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California Legislation Effective January 1, 2017 Provides Relief to Non-Citizens Convicted of Criminal Offenses

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On a national level, the incoming administration states a clear position involving increasing immigration enforcement and procedures to expedite removal of non-citizens convicted of criminal offenses. California has taken significant steps effective January 1, 2017 to provide relief for some non-citizens who previously would be subject to removal.

Effective January 1, 2017, three laws will go into effect that help immigrants who have had contact with the criminal justice system. These laws assist immigrants by: (i) eliminating the designation of certain prior misdemeanors as aggravated felonies, (ii) allowing immigrants to challenge the legal validity of criminal convictions based upon ineffective assistance of counsel and innocence, and (iii) providing safeguards for notifying immigrants in custody of ICE holds and preventing coercion from ICE officials.

SB 1242 - Making California Penal Code § 18.5 retroactive

SB 1242 amends California Penal Code § 18.5 to ensure that all misdemeanor crimes retroactively have a maximum possible sentence not exceeding 364 days. Previously immigrants who were convicted of certain misdemeanor offenses and sentenced to a suspended sentence of 365 days, were considered to have an aggravated felony for immigration purposes. Two years ago, SB 1310 was codified as California Penal Code § 18.5 which changed the maximum sentence for misdemeanors to 364 days. Unfortunately, SB 1310 was not retroactively applicable, leaving numerous immigrants with misdemeanor convictions that were still considered aggravated felonies. SB 1242 makes California Penal Code § 18.5 retroactive, allowing people who have been sentenced to misdemeanors with sentences of 365 days to submit an application to the superior court for modification of the sentence to 364 days, thereby ensuring that Californians with older misdemeanor convictions do not face aggravated felony consequences. For example, a misdemeanor conviction of Penal Code § 245(a)(4) (assault with great bodily injury) in 2014 with a sentence of 365 days would be considered an aggravated felony, unless the sentence was modified to 364 days under Penal Code § 18.5.

AB 813/California Penal Code § 1473.7 – Challenging Criminal Convictions for Legal Invalidity or Newly Discovered Evidence of Actual Innocence

AB 813, codified as Penal Code § 1473.7, will provide California criminal courts with an avenue to hear challenges to the legal validity of a criminal conviction after the case has expired and the person is no longer in custody. The new law will permit people to file a motion to vacate a conviction or sentence based on either (1) 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.

Under California law, individuals in actual or constructive custody are permitted to file a petition challenging the constitutionality of a conviction or sentence through a habeas corpus petition. See Pen. C. §1473. Once a person is no longer in custody (which includes jail, prison, probation, or parole), courts no longer have jurisdiction over a habeas petition. See *People v. Picklesimer*, 48 Cal. 4th 330; *People v. Villa*, 45 Cal.4th1063 (2009). 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*. In 2009, however, the California Supreme Court held that claims of ineffective assistance of counsel could not be raised in *coram nobis* petitions. *People v. Kim*, 45 Cal. 4th 1078 (2009).

The lack of a post-custodial vehicle to challenge unlawful convictions eliminated relief for many people who suffered devastating consequences caused by criminal convictions.¹ If a noncitizen became aware that the conviction made him or her deportable years after the completion of custody, there was no way to go back into court to erase the conviction. Additionally, many noncitizens who had entered pleas without counsel had no way to challenge convictions that carried unforeseen immigration consequences.

Due to the severity of these immigration penalties, 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. See *Padilla v. Kentucky*, 559 U.S. 356 (2010); *People v. Soriano*, 194 Cal.App.3d 1470 (1987); *People v. Bautista*, 8 Cal. Rptr. 3d 862 (2004); Cal. Pen. C. §§ 1016.2, 1016.3. Under California law, if the defendant does not understand the immigration consequences of a conviction, that constitutes good cause to withdraw the plea. *People v. Superior Court (Giron)*, 11 Cal.3d 793, 797-98 (1974).

AB 813 opens up critical new avenues for relief and grants the courts jurisdiction to hear specific claims of legal invalidity brought by individuals no longer in criminal custody. This law allows California to join 44 other states that offer a mechanism for people to challenge unlawful convictions after custody has ended. 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.

