



AMMENDMENTS TO CALIFORNIA PENAL CODE § 1473.7

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Introduction

On January 1, 2017, California Penal Code § 1473.7 went into effect, providing people who are no longer in criminal custody with a legal vehicle to challenge old, unlawful convictions.¹ This law has provided a critical opportunity for noncitizens to challenge convictions when the noncitizen failed to meaningfully understand, knowingly accept, or defend against the immigration consequences of a crime. Section 1473.7 also creates a vehicle to enable both noncitizens and U.S. citizens to raise claims of actual innocence, even after custody has ended. Section 1473.7 has provided immediate relief for thousands of people at a time when fears about immigration enforcement have reached an all-time high, and when there is a growing recognition of the importance of granting people a clean slate after a conviction.²

Throughout nearly two years of § 1473.7 implementation, courts took contradictory positions about the scope of their jurisdiction under the statute or the proper legal grounds for a vacatur. To ensure consistent application of the law and the full realization of the statute's intent, in the 2017-2018 session the California Legislature approved certain amendments to the statute. The Governor signed these amendments into law on September 27, 2018, and they will go into effect on January 1, 2019.

Section A of this advisory will detail the amendments to § 1473.7 and what those changes mean to advocates. Section B of this advisory contains the full text of the new statute.

A. Changes to the law

1. New findings and declarations

The first iteration of § 1473.7 did not contain findings and declarations. The new amendments include findings and declarations, which provide instructive cues about the Legislature's intent in enacting § 1473.7.

¹ For more about Cal. Pen. C. § 1473.7, see R.Cahn, *New law that will help vacate legally invalid convictions: Advisory about Penal Code 1473.7* (Oct. 20, 2016), available at <https://www.ilrc.org/new-law-will-help-vacate-legally-invalid-convictions-advisory-about-ab-813>.

² See, e.g., *Roadmap to Redemption* (Sept. 2018), available at: <https://www.ilrc.org/repairing-road-redemptioncalifornia>.

- **Lack of criminal custody is the only jurisdictional requirement (Sec. 1(a)).** Some courts mistakenly held that, in order to exercise jurisdiction over a § 1473.7 motion alleging immigration consequences, the moving party must currently be in removal proceedings. That was incorrect, as the court of appeals held in *People v. Morales*, 25 Cal.App.5th 502 (2018). The newly amended § 1473.7 makes clear in a number of places, including Section 1(a) of the findings and declarations, that courts can exercise jurisdiction over any § 1473.7 claim brought while the individual is no longer in actual or constructive criminal custody.
- **Must be interpreted in the interests of justice and in accordance with the findings and declarations of Cal. Pen. C. § 1016.2 (Sec.1(c) & (d)).** The new findings and declarations require courts to interpret § 1473.7 motions in the “interests of justice” and consistent with California Penal Code § 1016.2. Section 1016.2 describes the severe and disproportionate impact that criminal consequences can have for noncitizen defendants and the damage that deportations can cause to U.S. citizen family members and communities. By including a specific citation to § 1016.2 in the findings and declarations, the Legislature encourages courts to review § 1473.7 motions with the stated purpose of mitigating the disproportionate and unjust ongoing consequences of crimes. This mandate is made all the clearer in Section 1(d), which explicitly states California’s interest in “ensuring that no person suffers penalties or adverse consequences as a result of a legally invalid conviction.”
- **Section 1473.7 is still available even if someone has already obtained certain other forms of post-conviction relief. (Sec.1(e)).** The findings and declarations establish that courts shall have jurisdiction over a § 1473.7 motion, even if the moving party has already received a § 17(b) reduction or § 1203.4 expungement. This is consistent with existing case law, including, e.g., *Meyer v. Superior Court*, 247 Cal.App.2d 133 (1966).

2. “No longer in criminal custody” – § 1473.7(a)

The new law replaces the language “a person no longer imprisoned or restrained” with “a person who is no longer in criminal custody.” This is a non-substantive change designed to bring consistency between § 1473.7 and other provisions in the California Penal Code. “Criminal custody” refers to actual or constructive custody, which includes being in jail or prison or on probation or parole.

3. “A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel” – § 1473.7(a)(1)

Some courts mistakenly interpreted § 1473.7(a)(1) to apply solely to claims of ineffective assistance of counsel, ignoring the statutory language that a claim could be made based on the defendant’s subjective inability to “meaningfully understand” or “knowingly accept” the immigration consequences of a plea. This amendment to (a)(1) clarifies that the grounds covered include, but are not limited to, claims of ineffective assistance.

