

# Helping Immigrant Clients with Post-Conviction Legal Options

**A GUIDE FOR LEGAL SERVICES PROVIDERS**

by Rose Cahn



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## ACKNOWLEDGEMENTS

Californians for Safety and Justice would like to thank Rose Cahn, Criminal and Immigrant Justice Attorney at the Immigrant Legal Resource Center ([ilrc.org](http://ilrc.org)) for producing this guide. Her knowledge and decades of experience—and that of her organization (read more below)—allow criminal defense attorneys, re-entry-service providers, and immigration advocates who assist noncitizens to better serve their clients with this important, timely information.



### About Californians for Safety and Justice

Californians for Safety and Justice is a nonprofit project of the Tides Center working to replace prison and justice system waste with common sense solutions that create safe neighborhoods and save public dollars. As part of that work, our Local Safety Solutions Project supports innovative efforts by counties to increase safety and reduce costs by providing toolkits, trainings, peer-to-peer learning and collaborative partnerships. The organization also works across the state to effectively implement Proposition 47. Learn more at [safeandjust.org](http://safeandjust.org) or [MyProp47.org](http://MyProp47.org).



### About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) is a national nonprofit resource center that provides legal trainings, educational materials and advocacy to advance immigrant rights. Its mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Learn more at [ilrc.org](http://ilrc.org).

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## ABOUT THE AUTHOR



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## CHAPTER ONE

# Why Immigrant Record Clearance?

**O**n May 19, 2003, Angel Ramirez<sup>1</sup> was pulled over while driving home from work. A careful driver, Angel was sure he hadn't been speeding, but during this "routine stop," police asked for proof of citizenship. Having none, he was immediately arrested, transferred to immigration custody, and placed in removal proceedings. At the time of his arrest, Angel had lived in the United States for 30 years. He was a well-liked, civically engaged, small-business owner. He and his U.S.-citizen wife had four children together and a fifth on the way. But due to a single marijuana conviction from 1999—when he was 18 and represented by counsel who never told him the lasting immigration consequences of a plea deal—Angel faced losing his family, his business, and the only country he had ever called home. Barred by his conviction from lawful permanent residency and any opportunity for discretionary relief, he faced deportation to Mexico.

In August 2008, Maria Sanchez, a long-time lawful permanent resident ("LPR" or "green card" holder), was convicted of growing a marijuana plant in her backyard. Born in Mexico, Maria had lived in the United States for over three decades, raising her children and grandchildren here. Maria suffered from arthritis and turned to the same remedy her mother and grandmother had used: She grew a single marijuana plant, soaked it in rubbing alcohol, and rubbed the alcohol tincture on her painful joints. This was Maria's first and only arrest. Her public defender got a good deal from a criminal perspective: four months of house arrest. Unbeknownst to Maria, however, that plea was the functional equivalent

of signing her own deportation order. Considered an aggravated felony under immigration law, the conviction subjected Maria to mandatory deportation and mandatory imprisonment, with no opportunity for discretionary relief. She suddenly faced the real likelihood of being separated from her family forever.

Abigail had lived in the United States since she was a young girl. She graduated from high school in California and married her high school sweetheart. They were young when they had their first child together and felt an increased financial burden when, less than two years later, they had their second. Abigail had two shoplifting convictions in short succession: the first for stealing dog food and the second for stealing baby formula for her eight-month-old son. She pled guilty quickly, hoping to complete her short four-day jail sentence and return home to care for her family. However, instead of getting released from jail, she was shocked to find herself transferred immediately to immigration custody where she discovered, for the first time, that her two convictions subjected her to mandatory deportation.

When he was twelve years old, Richard left his home country of Jamaica to join his parents in the United States as a lawful permanent resident. He loved this country and volunteered to serve in the U.S. Army during the Vietnam War. He had a tough time reintegrating after he returned from his tour of duty. He was convicted of a small-scale drug offense for which he served 23 days in county jail. Richard eventually sobered up, got his life back on track, and decided to apply for U.S. citizenship.

Instead of receiving his citizenship, however, Richard was placed in removal proceedings and threatened with deportation to a country he hadn't called home in over 50 years.

For millions of immigrants, the story ends there. But in Angel, Maria, Abigail, and Richard's cases, there was a rare happy ending. They were able to secure post-conviction relief to successfully erase their unconstitutional convictions. Because the convictions were vacated, the grounds for removal evaporated. All four individuals are now naturalized citizens living with their families in the United States.

This manual is an effort to turn these stories into the rule, rather than the exception, by helping to build the capacity of legal service providers and pro bono attorneys to provide post-conviction relief to immigrants who would face certain deportation without it. This manual is not meant to be a substitute for the rich canon of criminal and immigration law resources that already exists,

including N. Tooby, *California Post-Conviction Relief for Immigrants* ([www.nortontooby.com](http://www.nortontooby.com), 2d ed., 2009) and *Criminal Defense of Immigrants*, at [www.ceb.com](http://www.ceb.com) (2017). This manual will instead provide an entry point and overview of the basic legal tools necessary to use state criminal procedural vehicles to erase or mitigate the immigration consequences of crimes.

**NOTE:** While this manual is focused on California practices and procedures, some of the principles are applicable outside of the state. We encourage out-of-state practitioners to read this manual and consider what vehicles exist in their own states that might have parallel applications to the California laws referenced here.

This introductory chapter will explore the context that makes post-conviction relief essential: the current enforcement regime and the legal framework governing the immigration consequences of crimes.

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## I. “CRIMMIGRATION” LANDSCAPE

Nearly 40 million people who reside in the United States—10 million in California alone—were born in another country. These immigrants are caught up in an epidemic of mass criminalization. In all of the United States, an estimated 65 million people suffer the lifelong consequences of a prior conviction.<sup>2</sup> Immigrants, 90% of whom are people of color subjected to racially-biased policing and prosecution, face all of the long-term consequences of a conviction that citizens face, plus an additional, compounding horror: lifelong banishment and permanent separation from their families.<sup>3</sup> The drastic and devastating immigration consequences of convictions have a uniquely destabilizing effect in California, the most immigrant-rich state in the country, where one out of every two children lives in a home with a parent born outside of the United States.<sup>4</sup>

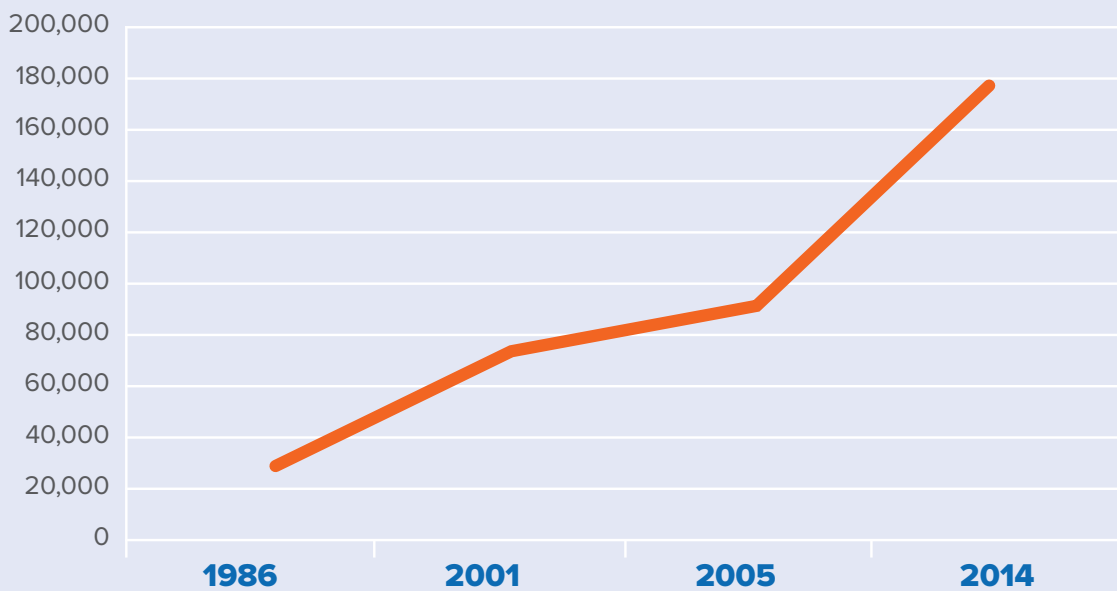
The United States' immigration system is heavily focused on swiftly deporting noncitizens who come into any contact with law enforcement. While this threat is particularly acute under the Trump administration, the current period of mass deportation started under the Obama administration. Between 2008 and 2016, three million people were deported from the United States—more than the number of people deported from the United States between 1892 and 1997 combined.<sup>5</sup> In 2017, Immigration and Customs Enforcement (ICE) reported that 83% of interior removals were of individuals who had some contact with law enforcement.<sup>6</sup> Many of these convictions are decades old, or they are for misdemeanors, infractions, or even just being charged with, or arrested for, a crime. This is consistent with a 15-year trajectory during which the number of removals

of noncitizens convicted of or merely charged with any crime has increased by a staggering 317%.<sup>7</sup>

The rate of removal for immigrants with criminal convictions is likely to increase under the current presidential administration. While the Obama administration had set out enforcement priorities that,

at least officially, targeted serious or repeat offenders, the Trump administration stated that its priority was to deport people who are convicted of, charged with, or may have committed any crime.<sup>8</sup> The Trump administration has requested expanded investment in immigration enforcement operations even beyond the historic expenditures of the Obama administration.<sup>9</sup>

## Deportations Based on Criminal Convictions



## II. LEGAL FRAMEWORK FOR DEPORTATION BASED ON CRIMES

While the amplified immigration enforcement tactics may be new, the federal immigration framework that makes deportation based on even low-level offenses possible is more than two decades old. The most punitive elements of the legislation were codified in two pieces of legislation passed in 1996 that dramatically altered the U.S. immigration system: the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform & Immigrant Responsibility Act (IIRIRA).<sup>10</sup> The

1996 laws make the immigration system so severe that a single marijuana conviction can lead to deportation even for a lawful permanent resident (LPR or “green card” holder) who has lived in the United States for decades and supports U.S.-citizen family members.<sup>11</sup>

The 1996 laws made broad changes to the U.S. immigration system. They drastically curbed due process rights and limited the rights of immigration judges to

## Criminal Conviction Grounds of Removability

Inadmissibility (8 U.S.C. § 1182)	Deportability (8 U.S.C. § 1227)
<ul style="list-style-type: none"> <li>One crime involving moral turpitude (but see Petty Offense Exception)</li> </ul>	<ul style="list-style-type: none"> <li>Crimes involving moral turpitude (two or more, or one within five year admission if potential one year sentence)</li> </ul>
<ul style="list-style-type: none"> <li>Controlled Substance Offense (including current drug abuse, admission of drug offenses, DHS having reason to believe trafficked in drugs)</li> </ul>	<ul style="list-style-type: none"> <li>Controlled Substance Offense (except a single offense of simple possession of 30g or less of MJ, includes drug abuse since conviction)</li> </ul>
<ul style="list-style-type: none"> <li>Prostitution-related offenses</li> </ul>	
<ul style="list-style-type: none"> <li>Conviction of two or more offenses + aggregate sentence of five years or more</li> </ul>	
	<ul style="list-style-type: none"> <li>Firearms offenses</li> </ul>
	<ul style="list-style-type: none"> <li>Domestic violence offenses (including violation of protective order)</li> </ul>
	<ul style="list-style-type: none"> <li>Aggravated felonies</li> </ul>
	<ul style="list-style-type: none"> <li>Inadmissible at last entry</li> </ul>

hear many cases.<sup>12</sup> Under these laws, undocumented persons with certain types of convictions, including a single misdemeanor, can be denied the right to appear before an immigration judge prior to being deported—regardless of U.S. relatives, number of decades in the country, eligibility to apply for relief, or other equities. A permanent resident with certain types of convictions, including a single misdemeanor, can physically appear before a judge but may be barred from submitting any application to stop the deportation.<sup>13</sup>

These laws also limit how federal courts can review the proceedings to ensure that these life-and-death legal decisions were correctly made.<sup>14</sup>

The 1996 laws act as one-strike laws. Noncitizens who commit certain crimes can be subject to mandatory deportation even when there is no jail sentence imposed.<sup>15</sup> In some cases, noncitizens can face mandatory deportation based on the maximum sentence that could have been imposed for their offense, rather than what was actually imposed.<sup>16</sup> The 1996 laws also allow the federal government to ignore state expungement laws and treat suspended sentences as if they were served.<sup>17</sup> The result is that often the only way that a person can remain in the United States, or at least have their “day in court” for a judge to consider their case, is to get post-conviction relief to erase an invalid conviction.

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### III. DUTY OF DEFENSE COUNSEL

In light of the severe and immutable consequences that attach to even low-level convictions, the U.S. Supreme Court, California courts, and the courts and legislatures of states across the country have held that a defense lawyer has the duty to inform a noncitizen defendant that a guilty plea or other proposed disposition will result in the person's deportation.<sup>18</sup> Without this advice, the immigrant defendant cannot make an informed decision to plead or take a case to trial. In addition, defense counsel has the duty to try to avoid these consequences, something

often possible to do through plea bargaining.<sup>19</sup> It is often the case that a plea to one misdemeanor or felony would result in an immigration catastrophe, but a plea to a related misdemeanor or felony, with different elements but the same or even greater criminal punishments, would not have such dire immigration consequences.<sup>20</sup> Defense counsel therefore has critical responsibilities when representing noncitizen defendants.

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### IV. IMPORTANCE OF POST-CONVICTION RELIEF

Under the 1996 laws, where criminal courts frequently act as the gateway to the punishing, mandatory, and permanent consequences meted out by the immigration system, it is often necessary to return to those same courts to seek relief. The good news is that in some cases a minor criminal court change in a person's record will remove the immigration consequences of a conviction, eliminating it

as a ground of deportation or helping the person become eligible to apply for immigration status or benefits.

The next chapter will talk about how practitioners can screen clients for potential eligibility for post-conviction relief.

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### ENDNOTES

<sup>1</sup> All names have been changed.

<sup>2</sup> Pew Center on the States, *One in 31: The Long Reach of American Corrections* (Washington, DC: The Pew Charitable Trusts, March 2009), p. 4; National Employment Law Project, *65 Million 'Need Not Apply': The Case for Reforming Criminal Background Checks for Employment*, March 2011, p. 1; Californians for Safety and Justice, *Repairing the Road to Redemption* (Sept. 2018), at: <https://www.ilrc.org/repairing-road-redemption-california>.

<sup>3</sup> Public Policy Institute of California (PPIC), *Immigrants in California*, at: [www.ppic.org/main/publication\\_show.asp?i=258](http://www.ppic.org/main/publication_show.asp?i=258).

<sup>4</sup> 2015 Statistics, Census Quick Facts, at: [www.census.gov/quickfacts/table/PST045215/00](http://www.census.gov/quickfacts/table/PST045215/00).

<sup>5</sup> *Growth in Deportations*, N. Y. Times, Feb. 22, 2013, at: <http://www.nytimes.com/interactive/2013/02/22/us/politics/growth-in-deportations.html>.

<sup>6</sup> U.S. ICE, *Fiscal Year 2017 ICE Enforcement and Removal Operations Report*, at: <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf>.

<sup>7</sup> U.S. ICE, *Removal Statistics - Criminal Aliens*, at: <http://www.ice.gov/removalstatistics>.

<sup>8</sup> *White House Executive Order Enhancing Public Safety in the Interior of the United States*, § Sec. 5, Jan. 25, 2017, at: <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>.

<sup>9</sup> Brian Bennett, *When Trump says he wants to deport criminals, he means something starkly different than Obama*, L.A. Times, Nov. 14, 2016, at: <http://www.latimes.com/politics/la-na-pol-trump-immigration-criminals-20161114-story.html>; Liam Quinn, *Trump vows to start deportations of criminals 'within one hour' of becoming president*, Daily Mail, Aug. 27, 2016, at: <http://www.dailymail.co.uk/news/article-3761998/Donald-Trump-says-immigration-policy-bad-guys-removed-Iowa-speech.html>; and FY2017 Appropriations Requests to Support Implementation of Trump Administration Executive Orders on Border Security and Immigration Enforcement, at: [https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/amendment\\_03\\_16\\_18.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/amendment_03_16_18.pdf).



<sup>10</sup> For more information about the 1996 laws, see Immigrant Justice Network, *Dismantle Don't Expand: The 1996 Immigration Laws*, May 2017, at: [https://www.immigrantdefenseproject.org/wp-content/uploads/1996Laws\\_FINAL\\_Report\\_5.10.17.pdf](https://www.immigrantdefenseproject.org/wp-content/uploads/1996Laws_FINAL_Report_5.10.17.pdf); Pub. L. No. 104 – 132, 110 Stat. 1214 (codified as amended in various sections of the U.S. Code); Pub. L. No. 104 – 208, 110 Stat. 3009 (codified as amended in various sections of the U.S. Code).

<sup>11</sup> Marijuana rules show how conviction for even minor conduct can cause an immigration catastrophe. An LPR who has one conviction for possessing more than 30 grams of marijuana, or two convictions for possessing any amount of marijuana, is deportable. The person can be placed in removal proceedings and will be deported if they are not granted some form of discretionary relief. See 8 U.S.C. § 1227(a)(2). But if the marijuana conviction occurred within the first seven years after the person was admitted to the United States, the LPR will not be eligible for the relief for LPR and will be deported—regardless of rehabilitation and equities since that time. See 8 U.S.C. § 1229b(a), (d). Further, an LPR who was convicted of sale of \$10-worth of marijuana—or of growing a single marijuana plant for home use—is not only deportable, but they have an “aggravated felony” conviction, which brings the harshest possible consequences. 8 U.S.C. § 1101(a)(43)(B). The person is deportable and automatically excluded from applying for almost all forms of relief. Note that in California, since January 1, 2017, some of the above conduct has become legal under Proposition 64. However, immigrants with past marijuana convictions still face deportation.

<sup>12</sup> See 8 U.S.C. § 1225 (provision authorizing expedited removal for inadmissible immigrants); 8 U.S.C. § 1228 (provision authorizing administrative removal for people with aggravated felony convictions).

<sup>13</sup> 8 U.S.C. § 1226(c) (listing grounds for mandatory detention); 8 U.S.C. § 1229b(a)(3) (barring cancellation of removal, the main form of equitable relief from deportation, for green card holders with aggravated felony convictions); 8 U.S.C. § 1229b(b)(1)(C) (creating bars to cancellation of removal for other criminal offenses). See 8 U.S.C. § 1229b(a)-(b) (limiting individuals eligible for cancellation of removal). The 1996 laws also eliminated the former INA § 212(c) waiver, which gave immigration judges much more discretion to grant relief; see INA, Pub. L. No. 82-414, § 212(c), 66 Stat. 181, 187 (codified at 8 U.S.C. § 1182(c) (repealed 1996)).

<sup>14</sup> See, e.g., 8 U.S.C. § 1252 (stripping federal courts of jurisdiction to review many immigration judge decisions).

<sup>15</sup> 8 U.S.C. § 1101(a)(43) et seq. (listing aggravated felony offenses, many of which do not require any sentence of jail time); 8 U.S.C. § 1229b(a)(3) (barring individuals with aggravated felony convictions from cancellation of removal); 8 U.S.C. § 1226(c) (listing grounds for mandatory detention). Permanent residents with less than seven years of residence prior to a crime may also face mandatory deportation for other offenses under the clock-stop rule.

<sup>16</sup> 8 U.S.C. § 1101(a)(48)(B) (defining an offense’s sentence as the length of incarceration ordered by a court, regardless of whether that sentence is suspended or actually served); see also 8 U.S.C. § 1227(a)(2)(A)(i)(II) (classifying some crimes for which a sentence of a year or longer may be imposed as deportable offenses); 8 U.S.C. §§ 1229b(a)(1) and 1229b(d)(1) (triggering the “clock-stop rule,” for immigrants who commit such offenses, thus preventing judges from calculating their length of residence in the United States past the time such an offense is committed, often making them ineligible for relief); see also 8 U.S.C. § 1101(a)(43)(J) (making any Racketeer Influenced and Corrupt Organizations Act (RICO) offense for which a sentence of a year or longer may be imposed an aggravated felony); 8 U.S.C. § 1101(a)(43)(T) (making any offense relating to failure to appear before a court an aggravated felony if a sentence of two years or longer may be imposed); 8 U.S.C. § 1229b(a)(3) (barring individuals with aggravated felony convictions from cancellation of removal).

<sup>17</sup> 8 U.S.C. § 1101(a)(48). The statute makes no exception for expunged offenses, and courts have consistently interpreted none to exist. See, e.g., *Murillo-Espinoza v. I.N.S.*, 261 F.3d 771, 774 (9th Cir. 2001) (affirming the of the Board of Immigration Appeals (BIA) position that “conviction” encompasses expunged offenses for immigration purposes).

<sup>18</sup> *Padilla v. Kentucky*, 559 U.S. 356 (2010); *People v. Soriano*, 194 Cal. App. 3d 1470 (1987); Cal. Pen. C. §§ 1016.2, 1016.3.

<sup>19</sup> See *Lee v. United States*, 137 S.Ct. 1958 (June 30, 2017); *People v. Bautista*, 115 Cal.App.4th 229 (2004).

<sup>20</sup> *People v. Bautista*, 115 Cal. App. 4th 229 (2004).

## CHAPTER TWO

# Initial Investigation and General Best Practices

**B**efore beginning representation in an immigrant post-conviction case, you must first embark on a thorough investigation of the individual’s criminal and immigration history. For example, a long-time, lawful permanent resident (LPR or “green card” holder) may have different immigration goals and need a different criminal solution than an undocumented person seeking to adjust status and get their green card. Understanding your client’s full criminal and immigration

history, current options for immigration relief, and the immigration impact of their conviction history must be accomplished before you can embark on a post-conviction relief case.

This chapter will discuss the questions one must investigate when screening for immigrant post-conviction relief and provide some best practices tips for how to do this.

## I. SCREENING

*In every case, an individual must be thoroughly screened for:*

- ✓ Immigration status
- ✓ Immigration relief
- ✓ Criminal record history

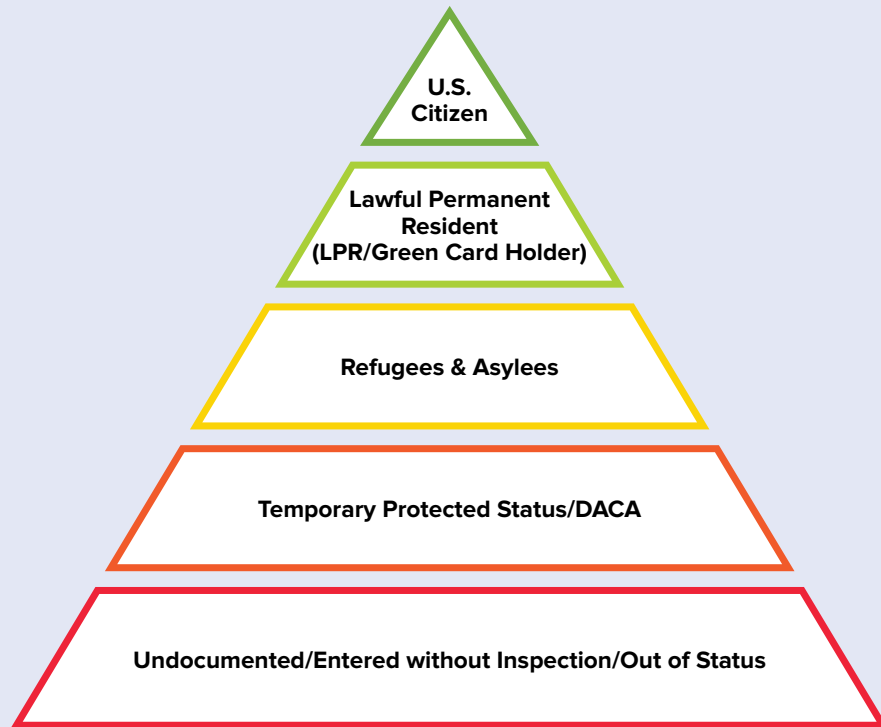
The Immigrant Legal Resource Center (ILRC) has developed a basic intake form available in English and Spanish (Appendix A), that can be used as a model for other organizations or individuals developing their own post-conviction-relief practices.<sup>1</sup>

### Screening for immigration status

The first step in screening for post-conviction relief is to determine your client’s immigration status. Some clients have a good understanding of their legal status

and will know, for example, whether they currently are a lawful permanent residents with a “green card,” are undocumented, or are somewhere in between. In other cases, the client might not know their correct status: They might have a work permit and not be sure of why it was granted, or they might be married to a United States citizen (“USC”) and wrongly think that this automatically makes them a USC, too. In any event, this analysis is rarely straightforward and should always be done with care.

## Types of Immigration Status



This section presents a very brief overview of various types of immigration status. An expanded version of this overview section, written for public defenders, is available online for free at: <https://www.ilrc.org/sites/default/files/resources/n.1-overview.pdf>.

### **A. Might the Person Be a United States Citizen (USC) and Not Know it?**

No USC can be legally deported from, or kept out of, the United States. However, there may be some instances where a client is a USC but is not aware of it. You can help your client tremendously by spotting when a person is, or might be, a USC, or by referring to an expert who can help.<sup>2</sup> You will note that the basic screening form asks questions about the immigration status of the individual's family members as well. Permanent residents whose parents naturalized (became U.S. citizens) before the individual turned 18 might already be U.S. citizens and not know it. The same might be true for any noncitizens

who may have had a U.S. citizen parent or grandparent at the time that they were born in another country. These individuals might be citizens even if they have been deported multiple times or convicted of federal offenses such as illegal entry into the United States. There is no more effective defense against deportation than U.S. citizenship, so it is very important to get complete immigration information about the individual and their family members.

### **B. Lawful Permanent Resident (“Green Card” Holder)**

A Lawful Permanent Resident (LPR) has permanent permission to live and work legally in the United States. An LPR can apply to become a USC after a certain amount of time. However, an LPR can lose this lawful status and be removed (deported) based on a conviction for certain crimes, violation of certain immigration laws, or other specified reasons.

An LPR can travel outside the United States and return, as long as they are not convicted of certain crimes, do not stay outside the United States for a very long period, or violate certain immigration laws.

LPRs are issued identity cards, often called “green cards” (although these days the cards are actually pink and white). The card will state “Resident Alien” across the top. While LPR status does not expire, the green card itself may need to be renewed every 10 years. If a green card is not renewed and expires, the person remains an LPR, even though they lack current documentation. Some older green cards do not ever need to be renewed.

Note that when a person renews a green card, immigration authorities will run the person’s fingerprints to see if they have been convicted of a deportable crime.

*An LPR who has been convicted of a crime at any time **must** get expert immigration advice before renewing a green card, to make sure that the conviction does not make the person deportable.<sup>3</sup>*

This is true even if the conviction is old or the person has successfully renewed the card in the past after being convicted. These days, the government checks green card renewals much more thoroughly than they did in the past, so past approvals are no guarantee that the person will be safe this time.

If the person has a card that states “Employment Authorization” across the top, they probably are not a permanent resident but are either applying for status or have or had some temporary status.

### C. Undocumented Persons

An “undocumented person” is someone who does not have legal status (permission to be here) under the immigration laws. People might say that they have “no papers.” This person can be removed (deported), even without any criminal conviction, just for being here unlawfully. Undocumented people may have entered the United States in some lawful status, like on a visitor visa,

and have overstayed that visa. Others may have entered the United States without documentation or entered without inspection (EWI). Ascertaining the manner of entry will be necessary to determining eligibility for future immigration relief.

To stay in the United States, an undocumented person will need to apply for some sort of relief or lawful status (for example, asylum or getting a green card through family). There are many possible forms of relief. The *ILRC Immigration Relief Toolkit*, available at: <https://www.ilrc.org/immigration-relief-toolkit-criminal-defenders>, provides a two-page summary of each type of relief along with its respective crime bars.

### D. Other Status and “Mystery” Status

There are many other kinds of immigration status and applications. These include persons who are applying for or already have asylee status, refugee status, Temporary Protected Status (TPS), Deferred Action for Childhood Arrivals (DACA) status, adjustment of status through family or other reasons, non-immigrant visas, etc. In addition, some people may have previously had some form of legal status and may have been ordered removed but may not yet have been removed due to, for example, the United States not having a repatriation agreement established with the country of origin. Some individuals with pending applications or who already have final orders of removal may periodically have to report to or “check in with” ICE. These check-in appointments can sometimes result in the person being re-arrested and placed in an immigrant-detention facility. If the person has employment authorization or any official document, or says that they have applied for something or has already been ordered removed, they need to consult an immigration expert to understand the kind of application or status that person might have.

### Screening for Immigration Relief

Once a person’s immigration status is ascertained, the next question is always what the ultimate immigration goal is for that individual. A green card holder may be concerned with avoiding the grounds of deportability and eventually naturalizing (becoming a U.S. citizen),

while an undocumented person may be interested in identifying a basis to qualify for immigration relief or to “adjust status” and get a green card by, for example, marriage to a U.S. citizen spouse.

You will notice that page three of the basic screening form contains a series of questions about family members, whether someone has been a victim of crime or possesses a fear of returning to their country of birth. These questions are designed to determine what relief, if any, a person might be eligible for.

The *ILRC Immigration Relief Toolkit* is an indispensable resource to have on hand, providing a nutshell analysis of every form of immigration relief, the disqualifying crimes, and the waivers available.

### Identifying Criminal History

As described above, to analyze the precise post-conviction relief necessary to avoid adverse immigration consequences, it is necessary to have a complete understanding of the client’s current and potential immigration status and the exact effect on the immigration status caused by the particular criminal convictions, sentences, and actual terms of incarceration suffered by the individual.

Page two of the basic screening form asks questions about an individual’s criminal-record history. To ensure obtaining an accurate record, one should not rely on the person’s memory but instead must (1) obtain the official criminal history reports of the individual’s arrests and convictions (the “RAP sheets”); (2) obtain copies of the plea and conviction records from the rendering courts; and (3) interview key participants in addition to the client who may have information of use in challenging the conviction.

**FBI RAP Sheets.** Many immigration law practitioners are familiar with how to obtain the FBI Criminal History Report. Though these RAP sheets are often incomplete, they theoretically contain a national overview of an individual’s criminal and immigration activities. Most essentially, because the Department of Homeland Security (DHS) is a federal agency, it often relies heavily on FBI criminal-history records, so it is helpful to know what they contain. Information for how to submit an FBI criminal-

history-check request can be found at: <https://www.fbi.gov/services/cjis/identity-history-summary-checks>. Many immigration legal services providers may have the capacity to provide in-house processing for FBI RAP sheet requests.

**State RAP Sheets.** A state RAP sheet is essential before anyone can embark on deciphering a post-conviction strategy. If an individual has only lived in their native country and in the state of California, for example, the FBI RAP sheet may not be necessary, and the state RAP could be sufficient. Though state RAP sheets often contain inaccuracies, they are the best source for a statewide overview of points of contact with state law enforcement. People can obtain their criminal record from the state Department of Justice by completing and submitting a form. The completed application will usually include a set of fingerprints and a fee. In California, Live Scan service providers will fingerprint and submit a request to the state Department of Justice. There is a fee, but a person may qualify for a fee waiver if written proof of government assistance is provided and their income is under a certain level. For a list of Live Scan locations by county and directions for submitting a request, visit: <https://oag.ca.gov/fingerprints/locations>.

**NOTE:** Though some individuals may be scared of providing their home address on a Live Scan request, there are no accounts of federal immigration authorities ever targeting an individual based on a Live Scan request. That said, some individuals may feel more comfortable placing the address of a legal services or community based organization, rather than their home address, on the Live Scan request.

**Court Files.** The most complete records of a conviction are those created by the court in which the conviction occurred. A state DOJ RAP sheet can help provide a roadmap of what additional information you need to obtain, by identifying the court, city, and docket number for each conviction. The court’s records of the conviction may generally be obtained by contacting the court clerk’s office. In state courts, the most authoritative evidence of the existence and nature of a criminal conviction consists of: (a) a certified copy of the record of the judgment and

clerk's minutes from the sentence hearing; and (b) the sentencing judge's oral pronouncement of judgment, as reflected in the reporter's transcript of the sentencing hearing. The judgment and clerk's minutes may be obtained from the clerk's office, as well. In some courts, the reporter's transcript of the plea and/or sentencing will also be in the court file. In many cases, it will be necessary to contact the court reporter directly in order to obtain a copy of the transcript. In any event, when requesting the court file, it is always best to request "all documents pertaining to the case" or to specify "a complete copy of the complete court file" rather than specifying particular documents.

**Defense Counsel's File.** It is often necessary to get a complete copy of the original defense counsel's case file before you can ascertain what grounds you may choose to raise in a motion. This includes a copy of the attorney's notes, investigation reports, and everything else contained in the file. Submit a written request, accompanied by an information release executed by the client. Since the entire file is the property of the client, this should not be difficult. If the attorney balks, gently educate them concerning the ethical obligation to deliver the entire file to successor counsel.<sup>4</sup> Original counsel may, of course, keep a copy at their expense.

Sometimes, reluctant counsel may not wish to produce the file, and may claim not to have retained it. Counsel,

**NOTE:** As you develop your post-conviction-relief strategy it will often be necessary to obtain a court file (e.g., for claims alleging a Penal Code section 1016.5 violation) or the original defense attorney's file (e.g., in claims alleging an ineffective assistance of counsel violation), before you can ascertain whether your client has a colorable claim. The factual development necessary for these claims is discussed further in Chapter Five.

however, is ethically required to retain the file. For example, Los Angeles County Bar Association, Formal Ethics Opinion No. 420 states: "In the absence of written instruction by the client, the client's file relating to a criminal matter in the possession of an attorney should be retained by the attorney and not destroyed."

State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1992-127 discusses the extent to which a criminal defense attorney, after being relieved by successor counsel, must cooperate with new counsel. It held original counsel must turn over the entire file (which belongs to the client) including the attorney's notes, and must answer all oral questions if failure to do so would prejudice the client. This Ethics Opinion, which was mailed to all California attorneys, is extremely useful in obtaining cooperation of original counsel.

### *Pointers about RAP sheets and records:*

- ✓ Though we have never seen an immigration enforcement action triggered by requesting a RAP sheet, some individuals may choose to put the address of the legal services provider or community-based organization they are working with on the request form instead of their personal home addresses.
- ✓ Even people who live outside of the state, are currently in immigration detention, or have been deported may request a copy of their state RAP sheet by following the instructions for "out-of-state residents," at: <https://oag.ca.gov/fingerprints/record-review>.
- ✓ We never recommend going to any law enforcement agency to get a client's fingerprint card. Instead, contact a private Live Scan operator or work with a trusted legal service provider.
- ✓ Keep an eye out for local record change events; many offer free Live Scans for attendees.
- ✓ Nonprofit organizations should look into purchasing their own Live Scan equipment and becoming Live Scan certified!

