

California Post-Conviction Relief: Options for Non-citizens Convicted of Crimes

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INTRODUCTION

A basic fact in immigration law is that certain convictions lead to removability and certain sentences for certain convictions lead to more bases for removability. Further, eligibility for relief from removal and from release from immigration custody is often dependent on the conviction and sentence a client has suffered. This article will explore some ways the dire aspects of criminal convictions and sentences can be ameliorated through sentence modification or vacating a conviction.

EVALUATE THE IMMIGRATION CONSEQUENCES OF A CONVICTION

Your first job in representing an alien facing removability because of a criminal conviction is to understand the impact of a conviction and sentence on removability, immigration detention, and availability for relief.

For example, the crime of assault with a deadly weapon is generally recognized as a crime of moral turpitude.¹ A sentence of 365 days or more will render that conviction an aggravated felony as a crime of violence with a sentence of a year or more.² This would bar the client from receiving Cancellation of Removal for Certain Permanent Residents and Nonpermanent Residents.³ Should the conviction have a maximum potential sentence of a year or more, it will result in ineligibility for Cancellation of Removal for Certain Nonpermanent Residents⁴ and subject them, if they have not been admitted to the United States, to mandatory detention.⁵

Practice Pointer

It is essential that at the earliest point in representation, you evaluate the effect of the criminal convictions and sentences of your client on removability, detention, and relief.

CHANGING CONVICTIONS AND SENTENCES

Should you become involved in a criminal case before the prosecution is complete, you may be tasked with advising the client of the immigration consequences of various criminal pleas as to how they will affect removability, relief from removal, and detention, and will be tasked with coming up with statutes of conviction and sentences that will maximize the chances of avoiding adverse immigration consequences. Normally, however, the immigration attorney receives the case after the conviction and sentence have been rendered. If the conviction and sentence have adverse immigration consequences, counsel may have to advise about or pursue post-conviction relief to ameliorate the adverse consequences of the statute of conviction or the sentence.

VACATING CONVICTIONS

In California, for a long time, an attorney could go into state court and vacate a misdemeanor conviction under the expungement statute, Cal. Penal Code §1203.4, and ameliorate the immigration consequences of a conviction.⁶ Over the next sixty-plus years the effect of expungement has taken several turns. The state of the law in California now is that expungement is effective only to ameliorate the immigration consequences of simple possession of controlled substance offenses when there were no prior controlled substance offense convictions and the convictions were before July 14, 2011.⁷

The lynchpin for the about-face was the passage of IIRAIRA, Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 to 3009-724, and the new definition of conviction at INA §101(a)(48).⁸

¹*Matter of Jing Wu*, 27 I&N Dec. 8 (BIA 2017).

²INA §101(a)(43)(F).

³INA §240A(a)(3); §240A(b)(1)(C).

⁴INA §240A(b)(1)(C) and INA §237(a)(2)(A)(I).

⁵INA §236(c)(1)(A). A maximum sentence of less than a year but with an actual sentence in excess of six months will also make the alien subject to mandatory detention. *See*, INA §212(a)(2)(A)(ii)(II).

⁶*Matter of O-T-*, 4 I&N Dec. 265 (Cent. Office, I&N Serv. Feb. 13, 1951).

⁷ *Nunez-Reyes v. Holder*, 646 F.3d 684, 687 (9th Cir. 2011).

⁸ In *Nunez-Reyes v. Holder*, *supra*, the Ninth Circuit did not address the new definition, writing that it assumes that

(A) The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where:

(I) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

The result of the definition is that a conviction exists when there is a 1) formal judgment of guilt or 2) a guilty plea, no-contest plea, or the admission of facts to support guilt and some punishment. Thus, a subsequent *vacatur* of the plea through expungement or the completion of a diversion program does not make the conviction go away.

Practice Pointer

When a client presents a conviction document, particularly when he was accepted into a diversion program, make sure there is a formal finding of guilt or that they either pled guilty or no contest or the client admitted facts to support guilt and imposed some sort of punishment. Otherwise, there is no conviction at all under federal law. Some states have diversion statutes that do not require pleading or admitting to any elements of the crime.