4. Timing and diligence – § 1473.7(b)

Some courts and prosecutors took the erroneous position that the individual had to be in removal proceedings in order to be eligible to file a § 1473.7 motion. The Court of Appeals settled this matter in *People v. Morales*, 25 Cal.App.5th 502 (2018), when it held that the only jurisdictional requirement of 1473.7 was for

the individual to no longer be in criminal custody. The amendments to subsection (b) of 1473.7 codify the holding of *People v. Morales*. The amendments establish that a court has jurisdiction over the motion provided that the individual is “no longer in criminal custody.”

The amendments also clarify that the *due diligence* clock on a § 1473.7(a)(1) claim starts ticking when the defendant is placed on notice of the immigration consequences of a crime, which occurs at the later of two dates, either: (1) when a person receives a notice to appear in removal proceedings or a denial of some immigration benefit alleging the conviction as the basis for removability or the benefit’s denial; or (2) when a person receives a final order of removal.

In other words, the Legislature is requiring people who are placed in removal proceedings or denied an immigration benefit as a result of a conviction to be diligent in their filing of a § 1473.7 motion. Note the difference between jurisdiction and the requirement of due diligence. A court may have jurisdiction over any § 1473.7(a)(1) claim as soon as the movant is no longer in criminal custody. But if the movant later is put on notice of the immigration consequences of the conviction through a notice to appear or a final removal order, and then waits too long a time to file the § 1473.7 motion, the court may deny the motion as not timely filed.

Example: In 2013, Bart is convicted of § 286(g), sodomy without consent due to intoxication. He is deported in 2015 as a convicted aggravated felon. He files a § 1473.7 motion to vacate his conviction in 2027. The California Superior Court has *jurisdiction* over the motion because Bart is no longer in criminal custody. The Court nevertheless rules that Bart’s motion is *untimely filed without due diligence*, because it was filed 12 years after he was placed on notice of the conviction’s immigration consequences, and 10 years after the vehicle existed to challenge the motion.

5. Hearing – § 1473.7(d)

Though all motions under § 1473.7 shall be entitled to a hearing, if the prosecution has no objection to the motion, the court may grant the motion to vacate without a hearing. However, if the prosecution indicates that it will file an objection to the motion, a § 1473.7 hearing must be held. The hearing may be held without the presence of the moving party provided that the court finds good cause as to why the movant cannot be present. This provision is particularly valuable in cases where the moving party has been placed in an immigration detention facility and securing their presence in criminal court is difficult.

Example: Lynn is in immigration detention and files a § 1473.7 motion to vacate her conviction for possession for sale of cocaine. The DA agrees to stipulate to the motion. The court grants the motion to vacate without a hearing.

6. Establish that error occurred – § 1473.7(e)(1)

Subdivision (a)(1) states that a motion may be made based on “prejudicial error.” Plainly speaking, the error must have mattered. Section 1473.7(e)(1) restates this concept in different terms: when raising a claim under (a)(1), 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.” Much like the motion raised under Cal. Penal Code § 1016.5, motions made under § 1473.7 must show a connection between the conviction and an articulable immigration consequence. Here, advocates may prove that an offense carries a specific immigration consequence by submitting any matter of evidence including: the declaration of a criminal and immigration law expert, a Notice to Appear alleging the conviction as its basis, and/or secondary materials that detail the immigration consequences of crimes.

7. Presumption of legal invalidity – § 1473.7(e)(2)

Dismissals and set asides do little to eliminate the immigration consequences of a conviction. Often, however, before entering into a diversion program including, for example Prop 36 treatment, courts nevertheless advise defendants that compliance with the terms of the program will result in a dismissal and the “arrest and conviction shall be deemed never to have occurred.” Immigrant defendants who dutifully comply with the terms of the court’s order are often surprised to discover that the court “dismissal” actually does nothing to alleviate the immigration consequences of the conviction.

Now, under the amendment in (e)(2), when the defendant complies with the terms of a court order, but has been misadvised that the conviction will be deemed never to have occurred, there is a “presumption of legal invalidity” for the purposes of (a)(1). The statutory advisement that compliance with the court-ordered program will result in the arrest and conviction vanishing from someone’s record constitutes misadvice, damaging the moving party’s ability to meaningfully understand or knowingly accept the immigration consequences of a conviction. In a similar statute, California Penal Code § 1203.43, the Legislature created a legal vacatur vehicle based on the statutory misadvice in the context of Penal Code § 1000.3 dismissals. Here, the Legislature extends that same reasoning to every case in which the defendant “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.”

To establish the presumption under (e)(2), post-conviction relief counsel should look through the reporter’s transcripts and minute orders from plea proceedings to determine whether there was misadvice in any given case.

8. Court findings – § 1473(e)(4)

Some judges wrongly held that in order to grant a claim under (a)(1) (relating to immigration consequences), they must issue a specific finding of ineffective assistance of counsel. The (e)(4) amendment clarifies to courts that, when granting a motion under (a)(1), the only finding they are required to make is that the moving party established the general grounds set forth in (a)(1)—i.e., that the defendant failed to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere. A recitation of the plain language of (a)(1) is sufficient; courts are not required to make more specific findings. In contrast, when issuing a vacatur under (a)(2) (relating to new evidence of innocence), the court shall specify the basis for the vacatur.

9. Court finding of ineffective assistance of counsel and notice to prior counsel – § 1473.7(g)

Subsection (g) provides that, for a court to make a specific finding of ineffective assistance of counsel, the attorney found to be ineffective must have been given timely advance notice of the motion hearing by the prosecutor or the moving party. Recall, however, that courts are not required to state the specific basis for the vacatur—they can instead simply recite the language contained in (e)(4), covering the defendant’s subjective inability to understand the immigration consequences, as well as potential claims of ineffective assistance of counsel. If the court issues a broad finding under (e)(4), no notice to the prior defense counsel is required. It is only when the court rules squarely on the grounds of ineffective assistance, and issues that finding in a court order or otherwise on the record, that advance notice must have been supplied to prior defense counsel.

B. Text of new law

SECTION 1.

The Legislature finds and declares all of the following:

(a) The Legislature enacted Section 1473.7 of the Penal Code to provide people no longer in criminal custody, or after the specified period in which to move for withdrawal of a plea has elapsed, with the opportunity to raise a claim of legal invalidity based on actual innocence or failure to meaningfully understand, defend against, or knowingly accept the immigration consequences of a conviction.

(b) It is the 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.

(c) This measure shall be interpreted in the interests of justice and consistent with the findings and declarations made in Section 1016.2 of the Penal Code.

(d) The State of California has an interest in ensuring that a person prosecuted in state court does not suffer penalties or adverse consequences as a result of a legally invalid conviction.

(e) It is the intent of the Legislature that courts have the authority to rule on motions filed pursuant to Section 1473.7 of the Penal Code, provided that the individual is no longer in criminal custody. Consistent with case law interpreting other statutes that authorize postconviction relief, including Meyer v. Superior Court (1966) 247 Cal.App.2d 133 (interpreting subdivision (b) of Section 17 of the Penal Code) and People v. Tidwell (2016) 246 Cal.App.4th 212 (interpreting Section 1170.18 of the Penal Code), a motion for relief pursuant to Section 1473.7 of the Penal Code shall be heard and may be granted, notwithstanding a prior order setting aside an adjudication of guilt or a prior order dismissing or reducing one or more charges under any provision of law.

SEC. 2.

Section 1473.7 of the Penal Code is amended to read:
1473.7.

(a) A person *who is* no longer ~~imprisoned or restrained~~ *may prosecute in criminal custody may file* 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. *A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.*

(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 (1) Except as provided in paragraph (2), a~~ motion pursuant to paragraph (1) of subdivision (a) shall be ~~filed with reasonable diligence after the later of the following:~~ *deemed timely filed at any time in which the individual filing the motion is no longer in criminal custody.*

~~(2) A motion pursuant to paragraph (1) of subdivision (a) may be deemed untimely filed if it was not filed with reasonable diligence after the later of the following:~~

~~(1) (A) 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.~~ *removal or the denial of an application for an immigration benefit, lawful status, or naturalization.*

~~(2) (B) The date~~ Notice that a *final* removal order *has been issued* against the moving party, based on the existence of the conviction or ~~sentence, becomes final.~~ *sentence that the moving party seeks to vacate.*

(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~~ *Upon* 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~~ *provided that it* finds good cause as to why the moving party cannot be present. *If the prosecution has no objection to the motion, the court may grant the motion to vacate the conviction or sentence without a hearing.*

(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). *For a motion made pursuant to paragraph (1) of subdivision (a), the moving party shall also 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.*

(2) ~~In granting or denying the motion, the court shall specify the basis for its conclusion.~~ *There is a presumption of legal invalidity for the purposes of paragraph (1) of subdivision (a) 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.*

(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.

(4) *When ruling on a motion under paragraph (1) of subdivision (a), 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. When ruling on a motion under paragraph (2) of subdivision (a), the court shall specify the basis for its conclusion.*

(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.

(g) *A court may only issue a specific finding of ineffective assistance of counsel as a result of a motion brought under paragraph (1) of subdivision (a) if the attorney found to be ineffective was given timely advance notice of the motion hearing by the moving party or the prosecutor, pursuant to Section 416.90 of the Code of Civil Procedure.*