

**Statutory Right to be Advised of Immigration Consequences of Guilty Plea
(Neil Auwarter – June 26, 2018)**

Statute	Substantive Right Conferred	Procedure Authorized	Date of Jgt/Retroactivity	Time to file
Pen. Code, § 1016.5 (eff. 1/1/78)	Prior to guilty plea, trial court must give general “may have the consequences of deportation” advisement (1016.5, subd. (a))	--Motion to vacate judgment & withdraw guilty plea (1016.5, subd. (b)) --Appealable (<i>People v. Superior Court (Zamudio)</i> (2000) 23 Cal.4th 183)	Applicable to any plea on or after 1/1/78 (1016.5, subd. (b))	No time limit to file motion.
Pen. Code, § 1016.2 (eff. 1/1/15)	“Codif[ies]” holding of <i>Padilla v. Kentucky</i> (2010) 559 U.S. 356 and “related California case law.” <i>Padilla v. Kentucky</i> held the 6th Amendment requires competent defense counsel “provide affirmative and competent advice to noncitizen defendants regarding the potential immigration consequences of their criminal cases.” (1016.2, subds. (a), (h))	None specified by statute, but would be the basis for claim on direct appeal or habeas corpus	If only a codification of <i>Padilla v. Kentucky</i> , then may be retroactive only to convictions non-final when <i>Padilla v. Kentucky</i> was decided in 2010. (See <i>Chaidez v. U.S.</i> (2013) 568 U.S. 342 [<i>Padilla v. Kentucky</i> not retroactive]; see also depub’d <i>People v. Landaverde</i> (2018) formerly 228 Cal.App.5th 287.) - But 1016.2 also codifies Cal. IAC cases as old as 1987 (<i>Soriano</i>)	--If appeal, include in appeal. --If habeas corpus, within a reasonable time the claim was discoverable per laches; and D must still be in custody or restraint
Pen. Code, § 1473.7 (eff. 1/1/17)	--Right to assert “prejudicial error damaging [D’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.” (1473.7, subd.(a)(1)) --The right described appears arguably broader than the rights conferred by sections 1016.5 and 1016.2; but the statute’s express application to “a person no longer imprisoned or restrained” suggests it is merely a procedural extension of the 6 th Amendment/IAC right set out in 1016.2 and <i>Padilla v. Kentucky</i> to out-of-custody D’s who can no longer proceed by habeas.	--Motion to vacate judgment & withdraw guilty plea (1473.7, sub. (a), (e)(3)) --Preponderance burden of proof is on D --Appealable (1473.7, subd. (f)) --Appellate standard of review: “deferential” as to fact findings; de novo as to legal issues of whether D understood & prejudice (<i>People v. Ogunmowo</i> (2018) 23 Cal.App.5th 67)	If no more than a procedural extension to non-confined D’s of the 6 th Amendment/IAC right in 1016.2 and <i>Padilla v. Kentucky</i> , then may be retroactive only to convictions non-final when <i>Padilla v. Kentucky</i> was decided in 2010. (See <i>Chaidez v. U.S.</i> (2013) 568 U.S. 342 [<i>Padilla v. Kentucky</i> not retroactive]) But see note above re codification of earlier Cal IAC cases.	--File motion “with reasonable diligence after the later of [date D receives notice to appear from immigration court or date deportation order becomes final] (1473.7(b))

A young child with dark hair is looking over a tall, dark metal border wall. In the background, there is a construction site with a tall metal scaffolding structure under a clear blue sky. The scene is set in a dry, hilly landscape.

Tearing down the wall: keeping America great

UPDATES IN IMMIGRATION & AVOIDING IMMIGRATION CONSEQUENCES
FOR NON-CITIZEN CLIENTS

LAUREN CUSITELLO

From #Fix96 to #NoBanNoWall: what a difference a year makes.

Travel Ban, Travel Ban 2.0, and Travel Ban 3.0.

Jefferson Sessions III confirmed as Attorney General.

Deferred Action for Childhood Arrivals (DACA) ended, with six-month window to find legislative fix (but renewals are back on!).

Temporary Protected Status (TPS) to end for Nicaraguans, Haitians, and Salvadorans.

Administration calls for an end to the **diversity lottery**, discussed **merit-based immigration**, seeks to limit **family-based immigration**.

