



## **GUIDANCE TO CRIMINAL DEFENSE ATTORNEYS, CRIMINAL PROSECUTORS, AND IMMIGRATION ATTORNEYS**

### **OBLIGATIONS UNDER SECTION 1016.3 OF THE PENAL CODE**

The Office of the Attorney General issues this guidance to provide information to criminal defense attorneys, criminal prosecutors, immigration attorneys, and other interested parties regarding obligations imposed on attorneys by Section 1016.3 of the Penal Code. In criminal proceedings against noncitizen defendants, Section 1016.3 imposes certain obligations on both defense and prosecution counsel toward the goal of ensuring that criminal defendants fully understand the immigration consequences of proposed dispositions of their criminal proceedings.

#### **BACKGROUND**

When a noncitizen faces criminal prosecution, the immigration consequences of a plea or conviction are “‘an integral part,’ and often even ‘the most important part,’ of a defendant’s calculus in responding to certain criminal charges[.]” (*People v. Vivar* (2021) 11 Cal.5th 510, 516, quoting *Padilla v. Kentucky* (2010) 559 U.S. 356, 364.) The Legislature has recognized that “[d]efendants who are misadvised or not advised at all of the immigration consequences of criminal charges often suffer irreparable damage to their current or potential lawful immigration status, resulting in penalties such as mandatory detention, deportation, and permanent separation from close family. In some cases, these consequences could have been avoided had counsel provided informed advice and attempted to defend against such consequences.” (Pen. Code, § 1016.2, subd. (e)<sup>1</sup>; see also 8 U.S.C. §§ 1182(a)(2) [criminal grounds of inadmissibility], 1227(a)(2) [criminal grounds of deportability], 2258(b)(2)(A)(ii) [particularly-serious-crime bar to asylum].) These considerations are not only integral to a proper defense, but also the prosecution, enabling the parties to “reach agreements that better satisfy the interests of both parties,” (§ 1016.2, subd. (b) [quoting *Padilla, supra*, 559 U.S. at p. 373]), as well as more broadly “helping reach a just resolution” (§ 1016.3, subd. (b)). Accordingly, the Legislature enacted Section 1016.3 of the Penal Code in 2015 to require (1) criminal defense attorneys to provide noncitizen defendants “accurate and affirmative advice about the immigration consequences of a proposed disposition,” and (2) criminal prosecutors to “consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution.”

#### **LEGAL REQUIREMENTS FOR CRIMINAL DEFENSE ATTORNEYS**

Section 1016.3, subdivision (a), provides: “Defense counsel shall provide accurate and affirmative advice about the immigration consequences of a proposed disposition, and when consistent with the goals of and with the informed consent of the defendant, and consistent with professional standards, defend against those consequences.”

The obligation of defense counsel to “provide accurate and affirmative advice about the immigration consequences of a proposed disposition” is not satisfied by generic advisements to defendants required by other laws, such as the immigration advisement given by the court pursuant to Penal Code Section 1016.5 or the immigration portion of the written waiver of rights commonly known as a *Tahl* form. (See, e.g., *People v. Manzanilla* (2022) 80 Cal.App.5th 891, 905–906, as modified (July 22, 2022) (defense counsel’s advice “deficient for lack of specificity”); *People v. Lopez* (2021) 66 Cal.App.5th 561, 567, 577–578 (*Tahl* form’s general statement regarding “deportation, exclusion from admission . . . , and denial of naturalization” and similar verbal warnings from trial court judge constituted “pro forma review” which “does not satisfy section 1016.3, which requires not only accurate but also ‘affirmative advice’ about the immigration consequences of a proposed plea agreement.”) A generic advisement may be inadequate even where the defendant acknowledges understanding the advisement in writing. (See *ibid.*) A generic advisement may also be inadequate even where it is phrased such that it affirmatively warns of the most severe immigration consequences, such as an advisement that a plea “will result” in deportation. (See *People v. Lopez, supra*, at p. 577.)

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<sup>1</sup> All California statutory references herein are to the Penal Code.

Rather, defense counsel is required to give specific advice with respect to the options available with respect to each charge, including the particular immigration consequences potentially associated with each option. (See, e.g., *People v. Manzanilla*, *supra*, at p. 905 (holding that failure to “explain that [defendant] faced mandatory deportation” rendered representation inadequate under *Padilla*.) Where necessary, defense counsel must conduct legal research or consult with immigration counsel to develop the knowledge required to be able to provide specific advice to a noncitizen client. Representing a noncitizen client without sufficient knowledge to provide individualized advice regarding the immigration consequences of each charge the client is facing is a violation of Section 1016.3. (See, e.g., *People v. Lopez*, *supra*, 66 Cal.App.5th 561 at pp. 579-80.)

