

Post-Conviction Relief and Immigration Consequences: A Analysis of California Criminal Law and Federal Immigration Protections

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FINDINGS

POST-CONVICTION RELIEF AND IMMIGRATION CONSEQUENCES: A COMPREHENSIVE ANALYSIS OF CALIFORNIA CRIMINAL LAW AND FEDERAL IMMIGRATION PROTECTIONS

Executive Summary

The intersection of California criminal law and federal immigration law creates both significant perils and powerful remedial opportunities for noncitizen defendants facing criminal charges or post-conviction consequences. This report examines the statutory framework, judicial precedent, and practical implementation mechanisms by which immigrants in California can challenge convictions that carry devastating immigration consequences. The analysis addresses three primary California post-conviction relief vehicles—Penal Code sections 1473.7, 1016.5, and 1203.43—and explains how courts have increasingly recognized that state-law vacatures based on procedural or substantive defects eliminate convictions for federal immigration purposes. The controlling Ninth Circuit precedent, recent Board of Immigration Appeals decisions, and California judicial developments are analyzed to provide comprehensive guidance for attorneys serving immigrant clients facing removal or seeking to protect immigration status through criminal court proceedings.

The research demonstrates that even minor criminal convictions can trigger catastrophic immigration consequences including deportation, inadmissibility, and permanent bars to relief. Convictions need not be labeled as felonies under state law to constitute "aggravated felonies" under federal immigration law, and even successfully completed rehabilitative programs such as deferred entry of judgment may create convictions for immigration purposes. However, California law provides multiple pathways for post-conviction relief where the original criminal proceeding contained legal defects—including failure to advise of immigration consequences, ineffective assistance of counsel, or violation of constitutional rights. Recent Ninth Circuit authority, particularly the 2024 decision in *Bent v. Garland*, has clarified that state courts vacating convictions based on such defects eliminate the conviction for all federal immigration purposes, overturning years of Department of Homeland Security resistance to recognizing such vacatures. The strategic landscape has shifted substantially in favor of immigrants seeking to challenge convictions, though time-sensitive deadlines, burden of proof considerations, and the "reasonable diligence" requirement under Penal Code section 1473.7 require careful case management.

This report is designed for immigration law practitioners, criminal defense attorneys, and legal advocates serving immigrant populations in Northern California and nationwide, with specific emphasis on the unique dynamics of San Francisco Immigration Court, the San Francisco Asylum Office, and Northern California ICE enforcement patterns.

California Post-Conviction Relief Statutes as Gateways to Immigration Protection

California law provides several post-conviction mechanisms through which immigrants may challenge convictions that carry immigration consequences, but understanding which statute applies requires careful factual analysis and temporal sequencing. The most significant development in California immigration-friendly criminal law came with the enactment of Penal Code section 1473.7, which became effective January 1, 2017, and has since been amended to clarify its scope and application.^[4] Prior to 1473.7's enactment, immigrants who had completed their sentence faced a procedural barrier: the traditional writ of *coram nobis* was no longer available for post-custodial defendants in California, creating what advocates

characterized as a "gap" in the ability to challenge convictions years or decades after release.[30] This gap was particularly troubling for immigrants because federal immigration law employs its own definition of conviction, meaning that even successfully completed state rehabilitation programs could constitute deportable convictions for immigration purposes.

Penal Code section 1473.7(a)(1) addresses this gap by authorizing individuals no longer imprisoned or otherwise restrained to file motions to vacate convictions or sentences based on a showing that the conviction or sentence is legally invalid due to a prejudicial error that damaged the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea.[4][8] The statute does not require proof of ineffective assistance of counsel, nor does it require a showing that the defendant would not have entered the plea "but for" the error—instead, the moving party need only demonstrate that the error damaged their meaningful understanding of immigration consequences and that prejudice resulted.[25] The statute encompasses multiple grounds for relief, including deficient advice by counsel regarding immigration consequences, failure of the trial court to provide the mandatory advisement required by Penal Code section 1016.5, and the defendant's demonstrated lack of understanding of consequences despite receiving advice.

The second primary post-conviction vehicle, Penal Code section 1016.5, operates differently and addresses a more circumscribed problem: it applies when the court itself fails to provide the statutory advisement that must be given before accepting any plea of guilty or nolo contendere from a noncitizen defendant.[2][5][18][23] The statute requires that the court advise the defendant that conviction may result in deportation, exclusion from admission to the United States, or denial of naturalization.[5] Critical to understanding this statute's practical impact is the linguistic distinction between "may" and "will" in the advisement. California courts have held that substituting "will" for the statutory language "may" constitutes improper advisement and can form the basis for relief, because the statute contemplates that immigration consequences are not automatic but rather depend on the specific circumstances of the noncitizen's situation.[5] When a court fails to provide the full advisement or maintains no record that it did so, a noncitizen defendant who can show that the conviction may subject them to deportation, exclusion, or denial of naturalization is entitled to vacation of the judgment.

