
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 1343
Author: Thurmond
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Urgency: No
Consultant: LT

Hearing Date: July 7, 2015

Fiscal: Yes

Subject: *Criminal Procedure: Defense Counsel*

HISTORY

Source: Immigrant Legal Resource Center

Prior Legislation: AB 142 (Fuentes) – 2011, vetoed
AB 15 (Fuentes) – 2009, vetoed
AB 806 (Fuentes) – 2010, vetoed

Support: California Immigrant Policy Center; California Public Defenders Association; The National Association of Social Workers, California Chapter; Immigrant Legal Resource Center; Dolores Street Community Services; United Farm Workers; East Bay Community Law Center; American Civil Liberties Union of California

Opposition: None known

Assembly Floor Vote: 77 - 0

PURPOSE

The purpose of this bill is to require defense counsel to comply with Padilla v. Kentucky (2010) 559 U.S. 356. and to advise defendants of the potential immigration consequences of a proposed disposition.

Existing law requires the court prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, to administer the following advisement on the record to the defendant:

“If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged 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.” (Penal Code § 1016.5 (a).)

Existing law provides that upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. (Penal Code § 1016.5 (a).)

Existing law requires the court, on the defendant's motion, to vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty, if the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which the defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement. (Penal Code § 1016.5 (a).)

This bill requires defense counsel to 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.

This bill requires the prosecution, in the interests of justice, and in furtherance of the findings and declarations of Section 1016.2, to consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution.

This bill states that this code section shall not be interpreted to change the requirements of Section 1016.5, including the requirement that no defendant shall be required to disclose his or her immigration status to the court.

This bill makes the following legislative findings:

- 1) In *Padilla v. Kentucky* (2010), 559 U.S. 356, the United States Supreme Court held that the Sixth Amendment requires defense counsel to provide affirmative and competent advice to noncitizen defendants regarding the potential immigration consequences of their criminal cases. California courts also have held that defense counsel must investigate and advise regarding the immigration consequences of the available dispositions, and should, when consistent with the goals of and informed consent of the defendant, and as consistent with professional standards, defend against adverse immigration consequences. (*People v. Soriano*, 194 Cal.App.3d 1470 (1987), *People v. Barocio*, 216 Cal.App.3d 99 (1989), *People v. Bautista*, 115 Cal.App.4th 229 (2004)).
- 2) In *Padilla v. Kentucky*, the United States Supreme Court sanctioned 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 this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties".
- 3) 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 conviction. It may be by far the most serious penalty flowing from the conviction.
- 4) With an accurate understanding of immigration consequences, many noncitizen 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.

- 5) Defendants 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 many cases, these consequences could have been avoided had counsel provided informed advice and attempted to defend against such consequences.
- 6) Once in removal proceedings, a noncitizen may be transferred to any of over 200 immigration detention facilities across the country. Many criminal offenses trigger mandatory detention, so that the person may not request bond. In immigration proceedings, there is no court-appointed right to counsel and as a result, the majority of detained immigrants go unrepresented. Immigration judges often lack the power to consider whether the person should remain in the United States in light of equitable factors such as serious hardship to United States citizen family members, length of time living in the United States, or rehabilitation.
- 7) The immigration consequences of criminal convictions have a particularly strong impact in California. One out of every four persons living in the state is foreign-born. One out of every two children lives in a household headed by at least one foreign-born person. The majority of these children are United States citizens. It is estimated that 50,000 parents of California United States citizen children were deported in a little over two years. Once a person is deported, especially after a criminal conviction, it is extremely unlikely that he or she ever is permitted to return.
- 8) It is the intent of the Legislature to codify *Padilla v. Kentucky* and California case law and to encourage the growth of such case law in furtherance of justice and the findings and declarations of this section.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity."(Defendants'

February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the “durable solution” to prison overcrowding “consistently demanded” by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee’s consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Legislation

According to the author:

In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the U.S. Supreme Court held that the Sixth Amendment requires defense counsel to provide affirmative information and competent advice to noncitizen defendants regarding the potential immigration consequences of their criminal cases. California courts have long since held the same, including that defense counsel must investigate, advise regarding, and defend against, potential adverse immigration consequences of a proposed disposition.

In order for the consideration of immigration consequences to result in meaningful change, it is important for both the prosecution and defense to consider immigration consequences in plea negotiations. The Supreme Court agreed, stating 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.

The effects of even a minor criminal conviction on the life of an immigrant cannot be understated. Immigrants can suffer irreparable consequences including loss of legal status, loss of ability to obtain legal status, inability to apply for citizenship (temporary or permanent), mandatory detention in immigration proceedings (no

bond), or permanent deportation, and subsequent family separation. Once in deportation proceedings, the injustice continues, where immigrants are often transferred to over 200 facilities across the country, often states away from friends or family, and without being provided an attorney. Offenses which can trigger these consequences can include possession of a controlled substance, petty thefts, and many more.

In many cases, these consequences could have been avoided or mitigated had the immigration consequences been considered in the criminal case. The result is disproportionate punishment, where immigrants are essentially punished twice for the same offense, with the immigration consequences often being worse than the criminal punishment.

These negative effects can be particularly felt in California, where one out of every four persons is foreign-born. One out of every two children lives in a household headed by at least one foreign-born person. When parents are deported, children may be left parentless and are thereafter more likely to enter the criminal justice system themselves. The majority of these children are U.S. citizens. It is estimated that 50,000 parents of California U.S. citizen children were deported in a little over two years. Once a person is deported, especially after a criminal conviction, it is extremely unlikely that he or she is ever permitted to return. Thus, countless California families are needlessly separated each year. .

2. Effect of This Legislation

Existing law requires courts to advise defendants that if not a citizen, the defendant may face consequences including deportation, exclusion from admission to the United States, or denial of naturalization. This bill will require defense counsel to advise defendants about the immigration consequences associated with a felony conviction and defend against those consequences. This bill would also require the prosecution to consider the avoidance of adverse immigration consequences in the plea negotiating process as a factor in reaching a just resolution.

3. Related Bill

AB 267 (Jones-Sawyer), which was passed by this Committee (5-1) on June 16th, seeks to advise defendants of additional consequences associated with a felony conviction before a defendant decides to accept a plea of guilty or a plea deal. Existing law requires courts to advise defendants of potential consequences including deportation, exclusion from admission to the United States, or denial of naturalization if the defendant is not a citizen. AB 267 would expand existing law to include a larger scope of consequences some of which are, difficulty in obtaining employment, loss of voting rights while incarcerated, etcetera, which will potentially affect the defendant after being released.