented immigrants **less likely to contact law enforcement if they were victims** of a crime for fear that the police will ask about immigration status.
- 82% of prosecutors reported that, Jan 2017, **DV is now underreported and harder to investigate/prosecute.**
 - 78% of immigrant sexual assault and DV survivors expressed **concerns about contacting police**
 - According to the Houston Police, **rape reporting** by members of the Latino community **decreased 40%** from the first quarter of 2016, despite an overall *increase* in city-wide rape reports.
 - Los Angeles – **decrease in reporting in sexual assault and domestic violence by Latinos**—but not other ethnic groups—in the 2017.

Ensuring Public Safety & Administration of Justice

“Our courts are the main point of contact for millions of the most vulnerable Californians in times of anxiety, stress, and crises in their lives. Crime victims, victims of sexual abuse and domestic violence, witnesses to crimes who are aiding law enforcement, limited-English speakers, unrepresented litigants, and children and families all come to our courts seeking justice and due process of law. As finders of fact, trial courts **strive to mitigate fear to ensure fairness and protect legal rights. Our work is critical for ensuring public safety and the efficient administration of justice.**

- Chief Justice Cantil-Sakauye, March 2017

Growing number of law enforcement leaders, including Police Chiefs, Sheriffs, State’s Attorneys, and District Attorneys – adding their voices to Amicus Briefs.

Federal Immigration Law

Top 7 Misconceptions About "Crim-Imm"

1. The immigration system is irrelevant to the criminal system
2. Everyone gets their day in court
3. Greencard holders and refugees, or people with U.S. citizen children, can't be deported
4. People are automatically deported if they have a criminal record
5. Taking into account immigration consequences means forgoing criminal punishment
6. Taking into account immigration consequences violates equal protection
7. Taking into account immigration consequences requires factual inaccuracy

Types of Immigration Status



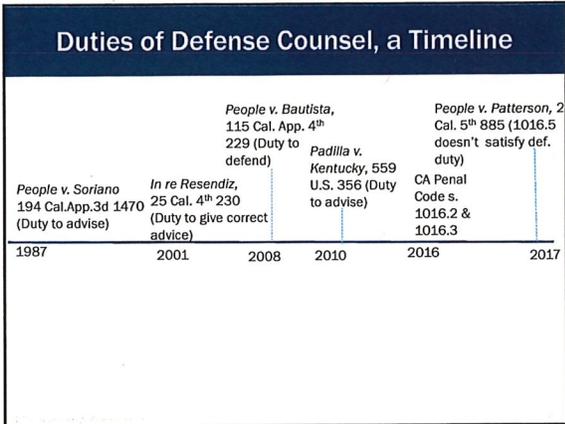
Grounds of Inadmissibility and Deportability

Inadmissibility (8 USC 1182)	Deportability (8 USC 1227)
One crime involving moral turpitude (but see Petty Offense Exception)	Crimes Involving moral turpitude (two or more, or 1 within 5 year admission if potential 1 yr sent)
Controlled Substance Offense (including current drug abuser, admission of drug offenses, DHS has reason to believe trafficked in drugs)	Controlled Substance Offense (except a single offense of simple possession of 30g or less of MJ, includes drug abuse since conviction)
Engaged in prostitution Conviction of two or more offenses + aggregate sentence of 5 years or more	
Current alcoholic	Firearms offenses Domestic violence offenses (including viol. of prot. Order) Aggravated felonies Inadmissible at last entry.

Federal Definition of Sentence

State Sentencing Disposition	Immigration Effect
Suspended Imposition of Sentence	No sentence, except for jail ordered as a condition of probation
Suspended Execution of Sentence	The whole suspended sentence counts
Probation	Not a sentence.
Probation violation	Additional custody time ordered for PV is added to original time on the count, to make the total sentence
Dismissal and set aside/PC 1000.3	Doesn't eliminate conviction or sentence for <i>post-plea</i> diversion (in most cases)

Legal Duties of Defense Counsel, Courts, and Prosecutors to Noncitizen Defendants



Court Duties

- **PC 1016.5(a):** Prior to acceptance of a plea of guilty or nolo contendere the court shall warn D that offense may **"have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."**
- Distinct from Def. Counsel's duty!
- Thus 1016.5 advisement doesn't by self save conviction
- BUT, no 1016.5 on tx/plea form IS fatal to conviction

Prosecutor Duty, Federal

- SCOTUS recognizes that deportation is a severe "penalty" that cannot be divorced from the criminal process.
- Deportation not "collateral"
- *Padilla*, also noted 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 this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties"**



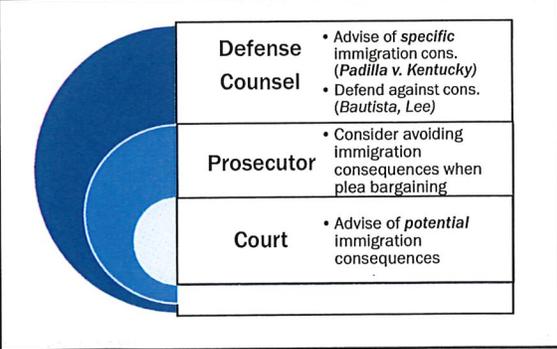
Prosecutor Duty, State Law

PC 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.

