CLEAN SLATE FOR IMMIGRANTS:

Reducing Felonies to Misdemeanors: Penal Code § 18.5, Prop 47, Penal Code § 17(b)(3), and Prop 64

By Rose Cahn

For noncitizens, reducing felony convictions to misdemeanor convictions can be a powerful way to eliminate certain grounds of deportability, or open up eligibility for immigration status or immigration benefits. There are three primary mechanisms to reduce a felony to a misdemeanor: Penal Code § 17(b), Prop 47, and Prop 64.

A reduction to a misdemeanor has the effect of lowering the maximum possible sentence for the conviction to 364 days. This can provide several immigration benefits, especially when it comes to crimes involving moral turpitude and some non-drug aggravated felonies. Note that, while reducing a felony to a misdemeanor might be very helpful for an offense that involves, e.g., theft or violence, it generally does not help avoid the immigration consequences of a controlled substance offense. The main reason to reduce drug possession conviction from felony to a misdemeanor would be to qualify for DACA or potential future DACA legislation.

Immigration authorities will accept as valid a criminal court order that changes a felony to a misdemeanor, or vacates or modifies an imposed sentence, regardless of the reason given for the sentence reduction. This is true even if the sentence reduction was sought solely for immigration purposes.[a] Contrast this with motions to vacate which must be based, at least in part, on a ground of legal invalidity. *See Matter of Pickering,* 23 I&N Dec. 621 (BIA 2003).

The following sections will discuss the immigration benefits of reducing a sentence, the different vehicles available to reduce felonies to misdemeanors in California, and how to secure a reduction.

[a] See *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005) (distinguishing sentencing changes from vacaturs of convictions which must contain a ground of legal invalidity to be valid for immigration purposes); *Matter of Song* 23 I&N Dec. 173 (BIA 2001) (holding that the newest sentence on the reduction of a sentence determines the immigration consequences); *Matter of Martin*, 18 I&N Dec. 226 (BIA 1982) (same).

California Felonies, Misdemeanors, and "Wobblers"

Under California law, a felony has a potential sentence of more than one year. The statute setting out the offense will say something like "felony" or punishable by more than a year, or Penal Code § 1170(h).

A California misdemeanor can have any of three maximum possible sentences. If the statute says 90 days, 90 days. If the statute says 365, it's actually a sentence of 364 days per 18.5. If the statute doesn't say anything, the misdemeanor likely has a maximum possible sentence of six months.

Certain California offenses are designated as alternative felony/misdemeanors, often called "wobblers." An offense is a wobbler if the judge is given discretion to impose either (a) a sentence of state prison or more than a year in jail pursuant to § 1170(h), or (b) no more than a year in jail or a fine, or both. If the offense is a wobbler, a person who originally was convicted of a felony can later ask the criminal court to reduce the offense to a wobbler as matter of discretion, as long as the person was not sentenced to a term including parole (this means that most people sentenced to prison cannot reduce their offense under Penal Code 17(b), though may be eligible under Prop 47). If the wobbler is reduced to a misdemeanor, it has a potential maximum sentence of just 364 days. If a sentence of 365 days was originally imposed, however, the person should ask the court specifically to reduce that sentence by one day.

I. Penal Code § 18.5

A. Penal Code § 18.5 Changes the Sentence of a Misdemeanor

Through a series of legislative changes enacted in 2015 and 2017, the California State legislature modified the maximum possible sentence on misdemeanor offenses and created a mechanism for reducing an imposed sentence of 365 days to 364. The full text of § 18.5 is:

> (a) Every offense which is prescribed by any law of the state to be punishable by imprisonment in a county jail up to or not exceeding one year shall be punishable by imprisonment in a county jail for a period not to exceed 364 days. This section shall apply retroactively, whether or not the case was final as of January 1, 2015.
>
> (b) A person who was sentenced to a term of one year in county jail prior to January 1, 2015, may submit an application before the trial court that entered the judgment of conviction in the case to have the term of the sentence modified to the maximum term specified in subdivision (a).

Although many California code sections—including one-year misdemeanors and wobblers—may continue to state that the penalty for the misdemeanor is "up to one year," under Penal Code § 18.5, such misdemeanors will actually carry a penalty of up to 364 days.