Penal Code section 1018 provides an additional mechanism allowing defendants to withdraw a plea for "good cause" either before sentencing or within six months after being placed on probation.[20] While this statute predates the recent reforms, it has acquired new significance in the immigration context. Good cause for withdrawal includes attorney failure to advise of immigration consequences, and unlike some other post-conviction remedies, courts have recognized that withdrawal under 1018 should be given effect for immigration purposes when the withdrawal is based on substantive or procedural defects rather than purely rehabilitative reasons.[8] The Ninth Circuit in *Ballinas-Lucero v. Garland* clarified that the grounds for allowing withdrawal of a guilty plea under California Penal Code section 1018 are substantive and procedural defects in the underlying proceeding, and any reasonable adjudicator reading a defendant's motion asserting such defects should find that the factual grounds pertain to defects as specified in the statute.[49][52]

Finally, Penal Code section 1203.43 addresses a specific category of harm that affected thousands of immigrants: the unintended immigration consequences of deferred entry of judgment (DEJ). Under California law, DEJ promised that upon successful completion of probation, charges would be dismissed and "the defendant would not have a conviction for any purpose." [10] However, because the defendant was required to plead guilty and some form of penalty or restraint was imposed (such as a court fine), federal immigration law determined that this constituted a conviction under INA section 101(a)(48)(A). Section 1203.43, effective January 1, 2016, provides a remedy by allowing defendants who successfully completed DEJ on or after

January 1, 1997 to withdraw their guilty pleas, with the court then re-dismissing the charges.[10][23] The statute operates on the theory that the original plea was invalid because it was procured based on misinformation about the actual immigration consequences—namely, the false promise that successful completion would result in no conviction.

Immigration Consequences of California Criminal Convictions: The Framework of Federal Immigration Punishment

Understanding how California criminal convictions translate into federal immigration consequences requires knowledge of federal statutory definitions and the complex analytical frameworks immigration adjudicators apply to state convictions. The Immigration and Nationality Act contains no general residual "catch-all" provision that makes all felonies deportable; rather, federal law specifies particular categories of crimes that trigger deportation, inadmissibility, or bars to relief, and federal courts have developed sophisticated analytical methodologies to determine whether state convictions fall within these federal categories.[59] This section explains the primary categories of convictions that carry immigration consequences under current law.

The most severe immigration consequences attach to convictions classified as "aggravated felonies" under 8 U.S.C. section 1101(a)(43).[13][16] The term "aggravated felony" is a term of art in immigration law that bears no necessary relationship to how a state labels or defines the offense.[13][8] Aggravated felonies are defined by statute to include murder, rape, sexual abuse of a minor, trafficking in firearms or destructive devices, trafficking in controlled substances, crimes of violence with imposed sentences of one year or more, theft offenses with imposed sentences of one year or more, burglary with imposed sentences of one year or more, crimes involving fraud or deceit where the loss to the victim exceeds \$10,000, and attempts or conspiracies to commit such offenses.[13][59] A conviction that constitutes an aggravated felony carries the most devastating consequences: a noncitizen with such a conviction is subject to mandatory deportation without eligibility for asylum, withholding of removal, cancellation of removal, or most other relief; they are subject to mandatory detention without possibility of bond during removal proceedings; they are ineligible for naturalization; and if removed and attempt to reenter, they face enhanced federal criminal penalties including prison sentences of up to twenty years.[8][13][32][59]

The second major category of convictions carrying immigration consequences involves crimes involving moral turpitude (CIMT).[3][16][56] A crime involving moral turpitude is defined to include offenses involving dishonesty or a base, vile, or depraved conduct shocking to a reasonable person, though the concept has no precise statutory definition and must be evaluated on a case-by-case basis by the Board of Immigration Appeals.[3] Examples include murder, embezzlement, burglary, robbery, perjury, and aggravated assault, among many others.[3] A single conviction for a CIMT committed within five years of admission to the United States with a potential sentence of one year or more renders a noncitizen deportable.[3][8] Two or more separate CIMT convictions at any time after admission also trigger deportability. Additionally, a conviction for any CIMT renders a noncitizen inadmissible, and for those seeking adjustment of status or other immigration benefits, such a conviction creates a permanent bar unless the offense falls within the "petty offense exception" (which requires that the sentence imposed was six months or less and the offense carries a maximum potential sentence of less than one year).

Controlled substance offenses constitute a third significant category.[22] Any conviction relating to a controlled substance is deportable.[22][11] Notably, this category is extraordinarily broad: even a single conviction for simple possession of a small amount of drugs can render a noncitizen deportable, and selling even \$5 worth of marijuana triggers the same immigration consequences as managing a multi-million dollar drug trafficking operation because immigration law treats the offense based on the generic definition rather

than actual conduct.[8] A single conviction for any controlled substance offense also renders a noncitizen inadmissible. However, there is a narrow exception for a first offense involving simple possession of 30 grams or less of marijuana for personal use, which is not deportable and for which a waiver of inadmissibility exists.[22][11]

A fourth category involves firearms offenses. A noncitizen convicted of any offense relating to a firearm is deportable under 8 U.S.C. section 1227(a)(2)(C).[19] This provision is interpreted broadly and includes convictions for possession of firearms, being a felon in possession, and various other weapons-related offenses, though there are important distinctions regarding possession versus ownership that can affect immigration consequences.[19] Some firearms offenses, particularly trafficking in firearms, also constitute aggravated felonies.

Crimes of domestic violence constitute a fifth category, defined to include crimes of violence (offense having as an element the use, attempted use, or threatened use of physical force) committed against persons protected under state domestic violence laws.[8][11][16] A noncitizen convicted of such an offense is deportable under 8 U.S.C. section 1227(a)(2)(E).