Continued calls to build a **wall** along the southern United States border.

How do these changes affect our clients and their families?

Enforcement priorities now include **ALL** criminal convictions & criminal charges that have not been resolved.

Emphasis on **Criminal Alien Program**, which includes ICE enforcement in police stations, jails, and courthouses.

Increase in **collateral** or **incidental enforcement**: ICE will arrest all removable people encountered during enforcement actions, not just the targets.

Prosecutorial discretion is very rare, and ICE is much less likely to set low bonds or release noncitizens on immigration parole.

Mass deportation by Executive Order.



143,470 administrative arrests in FY17: most in last 3 fiscal years

226,119 removals (decrease from FY16)

17% decrease in border removals due to increased emphasis on interior enforcement

But California is the new Texas.

California has passed many new laws to protect immigrants, including Senate Bill 54, the California Values Act.

Xavier Becerra became state Attorney General, and California has sued the administration over DACA (and won!), the Travel Bans, the border wall, and “sanctuary cities.”



How should trial defenders help avoid immigration consequences?

1. **LEARN** about each client's immigration status and history.
2. **ASK** about their client's case-related **and** immigration-related goals. "Do you want to continue living in the United States?"
3. **RESEARCH** the consequences of conviction as to each crime charged, research alternative pleas and sentencing options.
4. Armed with research, **WORK** to achieve your clients' goals through negotiation, litigation, or both.

“But I’m not an immigration lawyer!”

“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.”

Justice Stevens, *Padilla v. Kentucky*, 130 S. Ct. 1473, 559 U.S. 356 (2010)

California defenders have been obligated to investigate immigration consequences since 1987! *People v. Soriano*, 194 Cal.App.3d 1470.

Things I have had to learn about to effectively defend clients, an abridged list

- Bureau of Land Management animal grazing permits
- what “felony” meant when the constitution was drafted
- the mechanics of flare guns
- the Arkansas felony murder rule
- whether smoking marijuana can turn a person’s tongue green
- how to determine time of death from a person’s stomach contents
- the history of the *corpus delicti* rule
- Horizontal Gaze Nystagmus

Intro to immigration status for defenders

USC: United States citizen. Cannot be deported. A person can be born a citizen (in the U.S. or abroad), can derive citizenship when his parents become citizens, or can naturalize to become a citizen after a period of permanent residence.

LPR: Lawful permanent resident or “green card” holder. Eligible to naturalize after 5 years in LPR status (3 if married to USC). Removal requires a hearing before an Immigration Judge, and LPRs are eligible for “cancellation of removal” if no aggravated felony convictions and 5 years as LPR/7 years of residence in U.S.

Lawfully admitted or paroled: Person who was allowed to enter the United States in some status, including tourist visa, nonimmigrant visa, parole, or TPS.

Undocumented: Can mean MANY different things, including visa overstays, previously removed people, and people who entered without legal status.

1. Defenders should LEARN about their clients!



1. Were you born in the United States?
2. Did you naturalize to become a citizen?
3. Are you a permanent resident/do you have a green card?
4. Did you enter the U.S. with a visa or border crossing card?
5. Did you receive DACA? Is it still valid?
6. Are you married to/the child of/the parent of a U.S. citizen or LPR?
7. Have you ever been deported, had an immigration court case, or been denied entry to the U.S. before?
8. Are you afraid to return to your home country?

2. Goals: Because “time served” now could mean more time served later.



Mandatory detention: in the Ninth Circuit, must wait 6 months before eligible for an immigration bond.

Non-mandatory detention: Non-citizen must prove that he is not a flight risk or a danger, can be denied bond.

Illegal entry/re-entry: criminal detention & punishment for future entries.

The three warnings: removal, denial of admission, and denial of naturalization.

California Penal Code 1016.5 requires these in every case. What do they really mean?

Removal: the legal term for deportation. Forcible banishment from the United States, often without the possibility of legal return.

Denial of admission: Can mean denial of entry at the border (including for permanent residents!), also includes denial of adjustment for undocumented people or visa holders.

Denial of naturalization: Denial of an application to become a U.S. citizen, which affects ability to transmit citizenship to children or to immigrate family members.

Beyond removal and inadmissibility: relief from removal.

What forms of relief from removal exist?

