



PRACTICE ADVISORY¹

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HOW TO USE NEW CALIFORNIA LAW PENAL CODE §1473.7 TO VACATE LEGALLY INVALID CONVICTIONS

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Effective January 1, 2017, a new California law will help people erase the catastrophic consequences (immigration or otherwise) that can attach to even very old convictions. The text of the new law, California Penal Code §1473.7, is set out in **Appendix A**.

The new law will permit people no longer in criminal custody to file a motion to vacate a conviction or sentence based on either one 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.

Many thanks go to Assemblymember Lorena Gonzalez, who championed this bill in the California legislature. We also express our gratitude for our colleagues at the American Civil Liberties Union, California Attorneys for Criminal Justice, California Public Defenders Association, and the Lawyers' Committee for Civil Rights of the San Francisco Bay Area who, along with the ILRC, were co-sponsors and drafters of the bill.

The ILRC will host a webinar December 6, 2016, about how to file successful § 1473.7 motions and other post-conviction relief vehicles in California. To register, go to www.ilrc.org/webinars.

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.

¹ The Immigrant Legal Resource Center is a national, nonprofit resource center that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The mission of the ILRC 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. For the latest version of this practice advisory, please visit www.ilrc.org. For questions regarding the content of this advisory, please contact Rose Cahn at rcahn@ilrc.org.

² Thanks to Kathy Brady, Graciela Martinez, Mike Mehr, Anthony Pullara, and Norton Tooby for helpful review and comments to this advisory.

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.³

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 effectively shut the courtroom doors to many people who suffered devastating consequences caused by criminal convictions.⁴ If a noncitizen only 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, 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.⁵ Under California law, if the defendant does not understand the immigration consequences of a conviction, that constitutes good cause to withdraw the plea.⁶

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, so that criminal “custody” ended. 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 lapsed before the defendant even knew of the immigration consequences.

³ 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.4th1063 (2009).

⁴ 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).

⁵ 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.

⁶ *People v. Superior Court (Giron)*, 11 Cal.3d 793, 797-98 (1974).

The new law, AB 813, 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. The law joins California with the 44 other states that offer some 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. 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. This Advisory will focus on immigration-related claims.

2. New Penal Code §1473.7 Motions

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.

In immigration cases, §1473.7(a)(1) allows motions to be raised 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;⁷ (2) defense counsel failed to defend against immigration consequences of a plea by attempting to plea bargain for an immigration-safe alternative disposition;⁸ and (3) the defendant failed to meaningfully understand the immigration consequences of a conviction.⁹

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.

Prejudice

All of the grounds raised in a §1473.7(a)(1) must be accompanied by proof of prejudice to the defendant. In related contexts courts have held that prejudice is shown if the defendant establishes it was reasonably probable he or she would not have pleaded guilty absent the error or that "a decision to

⁷ 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.

⁸ *People v. Bautista*, 8 Cal. Rptr. 3d 862 (2004); Cal. Pen. C. §§1016.2, 1016.3.

⁹ 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 he failed to understand the immigration consequences).

reject the plea bargain would have been rational under the circumstances.”¹⁰ Defendants do not need to show that they actually could have obtained a more favorable outcome at trial or in plea negotiations.¹¹ In most cases, a court or defense counsel advisement of merely *potential* immigration consequences does not satisfy defense counsel’s duty, nor does it defeat a claim of prejudice.¹² Prejudice is met if defendants establish, 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 to take the case to trial.

Components of a Successful Motion¹³

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;¹⁴
- Proof of prejudice;¹⁵
- A declaration signed by an expert in criminal and immigration law identifying alternative immigration-safe dispositions;¹⁶
- A declaration signed by the defendant stating the basis for the motion;¹⁷
- Evidence of equities;¹⁸
- Motions may contain a proposed order for the judge to sign.

¹⁰ 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*, 132 S.Ct. 1399 (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 Pen. C. § 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).

¹¹ See *People v. Martinez*, 57 Cal.4th 555 (2013).

¹² *United States v. Rodriguez-Vega*, 797 F.3d 781 (9th Cir 2015).

¹³ A more robust discussion of these components, along with sample motions, is forthcoming and will be collected on the ILRC’s website and distributed on a 1473.7 listserv. Please contact rcahn@ilrc.org if you are interested in joining the listserv. For a longer discussion of post-conviction relief motions, please see Kathy Brady and Norton Tooby, *California Criminal Defense of Immigrants* (CEB 2016, Chap. 20: Post-Conviction Relief Proceedings).

¹⁴ If, for example, the claim is based on ineffective assistance of counsel, 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 original trial counsel, but such a declaration could be helpful.

¹⁵ 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 priorability 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 and suggested alternatives.

¹⁶ See, e.g., *People v. Bautista*, 115 Cal.App.4th 229 (2004).

¹⁷ 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.

¹⁸ 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.

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

Timing of the motion

Motions alleging that the defendant did not understand the immigration consequences of a plea must be filed with “reasonable diligence” after whichever of the following dates is latest: (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. Pen. C. §1473.7(b).¹⁹

Immigration attorneys who are representing individuals in removal proceedings should be aware of the “reasonable diligence” requirement and advise their 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 1473.3 motion.

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

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.

Before filing the motion with the court, but after the motion is prepared, it is advisable to reach out to the district attorney, explain the grounds for the motion, and suggest alternative immigration-safe pleas. See Repleading, 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 1473.7 motions are entitled to hearings before a judge. Penal Code §1473.7(d). 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 2-4 weeks of filing.

¹⁹ 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.

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 (51%) 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. Pen. C. §1473.7(f).

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. Penal Code §1473.7(e)(3). At that point, 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. 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 <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 with 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.²⁰

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).

3. Criminal and Immigration Impact of a § 1473.7 Vacation of Judgment

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).

Criminal Effects

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." Penal Code §§1437.7(e)(3).

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

²⁰ The general rule is that a defendant cannot be sentenced to more time after a successful appeal.

Immigration Effects

This motion is only available if based on a ground of legal invalidity. Penal Code §§1437.7(a)(1) (immigration grounds), 1437.7(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.²¹ A court order granting a Penal Code §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) ineffective assistance of counsel 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 ensure 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.²²

²¹ 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).

²² In deportation proceedings, the government bears the burden to establish that the dismissal is ineffective to eliminate the conviction for immigration purposes.

APPENDIX A BILL TEXT

SECTION 1.

Section 1473.7 is added to the Penal Code, to read:

1473.7.

(a) A person no longer imprisoned or restrained may prosecute a motion to vacate a conviction or sentence for either of the following reasons:

- (1) 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.
- (2) Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice.

(b) A motion pursuant to paragraph (1) of subdivision (a) shall be 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.
- (2) The date a removal order against the moving party, based on the existence of the conviction or sentence, becomes final.

(c) A motion pursuant to paragraph (2) of subdivision (a) shall be filed without undue delay from the date the moving party discovered, or could have discovered with the exercise of due diligence, the evidence that provides a basis for relief under this section.

(d) All motions shall be entitled to a hearing. At the request of the moving party, the court may hold the hearing without the personal presence of the moving party if counsel for the moving party is present and the court finds good cause as to why the moving party cannot be present.

(e) When ruling on the motion:

- (1) The court shall grant the motion to vacate the conviction or sentence if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a).
- (2) In granting or denying the motion, the court shall specify the basis for its conclusion.
- (3) 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.

(f) An order granting or denying the motion is appealable under subdivision (b) of Section 1237 as an order after judgment affecting the substantial rights of a party.