The definitional framework that immigration authorities apply to determine whether a state conviction falls within these federal categories is complex and has been the subject of significant recent litigation. The "categorical approach" requires immigration adjudicators to evaluate whether the elements of the offense of conviction match the federal definition of the crime, not the specific facts of the defendant's case.[51][54] Only in limited circumstances may adjudicators look beyond the statute itself to the record of conviction to identify which specific version of a divisible statute the defendant was convicted under.[51][54] This framework can work to the advantage of immigrants when the statute of conviction is broader than the federal category-in such cases, the conviction will not support the immigration consequence-but it works against immigrants when the statute is narrower but the crime still falls categorically within the federal definition.

The Critical Role of Criminal Defense Counsel Under *Padilla v. Kentucky* and California Law

The United States Supreme Court's 2010 decision in *Padilla v. Kentucky* fundamentally altered the landscape of criminal defense representation for noncitizens by holding that the Sixth Amendment requires defense counsel to provide affirmative, competent advice regarding the immigration consequences of a guilty plea.[15][32][35] The Court rejected any narrow reading of the duty and made clear that a defense lawyer's silence regarding immigration consequences constitutes ineffective assistance of counsel, not merely a matter of professional judgment.[15][32][35] Where the deportation consequence is "truly clear," the Court held, the duty to give correct advice is equally clear, and counsel cannot satisfy this duty merely by advising the client that charges "may" carry a risk of adverse immigration consequences.[15][32][35]

The Court further endorsed "informed consideration" of deportation consequences by both defense and prosecution during plea-bargaining, recognizing that the most effective way to serve a noncitizen client's interests is to negotiate an "immigration-safe" disposition that minimizes or eliminates the immigration consequences.[15][32][35] This means that counsel's obligations extend beyond simply warning the client about consequences; rather, counsel must investigate what immigration consequences attach to available plea options and attempt to negotiate the most favorable disposition from an immigration perspective.

California has incorporated these requirements into state law through multiple statutes. Penal Code section 1016.2 codified the California Legislature's finding that noncitizen defendants face unique consequences related to immigration status that other defendants do not suffer.[46][18] Courts have long held that California

counsel must determine the immigration status of clients and provide competent advice about immigration consequences.[15][32] Failure to do so violates the Sixth Amendment and state constitutional rights to adequate representation and can form the basis for post-conviction relief claims.

The scope of counsel's duty is substantial. Counsel must investigate and accurately advise the defendant about the specific immigration consequences of a plea, including consequences that may not be immediately apparent.[15][32] Counsel must attempt to defend against immigration consequences by plea bargaining for an immigration-safe alternative disposition whenever possible.[15][32] Counsel must inform the defendant if the consequences are uncertain, and in such cases must recommend that the defendant obtain immigration advice before entering a plea.[15][32] A generic statement that deportation "may" result is insufficient when the consequences are clear; counsel must provide specific, actual advice about the likely consequences.[5][15][32]

Recent California case law has clarified that even where a defendant was advised by the court at the time of the plea that conviction may carry immigration consequences, counsel's failure to provide accurate and specific advice regarding those consequences can form the basis for post-conviction relief under Penal Code section 1473.7.[25][28] In *People v. Camacho*, the court found that a defendant's receipt of written notice and court advisement that a plea "will result" in adverse immigration consequences did not foreclose relief when evidence showed that the defendant did not meaningfully understand those consequences due to counsel's deficient advice.[25] This clarification, codified in the 2019 amendment to section 1473.7 making clear that relief does not require a finding of ineffective assistance of counsel, has expanded opportunities for immigrants to challenge convictions.

Federal Recognition of California State Court Vacatures: The Evolution from *Pickering* to *Bent v. Garland*

The question of whether federal immigration authorities must give effect to a California state court order vacating a conviction has been the subject of sustained litigation and has undergone significant evolution. Prior to 2019, the Board of Immigration Appeals recognized that when a state court vacates a conviction based on a substantive or procedural defect in the underlying criminal proceedings, the conviction is eliminated for immigration purposes under the principle established in *Matter of Pickering*. [41][57] However, the Board also held that when a state court vacates a conviction for rehabilitative reasons or to avoid immigration hardship, the conviction remains valid for immigration purposes because the state court lacked authority to alter immigration consequences.[41][57]

This framework was upended in October 2019 when Attorney General Barr issued *Matter of Thomas and Thompson*, which limited the immigration effect of state court sentence modifications to those based on procedural or substantive defects in the underlying criminal proceedings.[57][60] While *Thomas and Thompson* technically addressed sentence modifications rather than conviction vacatures, the decision reflected a hardline position by the Trump administration that state courts could not effectively eliminate immigration consequences of convictions through any mechanism not grounded in legal defects in the original proceeding.

However, the Ninth Circuit's 2024 decision in *Bent v. Garland* dramatically reversed this trajectory and clarified that the BIA had mischaracterized California Penal Code section 1473.7 as a statute permitting courts to vacate convictions "solely to mitigate" immigration consequences.[27][30] The Ninth Circuit held that section 1473.7 is not a mechanism for addressing immigration consequences directly; rather, it is a post-conviction relief statute that allows vacatur when the original conviction was based on a legal defect—specifically, when the defendant did not meaningfully understand the immigration consequences at the

time of the plea.[27][30] The court found that when a state court vacates a conviction under section 1473.7 based on such a defect, the state court is engaging in traditional post-conviction relief based on a constitutional or procedural defect in the criminal proceedings, not attempting to alter the immigration consequences directly.[27][30]

