DACA AND CALIFORNIA PENAL CODE § 1016.3

October 24, 2019

Deferred Action for Childhood Arrivals ("DACA") is a reprieve from deportation that can be granted to immigrants who are undocumented, were brought to the United States as young people, and are either currently attending school, graduated from high school, or were honorably discharged from the U.S. military. The program alleviates deportation risk, comes with temporary employment authorization, and can create a path to permanent lawful status. In implementing the DACA program, the federal government built in strict conviction-based bars. These include convictions (infractions, misdemeanors, and felonies) for "driving under the influence ("DUI"). DHS did not include traffic offenses in the absolute bars to young people receiving DACA. The Immigrant Legal Resource Center ("ILRC") submits this short memorandum addressing plea negotiations under Cal. PC §§ 1016.2 and 1016.3 in cases where immigrants who are otherwise eligible for DACA are charged with DUI offenses.

When DACA applicants or recipients are charged with a DUI, California prosecutors often are in a position to accept a plea to the alternative resolution of reckless driving pursuant to Cal. VC § 23103.5 ("wet reckless"), which is not an automatic bar to DACA. California enacted Penal Code §§ 1016.2 and 1016.3 to further codify constitutional holdings regarding plea negotiations in cases of immigrants facing charges. The statutes require that prosecutors consider the avoidance of immigration consequences during the plea bargaining process.

Cases of DACA-eligible defendants facing DUI charges that can be resolved under VC § 23103.5 are clear examples of what the California legislature envisioned when it passed these laws. Offering VC § 23103.5 dispositions in these cases gives effect to California law and to Supreme Court holdings that clearly contemplate immigration consequences as a significant factor in the just and appropriate resolution of criminal cases of noncitizen defendants.

1. A Conviction under VC § 23152 or 23153 Is a *Per Se* Bar to DACA

In implementing the DACA program, DHS included strict bars, including a conviction for "driving under the influence." DHS's formal FAQ regarding DACA states, "[i]f you have been convicted of a … significant misdemeanor offense … you will not be considered." The FAQ goes on to say that "[f]or the purposes of" DACA, "a significant misdemeanor is a misdemeanor … for which the maximum term of imprisonment authorized is one year or less but greater than five days … and that … [r]egardless of the sentence imposed, is an offense of … driving under the influence." Vehicle Code §§ 23152 and 23153 fit these criteria. Both convictions are punishable by more than five days imprisonment. Both convictions are an offense of driving under the influence. Immigrants otherwise eligible for DACA will not be considered if convicted under either of these DUI statutes.

2. A Conviction under VC § 23103.5 Is Not a *Per Se* Bar to DACA

A § 23103.5 offense is not a DUI offense for purposes of DACA, because there is no finding or requirement that the defendant drove under the influence of alcohol.

On the ground practice confirms that DHS does not treat or consider a § 23103.5 conviction to be an absolute bar to DACA. TILRC is part of an extended network of California immigration legal services providers and has staff members who work specifically on DACA relief. Practitioners throughout California have reported to ILRC that DHS has granted DACA in cases involving § 23103.5 convictions, having found them not to be significant misdemeanors. As DHS acknowledges outright in its FAQ, "the decision whether to [grant DACA] in a particular case is an individualized, discretionary one that is made taking into account the totality of the circumstances," and thus a § 23103.5 conviction may serve as the basis for a discretionary denial of DACA. However, this is critically different from convictions under § 23152 or § 23153 which outright preclude a grant of DACA absent "extraordinary circumstances." *Cf. Moncrieffe v. Holder*, 569 U.S. 184, 204 (2013) (distinguishing between mandatory deportability and the ability to seek discretionary relief that the government may decide whether or not to grant).

3. The California Legislature Enacted PC §§ 1016.2, 1016.3 to Require Prosecutors to Consider Immigration Consequences in the Plea Bargaining Process

In 2016, the California legislature enacted PC § 1016.2, wherein the legislature makes a number of findings and declarations regarding the specific constitutional issues that emerge when noncitizen are facing criminal charges. In particular, the legislature examines and states its position on *Padilla v. Kentucky*, 559 U.S. 356 (2010), the seminal Supreme Court decision regarding the requirements for a constitutionally adequate adjudication of criminal charges in cases of noncitizen defendants. Of particular importance, § 1016.2 incorporates into California statutory law the following findings by the Supreme Court:

1. It is appropriate for immigration status to be considered during the plea bargain process. *See* PC § 1016.2(b).

2. Consideration of immigration consequences when plea bargaining can "satisfy the prosecution and court, but … have no, or fewer, adverse immigration consequences than the original charge." *See* PC § 1016.2(d).

3. "Mandatory detention, deportation, and permanent separation from close family" are immigration consequences that can be avoided through an active and engaged immigration-informed plea bargaining process. *See* PC § 1016.2(e).

At the same time, the California legislature enacted PC § 1016.3 to create the legal framework in which defense counsel and prosecutors are to function in cases involving noncitizen defendants. Subsection (b), which pertains to prosecutors, instructs that prosecutors "shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution." PC § 1016.3(b). It further states that

prosecutors shall do so "in the interests of justice, and in furtherance of the findings and declarations of Section 1016.2." PC § 1016.3(b).

4. Offering a Wet Reckless Rather than a DUI Honors California's Statutes as Well as the Holdings of the U.S. Supreme Court

For noncitizens otherwise eligible for DACA, the difference between a conviction under VC § 23103.5 as compared to VC § 23152 or § 23153 is absolute; whereas the former will allow for consideration of a DACA application, the latter two will not. This explains and exemplifies why the Supreme Court in *Padilla* held that "deportation is … intimately related to the criminal process," further observing that state and federal laws have "enmeshed criminal convictions and the penalty of deportation." 559 U.S. at 365-366. In codifying PC §§ 1016.2 and 1016.3, California has provided a statutory framework for prosecutors and defense counsel to engage in the plea bargaining process under modern and current terms where immigration consequences, like DACA, are bound up in rather than unrelated to the state's criminal prosecution and the result for a defendant. California's government intended, and the Supreme Court has held time and again, that criminal cases should resolve in a manner that allows noncitizens "to enter 'safe harbor' guilty pleas [that] do not expose the [alien defendant] to the risk of immigration sanctions." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (internal quotations omitted, brackets original). In criminal cases of DACA-eligible noncitizens, a plea to VC § 23103.5 rather than a DUI statute accomplishes this very ideal.