The California State Legislature created Penal Code § 18.5 specifically to help immigrants avoid the disastrous immigration consequences that can attach to even misdemeanor convictions. *See* Sen. Rules Com., Off. of Sen. Floor Analyses, Bill No. SB1310, p.3.; Sen Com. on Public Safety Analysis, SB 1310, p. 5. "This small change will ensure, consistent with federal law and intent, legal residents are not deported from the state and torn away from their families for minor crimes." Assem. Com. on Public Safety, Analysis on SB 1310, p. 2.

B. Mechanics of § 18.5 (a) and (b)

Under subsection (a) of 18.5, all California misdemeanors that previously had a potential sentence of 365 days now have a maximum potential sentence of 364 days. This change applies retroactively to all past misdemeanor convictions. The change also applies automatically, by operation of law, to any felony that is reduced to a misdemeanor. The person does not need to submit any application to the criminal court to change the maximum possible sentence for a past misdemeanor conviction.

The new 364-day maximum sentence for felonies reduced to misdemeanors is written explicitly into Judicial Council's CR-180 and CR-181 forms, used for, among other things, § 17(b) reductions. Again, although a current code section might state that a particular misdemeanor has a maximum possible sentence of 365 days, under § 18.5 that is held to mean that it has a maximum possible sentence of 364 days.

> ***Note about proving reduction*:** To take advantage of the full immigration benefit of a felony reduction, it is helpful for the order granting the reduction to state that, pursuant to Penal Code § 18.5, the new misdemeanor carries a maximum possible sentence of 364 days.

Under subsection (b) of 18.5, people who have a misdemeanor conviction and received an actual sentence imposed of 365 days in jail must petition the court to reduce the sentence by one day. Remember that a misdemeanor conviction may be a crime that was originally punished as a misdemeanor; a wobbler offense that was originally designated as a felony and later reduced to a misdemeanor under 17(b); or an offense reduced to a misdemeanor under Prop 47 or Prop 64, See Appendix A for a sample 18.5 petition. (Compare this to the change in potential sentence under § 18.5(a), which is automatic and requires no court application.) When petitioning for an 18.5(b) reduction to an imposed sentence, it is a good idea to include examples of your client's rehabilitation or other equitable reasons for the court to grant the one-day reduction.

How to Get 18.5(b) relief. If you need to reduce a 365-day sentence by one day using Penal Code § 18.5, you must file a petition with the court. See Appendix A for a sample petition. There is disagreement as to whether the one-day reduction is mandatory or discretionary. The sample in Appendix A treats it as mandatory. Nevertheless, it is a good idea to provide the court with documents that attest to the defendant's ties to the community, the importance of the one-day reduction to the defendant, any other evidence that might help convince a judge to rule favorably. You should append to your petition any criminal court documents from the original conviction that show the sentence imposed. You should file the motion with the criminal court clerk, and it will be placed on the motions calendar typically in 2-4 weeks. It is a good idea to prepare a sample order for the court to sign that indicates that the conviction has been resentenced to a term of 364 days pursuant to Penal Code § 18.5. This will help the immigration courts clearly understand that there has been a one-day sentence reduction.

C. Immigration Benefits of Penal Code § 18.5

Immigration authorities must give effect to state court orders reducing the level of an offense, even if the reduction occurs after deportation or removal proceedings have been initiated. *See Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003), *overruled on other grounds in Ceron v. Holder*, 747 F.3d 773, 778 (9th Cir. 2014). An imposed and/or a potential sentence of 364 rather than 365 days can help immigrants in a number of different contexts.

Moral Turpitude: Deportable. A noncitizen is deportable for a single conviction of a crime involving moral turpitude committed within five years of the first admission, if the offense has a maximum possible sentence of one year or more.[b] "Crime involving moral turpitude" (CIMT) is a term of art under immigration law that refers to certain offenses with a "bad intent." The most common examples of CIMTs are:

- Theft with intent to deprive the owner permanently, but not temporarily. Theft under PC § 484 is a CIMT, but a conviction for vehicle taking under Veh C § 10851 is not, because it includes a temporary taking.
- Any kind of fraud.
- Assault, battery or other offense if the statute requires intent to cause great physical injury, or certain other serious factors. It does not include simple battery, or even battery of a spouse (Cal. Pen. C. § 243(e)) where the minimum conduct to commit the crime includes a mere offensive touching.
- Certain serious offenses that involve lewd or reckless intent.

