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California Post-Conviction Relief: Options For Noncitizens Convicted of Crimes

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Sentences Have Consequences

Assault with a deadly weapon

- A sentence of 365 days or more: Removable. Will render that conviction an aggravated felony as a crime of violence with a sentence of a year or more. Ineligible for Cancellation.
- Maximum potential sentence of a year or more: Potentially removable. Ineligible for for Cancellation of Removal for Certain Nonpermanent Residents; Potentially mandatory detention (If EWI's or paroled).

Vacating Convictions Expungements and Diversion Programs

RIP

- Cal. Penal Code § 1203.4
- Proposition 36
- Cal. Penal Code § 1000



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

- Statutes useful 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.
- Not effective for other convictions, like under the influence or paraphernalia



Vacating Convictions Based on Substantive or Procedural Defect Still Effective

- A conviction overturned for substantive or procedural defect is not considered a conviction for immigration purposes and cannot serve as the basis for removability. *Nath v. Gonzales*, 467 F.3d 1185, 1187–89 (9th Cir. 2006); *see also*, *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379–80 (BIA 2000)



Modifying a Sentence Effective to Ameliorate the Consequences

- Changes in a sentence: *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.)
- Changing its denomination from felony to a misdemeanor potentially do have an ameliorative immigration effect: *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.



Why The Difference Between Vacating A Conviction And Modifying A Conviction?

IIRAIRA and the new definition of conviction at INA § 101(a)(48)

(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.



Effect of Appealing

- Conviction definition does not affect/address
- Appeals are not final convictions. *Matter of Acosta*, 27 I&N Dec. 420 (BIA 2018)
- *But see Planes v. Holder*, 652 F.3d 991, 994–97 (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.)



Will Sentence Modifications Remain Effective?

- *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018), a petty crime exception case
- INA § 237(a)(2)(A)(i)(II) (Petty Offense Exception): Exception Clause (i)(I) shall not apply to an alien who committed only one crime if—
 - (II) the maximum penalty possible for the crime of which the alien **was convicted** (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) **did not exceed** imprisonment for one year and, if the alien **was convicted** of such crime, the alien **was not sentenced** to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).



What Does This Mean? (1)

- Whether an alien has been convicted of a crime involving moral turpitude for which a sentence of 1 year or longer "may be imposed" calls for a backward-looking inquiry into the maximum possible sentence the alien could have received for his offense at the time of his conviction. We therefore hold that the amendment to section 18.5 of the California Penal Code, which retroactively lowered the maximum possible sentence that could have been imposed for an alien's State offense from 365 days to 364 days, does not affect the applicability of section 237(a)(2)(A)(i)(II) of the Act to a past conviction for a crime involving moral turpitude "for which a sentence of one year or longer may be imposed."



What Does This Mean? (2)

- Is the ineffective retroactivity because of the retroactive statute? or
- Because of the nature of the sentence at the time of sentencing?



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Why Do I Need To Understand PCR Options?

- Sometimes, the only relief a person has against removal is to modify or vacate a particular conviction or sentence.
- Where Post-Conviction Relief (PCR) cannot fully eliminate an immigration consequence such as being removable, it can at least make an individual eligible for relief, or at a minimum, increase the likelihood of a discretionary grant.



Duty to Be Aware Of PCR

- Since PCR can be a powerful and direct legal remedy and state law provides so many PCR options, CA immigration lawyers should know at least enough to identify the need for PCR & to advise clients of the same.
- The more you understand, the more effectively you can defend clients impacted by the criminal legal system.



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REHABILITATIVE RELIEF

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Cal. Penal Code 1203.4

- Commonly referred to as the “expungement statute”.
- Limited value in terms of eliminating immigration consequences.
- But for the *Lujan/Nunez* exception, an expunged conviction cannot eliminate triggering a statutory ground of removability or ineligibility for statutory relief.



Certificate of Rehabilitation

- A court may issue a Certificate of Rehabilitation if it finds that the petitioner has demonstrated rehabilitation. CPC 4852.13.
- The COR is an order declaring rehabilitation but also recommending a pardon by the Governor.
- COR does not eliminate statutory immigration consequences but helps establish rehabilitation.



Gubernatorial Pardon

- Rehabilitative relief but *CAN* eliminate certain grounds of removability.
- For example: Can eliminate CIMT or Agg Fel grounds of removability. But cannot eliminate C/S grounds, Firearms, or DV.
- Even where it cannot eliminate statutory grounds, it can help tremendously on discretion.



Example

LPR convicted of HSC 11378 (for selling meth).
DHS charges her as deportable under INA
237(a)(2)(A)(iii) as defined in INA 101(a)(43)(B)
(agg fel illicit drug trafficking) and under INA
237(a)(2)(B)(i) (controlled substance ground).