AN EXCEPTION FOR A PROCEDURAL OR LEGAL DEFECT IN A CONVICTION THAT LEADS TO VACATUR

A conviction overturned for substantive or procedural defect is not considered a conviction for immigration purposes and cannot serve as the basis for removability.⁹ Reasons for the vacating of a conviction unrelated to the merits of the underlying criminal proceedings, such as expungements or *vacatur* after a diversion program, may be used as a conviction in removal proceedings.¹⁰

the new definition of conviction includes expunged state convictions. *Id.* at 689 n.2, but the decision relies on the conclusions of other circuits, including a decision, *inter alia*, in the Third Circuit which held, A...because we are convinced that Acosta, whose criminal proceedings were dismissed in state court, falls squarely within the definition of conviction in Section 101(a)(48)(A) of the INA, we hold that we lack jurisdiction to entertain Acosta's petition for review. *Acosta v. Ashcroft*, 341 F.3d 218, 224 (3d Cir. 2003). *See, also, Matter of Punu*, 22 I. & N. Dec. 224, 224 (BIA 1998)(AThe third prong of the standard for determining whether a conviction exists with regard to deferred adjudications has been eliminated pursuant to section 101(a)(48)(A) of the Immigration and Nationality Act....).

⁹*Nath v. Gonzales*, 467 F.3d 1185, 1187B89 (9th Cir. 2006); *see also, Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379B80 (BIA 2000) (holding that there was no basis for removability where a criminal court order stated that the alien’s conviction was vacated based on a legal defect).

¹⁰*Poblete Mendoza v. Holder*, 606 F.3d 1137, 1141 (9th Cir. 2010).

Practitioners should be alert to the fact that vacating a conviction reopens the criminal case for prosecution. Your client may be exposed to conviction for a crime with worse immigration consequences and a harsher punishment than the deal that was vacated. They could also face the expense of a trial and the prospect of a worse outcome if prosecutors and the client cannot come to an agreement on a new plea deal.

CHANGES IN A SENTENCE OR THE DENOMINATING OF A CONVICTION AS A MISDEMEANOR HAVE AMELIORATIVE EFFECT

Unlike vacating a conviction, which will not have an ameliorative immigration effect unless there was a substantive or procedural defect in the conviction, changes in a sentence¹¹ or changing its denomination from felony to a misdemeanor¹² potentially do have an ameliorative immigration effect.

CONVICTIONS AND APPEALS

One may wonder what the effect of a direct appeal has on a conviction. After all, according to INA §101(a)(48), all a conviction requires is the formal entry of guilt, or a guilty plea, no-contest plea, or a finding of guilt or admission of facts to support guilt and some punishment. These elements exist when a case is on appeal, so, arguably, there is a conviction even when an appeal is pending. Fortunately, the Board of Immigration Appeals (BIA) rejected that reasoning, holding instead that a conviction does not attain a sufficient degree of finality for immigration purposes until the right to direct appellate review on the merits of the conviction has been exhausted or waived.¹³

STATUTES THAT BENEFIT ALIENS FACING REMOVAL OR MANDATORY DETENTION

¹¹*Matter of Song*, 23 I&N Dec. 173 (BIA 2001)(Where a criminal court vacated the one-year prison sentence of an alien convicted of a theft offense and revised the sentence to 360 days of imprisonment, the alien does not have a conviction for an aggravated felony within the meaning of section 101(a)(43)(G) of the Immigration and Nationality Act.); *Matter of Martin*, 18 I. & N. Dec. 226 (BIA 1982)(Where the alien respondent was convicted of aggravated robbery and received a sentence to confinement totaling 12 years, but thereafter that sentence was voided and the respondent re-sentenced to three months' confinement, her sentence did not constitute a term of imprisonment of at least one year. Thus, she was no longer removable as an aggravated felon.

¹²*Lafarga v. INS*, 170 F.3d 1213, 1216 (9th Cir. 1999)(After an alien successfully completed her probationary sentence, the judge determined that the undesignated offense to which she had pled guilty should be designated as a misdemeanor, the maximum sentence for which was six months, rendering her eligible for voluntary departure.)

¹³*Matter of Acosta*, 27 I&N Dec. 420 (BIA 2018), *but see Planes v. Holder*, 652 F.3d 991, 994B97 (9th Cir. 2011) (addressing a situation where the alien's appeal was from the sentence imposed following his guilty plea, rather than from his conviction and finding the sentence final and binding.)