For more information as to which California offenses might be held CIMTs, see the ILRC California Quick Reference Chart *at* www.ilrc.org/chart.

Under Penal Code § 18.5, a single California misdemeanor conviction of a CIMT will not trigger this deportation ground even if it is committed within the first five years after admission, because it will have a maximum possible sentence of only 364 days.

Moral Turpitude: Bar to Non-LPR Cancellation. Some undocumented people who have lived in the United States for ten years and meet other requirements can apply to "cancel" their deportation and get a green card. This is referred to as "cancellation of removal for non-permanent residents."[c] A conviction of a single CIMT is a bar to this relief if the offense has a maximum possible sentence of a year or more, or if a sentence of more than six months was imposed.[d] Under Penal Code § 18.5, a single California misdemeanor conviction never will bar this relief because it will have a maximum possible sentence of 364 days (or less).

Moral Turpitude: Petty offense exception. A single conviction of a CIMT is a ground of inadmissibility—i.e., it can bar someone from "adjusting status" and getting a green card from a family member. The "petty offense exception" applies when the noncitizen has committed just one moral turpitude offense for which the maximum possible penalty is 365 days or less and the actual sentence imposed is 6 months or less. When an immigrant qualifies for the petty offense exception, no waiver or other immigration relief is required, and the immigration authorities have no discretion to exclude the person from admission to the United States. A California felony CIMT that is reduced to a misdemeanor meets the "one year or less" requirement for the petty offense exception.

Moral Turpitude: Mandatory detention. Mandatory detention in an immigration detention facility can be triggered by a by a single CIMT committed within five years of admission*, if* a sentence of a year or

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[b] INA § 237(a)(2)(A), 8 USC § 1227(a)(2)(A).
[c] INA 240A(b)(1), 8 USC 1229b(b)(1). For more information about cancellation for non-permanent residents, see the ILRC *Immigration Relief Toolkit*, www.ilrc.ort/chart.
[d] See *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010); *Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010), discussing INA 240A(b)(1), 8 USC § 1229b(b)(1). Immigration advocates contest the "less than one year" rule. For more information on non-LPR cancellation, see *Immigration Relief Toolkit*, www.ilrc.org/chart

more was imposed.[e] FN INA 236(c)(1)(C). Getting a misdemeanor resentenced to 364 days (or, if needed, reducing a felony to a misdemeanor and then reducing the sentence to 364 days) can eliminate the offense as a basis for mandatory detention—and also eliminate it as a ground of deportability.

Aggravated Felony. "Aggravated felony" is a term of art under immigration law encompassing over fifty different classes of convictions—many of which do not need to be either aggravated or felonies. Some, but not all, types of offenses become an aggravated felony only if a sentence of a year or more is imposed. This includes a federally defined crime of violence, theft, receipt of stolen property, forgery, etc.[f] Under Penal Code § 18.5(a), going forward California misdemeanors will not become aggravated felonies under these categories, because a sentence of a year cannot be legally imposed. Under § 18.5(b), if in the past 365 days was imposed on a misdemeanor conviction (or on a felony that now is reduced to a misdemeanor), the person can request a criminal court judge to reduce the sentence by one day, eliminating this ground of mandatory deportation.

***A note about subsequent federal prosecution for illegal reentry*:** The Ninth Circuit has held that the reduction of a felony to a misdemeanor after the person was deported did not eliminate the conviction as an aggravated felony crime of violence for purposes of increasing the sentencing range under the sentencing guidelines for the offense of illegal reentry. The court held that the relevant time for determining whether a conviction was a felony or not for the purpose of the sentence enhancement, was at the time of deportation. *United States v. Salazar-Mojica*, 634 F.3d 1070 (9th Cir. 2011). Advocates should distinguish cases involving sentencing enhancements from the well-established line of case law concerning grounds of removability. *See Mater of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005).

II. Penal Code § 17(b) Motions to Reduce

Under California law, some offenses can be punished either as a felony or a misdemeanor. These offenses often are called "wobblers." An offense is a wobbler if the judge is given discretion to impose either (a) a sentence of state prison or more than a year in jail pursuant to § 1170(h), or (b) no more than a year in jail or a fine, or both.

For state-prison felonies, the statutory language describing a wobbler offense will include the phrase stating that the crime is punishable "by imprisonment in the state prison or confinement in a county jail for not more than one year." For county-prison felonies, the statutory language describing a wobbler offense will include the phrase stating that the crime is punishable "by imprisonment in a county jail for not more than one year, or by imprisonment pursuant to subdivision (h) of Section 1170."

Many California offenses are wobblers. A few common examples are driving under the influence, battery with serious bodily injury, welfare fraud, grand theft, and receiving stolen property.

Common wobblers that could potentially be charged as aggravated felonies with a sentence of a year or more, but are not aggravated felonies with a sentence of less than a year[g]:

[e] INA 236(c)(1)(C).
[f] See INA § 101(a)(43), 8 USC § 1101(a)(43).
[g] Though some of these could be charged as aggravated felonies with a sentence of a year or more, there may nevertheless be strong immigration defenses against that charge. See www.ilrc.org/chart and *Defending Immigrants in the Ninth Circuit*, for crime-specific defenses against the allegation that an offense is an aggravated felony.

- PC 32, accessory after the fact
- PC 118, perjury
- PC 136.1(b)(1), witness disuassion
- PC 245(a), assault with a deadly weapon
- PC 243(c), battery on a police officer
- PC 243(d), battery causing serious bodily injury
- PC 273.5, spousal injury (even as a misdemeanor, will still be a deportable domestic violence offense, but won't be an aggravated felony)
- PC 422, criminal threats
- PC 470, forgery
- PC 496, receiving stolen property

If a person has a felony conviction for an offense that is a "wobbler," and was sentenced to a term that included probation, he or she might be able to petition the court to reduce the felony to a misdemeanor pursuant to Penal Code § 17(b)(3). The court cannot reduce a wobbler to a misdemeanor when a prison sentence has been imposed, and execution of suspended, before probation was granted. *People v. Wood*, 62 Cal.App.4th 1262, 1266. Put another way, if the sentence imposed included a term of prison and then parole, the individual will not be eligible for a Penal Code § 17(b) reduction but if a sentence included county jail followed by probation, an offense originally punished as a felony can be reduced.

In addition to the immigration benefits of Penal Code § 17(b) combined with 18.5, discussed above, reducing your felony to a misdemeanor has other benefits including:

- making the conviction look less serious on the criminal record;
- allowing an applicant to answer that the applicant has never been convicted of a felony on certain job, housing, and other applications; AND
- restoring some of the rights that may have been lost due to a felony conviction—such as the right to possess a gun and the right to serve on a jury.

Once a felony becomes a misdemeanor, it should be disclosed only as a misdemeanor conviction. However, for certain purposes, a 17(b) reduced-misdemeanor may still be counted as a felony. Those exceptions include:

- Three strikes
- Some federal gun statutes
- Certain state occupational licenses

How to get 17(b) relief. A felony to misdemeanor reduction under Penal Code § 17(b)(3) is always discretionary. Because granting the motion is discretionary, the court must be provided with positive reasons to grant. The court's discretion is to be exercised only after a consideration of the offense, the character of the offender, and the public interest. A showing, therefore, that a petitioner has fulfilled the conditions of probation for the entire period of probation has less bearing on whether a §17(b) motion should be granted. Rather, a 17(b) motion should include information regarding the facts and circumstances of the offense itself, the defendant's character and any resulting effect on society. See

Manual on Prop 47 and Other Post-Conviction Reiief for more details, https://www.ilrc.org/manual-prop-47-other-post-conviction-relief-immigrants.

The California Judicial Council provides a standardized form, Form CR-180, "Petition for Dismissal" (also used for reductions) for seeking a 17(b) reduction and/or expungement. Every criminal court throughout the state recognizes Form CR-180 as the proper method for pursuing a felony to misdemeanor reduction. Judicial Council forms are available online. See Judicial Council Forms, http://www.courts.ca.gov/documents/cr180.pdf; http://www.courts.ca.gov/documents/cr181.pdf.