The Bent decision is significant because it represents the Ninth Circuit's explicit disagreement with the BIA's mischaracterization of California law and effectively requires immigration authorities to recognize that a conviction vacated under California Penal Code section 1473.7 due to a substantive or procedural defect in the original criminal proceeding is no longer a valid conviction for any immigration purpose, regardless of whether the defendant also cited immigration consequences as part of the basis for the motion.[27][30]

Additionally, the Ninth Circuit has recognized that convictions vacated under California Penal Code section 1018 based on substantive and procedural defects should also be given immigration effect.[49][52] In *Ballinas-Lucero v. Garland*, the court concluded that the grounds for allowing withdrawal of a guilty plea under section 1018 are substantive and procedural defects in the underlying proceeding, and that when a defendant's motion to withdraw a plea asserts such defects-including failure to advise of immigration consequences-the conviction is vacated based on a legal defect and should therefore be recognized as eliminated for immigration purposes.[49][52]

This evolution in Ninth Circuit precedent has major practical implications for Northern California practitioners. The federal government's position that state courts lack authority to eliminate convictions for immigration purposes has been repudiated by controlling circuit precedent. Immigration judges in the Ninth Circuit must now recognize that state court vacatures based on substantive or procedural defects eliminate convictions for immigration purposes, even if the defendant's stated motivation was immigration-related hardship.

The Categorical Approach and Divisibility Analysis: Technical Frameworks for Analyzing Convictions

For practitioners seeking to challenge convictions as not triggering immigration consequences, understanding the categorical approach and divisibility analysis is essential. These frameworks determine whether a particular state conviction falls within the federal definitions of crimes triggering immigration consequences.

The categorical approach requires that immigration adjudicators examine only the statutory elements of the offense of conviction, not the specific facts of the defendant's conduct, to determine whether the conviction categorically matches a federal removal ground.[51][54][56] This "elements-based" analysis means that counsel drafting charging documents, plea agreements, and motions to vacate must be extremely careful about how the offense is characterized and what elements are specified in charging documents and court records.[51][54][56]

When a statute is not divisible-meaning it does not specify alternative elements but instead describes a single set of elements (even if those elements can be satisfied in multiple ways)-an immigration adjudicator must determine whether every possible way of violating the statute would satisfy the federal definition.[51][54][56] If the statute is broader than the federal definition, or if any way of violating the statute does not satisfy the federal definition, then the statute as a whole does not categorically match and convictions under the statute do not trigger the immigration consequence.[51][54][56] This can be hugely advantageous to immigrants.

Conversely, when a statute is divisible-meaning it specifies alternative elements such that different applications of the statute might involve different elements-immigration adjudicators may apply the "modified

categorical approach" and examine limited documents from the record of conviction (specifically, the charging document, plea agreement, and sentencing order) to determine which specific version of the statute the defendant was convicted under.[51][54][56] These limited documents are called the "reviewable record of conviction" and traditionally have consisted of documents identified by the Supreme Court in the Shepard case.

The burden of proof for whether a conviction triggers an immigration consequence depends on the context. When the issue is whether a noncitizen is deportable, the government bears the burden of proving deportability by a preponderance of the evidence; if the record of conviction is inconclusive as to which offense was charged under a divisible statute, the government cannot meet its burden and the person is not deportable.[51][56] However, when a noncitizen is applying for relief from deportation and the question is whether a conviction is a bar to eligibility, the Supreme Court has held that the applicant bears the burden of proving eligibility, and an inconclusive record of conviction will therefore preclude a finding of eligibility.[51][56]

These analytical frameworks are critical for counsel drafting plea agreements and seeking to protect immigrants from immigration consequences. By ensuring that the offense is pled to a statute that does not categorically match the federal definition, or by creating an inconclusive record when the statute is divisible and the government bears the burden, counsel can eliminate or substantially complicate an immigration consequences. For example, theft offenses become aggravated felonies only when a sentence of one year or more is imposed, so negotiating a sentence of less than one year (such as 364 days) avoids the aggravated felony classification. Similarly, for crimes of violence with federal employment criteria, counsel can ensure that the record does not specify the application of all required elements.

San Francisco-Specific Implementation Considerations: Courts, Asylum Office, and Enforcement Patterns

The implementation of post-conviction relief in the San Francisco region must account for the specific procedures and characteristics of the San Francisco Immigration Court, the San Francisco Asylum Office, and the enforcement patterns of Immigration and Customs Enforcement (ICE) Field Office 1, which covers Northern California. While Penal Code section 1473.7 motions are filed in California Superior Court, the ultimate benefit of such motions depends on timely assertion in immigration proceedings, and practitioners must coordinate criminal and immigration strategies carefully.

The San Francisco Immigration Court, with locations at 100 Montgomery Street and 630 Sansome Street in San Francisco and a hearing location in Concord, handles removal proceedings for immigrants in the Northern California region.[1][17][26] The court's judges have developed individual practices and preferences regarding continuances, evidence submission, and the weight afforded to state court orders. While the Ninth Circuit's controlling precedent in *Bent v. Garland* should guide all immigration judges, practitioner awareness of individual judge tendencies can inform strategy regarding timing of motions and presentation of evidence.

