CALIFORNIA CRIMINAL SENTENCES AND ELIGIBILITY FOR RELIEF

Including New California P.C. § 18.5

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Sentences and Relief

Criminal sentence can have a big impact on immigration status and eligibility for relief. For example, immigration law makes a critical distinction between a potential or actual sentence of one year (365 days) versus one of 364 days. The one-day difference may determine whether a conviction is an "aggravated felony" that will bar eligibility for asylum, or is a deportable crime involving moral turpitude that will put a naturalization applicant at risk of removal proceedings. The felony/misdemeanor distinction also can be important. First, *no* California misdemeanor has a potential sentence of more than 364 days. See Cal PC § 18.5(a). In addition, to qualify for the "petty offense" exception to the moral turpitude inadmissibility ground, one must have a misdemeanor rather than a felony conviction, and a sentence of no more than six months imposed.

This Advisory first will review how immigration law treats different sentencing dispositions. Then it will discuss how that applies to California sentencing law, and how advocates can use state law, including amended California Penal Code § 18.5, to help their clients. The text of PC § 18.5 appears at the end of this Advisory.

A. How Immigration Law Treats Sentences

1. Aggravated Felony: Risk if Sentence of 365 Days is *Imposed*

Immigration law designates certain offenses as "aggravated felonies." INA § 101(a)(43), 8 USC § 1101(a)(43). An aggravated felony conviction carries the most serious immigration consequences. Besides being a ground of deportability, it is a bar to eligibility for many forms of relief, including asylum and all forms of cancellation of removal. If the conviction of an aggravated felony occurred on or after November 29, 1990, it is a permanent bar to establishing good moral character, and thus an absolute bar to eligibility for naturalization and VAWA. It is a strong negative discretionary factor for all applications, including T and U visas, adjustment of status, and withholding of removal. It will make the person a target of enforcement.

Some state offenses will be classed as an aggravated felony if and only if a sentence of a year or more is imposed. Some common California offenses that become an aggravated felony with a year or more sentence imposed include vehicle theft (Veh C § 10851), receipt of stolen property (PC § 496), and serious

assault (PC §§ 245, 273.5, 422). Common California offenses that do *not* become an aggravated felony even if a sentence of a year is imposed include a theft (PC §§ 484, 487, 666) or fraud offense, commercial burglary (PC § 459), and sex with a person under the age of 18 (PC § 261.5(c)). To see if a particular offense becomes an aggravated felony if a 365-day sentence is imposed, look it up in the California Quick Reference Chart (www.ilrc.org/chart).

If the person was sentenced to 365 days and the offense is a misdemeanor, or a felony that you can reduce to a misdemeanor, you can apply to reduce the sentence by one day under PC § 18.5(b). Then it will have a sentence of 364 days for immigration purposes. See Part B.1, below.

> **Example:** Simone was convicted of vehicle theft, VC § 10851, and sentenced to one year. This is an aggravated felony conviction. If she can reduce the sentence by one day under PC § 18.5(b), it will no longer be an aggravated felony. She also was convicted of commercial burglary, PC §§ 459, 460(b), and sentenced to a year, but this is not an aggravated felony even with a year's sentence.

2. Crime Involving Moral Turpitude: Risk if *Potential* 365-Day Sentence

Many California offenses are classed as crimes involving moral turpitude ("CIMTs"). Common California offenses that are CIMTs include theft (PC § 484, 487, 666), fraud, and more serious violent offenses. Common California offenses that, perhaps surprisingly, should not be held CIMTs include vehicle theft (VC § 10851), receipt of stolen property (PC § 496), commercial burglary (PC § 459) and many others. To see if a particular offense may be a CIMT, look it up in the California Quick Reference Chart (www.ilrc.org/chart).

One way that a single CIMT conviction carries a penalty is if the *potential* sentence is a year or more – regardless of whether any sentence was imposed.

- A person is deportable if she was convicted of one CIMT that has a potential sentence of one year or more, if it was committed within five years of admission to the U.S.[i] This is important to remember when screening naturalization applicants, to make sure that they are not deportable. An offense with a potential sentence of 364 days will not trigger this penalty.

