

Helping Immigrant Clients with Proposition 47 and Other Post-Conviction Legal Options

A GUIDE FOR LEGAL SERVICE PROVIDERS



ACKNOWLEDGEMENTS

Californians for Safety and Justice would like to thank **Kathy Brady, Senior Staff Attorney** at the Immigrant Legal Resource Center (ilrc.org),¹ and **Rose Cahn, Attorney and Senior Soros Justice Fellow** at the Lawyers' Committee for Civil Rights of the San Francisco Bay Area (lccr.com),² for producing this guide. Their knowledge and decades of experience — and that of their organizations (read more below) — allow criminal defense attorneys, re-entry service providers and immigration advocates who assist noncitizens to better serve their clients with this important, timely information.



About Californians for Safety and Justice

Californians for Safety and Justice is a nonprofit project of the Tides Center working to replace prison and justice system waste with common sense solutions that create safe neighborhoods and save public dollars. As part of that work, our Local Safety Solutions Project supports innovative efforts by counties to increase safety and reduce costs by providing toolkits, trainings, peer-to-peer learning and collaborative partnerships. The organization is also working across the state to effectively implement Proposition 47. Learn more at safeandjust.org or MyProp47.org.



About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) is a national nonprofit resource center that provides legal trainings, educational materials and advocacy to advance immigrant rights. Their mission is to work with and educate immigrants, community organizations and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Learn more at ilrc.org.



About the Lawyers' Committee for Civil Rights of the San Francisco Bay Area

Lawyers' Committee for Civil Rights of the San Francisco Bay Area, founded in 1968, works to advance, protect and promote the legal rights of communities of color, low-income persons, immigrants and refugees. Assisted by hundreds of pro bono attorneys, LCCR provides free legal assistance and representation to individuals on civil legal matters through direct services, impact litigation and policy advocacy. Learn more at lccr.com.

¹ See Appendix A for Kathy Brady's complete biography.

² See Appendix B for Rose Cahn's complete biography.

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ABOUT THIS TOOLKIT – AND WHO IT’S FOR

This toolkit is primarily for:

- Immigration legal service providers;
- Reentry legal service providers (for people exiting prison or jail); and
- Other organizations or advocates working to reduce unnecessary, long-lasting impacts of criminal convictions.

The toolkit:

- ✓ Explains key California post-conviction relief, including
 - Proposition 47, a California law that permits reduction of some felonies to misdemeanors;
 - Other California Penal Codes, such as:
 - P.C. § 17(b)(3), which also reduces certain felonies to misdemeanors;
 - P.C. § 18.5, which provides a new definition of misdemeanor that can help immigrant defendants;
 - P.C. § 1203.4(a), a dismissal (“expungement”) of conviction that can help immigrants in certain situations; and
 - P.C. § 1203.43, (a), a new withdrawal of plea procedure for immigrants who complete deferred entry of judgment;
- ✓ Discusses tools needed to determine how immigrant clients may overcome consequences of a criminal conviction — and how to give clients pertinent information,
- ✓ Provides tools to determine who might be eligible for certain post-conviction legal options (related to their charges and criminal record); and
- ✓ Discusses the eligibility requirements for the Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans (DAPA) programs, and how Proposition 47 clean slate relief can help an immigrant client’s case.

OVERVIEW: WHY THIS TOOLKIT IS NEEDED NOW

The United States has always been a nation of immigrants. Today, nearly 40 million people in the U.S. were born in another country, and California is home to about one-fourth of this population (more than 10 million immigrants).³ One out of every four Californians was born in another country, and half of all California children live in a home with a foreign-born head of household.⁴

Immigrants in the U.S. may be undocumented, lawful permanent residents, or a variety of forms of status in between (read more on this later in this chapter). Regardless of their status, they become integral parts of our communities as they find work and housing, raise families and more. When an immigrant commits a crime, they are held accountable just like other Californians, but criminal convictions — even for low-level, nonviolent crimes — can have far more long-term consequences for immigrants than for citizens. In fact, in terms of public safety, it is important to consider the long-term impact of destabilizing families when someone is deported due to contact with the criminal justice system.

³ U.S. Census Bureau, 2011 California American Community Survey 1-Year Report, available at: dof.ca.gov/research/demographic/state_census_data_center/american_community_survey/documents/2011ACS_1year_Rpt_CA.pdf.

⁴ Migration Policy Institute tabulations of the U.S. Bureau of the Census’ American Community Survey (ACS) and Decennial Census, California Immigration Data Profile, available at: migrationpolicy.org/data/state-profiles/state-demographics/CA#top.

For example, a foreign-born resident can be here legally, but if they have not completed the naturalization process and are convicted of a crime, they can lose their lawful status and be detained and deported — without any opportunity to prevent these outcomes. These consequences have terribly destabilizing effects on families, in terms of stress and grief, legal costs, loss of jobs or income, disruption of family responsibilities and more. (NOTE: No U.S. citizen can be legally deported from, or kept out of, the country.)

Since 2001, the number of people deported as a result of a criminal conviction has increased 317%, reaching a peak of 438,421 in 2013.⁵ In 2015, 91% of people removed from the interior of the United States were removed after a criminal conviction.⁶

Deportation is devastating for the affected families and comes at a high cost for taxpayers as well. Educating immigrant clients about available legal relief can help avoid this drastic outcome. In some cases, a minor change in a person's criminal record can remove immigration consequences — eliminating it as a ground for deportation or helping the person become eligible to apply for immigration status or benefits.

Proposition 47 (see sidebar) is just one example of California laws that can affect someone's immigration status and outcomes for certain, prior criminal convictions. This toolkit explains these opportunities further.

The Proposition 47 Opportunity

In November 2014, California voters passed Proposition 47, a ballot measure that changed six low-level, nonviolent offenses from potential felonies to misdemeanors. This included simple drug possession and five petty-theft offenses under \$950 in value. (Learn more at www.MyProp47.org.)

Because the law is retroactive, people with prior eligible convictions on their old criminal records can petition the California court where they were convicted to change the charges to misdemeanors. (If someone also has a prior conviction for serious crimes such as murder, rape, child molestation or are on the sex offender registry, they are disqualified from benefiting from Prop. 47.)

Tens of thousands of people have petitioned California courts to change their records — and succeeded — which has helped to remove barriers to jobs, housing and education, as well as reducing immigration consequences.

⁵ See U.S. Department of Homeland Security, Yearbook of Immigration Statistics: 2013, Enforcement Actions, dhs.gov/yearbook-immigration-statistics-2013-enforcement-actions (Table 39).

⁶ See U.S. Immigrations and Customs Enforcement FY 2015 ICE Immigration Removals, ice.gov/removal-statistics.

The Basics of Serving Noncitizen Clients

CHAPTER SUMMARY

This section will outline the fundamentals of post-conviction relief available to immigrants:

- The various types of immigration status that a client might have;
- The potential impact criminal convictions can have on a noncitizen's immigration status;
- How Prop. 47 and clean slate remedies can help alleviate that impact; and
- Best practices when serving immigrant clients.



In this document, USC stands for U.S. citizen and LPR stands for Lawful Permanent Resident (a person who has a “green card”).⁷

I. IMMIGRANT STATUS

The first step in serving immigrant clients is to determine their immigration status. Some clients have a good understanding of their legal status (i.e., whether they have a “green card,” are undocumented, or are somewhere in between), but other clients may not know their correct status. For example, a person might have employment authorization based on an application but is not sure if the application has been granted, or might be married to a USC and (wrongly) think that this automatically makes him or her a citizen.

This section presents a very brief overview of various types of immigration status. An expanded version of this section, written for public defenders, is available online for free.⁸

A. Might the person be a United States Citizen (USC) and not know it?

No U.S. citizen can be legally deported or kept out of the country. In California, attorneys assisting immigrants often have clients who are *unaware* that they are, in fact, U.S. citizens. You can help your client determine this or refer them to an immigration nonprofit or attorney to confirm citizenship.

B. Lawful Permanent Resident (“Green Card” Holder)

A Lawful Permanent Resident (LPR) has permanent permission to live and work legally in the U.S. and can apply to become a citizen after three to five years. However, an LPR can lose this lawful status and be deported due to conviction of certain crimes, violation of certain immigration laws, or other reasons.

⁷ See Appendix H, the Immigrant Legal Resource Center’s Immigration Relief Toolkit, also available at: ilrc.org/files/documents/17_relief_toolkit_jan_2015_final.pdf.

⁸ See Appendix I, the Immigrant Legal Resource Center’s Notes for Criminal Defenders, §N.1 Overview, also available at: ilrc.org/files/documents/n.1-overview.pdf.

Here are the ways that a person becomes a U.S. citizen:

✓ **Born in the U.S. or Territories.**

- Any person born in the U.S. is a U.S. citizen (USC), except for certain children of foreign diplomats.
- Any person born in Puerto Rico, Guam and the U.S. Virgin Islands – as well as those born in the Northern Mariana Islands after November 4, 1988 (and in many cases before), is a U.S. citizen.
- Individuals born in American Samoa and Swains Island are U.S. nationals, meaning they are not a USC but cannot be deported because of a criminal conviction.

✓ **Born outside the United States but automatically (and perhaps without knowing it) became a USC.**

If the answer to *any* question below is “yes,” investigate whether the client might be a USC.

- At time of birth in another country, did the client have a USC parent or grandparent?
- Did the following two events occur, in either order, before the client’s 18th birthday:
 - The client became a lawful permanent resident (LPR)?
 - One of client’s biological or adoptive parents was a USC?
- Was the client adopted by a USC before the age of 16, and did the client become an LPR before age 18?

✓ **Naturalization to USC.** A lawful permanent resident (LPR, “green card” holder) can apply for U.S. citizenship after five years of LPR status or three years of marriage to a citizen while in LPR status. There are some criminal bars. (Some current and former military personnel can naturalize without being LPRs, despite criminal convictions.) For more information on citizenship, see the ILRC *Immigration Relief Toolkit*, §§17.3, 17.4 (Appendix H).

LPRs can travel outside the U.S. and return, as long as they are not convicted of certain crimes, do not stay outside the U.S. for a long period, and do not violate certain immigration laws.

LPRs are issued identity cards, often called “green cards” (although now the cards are not actually green). The card will state “Resident Alien” across the top.

While LPR *status* does not expire, some green cards do expire, meaning the person will remain an LPR but lack current documentation. Most people must renew the card

itself every 10 years. At that time, immigration authorities will run the person’s fingerprints to see if he or she has been convicted of a deportable crime. LPRs who *might* be deportable for a crime should postpone renewing the card until they get an expert analysis from a qualified immigration provider.

If the person has a card that states “Employment Authorization” across the top, he or she probably is not a permanent resident, but either is applying for status or has some temporary status.

In Padilla v. Kentucky, 559 U.S. 356, 363 (2010), the Supreme Court recognized that “deportation is an integral part — indeed, sometimes the most important part — of the penalty that may be imposed on noncitizen defendants.”

C. Undocumented Individuals

An undocumented person is someone who currently does not have legal status (permission to be here) under U.S. immigration laws. People might say that they have “no papers.” This person can be deported without any criminal conviction, since they are here unlawfully.

To stay in the U.S., an undocumented person needs to apply for some kind of status or relief. A few common examples are:

- A green card through USC or LPR family;
- Deferred Action for Childhood Arrivals (DACA);⁹
- Relief for individuals who have been victims of crime or abuse (e.g., a U visa for crime victims, a T visa for victims of alien trafficking, or Violence Against Women Act (VAWA) relief for some domestic abuse victims);
- Asylum, Temporary Protected Status or other relief for people fleeing harm in their home country; and/or
- Cancellation for undocumented persons who have lived in the U.S. for ten years, or for permanent residents who have become deportable for a crime.

DACA and DAPA are discussed in greater detail later in this toolkit, and the ILRC Immigration Relief Toolkit in Appendix H provides a two-page summary of most types of applications, as well as a short questionnaire to determine whether a person might be eligible for some immigration relief.

D. Other Status and “Mystery” Status

Examples of other kinds of immigration status and applications include persons applying for, or who already have:

- Asylum or refugee status;
- Temporary Protected Status (TPS);
- Adjustment of status through family or other reasons; and
- Non-immigrant visas.

If the person has employment authorization or any official document — or says that they have applied for something — they need an immigration expert to understand the kind of application or status that person might have.