Cancellation of removal for LPRs: 7 years living in the US, 5 years as LPR, no **aggravated felony** convictions, **no prior grant of cancellation**. Clock stops when first removable offense is **committed**.

Cancellation of removal for non-LPRs: 10 years of physical presence, **good moral character**, no convictions for disqualifying offenses, exceptional and extremely unusual hardship to USC/LPR spouse, parent, or child.

Asylum/withholding of removal: faces persecution in country of origin, has not been convicted of a **particularly serious crime**. (Aggravated felony is *per se* "particularly serious" for asylum, aggravated felony with 5-year sentence is *per se* "particularly serious" for withholding of removal.)

Defenders must try to preserve eligibility for relief! *Padilla*, 130 S. Ct. at 1483.

3. Defenders must RESEARCH: Avoid removal by avoiding removability.

Permanent residents and other lawfully admitted people inside the United States must be **deportable** to be removed. Did the trial defender **RESEARCH** whether their client was charged with a deportable offense.

If it was/could be a deportable offense, defender must research alternative pleas that could avoid deportability.

- ILRC's California crimes chart (2016): <http://www.ilrc.org/chart>
- hire an immigration expert/independent research

Burden is on DHS to prove deportability, so an ambiguous record of conviction may prevent removal. Was that the goal?

RESEARCH: Avoiding removal by avoiding inadmissibility.

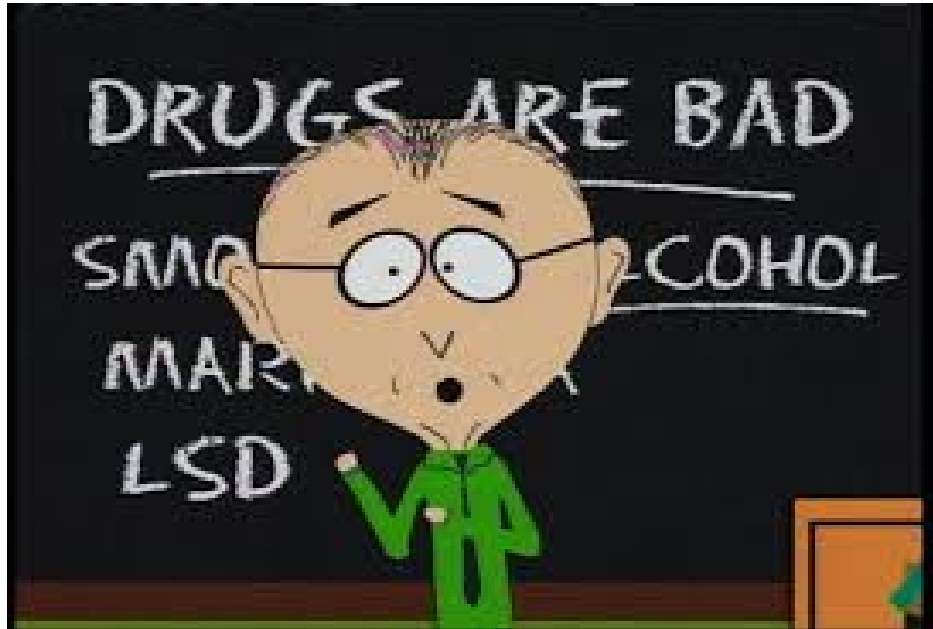
For LPRs arrested at a port of entry, or who ever want to travel outside the United States again, both **deportability** and **inadmissibility** could lead to removal.

For non-LPRs, **inadmissibility** could prevent them from becoming LPRs in the future. This includes undocumented people, visa holders, DACA recipients, and even people with prior orders of removal.

Some grounds of inadmissibility require conviction, but many don't. Did the trial defender consider this when crafting the factual basis for a plea?

Burden is on the noncitizen to establish admissibility, and ambiguous record of conviction probably will not satisfy the burden—did trial counsel understand AND explain this to the client?

Bad pleas, part 1: drug crimes!



Conviction of an offense involving a controlled substance is a ground of **deportability AND inadmissibility**.

Drug trafficking crimes are aggravated felonies.

A “reason to believe” that a person is involved in drug trafficking, even without a conviction, is a ground of **inadmissibility**.

There are very few waivers available to people with controlled substance convictions.

What is a “controlled substance” offense?