Prosecutor Duties: Equal Protection

- Not a special lesser benefit, imm defendants can plead up/plead to conviction with same sentence exposure and priorability.
- Because immigration consequences are not collateral, imm con are "intrinsically intertwined" with CJ punishment, consideration of imm con is central to consideration of punishment as a whole
- Findings of court and legislature indicate that DAs consideration of immigration consequences is a legal requirement.
- Impacts all ethnicities

The Legal Rights of Immigrant Defendants



**Charges and Immigration Neutral
Alternatives**

Common Drug Offenses and Alternatives

Offenses	Consequence	Alternatives
HS 11378, HS 11360, HS 11358	AF, Mand. Dept., D/I CS offense, CIMT	PC 32, PC 459, HS 11379 (sometimes);
HS 11377	D/I CS offense	PC 32, DEJ, 647(f), 602.5 (trespass); unspecified CS (sometimes)
HS 11550	D/I CS offense	PC 32, DEJ, 647(f)
DEJ Dispo	Pre-plea should be no conviction	Should be imm. neutral

Common Theft Offenses and Alternatives

Offenses	Consequence	Alternatives
PC 484, 487, 490.1	Could be ground of I, D, Bar to Relief	459.5, 459, 496, 10851
PC 496, VC 10851	Immigration neutral unless sentence of a year or more	To avoid a sentence of a year or more, waive credits for time served, or stack sentences consecutively
PC 211	AF w/ sentence over a year, I, D, Bar to Relief	PC 459, 136.1(b)(1), 496, 10851

Common DV Offenses and Alternatives

Misd/Felony Deportable	Misd/Felonies w/ sentence under 1 year not deportable
PC 273.5	PC 243(e)
PC 245(a)	PC 243.4
PC 422	PC 236/237
PC 273.6	PC 591, 594, 602, etc.
PC 166(a)(4); 166(b); 166(c)	PC 166(a)(1)-(3)
	<i>Not a COV, but avoid 1 yr</i>
	PC 136.1(b)(1)
	PC 32

Post-Conviction Relief

Post-Conviction Relief



Can be an effective way, once conviction has already been entered, to erase or mitigate immigration consequences and resolve underlying errors

Vehicles

V
C

• Motions to vacate: Habeas, 1018, 1016.5, 1473.7, Prop 64, 1203.43

V
R

• Includes PC 17(b), Prop 47, felony to misdemeanor reductions, PC 18.5

R
R

• PC 1203.4, 1203.41

Rule for Erasing Convictions

General rule: Convictions vacated for the sole stated purpose of avoiding immigration consequences, or for rehabilitative reasons, will not solve the immigration problem!

Must vacate on a ground of legal invalidity.

Matter of Pickering, 23 I&N 621 (BIA 2003)

This is why 1203.4s don't (usually) eliminate consequences!

However: Immigration-related defects, like ineffective assistance of counsel for failure to advise of immigration consequences, or if the plea was not knowing and voluntary, can invalidate plea for immigration.

New CA Post-Conviction Vehicles that Might Mitigate/Eliminate Imm. Con

- PC 1473.7 – Can be used to vacate sentence as well as conviction, Not necessarily IAC
- PC 1203.43 – DEJ vacatur
- PC 18.5(b) – Takes sentence down 1-day
- Prop 64
- SB 1437 – If underlying conviction is imm. neutral, like 459
- PC 236.14 (for trafficking) – If vacatur is based on a ground of legal invalidity
- AB 2942 – If new sentence is imm neutral

Marin: New 1473.7 Practices

- **DA:** PCR counsel sends thorough draft (w/ exhibits) to Jerry with proposed alternatives
- **PCR Counsel:** Reach out to DA with draft before filing
- **Both:**
 - Settle on if can reach a negotiated outcome, and what alternative plea
 - Then file, non-opp, & court hearing

Resources

Office-Specific Policies



- Office Imm Policy (Alameda, Santa Clara, Ventura, LA, CoCo)
- Streamlined PCR (Santa Clara, Alameda, SF, San Joaquin, CoCo, LA City Atty, Marin)
- Notario/Immigrant Fraud Outreach (Numerous)
- Community materials (e.g., website) in other Languages (Yolo)
- U-visa outreach

Recommendations for Prosecutors

- Enhance understanding of federal immigration consequences.
- Designate immigration point-person.
- Create office-wide/courthouse policy to offer immigration-safe alternatives.
- Create pre-arrest and pre-plea diversion programs.
- Support and streamline Post-Conviction Relief practices.
- Establish policy for Fraud/"Notarios", U-Visa, wage-theft.
- Speak up for immigrants rights to establish office as a safe space

Recommendations for Defense Counsel

PD's office

- Upon first meeting client, email/text/call Rachael to see if she can meet with client right away
- **In-custody:** this is even more crucial b/c of GO-05-28
- Yellow form, task requests, etc.
- Involve Rachael on any immigration-related question
- Screen and refer priors for post-conviction relief
- Refer to immigration attorney for immigration case

Others

- Involve crim/imm expert from the very beginning
- Familiarize yourself with GO-05-28/SB 54/I-247s, TRUTH Act, etc.
- Have you looked into EVERY ALTERNATIVE????
- Referrals to immigration counsel

Resources

- CEB, Criminal Law and Procedure – Chapt. Immigration
- Prosecutor's Role in Immigration Landscape:
https://www.ilrc.org/sites/default/files/resources/prosec_role_immig_landscape-rc-20180215.pdf
- "Federal Immigration Efforts Create a Between Police and Community. And Everyone Will Lose." USA Today, April 12, 2018:
<https://www.usatoday.com/story/opinion/policing/2018/04/12/daca-immigration-cops-trump/494357002/>
- FJP Issues at a Glance- Addressing Immigration Issues:
<https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Immigration.9.25.pdf>
- ILRC chart:
