
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 2867 **Hearing Date:** June 12, 2018
Author: Gonzalez Fletcher
Version: June 4, 2018
Urgency: No **Fiscal:** No
Consultant: SC

Subject: *Criminal Procedure: Postconviction Relief*

HISTORY

Source: American Civil Liberties Union of California
Immigrant Legal Resource Center
California Public Defenders Association
California Attorneys for Criminal Justice

Prior Legislation: AB 813 (Gonzalez), Ch. 739, Stats. 2016

Support: Asian Americans Advancing Justice – California; Californians for Safety and Justice; California Immigrant Policy Center; Centro Legal de la Raza; Communities United for Restorative Youth Justice; Community Legal Services in East Palo Alto; Courage Campaign; Dolores Street Community Services; East Bay Community Law Center; Ella Baker Center on Human Rights; Immigrant Defenders Law Center; Legal Services for Prisoners with Children; National Association of Social Workers – California Chapter; A New Way of Life Re-Entry Project; Pangea Legal Services; Root & Rebound; Rubicon Programs; Santa Clara County Office the Public Defender; Services, Immigrant Rights, and Education Network (SIREN); Social Justice Collaborative; Somera, Freeman & Cervantes; UC Irvine School of Law Criminal Justice Clinic; UC Irvine School of Law Immigrant Rights Clinic; The W. Haywood Burns Institute; one individual

Opposition: None known

Assembly Floor Vote: 59 - 1

PURPOSE

The purpose of this bill is to clarify the timing and procedural requirements of motions for post-conviction relief that are based on a legal error regarding a defendant's comprehension of immigration consequences stemming from his or her 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." (Pen. Code, § 1016.5, subd. (a).)

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 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. (Pen. Code, § 1016.5, subd. (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. (Pen. 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. (Pen. Code, § 1473, subd. (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 law authorizes a person no longer imprisoned or restrained to prosecute a motion to vacate a conviction or sentence for either of the following reasons:

- A legal error damaged the person's ability to understand, defend against, or knowingly accept the actual or potential immigration consequences of pleading guilty or no contest; or,
- 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. (Pen. Code, § 1473.7, subd. (a).)

Existing law states that a motion to vacate the conviction based on legal error shall 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. (Pen. Code, § 1473.7, subd. (b).)

This bill instead provides that a motion to vacate the conviction based on legal error is deemed timely filed at any time in which the individual filing the motion is no longer in criminal custody and that a motion to vacate the conviction based on legal error may be deemed untimely filed if it was not filed with reasonable diligence after the later of the following:

- 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 the denial of an application for an immigration benefit, lawful status, or naturalization; or,
- Notice that a final removal order has been issued against the moving party, based on the existence of the conviction or sentence that the moving party seeks to vacate.

Existing law requires all motions pursuant to Penal Code section 1437.7 are 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. (Pen. Code, § 1473.7, subd. (d).)

This bill removes the requirement that moving party shall make the request of the court and be present in order for the court to hold a hearing without the personal presence of the moving party.

This bill provides that if the prosecution has no objection to the motion, the court may grant the motion to vacate the conviction or sentence without a hearing.

Existing law provides that when ruling on a motion pursuant to Penal Code section 1437.7:

- 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;
- In granting or denying the motion, the court shall specify the basis for its conclusion; and,
- 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. (Pen. Code, § 1473.7, subd. (e).)

This bill additionally requires when ruling on the motion to vacate the conviction due to legal error:

- The moving party to establish that the conviction or sentence being challenged is currently causing or has the potential to cause removal or the denial of an application for an immigration benefit, lawful status, or naturalization;
- There is a presumption of legal invalidity if the moving party pleaded guilty or nolo contendere pursuant to a statute that provided that, upon completion of specific requirements, the arrest and conviction shall be deemed never to have occurred, where the moving party complied with these requirements, and where the disposition under the statute has been, or potentially could be, used as a basis for adverse immigration consequences; and,
- The only finding that the court is required to make is whether the conviction is legally invalid due to 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.

This bill deletes the requirement that in granting or denying a motion to vacate the conviction based on legal error, the court shall specify the basis for its conclusion but retains that requirement for a motion to vacate the conviction based on newly discovered evidence that actual innocence exists.