Because changes in sentencing and vacating convictions based on substantive or procedural defects do have ameliorative effects, practitioners should be aware of several statutes that could have ameliorative effects on criminal conviction.

Sentence Reductions

Cal. Penal Code §17(b)

Sentence reduction is a bit of a misnomer for 17(b) reductions which are really reclassifications from felony to misdemeanor. Many offenses in California are known as “wobbler” offenses which means that they can be charged as either felonies or misdemeanors.

Certain grounds of removability turn on the maximum possible sentence of an offense, as opposed to the actual sentence. For example, under 8 USC §237(a)(2)(A)(i).¹⁴

Cal. Penal Code §18.5

Effective January 1, 2017, California changed the maximum sentence for misdemeanor convictions to 364 days as opposed to one year in the county jail. Prior to that, many non-citizen clients suffered 365 day or one year sentences for misdemeanors such that their convictions could be classified as “aggravated felonies” for immigration purposes or would face a bar to eligibility for Cancellation or Removal for Certain Nonpermanent Residents¹⁵ or would be rendered subject to mandatory detention.¹⁶

Cal. Penal Code §18.5 has two sub-sections. Subsection (a) makes the 364-day maximum sentence retroactive such that the maximum *possible* sentence for convictions finalized even *before* the statute went into effect on January 1, 2015 is dropped to 364 days. This is important because certain grounds of removability are triggered based on the maximum *possible* sentence for an offense. However, the retroactive application of the statute was rejected by the BIA.¹⁷

Subsection (b) allows an individual who was sentenced to one year in the county jail *before January 1, 2015*, to seek a one-day sentence reduction pursuant to California Penal Code 18.5(b). Under current law, this reduction should be given full faith and credit under immigration law.

Rehabilitative Relief

Cal. Penal Code §1203.4

¹⁴Crimes of moral turpitude. Any alien who B

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.

¹⁵See *supra*, n.4.

¹⁶See *supra*, n.5.

¹⁷*Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018) holding that California misdemeanor convictions previously with one-year maximum sentences finalized before the change in the law remain as having one-year maximum sentences, rejecting retroactive application of the statute.

As discussed, *supra*,¹⁸ expungements under Cal. Penal Code ' 1203.4 have very limited value in terms of eliminating the immigration consequences of criminal convictions. One place where 1203.4 expungements have an ameliorative effect is in the Deferred Action for Childhood Arrivals (DACA) context. Expunged convictions cannot operate to bar someone from DACA eligibility. Expunged convictions can be considered and ultimately cause a denial, but they do not bar an applicant from consideration.¹⁹ Expungements may also constitute a positive equity or evidence in support of rehabilitation. For example, evidence that a conviction has been expunged will not eliminate a finding of removability based on that conviction but can be helpful if an individual is eligible for Cancellation of Removal for Certain Permanent Residents pursuant to INA ' 240A(a) in securing a favorable exercise of discretion.

Certificate of Rehabilitation

A court may issue a Certificate of Rehabilitation (COR) if it finds that the petitioner has demonstrated by his or her course of conduct his or her rehabilitation.²⁰ A COR is an order declaring that petitioner has been rehabilitated and recommending that the Governor grant a full pardon to the petitioner.²¹ A certificate of rehabilitation does not eliminate statutory immigration consequences but can help establish rehabilitation for purposes of a discretionary grant of status or relief from removal.

Presidential or Governor's Pardon

A Presidential or Governor's Pardon can fully eliminate immigration consequences under *certain* grounds of removability. Specifically, a pardon by the President or a Governor of a state can eliminate the immigration consequences of a conviction that is otherwise deemed to be crime involving moral turpitude, an aggravated felony, or high-speed border flight.²² Given that aggravated felony convictions, for example, trigger the most severe immigration consequences, this makes a gubernatorial pardon²³ a powerful tool in helping certain immigrants avoid deportation. However, there are numerous grounds of removability that a pardon will not waive, including controlled substances, certain firearm offenses, crimes of domestic violence, and national security and related grounds.²⁴

Vacatur

¹⁸See nn. 7 and 8, addressing first-offender simple possession of controlled substance convictions.