If a pardon is granted, Respondent still deportable
under the controlled substance ground b/c now
waived by the pardon.



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SENTENCE REDUCTIONS

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Cal. Penal Code 17(b)

- Use this statute to reclassify a felony conviction as a misdemeanor.
- Once a misdemeanor, the maximum possible sentence for the conviction will no longer be one year or more, which may eliminate certain grounds of removability.



Cal. Penal Code 18.5

18.5(a): Makes maximum *possible* sentence for a misdo 364 (not 365) and CA says this should apply retroactively even to sentences finalized after statute went into effect. But See *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018).

18.5(b): Allows individual sentenced to 1 year county jail before 18.5(a) went into effect to petition for 1-day sentence reduction. *But See Matter of Thomas and Thompson*, 27 I&N Dec. 674 (A.G. 2019).



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Cal. Penal Code 1203.43

- Allows a plea to be withdrawn where defendant granted post-plea DEOJ with a finding that the previous plea was invalid.
- Under DEOJ, a plea is “withdrawn” for state law purposes but remains a “conviction” for immigration purposes; unless 1203.43 relief.



Cal. Penal Code 1016.5

- State judges in California must give a specific immigration advisal under California Penal Code 1016.5.
- If the defendant was not adequately provided this advisal, you can challenge the legality of the plea by filing a motion to vacate pursuant to CPC 1016.5.



Cal. Penal Code 1018

- Allows plea to be withdrawn any time before judgment or w/in 6 months of probation grant *for good cause* & replaced with not guilty plea.
- Articulate good cause in a way that demonstrates a substantive or procedural defect in the plea.
- Ex: Failure to advise re imm consequences



Cal. Penal Code 1473.7

- For individuals no longer in actual or constructive criminal custody
- Who can show prejudicial error damaging their ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere

Cal. Penal Code 1473.7

- Be aware of 1473.7's timeliness provision.
- Motion to Vacate may be deemed untimely if not filed with reasonable diligence after either
- 1) receipt of NTA asserting conviction/sentence as basis for removal or 2) notice of final removal order based on conviction/sentence

No Prematurity Denials Once Custody Expires

- Subd. (e)(4) limits JX to prejudicial error finding.
- Cahn, Amendments to California Penal Code 1473.7 (Sept. 2018): “The amendments to subsection (b) of 1473.7 codify the holding of *People v. Morales*,” 25 Cal.App.5th 502 (2018).
- *Under Morales*, neither a notice to appear nor a final order are elements for a PC 1473.7 motion



PC 1473.7 subd.(a)(1) ideas

- Alternative non-IAC-based claims:
 - Deferred Entry of Judgment or Prop 36 (PC 1210.1) compliance = subd. (e)(2) of PC 1473.7 presumption
 - Rely on client's own error: "A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel." Subd. (a)(1)
- Assert IAC-based claim



Subd. (e)(2) presumption

- “presumption of legal invalidity [applies when a] moving party pleaded guilty or nolo contendere [and complied with] ... specific requirements [entailing] the arrest and conviction shall be deemed never to have occurred ... and where the disposition under the statute has been, or potentially could be, used as a basis for adverse immigration consequences.



Client's Own Error=No IAC Claim

- *People v. Camacho*, 32 Cal.App.5th 998 (2019)

“not only counsel error, but also ... 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 mandatory deportation and permanent exclusion from...” the U.S. resulted.

- *People v. Mejia*, 36 Cal.App.5th 859 (2019).

Client's own error sufficient if he reasonably believed himself to have mitigated immigration consequences.



IAC Claim Triggers Subd. (g)

- Tell court how trial counsel learned of hearing
- Subpoena is optional means of doing
- Affidavit in support of subpoena is great way to tell trial counsel @ proposed direct examination
- Refresh recollection: file & documented dialogue
- Confront trial counsel @ CEB non-compliance



PC 1473.7 or 1018 Motion

- PC 1473.7(a) bars motion until “A person [] is no longer in criminal custody”
- Before custody expires, a motion to withdraw plea under PC 1018 can be filed either within six months of conditional sentence on grant of probation imposition of sentence suspended (or otherwise prior to sentencing under *People v. Williams*, 199 Cal.App.4th 1285 (2011).)



Terminate Probation Early

- A successful motion to terminate probation early will establish PC 1473.7 JX b/c no custody
- Concede in motion itself or at oral argument that establishing PC 1473.7 JX is goal of motion
- Explain rationale in motion itself or at oral argument that alternative of petitioning for writ of habeas corpus usually forecloses hearing



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Questions? Comments?

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