⁹ President Obama announced an additional program, “Deferred Action for Parents of Americans and Lawful Permanent Residents” (DAPA), on November 20, 2014. The program has been stalled in federal litigation. Its legality is expected to be determined by the U.S. Supreme Court in the Summer of 2016.

II. IMPACT OF CRIMINAL CONVICTIONS ON IMMIGRANTS

TO RECAP:

- No U.S. citizen can be “removed” (deported) from the U.S.
- Lawful Permanent Residents (LPRs) can lose their green card and be removed if they become deportable (because of a deportable criminal conviction or other reason). Even if the LPR is not deportable, one or more criminal convictions can bar him or her from becoming a U.S. citizen.
- Every undocumented person — a person who is here without lawful immigration status — already is deportable (“removable”) from the United States, but the person might hope to apply for lawful immigration status. Certain criminal convictions can foreclose an undocumented person’s ability to legalize his or her immigration status by, for example, barring them from getting a green card based on a petition from a U.S. citizen family member.

How the government identifies which immigrants to deport

Immigrants come to the attention of the U.S. Immigration and Customs Enforcement (ICE) in different ways. The most common are:

- An immigrant is placed in criminal custody (e.g., county jail);
- An immigrant applies for some immigration “benefit” (e.g., an LPR who does not realize they are deportable might apply to replace an old green card or file a petition for naturalization, at which point they are identified for removal);
- An LPR with certain criminal convictions might return to the U.S. from a trip and be stopped by border officials at the airport;
- An undocumented person might apply for a green card — for example, on the basis for marriage to a U.S. citizen — without realizing that certain convictions will block the green card application; and
- In other cases, ICE will target individuals convicted of certain crimes by going to their homes, places of work,

etc., as part of coordinated “sweeps” of immigrants with criminal records. They are most likely to do this if the person’s conviction brings them within one of the ICE “enforcement priorities.” These priorities are discussed in Chapter 2 at Sections I.B.5, I.C.3, and II.C.3.

Consequences when there is no conviction

In a select few instances, an immigrant can be deported for committing a crime even if they have not been convicted. A person is inadmissible (meaning that they may be barred from getting new status or being admitted at the border) if immigration authorities have “reason to believe” that the person was involved in drug trafficking; if the person worked as a prostitute; or if the person formally admits certain offenses to an immigration official. A person can be found deportable or inadmissible if they come within a very broad medical definition of a drug addict or abuser (although this ground is rarely charged). In this case, the person should seek assistance from an expert in criminal and immigration law.

III. WHAT YOU – INCLUDING REENTRY PROVIDERS – CAN DO FOR YOUR CLIENT

Despite the complicated terrain of criminal and immigration law, sometimes you can eliminate the immigration consequences of a conviction — and open up new pathways to immigration relief — by simply changing the individual’s criminal record.

Reentry legal service providers regularly help their clients overcome the hurdles that a criminal record can present to employment and housing. In the past, many such providers have hesitated to serve noncitizen clients, because they know that they lack expertise in the immigration consequences of criminal convictions — or they fear that filing for Prop. 47 and/or clean slate relief might trigger the attention of ICE or make it impossible for the client to receive later necessary post-conviction relief.

However, those fears are misplaced. Providers that help people clean criminal records will not cause an immigrant client problems as long as they follow a few guidelines — and as long as they are clear about the limits of this help. Any non-expert pursuing immigration relief should:

- Clarify to immigrant clients that reducing a conviction to a misdemeanor, and/or getting a dismissal or expungement does not necessarily resolve immigration consequences;
- Carefully craft any court declarations to avoid admitting grounds of deportability;
- Explain that he or she cannot tell the immigrant the exact consequences of the criminal offense; and
- Warn the immigrant to always seek expert advice before initiating any contact with ICE, including traveling outside the country, applying for a benefit, renewing a 10-year green card or applying for naturalization.¹⁰

No one should give immigration advice or make any assumptions unless they are an expert. In fact, immigration consequences of crimes often do not make sense, and each case is different. Depending on the individual case, a minor misdemeanor can have terrible consequences, while a felony might not be that bad. An untrained person should not review the case and give advice. *Every* immigrant with any criminal conviction should have a competent expert analyze what impact that conviction may have on their immigration status.



Creating opportunities for immigrants to avoid deportation can slow the expanding prison-to-deportation pipeline, ensuring that fewer families are senselessly, needlessly torn apart.

There are only benefits to changing one’s record

Despite the caution above, **there is no downside to helping an immigrant get an expungement or reduce a felony to a 364-day misdemeanor.** Doing so will not adversely affect the immigrant’s legal situation, and there are no verified incidents of a person triggering the attention of immigration enforcement by filing for Prop. 47 or “clean slate” relief. Moreover, if the immigrant later needs to vacate the conviction on a ground of legal invalidity, a previous successful expungement or reduction will not bar that effort.¹¹

¹⁰ See Appendix E, *Client Disclaimer About Immigration Consequences of a Criminal Conviction*.

¹¹ See *Meyer v. Superior Court*, 247 Cal.App.2d 133, 140 (1966) (holding that, because “a conviction that has been expunged still exists for limited purposes,” petitioner should not be barred from seeking a more suitable post-conviction remedy, in that case, 17(b)).

Additionally, cleaning one’s record can bring housing and employment benefits as well as various immigration-related benefits:

- ✓ An expunged conviction can remove barriers to Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans (DAPA), if that becomes available.
- ✓ If a plea to a first-time possession offense was entered on or before **July 14, 2011**, an expungement will eliminate it as a ground of removability.
- ✓ In some cases, a theft or violence-related felony with a one-year sentence that is reduced to a misdemeanor (carrying no more than a 364-day sentence) can change certain aggravated felonies into non-deportable offenses — if the order specifically states the sentence has been commuted to 364 days.
- ✓ A lawful permanent resident or refugee who committed a “crime involving moral turpitude” (or a “bad intent” crime) within five years of entering the United States will not be deportable if the maximum *potential* sentence is 364 days, even if the qualifying conviction was originally a felony. Reducing the crime involving moral turpitude to a misdemeanor also may make an undocumented person eligible to apply for some lawful status.
- ✓ Reducing a felony to a misdemeanor can remove undocumented immigrants from an ICE “enforcement priority.”
- ✓ An expunged conviction can provide an ICE officer with the discretion not to target an individual as an enforcement priority.

IV. BEST PRACTICES WHEN SERVING NONCITIZENS

In order to abide by the credo, “Do No Harm,” reentry legal service providers should take special care when serving potentially vulnerable immigrant populations. To that end, we advise the following best practices when serving immigrants.

Do not provide unqualified or unauthorized legal counsel. If you have not first verified it with an immigration specialist, do not tell your immigrant client that a legal remedy will eliminate the immigration consequences of a conviction.

Always warn about common risks. All noncitizens should be warned not to travel outside the U.S. or pursue an immigration benefit without first consulting with a criminal and immigration law expert. Regardless of how many times a person has traveled from and reentered the U.S. (since a criminal conviction occurred), an immigrant can be detained, questioned and placed in immigration proceedings upon any return to the U.S. Similarly, an application for an immigration benefit, including

replacing a lost or expired green card or applying for naturalization, can trigger a comprehensive background check and result in removal proceedings.

Give referrals so that the person can get an immigration analysis. The best post-conviction relief is a partnership between skilled “clean slate” practitioners¹² and experienced immigration legal service providers¹³. Have a list on-hand of nonprofit immigration specialists who can analyze the impact of a criminal conviction on a person’s immigration record. These same specialists may be able to help your client secure subsequent immigration relief as well.

Always let your client be your guide. Your client may be seeking clean slate relief to alleviate the immigration consequences of a conviction, or may instead simply be concerned with the employment consequences of a conviction. Spend time identifying your client’s goals and work with them to provide the appropriate service plan to achieve those goals.

¹² See Appendix F for a statewide list of organizations that provide pro bono Prop. 47 and clean slate services.

¹³ See Appendix G for a statewide list of nonprofit immigration service providers.

CHAPTER TWO

The Basics in Criminal Record Remedies and How These Remedies Can Benefit Immigrants

CHAPTER SUMMARY

This chapter provides an in-depth discussion of the various post-conviction legal remedies and the potential impacts and benefits on immigrant clients. This includes:

- A comparison of felony reduction under Proposition 47 versus Penal Code § 17(b)(3)
- A discussion on clean slate relief such as expungements under Penal Code §§ 1000.3, 1203.4, and 1203.43 that went into effect January 1, 2016.

Record Change, Reduction, Expungement and Clean Slate Practice

“Reclassification” under Prop. 47 (also called “Record Change”) allows people with certain low-level, nonviolent felonies to change those convictions to misdemeanors. People are not excluded if they served a prison sentence.

“Reduction” under Penal Code 17(b) is another law that allows people to reduce some felony convictions to misdemeanors. A case is not eligible if the person was sentenced to prison for the case, even if no prison time was actually served. There are many convictions that are eligible for a Penal Code 17(b) reduction that are not eligible for Prop. 47 reclassification.

“Expungement,” also known as **“set aside and dismissal”** in California, allows people to seek a specific type of dismissal of their prior case. Most misdemeanors, felonies and non-traffic infractions that didn’t result in a prison sentence are eligible for expungement. Offenses that resulted in local prison sentences are also eligible for expungements. Convictions that resulted in a prison sentence are ineligible for this relief.

“Clean Slate Practice” refers to a practice of law where attorneys draw from all legal remedies available to assist individuals with both legal and civil issues in order to help them overcome the barriers that flow from incarceration, also defined as the “collateral consequences of incarceration.”

I. CHANGING A FELONY TO A MISDEMEANOR: PENAL CODE § 18.5, PROPOSITION 47, AND PENAL CODE § 17(B)(3)

For noncitizens, reducing felony convictions to misdemeanor convictions can be a powerful way to eliminate certain grounds for deportability or open up eligibility to obtain certain immigration status or benefits.

Immigration authorities will accept as valid a criminal court order that changes a felony to a misdemeanor, or vacates or modifies an imposed sentence, regardless of the reason given for the order. This is true even if the court order was sought solely for immigration purposes.¹

To take advantage of the full immigration benefit of a felony reduction it is essential that the order granting the reduction states that, pursuant to Penal Code § 18.5, the new misdemeanor carries a maximum possible sentence of 364 days. Whether the petitioner is pursuing a Proposition 47 reclassification (codified as Penal Code § 1170.18) or a Penal Code § 17(b)(3) reduction, it will often be the petitioner's responsibility to modify the default order used by the court to clearly state that the new misdemeanor conviction carries a maximum sentence of 364 days. See Appendices J and K for sample Proposition 47 and Penal Code § 17(b)(3) orders.

The following sections will discuss how a misdemeanor is defined under Penal Code § 18.5, the different vehicles available to reduce felonies to misdemeanors, how to secure a reduction, and the immigration benefits of felony reductions for noncitizens.

A. Penal Code § 18.5

1. Penal Code § 18.5 Changes the Definition of Misdemeanor

Penal Code § 18.5 went into effect on January 1, 2015. It states:

“Every offense which is prescribed by any law of the state to be punishable by imprisonment in a county jail up to or not exceeding one year shall be punishable by imprisonment in a county jail for a period not to exceed 364 days.”

Although California code sections — including one-year misdemeanors and wobblers (a crime that can be charged as a misdemeanor or a felony) — may continue to state that the penalty for the misdemeanor is “up to one year,” under Penal Code § 18.5, such misdemeanors actually will have a penalty of up to 364 days.

The California State Legislature created Penal Code § 18.5 specifically to help immigrants avoid the disastrous immigration consequences that can attach to even misdemeanor convictions.²

2. Immigration Benefits of Penal Code § 18.5

A jail sentence — even a *potential sentence* — of 364 rather than 365 days can help immigrants in three main ways.

Moral Turpitude: Deportable. A noncitizen is deportable for a single conviction of a crime involving moral turpitude committed within five years of first entering the United States, if the offense has a potential sentence of one year or more.³ “Crime involving moral turpitude”

¹ See *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005) (distinguishing sentencing changes from orders vacating convictions, which must contain a ground of legal invalidity to be valid for immigration purposes); *Matter of Song* 23 I&N Dec. 173 (BIA 2001) (holding that the newest sentence on the reduction of a sentence determines the immigration consequences); *Matter of Martin*, 18 I&N Dec. 226 (BIA 1982) (same).