¹⁹DHS DACA FAQs found online at: www.uscis.gov/archive/frequently-asked-questions#criminal_convictions

²⁰ Cal. Penal Code §4852.13.

²¹ *Id.*

²² INA §237(a)(2)(A)(vi).

²³While presidential pardons have the same ameliorative effect as a governor's pardon, a governor's pardon as a practical matter, while a long and difficult process, is more obtainable with instructions for their pursuit found at www.gov.ca.gov/pardons/.

²⁴ INA §237(a)(2) *passim*.

Cal. Penal Code §1203.43

Another California law, effective January 1, 2016, allows a plea to be withdrawn where the defendant was granted post-plea deferred entry of judgment (DEOJ) (on or after January 1, 1997) and successfully completed DEOJ with a finding that the previous plea was invalid because it was based on the erroneous representation that the plea could no longer be used to deny the defendant any benefit. Such a representation was deemed by the California legislature to constitute misinformation since such a DEOJ disposition, even after withdrawal, can be treated as a conviction for immigration purposes and serve to deny immigration benefits to the defendant.

Under Cal. Penal Code ' 1203.43, the defendant can withdraw the plea and replace it with a plea of not guilty, after which the court will dismiss the charges against the defendant.²⁵

Cal. Penal Code §1018

This statute allows a plea to be withdrawn any time before judgment or within 6 months²⁶ of the grant of probation for “good cause” and substituted with a not guilty plea. This is a great statute in situations where you are still within 6 months of when the conviction became final and where you can show good cause. Failure to advise on immigration consequences or failure of a defendant to meaningfully understand those consequences can constitute good cause to withdraw the plea, with the added bonus of not having to fully litigate those issues.

Cal. Penal Code §1016.5

In California, state court judges are required to provide the immigration advisement found at Cal. Penal Code ' 1016.5 to defendants in *every* case. This advisement usually appears in the plea agreement which the defendant is asked to initial or is provided orally during the plea colloquy. A defendant that was not issued such an advisement can file a 1016.5 motion seeking to withdraw a plea as defective because it was entered absent the required advisement.

Cal. Penal Code §1473.7

All immigration practitioners working with clients impacted by the criminal legal system in California *must* familiarize themselves with this new law. Under 1473.7, an individual may vacate *conviction* or *sentence* if they can show that the conviction or sentence is invalid due to *Ap*rejudicial error damaging the moving party’s ability to meaningfully understand, defend against,

²⁵ Be aware of efforts to undermine the applicability of a 1203.43 *vacatur* for immigration purposes. See, “BIA Solicits Amicus Briefs on Validity of a Conviction for Immigration Purposes” (June 27, 2018), AILA Doc. No. 18062731 (BIA seeking briefing on ' 1203.43); *Matter of Michael Vernon Thomas and Matter of Joseph Lloyd Thompson*, 27 I&N Dec. 556 (AG 2019) (Attorney general seeking briefing on Georgia *vacatur* judgments).

²⁶ See *People v. Williams*, 199 Cal.App.4th 1285 (2011).

or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.²⁷

§1473.7 is for individuals who are no longer in criminal custody. This is significant because in the past, the only way to bring an immigration related ineffective assistance of counsel (IAC) claim (*i.e.*, for failure to provide immigration advice) was to file a habeas corpus petition in state court. However, California law divests state courts from habeas jurisdiction in cases where an individual is no longer in active or constructive criminal custody. As such, if IAC was discovered after an individual served their sentence and/or completed probation on an offense, an individual would be jurisdictionally barred from challenging a constitutionally infirm conviction by way of a habeas petition.

Enter, §1473.7, which includes ineffective assistance of counsel claims but, fortunately, is not limited to them. So even where there was no failure to advise regarding immigration consequences, an exploration with your client regarding the criminal legal process and a review of documents in the criminal file may reveal other circumstances that may have damaged your client's ability to meaningfully understand or defend against immigration consequences; a mistake of fact, the absence of adequate translation services, an undiscovered mental health issue, or other relevant circumstance.