- An undocumented person cannot apply for "non-LPR cancellation of removal"[ii] if she is convicted of one CIMT that has a potential sentence of *one year or more*. An offense with a potential sentence of 364 days will not trigger this bar. Undocumented persons who are considering applying for relief such as DACA – or who are not currently eligible for any other relief -- will have a critical back-up plan if they also are eligible for non-LPR cancellation: if they are put in removal proceedings, being cancellation-eligible will entitle them to the procedural protections of a full removal hearing. It also may help them gain release from detention. (Note that the person also must not have a sentence imposed of more than six months on a CIMT conviction. See next section.)

Under Penal Code § 18.5, *all California misdemeanors have a potential sentence of 364 days,* at the most. Therefore, if the person has a single CIMT conviction that is a misdemeanor, or if we can reduce a felony conviction to a misdemeanor, the person will have a potential 364-day sentence and she will avoid the one-year problem. See Part B.2, below.

> **Example:** Frank is an LPR who wants to apply for naturalization. In 2002, just three years after he was admitted to the U.S. as an LPR, Frank was convicted of felony forgery and sentenced to six months in jail plus probation. This is his only CIMT conviction. You determine that this conviction

makes him deportable for CIMT, and therefore puts him at great risk if he applies to naturalize. But if you can reduce the felony to a misdemeanor, he will not be deportable (because the offense will have just a 364-day sentence) and he can naturalize without risk of being put in proceedings.

Example: Maria has lived here for twelve years and has two U.S. citizen children. She had hoped to apply for DAPA, but that program was never implemented. Now she is terrified about what will happen if she is picked up by ICE. If she is eligible for non-LPR cancellation, then if she is detained by ICE there is a real chance that she could be released on bond and could get a hearing before an immigration judge, a process that takes some years. She had just one criminal conviction from 2008, for California *misdemeanor* grand theft. She was sentenced to probation. Under PC § 18.5, as of January 1, 2017 the potential sentence for that offense automatically changed from one year to 364 days. Therefore it will not bar her from eligibility to apply for non-LPR cancellation. (If instead she had been convicted of felony grand theft, she would be barred. We would investigate if she could ask to reduce the felony to a misdemeanor. If that happened, the misdemeanor would have a potential sentence of 364 days.)

3. Crime Involving Moral Turpitude: The Petty Offense Exception and Actual and Potential Sentence

Many forms of relief require the applicant to be admissible under INA § 212(a), 8 USC § 1182(a). Conviction of a single CIMT is a bar to admissibility, unless the person comes within the so-called "petty offense" exception (or the less commonly used youthful offender exception for youth convicted as adults). To be eligible for the petty offense exception, the person must be convicted of just one CIMT that has a sentence *imposed* of six months or less, and has a *potential* sentence of one year or less. See the petty offense and youthful offender exceptions at INA § 212(a)(2)(A)(ii).

Regarding potential sentence, the 365/364-day distinction is not important for the petty offense exception; a potential sentence of 365 days still qualifies. But the person must be convicted of a California misdemeanor rather than a felony, because a felony has a potential sentence of more than a year. If you can reduce the felony conviction to a misdemeanor, the person will meet that requirement for the petty offense exception. (She also must meet the other requirements of only one CIMT, and six months or less sentence imposed.) See Part B.2 below on reducing a felony to a misdemeanor.

Example: Nora was convicted of felony theft and sentenced to 4 months in jail. That was her only CIMT conviction. Now she wants to apply for a green card through her U.S. citizen husband, and to do this she either must be admissible or obtain a waiver of inadmissibility. Because her offense is a felony and therefore has a potential sentence of more than a year, she does not qualify for the petty offense exception to the CIMT inadmissibility ground, and she is inadmissible. She must apply for the highly discretionary § 212(h) waiver, which might be denied. But if she reduces the felony to a misdemeanor she will qualify for the petty offense exception. Then she will not be inadmissible and will not need to apply for the waiver.

4. Other Immigration Penalties, Including Two or More Convictions with Total Five Years Imposed

Immigration law contains several other provisions relating to sentence, which we will not focus on in this Advisory. For example, a person is inadmissible if convicted of two or more offenses of any type where the aggregate sentence imposed is five years[iii]; is barred from establishing good moral character if she actually served 180 days or more as a result of a conviction[iv]; and is barred from withholding of removal if convicted

of one or more aggravated felonies with a total sentence imposed of five years[v]. For more information on these and other provisions, see *Defending Immigrants in the Ninth Circuit* (www.ilrc.org), Chapter 5.

B. How to Help Your Client with California Sentence Issues

This section discusses how to tell what the potential and imposed sentence is for a California conviction, and when it may be possible to reduce a felony to a misdemeanor or reduce the amount of sentence that was imposed.

1. What California Sentence was *Imposed*? Sentences, Suspended Sentences, Probation, Penal Code § 18.5, and Credit for Time Served

The risk of an imposed sentence of 365 days or more is that in some cases the offense becomes an aggravated felony. See Part A.1, above. The risk of an imposed sentence of more than six months on conviction of a crime involving moral turpitude (CIMT) is that the conviction will not qualify for the petty offense exception to the inadmissibility ground (see Part A.3, above) or that it will be a bar to qualifying for 10-year cancellation of removal (see Part A.2 above).

Immigration law has its own definition of when a sentence is imposed. INA § 101(a)(48(B), 8 USC § 1101(a)(48)(B). Different California sentencing dispositions have different immigration effect.

Regular sentence. A regular, "straight" sentence is a sentence imposed for immigration purposes. If the judge says, "I sentence you to 18 months in prison" or "I sentence you to four months in jail," there is an 18-month or four-month sentence for immigration purposes.

Suspended execution of sentence. A sentence can be imposed with execution suspended. This means that (at least absent future problems), the person does not have to go to jail for the suspended period. This does not translate to immigration benefits, however: the entire sentence still counts regardless of suspended execution. If the judge says, "I sentence you to two years but I will suspend execution of 18 months," the person has a two-year sentence for immigration purposes, even if she only has to spend six months in jail. On RAP sheets, you may see suspended execution referred to as "SE" or "ES."

Suspended imposition of sentence. This is a common disposition for less serious offenses in California. If imposition of sentence is suspended (the judge does not impose a formal sentence) and probation is imposed, there is no sentence for immigration purposes.

The exception is, if the judge orders the person to *custody as a condition of probation*, that jail period does count as a sentence. "I will suspend imposition of sentence and sentence you to three years of probation" means there is no sentence for immigration purposes. "I will suspend imposition of sentence, sentence you to three years of probation, and order you to six months' jail time as a condition of probation" means that the person was sentenced to six months for immigration purposes. The judge can order the person to jail for up to the maximum possible sentence, e.g., up to 364 days for a misdemeanor.

Some felonies also can get this kind of sentence, and the person can be ordered to spend up to 365 days in custody as a condition of felony probation. "I suspend imposition of sentence, sentence you to five years of felony probation, and impose six months' custody as a condition of probation" means that the person received a sentence imposed of six months for immigration purposes.

On RAP sheets, you may see suspended imposition referred to as "SI" or "IS" or "IOSS."

Sentence to probation. California probation alone is not a sentence for immigration purposes. "I sentence you to three years on probation" means no sentence for immigration purposes.

New sentence following a probation violation. If an additional sentence is imposed on the original conviction due to a probation violation, the total sentence will count for immigration. If the judge says, "You had a sentence of eight months. Due to your probation violation, I will add an additional six months to your sentence for that offense," that means that the person has a total 14-month sentence. To avoid this, some defenders have their clients plead to a new offense after a probation violation and take the additional time on that, rather than adding time to the original offense.

Reducing an imposed sentence, including Penal Code § 18.5. Sometimes a person can go back into criminal court and reduce the sentence that was imposed. Generally, immigration authorities will accept changes made to a state sentence, without any requirement that there was a legal error in the original hearing. *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005).

New Penal Code § 18.5(b) provides a way to reduce an imposed 365-day sentence to 364 days. The offense must be a misdemeanor, which includes a felony offense that was reduced to misdemeanor by, e.g., PC § 17(b)(3) or Prop 47. The sentence must have been imposed before January 1, 2015. See § 18.5(b). The person will request the original sentencing judge to reduce the sentence by one day, from 365 days to 364 days. (Note that under § 18.5(a), the *potential* sentence of all California misdemeanors was changed to 364 days automatically by operation of law; it is not necessary to go to criminal court or change any record. But to change a sentence that was *imposed* from 365 to 364 days, under § 18.5(b), one must make a request to the original sentencing court.)