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## II. BEST PRACTICES

In order to abide by the credo, “do no harm,” legal service providers should take special care when serving potentially vulnerable immigrant populations. We have included a client disclaimer handout about immigration consequences of criminal convictions in Appendix B. We typically advise the following best practices when serving immigrants:

- **Do not provide unqualified legal counsel.** Do not provide legal advice that you are not authorized to give. If you have not first verified it with a criminal and immigration specialist, do not tell your immigrant client that a legal remedy will eliminate the immigration consequences of a conviction.
- **Always warn about the risks of traveling outside the United States, pursuing an immigration application, or having any contact with immigration authorities.** Traveling outside the United States can be dangerous for a noncitizen. Regardless of how many times a person has traveled from and reentered the United States since the criminal conviction occurred, any time an immigrant returns through a port of entry to the United States the person is vulnerable to being detained and questioned and placed in removal proceedings. These days, border agents do increasingly thorough criminal-record checks, so that having previously made it through the checkpoint does not mean that the immigrant will make it through the next time. Similarly, an application

for an immigration benefit, including replacing a lost or expired green card or applying for naturalization, can trigger a comprehensive background check and result in removal proceedings. All noncitizens should be warned not to travel outside the United States or pursue an immigration benefit without first consulting a criminal and immigration law expert.

- **Give referrals so that the person can get an immigration analysis.** The best post-conviction relief is a partnership between skilled criminal court practitioners and experienced immigration legal services providers. Have a list on-hand<sup>5</sup> of nonprofit immigration specialists who are equipped to analyze the impact of a criminal conviction on a person’s immigration record. These same specialists may be able to help your client secure subsequent immigration relief, as well.
- **Always let your client be your guide.** Your client may be seeking criminal record relief to alleviate the immigration consequences of a conviction, or may instead simply be concerned with the employment consequences of a conviction. Spend time identifying an individual’s goals and work to provide the wrap-around service plan to achieve those goals. At the same time, don’t hesitate to let the client know about dangers they may not have spotted. Many noncitizen defendants were incorrectly advised that their criminal convictions would not harm their immigration status. It is almost always a good idea to consult with an expert if this is a new area of practice for you.

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## ENDNOTES

<sup>1</sup> These forms can also be found on the Immigrant Legal Resource Center (ILRC) website, at: <https://www.ilrc.org/immigrant-post-conviction-relief-project-intake-form>.

<sup>2</sup> The ILRC publishes charts that can help determine whether a person acquired or derived citizenship, at: <https://www.ilrc.org/acquisition-derivation-quick-reference-charts>.

<sup>3</sup> The ILRC offers an “Attorney of the Day” (AOD) service that is free for many California nonprofits. You can access the AOD service by emailing [aod@ilrc.org](mailto:aod@ilrc.org). The AOD can offer case-specific advice about the immigration impact of a criminal conviction. Private attorneys can set up an account to access ILRC’s AOD service. See <https://www.ilrc.org/technical-assistance>.

<sup>4</sup> Rules of Conduct of the State Bar of California 2-111 (A)(2); *Finch v. State Bar*, 28 Cal.3d 659, 665 (1981) (duty to forward the file to client or successor counsel); *Kallen v. Delug*, 157 Cal.App.3d 940, 950 (1984)

<sup>5</sup> To find a local pro bono or lo bono immigration services provider near you, check out the Immigration Advocates Network’s National Immigration Legal Services Directory, at: <https://www.immigrationadvocates.org/nonprofit/legaldirectory/>.



## CHAPTER THREE

# Developing a Post-Conviction Relief Strategy

**T**he starting point in developing a strategy for post-conviction relief begins by understanding the facts of the case, diagnosing the specific immigration impact of a conviction, and creating the post-conviction relief game plan.

Close consultation is necessary between someone experienced in immigration consequences of criminal convictions and a practitioner familiar with the various post-conviction relief vehicles.

Many manuals, treatises, and advisories can help, as well, including ILRC, *Defending Immigrants in the Ninth Circuit* ([www.ilrc.org](http://www.ilrc.org)); N. Tooby, *California Post-Conviction Relief for Immigrants* ([www.nortontooby.com](http://www.nortontooby.com)); K. Brady and N. Tooby, *Criminal Defense of Immigrants* ([www.ceb.com](http://www.ceb.com)); and R. Cahn, *Helping Immigrant Clients with Proposition 47 and Other Post-Conviction Legal Options* (available for free download at: <https://www.ilrc.org/immigrant-post-conviction-relief>), and *Practice Advisories* at: [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

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## I. UNDERSTANDING THE FACTS OF THE CASE: DEVELOPING A CHRONOLOGY

Once you have completed the fact and document gathering described in Chapter Two, you are ready to begin preparing a chronology of your client's criminal and immigration proceedings. This process is essential for both your own analysis as well as engaging the assistance of an expert. A sample chronology is included on the next page.

The chronology should list every pertinent date from the immigration and criminal case files. All of this can be found in the basic screening form, RAP sheets, and criminal court documents. Include both the commission date and the conviction date, as both can be relevant to identifying immigration relief.



## CHRONOLOGY

*Background:* Unmarried, has 18 y.o. USC child & USC brother, no immigration status, currently in removal proceedings, not represented yet by immigration counsel; criminal defense attorney for 2015 was [REDACTED]

04/20/67	DOB, Mexico (51 y.o.)
c. xx/xx/91	First entered U.S., no lawful status (approx. 24 y.o.)
05/13/94	Offense 1, commission
06/16/94	Offense 1, <b>pleaded guilty to count 1</b> , count 2 dismissed/negotiated plea, San Mateo County Count 1: <b>M VC 23152(A), DUI</b> Count 2: M VC 23152(B), DUI w/BAC > .08
06/16/94	Offense 1, sentence 2 days CJ, 3 yrs probation, work program and 1st offender program, fine
08/07/94	Offense 2, commission
09/08/94	Offense 2, <b>pleaded guilty to count 2</b> , count 1 dismissed/alternate charge, San Mateo County Count 1: M VC 23152(A), DUI Count 2: <b>M VC 23152(B), DUI w/BAC &gt; .08</b>
10/20/94	Offense 2, sentence 30 days CJ, 3 yrs probation, multi-offender program, fine, DL suspended 18 mos.
10/07/96	Offense 3, commission
11/27/96	Offense 3, <b>proceedings suspended/pre-plea diversion</b> , San Mateo County Count 1: HS 11350(A), poss'n controlled substance
04/07/98	Offense 4, commission
05/29/98	Offense 3, dismissed/successful completion of diversion
09/23/98	Offense 4, <b>pleaded no contest to count 1</b> , count 2 dismissed/negotiated plea, San Mateo County Count 1: <b>M PC 529.5(C), poss'n of gov't document purporting to be ID</b> Count 2: M PC 529.5(C)
09/23/98	Offense 4, sentence 18 mos. court probation, fine
05/xx/99	Last entry to the U.S.? [unclear from intake form]
10/11/13	Offense 5, commission
10/17/13	NTA issued, charged as inadmissible under INA 212(a)(6)(A), present w/o admission or parole – pro se so far; filed defensive asylum case
11/19/14	Offense 6, commission
05/21/15	Offenses 5-6, <b>pleaded no contest to misd count 1</b> , others dismissed, San Mateo County Count 1: <b>F/M HS 11350(A), poss'n controlled substance</b> Count 2: M 529.5(C), poss'n of gov't document purporting to be ID Count 3: M HS 11550(A), use/under influence of controlled substance
05/21/15	Offenses 5-6, sentence 18 mos. probation, classes, fine
02/xx/18	Immigration court individual hrg

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## II. DETERMINING WHETHER THE GROUNDS OF INADMISSIBILITY OR DEPORTABILITY APPLY TO YOUR CLIENT

Our immigration laws have two separate lists of reasons for which a noncitizen can be “removed” (deported, banished) from the United States: the grounds of inadmissibility and the grounds of deportability. (See chart on page 4.) In order to assess whether your client might face removal or qualify for relief, it is important to understand which list applies to your client’s situation. A comprehensive discussion is beyond the scope of this toolkit, but the basic standards are listed below.

- **Admitted → Deportability.** A noncitizen who has been admitted to the United States in any legal status, or who has adjusted status within the United States to acquire legal status, is subject to the grounds of deportability. See INA § 237(a), 8 USC § 1227(a). That means that if they come within a deportation ground, they can be placed in removal proceedings and removed for being deportable, unless they have some defense to removal.

***Example:*** A permanent resident or a person who was admitted on a tourist visa can be placed in removal proceedings if they become deportable under INA section 237 (e.g., by being convicted of an offense listed in section 237(a)(2)).

- **Request for admission → Inadmissibility.** A noncitizen who asks to enter the United States at a port of entry (border, international airport, etc.) is seeking to be “admitted” and is subject to the grounds of inadmissibility. A person applying for adjustment of status within the United States also is subject to the grounds of inadmissibility. INA § 212(a), 8 USC § 1182(a).

A permanent resident who travels abroad on a trip is not considered to be seeking a new admission when they return to a U.S. port of entry, unless the government proves that they come within any of five exceptions listed in INA section 101(a)(13)(C), 8 USC section 1101(a)

(13)(C).<sup>1</sup> Commonly applied exceptions are that the permanent resident committed an offense listed in the crimes for grounds of inadmissibility, or stayed outside the U.S. for more than six months. If the government does prove that an exception applies, then the permanent resident is treated like any other noncitizen: They either must be admissible or be granted a waiver of inadmissibility in order to be admitted.

***Example:*** A person with a student visa or visitor visa who applies for admission at the border can be denied entry if they are inadmissible (e.g., because they were convicted of an offense listed in INA section 212(a)(2)).

***Example:*** A person who comes to the border with no visa is subject to the grounds of inadmissibility. Even without a criminal conviction, the person is automatically inadmissible due to lack of a visa. INA section 212(a)(7).

- **Never lawfully “admitted” → Inadmissibility.** A noncitizen who entered the United States without inspection has never been “admitted” and so faces the grounds of inadmissibility. The person is automatically inadmissible under INA section 212(a)(6) and can be removed unless they are granted some form of relief. A person who is paroled into the United States is likewise subject to the grounds of inadmissibility. Different rules may apply to those granted some sort of permission to stay in the United States. For instance, non-immigrant status is considered an admission. If your client has some sort of protection, check with an expert to understand which list of rules applies.
- **Application for immigration relief → Varies depending on form of relief.** Some criminal convictions serve as a bar to eligibility to apply for immigration “relief.” We use the term “relief” to include any immigration benefit, lawful status, or waiver, such

as asylum, family immigration, or cancellation of removal. Anyone who is undocumented, or who has lawful status but has become deportable or otherwise disqualified from keeping the lawful status, is at risk of being removed unless they can qualify for some kind of relief. Each form of relief has its own standard for which crimes serve as a bar to eligibility. A bar might include an inadmissible offense, deportable offense, both, or neither. (To see a brief summary of the different forms of relief and their applicable crimes bars, see the *ILRC Immigration Relief Toolkit*, at: [www.ilrc.org/chart](http://www.ilrc.org/chart).) Pay careful attention to the wording in the statute that describes the bars. For example, to be barred, must the person actually “be” deportable (both subject to

the deportation grounds and actually coming within a ground), or just be convicted of an offense “described in” the deportation ground? Must there be a criminal conviction, or is conduct sufficient?

**Example:** A person who is undocumented, living in the United States, and applying for a green card on petition from a qualifying U.S. citizen family member must prove that they are admissible.

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### III. DIAGNOSING THE IMMIGRATION IMPACT OF A CONVICTION

If you are not experienced with immigration law, at this stage you should consult with an expert. If you are interested in attempting to analyze the case yourself and then run it by an expert, many materials are available to assist in that process.

Begin by taking a look at the chronology you’ve prepared and answering the following questions:

#### A. Do Convictions and Sentences Trigger One or More Grounds of Deportation?

First, determine whether the grounds of deportation affect your particular client. Typically, immigrants in any of the three following groups need to avoid coming within the crimes-based deportation grounds:

- People with secure lawful immigration status that they don’t want to lose, such as lawful permanent residents or refugees (because becoming deportable for crimes could cause them to be placed in removal proceedings and deported).

- People who were admitted at the border but no longer have lawful status (if the deportable offense might subject them to mandatory detention).
- Undocumented people who want to apply for cancellation of removal for nonpermanent residents but are barred from eligibility by a conviction described in the deportation grounds. Otherwise, undocumented people might not be hurt by coming within a crimes deportation ground.

Next, look at the categories in the deportation grounds. For a nutshell summary of the crimes-based grounds of deportability and inadmissibility, our partners at the Immigrant Defense Project have prepared an invaluable two-page checklist, available at: <https://www.immigrantdefenseproject.org/wp-content/uploads/Imm-Consq-checklist-2017-v3.pdf>. Look to see if your client is a green-card holder and if one or more of their convictions falls within the grounds of deportation listed on the sheet. Also, cross-reference the convictions from the chronology with the chart available at [www.ilrc.org/chart](http://www.ilrc.org/chart), which lists more than 200 of the most commonly charged criminal offenses and their immigration consequences.

Note in the margin of the chronology what impact, if any, the conviction has on immigration status. For example, does immigration law consider it a crime involving moral turpitude? An aggravated felony? As a refresher, green-card holders are typically concerned with avoiding the grounds of deportability.

## B. Does the Conviction Trigger One or More Grounds of Inadmissibility?

Consider how the grounds of inadmissibility might affect your particular client. Typically, immigrants in the following groups need to avoid coming within the crimes-based grounds of inadmissibility:

- Undocumented people who want to apply for some immigration benefit or status. Note that not all immigration applications require that. To see the various possible applications and their criminal-record bars, see the *ILRC Immigration Relief Toolkit*, at: [www.ilrc.org/chart](http://www.ilrc.org/chart).
- Lawful permanent residents, refugees, and others with lawful status who have become deportable and need to apply for some relief to avoid removal (if the relief requires them to be admissible). See the *ILRC Immigration Relief Toolkit*.
- LPRs or others with lawful status who will travel outside the United States or already have traveled. An LPR usually can travel and return to the United States, even if they are inadmissible, unless they come within certain exceptions. See INA § 101(a)(13)(C). One exception exists when the person is inadmissible under the crimes grounds.

The grounds of inadmissibility and deportability are similar but not identical. Look at the two-page checklist that lists the grounds of inadmissibility.

## C. Is There Some Form of Relief Available to the Client to Avoid the Adverse Immigration Consequences?

In the field of immigration law, where so many discretionary determinations are left in the hands of immigration officials, any criminal conviction will be a negative discretionary “ding.” However, to craft the appropriate post-conviction remedy, it is essential to identify whether a conviction bars some form of immigration relief and/or makes someone deportable, or whether a conviction will simply provide a negative discretionary factor for immigration officials to consider.

Page three of the immigration screening form (Appendix A) asks questions that will help you identify what, if any, form of immigration relief might be available for your client and whether the conviction stands in the way of that relief or is waivable. Cross-reference the *ILRC Immigration Relief Toolkit*, at: <https://www.ilrc.org/immigration-relief-toolkit-criminal-defenders>, with the answers provided in your immigration questionnaire.

For each arrest or conviction, you should identify the specific immigration consequence, if any, the disposition might cause. If you determine that immigration counsel can obtain some form of immigration relief despite the conviction, then no post-conviction relief may be necessary for immigration purposes.

**NOTE:** A conviction can have many different consequences outside of the world of immigration consequences, including potential impacts on employment and/or housing. Even if you determine that post-conviction-relief is not necessary for immigration purposes, an expungement or offense reclassification could have other additional benefits. A referral to a reentry legal services provider will help assess an individual’s eligibility for clean-slate services. See <https://ebclc.org/reentry-legal-services/for-a-county-by-county-map-of-clean-slate-service-providers-in-california>.

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## IV. DEVELOPING A POST-CONVICTION RELIEF GAME PLAN

Once you have worked with an expert to determine the full extent of the impact of the criminal conviction on a noncitizen, you must develop a “game plan” for achieving post-conviction relief goals.

A game plan consists of four fundamental components: (1) a vehicle; (2) a ground of legal invalidity; (3) an alternative immigration-neutral disposition; and (4) a showing of equities. The “vehicle” is the procedural mechanism you choose to present the motion before the criminal court. The

“ground” is the basis for relief that you raise in the vehicle. The immigration-neutral disposition, or “safe haven,” is the alternative offense or outcome which will negate the immigration consequences of the conviction. Even if not required by statute, the equities—a more complete picture of the individual, including their ties to the community—should always be included in a motion. Chapters Four through Seven discuss each of the four components in greater detail and provide examples of each.

### Components of a Post-Conviction Relief Game Plan



Counsel must choose each of the four elements independently and only after a thorough review of the full case file. However, all four exist in relation to each other. A strong showing in one area can make up for a weaker showing in another. For example, if there is a very strong claim that defense counsel committed ineffective assistance of counsel (IAC) and misadvised the defendant about the immigration consequences of a plea, then less-strong equities may be sufficient. Conversely, if the equities in a case are uniquely compelling, a district

attorney and court may be satisfied with stipulating to a motion with less-thorough corroboration of the grounds alleged. Nevertheless, the successful post-conviction relief motion shouldn't assume strength in any area; it should be thoroughly briefed, with declarations and external corroboration supporting each of the four critical components. The following chapters will provide more detailed description of each of the component of the game plan.

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## ENDNOTES

<sup>1</sup> See *Matter of Guzman-Martinez*, 25 I&N Dec. 845 (BIA 2012); *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011).

## CHAPTER FOUR

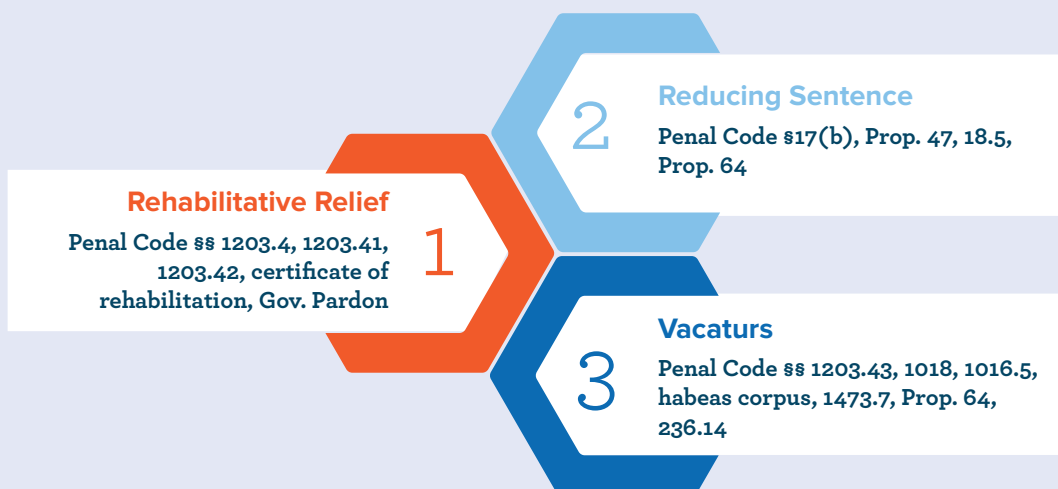
# Post-Conviction-Relief Vehicles: How to Present Your Case in Criminal Court

**Y**ou can think of choosing a post-conviction-relief “vehicle” as choosing the method to use to present your motion in criminal court. There are three general types of post-conviction-relief vehicles, which have varying immigration impact: (1) Rehabilitative Relief; (2) Reductions of Sentence; and (3) Motions to Vacate. With some exceptions, these vehicles appear from easiest to hardest to achieve. Rehabilitative relief such as a Pen Code section 1203.4 petition, for example, may be mandatory, while a motion to vacate pursuant to section 1473.7 may result in a full-fledged adversarial hearing in criminal court. In any case, you want to choose the **minimum and easiest post-conviction-relief** that will eradicate or mitigate the immigration consequences of a conviction.

As a general rule, immigration consequences are eliminated only by a conviction that is vacated as **legally invalid**. See *Matter of Pickering*, 23 I&N Dec 621 (BIA 2003). However, in some cases, a form of rehabilitative relief or a modification of the sentence will eliminate the adverse consequences. It is always critically important to go through the full menu of available post-conviction-relief options before selecting the appropriate vehicle.

**NOTE:** Though vacating based on a ground of legal invalidity will always be effective at eliminating conviction-based grounds of removability, every form of post-conviction relief should be considered in each and every case.

## Types of Post-Conviction-Relief



Prior post-conviction-relief efforts will not necessarily bar subsequent post-conviction-relief attacks. For example, an expunged conviction may still be attacked as legally invalid under Penal code § 1016.5, or an expunged conviction may later be reduced.<sup>1</sup>

A full infographic of all of the post-conviction relief vehicles and their immigration consequences can be found on the next page or online at: [https://www.](https://www.ilrc.org/infographic-about-california-post-conviction-relief-vehicles)

[ilrc.org/infographic-about-california-post-conviction-relief-vehicles](https://www.ilrc.org/infographic-about-california-post-conviction-relief-vehicles). A more comprehensive discussion of post-conviction relief vehicles and their jurisdictional requirements can be found at N. Tooby, *California Post-Conviction Relief for Immigrants* ([www.nortontooby.com](http://www.nortontooby.com), 2d ed., 2009) and K. Brady and N. Tooby, at *California Criminal Defense of Immigrants* ([www.ceb.com](http://www.ceb.com)).

## I. REHABILITATIVE RELIEF

### A. Vehicles: Set-Aside and Dismissals (Expungements)

There are many different state vehicles for “set-aside and dismissals.” These are laid out in Penal Code §§ 1203.4, 1203.4a, 1203.41, and 1203.42. These expungements are typically available if someone received a sentence to county jail and probation or “local/county prison” under “realignment /AB 109.”

In some cases, a grant of expungement will be mandatory, while in others the court’s determination will turn on the

“interests of justice.” Some defendants may choose to create a case-specific petition asking for relief. Others may simply rely on Judicial Council’s CR 180 and CR 181 forms to petition for relief. These forms can be found at: <http://www.courts.ca.gov/documents/cr180.pdf> and <http://www.courts.ca.gov/documents/cr181.pdf>.

Many public defender offices will offer expungement services through their office’s “clean slate” unit. In some counties, legal service providers and nonprofit community-based organizations may file expungement petitions for individuals.<sup>2</sup>

### CA Dismissal Statutes

Penal Code § 1203.4a	Penal Code § 1203.4	Penal Code § 1203.41	Penal Code § 1203.42
Applies to infractions	Applies to any sentence to county jail followed by probation	Applies to any sentence to “local prison” under realignment/AB 109	Applies to any pre-2011 sentence to prison that, after 2011, would have been a sentence to local prison

**NOTE:** Courts have repeatedly held that a prior expungement or dismissal does not bar subsequent post-conviction-relief.



# CALIFORNIA POST-CONVICTION RELIEF VEHICLES

## VEHICLES

- **1473.7 Defendant has evidence of actual innocence and/or was unaware of immigration consequences**

*Requirements:*

- D pleaded guilty or *no lo contendere*.
- D no longer in criminal custody.
- Failed to meaningfully understand the immigration consequences of a conviction AND conviction bars immigration relief OR
- Presents newly discovered evidence of actual innocence.

- **1016.5 Court failed to give mandatory statutory advisement about potential immigration consequences**

*Requirement:*

- No record that court advised about immigration consequences of a conviction.

- **1018 Motion to withdraw a guilty plea**

*Requirements:*

- Filed within 6 months of imposing probation.
- Show “good cause” plea should be withdrawn, including failure to understand immigration consequences.

- **Petition for Habeas Corpus, conviction is legally invalid**

*Requirements:*

- Must be in criminal custody (actual or constructive).
- Any ground of legal invalidity.

### VACATURS FOR CAUSE

### DIVERSION EXPUNGEMENT

## VEHICLE

- **1203.43**

*Requirement:*

- Received a grant of pre-trial diversion (DEJ), after 1997, and completed the diversion program pursuant to PC 1000.

## IMMIGRATION IMPACT

- **If motion granted on a ground of legal invalidity, it completely erases the conviction for all immigration purposes.**

- D must still answer to charges unless they are dismissed.

## IMMIGRATION IMPACT

- Will erase the conviction for all immigration purposes.



## FELONY TO MISDEMEANOR REDUCTIONS

### VEHICLES

#### ● Prop 47

*Requirements:*

- No super-strikes.
- Drug possession offense.
- Property crimes where amount is less than \$950.

#### ● Penal Code 17(b)

*Requirements:*

- Conviction of a “wobbler” — i.e., a conviction that can be charged as a felony or a misdemeanor—as a felony.
- Sentence to a term consisting of jail/probation (not prison/parole).

## EXPUNGEMENTS

### VEHICLES

#### ● 1203.4, 1203.41, 1203.4a

*Requirement:*

- Available after a non-prison sentence.

### IMMIGRATION IMPACT

- Eliminate ground of removability for first-time drug possession convictions entered on or before July 14, 2011. Only works in the Ninth Circuit and if there’s no probation violation.
- An expunged conviction may not bar Deferred Action for Childhood Arrivals.

### IMMIGRATION IMPACT

- When reduced to a misdemeanor, under PC 18.5 that new misdemeanor will carry a maximum sentence of 364 days

#### ● Reduction to a misdemeanor will help:

- Lawful permanent residents avoid the 1 crime involving moral turpitude ground of deportability.
- May help lawful permanent residents eliminate certain aggravated felonies from their records.
- May help undocumented people establish eligibility for a waiver from removability.

### PROP 64

*Requirement:*

- Available to reduce some marijuana offenses to misdemeanors or infractions, and vacate others.

#### ● Immigration Impact

- Untested.

## 1. Immigration Impact of Expungements: Generally unhelpful, narrow *Lujan* Exception in Ninth Circuit

Generally, a dismissal or expungement based on rehabilitative relief will not remove the adverse immigration consequences of a conviction. See *Matter of Pickering*, 23 I&N Dec 621 (BIA 2003). However, in the Ninth Circuit only, there is a narrow exception to this rule. State rehabilitative relief will eliminate all immigration consequences of a first conviction for possessing a drug, possessing drug paraphernalia, or giving away a small amount of marijuana (but not for being under the influence), as long as the conviction occurred on or before

July 14, 2011, and the person did not violate probation or have a prior grant of pretrial diversion.

The rationale for this was established by the Ninth Circuit in *Lujan-Armandariz v. INS*, 222 F.3d 728 (9th Cir. 2000), which held that state rehabilitative relief must have the same effect as a Federal First Offender Act expungement, which is “to restore such person, in the contemplation of the law, to the status he occupied before such arrest.” FFOA, 18 USC § 3605(c). Because a federal first drug possession offense would be entitled to dismissal, an equivalent state offense should be as well.

## QUICK LUJAN CHECKLIST

*Can my client eliminate the immigration consequences of the conviction with an expungement?*

**YES** 1. Is the client convicted of possession of a controlled substance, giving away a small amount of marijuana?<sup>5</sup>

**YES** 2. Is this the client’s first conviction for a drug offense?<sup>6</sup>

**YES** 3. Did the conviction occur on or before July 14, 2011?

**YES** 4. Is the person applying for immigration relief or an immigration benefit within the Ninth Circuit?

**NO** 5. Prior to the conviction, did the client ever receive a pretrial diversion disposition?

**NO** 6. Did the client violate probation on this offense?<sup>7</sup>

If the answers are **YES** to questions one through four and **NO** to questions five and six, then your client is eligible for the *Lujan* expungement but should be advised that this relief is only effective within the Ninth Circuit. If the answers are YES to question five or six, then your client is disqualified from benefiting from the *Lujan* expungement (although this might not be true for persons who committed the offense while under age 21).

The Ninth Circuit later overturned that reasoning **prospectively** in *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011).<sup>3</sup> Any drug conviction that occurred after the *Nunez-Reyes* decision will not be eliminated through an expungement. However, any conviction for a

possession offense (not an under-the-influence offense) that occurred on or before the *Nunez-Reyes* decision on July 14, 2011, will be effectively erased as a controlled-substance ground of inadmissibility and deportability.

**WARNING:** The *Lujan* expungement is available only in the Ninth Circuit. *Matter of Salazar-Regino*, 23 I&N Dec 223 (BIA 2002) (en banc). If a noncitizen defendant exits the states that make up the Ninth Circuit or leaves the United States and tries to re-enter through a state not within the Ninth Circuit, the expunged controlled-substance conviction immediately triggers deportability, inadmissibility, and other adverse immigration consequences.<sup>4</sup>

## B. Vehicles: Executive Pardons

### 1. What are pardons?

An executive pardon is a decision (either by a state Governor or the President) to nullify punishment or other legal consequences of a crime.

The pardon power for federal crimes is granted to the President under the U.S. Constitution, Art. II, Sec. 2. The President “shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.” “Executive clemency” generally includes pardons, conditional pardons, commutation of sentences, conditional commutation of sentences, remissions of fines or restitution, respite, reprieve, and amnesty. All clemency applications are granted or denied by the President. The Office of the Pardon Attorney at the Department of Justice reviews and makes nonbinding recommendations on clemency applications.

The pardon power for state crimes is granted to the Governor. Some states commit the power of the Governor to an appointed agency or board, such as a Board of Pardons and Paroles. In California, the pardon power is granted to the Governor by the California Constitution, Art. V, Sec. 8(a):

Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in case of impeachment. The Governor shall report to the Legislature each reprieve, pardon, and

commutation granted, stating the pertinent facts and the reasons for granting it. *The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, four judges concurring.*

Historically, very few gubernatorial pardons were granted and it was not seen as a major source of relief for immigrants. This was particularly true under Governors Wilson, Davis, and Schwarzenegger. However, California Governor Jerry Brown substantially increased the issuance of pardons, granting more than 1,300 pardons during his tenure as governor. Some of these have been pardons for immigrants to alleviate the immigration consequences caused by old convictions or to allow deported immigrants to naturalize and return to the United States.<sup>8</sup>

### 2. How do pardons help immigrants?

The immigration statute provides that executive pardons are effective to eliminate the deportation consequences of a conviction for an aggravated felony, a crime of moral turpitude, or a high-speed border chase. See 8 U.S.C. §1227(a)(2)(A)(vi). Pardons are not effective, however, to eliminate the deportation consequences of a controlled-substances conviction. *Aguilera-Montero v. Mukasey*, 548 F.3d 1248 (9th Cir 2008). Because pardons are effective at erasing aggravated felonies, a successful pardon can help make someone eligible for naturalization, though they may still be deportable. 8 C.F.R. § 316.10(c)(2).

A full and unconditional pardon does not waive the following conviction-based grounds of removal: (1) controlled substances; (2) certain firearm offenses; (3) certain crimes of domestic violence; and (4) national security and related grounds. 8 U.S.C. § 1227(a)(2).

The statutory limitations mean that a person could get a pardon for an aggravated felony and still be deportable under some other ground unless the underlying conviction is vacated. Similarly, a person could get a pardon for a deportable firearms offense, and still need to vacate it based on a ground of legal invalidity to remove the immigration consequences.

**EXAMPLE:** A person who receives a pardon for a drug trafficking crime would not be deportable for an aggravated felony under section 237(a)(2)(A)(iv) but would remain deportable for a controlled-substance conviction under section 237(a)(2)(B)(i).

Though it is well established that pardons will waive certain conviction-based grounds of deportability, there is not a parallel statute in the INA for conviction-based grounds of inadmissibility. Some practice treatises and courts have assumed that pardons do not apply to grounds of inadmissibility. However, there are arguments that pardons should apply to remove the grounds of inadmissibility. See *Matter of K*, 9 I.&N. Dec 121 (BIA 1960) (holding that even though Congress only referenced the pardon authority under the deportability grounds, as long as the pardon met the requirement of the deportability grounds, then it also waived exclusion grounds); *Matter of H-*, 6 I.&N Dec. 90 (BIA 1954) (“the pardoning clause should be extended to immunize the same alien for the same offense when he seeks to reenter the United States, where such an alien committed his offense in the United States and a valid pardon has been granted to prevent his expulsion”). But see *Aguilera-Montero v. Mukasey*, 548 F.3d 1248 (9th Cir. 2008); *Balogun v. U.S. Attorney General*, 425 F.3d 1356 (11th Cir. 2005) (“[8 U.S.C.] Section 1182 does not have a pardon provision...and we believe that if Congress had intended to extend the pardon waiver to inadmissible aliens, it would have done so”).

### 3. How to Apply for A Pardon in California

There are two ways to obtain a governor’s pardon for a California conviction from the Governor: (1) Applying for a certificate of rehabilitation first, or (2) Applying directly to the Governor for a pardon.

#### **Applying for a certificate of rehabilitation.**

Generally, applicants for a certificate of rehabilitation must demonstrate rehabilitative conduct for seven years since being released from custody, probation, or parole. See Penal Code section 4852.03 for specific offenses with longer periods of rehabilitation. Felony convictions

with a probationary sentence must be expunged prior to seeking a certificate of rehabilitation. In the interest of justice, the court can grant a certificate before the period of rehabilitation has lapsed. Pen. C. § 4852.22. In January 2019, changes in the law for certificates of rehabilitation went into effect, allowing applicants to file for a certificate either in the county in which they currently reside, or the county in which the conviction occurred. Pen. C. § 4852.06. The certified copy of the certificate of rehabilitation can be treated as a pardon application by the Governor, who can grant it immediately. The Board of Parole Hearings, pursuant to criteria established by the Governor, must make a recommendation as to whether the Governor should grant a pardon within one year of receiving the certificate of rehabilitation. Pen. C. § 4852.16.

#### **Applying to the governor for a pardon.**

Individuals who are seeking a pardon for a misdemeanor or one felony may apply directly to the governor for a pardon. In January 2019, the legislature enacted reforms to the pardon and commutation process. These changes require the California Governor to make available on its website the application for a pardon. They clarify that pardons and certificates of rehabilitation may be granted, regardless of someone’s citizenship status. The changes allow the Board of Parole Hearings to consider expediting their review of urgent pardon and commutation applications, such as when an applicant is facing deportation. Pen. C. § 4812(c).

### *Applying for a Direct Pardon*

People can apply directly to the Governor if:

- ✓ They are seeking pardons for misdemeanors or no more than one felony;
- ✓ They are not residing in California;
- ✓ They have not continuously resided in California for at least five years. Pen. C. § 4852.06;
- ✓ They are not yet eligible for a certificate of rehabilitation under Penal Code section 4852 because not enough time has passed;
- ✓ They have convictions for certain sex offenses;
- ✓ They are currently serving in the military. Pen. C. § 4852.01(c).

## II. PENAL CODE SECTION 1203.43'S WITHDRAWAL OF PLEA FOR CAUSE AFTER DEFERRED ENTRY OF JUDGMENT

Section 1203.43 is a petition to withdraw a guilty plea for cause, but procedurally it is quite similar to an expungement and, if the person meets the requirements, it is very easy to obtain. From January 1, 1997, to December 31, 2017, a criminal court judge could offer post-plea deferred entry of judgment (DEJ) to qualifying defendants charged with a first, minor drug offense. See P.C. §§ 1000 et seq. (2017). Under DEJ during this period, the defendant agreed to enter a guilty plea and was given from 18 to 36 months to complete a drug program. If the defendant successfully completed the requirements, the court dismissed the charges, and the statute provided that there would be no conviction “for any purpose,” and no denial of any license, employment, or benefit flow from the incident. See P.C. §§ 1000.1(d), 1000.3, 1000.4.

