SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	AB 813	**Hearing Date:**	July 7, 2015
Author:	Gonzalez		
Version:	June 22, 2015		
Urgency:	No	**Fiscal:**	No
Consultant:	MK		

Subject: ***Criminal Procedure: Post-Conviction Relief***

HISTORY

Source: American Civil Liberties Union
California Attorneys for Criminal Justice
California Public Defenders Association

Prior Legislation: None

Support: Alameda County Public Defender; California Immigrant Policy Center; Coalition for Humane Immigrant Rights of Los Angeles; Immigrant Defense Project; Immigrant Legal Resource Center; The Immigrant Rights Clinic at the University of California Irvine School of Law; Lawyers Committee of Civil Rights of the SF Bay Area; Legal Services for Prisoners with Children; The National Day Laborer Organizing Network; Pangea Legal Services; Public Counsel; Root and Rebound; Rubicon Programs

Opposition: Alameda County District Attorney; Judicial Council of California (unless amended)

Assembly Floor Vote: 65 - 11

PURPOSE

The purpose of this bill is to create a mechanism of post-conviction relief for a person to vacate a conviction or sentence based on error damaging his or her ability to meaningfully understand, defend against, or knowingly accept the immigration consequences of the conviction.

Existing law requires a court before accepting a plea to advise a criminal defendant as follows:

"If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." (Penal Code § 1016.5 (a).)

Existing law permits a defendant to make a motion to withdraw his or her plea if the court fails to admonish him or her about the possible immigration consequences of entering the plea. (Penal Code, § 1016.5 (a).)

Existing law permits a defendant to move to withdraw a plea at any time before judgment, or within six months after an order granting probation when the entry of judgment is suspended, or if the defendant appeared without counsel at the time of the plea. (Penal Code § 1018.)

Existing law allows every person unlawfully imprisoned or restrained of his or her liberty to prosecute a writ of habeas corpus to inquire into the cause of his or her restraint. (Penal Code § 1473 (a).)

Existing law authorizes a person no longer unlawfully imprisoned or restrained to prosecute a motion to vacate the judgment based on newly discovered evidence, as specified, if the motion is brought within one year of the discovery. (Pen. Code, § 1473.6.)

Existing federal law lists several categories of crimes which render a non-citizen removable from the United States, including: crimes of moral turpitude; aggravated felony convictions; domestic violence convictions; firearm convictions, and drug convictions. (INA § 237(a)(2), see also 8 U.S.C. § 1227(a)(2).)

Existing federal law lists several categories of crimes which will render a non-citizen inadmissible to the United States, including: crimes of moral turpitude; drug convictions; and prostitution convictions. (INA § 212(a)(2), see also 8 U.S.C. § 1182(a)(2).)

This bill permits a person no longer imprisoned or restrained to file a motion to vacate a conviction or sentence for either of the following reasons:

- 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; or,
- Newly discovered evidence of actual innocence exists which requires vacation of the conviction or sentence as a matter of law or in the interests of justice.

This bill provides that a motion to vacate be filed with reasonable diligence after the later of the following:

- 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;
- The date a removal order against the moving party, based on the existence of the conviction or sentence, becomes final;

This bill provides that the motion shall be filed without undue delay from the date of 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.

This bill entitles the moving party to a hearing; however, at the request of the moving party, the court may hold the hearing without his or her personal presence if counsel for the moving party is present and the court finds good cause as to why the moving party cannot be present.

This bill requires the court to 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 specified grounds for relief.

This bill requires the court when ruling on the motion to specify the basis for its conclusions.

This bill provides that 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.