III. Proposition 47

On November 4, 2014, California voters passed Proposition 47 ("Prop. 47") into law. The law impacts as many as 1 million Californians. Under Prop. 47, codified at Penal Code §1170.18, certain crimes previously categorized as felonies or wobblers have been re-categorized as misdemeanors. Prop. 47 applies to future charges, but also to past convictions. People who are currently serving sentences, and those who have already completed their sentences but would like to reduce past eligible felony convictions to misdemeanors, can benefit. After felonies are reduced they are considered misdemeanors for all purposes. Prop. 47 relief will not restore firearm privileges, and in fact anyone who gets Prop 47 relief is barred from legally owning or carrying a firearm. For this reason, if firearms owndership is important the person may wish to consider reducing the felony under Penal Code § 17(b)(3), instead,

Reducing a felony to a misdemeanor under Prop 47, when paired with Penal Code § 18.5, can bring all of the immigration benefits described in Part I(c). It also can restore access to certain professional licenses, some public benefits, and restore the right to serve on a jury.

A. Who Qualifies for Prop 47?

Prop. 47 can reduce seven kinds of felony offenses to misdemeanors.

1. **Grand Theft**, including auto theft ($950 or less) (Penal Code §§ 484, 487).
2. **Receipt of Stolen Property** ($950 or less) (Penal Code § 496(a)).
3. **Forgery of check, bank note, or other financial instrument** ($950 or less) (Penal Code §§ 470, 473).
4. **Check fraud/bad checks** ($950 or less, all checks added together)(Penal Code § 476a).
5. **Commercial burglary of a store during business hours** ($950 or less) (Penal Code §§ 459/460(b)). If the conduct was entering an open business with intent to steal, or actual theft of, goods the value of which does not exceed $950, then the felony commercial burglary can be changed to "shoplifting." Shoplifting is a newly created misdemeanor that has a six-month maximum possible sentence; see Penal Code § 459.5.
6. **Petty theft with a prior** (Penal Code § 666). Theft with a sentence enhancement for having prior theft convictions underwent a big change. The sentence enhancement (longer sentence) based on prior theft convictions cannot be imposed unless the person also was convicted of certain more serious prior offenses: either "super strikes" or offenses requiring registry as a sex offender. This is true even if the value of what was taken exceeded $950. Instead of Penal Code § 666, the offense will be classed as petty theft, a six-month misdemeanor, under Penal Code § 459.5. In other words, the minor theft will be treated as a misdemeanor, despite the fact that the person has been convicted of other thefts in the past.

7. **Simple possession of a controlled substance**, Health & Safety Code §§ 11350/11350(a), 11357/11357(a), 11377/11377(a). (Remember that reducing a drug offense to a misdemeanor has only limited immigration value.)

If the person's conviction was not for one of these seven offenses, he or she still might be able to reduce the felony to a misdemeanor under Penal Code §17(b)(3), above. This law has advantages and disadvantages when compared with Prop. 47. An advantage of Penal Code § 17(b) is that it includes additional offenses other than those mentioned above. See Part II for more on Penal Code §17(b)(3).

Felony convictions cannot be reclassified as misdemeanors under Prop. 47 if the petitioner has certain prior convictions. An individual seeking Prop. 47 relief should consult an attorney if she thinks she may be ineligible.

The priors that will bar Prop. 47 relief include:

- "Super strikes" or prior convictions for offenses listed in P.C. § 667(e)(2)(C)(iv) or any serious violent felony punishable by life in prison or death. (See Appendix D for Checklist of Prop. 47 "super strikes").
- Any prior sex offense requiring mandatory sex offender registration under P.C. 290(c), unless it was a juvenile adjudication. It is important to note that if a P.C. 290(c) conviction happens after or at the same time as the crime at issue it will not prevent a person from benefiting from Prop. 47.

Most public defender offices will provide Prop 47 services free of charge to low-income people with in-county convictions.

Note: People petitioning to reclassify (or get resentencing) on their Prop 47 conviction must file their petitions by November 4, 2022.