Unfortunately, the statutory promise that a defendant will not suffer any legal harm if they successfully complete DEJ is not true if the defendant is a noncitizen. Like the other dismissals discussed above, the DEJ disposition remains a “conviction” for immigration purposes. To eliminate a conviction for immigration purposes, the plea must be withdrawn for cause due to a legal defect in the underlying case.

Penal Code § 1203.43 permits people who successfully complete DEJ to withdraw their guilty pleas for cause due to legal error. The legal error is the fact that the DEJ statute misinformed defendants as to the real consequences of the guilty plea. Penal Code section 1203.43(a) provides:

- (a) (1) The Legislature finds and declares that the statement in Section 1000.4, that “successful completion of a deferred entry of judgment program shall not, without the defendant’s consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate” constitutes misinformation about the actual consequences of making a plea in the case of some defendants, including all noncitizen defendants, because the disposition of the case may cause adverse consequences, including adverse immigration consequences.
- (2) Accordingly, the Legislature finds and

declares that based on this misinformation and the potential harm, the defendant’s prior plea is invalid.

Noncitizens whose cases were handled under DEJ before January 1, 2018 need to obtain relief under Penal Code Section 1203.43.

### NOTE: CHANGES TO PENAL CODE SECTION 1000 ET SEQ.

Due to the above-described problems, as of January 1, 2018, California ended Deferred Entry of Judgment and amended Penal Code section 1000 to create a true pretrial diversion statute. See AB 208 (Eggman, 2017), amending Penal Code section 1000 et seq. With this program, as of January 1, 2018, a defendant can be referred to diversion after entering a plea of not guilty, rather than guilty. The not guilty plea does not amount to a conviction for immigration purposes. For more on the new law, see K. Brady, *New California Pretrial Diversion for Minor Drug Charges*, at: [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

### A. Immigration Impact of Penal Code section 1203.43<sup>9</sup>

A dismissal under Penal Code section 1203.43 eliminates the DEJ guilty-plea conviction for immigration purposes; the plea is invalid because the DEJ statute provided “misinformation about the actual consequences of making a plea.” In an unpublished case, the Board of Immigration Appeals held that a dismissal under section 1203.43 effectively eliminates a conviction for immigration purposes. (See Appendix C.) Compare withdrawal of plea under section 1203.43 to dismissal under § 1203.4(a), which immigration authorities refer to as “expungements.” An expungement under § 1203.4 will not eliminate a conviction for most immigration purposes because it is mere “rehabilitative” relief that the person earns by completing probation.

Immigration law will give effect to an order that eliminates a conviction due to a legal defect in the proceedings, as opposed to “rehabilitative relief” based on the defendant completing program requirements. It does not matter that the motivation for seeking the relief was immigration issues, as long as the legal defect is the basis. See, e.g., *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000); *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006). Section 1203.43(a) works for immigration purposes because the order is based on a legal defect in the proceedings: the fact that the DEJ statute provided “misinformation about the actual consequences of making a plea,” such that the plea must be withdrawn as legally “invalid.”

## B. How to Withdraw a Plea Under Penal Code Section 1203.43

In some counties, the section 1203.43 motion will be filed as a matter of course at the same time that the charges are dismissed upon completion of DEJ, under Penal Code sections 1000.3. However, for old DEJ convictions,

petitioners may use the Judicial Council CR-180/CR-181 forms to petition for the §1203.43 relief. Petitioners may also choose to present their own petitions for relief. (See Appendix D.) The petitioner should attach proof of successful compliance with a PC § 1000.3/DEJ program to the petition.

The § 1203.43 application can be granted without a hearing. The only requirement for relief under § 1203.43 is to show that charges were dismissed after successful completion of DEJ. Relief is mandatory. Section 1203.43(b) provides that the court “shall, upon request of the defendant,” withdraw the plea in any DEJ case in which the charges were dismissed after completion of requirements.

If the records showing resolution of the DEJ case are no longer available, the applicant will submit a sworn declaration that charges were dropped based on successful completion of DEJ. Pen. C. § 1203.43(b). The declaration will be presumed true if the person also submits a California DOJ record that either shows successful completion of DEJ or fails to show a final resolution of the DEJ case.

## IS MY CLIENT ELIGIBLE FOR SECTION 1203.43 RELIEF?



**YES**

Did the defendant agree to participate in DEJ, Pen Code section 1000 et seq. between January 1, 1997, and December 31, 2017?



**YES**

Did the defendant receive a successful dismissal under Penal Code section 1000.3?



**The defendant is eligible for a 1203.43 dismissal, which should vacate the conviction for immigration purposes.**



**YES**

Did the defendant agree to participate in DEJ, Pen Code section 1000 et seq. between January 1, 1997, and December 31, 2017?



**NO**

Did the defendant receive a successful dismissal under Penal Code section 1000.3?



**Participants who dropped out of DEJ programs and did not return to court might be able to request to be re-referred to DEJ and complete the program.**

If the defendant violated the terms of DEJ and then was sentenced to, e.g., Prop. 36 or to the initial offense charged, then the person won't be eligible for section 1203.43 relief.

**A NOTE ABOUT PROP. 36 AND PENAL CODE § 1203.43:** Sometimes people do not comply with the court-ordered deferred entry of judgment programing, do not get a dismissal under Penal Code § 1000.3, and are instead transferred into Prop. 36 treatment. If the conviction is not dismissed under Penal Code § 1000.3, then it would not qualify for the section 1203.43 vacatur.

### III. REDUCING AND RESENTENCING: HOW TO USE PENAL CODE § 18.5, PROP 47, PENAL CODE § 17(B)(3), AND PROP. 64

For certain 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 benefits. There are three primary mechanisms to reduce a felony to a misdemeanor: Penal Code § 17(b), Prop. 47, and Prop. 64.

For certain noncitizens, reducing a felony conviction to a misdemeanor may provide crucial benefits. Depending on the case, it might eliminate adverse consequences of a single moral turpitude conviction; make it possible to avoid a sentence-based aggravated felony; and/or prevent a conviction from being a bar to DACA or potential future DACA legislation. See discussion at section 3, below.

There are three primary mechanisms to reduce a felony to a misdemeanor: Penal Code § 17(b), Prop 47, and Prop 64. Immigration authorities will accept as valid a criminal court order.<sup>10</sup> 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. Penal Code Section 18.5

##### 1. Penal Code Section 18.5(a) Changes the Definition of Misdemeanor

Through a series of legislative changes enacted in 2015 and 2017, the California State legislature modified the maximum sentence on misdemeanor offenses and created a mechanism for resentencing. 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 actually will have a penalty of up to 364 days. This change is automatic, by operation of law; individuals do not need to get a court order to reduce the potential sentence 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 Analysis, 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.

## 2. Mechanics of Penal Code section 18.5(a) and (b)

**A note about 18.5(a).** Under the plain language of subsection (a) of Penal Code section 18.5, all California misdemeanors that previously had a maximum potential sentence of 365 days now have a potential sentence of 364 days, regardless of the date of conviction. However, the Board of Immigration Appeals held that it will treat California misdemeanor convictions that occurred before January 1, 2015 as having a potential sentence of one year, rather than 364 days. It will treat misdemeanor convictions (or felony convictions that later are reduced to misdemeanors) from on or after January 1, 2015 as having a potential sentence of 364 days. *Matter of Velasquez Rios*, 27 I&N Dec. 470 (BIA Oct.4, 2018). For further discussion and defense strategies, see the ILRC advisory at <https://www.ilrc.org/matter-velasquez-rios-and-364-day-misdemeanors>. This decision is currently being challenged at the Ninth Circuit, but it is governing law for past convictions.

### 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 section 18.5, the new misdemeanor carries a maximum possible sentence of 364 days. This is written directly into the CR-180/CR-181 Judicial Council form.

**How to Get Penal Code Section 18.5(b) Relief.** Under subsection (b) of section 18.5, people who have a misdemeanor conviction and received an actual sentence of 365 days in jail, either for a crime that was originally punished as a misdemeanor or originally punished as a felony and later reduced to a misdemeanor under Penal Code section 17(b) or Prop. 47, must petition the court to reduce the sentence by one day. See Appendix E 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

## CALIFORNIA FELONIES, MISDEMEANORS, AND “WOBLERS”

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, the sentence is 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 county 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 a sentence of 365 days was originally imposed, the person should ask the court specifically to reduce that sentence by one day pursuant to section 18.5(b).



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. The 18.5(b) sentence reduction was *not altered* by the decision in *Matter of Velasquez-Rios*. See ILRC advisory: <https://www.ilrc.org/matter-velasquez-rios-and-364-day-misdemeanors>.

There is disagreement as to whether the one-day reduction is mandatory or discretionary. The sample in Appendix E 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, and 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. File the motion with the criminal court clerk, and it will be placed on the motions calendar, typically in two to four weeks. It is a good idea to prepare a sample order for the court to sign indicating that the conviction has been reduced 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.

### 3. Immigration Benefits of Penal Code Section 18.5

Immigration authorities must give effect to state court orders reducing the level of 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). When a felony is reduced to a misdemeanor, the misdemeanor has a potential 364 days rather than one year sentence, under Pen C 18.5(a). However, the Board of Immigration Appeals has declined to apply Pen C 18.5(a) retroactively to convictions from before January 1, 2015. See discussion at *Matter of Velasquez-Rios*,<sup>9</sup>. 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 first admission, if the offense

has a maximum possible sentence of one year or more.<sup>11</sup> “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 of property permanently, not temporarily. Theft under PC § 484 is a CIMT, but a conviction for Vehicle Code § 10851 is not because it includes 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 to be CIMTs, see the ILRC *California Quick Reference Chart* at [www.ilrc.org/chart](http://www.ilrc.org/chart).

For convictions that occurred after January 1, 2015, 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. If *Matter of Velasquez-Rios* is overturned, this applies to all prior cases as well.

**Moral Turpitude: Bar to Relief.** 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 nonpermanent residents.”<sup>12</sup> 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.<sup>13</sup> Under PC § 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. Again, currently the BIA refuses to apply this to convictions from before January 1, 2015.

**Moral Turpitude: Petty Offense Exception.** A single conviction of a CIMT is a ground of inadmissibility. That means, for example, that without a special waiver it can bar someone from getting a green card or admission at the border. 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 six 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. Note that people will be eligible for the petty offense exception regardless of the Board’s decision in *Matter of Velasquez-Rios*.

**Moral Turpitude: Mandatory Detention.** Mandatory detention in an immigration detention facility can be triggered by a single CIMT committed within five years of admission, if a sentence of a year or more was imposed.<sup>14</sup> Using Penal Code § 18.5 to obtain a misdemeanor with a sentence of 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. 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 was ineffective to defeat the designation of the conviction as an aggravated felony crime of violence under 18 U.S.C. § 16(b) for purposes of imposing a 16-level sentence enhancement increasing the sentencing range under the U.S. Federal 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 *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005).

## **B. Penal Code Section 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 county 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 imposed, but are not aggravated felonies with a sentence of less than a year, include:<sup>15</sup>***

- Pen. C. § 32, accessory after the fact injury
- Pen. C. § 118, perjury
- Pen. C. § 136.1(b)(1), witness dissuasion
- Pen. C. § 245(a), serious assault
- Pen. C. § 243(c), battery on a police officer
- Pen. C. § 243(d), battery causing serious bodily injury
- Pen. C. § 273.5, spousal injury
- Pen. C. § 422, criminal threats
- Pen. C. § 470, forgery
- Pen. C. § 496, receiving stolen property
- VC 10851, theft and injury of vehicles

**NOTE:** Even if something is not an aggravated felony, it could still potentially be a deportable offense.

If a person has a felony conviction for an offense that is a “wobbler” and was sentenced to a term that included probation, they might be able to petition the court to reduce the felony to a misdemeanor pursuant to Penal Code section 17(b)(3). The court cannot reduce a wobbler to a misdemeanor when a prison sentence has been imposed and its execution suspended before probation was granted. *People v. Wood*, 62 Cal. App. 4th 1262, 1266 (1998). 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), discussed above, reducing a 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

**1. How Does a Person Get Penal Code Section 17(b)(3) Relief?**

Because granting a felony-to-misdemeanor reduction under Penal Code section 17(b)(3) is always discretionary, you must provide the court with reasons to grant your motion. The court’s discretion is to be exercised only after a consideration of the offense, the character of the offender, and the public interest. Therefore, a showing that a petitioner has fulfilled the conditions of probation for its entire period has limited 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. For more details, see *Manual on Prop. 47 and Other Post-Conviction-Relief*, available at: <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-misdemeanor reduction. The Judicial Council forms are available online at: <http://www.courts.ca.gov/documents/cr180.pdf> and <http://www.courts.ca.gov/documents/cr181.pdf>. Many clean slate units at public defender offices and many legal services providers will offer 17(b) reductions free of charge. The petitioner may combine 17(b) felony-reduction petitions with 1203.4 dismissal petitions and file them according to the same procedures.

### C. Proposition 47

On November 4, 2014, California voters passed Proposition 47 (“Prop. 47”) into law. The law impacted as many as one million Californians. Under Prop. 47, codified at Penal Code section 1170.18, certain crimes previously categorized as felonies or wobblers were recategorized as misdemeanors. Prop. 47 applies not only 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 ownership is important to your client, 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 section 18.5, can bring all of the immigration benefits described in section III(A)(3), above. It also can restore access to certain professional licenses, some public benefits, and restore the right to serve on a jury.

**NOTE:** Felony reduction under section 17(b) can restore firearm rights in some cases.

### 1. Who Qualifies for Prop. 47 Reduction?

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

1. **Grand Theft**, including auto theft (\$950 or less) (Pen. C. §§ 484, 487).
2. **Receipt of Stolen Property** (\$950 or less) (Pen. C. § 496(a)).
3. **Forgery of Check, Bank Note, or Other Financial Instrument** (\$950 or less) (Pen. C. §§ 470, 473).
4. **Check Fraud/Bad Checks** (\$950 or less, all checks added together)(Pen. C. § 476a).
5. **Commercial Burglary of a Store During Business Hours** (\$950 or less) (Pen. C. §§ 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 of commercial burglary can be changed to “shoplifting.” Shoplifting is a newly created misdemeanor that has a six-month maximum possible sentence. See Pen. C. § 459.5.
6. **Petty Theft With a Prior** (Pen. C. § 666). Theft with a sentence enhancement (longer sentence) 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 was also 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 violation of Penal Code § 666, the offense will now be classified as petty theft, a six-month misdemeanor, under Penal Code § 459.5. In other words, the minor theft will be treated as a misdemeanor, even if 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, they 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 offenses in addition to 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 they think they 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.
- 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 convictions must file their petitions by November 4, 2022.

For further information about the mechanics of petitioning for reclassification or resentencing of a Prop. 47-eligible felony, see [MyProp47.org](http://MyProp47.org). If someone is currently serving a sentence on a Prop. 47-eligible felony, then they will go through the resentencing rather than the reclassification process.

## 2. How Does Prop. 47 Help Immigrants?

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 Deferred Action for Childhood Arrivals (DACA) program. However, for the theft-related Prop. 47 offenses, a reduction to a

misdemeanor could eliminate it as a CIMT ground of deportability or inadmissibility, a bar to non-LPR cancellation, or potentially, as an aggravated felony theft offense.) See the discussion of immigration benefits of Penal Code section 18.5, above, in section III(A)(3).

**NOTE:** The 2016 case, *People v. Vasquez*, 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 new misdemeanor sentence of 364 days. 247 Cal. App. 4th 513 (2016). The court refused to reduce the 16-month prison sentence and resentence the defendant to the misdemeanor maximum. Note, however, that *People v. Vasquez* may be distinguished because it was published *before* the amendments to 18.5(a) made clear that the misdemeanor sentence shall apply retroactively for all misdemeanors. Prop. 47-eligible people with sentences of 365 days can still petition for a one-day reduction under Penal Code section 18.5(b).

**WARNING: PROP. 47 MAY NOT SOLVE ALL IMMIGRATION PROBLEMS.** Reducing a felony to a misdemeanor can be helpful, but immigrants still might be in danger from a misdemeanor or infraction marijuana 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 they need to get expert analysis of all convictions, whether misdemeanor, felony, or infraction.

## D. Proposition 64

On November 8, 2016, California voters passed Proposition 64 (Prop. 64) into law. Prop. 64 legalized the possession, transport, purchase, consumption, and sharing of up to one ounce (28.5 grams) 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 provided

for a strict system to regulate and tax the nonmedical use of marijuana, which began in 2018. In addition to the conduct it legalized, Prop. 64 reduced or eliminated criminal penalties for most marijuana offenses. Building on the work of Prop. 47, which passed in 2014, Prop. 64 provided 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 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 they possessed marijuana in accordance with California law might become inadmissible! See D. 3.

### 1. What Prop. 64 Does

Prop. 64 amended the penalties for five 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)
- ✓ Maintaining a place for sale of Marijuana (H&S Code § 11366)

Prop. 64 has a different effect on different offenses. Some felonies and misdemeanors were reclassified as misdemeanors or infractions, and some conduct was entirely legalized. The new penalty (i.e., misdemeanor, infraction, or dismissal) attached to each offense depends on the specific offense. For example, some conduct became outright legal (such as possession of up to one ounce (28.5 grams) of marijuana or up to 8 grams of concentrated marijuana), and a prior offense qualifies

for total dismissal and vacatur, while other offenses were reduced to misdemeanors or infractions (such as sales of marijuana). See *Prop. 64: A Guide to Resentencing at: <https://www.drugpolicy.org/resource/proposition-64-guide-resentencing-reclassification>*, for more information about the resentencing or reclassification process.

Going forward, some Prop. 64-eligible offenses, like adult possession of under 28.5 grams of marijuana, will not be prosecuted because they are no longer criminal offenses. Looking backward, any person with a prior conviction for one of the five offenses listed above may apply for reclassification or vacatur and dismissal. Unlike Prop. 47, Prop. 64 does not disqualify a petitioner from resentencing or reclassification because of any particular prior criminal offense. In other words, as long as the petitioner: (1) was convicted of an offense listed above; (2) is serving or has completed a sentence for one of those offenses; and (3) would have been guilty of a lesser offense under Prop. 64, the petitioner is eligible.

People who might be eligible can consult with their public defender office or obtain pro se forms available from the Judicial Council. See CR-400, at: <http://www.courts.ca.gov/documents/cr400.pdf> and CR-401 at: <http://www.courts.ca.gov/documents/cr401.pdf>. See county-specific forms at: <http://www.drugpolicy.org/prop-64-county-information>.

### 2. What is Prop. 64's Impact for 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 statutes, like cultivation or sale, were even previously classified as aggravated felonies. Now, because of Prop. 64, some noncitizens will avoid becoming deportable or inadmissible for having suffered a marijuana conviction.

## Immigration Impact of Prop. 64

Offense for people 21 and over	Does Prop. 64 eliminate this deportable offense?	Will Prop. 64 eliminate this inadmissible offense?	Will Prop. 64 eliminate this aggravated felony?	Will a family visa waiver be available for this conviction?
Possess of up to 28.5 grams of MJ or 8 grams of concentrated cannabis	YES	YES	N/A	Limited discretionary waiver
Give away or transport for personal use	YES	YES	N/A	No family visa waiver
Plant, cultivate, and process up to six plants for personal use	YES	YES	YES	No family visa waiver

By decriminalizing conduct such as cultivation of a small amount of marijuana for personal use by adults twenty-one 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 ages eighteen to twenty, Prop. 64 may or may not protect this age group from removal. There remains the distinct possibility that the infraction could be held an “aggravated felony.”

**Prop. 64 Infractions.** Prop. 64 turns some offenses into “infractions.” Some unpublished Ninth Circuit decisions have treated infractions as convictions. While there are no published cases, and there is a strong argument against this,<sup>16</sup> advocates report incidents where DHS and U.S. consulates have treated a California infraction as a “conviction” for immigration purposes. This could

have the consequence of a California infraction, like sale of marijuana, being classified as an “aggravated felony” by federal immigration authorities. Accordingly, reclassification of a Prop. 64 offense as an infraction has little value unless an immigration court rules that a California infraction is not a conviction.

**Prop. 64 Change of Sentence.** Pursuant to Health & Safety Code section 11361.8, subdivisions (b) and (c), added by Prop. 64, a person who was convicted of and is serving a sentence for what would be 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 do so 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 modified, the sentence reduction has little effect on the immigration penalties.

**Prop. 64 Vacatur.** Pursuant to Health & Safety Code section 11361.8, subdivisions (e)-(h), as added by Prop. 64, a person who has completed their 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. See discussion of Rehabilitative Relief in section I, above. Immigration authorities will give effect to a vacated judgment based on “a procedural or substantive defect in the underlying criminal proceedings,” such as a ground of legal invalidity (e.g., 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.” Immigration judges routinely respect criminal court orders, vacating convictions on grounds of legal invalidity, and they should do so here, as well. The “ground of legal invalidity” is that California voters have determined that the state erroneously treated certain marijuana-related conduct as criminal and, therefore, has enacted a mechanism for dismissing and vacating those convictions.

It is nevertheless possible 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 did not exist at the time of the conviction or that the statute does not identify any specific legal defect. Because Prop. 64 is still new, we don’t yet have published case law holding that its vacatur mechanism meets the *Pickering* standard.

As an additional safeguard, when requesting relief under 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, such as Penal Code § 1473.7, to present a Prop. 64 claim for vacatur. See discussion of grounds of legal invalidity in Chapter Five.

In some jurisdictions, prosecutors are proactively vacating or reclassifying all Prop. 64-eligible offenses.<sup>17</sup> Even if an immigration court erroneously rules that the dismissal is not valid for immigration purposes, a prior Prop. 64 dismissal will not foreclose a subsequent later vacatur.<sup>18</sup> It is possible that in some cases the sealing of the records will make it impossible for immigration authorities to produce sufficient proof of the conviction’s existence.

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

### 3. Prop. 64 Related pitfalls: Admitting Conduct to Immigration and Border Officials

Under Prop. 64, California law provides that any person age twenty-one or over can legally possess and use 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 they have ever used marijuana, the person can face very serious immigration problems, even if the person was never convicted of a crime, they just used marijuana at home, and marijuana use was legal under state law. The person can face serious problems if they apply for a green card, apply for U.S. citizenship, travel outside the United States, or are merely questioned on the street by ICE.

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

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



## 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 texts about you and marijuana on your phone, social media accounts, 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 okay. 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 anything about marijuana, you can't take it back. If you did admit something to a federal officer, get legal help quickly.

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## IV. VEHICLES FOR VACATING CONVICTIONS

While the above reductions, reclassifications, and expungements may be helpful for certain people, in many instances, the only way to ensure that a conviction will not cause immigration harm is to vacate the conviction based on a specific ground of legal invalidity.

To present your motion before the court, you need to choose a “vehicle” that will grant the court jurisdiction. There is no such thing as a *Padilla* motion. *Padilla v. Kentucky*, 559 U.S. 356 (2010), established the constitutional requirement that defense counsel must advise noncitizen defendants about the immigration consequences of a conviction, but the case did not create a mechanism to present such claims if that advice did not occur. Each state and the federal courts have their own vehicles available to present claims of legal invalidity. Different vehicles are appropriate for different grounds. For a discussion of grounds, see Chapter Five.

The discussion below provides a brief overview of the vehicles available under California criminal law to present claims of legal invalidity.

### A. Penal Code § 1018 Motion

Under Penal Code §1018, a court may allow a defendant to withdraw their guilty plea “for good cause shown,” either: a) before judgment is entered, or b) within six months after the defendant is placed on probation. A defendant may not use this motion after judgment has been imposed. See *People v. Williams*, 199 Cal. App. 4th 1285 (2011) (trial court properly denied motion to withdraw plea under Pen. C. § 1018 because it was not brought prior to judgment; although execution of sentence was suspended, imposition of prison term constituted “judgment”). On the other hand, a judgment of conviction is not deemed to have been entered when imposition of sentence is suspended and probation granted, even though a conviction may exist for purposes of finality and appeal. *People v. Giron*, 11 Cal. 3d 793, 797–98 (1974).

## 1. Timing

When a person has been placed on probation with imposition of sentence suspended, they may file a motion under Penal Code section 1018 to withdraw the guilty plea at any time within six months. Typically, a defendant who was sentenced to probation more than six months before the date on which post-conviction-relief is requested may not use Penal Code § 1018 but must vacate by using a different vehicle. However, in some cases, the defendant may be able to avail themselves of an equitable argument based on a late-filed section 1018 motion.

When deferred entry of judgment (DEJ) is granted under Penal Code section 1000, the defendant is not technically placed on “probation,” so you might argue that the motion to withdraw the plea can be made at any time. Note, however, that if your client has completed or will shortly complete DEJ, it would be easier to obtain relief under Penal Code section 1203.43.

## 2. Grounds

A Penal Code § 1018 motion can be made alleging the broadest of legal grounds. The moving party must only demonstrate “good cause” for the withdrawal of the plea. The California Supreme Court has held that a defendant’s ignorance of the immigration consequences of a plea may properly be considered “good cause” to withdraw the plea, in the discretion of the trial court. *People v. Patterson*, 2 Cal. 5th 885, 889 (2017); *People v. Giron*, 11 Cal. 3d 793, 797 (1974). This is in keeping with the general rule that “mistake, ignorance or inadvertence” will support withdrawal of a plea. In a proper case, evidence that the plea was entered under duress will also support granting this motion. *People v. Sandoval*, 140 Cal. App. 4th 411 (2006) (allowing defendant to withdraw plea where codefendant had threatened to harm defendant in prison if he refused to plead guilty, and the trial judge had improperly pressured defendant to plead guilty). Since this relief is discretionary, it is especially important to argue the equities.

It is important to make sure the plea is withdrawn on grounds of legal invalidity, rather than merely as a compassionate action to avoid the immigration

consequences. *Beltran-Leon v. INS*, 134 F.3d 1379 (9th Cir. 1998); *Matter of Pickering*, 23 I&N Dec 621 (BIA 2003).

The burden of proof on a motion to withdraw a guilty plea under Penal Code §1018 is borne by the defendant. *People v. Nance*, 1 Cal.App. 4th 1453 (1991).

## B. Direct Appeal

A direct appeal is the most direct form of post-conviction challenge to the legal validity of a criminal conviction. If the defendant prevails, the conviction is vacated as legally invalid and no longer exists to trigger any adverse immigration effects. See *Matter of Pickering*, 23 I&N Dec 621 (BIA 2003). Because a notice of appeal must be filed promptly (within sixty days after judgment in a felony case), this remedy is not available to a noncitizen who discovers the adverse immigration consequences of the conviction after that point.

A conviction must have a sufficient degree of finality before immigration consequences can attach. The Board of Immigration Appeals (BIA) held that a conviction does not attain a sufficient degree of finality for immigration purposes until the right to direct appellate review of the merits of the conviction has expired or been waived. *Matter of J. M. Acosta*, 27 I&N Dec. 420 (BIA 2018). The BIA set out the following rules. Once the time for filing a direct appeal has passed, a presumption arises that the conviction is final for immigration purposes. “To rebut that presumption, a respondent must come forward with evidence that an appeal has been filed within the prescribed deadline, including any extensions or permissive filings granted by the appellate court. They must also present evidence that the appeal relates to the issue of guilt or innocence or concerns a substantive defect in the criminal proceedings.” *Id.* at 432.

The BIA asserted that federal courts should defer to this ruling, and it distinguished the holdings of some federal courts that had come to a contrary conclusion, including the Ninth Circuit in *Planes v. Holder*, 652 F. 3d 991 (9th Cir. 2011), on the grounds that the decisions did not address

a direct appeal of right on the merits of a conviction. However, at this writing, the Ninth Circuit has not had an opportunity to respond to the BIA's ruling in *Acosta*. Despite this uncertainty, it is worthwhile to file direct appeals or "slow pleas" in appropriate cases, because (a) according to the BIA, a pending direct appeal means that a conviction is not final for the purposes of removal or disqualification from relief, and (b) the conviction may be overturned on appeal. But when possible, defense counsel should have an additional back-up strategy in case the Ninth Circuit does not accept this ruling.

### C. Habeas Corpus

A successful habeas petition will effectively vacate the conviction and put the defendant back in the spot they were in before the error occurred. Typically, that means that they will still have to answer to the open charges.

A court has jurisdiction over a petition for a writ of habeas corpus if the defendant is in current actual or constructive custody (i.e., currently imprisoned or on probation or parole) as a direct result of the criminal conviction. The procedure for a writ of habeas corpus can be complicated and burdensome, and it is always worth considering whether another vehicle for relief (e.g., Penal Code § 1016.5 or § 1018) might be appropriate in lieu of a habeas petition.

There are several requirements for issuance of the writ.

#### 1. Custody

The petitioner must be in actual or constructive custody. Conditions constituting constructive custody include release on probation or parole, commitment under a civil narcotics-addict program, and outpatient status under an order of commitment to a state hospital. Immigration custody, even flowing solely from the conviction under challenge, does not constitute custody sufficient to allow a challenge to the conviction by California habeas corpus petition. *People v. Villa*, 45 Cal. 4th 1063 (2009). An exception to the custody requirement exists when there is newly discovered evidence of government fraud, misconduct, or perjury; habeas may be filed even without custody if within one year of the date these facts were, or should have been, discovered. Pen C §1473.6(a).

#### 2. Exhaustion

The petitioner must show that other remedies, such as direct appeal, are inadequate or were exhausted or, if they were not exhausted, that special circumstances exist justifying the issuance of the writ. Denial of an important constitutional right such as effective assistance of counsel is such a circumstance. *In re Lopez*, 2 Cal.3d 141, 151(1970).

#### 3. Constitutional error

The act of the court or government challenged by the petition must have constituted a fundamental constitutional or jurisdictional error. "Jurisdictional" errors supporting issuance of the writ have been found where: (1) the accusatory pleading or commitment was defective; (2) material false evidence was introduced against the petitioner; (3) the guilty plea was entered under a misapprehension of law; (4) improprieties occurred regarding the granting or revoking of probation or parole; or (5) the sentence imposed was unauthorized, excessive, or unconstitutional.

#### 4. Due diligence

The defendant must have pursued relief with due diligence. There is no express time window in which a petitioner must seek habeas relief for noncapital cases. Rather, the general rule is that the petition must be filed "as promptly as the circumstances allow..." *In re Clark*, 5 Cal.4th 750, 765, n. 5 (1993). An untimely petition for a writ of habeas corpus may still be considered if the delay is justified by the petitioner, who bears the burden of demonstrating either: "(i) absence of substantial delay, (ii) good cause for the delay, or (iii) that the claim falls within an exception to the bar of untimeliness." *In re Robbins*, 18 Cal. 4th 770, 780 (1998); *In re Lucero*, 200 Cal. App. 4th 38 (2011) (defendant did not unreasonably delay in filing habeas corpus petition when filed within ten months after judicial decision on which the claim was based became final for all purposes).

## Vehicles for Vacating Convictions

Vehicle	Timing	Ground	Other Notes
<b>Penal Code § 1018 (Motion to Withdraw Plea)</b>	Must be filed within six months after the defendant is placed on probation. (It may be possible to argue for an exemption to the six-month requirement due to equitable tolling.)	May be granted for “good cause.” A defendant’s ignorance of the immigration consequences of a plea may be considered “good cause.”	Broadest legal ground, though narrowest window of time to file.
<b>Habeas Corpus</b>	<p><b>Custody.</b> The petitioner must be in actual or constructive custody. Immigration custody does not constitute custody sufficient to allow a challenge to the conviction. <i>People v. Villa</i>, 45 Cal. 4th 1063 (2009).</p> <p><b>Exhaustion.</b> Must show other remedies are inadequate or exhausted.</p> <p><b>Due diligence.</b> Defendant must have pursued relief with due diligence.</p>	Must allege constitutional error.	May sometimes be beneficial to file a habeas petition as a “nonstatutory motion to vacate” and habeas in the alternative. See <i>People v. Fosselman</i> , 33 Cal. 3d 572 (1983).
<b>Penal Code § 1016.5</b>	Must be filed with due diligence.	“Shall” be granted after a plea of guilty or no contest if the court fails to issue the mandated statutory warning that the conviction may cause (1) deportation, (2) exclusion, and (3) denial of naturalization.	Courts have added the requirement of a showing of prejudice. <i>People v. Zamudio</i> , 23 Cal. 4th 183 (2000).  If there are no records, there is a presumption the advisement was not given.
<b>Penal Code § 1473.7</b>	The defendant must no longer be in actual or constructive custody on the offense. If a final notice to appear or order of removal has issued, the motion must be filed with “due diligence.”	(1) a prejudicial error damaging the defendant’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, or (2) newly discovered evidence of actual innocence.	Section 1473.7(a)(1) covers claims of “failure to meaningfully understand” for noncitizens; and 1473.7 (a)(2) covers citizens or noncitizens when they have newly discovered evidence of actual innocence.

## 5. Procedure/hearing

Once a petition is filed, the trial court may not grant habeas relief except after issuance of an order to show cause, and after the court has required the opposing party filing of a return from the opposing party. Only after the order to show cause issues, and a return and reply are received, may the court hold a hearing on the petition. The court may choose to deny the petition at any point after it has been filed.

### D. Motion to Vacate Under Penal Code § 1016.5

In 1978, the California legislature enacted Penal Code § 1016.5, which requires courts, upon the entry of a guilty or nolo contendere plea, to advise noncitizens of the potential immigration consequences of a conviction. The court must warn noncitizen defendants:

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).

The statute expressly provides that, if this warning was not given before the plea was entered, the court on the defendant's motion "shall vacate" the conviction.

To qualify for a Penal Code § 1016.5 vacatur, a defendant must establish that: "(1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement." *People v. Totari*, 28 Cal.4th 876, 884 (2002).

Judicial Council's CR 187 and 188 forms provide pro se motions and orders for Penal Code sections 1016.5 and 1473.7 claims.<sup>19</sup>

## 1. Proving Grounds

In determining whether the advisement was properly given, the moving party should get a complete copy of the record of conviction documents, including the reporter's transcript of the plea proceeding, the clerk's minutes, and any minute orders or plea waiver forms.

A Penal Code § 1016.5 motion is appropriately filed if (1) the 1016.5 advisement was not given at the time of the plea; (2) the advisement was given incorrectly; or (3) there is no record that the court provided the advisement.

Notably, only 1016.5-related errors may be raised using the section 1016.5 motion. The defendant may not raise a claim of ineffective assistance of counsel (IAC) using the section 1016.5 vehicle. *People v. Chien*, 159 Cal. App. 4th 1283 (2008).

**Absence of record.** Absent a record that the court provided the advisement, the defendant shall be presumed not to have received the required advisement. Pen. C. § 1016.5(b). Therefore, if the court has no records because, e.g., the case is old and the file has been destroyed, then a Penal Code § 1016.5 motion may be appropriate. The court has the burden of proving that the required warning was given.