§1473.7 does have a timeliness provision that states that a motion to vacate may be deemed "untimely" if it was not filed with reasonable diligence after either (1) the moving party receives a Notice to Appear or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or denial of an immigration benefit or (2) the moving party receives notice that a final removal order has been issued against the moving party, based on the existence of the conviction or sentence that the moving party seeks to vacate B whichever comes later.²⁸ Finally, §1473.7 also provides a vehicle for individuals to vacate convictions or sentences based on newly discovered evidence.²⁹

Litigation Issues Regarding Cal. Penal Code §1473.7

California appellate decisions have grappled with elements for relief under Penal Code §1473.7. These elements include: (1) alternative claims for relief that you may present; (2) what additional burden you must carry in asserting ineffective assistance of counsel; (3) authority for you to cite on a motion attacking a conviction or sentence entered prior to the January 1, 2017, effective date of §1473.7; (4) why you should not file a §1473.7 motion until criminal custody is over; (5) positions for you to take, outside the context of active custody, when prosecutors claim prematurity; and (6) why you should not file a habeas petition as an alternative vehicle before custody expires.

²⁷Cal. Penal Code §1473.7(a)(1).

²⁸Cal. Penal Code §1473.7(b)(2).

²⁹Cal. Penal Code §1473.7(a)(2).

Practice Pointer

To improve your odds of success on a §1473.7 motion:

- Interview your client, get your client’s records, review trial counsel’s file, dialogue with trial counsel if possible, obtain all transcripts as well as a complete court file, and do FOIA’s on relevant agencies.
- Talk to others in your legal community to identify whether a specific Deputy District Attorney appears on section 1473.7 motions in the county in which your client suffered conviction.
- Build leverage by writing a motion before you try to negotiate with a Deputy District Attorney.

A Motion Exclusive of Ineffective Assistance Claims Frees You from Notifying Counsel Under Subd. (G)

Your motion to vacate judgment or sentence should not allege “prejudicial error” as a product of trial counsel falling below a threshold of effective assistance unless your tactical approach includes informing trial counsel of the hearing date under subd. (g) of section 1473.7. Rather, allege prejudicial error exclusive of ineffective assistance of counsel (IAC) to avoid subd. (g).

Your client’s own mistakes, in conjunction with any omissions or affirmative miscues by trial counsel that do not rise to an ineffectiveness claim, may result in 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.³⁰

Claim prejudicial error exclusive of IAC by reference to A...the focus of the inquiry in a section 1473.7 motion is on the defendant's own error in ... not knowing that his plea would subject him to mandatory deportation and permanent exclusion from the [United States] and your client’s equivalency to the following fact pattern: AThe facts established by defendant’s declaration and testimony showed not only counsel error, but also included defendant’s own error in believing that a negotiated plea calling for no time in custody would avoid making him deportable, and in not knowing that his plea would subject him to mandatory deportation and permanent exclusion from the United States.³¹ Focus exclusively on your client’s own errors to circumstantially show a ranking of mitigation of immigration consequences higher than mitigation of traditional penal consequences.³²

Breaking News on Depublication of an Appellate Decision Improves Odds on a Motion

³⁰*People v. Camacho*, 32 Cal.App.5th 998 (2019); *People v. Mejia*, 36 Cal.App.5th 859 (2019).

³¹*People v. Camacho*, *supra*, 32 Cal.App.5th at 1009.

³²*Id.*; *People v. Mejia*, *supra*, 36 Cal.App.5th at 871.

Exclusive Of IAC

Recognize the legal landscape changed by the California Supreme Court depublishing of an appellate opinion entitled *People v. Chen* in the context of denying a petition for review.³³

Keeping in mind that you cannot argue that the depublishing order becomes an opinion to the contrary of *Chen*, its depublishing conveys that trial courts may not want to rely on habeas jurisprudence from the United States Supreme Court on the reliability of a record devoid of A...contemporaneous evidence to substantiate a defendant's expressed preferences.³⁴

Why Compliance with Subd. (G) May Improve Odds of Prevailing on a §1473.7 Motion

Improve your leverage on a IAC-based motion under subd. (a)(1) by subpoenaing trial counsel and serving an affidavit about relevance of testimony and questions you will ask on direct examination, which is more than what's required to comply with subd. (g) of §1473.7.