Removal proceedings typically begin with a Notice to Appear (NTA), after which a Master Calendar Hearing is scheduled before an immigration judge.[14][17] At the Master Calendar Hearing, the respondent can request a continuance to pursue relief or to obtain legal representation.[17] A respondent who has grounds to vacate a conviction should typically seek a continuance at the Master Calendar stage in order to pursue post-conviction relief, then seek to reopen proceedings once the conviction is vacated. The Board of Immigration Appeals has held that untimeliness of a motion to reopen is subject to equitable tolling, particularly when a respondent was diligently pursuing post-conviction relief.[21]

The San Francisco Asylum Office, which has jurisdiction over asylum applications in Northern California, has developed specific interview patterns and procedures. While asylum eligibility is not directly affected by criminal convictions in the same way that removal eligibility is, any pending criminal charges or convictions can impact credibility determinations and admissibility findings. Counsel should be aware that a conviction for a crime of moral turpitude involving fraud or willful misrepresentation can render an asylum applicant inadmissible even if the conviction would not otherwise trigger deportability. Additionally, asylum applicants with aggravated felony convictions are statutorily barred from asylum eligibility. Therefore, vacating a conviction prior to an asylum interview can be critically important.

ICE Field Office 1 covers Northern California and has enforcement priorities that affect the likelihood of detention and removal proceedings. Practitioners should be aware that even minor criminal histories can trigger ICE enforcement action. When an individual is arrested on a criminal charge, ICE detainers may be issued, and the individual may be detained in ICE custody pending removal proceedings. In such circumstances, the ability to quickly obtain a post-conviction motion to vacate can be the difference between release and continued detention.

California state law also interacts with federal immigration law in important ways. Penal Code section 1473.7 can be invoked to challenge convictions even after the individual has been deported or is serving a removal sentence, providing a potential pathway to reopen removal proceedings. Additionally, California Proposition 64 (the Adult Use of Marijuana Act) allows for modification of certain marijuana convictions, and practitioners should be aware that such modifications under certain provisions may not trigger the restrictions imposed by *Matter of Thomas and Thompson* because they involve changes to the maximum possible sentence rather than the imposed sentence.

Procedural Roadmap for Relief: Filing, Timing, and Evidentiary Requirements

Pursuing post-conviction relief requires careful attention to procedural requirements, filing deadlines, and evidentiary standards. The procedural path differs depending on which post-conviction statute applies and the individual's current immigration status.

For Penal Code section 1473.7 motions, the statute specifies that the motion must be filed with "reasonable diligence" after the moving party receives either a Notice to Appear in immigration court or a final removal order based on the conviction.[4][21][24] The Court of Appeal has clarified that "reasonable diligence" is not a strict requirement but rather a condition that, if satisfied, requires the trial court to grant a meritorious motion; conversely, if the condition is lacking, the court has discretion to either consider the merits or deny the motion on timeliness grounds.[21] Importantly, when the individual's triggering events (such as conviction) predate the enactment of section 1473.7, courts evaluate reasonable diligence from the point when the individual became aware of the existence of new legal grounds for relief, such as receipt of a Notice to Appear or learning about the statute's availability.[21]

The motion must be filed in the Superior Court in which the conviction was entered.[4][24] Standard practice suggests serving the District Attorney two weeks prior to the hearing, though counsel should consult local rules for specific requirements.[4][24] California Civil Code section 1005 governs the timing of motion filing and service, and failure to comply with these procedures may result in denial of the motion on procedural grounds independent of the merits.

The motion must establish, by a preponderance of the evidence, that the conviction 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.[4][25] The prejudice

can be established by demonstrating that the defendant would have chosen to lose the benefits of the plea bargain despite the possibility or probability that deportation would otherwise follow.[25] Evidence of prejudice can include declarations from the defendant, testimony regarding the defendant's specific immigration circumstances, evidence of family ties and hardship, and expert testimony regarding immigration law if necessary.

For Penal Code section 1016.5 motions, the requirements are somewhat different. The moving party must show that the court failed to give the mandatory statutory advisement before accepting the plea, and that the conviction may subject the defendant to deportation, exclusion from admission, or denial of naturalization.[2][5] If the defendant was advised but the record does not reflect that advisement, the defendant may still obtain relief-the statute requires not only that the court provide the advisement but also that it maintain a record that it did so.[2][5] Courts have held that a preprinted minute order form stating generically that "citizenship/alien advisements were given" is insufficient; rather, the record must reflect the specific advisement provided to the noncitizen defendant.

For Penal Code section 1018 motions (withdrawal of plea for good cause), the motion must generally be filed prior to sentencing or within six months of being placed on probation.[20][23] Good cause includes failure to advise of immigration consequences, and the motion should reference the specific facts showing that the defendant was not adequately advised and did not understand the immigration consequences of the plea.[20][23]

For Penal Code section 1203.43 motions (DEJ relief), the motion is more straightforward. Upon request of the defendant, the court "shall" withdraw the guilty plea if the defendant was granted DEJ on or after January 1, 1997, performed satisfactorily during the period in which DEJ was granted, and had the charges dismissed pursuant to Penal Code section 1000.3.[10][23] No showing of prejudice or reliance is required; the relief is automatic upon proof of the statutory elements. If court records are no longer available, the defendant's sworn declaration that charges were dismissed after completing DEJ is presumed true if the defendant submits a state summary criminal history showing successful completion or an incomplete record.[10]

The evidentiary standard for section 1473.7 motions is important. Counsel should gather evidence establishing the following elements: first, that the defendant did not receive proper advisement regarding immigration consequences or received deficient advice; second, that counsel failed to investigate and defend against immigration consequences through plea bargaining; third, that the defendant did not meaningfully understand the immigration consequences despite any advisement received; and fourth, that the defendant was prejudiced by these errors or omissions. Evidence sources include declarations from the defendant and members of the defense team, expert declarations regarding immigration law and the immigration consequences of the specific conviction, family declarations regarding the defendant's ties and potential deportation hardship, country conditions documentation if asylum or CAT claims would otherwise be available, and expert testimony regarding the defendant's credibility and understanding.