**Timing and adequacy of warning.** Read the transcript carefully to determine if all of the required components of the advisement were administered. The California Supreme Court held that omission of even one of the three required warnings is sufficient to require reversal if: (a) the conviction "may result" in a listed consequence; and (b) there is a reasonable probability the defendant would have rejected the plea if the proper warning had been given and the defendant had investigated the exact immigration consequences of the case. *People v. Zamudio*, 23 Cal.4th 183 (2000). However, the exact words of the statute need not be used so long as the court warns the defendant of each of the three damaging potential immigration consequences specified in the statute: deportation, denial of naturalization, or exclusion from admission. *People v. Gutierrez*, 106 Cal. App. 4th 169 (2003).

A warning under Penal Code section 1016.5 that was given in a different case or at a time other than at the plea will not cure the statutory violation caused by failing to give the warning at the proper time. *Zamudio*, 23 Cal. 4th at 208. The Supreme Court also held that giving the warning in an earlier case cannot cure a later error since each plea might have different immigration consequences. *Zamudio*, 23 Cal. 4th at 204. See also *People v. Akhile*, 167 Cal. App. 4th 558, 564 (2008) (advisement given at earlier appearance insufficient to comply with the statute).

The required admonition is sufficient if given by any of the parties to the proceedings and need not be delivered by the judge personally. It need not be given orally. See *People v. Quesada*, 230 Cal. App. 3d 525, 536 (1991) (admonition sufficient if advice is recited in plea form and defendant and his counsel are questioned concerning that form to ensure defendant actually read and understood it). This, of course, raises questions of language ability, literacy, and comprehension. Obviously, in order for the plea to be valid, the warning must have been understood by the defendant.

**Minute orders and Penal Code section 1016.5.** In *People v. Dubon*, 90 Cal. App. 4th 944, 955 (2001), the court held that a minute order of entry of defendant's plea, indicating that the defendant was advised of the consequences of his plea on any "alien/citizenship/probation/parole status," without more, was insufficient to establish a record that the defendant received the complete and accurate advisement of immigration consequences of his plea: "[A]lthough a minute order may under proper circumstances qualify as a record, here the minute order stated only that Dubon was advised of possible effects on alien or citizenship status. It does not state that Dubon was given the required advisement in full, or accurately." *Dubon*, *id.* The court held that, because the minute order did not specify that Dubon was advised his conviction could result in deportation and stated only that he was advised of the effect of his plea on "alien/citizenship status," the minute order did not reflect substantial compliance with the statute.

Thus, by itself, the minute order was insufficient to establish a record that Dubon had received complete and accurate advisement of the immigration consequences of his plea. Nevertheless, coupled with the trial judge's testimony, the court found that the minute order "sufficiently rebutted the statutory presumption of nonadvisement." *Dubon*, *supra*. See also *People v. Castro-Vasquez*, 148 Cal. App. 4th 1240, 1245 (2007) (minute order indicating noncitizen defendant was advised of possible effects of plea on "alien/citizenship" held insufficient to show defendant was advised of all three possible immigration consequences before entering guilty plea, when the only record of advisement was minute order); *People v. Akhile*, 167 Cal. App. 4th 558, 564 n. 4 (2008) (court leaves open the question whether the notation in the clerk's minutes, "Defendant advised of provisions of Pen. C. §1016.5," sufficiently established compliance with Penal Code section 1016.5(a)).

## 2. Prejudice

In *People v. Zamudio*, 23 Cal.4th 183 (2000), the California Supreme Court imported a prejudice requirement to Penal Code § 1016.5. In addition to showing an error in the advisement, the moving party must also demonstrate a reasonable probability that, if properly advised, they would have rejected an existing plea offer. See *People v. Martinez*, 57 Cal.4th 555 (2013).

In *Martinez*, the court held that a defendant is prejudiced by the court's lack of proper advisement even if it is not reasonably probable that the defendant would have obtained a more favorable outcome. The court also held that relief is available if the defendant establishes they would have rejected the existing bargain to attempt to negotiate another. *Martinez*, 57 Cal.4th at 567. See also *Lee v. United States*, 137 S.Ct. 1958 (2017) (holding that it would be rational for the defendant to reject a plea that triggered deportation, even if it meant taking a "Hail Mary" and risking a guilty conviction at trial).

## E. Motion to Vacate under Penal Code § 1473.7<sup>20</sup>

California enacted Penal Code § 1473.7, effective January 1, 2017, to provide people no longer in criminal custody with a vehicle to erase the catastrophic consequences (immigration or otherwise) that can attach to even very old unlawful convictions.

This law permits people no longer in criminal custody to file a motion to vacate a conviction or sentence based on either of two claims: (1) a prejudicial error damaging the defendant'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; or (2) newly discovered evidence of actual innocence.

Effective January 1, 2019, the California legislature enacted amendments to 1473.7 clarifying the substance and scope of the law.<sup>21</sup>

Judicial Council's CR 187 and 188 provide forms for pro se motions and orders for Penal Code §§ 1016.5 and 1473.7 claims.<sup>22</sup>

### 1. Background

Under California law, individuals in either actual or constructive custody may file a petition challenging the constitutionality of a conviction or sentence by filing a habeas corpus petition. See Pen. C. §1473. Once a person is no longer in custody (i.e., they are no longer in jail or prison or on probation or parole), courts no longer have jurisdiction over a habeas petition.<sup>23</sup>

For years, people who sought to challenge the legal validity of a conviction but were no longer in criminal custody turned to the writ of *coram nobis*, a common law mechanism to vacate convictions. In 2009, however, the California Supreme Court held that claims of ineffective assistance of counsel could not be raised in *coram nobis*, a common law mechanism to vacate convictions. *People v. Kim*, 45 Cal.4th 1078 (2009).

The lack of a post-custodial vehicle to challenge unlawful convictions effectively shut the courtroom doors to many people who suffered devastating consequences caused by unlawfully imposed criminal convictions.<sup>24</sup> If a noncitizen only became aware that the conviction made them deportable years after the completion of custody, there was no way to go back into court to erase the conviction. Additionally, noncitizens who had entered pleas without counsel had no way to challenge convictions that carried unforeseen immigration consequences. In fact, if the sole complaining witness recanted testimony after custody had been served, there was no way for the convicted person—whether citizen or noncitizen—to present that new evidence in criminal courts.

These holes in California's criminal procedural landscape had a uniquely devastating impact on immigrants who suffered unconstitutional convictions. Certain criminal convictions can cause immigrants to be placed in removal proceedings; be detained for weeks, months, or years in immigration facilities often located hundreds of miles from home; and be deported and permanently separated from family and an established life in the United States.

Because of the severity of these immigration penalties and the fact that they flow directly from criminal convictions, California courts and the U.S. Supreme Court have held that criminal defense counsel have the legal obligation to advise noncitizen defendants of the immigration consequences of a conviction and to defend against those consequences by plea bargaining for an immigration-safe criminal disposition.<sup>25</sup> Under California law, if the defendant does not understand the immigration consequences of a conviction, that constitutes good cause to withdraw the plea.<sup>26</sup>

Many immigrants do not become aware of immigration consequences until immigration authorities initiate removal proceedings, often years after the person successfully completed probation or parole and thereby ended criminal “custody.” As a result, many families have been torn apart by deportations based on unconstitutional convictions that could not be challenged in criminal courts simply because custody or other post-conviction deadlines had lapsed before the defendant even knew of the immigration consequences.

Penal Code § 1473.7 closes this procedural loophole, opens up critical new avenues for relief, and grants courts jurisdiction to hear specific claims of legal invalidity brought by individuals no longer in criminal custody. Along with providing help to immigrants who did not understand the consequences of a conviction, Penal Code §1473.7 provides a vehicle to vacate a conviction for any defendant—citizen or noncitizen—who is no longer in custody and seeks to present new evidence of innocence. New evidence of innocence could consist of, for example, new scientific results such as DNA testing, the fact that another person admitted the crime, or facts that call into question the evidence that was used to convict the person, such as problems at a crime lab or new reason to doubt a key witness’s testimony.<sup>27</sup> The present discussion will focus on the requirements for a motion under Penal Code section 1473.7 (a)(1).

## 2. Immigration-related Grounds for Vacatur

Penal Code §1473.7(a)(1) states the general basis on which a motion to vacate can be made:

The conviction or sentence is legally invalid due to a 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. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.

In immigration cases, §1473.7(a)(1) allows motions alleging at least three distinct causes of action that may be raised independently or together: (1) defense counsel violated the duty to investigate and accurately advise the defendant about the specific immigration consequences of a plea;<sup>28</sup> (2) defense counsel failed to defend against immigration consequences of a plea by attempting to plea bargain for an immigration-safe alternative disposition;<sup>29</sup> and (3) the defendant failed to meaningfully understand the immigration consequences of a conviction.<sup>30</sup> As (a)(1) clarifies: these grounds may, but need not necessarily, include a finding of ineffective assistance. They can, in fact, be based on the defendant’s own subjective inability to understand the immigration consequences of a conviction.

When the defendant enters a plea without the assistance of counsel, no claim of ineffective assistance of counsel is possible. The defendant may, however, make a claim under Penal Code §1473.7(a)(1) that the defendant did not meaningfully understand the immigration consequences of this plea.

The 2019 amendments to 1473.7 also indicate that there is a “presumption of legal invalidity” when a defendant pleaded guilty or nolo pursuant to a statute that provided that, upon completion of specific requirements, “the arrest and conviction shall be deemed never to have occurred, where the moving party complied with these requirements, and where the disposition under the statute has been, or potentially could be, used as a basis for adverse immigration consequences.” 1473.7(e)(2). This advisement is provided in Prop 36 convictions, and also before many forms of diversion. Because the court misadvised immigrant defendants that a dismissal would result in the conviction being deemed “never to have occurred” the plea was violated due process because it was not knowing, voluntary, or intelligent. Accordingly, under 1473.7(e)(1) those convictions are now presumptively invalid and eligible for vacatur.



### 3. Prejudicial Error and Prejudice

There are two layers of prejudice that must be proven in a Penal Code section 1473.7 motion. First, penal code § 1473.7 requires that the error alleged be “prejudicial.” This requires a showing that but for the error, the defendant would be eligible for some form of immigration relief or benefit, or would not be removable. A Penal Code section 1473.7(a)(1) claim, therefore, is only properly made when the conviction is causing, or could cause, some form of immigration damage. See 1473.7(e)(1) (“For 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 the potential to cause removal or the denial of an application for an immigration benefit, lawful status, or naturalization.”).

The fact that the conviction itself must be prejudicial should not be confused with the separate requirement for prejudice a defendant must prove when raising a claim of ineffective assistance of counsel (IAC). In claims of ineffective assistance of counsel, it is also always necessary to establish not just that counsel violated their duty, but also that the defendant was prejudiced by that violation. For more on this prejudice requirement, see Chapter Five, Grounds. In related contexts, courts have held that prejudice is shown if the defendant establishes it was reasonably probable they would not have pleaded guilty absent the error or that “a decision to reject the plea bargain would have been rational under the circumstances.”<sup>31</sup> Defendants do not need to show that they actually could have obtained a more favorable outcome at trial or in plea negotiations—merely that the error mattered.<sup>32</sup> A court or defense counsel’s advisement of potential immigration consequences does not satisfy defense counsel’s duty, nor does it defeat a claim of prejudice.<sup>33</sup> Prejudice is met if the defendant establishes, by a preponderance of the evidence, a reasonable probability that they would have rejected the existing conviction or sentence to attempt to negotiate an alternative disposition or even made a “Hail Mary” that they would have taken the case to trial.<sup>34</sup>

### 4. Components of a Successful Motion

The basic components of a successful motion include, but are not limited to:

- ✓ Clear statement of the grounds for the motion;
- ✓ Corroborating evidence for each of the grounds raised;<sup>35</sup>
- ✓ Proof of prejudice;<sup>36</sup>
- ✓ A declaration signed by an expert in criminal and immigration law identifying alternative immigration-safe dispositions;<sup>37</sup>
- ✓ A declaration signed by the defendant stating the basis for the motion;<sup>38</sup>
- ✓ Evidence of equities;<sup>39</sup>
- ✓ Motions may contain a proposed order for the judge to sign.
- ✓ If alleging a claim of ineffective assistance of counsel, ideally include a declaration from defense counsel attesting to the lack of immigration advice or defense.

Note that, as a practical matter, a key strategy for bringing successful post-conviction-relief motions is to discuss the matter before filing, with the District Attorney, to offer an immigration-safe alternative disposition, and to attempt to persuade the DA’s office not to contest the motion. See Repleading in part 7, below.

### 5. Timing of the Motion

In general, motions alleging the defendant did not understand the immigration consequences of a plea are timely filed provided that the moving party is no longer in criminal custody. See 1473.7(b)(1). However, a motion may be deemed untimely filed if it was not filed with reasonable diligence after the later of the following: (1) The date the moving party receives a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or the denial of an application for an immigration benefit, lawful status, or naturalization; or (2) Notice that a final removal order has been issued against the moving party, based on the existence of the challenged conviction or sentence.<sup>40</sup>

Immigration attorneys who are representing individuals in removal proceedings should be aware of the “reasonable diligence” requirement and advise the noncitizen clients to investigate post-conviction relief options in a prompt fashion.

The statute does not require that a notice to appear or removal order has already been filed. For example, individuals who are interested in applying for a green card, naturalization, or other immigration benefit who are not currently in removal proceedings but who nevertheless wish to vacate a damaging conviction can also file a section 1473.7 motion. The Los Angeles District Attorney recently issued a policy statement recognizing that “the Office is persuaded that the Legislature intended section 1473.7 to apply regardless of whether the moving party has received notice of removal proceedings or a removal order.”<sup>41</sup>

Individuals who already have final orders of removal—including those who have already been deported—should also be able to file section 1473.7 motions challenging the validity of their convictions.

## **6. Procedure: Filing, Hearing, Judicial Decision**

Section 1473.7 motions should be filed in the Superior Court in which the challenged conviction or sentence was entered. Standard practice suggests that motions should be served upon the district attorney two weeks prior to the hearing on the motion. Consult local rules on this point.

After the motion is prepared, but before filing it with the court, it is advisable to reach out to the district attorney, explain the grounds for the motion, and suggest alternative immigration-safe pleas. See Repleading, in part 7, below. Some district attorney offices will have an attorney assigned to consider such cases. If the district attorney office does not have a designated attorney, you may contact the attorney who prosecuted the case in the first instance.

Unlike habeas petitions, which may be denied without a hearing, all section 1473.7 motions are entitled to hearings before a judge. Pen. C. § 1473.7(d). If the prosecution has no objection to the motion, the court may grant the motion to vacate the conviction or sentence without a hearing. *Id.* In line with the default motion practices of criminal courts, the moving party shall, with proper notice to the prosecutor, call the clerk of the criminal court to schedule a hearing date. While courts vary in their calendar-scheduling times, typical motions are heard within two to four weeks of filing.

Because some movants may be in immigration custody or already removed to their country of origin, the statute provides that the personal presence of the moving party may be waived, provided that counsel for the moving party is present and the court finds good cause for the moving party’s absence. Pen. C. § 1473.7(d).

The court shall grant the motion if the moving party establishes, by a preponderance of the evidence (51% or more), the existence of any of the grounds for relief. Pen. C. § 1473.7(e)(1). When ruling on a motion under (a)(1), 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 immigration consequences of a plea of guilty or nolo contendere. Pen. C. § 1473.7(e)(4). The court is not required to make a specific finding of ineffective assistance of counsel, even if that ground is alleged. When ruling on a motion under paragraph (2) of subdivision (a), the actual innocence provision, the court shall specify the basis for its conclusion. An order granting or denying the motion is appealable. Pen. C. § 1473.7(f).

## 7. Re-pleading

If the court grants the motion to vacate a conviction or sentence, the court shall allow the moving party to withdraw the plea. Pen. C. § 1473.7(e)(3). At that point, the moving party is in the same position that they would have occupied absent the error. Absent an arrangement with the district attorney to drop the charges, the defendant must still answer for the charges by negotiating an immigration-safe alternative disposition or taking the case to trial. This illustrates why it is helpful to identify at the outset an immigration-safe resolution that offers the district attorney the same, or greater, sentencing exposure as the original conviction. See the ILRC *California Quick Reference Chart*, at <https://www.ilrc.org/chart> for California offenses, their immigration consequences, and safe alternatives. It is advisable for attorneys who are not experts in criminal and immigration law to consult an expert who can help identify alternative dispositions.

Defendants must be given credit for time served. Though it is very rare that additional jail or prison time will be imposed, more time may be agreed upon as part of the negotiation process.<sup>42</sup>

Though the defendant need not be present for the hearing on the motion, the defendant's presence is mandatory to enter a subsequent felony plea (though presence can be waived for misdemeanor pleas). Compare Pen. C. § 977(b) with Pen. C. § 977(a).

## 8. Criminal Law Effect of a Vacatur

If granted, relief under this motion will vacate a California criminal conviction or sentence as legally invalid on a ground relating to lack of knowledge or understanding of immigration consequences of the conviction, or to newly discovered evidence of actual innocence. Pen. C. §§ 1473.7(a)(1) (immigration grounds); 1473.7(a)(2) (newly discovered evidence).

This relief eliminates the existing conviction or sentence and provides: "If the court grants the motion to vacate a conviction or sentence obtained through a plea of guilty or nolo contendere, the court shall allow the moving party to withdraw the plea." Pen. C. § 1473.7(e)(3).

If the plea is withdrawn, the conviction ceases to exist for any purpose. It may no longer be a basis for future sentence enhancements, and the plea withdrawal eliminates any registration requirements that may have previously attached.

## 9. Immigration Effects and Importance of the Order

This motion is only available if based on a ground of legal invalidity. Pen. C. §§ 1473.7(a)(1) (immigration grounds); 1473.7(a)(2) (newly discovered evidence of innocence). Therefore, relief under either branch of this statute automatically eliminates the conviction or sentence and its immigration consequences. *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003).

To eliminate a conviction for immigration purposes, the plea must be eliminated for cause, based on some legal error in the proceedings.<sup>43</sup> A court order granting a Penal Code section 1473.7 motion will, therefore, automatically meet the immigration-court requirement for vacatur because it will be based on: (1) a violation of the defendant's constitutional right to enter into a voluntary, knowing, and intelligent plea deal; (2) IAC for defense counsel's failure to investigate, accurately advise of, or defend against, the immigration consequences of a conviction; or (3) a claim of actual innocence.

Nevertheless, moving parties seeking to make certain that the order vacating the conviction will be given due deference by immigration courts would be wise to ensure that the order vacating the conviction specifies that the motion is granted because the prior conviction is deemed legally invalid. The order may spell out the specific grounds of legal invalidity underlying the order, or it may state more generally that the prior conviction is legally invalid.<sup>44</sup>

## Penal Code Section 1473.7 Dos and Don'ts

Do	Don't
<input checked="" type="checkbox"/> Provide a crim/imm expert declaration identifying the immigration-safe disposition	<input checked="" type="checkbox"/> Don't attack a conviction that is not "prejudicial"
<input checked="" type="checkbox"/> Reach out—or attempt to reach out—to prior defense counsel	<input checked="" type="checkbox"/> Claim ineffective assistance if there is no ineffective assistance
<input checked="" type="checkbox"/> Identify an immigration-neutral disposition	<input checked="" type="checkbox"/> File without trying to negotiate with the DA
<input checked="" type="checkbox"/> Join the section 1473.7 listserv	<input checked="" type="checkbox"/> File without talking to experienced practitioners

### 10. Best (and Worst) Penal Code section 1473.7 Practices

This section discusses some best practices when filing a 1473.7 claim:

**Join the section 1473.7 listserv.** The section 1473.7 practice varies from county to county. To understand the local county practice, it is advisable to consult with experienced post-conviction practitioners from that jurisdiction. The 1473.7 listserv is free and is a home to a rich and robust conversation among post-conviction-relief practitioners. You can make a request to join here: <https://groups.google.com/d/forum/14737pcr-group>.

**Look broader than ineffective assistance of counsel.** Ineffective assistance of counsel is a blunt instrument that courts and district attorneys can be hesitant to find. Even if you have a strong claim of IAC, consider alleging the broader ground that the defendant "failed to meaningfully understand" the consequences of a conviction. Allege this in addition to, or instead of, IAC. See Chapter Five for a discussion of alternative grounds.

**Identify an immigration-neutral disposition.** See the discussion in Chapter Six, Safe Havens, about how to identify an immigration-neutral disposition. This is important when asserting prejudice and for obtaining DA stipulations to your motions.

**Reach out to the DA before the hearing date.** See Chapter Six, Negotiating with DA. Often, by identifying an immigration neutral disposition that carries the same or greater sentence, post-conviction counsel can reach a mutually agreeable outcome and secure the prosecutor's support of a motion.

**Corroborate with expert declarations and citations to existing resources.** See Chapter Five for a deeper discussion, but always corroborate your motion with a declaration from a crim/imm expert and cite additional resources available at the time that made clear the commonly accepted practice norms.

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## ENDNOTES

<sup>1</sup> See *Meyer v. Superior Court*, 247 Cal. App. 2d 133, 140 (1966) (holding that, because “a conviction that has been expunged still exists for limited purposes,” petitioner should not be barred from seeking a more suitable post-conviction remedy); *People v. Weidersperg*, 44 Cal. App. 3d 551 (1975) (holding vacatur permitted after section 1203.4) (overturned on other grounds); *People v. Delong*, 101 Cal. App. 4th 482 (2002) (holding that an appeal was not moot after a Prop. 36 dismissal); *People v. Tidwell*, 246 Cal. App. 4th 212 (2016) (holding that a Prop. 47 reduction was not barred by an earlier expungement).

<sup>2</sup> See the East Bay Community Law Center’s county-by-county map, available at: <https://ebclc.org/reentry-legal-services/>.

<sup>3</sup> For more information about Lujan and Nunez-Reyes, please see the ILRC practice advisory, Lujan and Nunez: July 14, 2011, at: <https://www.ilrc.org/practice-advisory-lujan-nunez-july-14-2011>.

<sup>4</sup> The states that make up the Ninth Circuit are Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

<sup>5</sup> Qualifying offenses include convictions before July 14, 2011, of: H&S §§ 11350(a), 11377(a), 11357(a)-(c), 11364, 11365, 11360(a); Bus. & Prof. C. §§ 4060, 4140.

<sup>6</sup> The Ninth Circuit has held that an expungement of two simultaneously obtained qualifying convictions effectively eliminate both so they no longer bar cancellation of removal. See *Jimenez-Rice v. Holder*, 597 F.3d 952 (9th Cir. 2010), reversed on other grounds, *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc). Therefore, if a defendant pleaded guilty to one count of simple possession and one count of possessing paraphernalia at the same time, neither is a prior conviction with respect to the other, so an expungement of both convictions would qualify for Federal First Offender Act (FFOA) treatment and effectively eliminate all immigration consequences of both convictions. There is also an argument that, even if defendant committed two unrelated controlled-substance offenses at different times, neither is a prior conviction, and, therefore, the person would qualify for FFOA/Lujan expungement eligibility, provided that the defendant pleaded guilty to both at the same time. See *Villavicencio-Rojas v. Lunch*, 811 F.3d 1216, 1219 (9th Cir. 2016) (simultaneous conviction of possession of two different drugs on the same occasion constituted one “offense” for purposes of eliminating all immigration consequences); and discussion in *K. Brady, Defending Immigrants in the Ninth Circuit*, § 3.6 (10th ed. 2008, Jan. 2013 supp.).

<sup>7</sup> Under *Estrada v. Holder*, 590 F.3d 1039 (9th Cir. 2009), expungements have no immigration effect when the criminal court found two probation violations before ultimately granting expungement.

<sup>8</sup> See *K. Morrissey, Deported Veteran Returns Home After Governor’s Pardon*, *The San Diego Union Tribune*, Dec. 21, 2017 at: <http://www.sandiegouniontribune.com/news/immigration/sd-me-marco-chavez-20171221-story.html>.

<sup>9</sup> While unpublished Board of Immigration Appeals (BIA) decisions have held that Pen C § 1203.43 eliminates a DEJ “conviction” for immigration purposes, in some areas ICE continued to contest this. In August 2018, the BIA indicated that it will publish a ruling on the immigration effect of Pen C § 1203.43. Because the law is clear, advocates expect the BIA to make a positive ruling. However, nothing is guaranteed, and noncitizens who are concerned and who can afford to wait may decide to wait for the published opinion before applying for relief that depends on § 1203.43 to eliminate a conviction. You can see ILRC’s amicus brief about the matter here: <https://www.ilrc.org/ilrc-amicus-brief-arguing-validity-cal-penal-code-120343-vacatur>.

<sup>10</sup> See *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005) (distinguishing sentencing changes from vacatur 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).

<sup>11</sup> INA § 237(a)(2)(A); 8 USC § 1227(a)(2)(A).

<sup>12</sup> INA § 240A(b)(1); 8 USC § 1229b(b)(1). For more information about cancellation for nonpermanent residents, see the *ILRC Immigration Relief Toolkit*, at: [www.ilrc.org/chart](http://www.ilrc.org/chart).

<sup>13</sup> 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) and 8 USC § 1229b(b)(1). Immigration advocates contest the “less than one year” rule. For more information on nonLPR cancellation, see *Immigration Relief Toolkit*, at: [www.ilrc.org/chart](http://www.ilrc.org/chart).

<sup>14</sup> 8 U.S.C. § 1226(c)(1)(C).

<sup>15</sup> 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](http://www.ilrc.org/chart) and *Defending Immigrants in the Ninth Circuit*, supra n for crime-specific defenses against the allegation that an offense is an aggravated felony.

<sup>16</sup> See the ILRC advisory, *Arguing California Infractions are Not Convictions*, available at: <https://www.ilrc.org/arguing-california-infraction-not-conviction-test-non-misdemeanor-offenses>.

<sup>17</sup> See “*District Attorney George Gascón Applies Proposition 64 Retroactively to Every Marijuana Case Since 1975*,” Jan. 31, 2018, at: <http://sfdistrictattorney.org/district-attorney-george-gasc%C3%B3n-applies-proposition-64-retroactively-every-marijuana-case-1975>.

<sup>18</sup> See *Meyer v. Superior Court*, 247 Cal. App. 2d 133, 140 (1966) (holding that, because “a conviction that has been expunged still exists for limited purposes,” petitioner should not be barred from seeking a more suitable post-conviction remedy); *People v. Weidersperg*, 44 Cal. App. 3d 551 (1975) (vacatur permitted after 1203.4) (overturned on other grounds); *People v. Delong*, 101 Cal. App. 4th 482 (2002) (holding that an appeal was not moot after a Prop. 36 dismissal); *People v. Tidwell*, 246 Cal. App. 4th 212 (2016) (holding that a Prop. 47 reduction was not barred by an earlier expungement).

<sup>19</sup> See Judicial Council’s CR 187 and 188 here: <http://www.courts.ca.gov/documents/cr187.pdf>; <http://www.courts.ca.gov/documents/cr188.pdf>.

<sup>20</sup> See Appendix F, “Sample Penal Code section 1473.7 Motion.” This sample motion can also be found on the ILRC website, at: <https://www.ilrc.org/redacted-sample-penal-code-14737-motion-vacate>.

<sup>21</sup> See ILRC Advisory, 1473.7 Amendments, available at <https://www.ilrc.org/amendments-14737>.

<sup>22</sup> See Judicial Council’s CR 187 and 188 here: <http://www.courts.ca.gov/documents/cr187.pdf>; <http://www.courts.ca.gov/documents/cr188.pdf>.

<sup>23</sup> See *People v. Picklesimer*, 48 Cal. 4th 330 (party no longer in constructive custody may not file a writ of habeas corpus); *People v. Villa*, 45 Cal. 4th 1063 (2009).

<sup>24</sup> Penal Code section 1473.7 covers many individuals with no applicable remedy after custody has ended, but it does not replace existing special-purpose post-conviction vehicles, including, inter alia, Penal Code section 1018 (allowing defendants to withdraw pleas for “good cause” within six months of judgment); Penal Code section 1016.5 (allowing for vacatur where the court failed to provide the statutory advisement about potential immigration consequences); Penal Code section 1203.43 (vacating for cause controlled-substance convictions dismissed pursuant to deferred entry of judgment); Penal Code section 1385 (dismissing criminal actions in the interests of justice); Penal Code section 1473.6 (allowing a post-custodial motion to vacate for victims of the Rampart scandal, a 1998-2000 official inquiry into corruption among officers of the Rampart Division of the Los Angeles Police Department).

<sup>25</sup> See *Padilla v. Kentucky*, 559 U.S. 356 (2010); *People v. Soriano*, 194 Cal. App. 3d 1470 (1987); *People v. Bautista*, 115 Cal. App. 4th 229 (2004); Pen. C. §§ 1016.2, 1016.3.

<sup>26</sup> *People v. Giron*, 11 Cal. 3d 793, 797-98 (1974).

<sup>27</sup> See *Man’s name cleared based on new evidence and new California law*, Lake County News, Jan. 18, 2018, at <http://www.lakeconews.com/index.php/news/54068-regional-man-s-name-cleared-based-on-new-evidence-and-new-california-law>.

<sup>28</sup> See *Padilla v. Kentucky*, 559 U.S. 356 (2010); *People v. Soriano*, 194 Cal. App. 3d 1470 (1987); *In re Resendiz*, 25 Cal. 4th 230 (2001); Cal. Pen. C. §§ 1016.2, 1016.3.

<sup>29</sup> *People v. Bautista*, 115 Cal. App. 4th 229 (2004); Pen. C. §§ 1016.2, 1016.3.

<sup>30</sup> Under this ground, defendants may raise claims of, inter alia, a violation of the right to an interpreter. See also *People v. Superior Court (Giron)*, 11 Cal. 3d 793, 797-98 (1974) (holding that defendant could withdraw plea because they failed to understand its immigration consequences).

<sup>31</sup> See *Strickland v. Washington*, 466 U.S. 668 (1984) (specifying the two prongs—a violation of duty and a showing of prejudice—required to vacate a conviction on an allegation of ineffective assistance of counsel); *Missouri v. Frye*, 566 U.S. 134 (2012) (holding that defendants could be prejudiced by counsel’s ineffective assistance in plea bargaining); *People v. Superior Court (Zamudio)*, 23 Cal. 4th 183, 199 (2000) (holding that defendants must show prejudice to vacate a conviction based on court’s failure to provide the Penal Code section 1016.5 mandatory immigration advisement); *In re Resendiz*, 25 Cal.4th 230, 253-254 (2001) (stating prejudice standard in the context of affirmative misadvice claims); *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

<sup>32</sup> See *People v. Martinez*, 57 Cal.4th 555 (2013); *Lee v. United States*, 137 S. Ct. 1958 (2017).

<sup>33</sup> *United States v. Rodriguez-Vega*, 797 F. 3d 781 (9th Cir. 2015).

<sup>34</sup> *Lee v. United States*, 137 S. Ct. 1958 (2017).

<sup>35</sup> If, for example, the claim is based on IAC, corroborating evidence may include a declaration from trial counsel as to what advice and/or negotiations occurred at the time of the initial plea. A successful motion should not require a signed declaration from the original trial counsel, but such a declaration could be helpful.

<sup>36</sup> To support the claim of prejudice, it is helpful to identify alternative immigration-safe dispositions that would have provided the same, or greater, sentencing exposure and equivalent other priorbility penalties (e.g., registration requirements, strikes, etc.). Given the changing nature of immigration law, it is important to identify both what would have been an immigration-safe solution at the time of the plea and also what will be an immigration-safe solution now. See <https://www.ilrc.org/chart> for an analysis of the immigration consequences of California convictions, as well as suggested alternatives.

<sup>37</sup> See, e.g., *People v. Bautista*, 115 Cal. App. 4th 229 (2004).

<sup>38</sup> To establish a claim of prejudice, defendants must explain that, had they understood the immigration consequences of the plea, they would have rejected the plea. If true, it is helpful for defendants to state that they would have been willing to serve additional time in custody if it meant protecting their immigration status.

<sup>39</sup> The equitable evidence helps corroborate the prejudice claim that the defendant would have fought to remain in the United States. Such documentation includes signed declarations by family members or letters from employers, family members, neighbors, teachers, religious community members, etc. Pictures may also be attached as exhibits.

<sup>40</sup> If an immigration judge’s order of removal is appealed, it is not considered “final.” The regulatory definition of a final order provides that, except when certified to the Board of Immigration Appeals, the decision of the immigration judge becomes final “upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken, whichever occurs first.” 8 C.F.R. § 1003.39.

<sup>41</sup> <https://www.ilrc.org/los-angeles-district-attorney-office-policy-permitting-14737-motions-cases-without-any-nta-or>

<sup>42</sup> The general rule is that a defendant cannot be sentenced to more time after a successful appeal.

<sup>43</sup> See, e.g., *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (concluding that in light of the language and legislative purpose of the definition of a “conviction” at section 101(a)(48) of the Act, “there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships”); see also *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) (according full faith and credit to a New York court’s vacation of a conviction on the merits); see also *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (conviction vacated for failure to give legislatively required advisal of immigration consequences is eliminated for immigration purposes).

<sup>44</sup> In deportation proceedings, the government bears the burden to establish that the dismissal is ineffective to eliminate the conviction for immigration purposes.



## CHAPTER FIVE

# Grounds of Legal Invalidity

If a prior conviction must be vacated because it is causing adverse immigration consequences, counsel must examine the facts surrounding it to identify:

1. a meritorious ground of legal invalidity that was in existence on the date of conviction;
2. a procedural vehicle available to the defendant to raise this ground of legal invalidity.

There are many possible grounds for the legal invalidity of a conviction, and it is beyond the scope of this chapter to discuss every possible one. For an extensive list of over forty constitutional grounds for vacating a guilty plea, see Chapter Seven of N. Tooby, *California Post-Conviction Relief for Immigrants* ([www.nortontooby.com](http://www.nortontooby.com), 2d ed., 2009). Here, we will focus on the most commonly raised grounds.

It is often helpful to identify grounds of legal invalidity that do not rely directly on a claim of ineffective assistance of counsel (IAC). In some cases, judges and prosecutors are very motivated to avoid embarrassment or reputational harm to a popular former counsel. In

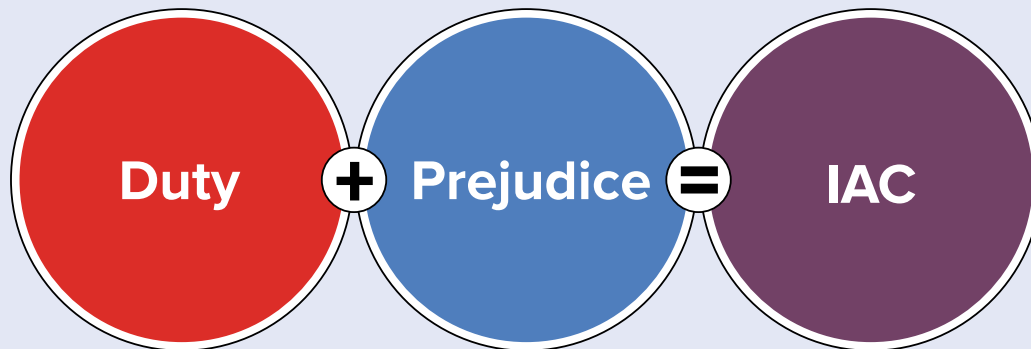
other cases, public defender offices may be willing to assist in a post-conviction case but may feel conflicted if they must allege an ineffective assistance claim against an attorney in their own office. Attorneys who are handling a post-conviction case may want to bring in an expert criminal defense attorney who can provide advice on other possible errors beyond IAC in the prior proceeding. That said, all attorneys have the duty to zealously advocate and must raise any credible and meritorious claims possible.