Previous dialogue or correspondence between trial counsel and yourself as successor counsel may calm trial counsel and avoid hostility at any forthcoming hearing that you handle. There is value in examination of trial counsel on a defendant's ranking of mitigation of immigration consequences versus traditional penal consequences. To the extent that trial counsel becomes hostile on the stand after being subpoenaed by you as successor counsel, you may wish to move the trial court for permission to treat trial counsel as a hostile witness in furtherance of impeachment. A trial court will not know that you as successor counsel complied with subd. (g) unless you make this assertion before the trial court or you file notice thereof with the trial court.

What You Should Do If Trial Counsel Declines to Appear After You've Subpoenaed Trial Counsel

As successor counsel at your client's 1473.7 hearing, you would gain an advantage in the context of trial counsel's non-appearance by arguing trial counsel's absence is an imputed concession of IAC-based "prejudicial error." You may alternatively move for a continuance on grounds of trial counsel's indispensability in furtherance of advancing the motion at hearing. A sanctions motion against trial counsel for non-compliance with subpoena is not a good idea.

Authority to Cite When Your Client's Conviction Was Entered Prior To January 1, 2017

As originally enacted, §1473.7 foreclosed Aa person imprisoned or restrained from establishing jurisdiction for relief. The statute now forecloses relief under subd. (a)(1) to anyone in custody.³⁵

³³Oct. 9, 2019 CA Supreme Court order depublishing *People v. Chen*, 36 Cal.App.5th 1052 (2019).

³⁴*Lee v. United States*, 137 S. Ct. 1958, 1967 (2017).

³⁵*People v. Perez*, 19 Cal.App.5th 818 (2018).

Overcoming Any Prematurity Claim Other Than Allegation of Your Client's Custody Status

You should always object to a prematurity finding precluding jurisdiction except in the single context of a defendant who is still in “custody” and who files a §1473.7 motion prematurely. Your objection should be based on relevance with regard to findings of neither suffering receipt of a notice to appear before the Immigration Court nor suffering a final order of removal.³⁶ Cite statutory amendments including subd. (e)(1) codifying caselaw, as follows: AFor a motion made pursuant to paragraph (1) of subdivision (a), the moving party shall also establish that the conviction or sentence being challenged is currently causing or has potential to cause removal or the denial of an application for an immigration benefit, lawful status, or naturalization.

Explain language, originally codified at subd. (e)(2) and now at subd. (e)(4), as being irreconcilable with denial for prematurity except in the context of custody not being expired. Keep in mind what subd. (e)(4) states, as follows, AWhen ruling on a motion under paragraph (1) of subdivision (a), the only finding that the court is required to make is whether the conviction 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 consequences of a plea of guilty or nolo contendere.³⁷

A trial court reviewing subd. (e)(4) should look to pre-amendment language of subd. (e)(2), as follows, AIn granting or denying the motion, the court shall specify the basis for its conclusions. Argue the term, “conclusions” is a statutory term of art stated in the plural to incorporate by reference from subd. (a)(1) deprivations undermining A...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.... Assert the amendment is thus consistent with [specification of] the basis for concluding whether asserted deprivations undermined a Ameaningful understand[ing], defen[se] against, or knowing accept[ance of] the actual or potential adverse immigration consequences of a plea of guilty.

Reasons Not to File A Habeas Petition Rather Than a §1473.7 Motion; How to Get There

Since a motion to vacate judgment is unavailable until a defendant's criminal custody expires, such a defendant can only petition for writ of habeas corpus. There is sometimes a vehicle to expedite closure of the “criminal custody” window by, for example, moving for early termination of probation. Drawbacks of a habeas petition include the frequent occurrence that trial courts do not convene a hearing unless a preponderance of evidence establishes a cognizable claim.

³⁶*People v. Morales* (2018) 25 Cal.App.5th 502, 510–11; Cahn, Amendments to California Penal Code §1473.7 (Sept. 2018), Timing and Diligence §1473.7(b), p. 3. The amendments to subsection (b) of 1473.7 codify the holding of *People v. Morales*, available at www.ilrc.org/sites/default/files/resources/ammends_ca_penal_code_1473.7-20180928.pdf [as of Oct. 14, 2019].

³⁷ Cal. Penal Code §1473.7 subd. (e)(4) (2019).

CONCLUSION

Non-citizens with criminal convictions can face the dire consequences of detention, ineligibility for relief from removal, and removal. Post-conviction relief to vacate a damaging conviction or to change the sentence may be available to ward off the dire outcomes of certain criminal convictions.