¹ Penal Code §1473.7 covers many individuals with no applicable remedy after custody has ended; but does not replace existing special-purpose post-conviction vehicles, including, *inter alia*, Penal Code §1018 (allowing defendants to withdraw pleas for “good cause” within six months of judgment); Penal Code §1016.5 (allowing for vacatur where the court failed to provide the statutory advisement about potential immigration consequences); Penal Code §1203.43 (vacating for cause controlled substance convictions dismissed pursuant to deferred entry of judgment); Penal Code §1385 (dismissing criminal actions in the interests of justice); Penal Code §1473.6 (allowing a post-custodial motion to vacate for victims of the Rampart scandal).

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.

In immigration cases, §1473.7(a)(1) allows motions to be raised alleging at least three distinct causes of action either independently or together:

- (1) Defense counsel violated the duty to investigate and accurately advise the defendant about the specific immigration consequences of a plea (*See Padilla v. Kentucky*, 559 U.S. 356 (2010));
- (2) Defense counsel failed to defend against immigration consequences of a plea by attempting to plea bargain for an immigration-safe alternative disposition (*People v. Bautista*, 8 Cal. Rptr. 3d 862 (2004); Cal. Pen. C. §§1016.2, 1016.3.) and
- (3) The defendant failed to meaningfully understand the immigration consequences of a conviction (see *People v. Superior Court (Giron)*, 11 Cal.3d 793, 797-98 (1974)).

Motions alleging that the defendant did not understand the immigration consequences of a plea must be filed with "reasonable diligence" after the later of: (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 (2) the date a removal order against the moving party, based on the existence of the conviction or sentence, becomes final. Penal Code § 1473.7(b).

Penal Code § 1473.7 motions should be filed in the Superior Court in which the challenged conviction or sentence was entered. All Penal Code § 1473.7 motions are entitled to hearings before a judge. Penal Code §1473.7(d). 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 as to why the moving party cannot be at the hearing. Penal Code §1473.7(d).

The court shall grant the motion if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief. Penal Code §1473.7(e)(1). As distinct from rulings on habeas petitions, the court is required to specify the basis for its conclusion. Penal Code §1473.7(e)(2). An order granting or denying the motion is appealable. Penal Code § 1473.7(f).

If the court grants the motion to vacate a conviction or sentence, the court shall allow the moving party to withdraw the plea. Penal Code §1473.7(e)(3). If granted, relief under this motion will vacate a California criminal conviction or sentence as legally invalid on a ground relating to unknown immigration consequences of the conviction, or on newly discovered evidence of actual innocence. Penal Code §§ 1437.7(a)(1)(immigration grounds), 1437.7(a)(2)(newly discovered evidence). Upon granting the motion, the moving party is in the same position that he or she 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.

SB 2792 (TRUTH Act)

The TRUTH Act helps to provide due process for immigrants held in local jails. The TRUTH Act requires that if Immigration and Customs Enforcement (ICE) places a detainer (such as to transfer custody or receive notice of release) on someone in a California jail, the jail must also provide the detainee with a copy of the detainer. Currently, many immigrants in custody are not notified that a detainer request has been placed, making it difficult for their defense counsel to effectively protect their rights. In addition, if the jail does notify ICE of an inmate's release date, the jail must provide the notification in writing to the immigrant and their attorney.

The TRUTH Act also provides detainees with procedural rights in ICE interviews. It requires law enforcement agencies to give inmates whom ICE wants to interview "a written consent form that explains the purpose of the interview, that the interview is voluntary, and that he or she may decline to be interviewed or may choose to be interviewed only with his or her attorney present." This written notification will help jailed immigrants to protect themselves from coercion and intimidation by ICE agents.

In addition, all records relating to ICE access to jail information will now be public records under the California Public Records Act, which acts as an accountability measure to enforce the other protections of the TRUTH Act. This also ensures that California communities have oversight over their local law enforcement agency's relations with ICE. Starting in 2018, the TRUTH Act requires annual public review and input on any local dealings with ICE.

While the new administration fully intends to increase deportation efforts, it is clear California has taken significant steps to provide for relief and equitable administration of justice for certain non-citizens convicted of criminal offenses.

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