² (See Sen. Rules Com., Off. of Sen. Floor Analyses, Bill No. SB1310, p.3; Sen. Com. on Public Safety Analysis, SB 1310, p. 5. “This small change will ensure, consistent with federal law and intent, legal residents are not deported from the state and torn away from their families for minor crimes.” Assem. Com. on Public Safety, Analysis on SB 1310, p. 2.)²

³ Immigration & Nationality Act § 237(a)(2)(A) [8 U.S.C. § 1227(a)(2)(A)].

(CIMT) is a term of art under immigration law that refers to certain offenses with a “bad intent.” The most common examples of CIMTs are:

- Theft with intent to deprive the owner permanently. Theft under Penal Code § 484 is a CIMT, but a conviction for joyriding is not.
- Any kind of fraud.
- Assault, battery or other offense if the statute requires intent to cause great physical injury, or some other serious factors. It does not include simple battery, or even battery of a spouse (Penal Code § 243(e), where the minimum conduct to commit the crime includes a mere offensive touching).
- Certain serious offenses that involve lewd or reckless intent.⁴

Under Penal Code § 18.5, a single California misdemeanor conviction of a CIMT will not trigger this deportation ground because it will have a potential sentence of 364 days.

Moral Turpitude: Bar to Relief. Some noncitizens who have lived in the United States for 10 years and meet other requirements can apply to “cancel” their deportation and get a green card. This is referred to as “cancellation of removal for non-permanent residents.”⁵ Conviction of a single CIMT is a bar to this relief if the offense has a potential sentence of a year or more.⁶ Under Penal Code § 18.5, a single misdemeanor conviction will not bar this relief because it will have a potential sentence of 364 days.

Aggravated Felony. “Aggravated felony” is a term of art under immigration law encompassing over 50 different classes of convictions — many of which do not need to be either aggravated or felonies. Some, but not all, types of offenses become an aggravated felony only if a sentence of one year or more is imposed. This includes a federally defined crime of violence, theft, receipt of stolen

property, forgery, etc.⁷ Under Penal Code § 18.5, California misdemeanors will not be aggravated felonies under these categories, because a sentence of one year cannot be legally imposed.

3. Always get a court order that references Penal Code § 18.5

When you reduce a felony to a misdemeanor, get an order that specifies that the new misdemeanor carries a 364-day sentence or is “pursuant to Penal Code § 18.5.”

Going forward, any person sentenced to a misdemeanor conviction after January 1, 2015, is sentenced pursuant to Penal Code § 18.5. However, because Penal Code § 18.5 did not contain an explicit retroactivity provision, we must carefully consider how convictions that occurred before that date can benefit from the new misdemeanor maximum.

Proposition 47 and Penal Code § 17(b) both provide a mechanism for reducing felonies to misdemeanors. Because any person who is sentenced to a misdemeanor after January 1, 2015, is sentenced pursuant to Penal Code § 18.5, those covered should automatically include people who get a misdemeanor sentence as a result of a misdemeanor reduction. But because immigration judges are not familiar with criminal law and may have questions or act in error, by far the best approach is to have the criminal court judge make the § 18.5 notation on the order reducing the felony to a misdemeanor. The immigration judge should accept the criminal court judge’s order.

For the above-noted reason, when representing immigrant clients the best practice is to make sure that the order reducing a felony to a misdemeanor either (a)

⁴ For more information as to which California offenses might be held CIMTs, see Appendix L, the Immigrant Legal Resource Center’s *California Quick Reference Chart*, also available at: ilrc.org/files/documents/ilrc-ca_chart_notes-2013-03_05.pdf.

⁵ Immigration & Nationality Act § 240A(b)(1) [8 USC 1229b(b)(1)]. For more information about cancellation for non-permanent residents, see the Immigrant Legal Resource Center’s *Immigration Relief Toolkit* (Appendix H).

⁶ See *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010); *Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010), discussing INA 240A(b)(1), 8 USC § 1229b(b)(1). Immigration advocates contest the “less than one year” rule. For more information on non-LPR cancellation, see *Immigration Relief Toolkit* (Appendix H).

⁷ See Immigration & Nationality Act § 101(a)(43) [8 USC § 1101(a)(43)].

specifies that the maximum possible sentence of the new misdemeanor is 364 days, or (b) states that the offense is a misdemeanor pursuant to Penal Code § 18.5. (These two options mean the same thing, but the judge might prefer one to the other.) Often, the default orders in some jurisdictions will not contain this language, so the client or his or her advocate must take action to ensure that the order contains this language. See Appendices J and K for sample orders.

Some judges or prosecutors may resist including the Penal Code § 18.5 language when they reduce a felony to a misdemeanor. Here are some suggestions for increasing your chance of success:

- If you do not frequently work with this court, or on this issue, consult with someone who does, such as a local reentry specialist or a public defender who specializes either in immigration or clean slate work.⁸ Find out what the current policy or approach is, and coordinate efforts.
- Appendix M contains a legal memo that can be used to explain why Penal Code § 18.5 should apply when a felony is reduced to a misdemeanor after January 1, 2015. The memo may be useful as talking points, or you may choose to provide it to the judge or prosecutor.

B. Changing a Felony to a Misdemeanor: Proposition 47

1. What Proposition 47 Does

On November 4, 2014, California voters passed Proposition 47 (“Prop. 47”) into law. Prop. 47 is the largest opportunity in U.S. history for people to change past felony convictions on their records. As many as one million Californians may be eligible.

Under Prop. 47, codified at Penal Code §1170.18, certain crimes previously categorized as felonies or alternate felonies/misdemeanors (“wobblers”) have been re-categorized as misdemeanors. Prop. 47 applies to future charges, but also to past convictions. People who are currently serving sentences, and those who have already completed their sentences but would like to reduce

past eligible felony convictions to misdemeanors, can benefit. After felonies are reduced they are considered misdemeanors for all purposes.

Reduction to a misdemeanor can remove some barriers to professional licenses and some public benefits, as well as restore the right to serve on a jury, although it will not restore firearm privileges, and in fact anyone who receives Prop. 47 relief is barred from legally owning or carrying a firearm.

Note: Felony reduction under section 17(b) can restore firearm rights in some cases.

Reduction to a misdemeanor, when paired with Penal Code § 18.5, can eliminate certain grounds of deportability for noncitizens and can create new pathways for immigration relief.

WARNING: PROP. 47 HAS A STRICT DEADLINE.

All applications to change a felony to a misdemeanor under Prop. 47 must be filed by November 4, 2017.

2. Qualifying offenses

Prop. 47 changed six low-level, nonviolent offenses from potential felonies to misdemeanors:⁹

- Simple drug possession
- Petty theft under \$950
- Shoplifting under \$950
- Forgery under \$950
- Writing a bad check under \$950
- Receipt of stolen property under \$950

If the person’s conviction was not for one of these offenses, he or she still might be able to reduce the felony

⁸ East Bay Community Law Center has a hover map, at: ebclc.org/reentry-legal-services, that will help you locate the reentry legal service provider(s) in your county. See also Appendix F for a statewide list of organizations providing Prop. 47 and clean slate services.

⁹ Proposition 47 amends various provisions of the Penal and Health and Safety Codes to reduce personal possession drug offenses and thefts involving less than \$950 from a straight felony or a “wobbler,” to a straight misdemeanor. A complete list of Prop. 47 offenses is provided in Appendix C.

to a misdemeanor under Penal Code § 17(b)(3), which includes additional offenses other than the Prop. 47 offenses listed above. See Part B in this chapter for more on Penal Code § 17(b)(3).

Example: In 2009, Paul was convicted of felony grand theft, Penal Code § 487, for stealing a bicycle worth \$500. Paul may be eligible to have the felony conviction changed to a misdemeanor under Prop. 47. This may be true even if he was sentenced to more than a year in prison for the theft.

Example: In 2010, Martin was convicted of assault with a deadly weapon, Penal Code § 245. Checking the above list, you see that assault is not one of the offenses eligible for Prop. 47. Martin should see if he might be able to reduce the conviction to a misdemeanor under another law, Penal Code § 17(b)(3).

3. Prior Convictions that Bar Prop. 47 Treatment

Felony convictions cannot be reclassified as misdemeanors under Prop. 47 if the petitioner has certain prior convictions.¹⁰ An individual seeking Prop. 47 relief should always consult an attorney.

The prior convictions that will bar Prop. 47 relief include:

- **“Super strikes”** or prior convictions for offenses listed in Penal Code § 667(e)(2)(C)(iv) or any serious violent felony punishable by life in prison or death.
- **Any prior sex offense requiring mandatory sex offender registration under Penal Code § 290(c)**, unless it was a juvenile adjudication.¹¹ Note that if a Penal Code § 290(c) conviction happens after or at the same time as a person files a Prop. 47 petition, he or she will not be barred from Prop. 47 relief.

A table of disqualifying prior convictions that will exempt individuals from having their record reclassified is provided in Appendix D.

4. How does a person get Prop. 47 relief?

Two different types of record change processes are available for individuals with Prop. 47-eligible convictions: *resentencing* and *reclassification*.

Resentencing is the process available to people who are currently in criminal custody, including jail, prison, probation, parole or an order of supervision on the basis of a Prop. 47 eligible offense.

Reclassification is available for individuals who are no longer in criminal custody, including no longer being on probation or parole.

All Prop. 47 petitions **must be filed by November 4, 2017**. Prop. 47 petitions must be filed in the county where the conviction occurred. There is no statewide Prop. 47 form. Each county has created its own petition and order. Contact your local Public Defender’s office to get a copy of the petition used in your jurisdiction.¹² Within each county, the same petition is generally used for resentencing and reclassification.

In a few counties — Alameda, San Francisco, Los Angeles and San Mateo — the default orders used should already specify that the reduced misdemeanor carries a 364-day maximum potential sentence. **Always double check to make sure that the order specifies the 364-day maximum.**

If the default order does not specify the new maximum sentence, write in the new 364-day maximum sentence on the order that the judge then signs, or create a new order that specifies the new maximum. This is an essential step in unlocking the immigration benefits contained in reducing a felony to a misdemeanor. See Appendices J and K for sample orders that include the 364-day language.

¹⁰ See Penal Code 1170.18(i).

¹¹ See discussion in Prison Law Office, Information Re: Prop. 47 (March 2015), available at: prisonlaw.com/pdfs/Prop47March2015.pdf.

¹² A good resource is the online County Map developed by Californians for Safety and Justice, available at: safeandjust.org/county-map, which provides a directory of Courthouses, Public Defender and District Attorney offices, and court forms by county.

Note regarding the importance of an order that states 364-day maximum:

Regardless of whether you are applying for resentencing or reclassification, to ensure that the Prop. 47 reduction has the maximum positive impact for your noncitizen client, you must secure an order that specifies that the new maximum sentence on the misdemeanor conviction is 364 days pursuant to Penal Code § 18.5.

a. Resentencing

This section will summarize how resentencing works under Prop. 47. For further information, see MyProp47.org.¹³

If a person is currently serving a sentence for an offense that qualifies under Prop. 47, or is on probation or parole for such an offense and is not excluded by one of the disqualifying convictions, that person may be eligible for resentencing. If the person qualifies, the judge *must* resentence the individual unless it is determined that the person poses an “unreasonable risk to public safety.” The maximum jail time for the misdemeanor will be 364 days in county jail, or in cases of shoplifting or theft, six months in jail. If a person has already served more than the maximum term of confinement and the Prop. 47 offense is then reduced to a misdemeanor, the person should be released or discharged from supervision.

If the person has not yet served the maximum term of confinement for the misdemeanor charge(s), the court may hold a hearing to determine if the sentence should be reduced. If there are other cases or charges that are holding the person in custody, he or she will not be released even if a reduction is granted on one or more charges. However, the person should still seek to have all

eligible offenses reduced to a misdemeanor, so that there are fewer felony convictions on the record.

Even if the case is reduced to a misdemeanor, any restitution orders will remain in effect. However, court fines and fees will likely be decreased if the case is reduced from a felony to a misdemeanor.

Procedure for Resentencing

The process for getting resentenced (if an individual is in custody) is different from the process for reclassification. Typically, there will be a hearing, and an attorney will represent the individual. If a person is eligible for resentencing, he or she should contact the Public Defender’s office or attorney who represented him/her in the original case, and the attorney should file the petition for resentencing. See Appendix N for answers to frequently asked questions about resentencing under Proposition 47.¹⁴

STEP 1: Obtain and Complete a Prop. 47 Petition

Court forms are available from the clerk at the court where the person was convicted.¹⁵ These forms are straightforward and simple to fill out — information is required about the conviction (date of conviction, case number, penal code section, and sentence). Make sure to check the box indicating the person is currently “under sentence” and is requesting to be resentenced. See Appendix O for sample resentencing petitions from San Francisco and Los Angeles counties.

STEP 2: Serve Copy of Petition and File Original Court Forms

A copy of the Prop. 47 Petition for Resentencing must be served on the District Attorney and any other people who are part of the case. The original Prop. 47 petition, along with the signed Proof of Service indicating that copies were served as required, must then be filed with the clerk of the court where the conviction occurred.

¹³ See also J. Richard Couzens and Tricia A. Bigelow, *Proposition 47: The Safe Neighborhoods and Schools Act*, (August 2015) available at: courts.ca.gov/documents/Prop-47-Information.pdf.

¹⁴ Courtesy of Californians for Safety and Justice, available at: MyProp47.org/resentencing.

¹⁵ A form for each county is also available online, at: safeandjust.org/county-map.

STEP 3: The Judge Reviews Petition to Determine Eligibility

After the petition is filed, a judge will review it to make sure the person is eligible for resentencing. In order to qualify for resentencing, the person must meet all of the following requirements:

- 1) The conviction must be for one of the qualifying convictions under Prop. 47;
- 2) There must be NO disqualifying convictions; *and*
- 3) The person must currently be “under sentence” for the qualifying conviction (incarcerated, or on parole or on Post-Release Community Supervision (PRCS)).

STEP 4: Qualification Hearing — if Requested

When a petition for resentencing under Prop. 47 is filed, the person is not automatically granted a hearing in front of a judge. A hearing, however, may be requested. If the conviction was for shoplifting, theft, receiving stolen property or forgery/bad checks, a hearing may be beneficial so that evidence can be presented to the judge to show that the value of property involved in the crime was under \$950 — and therefore qualifies under Prop. 47. Keep in mind that the District Attorney can also request a hearing to contest (challenge) the petition.

If there is a hearing on the petition, it is advisable that the person attend. Whether the person is able to attend the hearing or not, make sure that the judge has as much evidence to support the request for resentencing, including evidence of rehabilitation, proof of accomplishments since the conviction and letters of support. You should provide as much evidence as possible that the person requesting Prop. 47 relief does not pose any risk to public safety.

If the person meets all of the requirements for resentencing, he or she is entitled to be resentenced unless the judge decides that the individual poses an “unreasonable risk to public safety,” meaning that the judge specifically thinks that if the person is released, he or she will commit one of the violent “super strike” felonies listed in California Penal Code section 667(e)(2)(c)(iv). In making this decision, the judge will consider the complete conviction history including:

- type of crime(s) committed in the past;
- amount of injury to the victim(s);
- length of time spent in prison in the past;
- how long ago the crime(s) were committed;
- disciplinary record and record of rehabilitation while in prison;
- anything else the judge thinks is relevant;
- whether the individual poses any risk to society.

STEP 5: Resentencing

If the conviction is eligible and criminal history does not disqualify the person, and the judge does not think the individual poses an unreasonable risk to public safety, he or she is entitled to be resentenced to a misdemeanor sentence. The person will get credit for time served, so if he or she has already served the equivalent of a misdemeanor sentence, he or she can be released from custody.

If the person is still in prison at the time of resentencing, the judge will likely put the person on parole for one year. Depending on the facts of the situation, the judge may not grant parole at all.

If the person is on parole or Post-Release Conviction Supervision (PRCS) at the time of resentencing, the person could be discharged right away (if the equivalent of a misdemeanor sentence has been completed), or the judge may reduce the supervision to probation.

Note: It is crucial for noncitizen clients that the order granting the resentencing state that the new misdemeanor carries a maximum potential sentence of 364 days (or six months, in the case of theft or shoplifting).

b. Reclassification

People who are not in custody or on probation or parole for the Prop. 47-eligible offense will apply for reclassification. They should contact the Public Defender’s office in the county where the conviction occurred or a reentry legal service provider to seek out free assistance with a Prop. 47 reclassification. See Appendix F for a list of organizations statewide that provide free Prop. 47 and clean slate services. In addition, a list of upcoming Prop. 47 record change

events scheduled throughout the state is available at [MyProp47.org/events](https://myprop47.org/events). The steps below outline the reclassification record change process. See Appendix P for Californians for Safety and Justice’s step-by-step reclassification infographic in both English and Spanish.

Procedure for Reclassification

STEP 1: Get a Copy of the Criminal Record

A copy of the person’s “RAP Sheet” (criminal record) is needed to determine eligibility. If the person has only one conviction or multiple convictions from **one county**, he or she can visit the Superior Court where the conviction occurred to obtain their “Docket Sheet” (criminal record). If the person has multiple convictions from **different counties**, he or she must visit each court where a conviction occurred to request a copy of each Docket Sheet. Alternatively, people can obtain their complete California RAP Sheet from the Department of Justice by visiting a Live Scan provider who will fingerprint them and submit their request to the DOJ.¹⁶ There is a fee, but a person may qualify for a waiver if written proof of government assistance is provided and his or her income is under a certain level. See Appendix Q for a step-by-step guide to obtaining DOJ RAP Sheets and a sample DOJ RAP Sheet Fee Waiver.

Note: It can take up to two months (anywhere from two to eight weeks) to receive a copy of a DOJ RAP Sheet.

STEP 2: Complete Prop. 47 Petition for Reclassification

Just as for resentencing, a Petition for Reclassification must be filed. Most courts use a single form for resentencing and reclassification, which can be obtained from the clerk at the court where the conviction took place. The form will need to be filled in with basic information about the conviction (such as the date of conviction, case number, penal code section, and the sentence). Make sure to check the box indicating the request for reclassification.

In most counties, two documents will need to be completed: (1) an Application for Reclassification (record change), and (2) Proof of Service. A list of specific forms used in counties across California is provided at

safeandjust.org/county-map. Each county has developed its own form for Prop. 47 relief.

Note: As above for reclassification, confirm that the Prop. 47 order submitted along with the materials specifies the 364-day maximum potential sentence for the newly reduced misdemeanor. See Appendices J and K for sample orders that include the 364-day language.

STEP 3: Serve Copy of Petition and File Reclassification Packet

The completed reclassification forms are what is called the “reclassification packet.” A separate reclassification packet will need to be submitted for *each* conviction.

Make three copies of each reclassification packet:

- 1) One copy to be mailed to the District Attorney’s Office.
- 2) One copy for the client to keep.
- 3) One copy for the attorney preparing the court forms (optional, but a good idea if the attorney has capacity to hold the documents for tracking and follow-up purposes).

The **original** gets served on the appropriate court, with the Proof of Service indicating that a copy of the petition has been mailed to the District Attorney.

STEP 4: Wait for Approval

Once the petition is filed, a judge will review it to make sure the person qualifies for reclassification. The judge will check to see whether the conviction offense qualifies under Prop. 47 and whether there are any prior convictions that disqualify the person. Generally, a request for a hearing for reclassification is not necessary. However, it is possible that a hearing is necessary to prove the value of the property involved in the offense is less than \$950 to make sure it qualifies.

If all requirements are met, the judge **MUST** reclassify the conviction as a misdemeanor.

In most counties, the person is notified by mail once the Superior Court has recorded the reclassification. Some counties may require the person to return to court to learn the status of his or her petition.

¹⁶ For a list of Live Scan locations in California, by county, visit the Office of the California Attorney General at: oag.ca.gov/fingerprints/locations.

Typically, a hearing is not needed to process a record change. However, if there is a dispute and the application is denied, the person is entitled to a hearing. In some instances, it may be that the forms were completed incorrectly, which is why working with an attorney or legal clinic is so important. If someone qualifies, a public defender can represent that person at a hearing.

5. How does Prop. 47 help immigrants?

Having a felony rather than a misdemeanor conviction can hurt noncitizens in a few key ways. Prop. 47 solves the felony problem for certain offenses.

- Any felony conviction is a bar to DACA (Deferred Action for Childhood Arrivals) and DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents).¹⁷
- Any felony conviction makes a noncitizen an “enforcement priority” for immigration authorities. This means that the U.S. Immigration and Customs Enforcement agency (ICE) might show up at the person’s house or place of employment to arrest the individual and begin “removal” (deportation) proceedings.¹⁸
- Many noncitizens have immigration problems because they were convicted of a “crime involving moral turpitude.” In California, theft, fraud, forgery, and passing bad checks are considered crimes involving moral turpitude (CIMT), and receipt of stolen property and burglary might also be charged as CIMT. If the person is convicted of just *one* crime involving moral turpitude, changing the felony to a misdemeanor after January 1, 2015 — and specifying the new maximum sentence of 364 days — is possible and could help an immigrant in a number of ways:
 - The person *might* be able to apply for a green card based on having lived in the U.S. for 10 years and showing that his or her deportation would cause a hardship to a U.S. citizen or permanent resident family. For more information see Appendix H, ILRC *Immigration Relief Toolkit*.
 - A lawful permanent resident *might* be able to avoid becoming deportable based on the conviction.
 - The person *might* be able to get a green card through a family visa petition filed by a close relative who is a citizen or permanent resident. (In this case, the January 1, 2015, date does not matter.) See Appendix H, ILRC *Immigration Relief Toolkit*.

WARNING: PROP. 47 MAY NOT SOLVE ALL IMMIGRATION PROBLEMS.

Reducing a felony to a misdemeanor can be helpful, but certain misdemeanor convictions can still cause very serious immigration problems for noncitizens. The “wrong” misdemeanor can block the person from applying for DAPA, DACA or other immigration relief, can make the person an enforcement priority, or can cause a permanent resident to be deportable. Make it clear to the noncitizen that he or she needs to get expert analysis of *all* convictions, whether misdemeanor, felony or infraction. See Disclaimer/Advice Form in Appendix E.

¹⁷ On November 20, 2014, President Obama announced executive actions that would expand the existing DACA program and create a new program (DAPA) to allow parents of U.S. citizens and permanent residents to remain in the U.S. and work without fear of deportation. The executive actions were challenged in the courts by several states. On February 16, 2015, a federal judge in Texas blocked these two programs (expanded DACA and DAPA). The injunction meant that the two programs could not be implemented. On November 9, 2015, the 5th Circuit Court of Appeals in New Orleans reaffirmed the decision. The 2-1 ruling meant that President Obama’s expanded DACA and DAPA programs could not be implemented. The Obama Administration asked the U.S. Supreme Court to take the case. On January 19, 2016, the U.S. Supreme Court agreed to grant cert in the case of *United States v. Texas*. This means that they will take the case, and a final decision could be made in June 2016. For more information, see ilrc.org/daca and ilrc.org/policy-advocacy/executive-actionadministrative-relief.

¹⁸ For more information, see ilrc.org/enforcement.

C. Changing a Felony to a Misdemeanor: California Penal Code § 17(b)(3)

1. What Penal Code § 17(b)(3) Does

In addition to the immigration benefits of Penal Code § 17(b)(3), discussed in section 3 below, reducing a felony to a misdemeanor has other benefits including:

- A less serious conviction on a person’s criminal record;
- Allowing an applicant to answer that he or she has never been convicted of a felony on certain job, housing and other applications; AND
- Restoring some of the rights that may have been lost due to a felony conviction such as the right to serve on a jury.

Once a felony becomes a misdemeanor, it should be disclosed only as a misdemeanor conviction. The exceptions to this rule are:

- Three strikes
- Some federal gun statutes
- Certain state occupational licenses

a. Penal Code § 17(b)(3) designates a “wobbler” as a misdemeanor

Under California law, some offenses can be punished either as a felony or a misdemeanor. These offenses often are called “wobblers.” An offense is a wobbler if the judge is given discretion to impose either (a) a sentence of state prison or more than a year in jail pursuant to § 1170(h), or (b) no more than a year in jail or a fine, or both.

For state-prison felonies, the statutory language describing a wobbler offense will include the phrase stating that the crime is punishable “by imprisonment in the state prison or confinement in a county jail for not more than one year.” For county-jail felonies, the statutory language describing a wobbler offense will include the phrase stating that the

crime is punishable “by imprisonment in a county jail for not more than one year, or by imprisonment pursuant to subdivision (h) of Section 1170.”

Many California offenses are wobblers. A few common examples are driving under the influence, battery with serious bodily injury, welfare fraud, grand theft and receiving stolen property.

A few “stealth” wobblers permit the judge to sentence the defendant to state prison or with a fine.¹⁹ In these cases, the court may alternatively issue a sentence of less than a year in county jail, and in so doing, the offense may be reduced pursuant to PC § 17(b)(3).²⁰

If a person has a felony conviction for an offense that is a “wobbler,” he or she might be able to petition the court to reduce the felony to a misdemeanor pursuant to Penal Code § 17(b)(3).

b. Compare Prop. 47 and Penal Code § 17(b)(3)

Prop. 47 and Penal Code § 17(b)(3) are similar in that both can reduce a felony conviction to a misdemeanor. They have the same effect for immigration purposes. However, they have several important differences. For example, § 17(b)(3) reductions are discretionary, whereas Prop. 47 reclassifications are mandatory. The table below summarizes the differences between Prop. 47 and Penal Code § 17(b)(3) reductions.

¹⁹ See Penal Code § 18.

²⁰ See, e.g., Penal Code §§ 107 (escape from a reformatory or state hospital); 148.3(b) (false report of an emergency); 337b (point shaving in an athletic contest).

	PROP. 47, CODIFIED AS PENAL CODE § 1170.18	PENAL CODE § 17(B)(3)
What types of felonies can be changed to misdemeanors?	Only simple possession of a controlled substance, and certain property offenses where the amount taken did not exceed \$950.	Potentially any “wobbler” (alternate felony/misdemeanor) conviction.
What if the person was sentenced to more than a year for the felony?	Still eligible — plus, the prison sentence can be recalled if the person still is imprisoned or on probation or parole.	The person is not eligible for § 17(b)(3).
Do any prior convictions act as a bar to reducing the felony to a misdemeanor?	Yes, a prior conviction of a “super strike” or some offenses that require registry as a sex offender.	No prior conviction will bar § 17(b)(3).
Can the criminal court judge refuse to change the felony to a misdemeanor?	No. If the person is eligible, the relief is mandatory. (But a person who still is imprisoned must be found not dangerous in order to get early release.)	Yes. The judge may decide to grant or deny the motion as a matter of discretion.
Does getting the benefit prevent the person from lawfully owning a firearm thereafter?	Yes. To get Prop. 47 relief, the person must give up the right to own a firearm.	No, § 17(b)(3) itself does not require that.
Is there a deadline for applying?	Yes! All applications for relief under Prop. 47 must be submitted by November 4, 2017.	No. One can apply for § 17(b)(3) at any time, including during probation.

2. How does a person get Penal Code § 17(b)(3) relief?²¹

Unlike a Prop. 47 reclassification or resentencing, reduction of a felony to a misdemeanor under Penal Code § 17(b)(3) is always discretionary. Because granting the motion is discretionary, the petitioner may wish to provide the court with reasons to do so.²² The court’s discretion is to be exercised only after a consideration of the offense, the character of the offender, and the public interest.²³ A showing, therefore, that a petitioner has fulfilled the conditions of probation for the entire period of probation has little bearing on whether a Penal Code § 17(b)(3)

motion should be granted. Rather, a Penal Code § 17(b)(3) motion may include information regarding the facts and circumstances of the offense itself, the defendant’s character and any resulting effect on society.

a. Documentation

The California Judicial Council provides a standardized form, Form CR-180, “Petition for Dismissal” (also used for reductions) for seeking a Penal Code § 17(b)(3) reduction and/or expungement. See Appendix R for a copy of Form CR-180. Every criminal court throughout

²¹ Practitioners unfamiliar with the local practices should consult with the local public defender’s clean slate specialist or a local nonprofit that specializes in legal reentry representation. East Bay Community Law Center has a hover map, at: ebclc.org/reentry-legal-services, that will help you locate the reentry legal service provider(s) in your area. See also Appendix F for a statewide list of organizations providing Prop. 47 and clean slate services.

²² See *People v. Superior Court (Alvarez)*, 14 Cal.4th 968, 978 (1997).

²³ Id.

the state recognizes this form as the proper method for pursuing a felony to misdemeanor reduction as well as a misdemeanor reduction pursuant to Penal Code s. 17(d).²⁴

The petitioner may collect the same “rehabilitation” documents helpful for a dismissal petition. These include:

- Receipts or proofs of payment for fines and fees;
- Proof of completion of any court-mandated programs; and
- Documents demonstrating rehabilitation.

The documents should be typed and addressed to “The Honorable Judge.” One of these documents must be a declaration from the petitioner in the form of a narrative offering an explanation for the offense, describing how the petitioner has changed, and explaining why a reduction will help the individual move forward.

The petitioner should also include **letters of support** from people who can attest to the petitioner’s growth. Some letters can come from family but should include a mix of other individuals, such as employers, case managers, or landlords. See Appendix S for a template and sample letter of support for dismissal petition.

Though these practices vary county by county, if an employer does not want to sign under penalty of perjury, he or she should use letterhead. Family should always sign under penalty of perjury. The petitioner should also include any other evidence of rehabilitation, including certificates of completion of classes, diplomas, awards, etc.

If applicable, the petitioner should collect any documents (court minutes or hearing transcripts) showing that a felony reduction was part of the original plea agreement for the conviction and that the petitioner satisfied all terms of the plea agreement.

If a defendant is convicted of a felony and the court issues a “split sentence” pursuant to section 1170(h)(5), the defendant may be eligible for a felony reduction after the completion of the supervision period.²⁵

b. Filing

The petitioner may combine Penal Code § 17(b)(3) felony reduction and Penal Code § 1203.4 dismissal petitions, a practice anticipated by the statewide court forms that include the opportunity to ask for both types of relief. and file them according to the same procedures. Generally it is a good idea to obtain the dismissal along with the reduction. Procedures can vary between jurisdictions, so it is best to consult with a local legal reentry specialist to determine the practices in your area. The general practices and procedures are outlined below.

Petitions and supporting documents are filed in the court where the conviction was entered. Bring the following to the court:

- 1) the original Petition
- 2) a copy for the court
- 3) a copy for the petitioner (will be stamped by the court)
- 4) a copy to be stamped and served on the District Attorney

At the time of filing, the clerk will set a hearing date. There is usually a one- to three-month wait due to limits on how many petitions may be heard during each hearing.

c. Hearing

The court follows the same procedures for felony reduction petitions as for dismissal petitions, as described above.

Often, the Penal Code § 17(b)(3) hearings will first be heard “in camera,” *i.e.*, in a conference in the judge’s chambers.

If the judge wants more evidence of rehabilitation, the case may be put over to another calendar date while

²⁴ Form CR-180, and all Judicial Council forms, are available online at the California Judicial Branch website, at: courts.ca.gov/forms.htm?filter=CR.

²⁵ See Garrick Byers, “Realignment,” pp. 40–41, (October 17, 2011) available at: claraweb.us/wpcontent/uploads/2011/10/California-Public-Safety-Realignment-Analysis-by-Garrick-Byers-October-17-2011-Edition1.pdf.

further documentation is gathered. If the judge feels that more time must pass before a reduction can be granted, ask to withdraw the petition.²⁶

Following the chambers conference, the case is called in open court. The petitioner must be present unless he or she does not live nearby or is otherwise granted an exception.

d. How to get a felony reduction and expungement simultaneously

Even a misdemeanor conviction still appears on one's record when, for example, that person receives a background check before securing a new job. Therefore, in addition to getting a reduction, many individuals will want to get the conviction dismissed and set aside, or, "expunged." Section II of this chapter will discuss expungements in greater detail.

Having a felony conviction reduced to a misdemeanor may be done simultaneously with pursuing an expungement by submitting the Judicial Council's Petition for Dismissal Form CR-180. The form, used primarily for expungement, has a box that can be checked indicating that the conviction is also eligible to be reduced.

When the court holds a hearing for the expungement, the judge will consider both requests: first the request to reduce the conviction to a misdemeanor under Penal Code section § 17(b)(3), and next the request to have it expunged. If all requirements are met, the judge will usually grant both requests together. However, the decision is discretionary.

3. How does Penal Code § 17(b)(3) help immigrants?

For immigration purposes, there is no difference between reducing a felony to a misdemeanor under Penal Code § 17(b)(3) versus under Prop. 47. See the list of immigration effects for Prop. 47 at Section I.B.5. in this chapter; these apply equally to Penal Code § 17(b)(3).

Similar to securing a Prop. 47 reduction, in order to reap the full immigration benefits of a Penal Code § 17(b)

(3) reduction, you must specify that the newly reduced misdemeanor carries a *maximum possible sentence of 364 days*, pursuant to Penal Code § 18.5. See discussion in Section I.A.3. of this chapter.

Commonly, courts use Judicial Council form CR-181 to grant a reduction under Penal Code § 17(b)(3). (See Appendix T for a copy of Form CR-181, *Order for Dismissal*.) Petitioners should note on the form that the new misdemeanor carries a maximum possible sentence of 364 days pursuant to Penal Code § 18.5. If the court does not sign CR-181 orders and instead issues oral rulings on Penal Code § 17(b)(3) petitions, make sure that the judge orally states on the record that the newly reduced misdemeanor carries a new maximum possible sentence of 364 days. Provided that the minute order (the transcript of the oral ruling) shows the new sentence, this should be sufficient to take advantage of any immigration benefit of the reduction.

WARNING: RELIEF UNDER PENAL CODE § 17(b)(3), LIKE RELIEF UNDER PROP. 47, MAY NOT SOLVE ALL IMMIGRATION PROBLEMS.

Many misdemeanor convictions can cause very serious immigration problems. The "wrong" misdemeanor can block the person from applying for DAPA, DACA or other immigration relief. It can make the person an enforcement priority and cause a permanent resident to be deportable. Make it clear to the person that he or she still needs to get expert analysis of *all* convictions, whether misdemeanors, felonies or infractions.

²⁶ A court cannot grant 1203.4 relief while a petitioner is on probation in any case. A person can file a motion for early termination of probation pursuant to Penal Code § 1203.3, which will make them eligible for 1203.4 relief.

II. SET ASIDE AND DISMISSALS (EXPUNGEMENTS) UNDER PENAL CODE §§ 1203.4, 1203.4A, 1203.41, 1210.1(E) AND 1000.3

A. Overview: What Is a Dismissal (Expungement)?

Under Penal Code §§ 1203.4, 1203.4a, 1203.41, a person can petition to dismiss a conviction from his or her record. Dismissal and set aside (commonly referred to as expungement) is a way to clean up one's record by limiting the criminal history information that certain people can see in a background check and relieves the person of some of the consequences associated with his or her conviction. Under Penal Code §§ 1000.3 and 1210.1(e), a person who successfully completes the requirements of Deferred Entry of Judgment (DEJ)²⁷ or Prop. 36 drug treatment,²⁸ respectively, also can get a dismissal.

Although Penal Code § 1203.4 and its related sections state that they relieve a person of “all penalties and disabilities resulting from” the conviction, they actually eliminate only some penalties. A dismissed conviction remains on an individual's RAP Sheet, but an additional notation is added to the conviction, showing that it has been dismissed per Penal Code §§ 1203.4, 1203.4a, and 1203.41. Having a conviction expunged hides the conviction from some but not all background checks. For example, private employers are not allowed to see a conviction that has been expunged and most private employers cannot ask about, or even consider, a conviction that has been expunged when the person applies for a job. In contrast, a dismissal under Penal Code §§ 1000.3, 1000.4 after completion of Deferred Entry of Judgment (“DEJ”) requirements, or a dismissal under Penal Code § 1210.1(e) after completion of Prop. 36 requirements, provides more protection. However, all of the above dismissals have only limited effect in immigration law. See section C below.

Note that as of January 1, 2016, additional relief is available for persons who complete a Deferred Entry of Judgment, under new Penal Code § 1203.43. That relief should eliminate the conviction for all immigration purposes.²⁹ Penal Code § 1203.43 is discussed in detail in Section III of this chapter.

B. How to Get a Dismissal

If the sentence imposed included a term of probation, the remedy is a Penal Code § 1203.4 dismissal. If no probation was imposed, the remedy is a Penal Code § 1203.4a dismissal. If the sentence was to local (or county) prison for a Realignment sentence (Penal Code section 1170(h)), the remedy is Penal Code s. 1203.41 dismissal.