Because ninety-seven percent of all convictions are obtained via plea bargain, the emphasis in this discussion will be on immigration-related grounds to set aside a guilty or no contest plea. It is possible, however, to vacate a conviction, even after trial, on the grounds of ineffective assistance during plea bargaining.<sup>1</sup> See, e.g., *Laffler v. Cooper*, 566 U.S. 156 (2012) (fair trial failed to cure prejudice from ineffective counsel in plea bargaining); *In re Alvernaz*, 2 Cal. 4th 924 (1992) (ineffective assistance in deciding to go to trial based on erroneously low prediction of sentence upon conviction).



## I. INEFFECTIVE ASSISTANCE OF COUNSEL

### Components of Ineffective Assistance of Counsel



The right to counsel, secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 15, of the California Constitution, includes the guarantee that the defendant will receive effective representation

Success on an ineffective assistance of counsel (“IAC”) claim requires showing that: (1) legal counsel’s performance was deficient; and that (2) the defendant was prejudiced by counsel’s deficient performance. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Whether counsel’s performance is constitutionally deficient “is necessarily linked to the practice and expectations of the legal community: “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (quoting *Strickland*, 466 U.S. at 688). To establish prejudice, the defense must show a “reasonable probability of prejudice... sufficient to undermine confidence in the outcome.” *People v. Ledesma*, 43 Cal.3d 171, 217 (1987) (citing *Strickland*, 466 U.S. at 693-94).

While any ineffective assistance of counsel claim may be made in a writ of habeas corpus or motion to vacate pursuant to Pen C 1473.7, other post-conviction vehicles may not be used to raise it. (See, e.g., Pen. C. § 1016.5).

This chapter will focus particularly on the immigration-related claims of ineffective assistance of counsel that noncitizens can use to set aside convictions. However, advocates are encouraged to look broadly at the record to determine whether other grounds of ineffective assistance are present. As part of the duty to zealously advocate, counsel must raise every claim of legal invalidity that is available. See Chapter Seven in N. Tooby, *Tooby’s California Post-Conviction Relief for Immigrants*, (2d ed. 2009) for a detailed discussion of potential grounds of ineffective assistance.

**NOTE:** Courts, prosecutors, and prior defense counsel can sometimes be hesitant to grant a claim of ineffective assistance of counsel out of concern over the reputational or professional ramifications to prior counsel. Accordingly, even if there is a strong IAC claim, it is always helpful to raise additional, non-IAC-related grounds of legal invalidity; e.g., a Penal Code section 1016.5 violation.

U.S. Supreme Court precedent makes clear that the entitlement to effective assistance of competent counsel extends to the plea-bargaining process. See *Lafler*, 566 U.S. 156 (2012); *Missouri v. Frye*, 566 U.S. 133 (2012) (holding that “anything less... might deny a defendant

effective representation by counsel at the only stage when legal aid and advice would help him”) (citing *Messiah v. United States*, 377 U.S. 201, 204 (1964)).

Defense attorneys have two immigration-related duties at the plea-bargaining stage. First, they have an affirmative duty to investigate the future impact a guilty plea would have on a noncitizen client’s immigration status and to inform the client of such impact. See, e.g., *Padilla*, 559 U.S. at 363; *People v. Soriano*, 194 Cal. App. 3d 1470, 1479-80 (1987). Second, defense attorneys are required to defend against the negative immigration consequences of a guilty plea by affirmatively pursuing alternative dispositions that can mitigate the harm and if that effort fails, to consider whether the client wishes to take the case to trial even if there is nothing more than a “Hail Mary” chance to mitigate the risks. *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017); *People v. Bautista*, 115 Cal. App. 4th at 240-42 (2004).

In 2015, the California legislature affirmed these principles in Penal Code sections 1016.2 and 1016.3, stating: “It is the intent of the Legislature to codify *Padilla v. Kentucky* and related California case law and to encourage the growth of such case law in furtherance of justice and the findings and declarations of this section,” Pen. C. § 1016.2(h). The court mandated that “Defense counsel shall 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.” Pen. C. § 1016.3(a).

**NOTE:** Penal Code § 1016.2 makes a number of findings about the importance of immigrants to the state of California and the “irreparable damage” caused by defense counsel’s failure to advise or defend against immigration consequences. Advocates are encouraged to read the findings of Penal Code section 1016.2 and consider ways the findings can be helpful “in furtherance of justice.”

## A. Defense Counsel Duties

### 1. Advise of Actual Immigration Consequences

Federal and California laws require defense counsel to discover what impact a criminal conviction will have on a defendant’s immigration status. This is because, as the U.S. Supreme Court has noted, “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” *Padilla*, 559 U.S. at 364; *INS v. St. Cyr*, 533 U.S. 289, 323 (2001). “Preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” *Padilla*, 559 U.S. at 367; see *Soriano*, 194 Cal. App. 3d at 1480.

California has long held defense counsel’s performance deficient where counsel does not “make it her business to discover what impact [a defendant’s] negotiated sentence would have on [his] deportability.” *Soriano*, 194 Cal. App. 3d at 1480; Pen. C. §§ 1016.2, 1016.3. Since 1987, California law has required counsel to investigate a client’s immigration status, research the specific immigration consequences of a criminal conviction, and provide the client with accurate advice about those consequences. *People v. Barocio*, 216 Cal. App. 3d 99, 107-09 (1989); *Soriano*, 194 Cal. App. 3d at 1482.

In *Padilla*, the U.S. Supreme Court held that defense counsel has a duty to investigate and advise a client about immigration consequences and that failure to do so constitutes ineffective assistance of counsel. *Padilla*, 559 U.S. at 367. The Court held that: “It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so ‘clearly satisfies the first prong of the *Strickland* analysis.’” *Padilla*, 559 U.S. at 370, (quoting *Hill v. Lockhart*, 474 U.S. 52, 62 (1985)).

Defense counsel’s performance will, therefore, be considered deficient if they fail to investigate and advise the defendant of the actual immigration consequences of a plea.

## RETROACTIVITY OF PADILLA

In *Chaidez v. United States*, 568 U.S. 342 (2013), the Supreme Court held that *Padilla* does not have retroactive effect. *Chaidez*, however, had little or no effect on post-conviction relief from pre-*Padilla* California convictions. California has held since 1987 that defense counsel's failure to advise a defendant concerning the actual adverse immigration consequences is ineffective assistance of counsel, so California courts need not rely on *Padilla* to protect this important state constitutional right. *People v. Soriano*, 194 Cal. App. 3d 1470, 1478 (1987) (ruling based on both California and United States constitutions). California is free to adopt greater protections for federal constitutional rights than the United States Constitution does.

Both the United States and California Supreme Courts were clear that simply giving the statutory advice concerning the possible (as opposed to the actual) immigration consequences was insufficient. *Padilla*, 559 U.S. at 374 n.15; *Soriano*, 194 Cal. App. 3d at 1482; see also Cal. Pen. C. § 1016.3(c) (This code section shall not be interpreted to change the requirements of Section 1016.5). California courts have also been clear that giving the section 1016.5 advice on *possible* immigration consequences did not obviate the need for counsel to give accurate advice concerning the *actual* immigration consequences to the individual defendant. *In re Resendiz*, 25 Cal. 4th 230 (2001) (counsel's affirmative misadvice is ineffective assistance even if accurate Penal Code section 1016.5 advice has been given). *Patterson*, 2 Cal. 5th 885.

Counsel's obligation to advise concerning actual immigration consequences includes discussing deportability, inadmissibility, and eligibility for immigration relief. See *Padilla*, 559 U.S. 356 (2010) (requiring defense council to advise about deportability consequence of controlled-substances conviction and chances of obtaining relief); *St. Cyr*, 533 U.S. 299 (requiring defense council to advise concerning availability of former INA section 212(c) waiver of deportability).

Post-conviction counsel should be on alert for, and fight back against, attempts by the government to circumscribe California defense counsel's pre-*Padilla* duties. The California Supreme Court has twice depublished court of appeal decisions that have narrowly interpreted defense counsel's duty to advise about immigration consequences.

Those depublished opinions reached the mistaken conclusion that the duty to advise existed only when the immigrant defendant asked. For arguments against that narrow interpretation, see Landaverde Advisory, at <https://www.ilrc.org/request-depublish-people-v-landaverde>. The two California Supreme Court decisions to depublish should conclusively foreclose the government from raising these *Soriano*-limiting arguments going forward. .

*Chaidez v. United States*, 568 U.S. 342 (2013), specifically distinguished affirmative misadvice claims from failure-to-advise claims. Judicial decisions had recognized affirmative misadvice claims as IAC in many jurisdictions, including California, prior to *Padilla*.

### 2. Duty to Give Accurate Advice

Defense counsel's affirmative misadvice of immigration consequences also constitutes ineffective assistance. See *Resendiz*, 25 Cal. 4th 230. Affirmative misadvice can take many forms. For example, counsel can mistakenly say there will be no adverse immigration consequences, when in fact the conviction triggers some adverse consequences. Counsel can mistakenly say that the conviction "may" result in adverse immigration consequences, when it *will* in fact do so. Counsel can inform someone that post-conviction expungement will resolve a case when, in fact, it will have no immigration effect. This ineffective assistance can be separate and apart from a failure-to-advise claim, discussed above, but can often be present.

### 3. Duty to Defend Against Immigration Consequences

California law not only requires defense counsel to accurately advise about immigration consequences, but counsel must also defend against those consequences by plea bargaining for an immigration-neutral outcome. The U.S. Supreme Court in *Padilla* noted that counsel's duties include attempting to avoid an immigration disaster by seeking alternative dispositions for defendants: "Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence." *Padilla*, 559 U.S. at 371.

California state law also requires counsel not only to advise defendants of the immigration impact a conviction will have, but also affirmatively to try to mitigate that impact by seeking an alternative plea. In *People v. Barocio*, 216 Cal. App. 3d at 108-09, defense counsel was found deficient where he failed to make a motion at sentencing for a judicial recommendation against deportation (JRAD), which would have eliminated the deportation consequences of a conviction.

In *Bautista*, 115 Cal. App. 4th at 242, the court found that defense counsel failed to perform in an objectively reasonable manner when he did not discuss with the defendant the options of pleading guilty to a greater offense which was not an aggravated felony, in place of a lesser offense which was an aggravated felony: "[F]ailure to... utilize defense alternatives to a plea of guilty to an 'aggravated felony' may constitute ineffective assistance of counsel even if a defendant is warned that he 'would' be deported."

**PRACTICE TIP:** In order to make a claim that defense counsel "failed to defend," it is necessary to know what immigration-neutral dispositions existed at the time. Consult experts and published materials available at the time. See old charts here: <https://www.ilrc.org/old-outdated-charts-ca-crimes-and-their-immigration-consequences>.

### 4. Embedded Duties: Duty to Inquire, Duty Investigate

In order for defense counsel to provide accurate advice and defend against immigration consequences, it is, of course, necessary to inquire about the defendant's immigration status. However, immigration status can be a complicated fact to ascertain. Someone may not know that they are a U.S. citizen, or they may only know they have a "work permit" but not what specific legal status they have. Defense counsel must, on their own or with the help of an immigration expert, determine the defendant's precise legal status.

In addition, defense counsel must investigate the precise immigration impact of a conviction and identify equivalently weighted immigration-neutral dispositions. Failure to engage in this research constitutes ineffective assistance.

#### B. Prejudice

Alleging a violation of defense counsel's duties does not, on its own, meet the two-prong test set forth in *Strickland v. Washington*. Post-conviction counsel must also allege and prove that the defendant was prejudiced by the ineffective assistance. A defendant may show that they were prejudiced by their defense attorney's failure to investigate and advise them of the immigration consequences of their plea by establishing that, had they understood the consequences, "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 372; see also *Strickland*, 466 U.S. at 687-88.

Under California law, a defendant may establish prejudice in the plea context by demonstrating that "it is reasonably probable he would not have pleaded guilty if properly advised." *Martinez*, 57 Cal. 4th at 562 (internal citation omitted). A defendant need not establish that they "would have achieved a more favorable outcome" had they decided not to plead guilty. *Id.* at 559; see *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017). In *Lee v. United States*, the U.S. Supreme Court found that the defendant had proved prejudice by showing that, had he been properly advised, he would have thrown the "Hail Mary" of taking his case to trial, even though there was almost irrefutable proof of his guilt.

But common sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial. The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. Here Lee alleges that avoiding deportation was the determinative factor for him; deportation after some time in prison was

not meaningfully different from deportation after somewhat less time. He says he accordingly would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a “Hail Mary” at trial... There is no question that “deportation was the determinative issue in Lee’s decision whether to accept the plea deal.”

*Lee v. United States*, 137 S. Ct. at 1967.

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## II. FAILURE TO UNDERSTAND IMMIGRATION CONSEQUENCES

The Fifth and Fourteenth Amendments to the U.S. Constitution provide that, “No person shall... be deprived of life, liberty, or property, without due process of law.” The U.S. Supreme Court has held that, in accordance with the due process clause, the waiver of the constitutional right to a jury trial must be voluntary, knowing, and intelligent, “done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady v. United States*, 397 U.S. 742 (1970); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (waiver of fundamental right must be knowing and intelligent); *Faretta v. California*, 422 U.S. 806 (1975).

Even prior to *Padilla*, the California Supreme Court held that a defendant’s ignorance concerning the actual immigration consequences of a plea can constitute “good cause” to withdraw the plea. See *Giron*, 11 Cal. 3d 793; *People v. Patterson*, 2 Cal. 5th 885. If the defendant did not meaningfully understand the immigration consequences, then the plea, arguably, violates due process because it is not knowing, voluntary, or intelligent.

Where the defendant represented themselves and only ever received a general court admonishment about potential immigration consequences—and not the case-specific advice required by *Padilla*—then that conviction arguably violates due process. In those cases, obviously, no claim of ineffective counsel is possible, but still, the immigrant defendant was not aware of the immigration consequences. Language difficulties might also render the waiver deficient. Similarly, cultural, mental, or developmental problems, or the like, may prevent the defendant from entering a knowing and intelligent waiver. A plea made after an invalid waiver of counsel is itself invalid because it was not made knowingly or intelligently.

Notably, Penal Code § 1473.7(a)(1), is drafted specifically to cover instances when the defendant failed to “meaningfully understand” or “knowingly accept” the immigration consequences of a plea. This inquiry is separate, though sometimes related, to whether defense counsel provided advice about the immigration consequences.

**NOTE:** The violation of the right to an interpreter may also be a ground of legal invalidity. The right to an interpreter is recognized in many jurisdictions by statute or constitution. Failure to provide a competent interpreter—e.g., an interpreter who speaks the defendant’s native dialect—could be a ground of legal invalidity.

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## III. PRACTICAL CONSIDERATIONS

Establishing the presence of grounds of legal invalidity requires more than simply stating the laws above. It requires a thorough investigation into the prior criminal court proceedings. As discussed in Chapter Two, an effective

claim for post-conviction-relief begins with obtaining the complete files from the record of conviction and from former defense counsel.

## A. Proving a Ground of Legal Invalidity

It is necessary for the defendant to submit a declaration that attests to their recollection of the prior court proceedings. See Appendix G, “Sample Defendant’s Declaration.” However, additional evidence also is needed. The California Supreme Court held that courts are not required to defer to a defendant’s recollection about what occurred in prior proceedings.

A defendant’s self-serving statement—after trial, conviction, and sentence—that with competent advice he or she would have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant’s burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims.”

*In re Alvernaz*, 2 Cal. 4th at 938 (1992).

Because a defendant’s own declaration can be discredited, it will be necessary to cite external corroboration when attempting to prove a violation of defense counsel’s duty. A finding of deficient performance turns on the prevailing professional norms and standards extant at the time of the conviction. Therefore, citing treatises, manuals, resources, and guides that discuss the immigration consequences of a disposition at the time of the plea helps prove the prevailing standard of practice. Potential resources include relevant materials in the Continuing Education of the Bar (CEB) manual, *California Criminal Law—Procedure and Practice*, which has included a chapter on representing noncitizens since the early 1990s ([www.ceb.com](http://www.ceb.com)). This is an especially good source to cite, since virtually all criminal court judges, defenders, and prosecutors are familiar with it and know that it is used throughout California. In addition, consider the national treatise, *Immigration Law and Crimes* ([www.thomsonreuters.com](http://www.thomsonreuters.com)) (published annually or biannually since the 1980s); ILRC, *California Quick Reference Chart on Immigration Consequences of Crimes*, at [www.ilrc.org/chart](http://www.ilrc.org/chart) (posted online with periodic updates since 2003); ILRC, *Defending Immigrants in the Ninth Circuit* (formerly *California Criminal Law and Immigration*) (published 1995–2013); other ILRC advisories, or books by Norton Tooby ([www.nortontoooby.com](http://www.nortontoooby.com)). All of these resources have been in circulation and readily available

for many years and have provided specific and targeted discussion about the immigration consequences of various criminal dispositions. Older editions of charts and the CEB manual are both available for free download on the ILRC website at: <https://www.ilrc.org/immigrant-post-conviction-relief>.

Additional corroboration can be provided by obtaining a declaration by an expert in criminal and immigration law that states the consequences of the current disposition that would have been a reasonable alternative at the time of conviction, and the prevailing practice norms in place then, and the immigration-neutral disposition that the defendant is willing to agree to now if the conviction is vacated and charges are brought again. See Appendix J for a “Sample Expert’s Declaration.”

## B. Working with Prior Counsel

Defense counsel’s files or declarations can provide helpful corroboration for the defendant’s statements in a post-conviction matter. Defense counsel’s reaction may vary from a willingness to take responsibility for an error to an unwillingness to even consider the matter. Although it is delicate, some communication with prior counsel is helpful, if not necessary, for a winning post-conviction case.

### 1. Obtaining defense counsel’s file

First, it will be necessary to obtain a complete copy of the case file from the original defense counsel. This includes the attorney’s notes, investigation reports, and everything else contained in the file. Submit a written request, accompanied by an information release executed by the client. Since the entire file is the property of the client, this should not be difficult. If the attorney balks, gently educate them concerning the ethical obligation to deliver the entire file to successor counsel.<sup>2</sup> Original counsel may, of course, keep a copy at their expense.

Sometimes reluctant counsel may not wish to produce the file and may claim not to have retained it. Counsel, however, is ethically required to retain the file. For example, Los Angeles County Bar Association Formal Ethics Opinion No. 420 states: “In the absence of written instruction by the client, the client’s file relating to a

criminal matter in the possession of an attorney should be retained by the attorney and not destroyed.”

The trial counsel’s file should contain notes of any plea negotiations. If there are no notations about plea negotiations, then that provides helpful circumstantial evidence corroborating a claim of “failure to defend” by plea bargaining for an immigration neutral disposition.

## 2. Interviewing former defense counsel

Obtaining a declaration from defense counsel that corroborates the defendant’s statements about what did or didn’t happen at the time of the disposition can be extremely valuable in a post-conviction motion. When vacating a conviction requires claiming ineffective assistance, defense counsel may surprise you in their willingness to place the interests of the client first and provide a truthful declaration, even though it may expose their mistakes. Sadly, however, some counsel may be defensive and will place their own fears of retribution ahead of any duty to the client.

If the defendant has raised claim of ineffective assistance, the prosecution may sometimes decide to subpoena prior defense counsel. It is always better for you to know in advance what original defense counsel’s position will be. Therefore, however delicate it may be, it is important to reach out ahead of time to prior counsel and interview them about their recollection of the case.

The tactics of the interview will differ, depending on how cooperative trial counsel chooses to be. It is not always possible to tell in advance what the former attorney’s position will be. Obviously, it is in the client’s interest to persuade defense counsel to place the client’s interests first and to secure counsel’s cooperation.

When interviewing prior counsel, it is recommended to do so in the presence of another witness. If the defense counsel makes statements that they later retract, it may be helpful to provide the declaration of another witness who can provide a declaration of what they heard.

When speaking with former defense counsel, keep in mind the multiple different grounds of ineffective

assistance that can be raised. While many defense counsel may make the blanket assertion that “I always advise my clients about immigration consequences,” you must probe deeper to determine:

- ✓ Was counsel aware of the specific immigration consequences of this particular disposition?
- ✓ What research and investigation did counsel conduct to determine the actual immigration consequences of a particular conviction? Specifically, what did counsel think the full immigration consequences of the conviction would be?
- ✓ What did the attorney tell the client about the immigration consequences of the conviction? It is important to ask specifically what advice and information the attorney gave the client. If the attorney is vague, counsel can ask whether they informed the client that the conviction “might” result in the client’s deportation, exclusion from the United States, or denial of naturalization. Often this is the sum total of the information that defense counsel imparted to the client, or counsel may simply have advised the defendant to “discuss the matter with an immigration attorney.” This is inadequate to discharge defense counsel’s obligation to advise about the *exact* immigration consequences of a disposition. See, e.g., *Soriano*, 194 Cal. App. 3d 1470.
- ✓ What precise effort to plea bargain was made? Identify the immigration-neutral dispositions available at the time and ask specifically if defense counsel has any notes showing that they attempted to obtain those dispositions.

**NOTE:** If defense counsel is nonresponsive, then post-conviction counsel should document her efforts to contact defense counsel through, e.g., sending letters via certified mail. Include documentation of those requests within the motion. Those unreciprocated efforts could be helpful circumstantial evidence about the level of care and responsiveness defense counsel took at the time of the original conviction.

After the interview is over, current counsel can prepare a declaration for former defense counsel recording exactly what defense counsel said. See Appendix I for sample declaration from defense counsel.

### 3. Limited liability or state bar discipline for ineffective assistance.

Defense counsel may be concerned that admitting errors may result in some form of liability. You can inform them that this concern is misplaced. Criminal defense counsel is only liable for malpractice if the client can prove they were actually innocent of all wrongdoing—by winning a post-conviction claim for exoneration. The California Supreme Court defines “post-conviction exoneration” as “a final disposition of the underlying criminal case—for example, by acquittal after retrial, reversal on appeal with directions to dismiss the charges, reversal followed by the People’s refusal to continue the prosecution, or a grant of habeas corpus relief based on actual innocence...” *Coscia v. McKenna & Cuneo*, 25 Cal. 4th 1194, 1205 (2001); see also *Lynch v. Warwick*, 95 Cal. App. 4th 267 (2002) (plaintiff suing attorney for malpractice must prove actual [innocence of the crime, even if he is not suing for damages but only to get fees returned]); *Barner v. Lees*, 24 Cal. 4th 676 (2000); *Wiley v. County of San Diego*, 19 Cal. 4th 532 (1998). The same “actual innocence” standard for malpractice liability governs claims against post-conviction counsel. *Khodayari v. Mashburn*, 200 Cal. App. 4th 1184 (2011) (post-conviction counsel is not liable for malpractice unless: (a) the plaintiff can show actual innocence; and (b) the plaintiff obtained post-conviction exoneration of the offense concerning which malpractice liability is sought).

In addition, any statements original counsel makes in a declaration intended to reduce the damage to the client from IAC are inadmissible in any malpractice action against counsel. “[A]n attorney should be able to admit a mistake without subjecting himself [or herself] to a malpractice suit.” *Smith v. Lewis*, 13 Cal. 3d 349 (1975), *disapproved on other grounds in Marriage of Brown*, 15 Cal. 3d 838, 851 n.14 (1976).

Concern with some disciplinary action by the state bar is misplaced, as well. A simple mistake is not cause for disciplinary action before the state bar. Rule 1.1 of the California Rules of Professional Conduct provides that a “member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” Therefore, a single instance of accidental ineffective assistance of counsel that is not intentional or reckless cannot constitute grounds for discipline. See *In re Torres*, 4 Cal. State Bar Ct. Rptr, 138, 149 (Rev. Dept. 2000).

Indeed, the California State Bar has noted: “[W]e have repeatedly held that negligent legal representation, even that amounting to legal malpractice, does not establish a rule 3-110(A) [1.1(a)] violation.” *In the Matter of Riley*, 3 Cal. State Bar Ct. Rptr. 91, 113 (Review Dept. 1994). In *Call v. State Bar*, 45 Cal. 2d 104 (1955), the Supreme Court held that an attorney’s negligence is not a proper ground for disciplinary action. The court held that errors resulting from even gross negligence and carelessness are not grounds for discipline “unless the conduct involves moral turpitude...”

Indeed, no California case has been found in which any disciplinary action has been taken on the basis of such a mistake alone. See N. Tooby & J. Rollin, *Criminal Defense of Immigrants*, § 4.52 (2007). This is as it should be. Trial attorneys make thousands of decisions in the course of defending a case, and some are bound to be erroneous. Some of the errors may wind up having a very serious impact upon the client. While the client should not be made to suffer for counsel’s mistakes, it would be inappropriate for counsel to suffer discipline on the basis of an innocent mistake, however serious.

### C. Proving Prejudice

As discussed above, one cannot simply allege that the defendant was prejudiced. One must prove that prejudice by showing that it is more likely than not (a 51% probability) that absent the error, the defendant would have rejected the plea. Demonstrating the client’s deep ties to the United States can be a way of showing that had the defendant been aware of the immigration



consequences in the first instance, the defendant would have fought to avoid them. See the discussion in Chapter Seven, Demonstrating Equities. In addition, you can cite the effort and expense the defendant is expending now to fight the consequences as evidence that they would have asserted the same effort and expense at the time of the conviction. You may also submit a defendant’s statement that if the instant conviction is vacated, they are willing to plead to an immigration-neutral offense that is as, or more, serious than the original offense, as long as it is immigration-neutral, may also be submitted as evidence.

**A Penal Code Section 1016.5 Warning Does Not Defeat Prejudice.** The California Supreme Court has explained that a properly administered Penal Code section 1016.5 warning does not defeat a claim of prejudice, nor does it replace defense counsel’s unique duties to the defendant. *Martinez*, 57 Cal. 4th at 562 (internal citation omitted); *Patterson*, 2 Cal. 5th 885. “Defense counsel clearly has far greater duties toward the defendant than has the court taking a plea.” *Resendiz*, 25 Cal. 4th at 246. To “construe section 1016.5 as a categorical bar to immigration-based ineffective assistance claims ‘would deny defendants [who prove incompetence and prejudice] a remedy for the

specific constitutional deprivation suffered.” *Id.* at 241-42 (rejecting the State’s suggestion that a section 1016.5 warning should shield pleas from collateral attack).

Some courts are altering the statutory “may result” advice and stating the conviction “will result” in deportation, inadmissibility, and denial of naturalization. This is improper for many reasons. Further, this judicial misstatement cannot relieve counsel from the duty to make sure the advice is accurate. For example, if the conviction does not trigger deportability, this judicial advice is inaccurate, and counsel renders ineffective assistance by standing by silently (failure to advise) or adopting the court’s mistaken advice through silence (affirmative misadvice). The same is true if the conviction triggers removal, but the client is eligible to apply for relief. In either case, the mistaken advice can be devastating for the client, who may believe it and agree to deportation instead of retaining immigration counsel to avoid removal by terminating removal proceedings or obtaining other relief.

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## ENDNOTES

<sup>1</sup> Notably, a section 1473.7 post-custodial motion is only available to vacate convictions by plea negotiation, not convictions obtained after a jury trial.

<sup>2</sup> Rule 2-111(A)(2) of the Rules of Conduct of the State Bar of California; *Finch v. State Bar*, 28 Cal. 3d 659, 665 (1981) (duty to forward the file to client or successor counsel); *Kallen v. Delug*, 157 Cal. App. 3d 940, 950 (1984). State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1992-127, discusses the extent to which a criminal defense attorney, after being relieved by successor counsel, must cooperate with new counsel. Original counsel must turn over the entire file (which belongs to the client), including the attorney’s notes, and must answer all oral questions if failure to do so would prejudice the client. This ethics opinion, which was mailed to all California attorneys, is extremely useful in obtaining original counsel’s cooperation.



## CHAPTER SIX

# Successful Negotiation with Prosecutor and Identifying a Safe Haven

**N**egotiating with the prosecutor to secure an immigration neutral disposition is an essential, yet often overlooked, component of successful post-conviction-relief. Prosecutors may be willing to stipulate to a motion to vacate if the defendant can identify an immigration-neutral alternative that offers the same or greater sentencing exposure as the original offense. It is, of course, possible to win a motion over the prosecution’s opposition. However, when a conviction is vacated, the individual is put back into the position they were in before the error occurred, typically facing an open complaint alleging criminal conduct. If you can secure prosecutorial cooperation, the prosecutor will amend the complaint to add the newly agreed-upon immigration-neutral count, and the defendant will plead to the new disposition. If you do not reach an agreement with the prosecutor about adding a new count, then the defendant will have to plead to the existing charges and

start the process of bargaining to a different offense, or take the case to trial—which may or may not lead to an immigration-neutral outcome. See Chapter Three, Identifying a Strategy.

The Supreme Court in *Padilla v. Kentucky* recognized that “informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process.” 559 U.S. at 373. Agreeing on an immigration-neutral disposition with the prosecutor before a judge hears the case, will help ensure that you obtain the result that will mitigate or eliminate the immigration consequences of an offense and greatly increase your chances of getting the original conviction vacated. This chapter will explore how to identify and propose an immigration-neutral alternative disposition (or “safe haven”) and how and when, to engage in negotiating with the prosecutor.

## I. HOW TO IDENTIFY A SAFE HAVEN

A safe haven is an alternative disposition that does not trigger adverse immigration consequences.

When identifying an immigration-neutral outcome, you must look for alternatives that are realistic and provide the same (or greater) sentencing exposure as the offense being challenged. It is not realistic, nor is it compelling to the prosecution, for you to offer a misdemeanor plea to substitute for a felony strike conviction. In fact, under California law, it is possible to identify serious felony offenses that have no, or at least relatively small, immigration effect, so that usually there is a realistic counter-offer. In the upside-down world of criminal and immigration law, an infraction can potentially lead to mandatory deportation, while a felony strike offense may trigger no immigration consequences whatsoever. If you can't identify any safe haven, and the only immigration "safe" resolution in the case is to eliminate a conviction with no new plea, then it is harder to claim the original defense counsel erred.

**NOTE:** On occasion, if an offense is very old or insignificant, the prosecutor, after a vacatur, may decide to dismiss the open charges. If the charges are dismissed, the defendant will not have to re-plead to a new charge. However, you should operate under the assumption that the defendant will have to answer to the charges alleged, and they should always identify the immigration-neutral dispositions.

### A. Identify a Safe Haven Then and Now

There are two different moments in time that you must analyze when identifying the safe dispositions: (1) the safe disposition at the time of the plea, and (2) the safe disposition now. Because immigration law is ever-changing, those dispositions might be the same, or they might be different if subsequent case law has changed the analysis.



Identifying the immigration neutral offense at the time of the conviction is essential to proving that some error occurred and that the defendant was prejudiced by that error. Armed with an immigration neutral alternative, you can say, "This is the disposition that, had they been informed, the defendant could and should have pursued at the time of the original disposition or, if no outcome could be obtained, that defendant would have taken the 'Hail Mary' at trial." See Chapter Five, Grounds of Legal Invalidity.

Identifying the immigration-neutral offense that is available now is important for a different reason—not to point out defense counsel's original error, but to help engage or incentivize the prosecutor in negotiations for an immigration-neutral disposition now.

### B. Consult an Expert to Identify and Document the Safe Haven

To identify a safe haven, it will often be necessary to consult with an expert in criminal and immigration law. The ILRC's Attorney of the Day hotline offers expert consultation services. To find out more about those services, look here: <https://www.ilrc.org/technical-assistance>. Or identify another attorney with real expertise in immigration and California crimes. Another benefit of consulting an expert is to make sure that the conviction really has the adverse immigration

consequence that you believe it does. This area of the law is fast changing and complex, and an expert can provide invaluable insight and assistance.

As discussed in Chapter Five, submitting a signed declaration from an expert attorney as one of the motion-to-vacate documents will often be instrumental in the motion's success. See *Bautista*, 115 Cal. App. 4th at 240-42 (quoting extensively from expert declaration about the immigration-neutral disposition and the likelihood of obtaining that disposition). We have included in Appendix J, "Sample Expert's Declaration." **Every motion should have a declaration from an expert!**

The expert declaration will identify the immigration-neutral disposition at the time of the offense, the immigration-neutral disposition available now, and the likelihood of the prosecution agreeing to such a defense. For example, if the neutral disposition offers greater sentencing exposure or if the expert has personally overseen similar cases, then the expert will be able to credibly say that prosecutors regularly accept such alternatives when those alternatives are presented.

### C. Additional Resources

For many decades, the ILRC, along with partner organizations like the Law Office of Norton Tooby, has published resources for defense attorneys detailing the immigration consequences of convictions and identifying immigration-neutral alternatives. See Chapter Five, part III A, "Proving Ground of Legal Invalidity." These

resources can be relied on to establish the safe haven at the time of the offense; the safe disposition now; and the prevailing standard of practice at the time of the plea. Potential resources include relevant materials in the Continuing Education of the Bar manual, *California Criminal Law—Procedure and Practice*, which has included a chapter on representing noncitizens since the early 1990s ([www.ceb.com](http://www.ceb.com)). This is an especially good source to cite, since virtually all criminal court judges, defenders, and prosecutors are familiar with it and know that it is used throughout California. The ILRC has posted prior editions of the CEB books on its website for free access here: (<https://www.ilrc.org/outdated-editions-continuing-education-bar-california-criminal-law-procedure-and-practice>). In addition, consider the national treatise, *Immigration Law and Crimes* ([www.thomsonreuters.com](http://www.thomsonreuters.com)) (published annually or biannually since the 1980s); the ILRC resource, *California Quick Reference Chart on Immigration Consequences of Crimes* at [www.ilrc.org/chart](http://www.ilrc.org/chart) (posted online with periodic updates since 2003), the ILRC treatise, *Defending Immigrants in the Ninth Circuit* (formerly *California Criminal Law and Immigration*) (published 1992-2013), or books by Norton Tooby ([www.nortontoby.com](http://www.nortontoby.com)). All of these resources have been in circulation and readily available for many years, and have provided specific and targeted discussion of the immigration consequences of various criminal dispositions. Old editions of the CEB manual and the ILRC charts are available for free download at <https://www.ilrc.org/immigrant-post-conviction-relief>.

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## II. REACHING OUT TO PROSECUTOR

Some prosecutors request that you file the motion to vacate before you reach out to negotiate an alternative disposition. Others prefer that you contact them before filing with a completed copy of the motion and exhibits. Either way, engaging with the prosecutor before you arrive in court will often be crucial to your case's success.

Some prosecutor offices have assigned an office point-person to review post-conviction motions, while others prefer that you approach the Deputy District Attorney who originally prosecuted the case. Consult with local practitioners to determine the prevailing approach in the county in which you intend to file and to determine point of contact in the office. The post-conviction-relief

practitioner's listserv can be a helpful place to ask about local practices. You can join the group here: <https://groups.google.com/d/forum/14737pcr-group>.