Deportability: INA § 237(a)(2)(B)(i)

Any alien who at any time after admission has been **convicted** of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in *section 802 of title 21*), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

Inadmissibility: INA § 212(a)(2)(A)(i)(II)

Except as provided in clause (ii), any alien **convicted of**, or who **admits having committed**, or who **admits committing acts which constitute the essential elements of ...** a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), is inadmissible.

Alternatives to bad pleas, part 1.

Generic controlled substance pleas:

California bans more drugs than the federal government does, so pleas that involve the phrase “controlled substance” **without reference to any specific substance** can avoid deportability. (Inadmissibility is tougher.)

Disorderly conduct: Penal Code section 415 is an alternative to any charges involving possession, paraphernalia, or being under the influence of a controlled substance.

Importation of contraband: 18

U.S.C. § 545 is a common alternative disposition for federal drug importation pleas.

Misprision of a felony: 18 U.S.C. § 4 is not an aggravated felony and is not a controlled substance offense. It is not a crime involving moral turpitude in the Ninth Circuit.

Bad pleas, part 2: aggravated felonies.

Where to find them: INA § 101(a)(43)

Ground of **deportability**, not **inadmissibility**. BUT many aggravated felonies correspond to grounds of inadmissibility too.

Precludes voluntary departure, cancellation of removal, asylum, naturalization for LPRs.

Many require sentence of one year or more (crimes of violence, theft offenses, obstruction of justice).



Alternatives to bad pleas, part 2.

Sentencing agreements to avoid one-year sentence on any single count—was this pursued?

For fraud offenses, record of conviction must keep **loss amount below \$10,000**: must not appear anywhere in plea or judgment.

Solicitation/offering to deliver drugs is not an aggravated felony!

Look for **minimum contact** and **mens rea** with any potential crime of violence—must be “force,” and recklessness is not enough!

Did the trial defender consider “**pleading up**”—offering a higher sentence or seemingly more serious offense to avoid aggravated felony count of conviction?

- • *People v. Bautista*, 8 Cal. Rptr. 3d 862 (2004).

Bad pleas, part 3: alien smuggling

Inadmissibility, INA § 212(a)(6)(E): “Any alien who **at any time** knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.”

Deportability, INA § 212(a)(1)(E): “Any alien who (**prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry**) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.”

These do not require a conviction! But also, a conviction under 8 U.S.C. § 1324(a)(1)(A) or (2) is an **aggravated felony!**

Alternatives to bad pleas, part 3

Accessory after the fact to 8 U.S.C. § 1325, illegal entry.

Smuggling contraband, 18 U.S.C. § 545, for people arrested at the border.

False statement to a federal officer, 18 U.S.C. § 1001, as a last resort, because it is a crime involving moral turpitude.

Bad pleas, part 4: yep, there's more.

Prostitution and commercialized vice: people who have “engaged in” or have “procured” are inadmissible; not a ground of removal.

Money laundering: inadmissible even without a conviction (“reason to believe”); deportable if amount > \$10,000.

Firearm offenses: ground of inadmissibility and deportability, BUT many California firearm offenses do not qualify under the federal definition.

Domestic violence/child abuse: need not be a defined crime of domestic violence, if the relationship qualifies, but must be a crime of violence.

Stalking or violating protective orders

Any offense involving a false claim to citizenship

Any offense involving terrorism

Alternatives to bad pleas, part 4.

Pay attention to the factual basis! Many of these grounds of removal do not require a conviction, and allow the immigration judge to look at the facts surrounding the plea.

Domestic relationship/age in DV or child abuse cases.

Amount of money in money laundering case.

False ID/document that includes statement re: citizenship.

“Lewd act” instead of intercourse in prostitution cases.

How to save a life: negotiating in the shadow of deportation

WHAT TRIAL DEFENDERS SHOULD BE DOING TO CONVINC
PROSECUTORS TO GIVE THEM THE CHARGE, SENTENCE, OR
FACTUAL BASIS THE CLIENT NEEDS

The typical prosecutor's response to a request for an alternate resolution...



Considering immigration consequences: not just a good idea, it's the law!



Penal Code 1016.3 (b) mandates:

“The prosecution, in the interests of justice...**shall consider the avoidance of adverse immigration consequences** in the plea negotiation process as one factor in an effort to reach a just resolution.”