Some dismissals are mandatory; others are discretionary. Regardless of whether the dismissal is mandatory or discretionary, or which dismissal remedy applies, the same petition and order is used across the state: CR-180 and CR-181. See Appendices R and T for a copy of the forms.

Dismissals after successful completion of Deferred Entry of Judgment or Prop. 36 requirements will take place as part of the DEJ or Prop. 36 process, at the closing hearing.

Consult with a local clean slate practitioner to determine the standards and procedures used in your area.

1. Mandatory Dismissals

Under Penal Code § 1203.4, dismissal of a conviction is mandatory if the petitioner can demonstrate that:

- Sentence imposed did not include state prison;

²⁷ DEJ is a program for first-time drug offenders only. An offender will usually plead guilty to the charge with a stated sentence and the court proceedings are stayed pending the DEJ program. If the person successfully completes the program, at the end of six months, the court will set aside his or her prior guilty plea and will dismiss the underlying criminal charge.

²⁸ The Substance Abuse and Crime Prevention Act of 2000, also known as Proposition 36, amended existing drug sentencing laws to require criminal defendants who are convicted of a nonviolent drug offense to be placed in drug treatment as a condition of probation, instead of incarceration. Drug treatment was also required for State parolees convicted of a nonviolent drug related violation of parole.

²⁹ California Gov. Jerry Brown signed AB 1352 in October 2015, so that new Cal. P.C. § 1203.43 will be in effect as of January 1, 2016. Advocates will post sample § 1203.43 application forms, pending creation of a government form. See Immigrant Legal Resource Center's Advisory at: ilrc.org/resources/New_California_Drug_Law_1203.43.

- Conviction was not for a
 - Serious sex offense (Penal Code §§ 286, 288, 288a(c), 288.5, 289(j), or 261.5(d) (crimes against a minor or felony rape));
 - Failure to stop violation listed in Vehicle Code § 42001.1;
 - A violation listed in §§12810(a)-(e) of the Vehicle Code.
- Petitioner is NOT currently on probation or parole in any county;
- Petitioner has no pending charges;
- Petitioner has paid all fines, fees, and restitution (in most cases); AND
- Petitioner successfully and entirely completed all terms of probation (*i.e.*, no new arrests during probationary period).

If the dismissal is mandatory, the petitioner may apply for a dismissal without any supporting documentation.

2. Discretionary Dismissals

If the petitioner is not eligible for a mandatory dismissal, he or she may still be eligible for a discretionary dismissal.

The court can exercise its discretion to *not* grant a dismissal in the following cases:

- Petitioner still has outstanding monetary obligations on his or her case;
- Petitioner did not successfully complete probation, due to a new arrest or conviction during the probationary term.
- Petitioner was convicted of a violation listed in §§ 12810(a)-(e) of the Vehicle Code.

If a dismissal is discretionary, the petitioner may wish to file supporting documents. The standard for a discretionary petition is “in the interests of justice.”

In some counties, judges may not be familiar with Penal Code § 1203.4 or their power to award discretionary relief. In those counties, a memo of points and authorities may be useful. See Appendix U for a sample memo.

3. Components of a Petition

Once you determine that the client is eligible for a dismissal, work with him or her to compile documents in support of the petition.

In practice, Penal Code § 1203.4 and 1203.41 dismissals are often treated as discretionary by the court. The standard is “in the interests of justice.” In deciding whether to grant the petition, the court will weigh a number of factors, including the severity of the offense, how much time has passed since it occurred, and the strength of the rehabilitation evidence presented, especially if the petitioner only recently is off probation. If you are in doubt as to whether the expungement relief is mandatory, it is best to prepare all of the supporting documentation that is necessary for a discretionary petition.

The petitioner should submit Judicial Council Form CR-180, “Petition for Dismissal.” See Appendices R and T for a sample petition and order. The petitioner should also submit receipts or proofs of payment for fines and fees, proof of completion of any court-mandated programs, and approximately four to six documents demonstrating rehabilitation.

The “proof of rehabilitation” should be typed and addressed to “The Honorable Judge.” One of these documents must be a declaration from the petitioner that is in the form of a narrative offering an explanation for the offense and describing how the petitioner has changed and why a dismissal will help the individual move forward in his or her life. When representing immigrant clients, be attentive to not including unnecessary details that could be potentially damaging in future immigration proceedings. For example, refrain from citing your client’s specific immigration status, or in a drug offense, refrain from citing the specific controlled substance involved.

The petitioner must also include letters of support from people who can attest to the petitioner’s growth. Some of the letters can come from family but must be a mix of other individuals, such as employers, case managers or landlords. See Appendix S for a template and sample

letter of support for dismissal petition. If an employer does not want to sign under penalty of perjury, he or she must use letterhead; family must always sign under penalty of perjury.

The petitioner should also include any other evidence of rehabilitation, including certificates of completion of classes, diplomas, awards, etc.

4. Filing the Petition

Petitions and supporting documents are filed in the court where the conviction was entered. Bring the following to the court:

- 1) the original
- 2) a copy for the court
- 3) a copy for the petitioner (will be stamped by the court)
- 4) a copy to be stamped and served on the District Attorney

At the time of filing, the clerk will set a hearing date. Some courts specify one courtroom or judge to hear dismissal petitions; others will assign you randomly. There is usually a one- to three-month wait time to be scheduled for a hearing.

5. Hearing

The practices for hearing a dismissal petition will depend on the jurisdiction. In San Francisco, for example, petitions are first discussed through conference in the judge's chambers. During the conference, the judge will hear from the attorneys, the probation department and the Comprehensive Collections Unit.

If you are filing a discretionary expungement petition, it is always a good idea to ask for a hearing so that you have an in-person opportunity to convince the court to grant the petition.

If the judge wants more evidence of rehabilitation, ask for the case to be put over to another calendar date while

further documentation is gathered. If the judge feels that more time must pass before a dismissal can be granted, ask to withdraw the petition.

Following the chambers discussions, the case is called in open court. The client must be present unless the petition is mandatory or the client does not live nearby.

C. Immigration Benefits of a Dismissal

As a general rule dismissals do not eliminate a conviction for immigration purposes.³⁰ However, there are several important exceptions to this rule.

1. Expungement of first-time drug possession convictions entered on or before July 14, 2011, eliminate the conviction as a ground for deportability.

An expungement will eliminate all immigration consequences of a first conviction for possessing a drug, possessing drug paraphernalia, or giving away a small amount of marijuana (but not for being under the influence), as long as the conviction occurred before July 14, 2011, and the person did not violate probation or have a prior grant of "pre-trial diversion." This only works in immigration cases arising in the Ninth Circuit Court of Appeals.³¹

2. An expunged conviction will not bar Deferred Action for Childhood Arrivals (DACA).³²

DACA, President Obama's administrative relief for immigrants who came to the United States as children and attended school here, has strict criminal bars. However, an expunged conviction can overcome the criminal bars to DACA and restore an adjudicating officer's ability to exercise discretion favorably and grant administrative relief.

The same will be true of the Deferred Action for Parents of Americans (DAPA) program, for certain parents of permanent residents and U.S. citizens, if that program is permitted to go forward. Currently it is on hold, pending the outcome of a federal lawsuit.

³⁰ See *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

³¹ See *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. July 14, 2011) (en banc) and see Advisory at: ilrc.org/resources/practice-advisory-lujan-nunez-july-14-2011.

³² President Obama's Deferred Action for Parents of Americans (DAPA) is currently stalled in federal litigation. However, expunged convictions would operate in the same way to alleviate certain criminal bars of eligibility to that form of administrative relief.

3. An expunged conviction can provide an Immigration and Customs Enforcement (ICE) officer with the authority to exercise discretion not to arrest an immigrant or place him or her in removal proceedings.

Immigration authorities use a set of enforcement priorities, set out in 2014, to identify noncitizens for arrest and removal. Any person convicted of any felony or of certain misdemeanors is an enforcement priority. Priority misdemeanors include certain types of offenses — for example a DUI or domestic violence offense — as well as any misdemeanor if a sentence of 90 days or more was imposed. Expunging a conviction could mean that the person is no longer an enforcement priority. As a matter of discretion the person might not be arrested, or removal proceedings might not be imposed.³³

D. Other Benefits of a Dismissal

In addition to the immigration benefits of a dismissal, a dismissed conviction can help a person in many areas of his or her life.

A dismissal allows a person to state “no convictions” on job applications for most private employers. However, the benefit of non-disclosure applies only if *all* convictions have been dismissed; and for Penal Code § 1203.4-type dismissals this benefit does not apply when seeking a government job, a job working with a sensitive population (children, seniors and people with disabilities), a job at a licensed facility (community care, health, banks) or a job that requires licensing from the state. This limit does not apply to dismissals after completion of DEJ or Prop. 36, under Penal Code §§ 1000.3, 1210.1(e)(3); in that case the person may deny that the arrest or conviction occurred in all contexts other than application to become a peace officer.

1. A dismissal provides evidence of rehabilitation for licensing and certification applications.

2. A dismissal can assist with obtaining public or private housing.

3. A dismissal assists with eligibility for federal student loans.

4. A dismissal is the first step toward obtaining a governor’s pardon and a Certificate of Rehabilitation in some cases.

A Penal Code § 1203.4-type dismissal does *not* erase a conviction from a person’s record. When disclosing a dismissed conviction, the applicant should note that the conviction “has been dismissed pursuant to PC 1203.4/1203.4a/1203.41.”

- A dismissed conviction still appears on RAP Sheets and public court records, albeit with a notation as described above.
- A dismissed conviction may count as a “prior” or “strike.”
- The state will not reinstate firearm privileges or driving privileges, if relevant.
- A dismissal does not remove a person’s obligation to register as a sex offender, if relevant.
- A dismissed conviction may be used for impeachment purposes at trial for a defendant testifying against himself.
- A dismissal does not prevent the federal government from considering the conviction for immigration purposes.
- A dismissed conviction must still be disclosed in response to direct questions on applications and forms for most immigration purposes:
 - Public office (essentially any public employment);³⁴
 - Health care facilities where the position requires patient contact or access to medication (for certain types of convictions);³⁵
 - Employment as a peace officer;³⁶
 - Contracting with the California Lottery;³⁷
 - Licensure by any state or local agency;³⁸
 - Jury service.

³³ See FAQs relating to Executive Action on Immigration at the U.S. Immigration and Customs Enforcement website, at ice.gov/immigrationAction/faqs, and Department of Homeland Security memorandum relating to new policies, at: dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

³⁴ Cal. Pen. Code § 1203.4(a) (2012).

³⁵ Cal. Lab. Code § 432.7(f) (2012).

³⁶ Cal. Pen. Code § 1203.4(a) (2012).

³⁷ Cal. Pen. Code § 1203.4(a) (2012).

³⁸ Cal. Pen. Code § 1203.4(a) (2012).

III. WITHDRAWAL OF PLEA FOR CAUSE AFTER DEFERRED ENTRY OF JUDGEMENT UNDER NEW PENAL CODE § 1203.43

A. What is a Withdrawal of Plea under Penal Code § 1203.43?

A criminal court judge may offer deferred entry of judgment (DEJ) to qualifying defendants charged with a first, minor drug offense. See P.C. § 1000 et seq. Under DEJ the defendant agrees to enter a guilty plea and is given from 18 to 36 months to complete a drug program. If the defendant successfully completes the requirements, the statute states that the court will dismiss the charges, there is no conviction “for any purpose,” and no denial of any license, employment, or benefit may flow from the incident. See Penal Code §§ 1000.1(d), 1000.3, 1000.4, and discussion in Section II of this chapter.

Unfortunately, the statutory promise that a defendant will not suffer any legal harm if he or she successfully completes DEJ is not true if the defendant is a noncitizen. Like the other dismissals discussed in Section II of this chapter, the DEJ disposition remains a “conviction” for immigration purposes. To eliminate a conviction for immigration purposes, the plea must be withdrawn for cause, due to a legal defect in the underlying case.

The new law, Penal Code § 1203.43, permits people who successfully complete DEJ to withdraw their guilty plea for cause, due to legal error. The legal error is the fact that the DEJ statute misinformed defendants as to the real consequences of the guilty plea. New Penal Code § 1203.43(a) provides:

(a) (1) The Legislature finds and declares that the statement in Section 1000.4, that “successful completion of a deferred entry of judgment program shall not, without the defendant’s consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate” constitutes misinformation about the actual consequences of making a plea in the case of some defendants, including all noncitizen defendants, because the disposition of the case may

cause adverse consequences, including adverse immigration consequences. (2) Accordingly, the Legislature finds and declares that based on this misinformation and the potential harm, the defendant’s prior plea is invalid.