If the person does not qualify for P.C. § 18.5(b), consult a post-conviction relief expert to see if there is another way to reduce the sentence. This will require a lawyer and may be costly.

Credit for time served. You may see criminal records where immigrants spent much longer in jail than their "sentence." Sometimes an immigrant can avoid a long "official" sentence by agreeing to waive credit for time she already served in jail. Say that Oscar will plead to vehicle theft, VC § 10851, which becomes an aggravated felony if a sentence of a year or more is imposed. He has been in jail awaiting his hearing for six months because he is too poor to make bail. The DA requires a sentence of 16 months. Usually a defendant would just take the 16-month official sentence, on the condition that with credit for the six months already served, he would face only an additional eight months in jail. However, for immigration purposes the person would have a "sentence" of 16 months. In Oscar's case, that would be an aggravated felony. But an informed defender often can negotiate to waive credit for time served in exchange for a lower sentence. Oscar can waive credit for his six months served, in exchange for a sentence of felony probation and ten months in custody (or even a little more, if that was necessary to make the deal). They he will not have an aggravated felony.

2. What is the *Potential* Sentence? California Felonies, Misdemeanors, Wobblers, and California Penal Code § 18.5

A *potential* sentence of 365 days or more can be damaging for an immigrant convicted of just one crime involving moral turpitude (CIMT). To fix the problem for a California conviction, an immigrant wants that one CIMT to be a California misdemeanor (which carries a maximum sentence of 364 days) rather than a California felony. (If the person has more than one CIMT conviction, the analysis is different.[vi]) A felony can

cause the person to be deportable or barred from non-LPR cancellation (triggered by a potential sentence of a year or more; see Part A.2, above) or to be unable to qualify for the petty offense exception to the CIMT inadmissibility ground (triggered by a potential sentence of more than a year; see Part A.3, above).

This section describes the potential sentence for different types of California offenses. Note that California law provides some ways to reduce a felony offense to a misdemeanor. If that happens, the misdemeanor will have a maximum potential sentence of 364 days.

Felonies. All California felonies have a potential sentence of more than a year. Cal PC § 17. Therefore, any California felony conviction of a CIMT brings the adverse consequences described in Part A.2, A.3, above. In some cases, a felony can be reduced to a misdemeanor; see below.

(Remember that a person can be convicted of a California felony and have a sentence *imposed* of less than a year. See discussion of suspended imposition of sentence in Part B.1.)

Misdemeanors. California misdemeanors have different potential sentences. If the code section (e.g., California Penal Code, Vehicle Code) does not name a sentence for the particular misdemeanor, the maximum possible sentence probably is six months. Cal PC § 19. A few misdemeanor offenses have a maximum possible sentence of just 90 days. Obviously, six-month and 90-day misdemeanors have less than a 365-day potential sentence.

For other misdemeanors, the code states that the maximum possible sentence is one year. *However, that statement in the code is no longer accurate,* under PC § 18.5(a). No California misdemeanor conviction, including prior convictions, carries a maximum possible sentence of 365 days; the maximum is 364 days. Therefore no single California misdemeanor conviction of a CIMT triggers the consequences discussed in A.2 and A.3, above. See discussion of § 18.5, below.

"Wobblers." Some California offenses are alternate felony/misdemeanors, often called "wobblers." Here the offense can be charged as a felony or a misdemeanor. If the defendant originally was convicted of a felony wobbler, it is possible that the conviction can be reduced to a misdemeanor; see next section.

A code section defining a wobbler will say something like "shall be punished in the state prison for a term of two, three, or four years or in the county jail for not exceeding one year," or "imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170 …." Again, although the code section says "one year," under PC § 18.5 this actually means 364 days. See discussion of § 18.5, below.

Reducing a felony to a misdemeanor. California law provides a few ways to reduce a felony to a misdemeanor. Under Penal Code § 17(b)(3), if the offense is a wobbler, a judge has discretion to reduce a felony to a misdemeanor as long as the person was not sentenced to state prison time (i.e., if the person received suspended imposition of sentence and felony probation; see Part B.1, above). Many, many California offenses are wobblers, including some involving violence, fraud, theft, or lewd intent.