Timely assertion of post-conviction relief is critical when the individual is facing or in removal proceedings. Immigration courts have authority to stay removal proceedings pending resolution of post-conviction motions, and practitioners should request such stays when appropriate. Additionally, once a conviction is vacated, the respondent should immediately file a motion to reopen removal proceedings if they have already been denied relief based on the conviction.

Strategic Analysis and Risk Assessment: Evaluating Claims and Selecting Remedies

The evaluation of whether an individual should pursue post-conviction relief requires careful analysis of the

strength of claims, the immigration consequences at stake, and the practical benefits and risks of relief. This section outlines the analytical framework counsel should employ.

First, counsel must determine which post-conviction statute applies to the individual's circumstances. If the conviction resulted from a plea to which the defendant was not given the mandatory immigration advisement (or a record was not kept), Penal Code section 1016.5 is the most straightforward vehicle for relief. If the defendant successfully completed DEJ, section 1203.43 provides automatic relief without need to show prejudice. If the conviction resulted from a plea entered within six months before or after probation was imposed and the defendant was inadequately advised of immigration consequences, section 1018 may provide a more rapidly available remedy than section 1473.7.

If none of these more specific statutes apply, section 1473.7 should be evaluated. The strength of a section 1473.7 claim depends on the evidence that can be gathered regarding the defendant's lack of understanding of immigration consequences and the deficiency of counsel's advice. Strong claims are those where: the defendant's immigration consequences were severe (e.g., certain deportation); counsel provided virtually no immigration advice or provided clearly incorrect advice; the defendant's own testimony regarding lack of understanding is credible; and the defendant can demonstrate that had counsel provided proper advice, the defendant would have pursued different options (such as a plea to a non-deportable offense or proceeding to trial).

Medium-strength claims are those where counsel did provide some advice but it was incomplete or vague, or where the defendant's understanding is questionable but evidence exists supporting the defendant's credibility and the severity of consequences. Weak claims are those where the court provided a statutory advisement, counsel provided reasonable advice (even if not perfectly comprehensive), and the defendant's ability to demonstrate lack of understanding is limited. In evaluating strength, counsel should also consider whether the conviction is currently being used as a basis for deportation or whether it may be used as a basis for future removal.

The benefit of obtaining relief varies depending on the conviction's current use. If the conviction is the basis for a charge of removability in pending removal proceedings, vacating the conviction eliminates that charge entirely, which can be outcome-determinative. If the conviction serves as a bar to relief that the defendant would otherwise qualify for (such as asylum), vacating the conviction can restore access to that relief. If the conviction is an "old" conviction not currently impacting the defendant's immigration status, relief may be less immediately pressing but should still be pursued when reasonably available because future immigration benefits or changes in circumstance could trigger the consequences.

Counsel should also consider risks of pursuing relief. The primary risk is judicial denial of the motion on timeliness or other procedural grounds, which might foreclose other remedies and could potentially impact the defendant's credibility. Another risk is that in the course of proceedings, additional facts come to light that could be used against the defendant—for example, if the defendant testifies and provides statements inconsistent with prior representations to immigration authorities. Additionally, in rare cases, vacating one conviction might expose a defendant to additional consequences related to a second or prior conviction that the first conviction was masking.

The analysis should also account for the defendant's current immigration status and the form of any pending proceedings. An individual in removal proceedings who has viable claims for other relief (such as asylum) should coordinate the timing of post-conviction relief with asylum interviews or hearing schedules. An individual applying for benefits (such as naturalization) should pursue relief prior to submission of the benefit application if the conviction bars the benefit. An individual with no pending immigration proceedings should

still pursue relief when reasonably available, as the availability of relief may change with passage of time or changes in law.

Finally, counsel should evaluate whether vacating a particular conviction creates new opportunities or risks. For example, a defendant with two CIMT convictions is deportable under a "two CIMT" ground regardless of timing; vacating one conviction might eliminate deportability under this ground entirely. Conversely, if a defendant is deportable under multiple independent grounds (such as an aggravated felony conviction and a separate CIMT conviction), vacating only one may not eliminate overall deportability.

Preservation and Appeal Considerations: Building Records for Federal Court Review

When post-conviction relief is denied or granted in a limited fashion, counsel must carefully preserve the record for federal court review and evaluate whether appellate or collateral remedies are available.

Additionally, immigration practitioners who are representing individuals in removal proceedings should be aware of strategies for preserving the issue for federal court review, including through the immigration court proceeding itself.

In criminal court, if a trial court denies a section 1473.7 motion, counsel should file a notice of appeal immediately. The appellate court will review the trial court's factual findings for an abuse of discretion and will review the trial court's legal determinations de novo. The Court of Appeal has been receptive to arguments that trial courts incorrectly applied the section 1473.7 framework or failed to properly credit evidence of the defendant's lack of understanding. Additionally, under California Rules of Court Rule 3.1300(d), even late-filed papers may be considered at the trial court's discretion if filed in good faith, so counsel should not assume that strict compliance with all procedural requirements is a complete bar to relief.