1. **Did the trial defender explain the adverse consequences** to the prosecutor?
2. **Did the trial defender remind** her of her obligation to consider them?
3. Did the trial defender **propose an alternative?**
4. How did the prosecutor respond?

AB 208: pretrial diversion in drug cases!

Penal Code 1000 has allowed some defendants to receive **deferred entry of judgment** in many common drug cases, but required a guilty plea.

But the INA defines a “conviction” as a finding or admission of guilt + some punishment, penalty, or **restraint on the alien’s liberty**.

So, **PC 1203.43** was passed to permit noncitizens to vacate old deferred entry of judgment pleas as “legally invalid,” to avoid immigration consequences.

Then, in October 2017, Gov. Brown signed AB 208, so no plea is required to enter pretrial diversion in drug cases.

Was this option considered in a drug case? If not, why not?

Working with immigration counsel—just like other experts, but with bar cards!

1. Did the trial defender encourage the client to seek an immigration attorney? If so, what did the client say or do in response?
2. Did the trial defender strategize with immigration counsel or an immigration attorney expert about how best to avoid adverse immigration consequences and potential forms of relief from removal? Immigration counsel (or an expert) can also write a letter to give to the prosecutor.
3. Did the trial defender work with an immigration attorney to craft plea and judgment forms to avoid adverse immigration consequences?

Paved with good
intentions...

COMMON DEFENDER MISTAKES

1. Assuming removal is inevitable.



Plea forms and plea agreements warn everyone—including citizens!—that they may/will be deported.

Not all charges are grounds of removal, and charges can be negotiated!

Telling a client that he “will be deported” without trying to avoid that outcome is not enough.

2. Good facts, bad plea.

Example one: LPR is charged with possession of methamphetamine by complaint. Defender negotiates factual basis to possession of a controlled substance, but complaint is not amended and client pleads guilty to the one count in the complaint.

Example two: DACA-eligible wife of USC and mother of USC children is charged with possession of drug paraphernalia, with no specific device identified in the complaint. She pleads guilty to that offense with no factual basis indicating what drug was involved.

3. Good plea, bad facts.

Example One: Undocumented husband of USC and father of USC children is charged with PC § 243(c), battery on a police officer causing injury. Defender negotiates plea to PC § 69, resisting an officer. During a probation interview, the defendant explains that he was under the influence of methamphetamine at the time of the incident.

Example Two: LPR is arrested at the San Ysidro Port of Entry with methamphetamine hidden inside the car he is driving. Defender negotiates plea to 18 U.S.C. § 545, smuggling contraband. Factual basis says that defendant failed to declare methamphetamine, which he knew was in the car.

4. Fear of litigation.

Framing is *very important* with noncitizen clients. How did the trial defender explain the risk of a higher sentence, the risk of removal, and the penalties for returning illegally? Did the defender explain mandatory detention or relief from removal?

Did the trial defender treat removal as part of the penalty for the case and discuss it **each time** he discussed plea offers with the client?



Here comes the sun.

RECENT CALIFORNIA LAWS TO HELP NONCITIZEN CLIENTS

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Prop 47 & PC 18.5: felony reduction.

Proposition 47 reduced many California offenses from felonies to misdemeanors: theft offenses involving less than \$950 worth of property and drug possession offenses.

Penal Code 18.5 changed the maximum penalty for a misdemeanor from 365 to 364 days.

Example: LPR was convicted of PC § 666, petty theft with a prior, and sentenced to 16 months' prison, for stealing a 6-pack of beer from a grocery store. This potential aggravated felony can be reduced to a misdemeanor with a 364-day sentence, avoiding that consequence.

PC § 1203.43: erasing past drug diversion pleas.

Past deferred entry of judgment (DEJ) pleas still qualified as “convictions” for immigration purposes, even after dismissal. That’s why we needed AB 208!

California legislature found that courts and defenders affirmatively misadvised noncitizens about the consequences of these pleas.

People who have successfully completed may now have the conviction vacated as legally invalid—meaning it is no longer a conviction for immigration purposes.

PC § 1473.7: new post-conviction relief for noncitizens and innocent people.

PC § 1473.7 allows a person whose sentence has been completed to file a motion to vacate the conviction.

Requires “a 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.”