Under Prop 47, a judge is required to reduce certain felony offenses to misdemeanors if certain conditions are met (the amount taken was $950 or less, the offense is for simple felony drug possession, the person does not have certain priors, etc.). The Prop 47 offenses include receipt of stolen property, passing bad checks, forgery, theft, burglary, and felony drug possession. (Theft and burglary have special provisions by which they may become six-month misdemeanors). See Penal Code § 1170.18. For more information

about how to reduce a felony to a misdemeanor using these provisions, see a free online manual by ILRC, Lawyers Committee for Civil Rights of San Francisco, and Californians for Safety and Justice, at https://www.ilrc.org/manual-prop-47-other-post-conviction-relief-immigrants.

Immigration law accepts California reduction of a felony to a misdemeanor under these provisions.[vii] Under PC § 18.5(a), once a felony is reduced to a misdemeanor, by definition the misdemeanor has a potential sentence of only 364 days, even if the conviction was reduced prior to the effective date of 18.5(b) (January 1, 2017). See next section.

Penal Code § 18.5. There have been two versions of California Penal Code § 18.5. Effective January 1, 2015, P.C. § 18.5 provided that from that day forward, any California misdemeanor listed as having a potential sentence of up to one year in fact would have a sentence of up to 364 days. It did not apply to prior convictions, however. Effective January 1, 2017, this provision was extended to prior convictions as well. Today all California misdemeanor convictions, regardless of date, that are identified in a code section as having a penalty of up to one year actually have a penalty of up to 364 days. See PC § 18.5(a). (Misdemeanors with a maximum possible sentence of six months or less are unchanged by § 18.5.)

Note that this change happened to prior convictions automatically, by operation of law. No one has to go to criminal court in order to change the *potential* sentence for a misdemeanor conviction to 364 days. In contrast, a judge must order reduction of an *imposed* misdemeanor sentence from 365 to 364 days. See Part B.1 above, and see § 18.5(b).

A felony that is reduced to a misdemeanor under P.C. § 17(b)(3), Prop 47, or other means, has a maximum possible sentence of 364 days rather than one year, pursuant to PC § 18.5(a). This is reflected, for example, in the California Judicial Council form for reducing a felony to a misdemeanor under § 17(b)(3), which provides that the felony is reduced to a 364-day misdemeanor. See Form CR-181 at www.courts.ca.gov/documents/cr181.pdf.

Appendix: Text of California Penal Code 18.5 (January 1, 2017)

18.5(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).

ENDNOTES

[i] INA § 237(a)(2)(A)(i), 8 USC § 1227(a)(2)(A)(i). See also Practice Advisory on *Matter of Alyazji* at www.ilrc.org/sites/default/files/resources/alyazji_advisory_moral_turpitude_deportation_ground.pdf

[ii] INA § 240A(b)(1), 8 USC § 1229b(b)(1).

[iii] INA § 212(a)(2)(B), 8 USC § 1182(a)(2)(B).

[iv] INA § 101(f)(7), 8 USC § 1101(f)(7).

[v] INA § 241(b)(3)(B), 8 USC § 1251(b)(3)(B).

[vi] A person convicted of two or more CIMTs after admission is deportable regardless of potential sentence or timing, unless the convictions arose from a "single scheme of criminal misconduct," interpreted as essentially arising from the same incident. INA § 237(a)(2)(A)(ii), 8 USC § 1227(a)(2)(A)(ii). A person convicted of two CIMTs at any time, regardless of single scheme, is inadmissible for CIMT because the person cannot qualify for the petty offense or youthful offender exception. INA § 212(a)(2), 8 USC § 1182(a)(2).

[vii] See *LaFarga v. INS*, 170 F.3d 1213 (9th Cir 1999) (Arizona felony reduced to a misdemeanor is a misdemeanor for immigration purposes); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003) (same rule when California felony is reduced to a misdemeanor, pursuant to PC § 17(b)(3)); *Ceron v. Holder*, 747 F.3d 773, 777-778 (9th Cir. 2014) (en banc), (overruling *Garcia-Lopez* to the extent it wrongly stated that a California wobbler becomes a six-month rather than one-year misdemeanor when reduced) (decision issued before enactment of Cal PC § 18.5 defined a misdemeanor as having a maximum 364-day sentence).

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