For further information about the mechanics of petitioning for reclassification or resentence of a Prop 47-eligible felony, see myprop47.org. If someone is currently serving custody on a Prop 47-eligible felony, then they will go through the *resentencing* rather than *reclassification* process.

B. Immigration Impact of Prop 47

The immigration impact of a controlled substance offense for the most part does not hinge on whether the state classifies the offense as a felony or a misdemeanor. (The exception would be the DACA program, or possibly if a DACA statute is passed.) However, for the theft-related Prop 47 offenses, a reduction to a misdemeanor could eliminate it as a CIMT ground of deportability or inadmissibility, bar to non-LPR cancellation, or potentially as an aggravated felony theft offense. See discussion of immigration benefits of 18.5, above.

Note: At least one court held that if a person is no longer in criminal custody, they can apply to reduce their felonies to misdemeanors under Prop 47, but cannot vacate the sentence imposed and impose the misdemeanor sentence of 364 days. *People v. Vasquez*, 247 Cal.App.4th 513 (2016). The Court refused to reduce the 16-month prison sentence and resentence the defendant to the misdemeanor maximum. Prop 47-eligible people with sentences of 365 days can petition for a one-day reduction under Penal Code § 18.5(b). But under *People v. Vasquez*, Prop 47-eligible people with sentences of

more than 365 days, may not be able to take advantage of the 364-maximum and may instead need to vacate their sentence using a different vehicle like, e.g., Penal Code § 1473.7.

WARNING: Prop. 47 May Not Solve All Immigration Problems. Reducing a felony to a misdemeanor can be helpful, but the immigrant still might be in danger from the conviction. Certain misdemeanor convictions cause very serious immigration problems. The "wrong" misdemeanor can block an undocumented person from getting lawful status or cause a permanent resident to become deportable. Make it clear to the noncitizen that he or she needs to get expert analysis of all convictions, whether misdemeanor, felony, or infraction.

IV. Prop 64

On November 8, 2016, California voters passed Proposition 64 ("Prop. 64") into law. Prop. 64 legalizes the possession, transport, purchase, consumption and sharing of up to one ounce of marijuana and up to eight grams of marijuana concentrates (hashish) for adults aged 21 and older. Adults may also grow up to six plants at home. The ballot measure also provides for a strict system to regulate and tax the nonmedical use of marijuana, which begin in 2018. Prop. 64 also reduces or eliminates criminal penalties for most marijuana offenses, in addition to the conduct it legalizes. Building on the work of Prop. 47, Prop. 64 provides a mechanism for people with prior qualifying marijuana convictions to petition a court to have their convictions reduced or vacated.

WARNING: While Prop 64 creates many legal benefits, only some are helpful with immigration status. It is an enormous benefit that fewer people will be convicted of minor marijuana offenses in the future. However, the post-conviction relief for prior convictions that is provided by Prop. 64 may or may not assist with immigration issues. In addition, an unwary immigrant who simply admits to an immigration officer that he or she possessed marijuana in accordance with California law, might become inadmissible!

A. What Prop 64 Does

Prop. 64 amended the penalties for four criminal offenses:

- ✓ Possession of marijuana or concentrated marijuana (H&S Code § 11357)
- ✓ Cultivation of marijuana (H&S Code § 11358)
- ✓ Possession with intent to sell marijuana (H&S Code § 11359)
- ✓ Sale or transportation of marijuana (H&S Code § 11360)

Prop 64 has a different effect on different offenses. Some felonies and misdemeanors were re-designated as misdemeanors or infractions, and some conduct was entirely legalized. The new penalty (i.e. misdemeanor, infraction, or dismissal) attached to each offense will depend on the specific offense. For example, some conduct became outright legal (such as possession of up to 28.5 grams of marijuana or up to 8 grams of concentrated marijuana) and a prior offense qualifies for total dismissal or vacatur, while some offenses were reduced to misdemeanors (such as sales of marijuana). See *Prop 64: A Guide to Resentencing*, https://www.drugpolicy.org/sites/default/files/prop64-resentencing-guideoctober2017_0.pdf for more information about the resentencing or reclassification process.

While, going forward, these offenses may not be prosecuted, any person with a prior conviction for one of the four offenses listed above may apply for reclassification or vacatur.