This bill states that a finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.

This bill provides that a court may only issue a specific finding of ineffective assistance of counsel as a result of a motion to vacate the conviction based on legal error if the attorney found to be ineffective was given timely advance notice of the motion hearing by the moving party or the prosecutor, as specified.

This bill states that it is intent of the Legislature to provide clarification to the courts regarding Section 1473.7 of the Penal Code to ensure uniformity throughout the state and efficiency in the statute's implementation.

COMMENTS

1. Need for this Bill

According to the author of this bill:

California Penal Code §1473.7, established by AB 813 (Gonzalez) in 2016, permits individuals who are 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.

Prior to the enactment of AB 813, individuals who gained access to evidence of actual innocence, or to proof of a defect in the underlying criminal proceeding, had no legal vehicle to present this evidence after their criminal custody had expired. This lack of a remedy had a particularly devastating impact on California's immigrant communities.

Many immigrants suffered convictions without having any idea that their criminal record will, at some point in the future, result in mandatory immigration imprisonment and deportation, which only serves to permanently separate families. 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.

In light of the Trump Administration's increased immigration enforcement, California Penal Code §1473.7 motions have proven to be a critical legal tool for immigrants to challenge old, legally-invalid convictions. Courts throughout California have been reviewing and hearing California Penal Code §1473.7 motions since the section became operative on January 1, 2017. As these motions have been adjudicated, courts have reached differing interpretations of the proper timing and grounds for the motions, and what notice must be provided to the petitioning individual's prior defense counsel. AB 2867 addresses this issue by clarifying the Legislature's intent of California Penal Code §1473.7.

2. Sixth Amendment Guarantee to Counsel

Under the Sixth Amendment to the U.S. Constitution, a defendant is entitled to the effective assistance of competent counsel. (*McMann v. Richardson* (1970) 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970); *Strickland v. Washington* (1984) 466 U.S. 668, 686.)

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.)

3. Habeas Corpus

A writ of habeas corpus is the main vehicle for review of orders where an appeal is precluded or would be an inadequate remedy. Habeas corpus is also used to bring to the court's attention to matters outside the record which are crucial to the petitioner's claims for relief, and which have resulted in a constitutional violation, thereby rendering the petitioner's restraint unlawful. (*In re Bower* (1985) 38 Cal.3d 865, 872.) One common example of the use of habeas corpus is ineffective assistance of counsel claims. An individual could allege that his or her attorney was ineffective by failing to advise him or her of the adverse immigration consequences of accepting a plea, or by providing erroneous advice. (See e.g. *People v. Soriano* (1987) 194 Cal.App.3d 1470.)

However, to be eligible for habeas corpus the individually must be considered "unlawfully imprisoned or restrained." (Pen. Code, § 1473.) Actual incarceration in prison or jail is not required for a petition for writ of habeas corpus; persons on bail, probation, parole, or committed to a state hospital are considered to be in constructive custody for purposes of habeas corpus writ review. (*In re Bandmann* (1959) 51 Cal.2d 388, 396-397; *In re Petersen* (1958) 51 Cal.2d 177, 181.) However, federal immigration custody alone, does not qualify as "custody" for purposes of habeas corpus writ review. (*People v. Villa* (2009) 45 Cal.4th 1063.) AB 813 (Gonzalez), Chapter 739, Statutes of 2016, remedied that limitation by creating a procedure through Penal Code section 1473.7 that allows individuals detained in federal immigration custody to seek relief from a conviction that they did not understand would have adverse immigration consequences.

This bill makes changes to Penal Code section 1473.7 to clarify the timing and procedural requirements of motions to vacate convictions based on legal error. An added requirement is that the moving party must establish that the conviction or sentence being challenged is currently causing or has the potential to cause removal or the denial of an application for an immigration benefit, lawful status, or naturalization. This bill also creates a presumption of legal invalidity if a person pled guilty to an offense with the understanding that, upon completion of specific requirements, the arrest and conviction would be deemed never to have occurred, where the moving party complied with those requirements, and where the disposition of the case has been, or potentially could be, used as a basis for adverse immigration consequences.