Defense counsel should bear in mind that the touchstone of compliance with Section 1016.3 is the defendant’s subjective **understanding** of the immigration consequences of their decisions in their criminal cases, rather than the nature and scope of information that the lawyer **communicates** to the defendant. (See, e.g., *People v. Manzanilla*, *supra*, 80 Cal.App.5th at pp. 909–910; *People v. Rodriguez* (2021) 68 Cal.App.5th 301, 321.) Accordingly, defense counsel should ensure that a qualified interpreter is used where necessary (see, e.g., *People v. Moran* (Cal.Ct.App., May 24, 2021, No. B299598) 2021 WL 2070302, at \*5-6 [citing *People v. Rodriguez* (1986) 42 Cal.3d 1005, 1010]), and should ensure that their clients have a sufficient understanding.

## **LEGAL REQUIREMENTS FOR CRIMINAL PROSECUTORS**

Section 1016.3, subdivision (b), provides: “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.”

As California courts have noted, this requirement “goes further than *Padilla* by also requiring prosecutors, when developing and considering plea offers, to ‘consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution.’” (*People v. Codinha* (2021) 71 Cal. App.5th 1047, 1065; see also *People v. Patterson* (2017) 2 Cal.5th 885, 896–897 & fn. 4, as mod. on den. of reh. (May 24, 2017) [citing section 1016.3, subd. (b) as support for legislative intent that courts must grant defendants “a reasonable amount of time to negotiate with the prosecuting agency in the event the defendant or the defendant’s counsel was unaware of the possibility of [adverse immigration consequences] as a result of conviction.”)

## **REMEDIES FOR VIOLATIONS OF SECTION 1016.3**

**Incarcerated Persons:** For incarcerated persons, the principal remedy for violations of Section 1016.3 is a petition for writ of habeas corpus. (See, e.g., *People v. Patterson*, *supra*, 2 Cal. 5th at p. 892.)

**Formerly Incarcerated Persons:** After release from custody, a former defendant may receive relief under Section 1473.7 of the Penal Code, which authorizes the superior court to vacate the conviction or sentence of a person no longer in criminal custody who establishes by a preponderance of the evidence that “[t]he 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 conviction or sentence.” (§ 1473.7, subs. (a)(1), (e)(1).) It further clarifies that a “finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.” (§ 1473.7, subd. (a)(1).)

**Totality of the Circumstances Legal Standard:** For a defendant to show a guilty plea was infected with the requisite “prejudicial error,” they must “demonstrat[e] a reasonable probability that [they] would have rejected the plea if [they] had correctly understood its actual or potential immigration consequences.” (*People v. Vivar*, *supra*, 11 Cal.5th at p. 529.) In determining whether a defendant has made such a showing, courts are to consider the totality of the circumstances. The California Supreme Court has identified the following factors as “particularly relevant” to this inquiry: (1) “the defendant’s ties to the United States”; (2) “the importance the defendant placed on avoiding deportation”; (3) “the defendant’s priorities in seeking a plea bargain”; (4) “whether the defendant had reason to believe an immigration-neutral negotiated disposition was possible”; (5) “the defendant’s probability of obtaining a more favorable outcome if he had rejected the plea”; and (6) “the difference between the bargained-for term and the likely term if he were convicted at trial.” (*Id.* at pp. 529-530; *People v. Espinoza* (2023) 14 Cal.5th 311, 320.)

Evidence relevant to the first of these factors—the defendant’s ties to the United States—may include “facts provided by a defendant’s declaration or declarations from family members, friends, colleagues, community members, or other acquaintances.” (*People v. Espinoza*, *supra*, 14 Cal.5th at p. 321.) Evidence relevant to the fourth

factor—“whether alternative, immigration-safe dispositions were available at the time of the defendant’s plea”—includes “the defendant’s criminal record, the strength of the prosecution’s case, the seriousness of the charges or whether the crimes involved sophistication, the district attorney’s charging policies with respect to immigration consequences, and the existence of comparable offenses without immigration consequences.” (*Id.* at p. 323.) The California Supreme Court has likewise explained that, to prevail on a section 1473.7 motion, a defendant is “not required to provide the declaration of plea counsel” or “contemporaneous documentation from the time of the plea.” (*Id.* at p. 325.)

A material violation of any part of Section 1016.3 will generally be grounds for vacatur under Section 1473.7 whenever that violation is established to have prejudiced the defendant. (§§ 1473.7, subd. (a)(1); 1016.3, subd. (a).)