Compare withdrawal of plea under Penal Code § 1203.43 to a dismissal under Penal Code § 1203.4(a), which immigration authorities refer to as expungements and which will not eliminate a conviction for most immigration purposes because it is mere “rehabilitative” relief that the person earns by completing probation. In contrast, a dismissal under § 1203.43 does eliminate the conviction for immigration purposes, because the plea is considered invalid due to the fact that the DEJ statute provided “misinformation about the actual consequences of making a plea.”

B. How to Withdraw a Plea Under Penal Code § 1203.43

Penal Code § 1203.43 took effect on January 1, 2016, and at this writing we do not know what types of application procedures various counties will create. Pending creation of a Judicial Council form, advocates have provided a model application form for Penal Code § 1203.43 relief.³⁹

Hopefully the procedure will be as simple as filing for a rehabilitative dismissal. In fact, some counties state that the Penal Code § 1203.43 motion will be filed as a matter of course at the same time that the charges are dismissed upon completion of DEJ, under Penal Code § 1000.3.

The Penal Code § 1203.43 application can be granted without a hearing. The only requirement for relief is to show that charges were dismissed after successful completion of DEJ. Relief is mandatory: Section 1203.43(b) provides that the court “shall, upon request of the defendant” withdraw the plea in any DEJ case in which the charges were dismissed after completion of requirements.

³⁹ See Appendix V for sample applications forms (one in “narrative style” and another in “check the box” style). These and other practice aids for Penal Code § 1203.43 work can be found online at irc.org/resources/New_California_Drug_Law_1203.43.

If the records showing resolution of the DEJ case are no longer available, the applicant will submit a sworn declaration that charges were dropped based on successful completion of DEJ.⁴⁰ The declaration will be presumed to be true if the person also submits a California Department of Justice (DOJ) record that either shows successful completion of DEJ, or fails to show a final resolution of the DEJ case.

C. Immigration Benefits of Penal Code § 1203.43

Because § 1203.43 is a new law, there are no rulings as of yet. However, because the plea is withdrawn for cause, § 1203.43 should have the same effect as vacating a judgment for cause: It should eliminate the conviction for all immigration purposes, as of the date the conviction was entered. See discussion in Section IV of this chapter.

Immigration law will give effect to an order that eliminates a conviction due to a legal defect in the proceedings, as opposed to “rehabilitative relief” based on the defendant completing program requirements. It does not matter that the motivation for seeking the relief was immigration issues, as long as the legal defect is the basis.⁴¹ Section 1203.43(a) works for immigration purposes because the order is based on a legal defect in

the proceedings: The fact that the DEJ statute provided “misinformation about the actual consequences of making a plea,” such that the plea must be withdrawn as legally “invalid.”

D. What About the Other Dismissals Discussed in Section II?

Other “rehabilitative relief” under California law also promises to eliminate a conviction, and thus also provides misadvice to immigrants about the real consequences. For example, Penal Code § 1210.1(e)(3), dismissal after completion of Prop. 36 requirements, uses the same language about loss of legal benefits as the DEJ statute does. Can these people also qualify for § 1203.43?

Unfortunately, it appears that they cannot. By its terms, § 1203.43 is available only to persons who obtained a dismissal under California DEJ, and not to persons who obtained other kinds of dismissals. It is possible, however, that a motion to vacate judgment could be filed on the same grounds: that the statute provided affirmative misadvice about the consequences of the plea. See discussion of motions to vacate a conviction in the next section of this chapter.

IV. MOTIONS TO VACATE CONVICTIONS BASED ON A CLAIM OF LEGAL INVALIDITY

While the above reductions, reclassifications or dismissals may be helpful for certain people, in many instances the only way to assure that a conviction will not cause immigration harm is to vacate the conviction based on a specific ground of legal invalidity.

For a conviction to cease to exist for *all* immigration purposes, it must be vacated on a ground of legal invalidity.⁴² For many immigrants, that ground of legal invalidity will be based on a claim that defense counsel

failed to inform them, and/or to defend against, the actual or possible immigration consequences of a conviction.⁴³ Counsel will need to develop a “game plan” for achieving post-conviction relief goals, including (1) choosing a procedural vehicle (2) determining a ground of legal invalidity that undermines the conviction, (3) identifying one or more alternative immigration-safe offenses to offer to substitute for the offense of conviction, and (4) developing a list of equities that can be used to persuade the court and prosecution to cooperate in this effort.

⁴⁰ Penal Code § 1203.43(b).

⁴¹ See, e.g., *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000); *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006).

⁴² *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

⁴³ See *People v. Soriano*, 194 Cal.App.3d 1470 (1987); *People v. Bautista*, 115 Cal.App. 4th 229 (2004); *Padilla v Kentucky*, 559 U.S. 356 (2010).

COMMON POST-CONVICTION RELIEF VEHICLES

VEHICLE	TIMING	GROUND	OTHER NOTES
Penal Code § 1018 (Motion to Withdraw Plea)	Must be filed within six months after the defendant is <i>placed on probation</i> . (*It may be possible to argue for an exemption to the six-month requirement due to equitable tolling.)	May be granted for “good cause.” A defendant’s ignorance of the immigration consequences of a plea may be considered “good cause.”	
Habeas Corpus	<p>Custody. The petitioner must be in actual or constructive custody. Immigration custody does not constitute custody sufficient to allow a challenge to the conviction. <i>People v. Villa</i>, 45 Cal. 4th 1063 (2009).</p> <p>Exhaustion. Must show other remedies are inadequate or exhausted.</p> <p>Due diligence. Defendant must have pursued relief with due diligence.</p>	Must allege constitutional error.	May sometimes be beneficial to file a habeas petition as a “nonstatutory motion to vacate” and habeas in the alternative. See <i>People v. Fosselman</i> , 33 Cal.3d 572 (1983).
Penal Code § 1016.5	Must be filed with due diligence.	“Shall” be granted after a plea of guilty or no contest if the court fails to issue the mandated statutory warning that the conviction may cause (1) deportation, (2) exclusion and (3) denial of naturalization.	Courts have added a showing of prejudice. <i>People v. Zamudio</i> , 23 Cal.4th 183 (2000).
Penal Code § 1385	No time limit or due diligence requirement, but some courts have held it inapplicable if a person has served a prison sentence. See <i>People v. Kim</i> , 212 Cal.App. 4th 117 (2012). Therefore, safest to file when a person receives a suspended imposition of sentence and grant of probation. See <i>People v. Orabuena</i> , 116 Cal. App. 4th 84 (2004).	May be granted in the “interests of justice,” so the suggestion to dismiss must specifically allege a ground of legal invalidity.	Penal Code § 1385 allows the court, on its own motion or that of the prosecutor, to dismiss in the interest of justice. While the defendant may not make the motion him- or herself, he or she may “suggest” that the court exercise its power to dismiss on its own motion. A petitioner should therefore title the pleadings as a “Suggestion to Dismiss in the Interests of Justice.”

A conviction vacated on a ground of legal invalidity will cease to exist for any purposes, including immigration consequences.

A person seeking to file a substantive motion to vacate is advised to contact a post-conviction specialist. In

addition, the Lawyers’ Committee for Civil Rights of the San Francisco Bay Area runs a pro bono post-conviction relief project and may be available to provide guidance.⁴⁴

⁴⁴ See also other publications such as Tooby & Cahn, “California Post-Conviction Relief for Immigrants,” available at: nortontooby.com/resources/premium/other-publications.

CHAPTER THREE

Checklist: How to Provide Proposition 47 and Clean Slate Services to Immigrant Clients

CHAPTER SUMMARY

This chapter provides legal service providers with the practical tools to serve immigrants with a range of types of noncitizen status. It includes an in-depth discussion of the eligibility requirements for the Deferred Action for Childhood Arrivals (DACA) program, and how Proposition 47 clean slate relief can help.

I. REDUCING OR EXPUNGING CONVICTIONS IS NOT A GUARANTEE

Advise Client: I can safely help you apply to reduce a felony to a 364-day Misdemeanor, or to get an Expungement/Dismissal, but this might not solve all immigration problems.

Reentry services are safe for immigrants. It is a legal service provider's obligation to "do no harm" to his or her clients. According to all current evidence, it does not harm a noncitizen in California to receive a dismissal (also known as expungement) or to reduce a felony to a 364-day misdemeanor.

- It does not appear to expose the client to action by immigration authorities. To date, there are no reports of U.S. Immigration and Customs Enforcement (ICE) agents arresting or identifying immigrants because the person obtained an expungement or felony reduction.
- It does not prejudice the immigrant's legal case. Even after a conviction is reduced or "expunged," it still can be vacated for cause later, if necessary.¹ Also, a reduction from a felony to a misdemeanor under Proposition 47 or California Penal Code § 17(b)(3) does no harm for immigration purposes, as long as the order states it is reduced to a "364-day misdemeanor" or

"misdemeanor pursuant to Penal Code 18.5."

Failure to specify the new maximum could create extra procedural hurdles and challenges for your immigrant client.

Therefore, if a person is a noncitizen and requests Proposition 47 and/or clean slate services, a legal service provider can provide assistance in good conscience *without doing any further immigration analysis*.

Do not give advice regarding your client's immigration case. Legal service providers cannot give immigration legal advice to clients unless they are a qualified expert in immigration law. To protect both your client and yourself, you should make this limitation very clear. (See Appendix E for sample handouts with these warnings.) Discuss the warning with your client. You can adapt the following script when advising clients:

"Getting a dismissal or felony reduction can help with many issues, such as employment, housing and education. It *might* help with immigration, too, but there is no guarantee. I am not an immigration expert and each person's immigration case is different. I would like to refer you to someone who can advise you about how this conviction might affect your immigration status.

¹ See *Meyer v. Superior Court*, 247 Cal.App.2d 133, 140 (1966) (holding that, because "a conviction that has been expunged still exists for limited purposes," petitioner should not be barred from seeking a more suitable post-conviction remedy, in that case, 17(b) relief).

Meanwhile, please be very careful. It is even possible that immigration authorities would arrest you due to this conviction. Until you consult with an immigration expert, do not leave the United States and do not submit any applications or petitions to Immigration.”

Always advise immigrant clients with criminal convictions to refrain from applying for citizenship, renewing a green card or traveling outside of the United States until they have consulted with an immigration expert.

Give your client information about who can help.

Provide referrals to immigration service providers. (See Appendix G for a list of nonprofit immigration service providers in California.) If you wish, you can give the client a screening sheet to try to identify possible forms of relief to discuss with providers. (See the *Immigration Relief Toolkit* in Appendix H.)

II. MIGHT THE PERSON BE A U.S. CITIZEN AND NOT KNOW IT?

Some people who believe that they are undocumented might actually be U.S. citizens. This could include people who have been deported in the past, or who have been sent to prison for illegally entering the United States.

You can do the client a great service by using the screening questions below to see if they might be a citizen. (To read more on the law, see Section I.A. in Chapter I, or see Section 17.3 of the *Immigration Relief Toolkit* in Appendix H.)

Screen every noncitizen client. Ask a few questions to see if a client might be a U.S. citizen. (Or, ask the person to complete the first written questions from the *Immigration Relief Toolkit*.) If the person answers “yes” or “maybe” to any of the following questions, he or she might be a citizen (the person does not have to answer yes to all the questions):

1. When you were born in another country, did you have either a parent or a grandparent who was a U.S. citizen (not including stepparents)?
2. Before your 18th birthday did you become a permanent U.S. resident? Was at least one of your parents (not including stepparents) a U.S. citizen, or did he or she become one before you turned 18?
3. Are you adopted? If so, did the following events occur in any order?
 - a. Did you become a permanent U.S. resident before age 18?
 - b. Were you legally adopted by a U.S. citizen before reaching the age of 16?

c. Did you reside in the legal custody of the citizen parent for two years at any time?

4. Were you born in the U.S., Puerto Rico, Guam, U.S. Virgin Islands, Swains Island, American Samoa, or Mariana Islands? (The person might be a citizen or a “national,” which is nearly the same thing.)