People who might be eligible can consult with their public defender office or pro se forms are available by judicial council. See CR-400 and CR-401. See county-specific forms available here, http://www.drugpolicy.org/prop-64-county-information.

B. How does Prop 64 help immigrants?

Most obviously, decriminalizing minor marijuana offenses for people 21 and older will prevent noncitizens in this age group from suffering severe immigration consequences based on the conviction-based immigration grounds. Other than possession of 30 grams or less of marijuana, conviction under any marijuana-related statute (e.g., cultivation, sale, or possession), creates a ground of deportability and a ground of inadmissibility. Some, like cultivation or sale, were even aggravated felonies. Now, because of Prop. 64 some noncitizens will avoid becoming deportable or inadmissible for having engaged in marijuana offenses.

By decriminalizing conduct such as cultivation of a small amount of marijuana for personal use for adults 21 and older, Prop. 64 eliminates this offense as an aggravated felony and protects all noncitizens from the immigration consequences of such a conviction.

By making this conduct an infraction for persons age 18 to 20, Prop. 64 may or may not protect this age group from deportation. There remains the possibility that the infraction could be held an "aggravated felony."

Infractions: Prop 64 turns some offenses into "infractions." It is an open question as to whether a California infraction should be considered a "conviction" for the purposes of triggering a conviction-based ground of removability. While there are no published cases and there is a strong argument against this, advocates report incidents where DHS or U.S. consulates have treated a California infraction as a "conviction" for immigration purposes, and there are unpublished Ninth Circuit cases that have followed suit.

Change of sentence. Pursuant to Cal. Health & Safety Code Section 11361.8, subdivisions (b), (c), added by Prop. 64, a person who is convicted and serving a sentence that would have been guilty of a lesser offense under Prop. 64 can apply to lower the sentence. Generally, immigration authorities give effect to a state action that changes a sentence even if the change is not based on legal invalidity, and they should in this instance. However, when it comes to controlled substance offenses, the immigration penalties generally flow from the conviction itself and not from the length of sentence. Here, because the conviction would stand and only the sentence would be reduced or eliminated, the sentence reduction has little effect on the immigration penalties.

Vacaturs. Pursuant to Cal. Health & Safety Code Section 11361.8, subdivisions (e)-(h), as added by Prop. 64, a person who has completed her sentence can file an application "to have the conviction dismissed and sealed because the prior conviction is now legally invalid" in accordance with the various new offense sections.

Federal immigration law does not give effect to all types of state post-conviction relief. In general, the federal rule is that state "rehabilitative" relief to eliminate a conviction will not be given effect in immigration proceedings. Immigration authorities will give effect to a vacation of judgment based on "a procedural or substantive defect in the underlying criminal proceedings," such as a ground of legal

invalidity such as a constitutional error or other problem. *See Matter of Pickering,* 23 I&N Dec. 621 (BIA 2003).

Prop. 64 specifically provides that an applicant may ask a judge to dismiss and seal a qualifying prior conviction as being "legally invalid." Arguably immigration authorities must accept the judge's order vacating the conviction for legal invalidity. Immigration judges routinely respect criminal court orders vacating convictions on general grounds of "legal invalidity." It is possible, however, that despite the explicit language of Prop. 64, immigration authorities may refuse to honor the court order on the premise that the ground of legal invalidity was not in existence at the time the conviction first arose or that the statute does not identify any specific legal defect. To further support their case, when requesting relief under Prop 64's vacatur provisions, Health & Safety Code § 11361.8(e)- (h), immigrant advocates may decide to ask the criminal court to include additional grounds of legal invalidity in the judgment or use another vehicle, like Penal Code § 1473.7, to present a Prop 64 claim for vacatur.

For more information about how Prop 64 can benefit immigrants, read the ILRC report available here https://www.ilrc.org/immigration-impact-analysis-adult-use-marijuana-act.

C. Prop 64 related pitfalls: Admitting Conduct to Immigration and Border Officials

Under Prop 64, California law provides that any person age 21 or over can legally possess and use marijuana. California also permits medical use of marijuana. Because of this, immigrants in California may think that using marijuana will not hurt their immigration status. Unfortunately, that's wrong! It is still a federal offense to possess marijuana, and federal law controls for immigration.