When you reach out to the prosecutor, it is helpful to have prepared a brief summary of the case, leading with your client's equities (see discussion in Chapter Seven) and the reasonable alternative disposition you seek.

**Importance of Penal Code §§ 1016.2 & 1016.3.** Some district attorney offices once had a policy of refusing to consider the immigration consequences of disposition. However, Penal Code § 1016.3(b) clarified prosecutors' obligation to consider immigration consequences:

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

Penal Code § 1016.3 refers to any plea negotiating process, encompassing post-conviction actions in addition to the initial plea bargaining stage of a disposition. If the prosecutor refuses to engage in conversations about plea negotiations, point out that they may be in violation of their responsibilities under Penal Code §§ 1016.3 and 1016.2, as well as any office-specific policies by which they may be bound.

Pursuant to Penal Code 1016.2 and 1016.3, many prosecutor offices have adopted policies that require DAs to consider immigration neutral outcomes. It will be helpful to consult with practitioners who can help you determine what that county office's policies are with respect to post-conviction relief practices and immigrant defendants.



## CHAPTER SEVEN

# Humanizing Your Client: Demonstrating Equities

**A** robust presentation of your client's equities will help humanize your client to the prosecutor and the court and will often be an essential component of winning your case. Even though the motion must allege—and the order vacating the conviction must be based upon—a *ground of legal invalidity* (see Chapter Five, “Grounds of Legal Invalidity”), it is often the full demonstration of the client's equities that influences the prosecution and court's decision-making in a particular matter.

As Professor Bryan Stevenson says, “Each of us is more than the worst thing we've ever done.” B. Stevenson, *Just Mercy* (Spiegel and Grau, 2015). Demonstrating the “more than” that makes your client unique—the family and community ties; length of time in the United States; contribution as a parent, neighbor, spouse, child, and employee; and other special characteristics that represent the person's individuality—is a necessary, though often overlooked, component of a successful motion.

Many lawyers preparing post-conviction motions focus their attention on proving their legal arguments and give short shrift to the equitable components of their client's case. This does a disservice to their clients. A thorough and dynamic presentation of the full scope of your client's life is often the lynchpin to winning your case.

Equally important, preparing and presenting your client's equities can be an empowering experience for your client and their family. It helps your client control the narrative

of their life story and contextualize the offense as one of, but not *the*, defining moment in their life. It helps the client feel invested in the case and more self-confident. There are a number of different groups or resources that can help you as you prepare the equity packet.

**Participatory Defense.** Spearheaded by Silicon Valley De-Bug (<https://www.siliconvalleydebug.org>), community organizations throughout the country have begun engaging in “participatory defense” to support families “transform the landscape of power in the court system.”<sup>1</sup> Organizations will help family members present “social biography” packets or videos to show the court in an effort to impact the outcome of a case. Consider reaching out to local criminal-justice-reform organizations to see if they can help your client marshal their equities.

**Work With Immigration Counsel.** Many immigrant clients pursuing post-conviction-relief will do so after losing an immigration case. These individuals may have already worked with their immigration attorney to prepare letters from family members or other documentation of their equities. Contact immigration counsel to see if they have already developed an equity packet and ask whether you can use it as a starting point for your motion. The letters may have to be revised and resubmitted, but they are a good starting point. If such a packet has not yet been developed, consult with the immigration attorney to determine which of you would be best able to assemble one within your time frame.

## Examples of Equities

The types of equities you present should vary depending on your client's life and family ties. Examples include:

- ✓ Letters from spouse
- ✓ Letters/cards from children
- ✓ School awards (large or small) given to children
- ✓ Letters from employers
- ✓ Letters from coworkers
- ✓ Letters from school teachers
- ✓ Letters from neighbors
- ✓ Letters from religious clergy
- ✓ Letters from law enforcement
- ✓ Letters from friends
- ✓ Photographs from family functions
- ✓ Signature petition signed by community members speaking to the important role your client plays in the community and the benefits of having them stay in the United States
- ✓ Proof of successful completion of rehabilitative treatment, if relevant
- ✓ Medical records from ailing family members for whom your client provides care
- ✓ Graduation degrees
- ✓ Other awards or honors
- ✓ Conditions in country of origin
- ✓ Proof that your client will face persecution in country of origin

Let your client be the guide and thought partner in gathering and expansively presenting their life for the court.

**Equities as a Part of Showing Prejudice.** A thorough demonstration of equities can help prove prejudice in a case by showing what the defendant had at stake at the time of the plea. Given extensive family and community ties, one can argue that had the defendant been accurately advised of—and defended against—the immigration consequences of a conviction, they would have never entered the plea.

**Equities and Proving Legal Invalidity.** Though the equities may play an important role in convincing the decision-maker in a case, the vacatur order must make clear that the conviction is vacated *based on a ground of legal invalidity*. See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

<sup>1</sup>See *What is "Participatory Defense,"* at <https://acjusticeproject.org/about/purpose-and-practice/>.



## CHAPTER EIGHT

# Winning the Case

**S**o far this manual has discussed how to prepare and present a complete post-conviction-relief packet, including investigating a case for post-conviction-relief (Chapter Two); developing a post-conviction strategy (Chapter Three); filing a motion with the proper vehicle (Chapter Four); presenting grounds of legal invalidity (Chapter Five); approaching the district attorney with an immigration-neutral alternative disposition (Chapter Six), and demonstrating your client's equities (Chapter Seven). If you follow the directions in these chapters, your case should be in a winning posture.

This chapter discusses how to be sure that a win in criminal court will actually help your client—the nuts and bolts of ensuring your vacatur carries the maximum positive benefit for immigration purposes.

**Court Hearing on the Motion and Repleading.** When the court rules that the conviction is legally invalid, the conviction is vacated, and the client is left in the same situation they occupied immediately prior to the plea, trial, or sentence that was causing immigration problems. That means that the case must be defended all over again, this time with accurate knowledge of the actual immigration consequences of the disposition. This is why

it is so crucial to identify—and have the prosecutor add—a new, immigration-neutral count to the complaint.

Often, if the motion is uncontested, the court will vacate the motion, and the defendant will replead to the new count in the same proceeding. California law requires that the client receive full and mandatory credit for time served for every day spent in custody on the original sentence. Pen. C. § 2900.5. Once the defendant repleads, the prosecutor or the court will then move to dismiss the remaining counts under Penal Code § 1385.

Sometimes, if the conviction is very old and seemingly insignificant, some district attorneys may choose to simply dismiss all the counts altogether, rather than requiring the defendant to replead. This is, however, unusual and should not be expected.

If the motion is contested, the standard court rules governing motions apply. The prosecutor and the moving party may present and cross-examine witnesses. In some jurisdictions, district attorneys regularly subpoena former defense counsel if an ineffective assistance of counsel claim has been raised in post-conviction proceedings.



**Successful Order.** To ensure that your successful motion carries its full weight in immigration proceedings, it is helpful to coordinate closely with immigration counsel. You should always prepare a draft order granting your motion and submit it along with your full pleadings packet. See Appendix J, “Sample Order Granting Penal Code Section 1473.7 Motion.” Immigration law only recognizes as eliminated those convictions that are vacated on a ground of legal invalidity. Therefore, the judge’s order must make clear that the motion was, in fact, vacated because it found the conviction legally invalid. The order can cite the specific ground of legal invalidity—e.g., a court error under Penal Code section 1016.5 or ineffective assistance of counsel. The order can also say more generally that the vacatur was granted because the conviction violated state and federal laws—though it is ideal to specify which laws (e.g., Penal Code § 1016.3 and/or the Sixth Amendment to the U.S. Constitution). The prosecutor and court may want input in drafting or amending the sample order. Use *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), as your guidepost in drafting or negotiating the order.

**Copy the Order.** After the order has been signed and the original matter resolved, you must obtain multiple certified copies of the court order because the immigration courts often require them. This is best done at the time you are in court. Take the signed original order to the clerk and ask them to provide you with three certified copies. Give one to the client and keep one in your file for possible future reference. Send the third certified copy to the client’s immigration lawyer so it can be presented as proof that the conviction has been eliminated.

**Translating your victory in criminal court into an immigration victory.** Winning the criminal court case is just one component of the victory. You must also help your client achieve their ultimate immigration goal. If your client is a lawful permanent resident who wanted to vacate a conviction in order to be eligible to naturalize, they must work with an immigration attorney who helps explain to the adjudicating naturalization officer that a successful vacatur eliminates the grounds of deportability or the bar to naturalization. Or, if your client

is in removal proceedings, immigration counsel may need to file a motion to terminate the proceedings based on a successful vacatur. Finally, if your client has already been ordered removed, then they may need immigration counsel to file a motion to reopen the immigration proceedings. Each of these processes is complex. Ensure that your client works with immigration counsel familiar with how to translate criminal court vacaturs into immigration court victories.

**Post-conviction Vacatur May Not Alleviate All Immigration Consequences.** Vacating a conviction eliminates the conviction-based grounds of removability or bars of relief. However, immigration law provides some conduct-based grounds of removability, such as, for example, reason to believe that someone is a drug trafficker; admission of commission of a crime involving moral turpitude or a controlled substance; or prostitution. See 8 U.S.C. § 1182(a)(2). While a vacatur may help the defendant eliminate the *conviction* bars, your client should be careful not to trigger the *conduct* bars. Depending on the acts committed, this may not be possible. Accordingly, defendants who have successfully obtained post-conviction-relief should work closely with immigration counsel who can help avoid common pitfalls.

Similarly, when someone is attempting to qualify for eligibility for some form of discretionary relief (like citizenship or DACA), even if a conviction has been vacated, an adjudicator may nevertheless still decline to grant the sought-after relief as a matter of discretion. While post-conviction-relief may open certain doors, it will not necessarily secure your client’s ability to walk through them. Be careful when setting expectations for your client.



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# APPENDIX A

## Immigrant Post-Conviction Relief Screening Form in English and Spanish



1663 Mission Street, Suite 602  
San Francisco, CA 94103  
[pcr@ilrc.org](mailto:pcr@ilrc.org)

## Intake Information Sheet

**Thank you for your interest in our services.**

- This form should be completed by a legal service provider or community organization working with a client
- Completion of this form does not create a lawyer/client relationship
- This form may be reviewed by volunteer attorneys, but will not be shared with any other individuals, entities, or organizations without advance permission
- Please consult the RAP sheet and/or criminal court documents to complete the form
- If more space is needed to answer a question completely, please use a separate page
- Please submit a California DOJ RAP sheet along with the intake form

**For EACH criminal case, please gather copies of the following documents, if available:**

1. The charging paper (i.e., complaint, information, etc.)
2. The police report
3. The state and/or FBI rap sheet or criminal history report
4. The docket or clerk's minutes from the plea and sentence
5. The reporter's transcript of the plea and sentence
6. Any waiver of rights form signed by the defendant, and
7. The probation report.

**Once you have completed the Intake Form, email it to [pcr@ilrc.org](mailto:pcr@ilrc.org).**

## Immigrant Post-Conviction Relief Intake Form

### I. Contact Information of individual/organization

<b>Name of person needing PCR</b>	<b>Email</b>	<b>Phone Number</b>
<b>Country of Birth</b>	<b>Date of Birth</b>	<b>In removal proceedings?</b>
		<input type="checkbox"/> Yes <input type="checkbox"/> No
<b>Custody status</b>	<b>Immigration attorney</b>	<b>Criminal defense attorney?</b>
<input type="checkbox"/> Not in custody <input type="checkbox"/> In criminal custody <input type="checkbox"/> In immigration custody? If in custody, where: _____ Release date: _____	<input type="checkbox"/> No <input type="checkbox"/> Yes If yes, name: _____ Phone number: _____	<input type="checkbox"/> No <input type="checkbox"/> Yes If yes, name: _____ Phone number: _____

<b>Name of referring Atty/Staff</b>	<b>Referring Organization</b>
<b>Email</b>	<b>Phone Number</b>

### II. Immigration information

<b>Date first entered U.S.</b>	<b>Visa Type (or "none")</b>	<b>Departures from US (approx. OK)</b>
		Date/s: Length of departure/s

<b>Lawful permanent resident ("green card")</b> <input type="checkbox"/> Yes <input type="checkbox"/> No    Date Obtained? _____  On what basis (e.g., family visa, refugee): _____  Check one: To obtain LPR status, went to: - Intvw in home country <input type="checkbox"/> - Processed ("adjusted status") here in U.S. <input type="checkbox"/>	<b>Other Current Immigration Status</b> <input type="checkbox"/> Undocumented <input type="checkbox"/> Doesn't know <input type="checkbox"/> Has work permit but unsure of status <input type="checkbox"/> Refugee <input type="checkbox"/> Asylee <input type="checkbox"/> Temporary Protected Status <input type="checkbox"/> Deferred Action for Childhood Arrivals (DACA)  Other: _____
<b>Screen for possible U.S. citizenship</b> <input type="checkbox"/> Grandparent or parents were U.S. citizens at birth <input type="checkbox"/> Parent/s became USCs while applicant under 18; (Mark even if parents or grandparents now are deceased. Stepparents do not qualify here) <input type="checkbox"/> Neither of the above	<b>USC or LPR Parent, Spouse, Child</b> List each relative and whether the person is an LPR or a USC. Include age of each child: <input type="checkbox"/> Spouse & immigration status _____ <input type="checkbox"/> Child(ren). If yes, how many? _____ Age(s) _____ Immigration status: _____

**III. Prior Removal/Deportation/Voluntary Departure:**

Ever deported or got "voluntary departure"	Describe what happened, to extent possible
<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know	

**IV. Biographic information:**

Other immediate family in the U.S.?	Your Occupation	Your Employer
<input type="checkbox"/> Yes <input type="checkbox"/> No If yes, how many? _____ Immigration status _____		

**V. Conviction history**

Conviction(s) (list all counts)	Date offense committed	City, State, County of Arrest	Date of Plea/Verdict	Sentence
Charges:				
Convictions:				
Charges:				
Convictions:				
Charges:				
Convictions:				
Charges:				
Convictions:				

Were you aware of immigration consequences at the time of your conviction?	What advice, if any, did your defense counsel provide about the immigration consequences of a conviction?	Did you consider alternative dispositions to avoid immigration consequences?
<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't know

## VII. Immigration Relief

### Eligible to Apply for Lawful Status or Relief from Deportation

If the answer to any question is “yes,” the individual might be eligible for the relief indicated. References are to the Relief Toolkit for Defenders, available free online at [www.ilrc.org/chart](http://www.ilrc.org/chart).

“USC” stands for U.S. Citizen and “LPR” stands for lawful permanent resident (green card-holder)

#### Questions for LPRs (green card-holders) Only:

**1. Has LPR lived in the U.S. for at least seven years**  Yes  No

To apply for this waiver in deportation proceedings, must be an LPR who (a) is not convicted of an aggravated felony; (b) has been an LPR for at least five years; and (c) has lived in the U.S. for at least seven years since being admitted in any status (e.g. as a tourist, LPR, etc.). See §17.5 LPR Cancellation.

**2. Can LPR apply for U.S. Citizenship?**  Yes  No

An LPR can apply for U.S. citizenship after five years LPR status, or three years of marriage to a USC while an LPR; must establish good moral character and should not be deportable. More beneficial rules apply to some current and former military personnel. See §17.4 Naturalization.

#### Questions for All Immigrants, Including Undocumented Persons and LPRs

**3. Has person ever been abused by a USC or LPR relative?**  Yes  No

Individual, or certain family member/s, have been abused (including emotional abuse) by a USC or LPR spouse, parent, or adult child. What relative and what immigration status? \_\_\_\_\_  
See §17.8 VAWA. (If abuser does not fit this profile, consider U Visa, below.)

**4. Is person a juvenile and a victim of abuse, neglect, or abandonment?**  Yes  No

A person can't be returned to at least one parent, due to abuse, neglect or abandonment. See §17.9 Special Immigrant Juvenile.

**5. Is person a victim of abuse who also was convicted of domestic violence?**  Yes  No

If person was convicted of a deportable DV or stalking offense, but in fact is the primary victim in the relationship, a waiver of the DV deportation ground, or the DV bar to non-LPR cancellation, might be available. See §17.11 Domestic Violence Waiver.

**6. Did person enter the U.S. before his or her 16th birthday?**  Yes  No

Person entered U.S. before turning 16 and before 6/15/2007. See §17.12 DACA.

**7. Has person lived in the U.S. for at least ten years?**  Yes  No

To be eligible for this defense in removal proceedings, person must have lived in U.S. at least ten years and have a USC or LPR parent, spouse or child (see §17.14 Non-LPR Cancellation of Removal) or lived here at least ten years and all deportable convictions occurred before April 1, 1997 (see § 17.15 Suspension of Deportation, available in Ninth Circuit states).

**8. Has person been a victim of a crime?**

Yes  No

Person must have been a victim of a crime such as DV, assault, false imprisonment, extortion, stalking, or sexual abuse, and be or have been willing to cooperate in investigation or prosecution of the crime. See §17.16 The “U” Visa.

**9. Has person been a victim of human trafficking?**

Yes  No

Person must have been victim of (a) sex trafficking of persons (if under age 18, could have been consensual), or (b) labor trafficking, including being made to work by force/fraud. See §17.17 “T” Visa.

**10. Is person afraid to return to his or her home country for any reason?**

Yes  No

Mark “yes” if (a) Person fears persecution or even torture if returned to the home country (see §§ 17.19 Asylum and Withholding and 17.20. Convention Against Torture); or (b) Person already is an asylee or refugee, (§17.21 Refugees and Asylee); or (c) Person is from a country that the U.S. designated for TPS status, based on natural disaster, civil war, or the like (see §17.22 Temporary Protected Status (TPS)).

**11. Is your client from the former Soviet Bloc, El Salvador, Guatemala, or Haiti?**

Yes  No

Your client might be eligible for a program if he/she from these areas and applied for asylum or similar relief in the 1990’s -- or is a dependent of such a person. (See §17.23 NACARA for Central Americans, and see §17.24 HRIFA for Haitians and Dependents).

**12. Does your client, or parent or spouse, have an imm case from 1980’s “amnesty”?**

Yes  No

The application still might be pending and viable. (See §17.25).



## Documento de información de registro

### Gracias por su interés en nuestros servicios.

Este formulario debe completarse por un proveedor de servicios legales, o una organización comunitaria que trabaja con clientes.

Al llenar este formulario no se crea una relación de abogado/cliente

Este formulario puede ser revisado por abogados voluntarios, pero no será compartido con otros individuales, entidades, u organizaciones sin un permiso previo

Por favor consulte el documento RAP, y o los documentos de la corte criminal para llenar este formulario

Si necesita más espacio para contestar una pregunta completamente, por favor use una hoja por separado.

Por favor presente la hoja de California del DOJ RAP junto con el documento de registro

Por cada caso criminal, por favor reúna copias de los siguientes documentos, si están disponibles.

El documento de cargos (eje. De queja, información, etc.)

El reporte de la policía

El reporte historial criminal del Estado y o del FBI

El informe del expediente, o los minutos del secretario de la corte sobre los cargos y la sentencia

El expediente del reportero tribunal sobre el cargo y la sentencia

Cualquier forma de renuncia sobre los derechos firmada por el acusado y

El reporte de prueba

Una vez que haya completado el documento de información de registro mándela por correo electrónico a: [pcr@ilrc.org](mailto:pcr@ilrc.org).

**Formulario de registro sobre condena posterior del inmigrante**  
**Información de contacto del individuo/organización**

<b>Nombre de persona que necesita PCR</b>	<b>Correo electrónico</b>	<b>Número de teléfono</b>
<b>País de nacimiento</b>	<b>Fecha de nacimiento</b>	<b>¿En Procedimiento de expulsión?</b>
		Si <input type="checkbox"/> No <input type="checkbox"/>
<b>Estado de Custodia</b>	<b>Abogado de Inmigración</b>	<b>¿Abogado de defensa criminal?</b>
No estoy en custodia <input type="checkbox"/> En custodia criminal <input type="checkbox"/> En custodia de Inmigración <input type="checkbox"/> Si esta en custodia; dónde:  Fecha de salida:	No <input type="checkbox"/> Si <input type="checkbox"/>  Si sí, nombre:  Número de teléfono:	No <input type="checkbox"/> Si <input type="checkbox"/>  Si sí nombre:  Número de teléfono:

<b>Nombre del abogado/persona que lo refirió</b>	<b>La organización que lo refirió</b>
<b>Correo electrónico</b>	<b>Número de teléfono</b>

**II. Información de Inmigración**

<b>Fecha de la primera entrada a EE.UU.</b>	<b>Tipo de Visa (o "ninguna")</b>	<b>Salidas de EE. UU (aprox está bien)</b>
		Fechas: Duracion de salida/s

<b>Residente Permanente Legal ("tarjeta verde")</b>	<b>Otro tipo de estatus migratorio actual</b>
<input type="checkbox"/> Sí <input type="checkbox"/> No    Fecha cuando la obtuvo?  Sobre qué base (ej., visa familiar, refugiado):	<input type="checkbox"/> Indocumentado <input type="checkbox"/> No sabe <input type="checkbox"/> Tiene un permiso de trabajo, pero no sabe su estatus <input type="checkbox"/> Refugiado <input type="checkbox"/> Asilado

Marque uno: Para obtener estatus RPL, fue a: - Entrevista a su país natal <input type="checkbox"/> - Procesado ("ajuste de estatus") Aquí en EE.UU. <input type="checkbox"/>	<input type="checkbox"/> Protección temporal de estatus <input type="checkbox"/> Acción diferida para los llegados en la infancia (DACA)  Otro:
<b>Pre-evaluación para La Ciudadanía posiblemente</b>	<b>Padre, Esposo/a, hijo americano, o RPL.</b>
<input type="checkbox"/> Abuelos, o Padres fueron Ciudadanos Americanos de nacimiento  <input type="checkbox"/> Madre/Padre/Padres se hicieron Ciudadanos Americanos cuando el solicitante tenía menos de 18 años; (Marque aunque los padres o abuelos están difuntos. Padrastros no califican en esta categoría)  <input type="checkbox"/> Nada de lo de Arriba.	Nombre cada pariente y si la persona es un RPL, o Ciudadano Americano: incluya la fecha de cada niño.  <input type="checkbox"/> Esposo Y su status migratorio <input type="checkbox"/> Hijo/s. ¿Si sí cuantos?  edad(es): Estatus migratorio:

### III. Previa remoción/ Deportación/Salida voluntaria

Ha sido deportado, o obtuvo una salida voluntaria	Describa que paso lo más posible que pueda.
<input type="checkbox"/> Sí <input type="checkbox"/> No <input type="checkbox"/> No sé	

### IV. Datos Biográficos:

Otro familiar mas cercano en EE.UU?	Su ocupación	Su empleador
Sí <input type="checkbox"/> No <input type="checkbox"/> ¿Si sí cuantos? Estatus migratorio		

### V. Historial de Convicción

Convicción (es) (liste todos los cargos)	Fecha cuando la ofensa ocurrió	Ciudad, Estado, Condado del arresto	Fecha de la contesta/veredicto	Sentencia
Cargos:				

Convicciones:				
Cargos:				
Convicciones:				
Cargos:				
Convicciones:				
Cargos:				
Convicciones:				

¿Estaba usted consiente sobre las consecuencias migratorias en el tiempo de su convicción?	¿Que consejo, si hubo alguno, su cónsul de defensa le proveo sobre las consecuencias migratorias de una convicción?	¿Considero algunas disposiciones alternativas para evitar las consecuencias migratorias?
<input type="checkbox"/> Sí	<input type="checkbox"/> Sí	<input type="checkbox"/> Sí
<input type="checkbox"/> No	<input type="checkbox"/> No	<input type="checkbox"/> No
<input type="checkbox"/> No sé	<input type="checkbox"/> No sé	<input type="checkbox"/> No sé

## VII. Alivio Migratorio

### Apto para Solicitar por un estatus legal, o un alivio de la deportación

Si la respuesta es sí a una de estas preguntas, el individuo podría ser elegible por el alivio indicado. Existen referencias al paquete de herramientas de alivio para los defensores en la web en [www.ilrc.org/chart](http://www.ilrc.org/chart).

*“USC” representa para un Ciudadano estadounidense y “LPR” representa para un Residente permanente Legal (poseedor de la tarjeta verde)*

**Preguntas solamente para LPRS (poseedores de la tarjeta verde)**

- 1. ¿La persona con Residencia Permanente ha vivido en los Estados Unidos por lo menos siete años?**  Sí  No

Para solicitar por esta exención en procedimientos de deportación, debe ser un Residente Permanente que (a) no ha sido convicto de una felonía agravada; (b) ha sido Residente Permanente por lo menos cinco años, y (c) ha vivido en los Estados Unidos por lo menos siete años desde que fue admitido con cualquier estatus (Ej. Como un turista, Residente Permanente, etc.) *Vea §§17.5 Cancelación de Residencia Permanente.*

- 2. ¿Puede la persona con Residencia Permanente solicitar la Ciudadanía?**  Sí  No Una

persona con Residencia Permanente puede solicitar la Ciudadanía después de tener 5 años con su tarjeta verde, o después de tres años de matrimonio con un Ciudadano/a siendo un Residente Permanente; debe establecer buen comportamiento moral y no debe ser deportable. Aplican más reglas beneficiarias para ciertas personas previas y actuales del servicio militar. *Vea §§17.4 Naturalización.*

**Preguntas para todos los Inmigrantes, Incluyendo Personas Indocumentadas y con la Residencia Permanente.**

- 3. ¿La persona ha sido abusada por un familiar Ciudadano o con Residencia Permanente?**  Sí  No

Un individual, o ciertos miembros de la familia, han sido abusados (incluyendo abuso emocional) por un esposo/a americano o Residente Permanente, un hijo adulto. ¿Qué familiar y que estatus migratorio tiene?

*Vea §§17.8 VAWA. (Si el agresor no encaja el perfil, considere la U-Visa, abajo.)*

- 4. ¿Es la persona menor de edad y víctima de abuso, negligencia o abandono?**  Sí  No

La persona no puede ser regresada por lo menos a un padre, debido al abuso, negligencia o abandonamiento. *Vea §§17.9 Inmigrante Especial Juvenil.*

- 5. ¿Es la persona víctima de abuso y también fue convicta de violencia domestica?**  Sí  No

Si una persona ha sido convicta de un crimen de violencia doméstica o de una ofensa de acoso, lo cual puede ser base para una deportación, pero en realidad es la víctima principal en la relación, puede haber un perdón para la base de deportación, o para el castigo contra la cancelación de deportación para personas que no sean residentes permanentes.

- 6. ¿Entró la persona a Los Estados Unidos antes de cumplir los 16 años de edad?**  Sí  No

La persona entro a los Estados Unidos antes de cumplir los 16 años de edad antes del 6/15/2007. *Vea §§17.12 DACA.*

7. ¿La persona ha vivido en los Estados Unidos por lo menos 10 años?  Sí  No

Para ser elegible para esta defensa en procedimientos de deportación, la persona debe haber vivido en los Estados Unidos por lo menos diez años y que tenga un padre, esposo/a o hijo Ciudadano o Permanente Residente (Vea §§17.14. *Cancelación de deportación a una persona no RPL*) o que haya vivido aquí diez años y todas las convicciones de deportación haya ocurrido antes de abril 1, 1997 (Vea §§17.15 *Suspensión de deportación, disponible en el noveno circuito de los Estados*)

8. ¿Ha sido la persona víctima de un crimen?  Sí  No

La persona debe haber sido víctima de un crimen tal como, Violencia Domestica, asalto, encarcelamiento falso, extorción, acoso, o abuso sexual, and deber haber estado dispuesto en cooperar con la investigación y el procesamiento del delito. Vea §§17.16. *La "U" Visa*.

9.

10. ¿Ha sido la persona víctima de trata de personas?  Sí  No

Las personas deben de haber sido víctimas de (a) personas de tráfico sexual (si son menores de 18 anos, podría haber sido consensual, o (b) trafico laboral, incluyendo hacer trabajo por la fuerza/fraude. Vea §§17.17 *Visa "T"*.

11. ¿La persona tiene miedo de regresar a su país de origen por cualquier razón?

Sí  No

Marque "si" si (a) La persona teme que vaya ser perseguida o hasta torturada si es regresada a su país de origen (vea §§ 17.19 *Asilo y Retenciones* y 17.20. *Convención Contra la Tortura*); o (b) La persona es de un país que ha sido designado por los Estados Unidos como Estatus Protegido Temporal (TPS), debido a un desastre natural, guerra civil, o algo similar (vea §§17.22 *Estatus Protegido Temporal (TPS)*).

11. ¿El cliente es del bloque Soviético anterior, de El Salvador, de Guatemala, o de Haití?

Sí  No

Su cliente puede ser elegible para un programa si él/ella es de una de estas áreas y solicito asilo o un alivio similar en los años 1990s – o si es un dependiente de alguien que lo haya hecho. (Vea §§17.23 *Ley de Ajuste Nicaragüense y Alivio Centroamericano (NACARA) para los Centroamericanos*, y vea §§17.24 *Ley de Equidad de Inmigración de los Refugiados de Haití (HRIFA) para haitianos y sus dependientes*).

12. ¿El cliente, padre o cónyuge, tiene un caso de inmigración de la amnistía de los 1980s?

La solicitud aún puede estar en proceso y ser viable. (Vea §17.25).

Sí  No

# APPENDIX B

## Client Disclaimer About Immigration Consequences of a Criminal Conviction



## Client Disclaimer About Immigration Consequences of a Criminal Conviction

I am not an expert in the immigration consequences of criminal convictions. I am not permitted to give you any advice about how your conviction might affect your immigration status. The immigration consequences of criminal convictions can be complex, and they may not make sense. Sometimes even a small misdemeanor causes serious problems, and sometimes even a felony does not cause any problems. Every person's case is different, depending on their immigration situation and criminal record.

**You must consult with a trained immigration expert** before pursuing any immigration benefit or contact with immigration officials. I strongly encourage you to get immigration advice from an expert before doing any of these things:

- I advise you not to **travel outside of the country** until you consult with an expert. When you return to the United States, immigration may perform a background check. It is possible that your conviction would cause them to take away your lawful status and bar you from re-entering the U.S. See an expert first, to make sure it is safe to travel.
- I advise you not to **apply for any immigration paper or benefit** for which you might be eligible – for example, for a family visa or Deferred Action for Childhood Arrivals – until you speak with an expert. When you apply, immigration authorities will run your fingerprints to obtain your criminal record. It is possible that your conviction would cause your application to be denied, and cause you to be placed in deportation proceedings or even arrested and detained. See an expert first, to make sure it is safe to apply.
- If you have a green card that has expired, I advise you not to **apply to renew your green card** until you consult with an expert. When you apply, immigration authorities will run your fingerprints to obtain your criminal record. It is possible that your conviction would cause your application to be denied, and cause you to be placed in deportation proceedings or even arrested and detained. See an expert first, to make sure it is safe to apply.
- I advise you not to **apply for naturalization** until you consult with an expert. When you apply, immigration authorities will run your fingerprints to obtain your criminal record. It is possible that your conviction would cause your application to be denied, and cause you to be placed in deportation proceedings or even arrested and detained. See an expert first, to make sure it is safe to apply.



# APPENDIX C

Redacted BIA opinion recognizing  
1203.43 vacatur



**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals  
Office of the Clerk*

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*5107 Leesburg Pike, Suite 2000  
Falls Church, Virginia 22041*

**Strickland, Barbara Kay  
Stephanie Alcala Law Office  
2209 Highland Avenue  
National City, CA 91950**

**DHS/ICE Office of Chief Counsel - SND  
880 Front St., Room 2246  
San Diego, CA 92101-8834**

Name: [REDACTED]

A [REDACTED]

**Date of this notice: 9/7/2016**

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

*Donna Carr*

Donna Carr  
Chief Clerk

Enclosure

Panel Members:  
Cole, Patricia A.  
Liebowitz, Ellen C  
Malphrus, Garry D.

User team: Docket

Falls Church, Virginia 22041

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File: [REDACTED] – San Diego, CA

Date: **SEP - 7 2016**

In re: [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Barbara K. Strickland, Esquire

ON BEHALF OF DHS: Kathryn E. Stuever  
Senior Attorney

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -  
Present without being admitted or paroled

APPLICATION: Cancellation of removal; voluntary departure

This matter was last before the Board on April 1, 2015, when we dismissed the respondent's appeal from an Immigration Judge's decision denying his application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). The respondent thereafter filed a petition for review with the United States Court of Appeals for the Ninth Circuit, which has now remanded the matter for further consideration. The record will be remanded to the Immigration Judge.

The respondent, a native and citizen of Mexico, concedes that he is removable from the United States because of his unlawful presence. See section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i). Therefore, the only issue in dispute is whether he qualifies for cancellation of removal. In our decision of April 1, 2015, we found the respondent ineligible for such relief pursuant to section 240A(b)(1)(C) of the Act because he had sustained a 1999 "conviction" for use or being under the influence of a controlled substance—a violation of section 11550(a) of the California Health and Safety Code and an "offense under" section 212(a)(2)(A)(i)(II) of the Act.

On remand, the respondent has filed a motion requesting that we take administrative notice of a judicial record which purports to be a January 2016 judgment of a California Superior Court dismissing his 1999 conviction pursuant to section 1203.43 of the California Penal Code. In a supporting brief, moreover, the respondent argues that the aforementioned dismissal has eliminated his 1999 conviction, thereby permitting him to apply for cancellation of removal.<sup>1</sup>

<sup>1</sup> The respondent also argues that the guilty plea underlying his 1999 conviction was constitutionally infirm, but that argument is not properly before us. This Board has no authority to review the validity of criminal convictions. *E.g., Matter of Cuellar*, 25 I&N Dec. 850, 854-55 (BIA 2012).

As the respondent argues, section 240A(b)(1)(C) of the Act bars cancellation of removal for aliens who stand “convicted” of certain crimes, including controlled substance violations. In 1999, the respondent pled guilty to using or being under the influence of a controlled substance (methamphetamine) in violation of section 11550(a) of the California Health and Safety Code, as a result of which he was granted a “deferred entry of judgment” under section 1000 et seq. of the California Penal Code. Despite the respondent’s arguments to the contrary, a diversionary disposition under section 1000 et seq. of the California Penal Code is a “conviction” under section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), because it requires a “plea of guilty”—Cal. Penal Code § 1000.1(b)—and the judicial imposition of a “restraint on ... liberty” in the form of mandatory compliance with “education, treatment, or rehabilitation”—Cal. Penal Code §§ 1000(c), 1000.3. *See de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1025 n.3 (9th Cir. 2007); *see also Contreras-Negrete v. Lynch*, --- F’ Appx. ----, No. 14-72650, 2016 WL 801938, at \*1 (9th Cir. Mar. 1, 2016). There is no indication from the present record that the respondent’s participation in the deferred entry of judgment program was suspended by the sentencing judge, and thus the Ninth Circuit’s decision in *Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010), is inapposite.