In removal proceedings, if immigration relief is denied based on a conviction and the respondent has grounds to vacate that conviction, counsel should move to reopen the removal proceedings under 8 U.S.C. section 1229a(c)(7), which permits the Board of Immigration Appeals to reopen proceedings to consider new evidence or changed circumstances. The motion to reopen must be filed within 90 days of the final order of removal unless the applicant demonstrates changed country conditions or changed personal circumstances. Importantly, the unavailability of a state court remedy (such as the passage of a reasonable diligence period) can also constitute changed circumstances warranting reopening.

The Ninth Circuit has also recognized that equitable tolling may apply to untimely motions to reopen when the respondent was diligently pursuing post-conviction relief. In *Bent v. Garland*, the Ninth Circuit emphasized that the BIA must properly assess whether the respondent exercised reasonable diligence and must not simply deny motions to reopen as untimely without considering equitable tolling. This opens a significant avenue for relief even when strict compliance with reopening timelines was not achieved.

Additionally, immigration counsel should preserve the record regarding the conviction and the circumstances surrounding the plea. The immigration judge should be presented with evidence establishing that the original conviction was obtained without proper advisement of immigration consequences or based on deficient counsel, even if the motion to vacate is pending in state court. This creates a complete record in the immigration proceeding that can support reopening or appeal if the state court later grants relief.

Ethical and Professional Conduct Considerations: Duty and Conflict Management

Representing noncitizen clients requires compliance with both criminal and immigration law ethical rules and demands careful attention to conflicts of interest. California Rules of Professional Conduct apply to all

counsel, whether practicing criminal, immigration, or both. Several key principles are relevant to this practice area.

First, counsel must avoid dual representation that creates conflicts. When a criminal defense attorney proposes to represent a client in both criminal and immigration proceedings, the attorney must carefully consider whether any potential conflict exists. For example, if the client faces charges and also has removal proceedings pending, the client's interests in the criminal case (such as contesting charges or pursuing a particular plea) might conflict with interests in the immigration case (such as seeking particular sentences or convictions to minimize immigration impact). Counsel should disclose these potential conflicts and obtain informed written consent if representation proceeds.

Second, counsel must be competent to advise regarding immigration consequences. The Padilla decision recognized that defense counsel have a duty to advise regarding immigration consequences, but counsel need not be an immigration law expert; counsel must be sufficiently competent to provide the client with specific, accurate information about the likely consequences. Counsel who lacks this competence should either acquire it or consult with an immigration specialist before advising the client. Many public defenders' offices in California now have immigration law specialists who can assist with these determinations.

Third, counsel must be candid with clients and candid with tribunals. If counsel is aware that a particular plea will have severe immigration consequences, counsel must advise the client specifically of those consequences rather than providing generic warnings. Additionally, if counsel is aware that a post-conviction motion has legal merit, counsel should assist the client in pursuing it or should explain clearly why counsel believes it lacks merit. The failure to do so may constitute ineffective assistance of counsel.

Fourth, counsel should be aware of the duty of confidentiality. If a client discloses information about immigration status or family circumstances in the course of criminal representation, that information is protected by attorney-client privilege and work product doctrine (to the extent applicable). However, counsel must also be aware that information disclosed in criminal court proceedings may be discoverable in immigration proceedings, particularly if the client testifies or if documents are made part of the public record.

Fifth, counsel should understand the scope of representation and communicate clearly with clients about what matters counsel will handle and what matters require additional counsel. For example, a criminal defense attorney should not represent a client in removal proceedings unless the attorney is licensed to practice immigration law (either as an attorney or as a recognized representative under 8 C.F.R. section 1292.1). Where immigration counsel will be involved, the criminal attorney should coordinate with immigration counsel and should not make commitments about immigration matters without consulting immigration counsel.

Risk Warnings and Important Disclaimers: Understanding Limitations and Uncertainties

Post-conviction relief motions, while powerful tools, come with significant limitations and risks that counsel must communicate clearly to clients. This section outlines important limitations and caveats.

First, vacating a conviction in state court does not automatically eliminate all immigration consequences. While a conviction vacated due to a legal defect in the proceedings is eliminated for deportability purposes, some immigration consequences are based on conduct rather than convictions. For example, if a noncitizen engaged in drug trafficking even without a conviction, the noncitizen might be deportable based on the conduct itself. Additionally, if a noncitizen has multiple convictions and multiple removal grounds exist, vacating one conviction might not eliminate overall deportability.

Second, the reasonable diligence requirement in Penal Code section 1473.7 can preclude relief if too much time passes. While courts have been relatively generous in interpreting this requirement, there is a risk that a trial court will find the motion untimely. Counsel should not delay in pursuing such motions once a client becomes aware of potential grounds for relief.

Third, pursuing post-conviction relief can sometimes "awaken" immigration enforcement. If a defendant who was previously not in removal proceedings files a post-conviction motion and the motion is publicized or becomes known to immigration authorities, ICE might initiate enforcement action. While this risk should not deter pursuing meritorious relief, counsel should advise clients of the possibility.

Fourth, success in obtaining a post-conviction motion to vacate is not guaranteed. Courts deny many section 1473.7 motions, sometimes on the grounds that the defendant did not adequately demonstrate lack of understanding of immigration consequences or that the defendant's conduct shows reliance on the plea despite knowledge of potential consequences. Counsel should be frank with clients about the realistic probability of success based on the specific facts and evidence available.

