



Immigration Consequences, Charging Decisions, Dispositions and Sentencing in Light of *Padilla v. Kentucky*

In order to arrive at the appropriate charge, disposition, and sentence for a criminal defendant, prosecutors routinely review and consider all relevant factors relating to the crime itself as well as all relevant factors relating to the defendant. In some cases, the factors relating to the defendant include adverse consequences that the defendant will suffer as a result of the conviction in addition to direct consequences of the conviction. Immigration consequences can, in some cases, have a greater adverse impact on a defendant than the conviction alone.¹

Because immigration consequences have a serious and long-lasting adverse impact on a non-citizen defendant, the resulting penalty is disproportionate to the penalty other defendants receive for the same crime. In view of this, prosecutors shall attempt, wherever possible and appropriate, to agree to immigration neutral pleas and sentences which do not have adverse immigration consequences.

The Supreme Court in *Padilla v. Kentucky* recognized that immigration consequences are so intimately tied to the criminal process, that it is “uniquely difficult to classify as either a direct or a collateral consequence.”² For that reason, the Court characterized deportation as a “severe ‘penalty’” that must be taken into account in a criminal case.³ Further, the California Rules of Court lists collateral consequences as a factor that the court considers in a criminal case, specifically when imposing a sentence. Rule 4.414(b)(6) allows courts to consider the “adverse collateral consequences on the defendant’s life resulting from the felony conviction” when deciding whether or not to grant probation for a defendant who has suffered a felony conviction. Since immigration consequences are a “severe penalty” and not merely a collateral consequence, there is even more justification for their consideration during the criminal process.

I. Immigration Consequences

This Office accepts the guidance offered by the U.S. Supreme Court's statement that **"informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process"** and that **"[b]y 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."** *Padilla v. Kentucky*, 130 S.Ct. 1473, 1486 (2010). [Emphasis added].

¹ Describing deportation as a “drastic measure,” the Court stated that deportation is an “integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” *Padilla v. Kentucky*, 130 S. Ct 1473, 1480 (2010).

² *Id.* at 1482.

³ *Id.* at 1481.

Prosecutors shall consider adverse consequences of a conviction, such as immigration consequences, in charging decisions, plea negotiations, and sentencing non-citizen defendants. For example, in plea negotiations prosecutors may agree to plead a noncitizen defendant to an alternate offense that may not have adverse immigration consequences. In general, the alternative offense will be commensurate with the original charge and carry a commensurate penalty, but in some cases the offense and penalty may be greater or lesser as required for immigration consequences. Prosecutors may not seek additional or harsher penalties for noncitizens. Such issues related to immigration status and illegal re-entry are not within this Office's jurisdiction as they are civil matters and federal offenses, respectively.

This Office also accepts the guidance offered by *Padilla v. Kentucky* that adverse immigration consequences, especially deportation, is an additional punishment—not shared by a citizen defendant- which often inexorably follows from a conviction and sentence. A citizen and a non-citizen—each with the same culpability—can be convicted of the same crime and receive the same sentence. The citizen walks out of jail and returns to his family. A non-citizen with a valid visa or permanent resident status ends up deported. Therefore, this Office believes that, to the extent possible, alternative pleas which are immigration neutral can and should be considered. In general, the alternate offense will be commensurate with the original charge and carry a commensurate penalty, but in some cases the offense and penalty may be greater or lesser as required to be immigration neutral. In general, the more serious the offense, the less consideration should be given to adverse immigration consequences. But, it shall no longer be the policy of this Office that we do not consider immigration consequences.

To that end, prosecutors may also consider changing the language of the charging document to accurately reflect the statute, for example using “or” rather than “and” when the statute does. Prosecutors may consider changing the language of the charging document to identify only some offenses within the charged document.

II. Plea to Related Offense, Factual Basis

This Office accepts the guidance offered by the U.S. Supreme Court when it urges prosecutors to consider a plea to an offense a plea with fewer immigration consequences, in a case where multiple charges might arise from an incident. The Court stated:

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 reduces 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. [Emphasis added]

Padilla v. Kentucky, 130 S.Ct. 1473, 1486 (2010).

It is proper to consider a related offense in plea negotiations. A related offense is proper if it has a categorical similarity to the charged offense or was likely committed during the course of crime. *People v. West* (1970) 3 Cal. 3d 595, 613. As the Court stated in that case “[p]lea

bargaining [] permits the courts to treat the defendant as an individual, to analyze his emotional and physical characteristics, and to adapt the punishment to the facts of the particular offense [citation omitted].” *Id.* at 605.

III. Sentencing Considerations

It is appropriate to agree to a sentence of 364 days or less to avoid an aggravated felony if the person is otherwise eligible for probation since a court is permitted "to limit the number of days served in local custody as a condition of probation to enable a defendant to avoid deportation" if doing so is consistent with the primary consideration in granting probation. *People v. Mendoza* (2009) 171 Cal.App. 4th 1142, 1157-1158; *People v. Bautista* (2004) 115 Cal.App.4th 229, 240, fn. 8 (technique available to a defendant to avoid adverse immigration consequences is to obtain a disposition of 364 days instead of 365 days). It is also appropriate to agree to a maximum sentence of no more than 180 days on a crime of moral turpitude to enable a defendant to come within the petty offense exception to inadmissibility where a sentence within that range is otherwise appropriate.

IV. Defense Counsel’s Request for Continuances

We acknowledge that Penal Code section 1016.5(d) states that it is the intent of the Legislature that the court shall grant the defendant a reasonable amount of time to "*negotiate*" with the prosecuting agency once the defendant becomes aware of the immigration consequences.

Prosecutors shall agree to continuances, when appropriate, to allow defense counsel to research and properly advise defendants.