According to the respondent, however, his 1999 diversionary disposition no longer qualifies as a “conviction” under section 101(a)(48)(A) of the Act because it was vacated pursuant to section 1203.43 of the California Penal Code, which went into effect on January 1, 2016. Section 1203.43 reads as follows, in its entirety:

**§ 1203.43. Successful completion of deferred entry of judgment program in cases where criminal charges were dismissed; permission for defendant to withdraw plea of guilty or nolo contendere**

(a)(1) The Legislature finds and declares that the statement in Section 1000.4, that “successful completion of a deferred entry of judgment program shall not, without the defendant’s consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate” constitutes misinformation about the actual consequences of making a plea in the case of some defendants, including all noncitizen defendants, because the disposition of the case may cause adverse consequences, including adverse immigration consequences.

(2) Accordingly, the Legislature finds and declares that based on this misinformation and the potential harm, the defendant’s prior plea is invalid.

(b) For the above-specified reason, in any case in which a defendant was granted deferred entry of judgment on or after January 1, 1997, has performed satisfactorily during the period in which deferred entry of judgment was granted, and for whom the criminal charge or charges were dismissed pursuant to Section 1000.3, the court shall, upon request of the defendant, permit the defendant to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty, and the court shall dismiss the complaint or information against the defendant. If court records showing the case resolution are no longer available, the defendant’s declaration, under penalty of perjury, that the charges were dismissed after he or

she completed the requirements for deferred entry of judgment, shall be presumed to be true if the defendant has submitted a copy of his or her state summary criminal history information maintained by the Department of Justice that either shows that the defendant successfully completed the deferred entry of judgment program or that the record is incomplete in that it does not show a final disposition. For purposes of this section, a final disposition means that the state summary criminal history information shows either a dismissal after completion of the program or a sentence after termination of the program.

The upshot of section 1203.43 is that any alien who may face “adverse immigration consequences” because he pled guilty to an offense and successfully completed a deferred entry of judgment program is conclusively presumed to have pled guilty on the basis of “misinformation” about the plea’s consequences.<sup>2</sup> As a result of that presumption, the alien is entitled to withdraw his guilty plea, enter a “not guilty” plea instead, and have the charge dismissed, thereby ostensibly eliminating the “plea of guilty” required for a “conviction” under section 101(a)(48)(A)(i) of the Act.

We conclude that 28 U.S.C. § 1738 obliges immigration adjudicators to extend full faith and credit to a California court order vacating a guilty plea and dismissing a drug charge under section 1203.43 of the California Penal Code. *See Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379-80 (BIA 2000). Under this Board’s precedents, a “conviction” ceases to be effective for immigration purposes if it is vacated because of a substantive or procedural defect in the underlying criminal proceedings, *see Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006), but a conviction remains effective if it is vacated solely for rehabilitative purposes or to alleviate immigration hardships. *See Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) (rehabilitation); *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (immigration hardships). In section 1203.43, the California Legislature has determined that California law systematically “misinform[s]” alien defendants about the possible “adverse immigration consequences” of their guilty pleas to first-time minor drug offenses, thereby necessitating vacatur of those pleas and dismissal of the charges to which those pleas were entered. This “misinformation” qualifies as a “substantive” defect in the criminal proceedings, notwithstanding its connection to the consequences of immigration enforcement. *Accord Matter of Adamiak, supra* (holding that an Ohio conviction was no longer effective for immigration purposes where it was vacated based on a failure to properly inform the defendant that his plea could have adverse immigration consequences).<sup>3</sup>

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<sup>2</sup> Deferred entry of judgment under section 1000 et seq. of the California Penal Code is available only to first offenders who plead guilty to minor drug crimes, such as simple possession, possession of drug paraphernalia, or (as here) use or being under the influence. It is not available to recidivists or to individuals who plead guilty to selling or trafficking in drugs.

<sup>3</sup> We note that a state court judgment is entitled to full faith and credit even if it is erroneous as a matter of state law and even if the error implicates matters of federal law. *See Turnbow v. Pac. Mut. Life Ins. Co.*, 934 F.2d 1100, 1103 (9th Cir. 1991).

Although a section 1203.43 dismissal is entitled to full faith and credit in immigration proceedings, on the present record we are unable to determine whether the respondent's conviction was dismissed under that section. Specifically, while the respondent submitted a copy of a document purporting to be a judgment vacating his 1999 conviction, the document is not signed by a judge or court clerk and contains inconsistent information. Near the top of the document a box is checked next to text which states "Petition for dismissal PC 1203.4," but the number "3" is added through hand-written interlineation after "1203.4" to make it appear like the dismissal was ordered under section "1203.43." No initials are included to identify the person who made this amendment. Later in the same document, moreover, a box is checked next to text which states that "Defendant's Petition for Dismissal pursuant to PC 1203.4 is granted." That text contains no hand-written reference to section 1203.43. A dismissal pursuant to section 1203.4 of the California Penal Code is rehabilitative in nature and has no effect upon the validity of the underlying conviction for immigration purposes. *See Ramirez-Castro v. INS*, 287 F.3d 1172, 1175 (9th Cir. 2002). Given the ambiguity of the record, we conclude that additional fact-finding is required to determine whether the respondent's conviction was in fact dismissed pursuant to section 1203.43 of the California Penal Code. *See* 8 C.F.R. § 1003.1(d)(3)(iv).

In conclusion, the respondent remains removable as charged but his eligibility for cancellation of removal is now an open question given the uncertain status of his 1999 California conviction for using or being under the influence of a controlled substance. Accordingly, the record will be remanded for supplemental fact-finding and for such further proceedings (and the entry of such further orders) as the Immigration Judge deems necessary and appropriate.

ORDER: The record is remanded for further proceedings consistent with the foregoing opinion.

  
\_\_\_\_\_  
FOR THE BOARD

# APPENDIX D

## Sample 1203.43 Petition

1 LATHAM & WATKINS LLP  
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7 Attorneys for Petitioner  
[Redacted]

FILED  
SUPERIOR COURT-MANTECA

[Redacted] PM 4:14

[Redacted]

BY [Redacted]  
DEPUTY

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF SAN JOAQUIN

12 PEOPLE OF THE STATE OF CALIFORNIA,  
13  
14 v.  
15 [Redacted],  
16 Defendant.

CASE NO. [Redacted]

**PETITIONER'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION TO  
WITHDRAW GUILTY PLEA, ENTER  
NOT GUILTY PLEA, AND DISMISS  
THE COMPLAINT OR INFORMATION  
PURSUANT TO PENAL CODE  
SECTION 1203.43**

[NOTICE OF MOTION AND MOTION  
FILED CONCURRENTLY]

Date: [Redacted]  
Time: 10:00 AM  
Dep't: *WZ*  
Judge:



1 **I. INTRODUCTION**

2 On [REDACTED], Defendant [REDACTED] pleaded guilty to a single violation of  
3 Health and Safety Code § 11364(A) and was granted deferred entry of judgment (“DEJ”)  
4 pursuant to Penal Code § 1000 *et seq.* See Ex. A (September 24, 2013 Minute Order). Mr.  
5 [REDACTED] successfully completed his DEJ program and, as a result of that completion, this court  
6 dismissed his case on [REDACTED]. See Ex. B (January 26, 2015 Minute Order recognizing  
7 completion of DEJ program and dismissing case). Pursuant to Penal Code § 1203.43 (effective  
8 January 1, 2016) Mr. [REDACTED] respectfully requests permission to withdraw his plea of guilty and  
9 to enter a plea of not guilty, and also requests that after Mr. [REDACTED]’s plea of not guilty is entered,  
10 this Court dismiss the complaint or information associated with this case number.

11 **II. BACKGROUND**

12 At the time of Mr. [REDACTED]’s guilty plea, California Penal Code section 1000.4 informed  
13 defendants that “successful completion of a deferred entry of judgment program shall not,  
14 without the defendant’s consent, be used in any way that could result in the denial of any  
15 employment, benefit, license, or certificate.” Cal. Pen. Code § 1000.4 (2013). However, in  
16 2015 the California legislature “[found] and declare[d]” that the language from the section  
17 quoted above “constitutes misinformation about the actual consequences of making a plea in the  
18 case of some defendants, including all noncitizen defendants, because the disposition of the case  
19 may cause adverse consequences, including adverse immigration consequences . . . .” Cal. Pen.  
20 Code § 1203.43(a). Consequently, “based on this misinformation and the potential harm, the  
21 defendant’s prior plea is rendered invalid.” *Id.* In 2016, the California legislature enacted Penal  
22 Code § 1203.43 to prevent the unintended consequences of a DEJ disposition on noncitizens’  
23 immigration status or eligibility for an immigration benefit. Section 1203.43 provides that “in  
24 any case in which a defendant was granted deferred entry of judgment on or after January 1,  
25 1997, has performed satisfactorily during the period in which deferred entry of judgment was  
26 granted, and for whom the criminal charge or charges were dismissed pursuant to Section  
27 1000.3, the court shall, upon request of the defendant, permit the defendant to withdraw the plea  
28

1 of guilty or nolo contendere and enter a plea of not guilty, and the court shall dismiss the  
2 complaint or information against the defendant.” Cal. Pen. Code § 1203.43(b).

### 3 **III. DISCUSSION**

4 The legislature has instructed the judiciary that the proper redress for a plea of “guilty”  
5 under the DEJ program is withdrawal of the plea and dismissal of the corresponding complaint  
6 or information pursuant to California Penal Code Section 1203.43. Dismissal of a complaint or  
7 information in which a defendant entered a guilty or nolo contendere plea is mandatory under  
8 California Penal Code Section 1203.43(b), as long as the defendant performed satisfactorily  
9 during the period in which deferred entry of judgment was granted and the charges were  
10 dismissed pursuant to Penal Code section 1000.3. *See* Cal. Pen. Code § 1203.43(b) (providing  
11 that, where such requirements are met, “the court *shall*, upon request of the defendant, permit the  
12 defendant to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty, and the  
13 court *shall* dismiss the complaint or information against the defendant.” (emphasis added)).

14 Mr. ██████ meets each of the requirements noted in Section 1203.43(b). *First*, this court  
15 granted Mr. ██████ deferred entry of judgment on ██████—after the statute’s  
16 January 1, 1997 deadline. *Second*, court records demonstrate that during the period in which  
17 deferred entry of judgment was granted, Mr. ██████ performed satisfactorily and this court  
18 dismissed the criminal charge for violation of Health and Safety Code § 11364.1(A) pursuant to  
19 Penal Code section 1000.3. *See* Ex. B (copy of the court’s minute order, acknowledging  
20 successful completion of the deferred entry of judgment and dismissing the case “in the interest  
21 of justice[.] Reason: Successful completion of DEJ”); *see also* Ex. C (certificate of program  
22 completion). Accordingly, withdrawal of Mr. ██████’s guilty plea and dismissal of the  
23 corresponding complaint and information is mandatory.

### 24 **IV. CONCLUSION**

25 Mr. ██████ respectfully requests that this Court grant him permission to withdraw his plea  
26 of guilty for violation of Health and Safety Code Section 11364.1(A) and to enter instead a plea  
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28

1 of not guilty, and that it dismiss the complaint or information in this case pursuant to California  
2 Penal Code Section 1203.43.

3

4 Dated: [REDACTED]

5

LATHAM & WATKINS LLP

6

7

By [REDACTED]

8

Sarah M. Ray (Bar No. 229670)  
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Attorneys for Petitioner, [REDACTED]

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Exhibit B	[REDACTED] Minute Order	8
Exhibit C	[REDACTED] Drug Program Completion Report	10

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[REDACTED]

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF SAN JOAQUIN

12 **PEOPLE OF THE STATE OF**  
13 **CALIFORNIA,**

14 v.

15 [REDACTED],  
16 Defendant.

CASE NO. [REDACTED]

**[PROPOSED] ORDER PERMITTING  
DEFENDANT TO WITHDRAW HIS  
GUILTY PLEA AND ENTER NOT GUILTY  
PLEA, AND DISMISSING THE  
COMPLAINT OR INFORMATION  
PURSUANT TO PENAL CODE SECTION  
1203.43**

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**[PROPOSED] ORDER**

On \_\_\_\_\_, Defendant [REDACTED]'s Motion to Withdraw Plea, and Dismissing the Complaint or Information Pursuant to California Penal Code Section 1203.43 came on for hearing in Department \_\_\_\_ of this Court. Having read and considered the Motion and supporting documents,

**IT IS HEREBY ORDERED THAT:**

Pursuant to California Penal Code § 1203.43, the Court hereby permits Defendant to withdraw his plea of guilty and to enter a plea of not guilty, and dismisses the complaint or information against Defendant.

Dated: \_\_\_\_\_, 2017

\_\_\_\_\_  
Judicial Officer

# APPENDIX E

## Sample 18.5 Petition

## Sample 18.5 Petition<sup>1</sup>

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.

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<sup>1</sup> 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.

# APPENDIX F

Redacted Sample 1473.7 Motion

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6 Attorneys for Defendant [REDACTED]

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF MARIN

11 THE PEOPLE OF THE STATE OF  
CALIFORNIA,

12 Plaintiff,

13 vs.

14 [REDACTED],

15 Defendant.

Case No. SC181237A

**NOTICE OF MOTION TO VACATE  
CONVICTIONS UNDER PENAL CODE  
SECTION 1473.7**

Hon. Andrew Sweet  
Courtroom D

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NOTICE OF MOTION TO VACATE CONVICTIONS

1 TO THE HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF  
2 RECORD:

3 PLEASE TAKE NOTICE that, as soon as counsel may be heard, [REDACTED] will and  
4 hereby does move this Court to vacate his misdemeanor convictions of June 5, 2013 pursuant to  
5 Penal Code section 1473.7 and allow him to withdraw his guilty plea.

6 PLEASE TAKE FURTHER NOTICE that [REDACTED] is entitled to a hearing under Penal  
7 Code section 1473.7(d).

8 The grounds for the Motion are as follows:

9 Penal Code section 1473.7(e) provides that the Court “shall” vacate a defendant’s  
10 convictions and allow him to withdraw his guilty plea if he establishes, by preponderance of the  
11 evidence, the existence of a ground for relief specified in section 1473.7(a), which in turn,  
12 includes a finding that the convictions were “legally invalid due to a prejudicial error damaging  
13 the moving party’s ability to meaningfully understand, defend against, or knowingly accept the  
14 actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.”

15 [REDACTED]’s convictions were legally invalid because of defects in the criminal process  
16 that prevented him from understanding the immigration consequences of his guilty plea. Not only  
17 was he deprived of effective assistance of counsel due to his defense counsel’s affirmative  
18 misadvice and failure to adequately explore immigration-safe alternative pleas, but also he could  
19 not have entered a knowing and intelligent plea because of serious impairments in his cognitive  
20 capacity at the time. These errors independently prejudiced [REDACTED], so he is entitled to relief.

21 This Motion is based upon this Notice of Motion, the attached Memorandum of Points and  
22 Authorities, declarations of [REDACTED], [REDACTED], [REDACTED], [REDACTED],  
23 and [REDACTED], along with accompanying exhibits filed concurrently herewith, all  
24 pleadings and papers of record and on file in this case, all matters of which judicial notice may be  
25 taken, and any other materials properly before the Court.

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DATED: September 25, 2018

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP  
PETER A. DETRE  
DANE P. SHIKMAN

By:   
Dane P. Shikman

Attorneys for Defendant .

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9 COUNTY OF MARIN

10  
11 THE PEOPLE OF THE STATE OF  
CALIFORNIA,

12 Plaintiff,

13 vs.

14 [REDACTED],  
15 Defendant.

Case No. SC181237A

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO VACATE CONVICTIONS  
UNDER PENAL CODE SECTION 1473.7**

Hon. Andrew Sweet  
Courtroom D

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO VACATE CONVICTIONS

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1 **I. INTRODUCTION**

2 [REDACTED] entered a guilty plea in May 2013 that was legally invalid. Not only  
3 was he deprived of effective assistance of counsel, but, in addition, he did not enter a knowing and  
4 intelligent plea. His defense counsel both affirmatively misadvised him regarding the immigration  
5 consequences of the charges he faced, and also failed to pursue immigration-safe alternative pleas  
6 which were readily available. This alone is grounds to vacate his misdemeanor convictions. The  
7 guilty plea was further tainted by serious impairments in [REDACTED]'s cognitive functioning at the  
8 time, which prevented him from meaningfully understanding the consequences of his plea. As a  
9 result of these defects, [REDACTED] now faces deportation to a country he fled as a persecuted  
10 orphan when he was sixteen years old.

11 [REDACTED] has resided in the United States for fifteen years. In that time, his  
12 conduct and contributions to those around him have been exemplary. As one of [REDACTED]'s  
13 friends noted, his "life here in the United States has been marked by hard work and an  
14 extraordinary determination to take every opportunity afforded to him to learn new skills to  
15 improve his life and the lives of [his loved ones]." Declaration of [REDACTED] ("[REDACTED] Decl."),  
16 Ex. A. He has a wife and two young daughters who depend on him emotionally and financially,  
17 with a new baby on the way. He has built a successful landscaping business with over a hundred  
18 customers. He and his family are also active members of the Tabernacle of David church here in  
19 Marin County. By contrast, he has no connections to his birth nation of El Salvador.

20 [REDACTED] respectfully requests that this Court vacate the convictions to which he  
21 pleaded guilty in the above-captioned matter. Under Penal Code section 1473.7, the Court "shall  
22 grant" the motion for vacatur if the guilty plea is "legally invalid due to a prejudicial error"  
23 affecting the defendant's ability to meaningfully understand the immigration risks of the plea.  
24 Penal Code § 1473.7(a)(1), (e). The prejudicial error is readily apparent here. [REDACTED] entered a  
25 guilty plea without effective assistance of counsel and without sufficient mental capacity to  
26 understand the immigration consequences of his convictions, even as they were presented to him.

1 **II. FACTUAL BACKGROUND**

2 **A. ██████████'s Arrival in the United States**

3 ██████████ has resided in the United States for fifteen years since fleeing from  
4 persecution in El Salvador. ██████████ Decl. ¶¶ 2-4. When he arrived in the United States as an  
5 orphan at the age of sixteen, he moved in with a family friend living in Marin County. *Id.* ¶ 4.  
6 ██████████ immediately enrolled at San Rafael High School, but dropped out of school in eleventh  
7 grade to earn money to support his new adopted family. *Id.* ¶ 5. He began working as a day  
8 laborer, waiting on the street corner to get picked up for miscellaneous landscaping and home  
9 improvement projects. *Id.* Around this time, ██████████ obtained asylum and became a legal  
10 permanent resident in December 2006. *Id.*

11 ██████████'s dream was to become an architect. *Id.* ¶ 6. He spent his early years in  
12 the United States learning about his craft, gradually moving away from day-labor jobs toward  
13 steady employment at construction and landscaping companies. *Id.* He scribbled notes on his arm  
14 as contractors would explain their projects, slowly teaching himself about plumbing, carpentry,  
15 electrical wiring, and other aspects of construction work. *Id.* His interests then gravitated toward  
16 landscaping, leading to his attending a landscaping school for six months. *Id.* In about 2006, ██████████  
17 ██████████ started his own landscaping business, ██████████ Landscaping Company. *Id.*

18 **B. ██████████'s Criminal Threats and Mental Health Challenges**

19 In 2007, ██████████ met ██████████ at the Marin County Fair and fell in  
20 love with her. *Id.* ¶ 7. They subsequently moved in together, and, while they were living together  
21 as a family, ██████████ gave birth to their daughter ██████████ in December 2008. *Id.* At the demand  
22 of ██████████'s stepmother, the couple moved in with her, but the couple's relationship  
23 immediately began to deteriorate. *Id.* It became apparent that the stepmother did not want ██████████  
24 ██████████ in the house or involved in ██████████'s life. *Id.* Eventually, she evicted ██████████ and insisted  
25 that he have no contact with ██████████. *Id.* ██████████ and ██████████ then separated. *Id.*

26 ██████████ obtained a Family Court order allowing him visitation rights, but ██████████  
27 ██████████ continually interfered with the order and prevented ██████████ from seeing ██████████. *Id.* ¶ 8.  
28 ██████████ felt isolated and cut off from his daughter. *Id.* Making matters worse, ██████████

1 believed that ██████ was dating a man whom he strongly suspected was dealing drugs,  
2 raising fears for his daughter's safety. *Id.* By mid-2012, ██████ became increasingly  
3 panicked about not being able to see ██████ and worried about her well-being. *Id.* ¶ 9. Feeling  
4 angry and afraid, he sent a series of threatening messages to ██████. *Id.* He acknowledges  
5 that these messages were a mistake and that his anxious mental state was no excuse, and he regrets  
6 the unnecessary distress he inflicted on her. *Id.* ██████ reported ██████'s messages to  
7 the police and he was arrested on July 6, 2012. *Id.* ¶ 10.

8 ██████ was released on bail shortly after his arrest. Declaration of ██████  
9 ██████ ("██████ Decl."), Ex. B at 2. ██████ then obtained a restraining order completely  
10 cutting ██████ off from his daughter. *Id.* at 9. ██████ descended into a tailspin of  
11 depression and psychosis, exhibiting symptoms of Major Depressive Disorder. ██████ Decl. ¶ 10;  
12 *see also* Declaration of ██████, M.D. ("██████ Decl.") ¶¶ 5, 7. He began seeing a  
13 psychiatrist to help manage his symptoms. ██████ Decl. ¶ 11. On February 6, 2013, he was  
14 placed on an involuntary 72-hour hold under Welfare and Institutions Code 5150 for presenting a  
15 danger to himself. *Id.*; *see also* Declaration of ██████ ("██████ Decl.") ¶ 6. During  
16 this mental breakdown, he was given anti-depressant and anti-psychotic medications and was  
17 directed to continue taking the pills to help control his depression and anxiety. ██████ Decl. ¶ 11.  
18 The medication made him feel chronically fatigued and affected his ability to process information  
19 and think clearly. *Id.*

20 **C. ██████'s Guilty Plea and the Plea Bargaining Process**

21 After ██████'s arrest, the district attorney filed a complaint alleging five counts  
22 of criminal threats under Penal Code section 422, all based on the messages to ██████.  
23 ██████ Decl. ¶ 3. Deputy Public Defender ██████ was assigned to represent ██████ in  
24 connection with these charges. *Id.* ¶ 2. After learning that ██████ was a non-citizen, ██████  
25 ██████ consulted an outside attorney, ██████, who had specialized immigration  
26 experience. *Id.* ¶ 4. He asked ██████ whether it would be immigration-safe for ██████  
27 ██████ to plead guilty to a misdemeanor under Penal Code sections 236 (false imprisonment), 422  
28 (criminal threats), or 646.9 (stalking) with conditions of probation pursuant to section 1203.97

1 (relating to victims of domestic violence). *Id.* ██████ advised him that sections 422 and  
2 646.9 were not immigration-safe, but that ██████ could plead guilty to a misdemeanor offense  
3 under section 236. *Id.* ██████ subsequently informed him that she spoke with a  
4 supervising lawyer in the district attorney’s office and proposed an alternative misdemeanor plea  
5 under Penal Code section 273.5 (corporal injury to spouse). *Id.* Believing that a felony plea to  
6 section 273.5 would be acceptable to the district attorney, ██████ confirmed with ██████  
7 that he would be willing to plead guilty to that offense. *Id.* However, for reasons that are not clear  
8 in the record, the parties ultimately did not reach a plea deal prior to the preliminary hearing. *Id.*  
9 On October 31, 2012, after the preliminary hearing, the government filed an Information alleging  
10 five counts of criminal threats under Penal Code section 422, and one count of stalking under  
11 section 646.9(a). *Id.* ¶ 5.

12 ██████ informed his lawyer that he did not want to plead guilty to these  
13 charges, preferring instead to proceed to trial. ██████ Decl. ¶ 12. Defense counsel advised him,  
14 however, that the evidence was sufficiently strong that a jury would likely find him guilty and  
15 recommended that he plead guilty to the charges if the court would agree to reduce them to  
16 misdemeanors at sentencing. *Id.* ██████ expressed his concern about the immigration  
17 consequences of a guilty plea. *Id.* ¶ 13. In response, defense counsel acknowledged there would  
18 be immigration risks, but informed ██████ that he was a candidate for Support and Treatment  
19 After Release (“STAR”) Court—a court-supervised program for defendants with serious mental  
20 illnesses—which had the discretionary power to dismiss misdemeanor convictions after successful  
21 completion of the program. ██████ Decl. ¶ 7. He advised ██████ that STAR Court’s  
22 dismissal of his convictions could therefore immunize ██████ from the immigration  
23 consequences he would otherwise face based on those convictions. *Id.*

24 As noted, ██████ was experiencing severe depression and cognitive  
25 impairments leading up to the time of his guilty plea. ██████ Decl. ¶¶ 5,7, 23. All that ██████  
26 ██████ understood from defense counsel’s explanation was that he would be safe in terms of  
27 immigration risk if he pleaded guilty. ██████ Decl. ¶ 13. Thus, on May 13, 2013, after the court  
28 agreed to reduce the charges to misdemeanors at sentencing, ██████ pleaded guilty to the

1 pending charges: five counts of criminal threats under Penal Code section 422, and one count of  
2 stalking under section 646.9(a). *Id.* Based on defense counsel's prior assurances, on May 13,  
3 2013, ██████ signed the Court's felony guilty plea form, which included a general  
4 acknowledgement that some convictions may carry immigration consequences for non-citizens.  
5 ██████ Decl., Ex. C. On June 5, 2013, the Court entered judgment and issued the sentence,  
6 reducing all convictions to misdemeanors under Penal Code section 17(b). *Id.*, Ex. B at 17;  
7 ██████ Decl. ¶ 8. The Court imposed a total of 180 days in jail (after 14 days credit for time  
8 served), with the jail sentence stayed pending successful completion of STAR Court. ██████  
9 Decl., Ex. B at 36.

10 In one of his initial appearances at STAR Court, on June 21, 2013, ██████  
11 signed the STAR Court Agreement. *Id.*, Ex. B at 22. Notwithstanding defense counsel's advice  
12 that STAR Court could dismiss ██████'s convictions, ██████ discovered after he pleaded  
13 guilty that, under his particular STAR Court Agreement, the Court in fact would *not* dismiss his  
14 convictions even upon successful completion of the program. *Id.*, Ex. D at 3. ██████  
15 graduated early from STAR Court and satisfied all the terms and conditions. *Id.*, Ex. B at 34.

16 **D. ██████'s Life Today**

17 ██████ has a powerful interest in remaining in the United States where he is  
18 thriving. He owns a successful landscaping business, now called Bay Area Green Design, which  
19 employs two permanent workers and additional temporary employees. ██████ Decl. ¶ 17. He has  
20 served over one hundred customers, and his company is highly rated in online review platforms.  
21 *Id.* ██████ is in the process of obtaining his general contractor's license, which will help to  
22 grow his business even further. *Id.* He also has a network of friends who count on him for  
23 support. *See generally id.*, Exs. A-G (letters of support). He is an active member of the  
24 Tabernacle of David church in Marin County. *Id.* ¶ 17. Most importantly, he is a dedicated father  
25 to ██████. *Id.* He has worked hard to provide for ██████ enrolling her in dance class and soccer  
26 programs, and taking her to movies and local hikes. *Id.*, Ex. B. He shares roughly equal custody  
27 over ██████ with ██████, and continues to pay child support to ensure ██████ has the resources  
28 she needs while living with her mother. *Id.* ¶ 17. He is also recently married to his wife, ██████

1 with whom he has a second daughter, ██████ and the birth of their second child is expected next  
2 year. *Id.* His new family, along with ██████ depends on him emotionally and financially. *Id.* If  
3 ██████ were to be deported, it would result in significant hardship not only to himself, but also  
4 to his wife, his two daughters, and his unborn child. ██████ has tried to be an upstanding  
5 member of his community since his 2013 convictions; for example, he consistently pays his taxes  
6 and child support on time, and he does not use illegal drugs or even drink alcohol except on  
7 holidays. *Id.* He has no remaining connection to El Salvador. *Id.* ¶ 18.

### 8 **III. ARGUMENT**

9 Penal Code section 1473.7 authorizes the filing of a motion to vacate a “conviction  
10 or sentence [that] is legally invalid due to a prejudicial error damaging the moving party’s ability  
11 to meaningfully understand, defend against, or knowingly accept the actual or potential adverse  
12 immigration consequences of a plea of guilty or nolo contendere.” Penal Code § 1473.7(a). The  
13 Court “*shall grant* the motion . . . if the moving party establishes, by a preponderance of the  
14 evidence” such a prejudicial defect. *Id.* § 1473.7(e)(1) (emphasis added). ██████’s  
15 convictions were legally invalid, both because he was deprived of effective assistance of counsel,  
16 and because he did not enter a knowing and intelligent guilty plea. These deficiencies were  
17 prejudicial to ██████’s willingness to proceed to trial, as well as his ability to obtain an  
18 immigration-neutral alternative plea. Vacatur is therefore warranted.

#### 19 **A. ██████’s Convictions Are Legally Invalid**

##### 20 **1. ██████ Was Deprived of Effective Assistance of Counsel**

21 Both the U.S. and California constitutions guarantee criminal defendants the right  
22 to effective assistance of counsel. *See* U.S. Const. amend VI; Cal. Const. art. I, § 15; *see also*  
23 *People v. Soriano*, 194 Cal. App. 3d 1470, 1478 (1987). The right to effective assistance of  
24 counsel applies not only at trial, but also during the plea-bargaining process. *See, e.g., Lee v.*  
25 *United States*, 137 S. Ct. 1958, 1964 (2017) (citing cases). To demonstrate ineffective assistance,  
26 a defendant must show the representation “fell below an objective standard of reasonableness” and  
27 that counsel’s failure prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 688  
28 (1984). This measure of objective reasonableness “is necessarily linked to the practice and

1 expectations of the legal community.” *Padilla v. Kentucky*, 559 U.S. 356, 366-67 (2010) (courts  
2 should consider “prevailing professional norms of effective representation, especially as these  
3 standards have been adapted to deal with the intersection of modern criminal prosecutions and  
4 immigration law”). In this case, ██████’s counsel did not meet the minimum constitutional  
5 standard in two distinct ways: (1) he affirmatively misadvised ██████ that successful  
6 completion of STAR Court could result in dismissal of the convictions and elimination of adverse  
7 immigration consequences, and (2) he failed to pursue readily available immigration-safe pleas  
8 during the plea bargaining process.

9 (a) ██████’s Counsel Provided Inaccurate Advice Regarding a  
10 Potential STAR Court Dismissal

11 It has long been settled in California that “affirmative misadvice regarding  
12 immigration consequences can in certain circumstances constitute ineffective assistance of  
13 counsel.” *In re Resendiz*, 25 Cal. 4th 230, 240 (2001), *abrogated on other grounds by Padilla v.*  
14 *Kentucky*, 559 U.S. 356 (2010). In addition, “failing to adequately research the immigration  
15 consequences of a guilty plea” can constitute ineffective assistance of counsel. *Soriano*, 194 Cal.  
16 App. 3d at 1478; *accord id.* at 1482 (“Furthermore, whatever advice his counsel did give him was  
17 not founded on adequate investigation of federal immigration law.”). The duties of adequate  
18 investigation and accurate advice were well established at the time of ██████’s guilty plea.  
19 Just two years earlier, the U.S. Supreme Court declared in *Padilla v. Kentucky*, 559 U.S. 356, 367  
20 (2010), that the weight of professional norms required counsel to competently advise non-citizen  
21 defendants regarding the immigration consequences of a guilty plea.<sup>1</sup>

22 Such ineffective assistance renders a conviction legally invalid within the meaning  
23 of Penal Code section 1473.7. In fact, the Court of Appeal recently reversed the denial of a  
24 motion under section 1473.7 after finding that defense counsel failed to adequately research and

25 \_\_\_\_\_  
26 <sup>1</sup> These duties announced in *Padilla* were so ingrained in California case law that the Legislature  
27 subsequently saw fit to “codify” them in Penal Code section 1016.3(a), effective January 1, 2016.  
28 *See* Penal Code § 1016.2(h); *see also id.* § 1016.2(a) (citing decades-old California cases to  
support the principle that defense counsel must provide “affirmative and competent advice”  
regarding potential immigration consequences).



1 affirmatively misadvised the defendant about the immigration consequences of a guilty plea. *See*  
2 *People v. Ogunmowo*, 23 Cal. App. 5th 67 (2018). In *Ogunmowo*, the Court held:

3 This is not a case where trial counsel remained silent and failed to  
4 discuss immigration consequences with his client at all. . . .  
5 Here, . . . [counsel] gave him *incorrect advice without researching*  
6 *or investigating the issue. Affirmatively misadvising a client that*  
7 *he will not face immigration consequences as a result of a guilty*  
8 *plea . . . —when the law states otherwise—is objectively deficient*  
9 *performance under prevailing professional norms.*

7 *Id.* at 77 (emphasis added). As in *Ogunmowo*, ██████████'s counsel failed to adequately research  
8 and affirmatively misadvised ██████████ regarding the effect of a post-conviction dismissal by  
9 STAR Court in subsequent removal proceedings, thereby rendering his conviction legally invalid.

10 As an initial matter, it is well established that ██████████'s convictions could  
11 trigger mandatory deportation, along with other adverse immigration consequences. Declaration  
12 of ██████████ (“████████ Decl.”) ¶¶ 6-9 (citing statutes). His defense counsel informed him, however,  
13 that STAR Court could dismiss his convictions upon successful completion of the program, and  
14 that such a dismissal would have the effect of protecting ██████████ from deportation. That is  
15 patently incorrect. Even a cursory investigation, as required by law, *e.g.*, *Soriano*, 194 Cal. App.  
16 3d at 1478, would have shown that, although STAR Court has the power to dismiss certain  
17 convictions, such a dismissal would have no effect in a subsequent removal proceeding.

18 A conviction is eliminated from the non-citizen's record for immigration purposes  
19 only when the dismissal is based on a procedural or substantive defect in the underlying  
20 proceeding itself. As the Board of Immigration Appeals (“BIA”) explained in a seminal decision:

21 [T]here is a significant distinction between convictions vacated on  
22 the basis of a procedural or substantive defect in the underlying  
23 proceedings and those vacated because of post-conviction events,  
24 such as rehabilitation or immigration hardships. . . . If, however, a  
25 court vacates a conviction for reasons unrelated to the merits of the  
26 underlying criminal proceedings, the respondent *remains*  
27 *'convicted' for immigration purposes.*

25 *In re Pickering*, 23 I. & N. Dec. 621, 624 (BIA 2003), *rev'd on other grounds*, *Pickering v.*

26 *Gonzales*, 454 F.3d 525 (6th Cir. 2006) (emphasis added). The U.S. Court of Appeals for the

27 Ninth Circuit has confirmed the BIA's holding repeatedly in no uncertain terms. *See, e.g., Poblete*

28 *Mendoza v. Holder*, 606 F.3d 1137, 1141 (9th Cir. 2010) (finding an Arizona conviction vacated

1 for rehabilitative purposes could nevertheless be used in subsequent removal proceedings); *Nath v.*  
2 *Gonzales*, 467 F.3d 1185, 1189 (9th Cir. 2006).