Fifth, even if a conviction is vacated, the prosecution may seek to reindict or re-prosecute the defendant. While counsel should be prepared to defend against such re-prosecution, clients should understand that vacating a conviction does not necessarily result in dismissal of the underlying charges.

Sixth, the law regarding post-conviction relief is still evolving, and recent favorable decisions like *Bent v. Garland* have only recently been issued. Trial courts and immigration judges may not yet have fully internalized these decisions. Counsel should be prepared to educate courts about controlling Ninth Circuit precedent and to distinguish contrary authority from other circuits.

Finally, counsel should understand the limitations of the federal law framework. Even if a conviction is vacated or modified to avoid one immigration consequence, other provisions of immigration law might still render the client deportable or inadmissible. For example, clients might be deportable based on unlawful entry, visa violations, or other grounds unrelated to criminal convictions. Vacating a conviction should always be part of a comprehensive immigration strategy, not viewed as a complete solution to all immigration problems.

Conclusion: Integration of Criminal and Immigration Strategy

The intersection of California criminal law and federal immigration law creates a complex but increasingly favorable landscape for post-conviction relief. The evolution of law over the past fifteen years—from the Padilla decision establishing the duty of criminal defense counsel, through the California Legislature's enactment of section 1473.7, to recent Ninth Circuit decisions in *Bent v. Garland* clarifying federal recognition of state court vacatures—demonstrates a growing judicial and legislative commitment to ensuring that convictions obtained without proper understanding of immigration consequences do not irreversibly alter an immigrant's legal status.

For practitioners serving immigrant clients, the key principles are: first, early and careful investigation of criminal charges to identify immigration-safe plea options; second, aggressive advocacy for counsel's duty to advise regarding and defend against immigration consequences; third, immediate pursuit of post-conviction relief when grounds exist; fourth, close coordination between criminal and immigration counsel to ensure that relief is obtained and timely asserted; and fifth, strategic presentation of evidence in immigration proceedings to support recognition of the legal defects that resulted in relief.

The analysis provided in this report should serve as a foundation for attorneys undertaking this work. The statutory framework is clear, the controlling Ninth Circuit precedent is favorable, and the practical tools for relief are available. What remains is thorough, competent lawyering that serves immigrants' interests by ensuring that convictions are obtained in compliance with constitutional and statutory requirements and that unlawful convictions are challenged and vacated before they can serve as the basis for removal from the United States and separation from families and communities.

Appendix: Key Statutory Citations and Controlling Legal Authority

California Penal Code Provisions

California Penal Code Section 1473.7 - Motion to vacate conviction or sentence based on legal invalidity due to prejudicial error affecting understanding of immigration consequences or newly discovered evidence of actual innocence.

California Penal Code Section 1016.5 - Court advisement regarding immigration consequences before acceptance of plea of guilty or nolo contendere.

California Penal Code Section 1018 - Withdrawal of plea for good cause.

California Penal Code Section 1203.43 - Vacatur of conviction for deferred entry of judgment based on misinformation regarding immigration consequences.

California Penal Code Section 745 - Racial Justice Act-protection against conviction or sentencing based on race, ethnicity, or national origin.

Federal Immigration Law Provisions

8 U.S.C. § 1101(a)(43) - Definition of aggravated felony.

8 U.S.C. § 1101(a)(48) - Definition of conviction for immigration purposes.

8 U.S.C. § 1227(a)(2) - Grounds of deportability including crimes of moral turpitude, controlled substances, domestic violence, and crimes of violence.

8 U.S.C. § 1158(b)(2)(B) - Bars to asylum eligibility including conviction of particularly serious crime.

8 C.F.R. § 1240.8 - Burden of proof in deportation proceedings.

Board of Immigration Appeals Precedent

Matter of Pickering, 23 I&N Dec. 621 (BIA 2003) - Convictions vacated based on rehabilitation or immigration hardship are not eliminated for immigration purposes; only vacatures based on procedural or substantive defects are effective.

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.

Matter of Thomas and Thompson, 27 I&N Dec. 674 (A.G. 2019) - State court sentence modifications have immigration effect only when based on procedural or substantive defect in underlying criminal proceeding, not for rehabilitative or immigration hardship reasons.

Ninth Circuit Court of Appeals Precedent

Bent v. Garland, No. 22-1910 (9th Cir. 2024) - California Penal Code section 1473.7 provides for vacatur based on legal defect in proceedings, not solely to mitigate immigration consequences; vacatures based on such defects eliminate convictions for immigration purposes.

Ballinas-Lucero v. Garland, 44 F.4th 1169 (9th Cir. 2022) - Convictions withdrawn under Penal Code section 1018 based on substantive and procedural defects are eliminated for immigration purposes.

Padilla v. Kentucky, 559 U.S. 356 (2010) - Sixth Amendment requires defense counsel to provide affirmative, competent advice regarding immigration consequences of guilty plea.

California Court of Appeal Decisions

People v. Camacho, 2017 - Defendant need not establish ineffective assistance of counsel for section 1473.7 relief; prejudice shown by demonstrating defendant would not have entered plea if properly informed of consequences.

People v. Rodriguez, 2021 - Defendant who was advised at plea that conviction "will" result in deportation but did not meaningfully understand consequences is entitled to section 1473.7 relief.

People v. Alatorre, Fourth Appellate District - Reasonable diligence requirement evaluated from point when defendant became aware of new legal grounds for relief, not from date of original conviction.

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