If a noncitizen admits to an immigration official that he or she has ever used marijuana, the person can face very serious immigration problems, even if the person never was convicted of a crime, just used marijuana at home, and it was legal under state law. The person can face serious problems if he or she applies for a green card, applies for U.S. citizenship, travels outside the United States, or ICE just questions them on the street.

Some immigration officers are asking noncitizens if they have ever used marijuana–especially in states that have legalized marijuana and are using the answers to that question as a basis to deny naturalization or other immigration benefits, or even to charge a ground of removability.

What to do: Legal Self-Defense for Noncitizens

- Don't use marijuana until you are a U.S. citizen. Don't work in the marijuana industry.
- If you have a real medical need and there is no good substitute for medical marijuana, get legal counsel.
- Never leave the house carrying marijuana, a medical marijuana card, paraphernalia (like a pipe), or accessories like marijuana T-shirts or stickers.
- Don't have photos or text about you and marijuana on your phone, Facebook, or anywhere else.
- ***Never discuss any conduct relating to marijuana with any immigration or border official***, unless you have expert legal advice that this is OK. If a federal official asks you about marijuana, say that you don't want to talk to them and you want to speak to a lawyer. You have the right to remain silent. Stay strong – once you admit it, you can't take it back. If you did admit this to a federal officer, get legal help quickly.

For further discussion of marijuana issues, see ILRC Practice Advisory*, Marijuana and Immigrants* at https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana.

Appendix A
Sample Penal Code § 18.5(b) Petition[8]

TO THE HONORABLE JUDGE OF THE ABOVE-ENTITLED COURT AND TO THE DISTRICT ATTORNEY OF FRESNO COUNTY:

PLEASE TAKE NOTICE that on date, time, and department described above, or as soon thereafter as counsel may be heard, defendant will move for an order reducing his sentence to 364 days in each case.

The motion will be made on the grounds that the statutory maximum for the offenses is 364 days.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

On October 8, 2002, the defendant pled no contest to felony violations of Penal Code sections 273.5 and 422. On November 5, 2002, , the court sentenced him to 365 days in custody.

On December 19, 2008, the court reduced both offenses to misdemeanors. On that same date, the court denied the defendant's request to reduce the length of the sentences in each case by one day, to 364 days.

His immigration attorney, [redacted], informed me of the following:

Mr. [redacted] has four children. They are United States citizens. He has physical custody of the children. He entered the United States legally as a Cambodian refugee. The United States government granted him lawful permanent residency. He served in the United States military. If his sentence is changed to 364 days on each count, the immigration court will have discretion not to deport him. Otherwise, deportation is mandatory.

[8] Many thanks to Douglas Feinberg from the Fresno County Public Defender for the model motion.

ARGUMENT

PENAL CODE SECTION 18.5 REQUIRES THAT THE SENTENCES BE REDUCED BY ONE DAY.

> a) Every offense which is prescribed by any law of the state to be punishable by imprisonment in a county jail up to or not exceeding one year shall be punishable by imprisonment in a county jail for a period not to exceed 364 days. This section shall apply retroactively, whether or not the case was final as of January 1, 2015.
>
> (b) A person who was sentenced to a term of one year in county jail prior to January 1, 2015, may submit an application before the trial court that entered the judgment of conviction in the case to have the term of the sentence modified to the maximum term specified in subdivision (a).

(Pen. Code, § 18.5.)

The requirement for the court to modify the sentence to 364 days is mandatory. Subdivision (a) provides that section 18.5 "shall apply retroactively." "'[S]hall' is ordinarily construed as mandatory." (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443.) Although subdivision (b) contains the word "may," that refers to the petitioner being able to file the petition rather than conferring any discretion upon the court. In issuing its order under subdivision (b), the court merely issues an order specifying that subdivision (a) is correct.

The defendant's sentences have been reduced to misdemeanors. As a result of subdivision (a), the maximum punishment is 364 days for each offense. As a result of subdivision (b), the court is authorized to reduce the sentences in case such as this, where the defendant has already been sentenced to a year.

CONCLUSION

The defendant meets the requirements for having his sentence reduced. Accordingly, he asks for the reduction of each sentence by one day.