3 Even when STAR Court dismisses convictions, it does not do so based on “a  
4 procedural or substantive defect in the underlying proceedings,” *In re Pickering*, 23 I. & N. Dec.  
5 at 624, but rather for rehabilitative purposes. Indeed, STAR Court is a self-described alternative to  
6 traditional supervised probation designed to rehabilitate offenders suffering from serious mental  
7 illness: “The goal of STAR Court is to decrease the frequency of clients’ contacts with the  
8 criminal justice system by improving their social functioning skills and by linking them to  
9 employment, housing, regular treatment, and support services.” ████████ Decl., Ex. E. Hence,  
10 contrary to defense counsel’s advice, even if ████████’s convictions had been dismissed by  
11 STAR Court, it would have had no effect on the immigration consequences of those convictions.

12 Defense counsel’s failure to adequately investigate this issue and accurately advise  
13 ████████ that the conviction would remain effective after a STAR Court dismissal “fell below an  
14 objective standard of reasonableness under prevailing professional norms,” *Ogunmowo*, 23 Cal.  
15 App. 5th at 75, and therefore constituted ineffective assistance. His representation of ████████  
16 was therefore constitutionally deficient on this ground alone.

17 (b) ████████’s Counsel Failed to Pursue Readily Available  
18 *Immigration-Safe Plea Alternatives*

19 Defense counsel’s representation fell below an objective standard of reasonableness  
20 for the additional reason that he failed to pursue readily apparent immigration-safe alternative  
21 pleas. Failing to defend against the immigration consequences of a conviction can constitute  
22 ineffective assistance of counsel. *See People v. Bautista*, 115 Cal. App. 4th 229, 237-39 (2004);  
23 *see also* Cahn Decl. ¶ 14. When representing a non-citizen criminal defendant, counsel can  
24 “defend against adverse immigration consequences” by “plead[ing] to a different but related  
25 offense” or “plead[ing] to a more serious offense with greater sentencing exposure.” *Bautista*, 115  
26 Cal. App. 4th at 240. This does not demand much of defense attorneys, as even a lawyer with “the  
27 most rudimentary understanding of the deportation consequences of a particular criminal offense  
28 may be able to plea bargain creatively . . . to craft a conviction and sentence that reduce the

1 likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the  
2 removal consequence.” *Padilla*, 559 U.S. at 373.<sup>2</sup> Moreover, as noted above, defense counsel has  
3 the obligation “to adequately research the immigration consequences of a guilty plea,” and failing  
4 to do so can constitute ineffective assistance. *Soriano*, 194 Cal. App. 3d at 1478. Taken together,  
5 these principles require counsel to explore and advocate for alternative pleas based on adequate  
6 research and investigation of the immigration-safe alternatives available to the defendant.

7 That did not occur here. To be sure, defense counsel consulted an immigration  
8 specialist who informed him that ██████ could plead guilty to a misdemeanor offense under  
9 Penal Code section 236 (false imprisonment).<sup>3</sup> But defense counsel understood that the district  
10 attorney did not consider a misdemeanor charge acceptable in light of the perceived seriousness of  
11 the crimes. The record does not indicate that defense counsel proposed any of the more serious  
12 offenses that would have been immigration-safe. ██████ Decl. ¶ 4. For example, ██████  
13 could have pleaded guilty to a felony strike offense of witness dissuasion under Penal Code  
14 section 136.1(b), or a felony strike offense of battery with serious bodily injury under section  
15 243(d), or even an offense of simple battery under section 243(e). ██████ Decl. ¶ 10. These  
16 immigration-neutral alternatives were described in detail in public and free resources readily  
17 available to defense counsel at the time of ██████’s guilty plea. *Id.* ¶ 15 (listing resources).  
18 Counsel’s failure to investigate or pursue any of these options made his performance  
19 constitutionally deficient.

20 To the extent defense counsel was concerned about ██████ pleading to a more  
21 serious offense, that does not negate an ineffective assistance claim. It is well settled that

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22 <sup>2</sup> So well established is this obligation to pursue immigration-neutral pleas that the California  
23 legislature “codif[ied]” this rule from well-settled case law in Penal Code 1016.3(b), effective  
24 January 1, 2016. *See* Penal Code § 1016.2(h).

25 <sup>3</sup> The immigration consultant also suggested that ██████ could plead guilty to a misdemeanor  
26 offense under Penal Code section 273.5 (corporal injury to spouse). That is wrong. Such a  
27 conviction would trigger mandatory removal without exception. ██████ Decl. ¶ 13. This advice  
28 casts doubt over the reliability of the consultation process. *Id.* Even worse, defense counsel  
apparently confirmed with ██████ that a felony plea to that section would be acceptable,  
██████ Decl. ¶ 4, but for reasons that are unclear on this record, the parties did not agree to this  
charge.

1 “deportation is a particularly severe penalty,” *Padilla* 559 U.S. at 365 (internal quotation marks  
2 omitted), and “preserving the client’s right to remain in the United States may be more important  
3 to the client than any potential jail sentence,” *id.* at 368 (quoting *INS v. St. Cyr.*, 533 U.S. 289, 322  
4 (2001)). In fact, ██████ has made clear that staying in the United States *was* more important  
5 to him than a possible jail sentence. ██████ Decl. ¶ 15. This is not surprising. In practice it is not  
6 uncommon for non-citizen defendants to accept a more serious charge rather than a lesser penalty  
7 that carries the threat of removal. ██████ Decl. ¶ 12. Nevertheless, defense counsel did not explore  
8 any of these alternative pleas and therefore failed to render effective assistance of counsel.

9           **2. ██████ Could Not Meaningfully Understand the Immigration**  
10           **Consequences of His Guilty Plea**

11           There is separate and independent basis to find ██████’s guilty plea legally  
12 invalid. In the months before pleading guilty, ██████ was suffering from severe depression  
13 with psychotic symptoms, which impaired his ability to meaningfully understand the immigration  
14 consequences of the pending charges. The decision to plead guilty must “not only must be  
15 voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant  
16 circumstances and likely consequences.” *Brady v. United States*, 397 U.S. 742, 748 (1970) (citing  
17 forty years of Supreme Court precedent); *accord Boykin v. Alabama*, 395 U.S. 238, 244 (1969)  
18 (courts must ensure the accused “has a full understanding of what the plea connotes and of its  
19 consequence”). The California Supreme Court has specifically addressed ignorance of  
20 immigration consequences as a basis for invalidating a guilty plea. *See People v. Superior Court*  
21 *(Giron)*, 11 Cal. 3d 793, 797-798 (1974) (en banc). In *Giron*, “the accused entered his plea of  
22 guilty without knowledge of or reason to suspect [these] severe collateral consequences,” thus  
23 “justice required the withdrawal of the plea.” *Id.* at 798.

24           A combination of factors impaired ██████’s ability to meaningfully understand  
25 the immigration consequences of his guilty plea in May 2013, even if he had received accurate  
26 advice. First, he was suffering from severe depression with psychotic symptoms at the time, for  
27 which he had been hospitalized mere months beforehand in February 2013. ██████ Decl. ¶¶  
28 14-17. Those symptoms were consistent with Major Depression Disorder, which has been shown

1 to hinder cognitive functioning even after recovery from an acute depressive episode. *Id.* ¶ 18.  
2 Second, as a consequence of that hospitalization, ██████ had been given, and was taking,  
3 antipsychotic and antidepressant medications which have “well-recognized side effects of sedation  
4 and impairments in attention, concentration, decision-making, and information processing.” *Id.* ¶  
5 22. ██████ himself reports that he was experiencing constant fatigue and unclear thinking at  
6 the time of his guilty plea. ██████ Decl. ¶ 11. Third, ██████ had a history of traumatic brain  
7 injury, and was observed by clinicians to exhibit “intellectual limitations” or “borderline  
8 intellectual functioning.” ██████ Decl. ¶ 12. Fourth, ██████’s experiences as a child  
9 refugee, which involved “repetitive emotional trauma” and “social/parental deprivation” may have  
10 “adversely affect[ed] [his] brain development.” *Id.* ¶¶ 19-20. That history, combined with the  
11 more recent traumas of his criminal prosecution and the potential loss of custody over his  
12 daughter, qualified ██████ for a diagnosis of Post-Traumatic Stress Disorder, which is  
13 “strongly associated with cognitive dysfunction.” *Id.* ¶¶ 6, 21. It is no surprise, then, that ██████  
14 ██████’s probation officer believed he was “in great need of mental health services and support.”  
15 ██████ Decl., Ex. A at 6.

16 For these reasons, a medical doctor trained in evaluating mental health  
17 competencies in the criminal prosecution context has determined that ██████ “could not have  
18 reasonably understood many of the individual terms and conditions” of the guilty plea, and “would  
19 not have been able to reasonably weigh, process, and render a free and informed decision” about  
20 whether to plead guilty to the charged offenses. ██████ Decl. ¶ 23. Accordingly, even if  
21 defense counsel had accurately advised ██████, ██████’s conviction would nevertheless be  
22 legally invalid because he was not able at the time to meaningfully understand the immigration  
23 consequences of his guilty plea.

24 **B. ██████ Was Prejudiced By His Failure to Understand the Immigration**  
25 **Consequences of his Plea and By His Counsel’s Deficient Performance**

26 Penal Code section 1473.7 requires a showing that the ground for legal invalidity  
27 resulted in a prejudice to the criminal defendant. Penal Code § 1473.7(a) (referring to a  
28 “prejudicial error”); *see also Ogunmowo*, 23 Cal. App. 5th at 78. To show prejudice in the context

1 of vacating a guilty plea, the defendant does not have to show that an alternate plea would have  
2 been entered, or that he would have prevailed if the case had gone to trial. Rather, he must show  
3 only that “it is reasonably probable that he would not have pleaded guilty” to the charges absent  
4 the error. *See, e.g., Bautista*, 115 Cal. App. 4th at 241; *accord Lee v. United States*, 137 S. Ct.  
5 1958, 1965 (2017) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). This standard “considers  
6 *what the defendant would have done*, not whether the defendant’s decision would have led to a  
7 more favorable result,” *People v. Martinez*, 57 Cal. 4th 555, 562 (2013). In this case, both of the  
8 defects in ██████’s guilty plea—his counsel’s failure to render constitutionally adequate  
9 assistance and his acute mental condition impairing his ability to understand the immigration  
10 consequences of his plea—separately prejudiced ██████. Had he received accurate advice or  
11 understood the consequences of his plea, ██████ would only have pleaded to an immigration-  
12 neutral offense. And, had the district attorney not agreed to such a plea (although, as discussed  
13 above, immigration-neutral pleas that may well have been acceptable to the district attorney were  
14 not pursued), ██████ would have opted to go to trial rather than accept a plea he knew would  
15 render him deportable.

16           It is at least “reasonably probable” that ██████ would have accepted any of the  
17 alternative pleas if defense counsel had explored and pursued them. Remaining in the United  
18 States was of paramount importance to ██████ at the time of his guilty plea. Thus, ██████  
19 would have accepted a more serious, but immigration-safe, plea alternative. ██████ Decl. ¶ 15.  
20 He would never have knowingly risked his ability to continue being involved in his daughter’s  
21 life—indeed, anxiety about losing his daughter is what prompted him to send the threatening  
22 messages to ██████ in the first instance. *Id.* ¶ 15. Moreover, ██████ received asylum  
23 based on his well-founded fear of persecution in El Salvador. As result of his guilty plea, he faces  
24 a serious risk that he will be returned to a country he fled as a persecuted orphan—an outcome he  
25 would not have knowingly accepted. However, defense counsel’s failure to investigate and  
26 propose the easily discoverable alternative pleas deprived ██████ of the opportunity to choose  
27 such immigration-safe plea options over the ones he ultimately accepted.

28

1           The possibility that the district attorney would not have agreed to an immigration-  
2 safe plea is immaterial and should be rejected on these facts. First, it is irrelevant as a matter of  
3 law: the question is “*what the defendant would have done*,” not whether the district attorney would  
4 have agreed to an immigration-safe disposition. *Martinez*, 57 Cal. 4th 555 at 562. Second, the  
5 district attorney in this case insisted that ██████’s threats were serious and warranted a felony  
6 plea. ██████’s counsel could have easily satisfied the district attorney’s wishes, as *there were*  
7 *felony strike plea alternatives available* which defense counsel did not investigate or propose (e.g.,  
8 Penal Code section 136.1(b) (false imprisonment), or section 243(d) (battery with serious bodily  
9 injury)). See ██████ Decl. ¶ 10. Had defense counsel pursued any of these, alone or in  
10 combination, it is at least reasonably probable that the district attorney would have accepted the  
11 proposal and ██████ would be free of the threat of deportation based on those convictions.

12           Even if plea negotiations had fallen through, ██████ would have proceeded to  
13 trial if he had been accurately advised of the immigration risk or if he had not been mentally  
14 compromised at the time. ██████ Decl. ¶ 15. To be sure, the direct evidence against ██████  
15 was strong and a jury may have found him guilty on these charges. But even where the defendant  
16 is likely to lose at trial, pleading guilty based on a mistaken premise about immigration  
17 consequences can be enough to show prejudice. See, e.g., *Martinez*, 57 Cal. 4th at 559 (“[R]elief  
18 should be granted if the court . . . determines the defendant would have chosen not to plead guilty  
19 or nolo contendere, *even if the court also finds it not reasonably probable the defendant would*  
20 *thereby have obtained a more favorable outcome*.” (emphasis added)). On that point, *Lee v.*  
21 *United States*, 137 S. Ct. 1958 (2017) is instructive. In *Lee*, the non-citizen defendant “knew,  
22 correctly, that his prospects for acquittal at trial were grim,” *id.* at 1965, but he nevertheless  
23 “insist[ed] he would have gambled on trial, risking more jail time for whatever small chance there  
24 might be of an acquittal that would let him remain in the United States,” *id.* at 1966. The Supreme  
25 Court held that there is a difference between pleading guilty to charges that are not immigration-  
26 safe—which will “*certainly* lead to deportation”—and instead proceeding to trial and risking a  
27 guilty verdict, which will “*almost* certainly” lead to the same result. *Id.* at 1968. “[T]hat ‘almost’  
28 could make all the difference.” *Id.* at 1969. So too here. ██████ might have been facing an

1 uphill battle at trial, but that is not enough to undermine the likelihood that he would have chosen  
2 to take his chances at trial rather than plead guilty. In fact, it is common for immigrants with  
3 established connections to the United States to decline plea offers that are not immigration-safe  
4 and take their chances at trial. [REDACTED] Decl. ¶ 14. [REDACTED]'s interest in remaining in the United  
5 States was simply too strong for him to enter a plea that could lead to deportation.

6 But for his counsel's incorrect advice and his impaired mental condition, [REDACTED]  
7 [REDACTED] would not have entered into a guilty plea with adverse immigration consequences, but  
8 instead would have held out for an immigration-safe plea or taken his chances at trial. [REDACTED]  
9 was therefore prejudiced by the ineffective assistance of his counsel as well as by his inability to  
10 meaningfully understand the immigration consequences of his guilty plea.<sup>4</sup>


11 **IV. CONCLUSION**

12 [REDACTED]'s convictions suffered from a legal error that prejudiced [REDACTED].  
13 These convictions must therefore be vacated under Penal Code section 1473.7.

14  
15 DATED: September 25, 2018

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP  
PETER A. DETRE  
DANE P. SHIKMAN

16  
17  
18  
19  
20 By:   
Dane P. Shikman

21 Attorneys for Defendant Eliseo [REDACTED]  
22

23 <sup>4</sup> The fact that [REDACTED] initialed a standardized form in connection with his guilty plea  
24 indicating that the plea "may" have adverse immigration consequences does not negate the  
25 evidence of prejudice. See *Ogunmowo*, 23 Cal. App. 5th at 75. Defense counsel's incorrect  
26 advice regarding STAR Court, as understood by [REDACTED] in his impaired mental state, led [REDACTED]  
27 [REDACTED] to the conclusion that entering the guilty plea would *not* expose him to the risk of  
28 deportation. [REDACTED] was in no condition to meaningfully understand the various statements on  
the court form that he initialed. Moreover, even if he had understood them, it would have been  
reasonable for him to rely on defense counsel's advice that he would be safe from any potential  
immigration consequences.



# APPENDIX G

## Sample Defendant's Declaration

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**ENDORSED  
FILED**

**NOV 25 2015**

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SONOMA

Attorneys for Defendant [REDACTED]

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SONOMA

PEOPLE OF THE STATE OF  
CALIFORNIA,

Plaintiffs,

v.

[REDACTED]

Defendant.

Case No. [REDACTED]

**DECLARATION OF [REDACTED]  
IN SUPPORT OF NOTICE OF  
SUGGESTION AND SUGGESTION TO  
DISMISS IN THE INTERESTS OF  
JUSTICE (Penal Code § 1385)**

The Honorable Patrick Broderick  
Department 13

1 I, [REDACTED] declare as follows:

2 1. I was born in Tumbiscatio, Michoacán, Mexico. I attended school there through  
3 sixth grade, and then I stayed home to help my mother with the household. I have six siblings.  
4 My family was poor, and my father worked in agriculture, while my mother stayed home with the  
5 children.

6 2. In 1970, I met my future husband [REDACTED] and we decided to immigrate  
7 to the United States in search of a brighter future. I was 17 years old at the time. I have lived in  
8 the United States ever since.

9 3. My husband and I married shortly after we arrived in the United States. After we  
10 first arrived, we lived in Escondido, California. We stayed there for approximately nine months. I  
11 worked at a chicken factory there. After I became pregnant, we decided to move to Sonoma,  
12 where my father and oldest sister were living, in order to be near family.

13 4. Our first home in Northern California was in Oakmont, in a trailer provided by my  
14 husband's employer. We bought our first house in Windsor in 1976, and we lived there from  
15 1976 to 2003. I still own that house, and I rent it out. I bought my current home, which is also in  
16 Windsor, in 2003.

17 5. After we arrived in Northern California, my husband found work in construction.  
18 He worked construction for many years. He then established his own small business, selling  
19 Mexican products. At the time, there were no Mexican markets in the area, and he sold tortillas,  
20 cheese, candies, and soda at different work sites.

21 6. In 1979, my husband was diagnosed with leukemia, and he was very sick for the  
22 rest of his life. He died in 1991. I have never remarried.

23 7. I have worked my entire adult life. I became the sole-income earner in our family  
24 once my husband became sick. I have never received any welfare or public assistance from the  
25 government. My first job in Northern California was at a florist shop. I worked there for  
26 approximately nine months. Next, I worked for approximately nine months in an electronics shop  
27 in Rohnert Park, and then for one year at a stuffed animal factory in Rohnert Park. For the last  
28 40-plus years, I have worked as a fish filleter. First, I worked at Point St. George's Fishery in

1 Santa Rosa, for 20 years. After it closed in 1992, I worked at the company's location at Pier 39 in  
2 San Francisco for one year. Since then, I have worked at Tides Wharf Seafood in Bodega Bay. I  
3 still work there today.

4 8. My daughter [REDACTED] was born in 1971 and my daughter [REDACTED] was born in  
5 1977. They were both born in Santa Rosa. After [REDACTED] was born, my husband and I received  
6 legal permanent residence through a program for parents of United States citizens. I have been a  
7 green card holder for 41 years, since July 30, 1974.

8 9. My daughters both graduated from Healdsburg High School. My daughter  
9 [REDACTED] attended Empire College's business school and now works at Key Site Technologies in  
10 Santa Rosa. She has two children. After [REDACTED] husband died in 1997, I helped take care of  
11 my grandchildren.

12 10. My daughter [REDACTED] started working at age 13, after her father died. She now  
13 works at First Priority Financial, as a senior loan processor. [REDACTED] has always lived with me,  
14 and now [REDACTED] husband and daughter do as well.

15 11. Between 1960 and the mid-1970s, all of my six siblings and their families moved  
16 to Sonoma County. My siblings are all legal residents of the United States. Five are United  
17 States citizens, and my brother and I are green card holders. Five of my siblings live in Sonoma  
18 County, and my half-sister lives in Sacramento.

19 12. My children, nieces, and nephews are all United States citizens. I have 24 nieces  
20 and nephews, and each of them now has children. With the exception of my family in  
21 Sacramento, all my siblings, nieces, nephews, great-nieces, and great-nephews reside in Sonoma  
22 County. My siblings are all now retired. My sisters also worked at Point St. George Fishery,  
23 and one of my sisters worked at Medtronic for ten years. Two of my brothers worked at Standard  
24 Structures, a construction company, for more than 25 years. One of my brothers was a janitor for  
25 40 years at El Molino High School in Forestville, CA.

26 13. I see my siblings every weekend. We get together for meals and to play cards.  
27 Every evening, I go for a walk with my oldest sister, Fina. My daughters, my grandchildren, and  
28 I spend a lot of time my siblings and their children and grandchildren. We like to say that our

1 family is our friends. Our holiday gatherings for Easter, Thanksgiving, and Christmas, often  
2 entail 50 relatives. We regularly have the gatherings at my house.

3 14. Due to my work in the fish factories, including the Tides Wharf factory in Bodega  
4 Bay, I developed arthritis. At the factory, we work over ice while filleting the fish. But at the  
5 same time, the factory blows in heat towards our backs to warm us. This combination of hot and  
6 cold, along with the repetitive nature of the fish-filleting work, caused me severe chronic pain  
7 from arthritis.

8 15. Because of my arthritis, I began cultivating a small number of marijuana plants in  
9 my backyard. I have never smoked or sold marijuana. Instead, I used the marijuana to make a  
10 tincture for relief of the severe pain in my hands due to arthritis. Marijuana soaked in rubbing  
11 alcohol is a traditional Mexican home remedy to treat arthritis and other problems, and it helped  
12 my pain. On September 4, 1997, my daughters and I were arrested because of the marijuana  
13 plants found in my backyard. The police also found the marijuana-alcohol solution in my  
14 bedroom, but did not find any evidence of anyone smoking or selling marijuana.

15 16. When my daughters and I were arrested, my sister-in-law recommended a lawyer,  
16 [REDACTED] of Santa Rosa. I paid [REDACTED] \$2,000 total for his representation. I  
17 spoke to him a total of three times. I met with him once for a brief, initial consultation, and then I  
18 saw him at each of my two court appearances.

19 17. [REDACTED] never said anything to me about any possible immigration issues  
20 related to the criminal conviction. He only asked me whether I "had papers." Because I am a  
21 green card holder, I said yes. That was the end of our discussion regarding immigration issues.  
22 [REDACTED] did not ask whether I was a United States citizen. Throughout the time he  
23 represented me, he told me very little about the proceedings, and all his communications with my  
24 family were short.

25 18. At the first court hearing, [REDACTED] presented a plea deal to me. He  
26 explained that I would plead guilty to one charge, and if I accepted the deal, I would not have to  
27 go to jail and the charges against my daughters would be dropped. The proposed sentence was  
28 four months' house arrest, 36 months' probation, and a fine. Mr. [REDACTED] recommended that I

1 take the deal. Again, he did not say anything about immigration issues. As far as I know, Mr.  
2 [REDACTED] did not try to get, or even investigate the possibility of, a different deal for me in order  
3 to protect me from possible deportation.

4 19. I relied on my lawyer's advice and decided to accept the deal. I was glad that the  
5 deal did not involve any jail time and that my daughters would not be impacted. It was important  
6 to me that my daughters not be involved because my daughter I [REDACTED] had just been widowed.  
7 I was afraid that if [REDACTED] was convicted of a crime, her children might be taken away. I  
8 thought that if I took the deal and carefully followed the Court's order, my family could be spared  
9 any negative consequences. I never thought for a second that the conviction would jeopardize my  
10 green card status or ability to remain in the United States with my family.

11 20. I entered the plea on February 23, 1998. I understand the transcript from the  
12 hearing says that I was read a warning about possible immigration consequences, including  
13 deportability and exclusion. I do not remember hearing the warning. I was very nervous, and  
14 anxious for the proceedings to be over. I trusted that Mr. [REDACTED] had given me all relevant  
15 information. But Mr. [REDACTED] had never warned me that I might face immigration  
16 consequences as a result of accepting the plea deal he had recommended.

17 21. I served my sentence without any problems. I completed the house-arrest time,  
18 paid the Court-ordered fine, completed probation, and attended Alcoholics Anonymous meetings,  
19 even though I had never smoked marijuana or ever had any substance abuse problems. I then put  
20 the conviction behind me, and moved on with work and spending time with my family.

21 22. I have been to Mexico several times in the last 15 years. I never had any problems  
22 on any of those trips. However, on May 9, 2012, I returned from a vacation to Mexico, and I was  
23 detained upon my arrival at Oakland International Airport. I was very surprised. After several  
24 hours in detention, I came to understand that there was a problem that related to the conviction.  
25 This was the first time that I had any idea that the conviction could impact my ability to remain in  
26 the United States.

27 23. If I had known that the plea deal would put my immigration status at risk, I never  
28 would have accepted the offer. My entire life is here, including my family and my work. I have

1 not lived in Mexico since I was a teenager. I never would have willingly accepted a plea deal that  
2 meant I would be deported. If I had known the risk I was taking, I would have insisted on  
3 resolving the case some other way, either through a different plea deal that would not have  
4 affected my immigration status or by going to trial to try to avoid losing my right to remain in this  
5 country. I was then, and am now, willing to enter a new plea, even if it means risking a greater  
6 sentence, so that I can preserve a chance of remaining in the United States.

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I declare under penalty of perjury under the laws of the State of California that the  
foregoing is true and correct and that this declaration was executed on October 4, 2015, in  
Windsor, California.



# APPENDIX H

## Sample Defense Counsel's Declaration



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KEKER & VAN NEST LLP

[REDACTED]

633 Battery Street  
San Francisco, CA 94111-1809  
Telephone: 415 391 5400  
Facsimile: 415 397 7188

[REDACTED]

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SONOMA

PEOPLE OF THE STATE OF  
CALIFORNIA,

Plaintiffs,

v.

[REDACTED]

Defendant.

Case No. [REDACTED]

**DECLARATION OF [REDACTED]  
[REDACTED] IN SUPPORT OF  
SUGGESTION TO DISMISS IN THE  
INTERESTS OF JUSTICE (Penal Code §  
1385)**

Courtroom [REDACTED]  
The Honorable Allan D. Hardcastle

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I, [REDACTED] declare:

1. I was an attorney duly licensed to practice law before the state courts of California.

2. I represented [REDACTED] in *People v.* [REDACTED], Case No. [REDACTED]. I negotiated a deal with Sonoma County District Attorney for Ms. [REDACTED] to plea to one count of violating Health & Safety Code § 11358, for cultivation of marijuana. I represented Ms. [REDACTED] at the hearing on February 23, 1998, when she entered her plea.

3. I am sure that I did not advise Ms. [REDACTED] that a conviction under Health & Safety Code § 11358 could affect her immigration status. I am certain of this because I did not know that a conviction under Health & Safety Code § 11358 would result in deportation of a long-term legal resident of the United States until I was informed of this consequence on August 23, 2015.

4. Because I did not know that a conviction under Health & Safety Code § 11358 would have immigration consequences for Ms. [REDACTED], I am also certain that I did not attempt to negotiate with the prosecutor an alternative plea that would not jeopardize Ms. [REDACTED] immigration status.

5. I understand that Ms. [REDACTED] is now in removal proceedings. If I had known that Ms. [REDACTED] would face deportation as a result of a conviction under Health & Safety Code § 11358, I would not have advised her to accept the deal. I would have sought advice from experienced immigration counsel and tried to secure an immigration-safe alternative disposition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September \_\_, 2015, in \_\_\_\_\_, California.

\_\_\_\_\_  
[REDACTED]

# APPENDIX I

## Sample Expert Declaration

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LATHAM & WATKINS LLP  
[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]  
505 Montgomery St.  
San Francisco, California 94111-6538  
Telephone: (415) 395-8157  
Facsimile: (415) 395-8095

Counsel for Defendant

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN MATEO  
REDWOOD CITY FACILITY**

THE PEOPLE OF THE STATE OF CALIFORNIA

v.

[Redacted],  
Defendant.

CASE NO. [Redacted]

**DECLARATION OF ROSE CAHN IN  
SUPPORT OF DEFENDANT’S MOTION TO  
DISMISS PURSUANT TO PENAL CODE  
SECTION 1016.5 OR, IN THE  
ALTERNATIVE, MEMORANDUM IN  
SUPPORT OF SUGGESTION TO DISMISS  
IN THE INTERESTS OF JUSTICE  
PURSUANT TO PENAL CODE SECTION  
1385**

I, Rose Cahn, declare and state as follows on oath or affirmation:

1. My name is Rose Cahn and I am an attorney duly licensed to practice before all the courts in the State of California and the Immigration Courts of the United States.
2. I am the Criminal and Immigrant Justice Attorney at the Immigrant Legal Resource Center (ILRC), 1663 Mission Street, Suite 602, San Francisco, CA 94103. The ILRC is a national non-profit center focusing on analysis, education

1 and policy relating to immigration law. Public defender agencies, including the  
2 San Mateo Private Defender Program, and private criminal defense attorneys  
3 throughout the state have contracts with the ILRC's Attorney of the Day Program,  
4 where we counsel defenders about immigration-safe dispositions for noncitizens  
5 facing criminal charges.

6  
7 3. I have specialized in the interplay between immigration and criminal law,  
8 including the immigration consequences of criminal convictions, for nearly a  
9 decade. I have written and spoken extensively on the subject, to both immigration  
10 and criminal attorneys. I have served as update editor of the chapter on  
11 representing noncitizen defendants in the basic Continuing Education of the Bar  
12 manual, *California Criminal Law – Procedure and Practice* (University of  
13 California) and *California Post-Conviction Relief for Immigrants*. I have  
14 published nationally circulated articles and advisories on the subject and founded  
15 the state's first pro bono immigrant post-conviction relief project. I have edited  
16 the *California Quick Reference Chart and Notes on Immigration Consequences of*  
17 *Crimes*. I have spoken on this topic to members of the criminal defense bar, as  
18 well as to groups of District Attorneys and lectured on the subject at Stanford  
19 University School of Law and UC Davis School of Law.

20  
21  
22 4. I make this declaration in support of the motion of [REDACTED], to dismiss  
23 his conviction of July 12, 1994, in [REDACTED], San Mateo  
24 County Superior Court Case No. [REDACTED]. I am familiar with Mr. [REDACTED]  
25 [REDACTED]'s immigration history.

26 5. Mr. [REDACTED] is a citizen of Mexico. However, the United States is now his  
27 home. He first entered the United States in 1983 or 1984 when he was  
28

1 approximately 15 years old. He has lived in this country for 33 years, over two  
2 thirds of his adult life. In addition, Mr. [REDACTED] s wife, [REDACTED]  
3 [REDACTED], and two children, [REDACTED] and [REDACTED],  
4 [REDACTED], as well as five of his sisters, all live in the United States.

- 5
- 6 6. Mr. [REDACTED] was convicted under Penal Code § 647(b) for misdemeanor  
7 solicitation on July 12, 1994. This conviction triggered adverse immigration  
8 consequences, including deportation, exclusion, and denial of naturalization,  
9 because Mr. [REDACTED] was previously convicted under Penal Code § 484(a) for  
10 petty theft on May 27, 1988. Since both Penal Code § 647(b) and Penal Code  
11 § 484(a) constitute crimes involving moral turpitude, Mr. [REDACTED] is  
12 removable under INA § 237(a)(2)(A)(ii) for convictions of two crimes involving  
13 moral turpitude, not arising out of a single scheme of criminal misconduct.  
14
- 15 7. Under INA § 237(a)(2)(A)(ii), Mr. [REDACTED] is ineligible for U.S. citizenship,  
16 even though his wife and two children are U.S. citizens and he would otherwise  
17 be qualified for naturalization. Furthermore, Mr. [REDACTED] may be subject to  
18 deportation and/or exclusion from the United States. Such adverse immigration  
19 consequences are unjust given the fact that Mr. [REDACTED] has turned his life  
20 around, has lived in the United States for over thirty years, and has family living  
21 in the United States who depend on him both emotionally and financially.  
22
- 23 8. If I had been consulted about the immigration consequences prior to Mr. [REDACTED]  
24 [REDACTED] decision regarding whether to proceed to trial or enter a plea in this case, I  
25 would have recommended in the strongest possible terms that Mr. [REDACTED]  
26 avoid risking a conviction to Penal Code § 647(b), due to the adverse immigration  
27 consequences discussed above in paragraph 5. The plea that Mr. [REDACTED]  
28

1 ultimately took is emphatically a bad plea because of the severe immigration  
2 consequences. I would have instead advised Mr. [REDACTED] to enter a plea to an  
3 alternative offense that would not have rendered him deportable, inadmissible  
4 and/or ineligible for naturalization. In addition, I would have requested that the  
5 District Attorney and the Court allow Mr. [REDACTED] to plead to an immigration-  
6 safe offense. I would have been willing to assist his counsel in explaining to the  
7 District Attorney and the Superior Court the adverse and immutable immigration  
8 consequences of this conviction for Mr. [REDACTED], and the equivalent safe  
9 alternatives that would allow a different conviction with the same sentence or  
10 penalty.  
11

12 9. Mr. [REDACTED] had available alternatives pleas in this case. I would have  
13 strongly advised defense counsel to negotiate an immigration-safe alternative,  
14 such as a plea to accessory after the fact, under Penal Code § 32. Alternatively, I  
15 would have recommended that he plead to Penal Code § 647(f). Even with  
16 additional jail time, neither of these offenses would have made Mr. [REDACTED]  
17 deportable or barred his naturalization.  
18

19 10. If the Court vacates this conviction, and the parties negotiate an immigration-safe  
20 disposition, Mr. [REDACTED] could have the possibility of naturalizing as a U.S.  
21 citizen, permitting him to remain in the United States with his wife and children.  
22

23 I declare under the penalty of perjury that the foregoing is true and correct to the best of  
24 my knowledge, information, and belief, and that this Declaration was executed this \_\_\_ day of  
25 \_\_\_\_\_ 2016, in San Francisco, California.  
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27 \_\_\_\_\_  
28 Rose Cahn  
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# APPENDIX J

## Sample Order Granting 1473.7 Motion



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[REDACTED]

560 Mission Street  
Twenty-Seventh Floor  
San Francisco, California 94105-2907  
Telephone: (415) 512-4000  
Facsimile: (415) 512-4077

Attorneys for [REDACTED]

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

[REDACTED]

Defendant.

Case [REDACTED]

**[PROPOSED] ORDER VACATING  
CONVICTION UNDER PENAL CODE  
SECTION 1473.7**

Judge: [REDACTED]  
Dept.: 701

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**[PROPOSED] ORDER**

Upon notice and hearing, and upon consideration of the prosecution’s position and its reasons therefor, and good cause appearing, IT IS HEREBY ORDERED that the Defendant’s motion to vacate the conviction of October 5, 2012, for misdemeanor drug possession under Health & Safety Code section 11377(a), is granted.

The conviction is set aside in its entirety under Penal Code section 1473.7 on grounds that it was legally invalid due to a prejudicial error damaging Defendant’s ability to meaningfully understand, defend against, and knowingly accept the immigration consequences of his plea.

DATED: March \_\_, 2017

By: \_\_\_\_\_  