This bill permits an appeal from an order granting or denying a motion to vacate the conviction or sentence.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity."(Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

> California lags far behind the rest of the country in its failure to provide its residents with a means of challenging unlawful convictions after their criminal sentences have been served. Forty-four states and the federal government all provide individuals with a way of challenging unjust convictions after criminal custody has ended. In California, however, individuals who gain access to evidence of actual innocence - or to proof of a defect in the underlying criminal proceeding - have no way to present this evidence before the court after criminal custody has expired.
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> This omission has a particularly devastating impact on California's immigrant community. Since 1987, California law has required defense counsel to inform non-citizen defendants about the immigration consequences of convictions. However, many defense attorneys still fail to do so. Many immigrants suffer convictions without having any idea that their criminal record will, at some point in the future, result in mandatory immigration imprisonment and deportation, permanently separating families.
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> While the criminal penalty for a conviction is clear, the immigration penalty can remain "invisible" until an encounter with the immigration system raises the issue. For many immigrants, the first time they learn of the immigration consequences of a conviction can occur years after they have successfully completed their criminal sentence when Immigration and Customs Enforcement initiates removal proceedings. Challenging the unlawful criminal conviction is often the only remedy available to allow immigrants an opportunity to remain with their families in the United States. Yet, in California, affected individuals have no way of challenging their unjust convictions once probation ends, because they no longer satisfy habeas corpus' strict custody requirements. Californians are thus routinely deported on the basis of convictions that never should have existed in the first place.
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> AB 813 will fill a gap in California criminal procedure by providing a means for people to challenge their legally invalid convictions. The proposal does not

guarantee an automatic reversal of the conviction, but an opportunity to present a case in front of a judge.

2. *People v. Kim* (2009) 45 Cal.4th 1078

Kim was a legal resident, but not a citizen of the United States, when he suffered multiple criminal convictions. The federal government sought to deport him based on the convictions, and Kim petitioned for a writ of error coram nobis, seeking to vacate the convictions which triggered the deportation proceedings based on his unawareness of the immigration consequences of his plea. The California Supreme Court granted review to address whether persons in similar situations are entitled to have their guilty pleas vacated by a writ of error coram nobis. (*Id*. at p. 1084.)

The Supreme Court observed, the writ of coram nobis is granted only when three requirements are met. First, the petitioner must demonstrate that some fact existed which, through no fault or negligence on his part, was not presented to the court at the trial, and which if presented would have prevented the rendition of the judgment. Next, the petitioner must show that the newly discovered evidence does not go to the merits of issues tried because issues of fact, once adjudicated, even if incorrectly, cannot be reopened except on motion for new trial. This requirement applies even though the evidence in question is not discovered until after the deadline for filing a motion for new trial time or after the motion has been denied. Finally, the petitioner must show that the relied-upon facts were not known to him or her and could not in the exercise of due diligence have been discovered at any time substantially earlier than the time of the motion for the writ. (*People v. Kim*, *supra*, 45 Cal.4th at pp. 1092-1093, citing *People v. Shipman* (1965) 62 Cal.2d 226.)

The Court held that Kim was ineligible for a coram nobis relief. Kim was put on notice of the possible immigration consequences pertaining to the plea agreement. The fact that the actual immigration consequences of the plea were unknown to the court and the parties was a mistake of law, not a mistake of fact. Kim's claim amounted to a claim of ineffective assistance of counsel, which is not reviewable by way of writ of coram nobis. Here, Kim's contention was not a basic flaw which would have prevented rendition of the judgment, but rather facts which went to the legal effect of the judgment. (*People v. Kim*, *supra*, 45 Cal.4th at pp. 1102-1103.) In *Kim*, the Court concluded by noting, "[T]he Legislature has been active in providing statutory remedies when the existing remedies such as habeas corpus have proven ineffective. Section 1016.5 especially shows the Legislature's concern that those who plead guilty or no contest to criminal charges are aware of the immigration consequences of their pleas. Because the Legislature remains free to enact further statutory remedies for those in defendant's position, we are disinclined to reinterpret the historic writ of error coram nobis to provide the remedy he seeks." (*People v. Kim*, *supra*, 45 Cal.4th at p. 1107.)

3. Motion for Post-Conviction Relief

This bill creates a new mechanism for post-conviction relief for a person who is no longer in actual or constructive custody. Specifically, it allows a person to move to vacate a conviction due to error affecting his or her ability to meaningfully understand, defend against, or knowingly accept the actual or potential immigration consequences of the conviction.

In *Padilla v. Kentucky* (2010) 559 U.S. 356, the United States Supreme court held that the Sixth Amendment requires defense counsel to provide affirmative and competent advice to noncitizen

defendants regarding the potential immigration consequences of their criminal cases. (*Id*. at p. 360.) Specifically, the United States Supreme Court held that defense counsel is constitutionally deficient if there is a failure to advise a noncitizen client entering a plea to a criminal offense of the risk of deportation. "Deportation as a consequence of a criminal conviction has become an integral part of the penalty for a criminal conviction for noncitizens, sometimes the most important part. (*Id*. at p. 364.) The court's holding is not limited to only affirmative mis-advice of the consequence because that would encourage defense counsel to remain silent on a matter of great importance to a noncitizen client, and that would be inconsistent with counsel's duty to provide advice to a client considering the advantages and disadvantages of a plea agreement. (*Id.* at pp. 370-371.)

A criminal defendant who is no longer in "custody" for purposes of the writ of habeas corpus, can move to withdraw a guilty plea if the trial court accepting the plea, failed to admonish the defendant of the possible immigration consequence of the plea under Penal Code section 1016.5. There is no time limit within which such a motion must be filed, but there is a due diligence requirement. (*People v. Zamudio* (2000) 23 Cal.4th 183.) However, the grounds for this basis of relief are quite limited. It is only available where the *court* fails to give the general admonishment or the record is silent on the matter. (*People v. Martinez* (2013) 57 Cal.4th 555, 565.)

At this time, under California law, there is no vehicle to for a person who is no longer in actual or constructive custody to challenge his or her conviction based on a mistake of law regarding immigration consequences or ineffective assistance of counsel in properly advising of these consequences when the person learns of the error post-custody. The *Padilla* case requiring that a defense counsel properly advise a person on immigration consequences was subsequent to the California decision in *Kim* prohibiting the use of *corum nobis* and so this bill would create a mechanism for post-conviction relief where there is not one currently.

4. Support

The Alameda County Public Defender supports this bill stating:

> Currently, only people who are in prison, on parole or on probation may ask a court to review the validity of their conviction. People with old convictions—who long ago completed their sentence and have become productive members of society—have not way to raise a claim of innocence or otherwise challenge the legal validity of the convictions. California is one of the very few states that lacks a vehicle for post-custodial review. In fact, forty-four other states and the federal government all provide individuals with a way of challenging unjust convictions after criminal custody has ended.
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> This deficiency in current law has a particularly devastating impact on California's immigrant communities. While the criminal penalty for a conviction is obvious and immediate, the immigration penalty can remain "invisible" until an encounter with the immigration system raises the issue. Since 1987, California law has required defense counsel to inform noncitizen defendants about the immigration consequences of convictions. But, despite this requirement, some defense attorneys still fail to do so. Immigrants may only find out that their conviction makes them deplorable when, years later, Immigration and Customs Enforcement initiates removal proceedings. By then, however, it is too late. Without any vehicle to

> challenge their convictions in state court, immigrants are routinely deported on the basis of conviction that never should have existed in the first place.

5. Opposition

The Alameda County District Attorney opposes this bill stating:

> I oppose this bill for many reasons. The first is that existing law already creates a mechanism for a person to seek relief if they did not know their immigration consequences of a conviction. Second, this bill requires all motions shall be entitled to a hearing which removes the discretion from the court to have a hearing because there is not requirement of showing or new evidence. Also this new hearing also doesn't require the defendant to be present for the hearing so who is going to testify that he or she didn't understand their immigration consequences.

6. Related Legislation

AB 267 (Jones-Sawyer) would require the court, prior to the acceptance of a guilty plea to a felony offense, to inform the defendant of the various consequences that may result from conviction of a felony. AB 267 passed this Committee on June 16.

AB 1343 (Thurmond) would require defense counsel to provide accurate and affirmative advice to a defendant regarding the potential immigration consequences of a proposed disposition and attempt to defend against those consequences. AB 1343 will be heard in this Committee today.

AB 1352 (Eggman) would require the court to allow a defendant to withdraw his or her plea in a deferred entry of judgment case in order to avoid specified adverse consequences, including deportation. AB 1352 (Eggman) is set to be heard in this committee on July 14th.

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