How to advise someone who answers “yes” or “maybe.”

Discuss these main points with the client and try to make sure he or she understands.

- **You might already be a U.S. citizen — but we don’t know for sure.** Someone must do some legal research. I will give you a referral to an attorney or pro bono office that can look at your individual case to see if you really are a citizen. (Many immigration non-profit or pro bono groups will do this for free or low cost.)
- **Until we establish your citizenship, you still may be at risk from ICE.** If you do not have documents proving your citizenship, or if you might be deportable for a conviction, keep taking precautions. Get expert legal advice before you travel outside the U.S., and do not apply for any immigration benefit or have any contact with immigration officials.
- **If you actually are a U.S. citizen and can prove it, you will not have any more problems with immigration.** You should be able to get a U.S. passport. If you were deported in the past, or if you were convicted of illegally re-entering the U.S., that will not hurt you now.

III. CLIENT SAYS HE OR SHE IS A LAWFUL PERMANENT RESIDENT (“GREEN CARD” HOLDER)

A person who is a lawful permanent resident – “LPR” for short – generally has the right to live and work permanently in the U.S. If that person wishes, he or she can apply to become a U.S. citizen after a period of time.

Legal service providers should be on the lookout for two issues with clients who state that they are permanent residents.

- First, it is possible that the person is mistaken. Some people think they are LPRs when in fact they only have a pending application, or they have some status less than LPR. Check the client’s immigration document. If it is not a permanent resident card, you can alert the person to the problem.
- Second, an LPR who is convicted of certain crimes, or commits certain misconduct, is at great risk – and might not know it. Tell the client that he or she should speak with an expert, and provide a referral.

In both of these cases, you can safely help the client reduce a felony to a 364-day misdemeanor or get a dismissal/expungement. This will not harm the client. However, the person *must* understand that the conviction still *might* cause immigration problems and therefore should see an expert.

Confirm permanent residency. Ask to see your client’s Legal Permanent Resident card, to confirm his or her status. An LPR card will have “Alien Registration Card” across the top. If possible, make a photocopy of the front and back of the card to put in the client’s file.

If the card says “Employment Authorization” or something else across the top, that is not proof of LPR status. The client’s application for LPR status may be pending, or the person might have been granted some temporary status that is not permanent residence.

Some immigrants incorrectly believe that an employment authorization card is the LPR card. In that case, advise

*Unless you are entitled to give legal advice and are competent in criminal law and immigration, **never give an LPR advice on the consequences of a conviction!** This is a highly technical and illogical area. A small misdemeanor or even an infraction could be very dangerous, while a felony might not be. The person needs to see an expert.*

them that this is not an LPR card, and refer them to an immigration provider. If possible, make a photocopy of that card for the client’s file.

LPR cards will include a useful number that begins with “A,” referred to as the person’s “A number.” This is the number that the government will use to identify the person for all immigration purposes.

Warn the client that a conviction might make an LPR eligible for deportation. Hand the client the printed warnings from Appendix E. Make sure that your client understands that, even after the dismissal or reduction, the conviction still *might* be dangerous for immigration. Refer these clients to a low-cost expert so they can find

out the actual immigration impact of their criminal record. Warn them not leave the U.S. and not to submit any papers or applications to immigration authorities. That might not be enough — in some cases, ICE agents

can go to an immigrant's home or place of employment and place him or her under arrest. You don't want to scare your client, but you do want to warn about risk.

IV. OTHER KINDS OF LAWFUL STATUS

Give the same advice as for permanent residents. Note that the situation is even more complicated because there are many different types of immigration status, and immigrants of varying status can be harmed by different

convictions. Advise your client to consult with an expert before traveling outside the United States or applying for any immigration benefit.

V. HELP FOR UNDOCUMENTED PERSONS: DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)

A. Is Your Client Eligible for DACA, or, Potentially, for Expanded DACA?

Deferred Action for Childhood Arrivals (DACA) helps some undocumented immigrants who came to the U.S. before age 16. It provides employment authorization so they can work legally, open a bank account and enjoy other benefits. It provides temporary protection against removal. It does not provide a green card or other lawful status.

Even if you are not an immigration expert, you can help a client determine if he or she *might* be eligible for DACA and refer them to a qualified immigration services provider. Review the eligibility requirements below to advise your client. Or, ask the client to complete the brief DACA Eligibility Questionnaire in Appendix W. In addition, you can help clients gather information about their criminal record and either assist them, or refer them to a legal service provider, if they need to clean up their criminal record via Proposition 47, expungement, or other relief.

Even if a client might be eligible, warn the person not to submit a DACA application until he or she has consulted with a DACA specialist (assuming you are not one). For someone with a criminal conviction, applying for DACA without consulting a specialist could be especially dangerous.

Eligibility requirements. Original DACA requires that the applicant:

- Is at least 15 years old at the time of filing the request (or younger, if the youth is in removal proceedings or has a final order of removal or voluntary departure).
- Came to the United States under age 16, entered by June 15, 2007, and has resided continuously in the U.S. since then.
- On June 15, 2012, was physically in the U.S., undocumented, and under 31 years of age.
- Is currently in school, has graduated or obtained a certificate of completion from high school, has obtained a general education development (GED) certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States.
- Does not come within the crimes or public safety bars, and is not denied as a matter of discretion.

At this writing it is not possible to apply for “expanded” DACA, while the U.S. Supreme Court hears a legal challenge to the law.² It still is useful to let clients know that they might be eligible for expanded DACA if it goes forward, and to help them prepare. If and when the law takes effect, the requirements for expanded DACA will be the same as for the original DACA *except*:

² See U.S. Citizenship and Immigration Services website at: uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca.

- The applicant can have entered the U.S. under age 16. He or she must have entered by January 1, 2010 (rather than June 15, 2007), and must have resided here since that date.
- There is no cap at age 31.

Example:

Sara’s parents brought her to the U.S. illegally in 2005, when Sara was age 10. She has lived here in undocumented status since then. She has graduated from high school and has no criminal record, gang allegations or other public safety issues. A DACA expert probably will find that Sara should apply because she entered the U.S. while under age 16, before June 15, 2007, and appears to meet all other requirements for “original” DACA.

Example:

Jose entered the U.S. in 1979 on a student visa when he was 12. His permission to stay on the student visa ended a year later, in 1980. He has lived in the U.S. in undocumented status since that time and has completed college. He is not eligible for the original DACA program because he was over 31 years old as of 2012 (he was 45 years old). But if the expanded DACA program goes forward, he may be eligible, because that program eliminates the age 31 cap.

B. Which Crimes Are Bars to DACA? How Can Proposition 47, Expungements and Other Laws Help?

An immigrant is not eligible for DACA if he or she has been convicted (as an adult) of a felony, of a “significant” misdemeanor, or of three or more misdemeanors of any

kind arising from three separate incidents. There are exceptions. A minor traffic offense does not count as one of the three misdemeanors. A state offense that specifically punishes immigrants does not count as a “significant” misdemeanor.

A conviction that has been expunged or otherwise erased for state purposes is *not* a bar, although it can be a negative discretionary factor.³ The same is true for a juvenile disposition. A felony that has been reduced to a misdemeanor under Proposition 47 or California Penal Code § 17(b)(3) is a misdemeanor for all immigration purposes, including DACA.

A DACA application can also be denied if a person is a “national security” or “public safety” threat. This category has been used to deny persons who are suspected of any gang activity.

WARNING:

Any undocumented immigrant who comes within these criminal bars to DACA also will come within the 2014 immigration “enforcement priorities.” Immigration authorities generally will target such individuals for arrest, detention and removal. Warn clients who come within these categories that ICE (immigration police) may go to their last-known address to find them. This is true even if the conviction is old. For example, in 2014 many people were picked up at their homes based upon DUI convictions from 10 or 20 years earlier.

³ The DACA FAQs on the U.S. Citizenship and Immigration Services website state “Expunged convictions and juvenile convictions will not automatically disqualify [DACA applicants]. [Requests] will be assessed on a case-by-case basis to determine whether, under the particular circumstances, a favorable exercise of prosecutorial discretion is warranted.” See FAQ 67 at: uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.

Review each of the bars to DACA below.

a. Conviction of Any Felony

What is a felony? DACA defines a felony as a criminal offense that has a potential sentence of more than one year. This is the same definition that California uses, so any felony conviction under state law will be an absolute bar to DACA. However, if the applicant was convicted of an attempt to commit a felony, and the offense has a potential sentence of less than a year, it may not count as a felony for DACA. (Note that DAPA has a slightly different definition of felony; see Section C of this chapter.)

Solution 1. Change the felony to a misdemeanor. First, if at all possible, change the felony to a misdemeanor. This may be possible under Proposition 47 (see Chapter 2, Section I.B.) or California Penal Code § 17(b)(3) (see Chapter 2, Section I.C.).

If you are an immigration services provider, you may be able to find free help for a client to get this relief in criminal court. If an indigent defense office (public defender, private defender, or alternate defender) represented the person, call that office to find out if it would handle the Proposition 47 or California Penal Code § 17(b)(3) case for free.⁴ Or, look for a clean slate clinic near where the conviction took place.⁵

Solution 2. Expunge the conviction under California Penal Code § 1203.4 or similar provisions. It is important to try first to reduce the felony to a misdemeanor because immigration authorities always recognize this. Once you have reduced a felony (or if this is not possible), try to obtain an expungement. An expunged conviction will not bar DACA relief. See discussion of expungements in Chapter 2, Section II.

b. Conviction of Three Misdemeanors from Separate Incidents

DACA is barred by a conviction of “three or more other misdemeanor offenses not occurring on the same date and not arising out of the same act, omission, or scheme of

misconduct.” In addition, a “minor traffic offense will not be considered a misdemeanor” for DACA.⁶

Certain misdemeanors are classed as “significant misdemeanors.” Just one conviction of a significant misdemeanor is a bar to DACA. See Section C of this chapter.

What is a misdemeanor? DACA defines a misdemeanor as an offense that is punishable by imprisonment of more than five days but not more than one year. Therefore, a California *infraction* is not a misdemeanor, because it does not have any potential jail sentence. Infractions from other states might be misdemeanors.

Misdemeanors from three separate incidents. The good news is that the three misdemeanor convictions must be from three separate events or schemes. If multiple convictions result from a single act, it will only count as one misdemeanor for purposes of counting toward the three misdemeanors bar.

Example:

Lucinda was convicted of petty theft in 2007 and sentenced to probation. In 2013, she was convicted of misdemeanor vandalism and misdemeanor disorderly conduct, after she was arrested one night for painting graffiti on a bridge and being loud. She was sentenced to three months’ suspended sentence and two years’ probation.

Under the three misdemeanors bar, Lucinda has only two misdemeanors. Because the vandalism and disorderly convictions arose from the same incident, they count as just one misdemeanor for this bar. The theft counts as the other. (As always, however, Lucinda could be denied at the discretion of United States Citizen and Immigration Services (USCIS).)

⁴ A statewide directory of Public Defender offices is provided at: safeandjust.org/county-map.

⁵ Appendix N provides a list of clean slate clinics and Prop. 47 legal services providers throughout California. Additionally, a county directory of reentry legal service providers is available at: ebclc.org/reentry-legal-services and a list of upcoming Prop. 47 record change events scheduled throughout the state is available at: MyProp47.org/events.

⁶ USCIS DACA FAQ 64.

Minor traffic offenses don't count. USCIS materials state, "A minor traffic offense will not be considered a misdemeanor for the purposes of this [DACA] process."⁷ Exceptions can include offenses such as driving without a license or speeding, regardless of how they are classified under state or local law. However, it is likely that offenses such as misdemeanor hit and run or reckless driving will not come within the exceptions. Driving under the influence is a "significant" misdemeanor that will bar DACA (see Section C of this chapter).

The DACA application instructs applicants answering the question regarding arrests, charges or misdemeanor or felony convictions to not include "minor traffic violations unless they were alcohol or drug-related." Officials warned that several traffic convictions could be a negative factor for discretion.

Solution 3. Expunge the third misdemeanor — or all of them. USCIS states that an expunged conviction will not act as an automatic bar to DACA. If the applicant has three misdemeanors from three separate events, expunge at least one of them. When possible, expunge all three convictions. DACA is a discretionary relief, and this might be taken as a positive factor. See discussion in Chapter 2, Section II for details on how to secure an expungement (dismissal).

c. Conviction of One Significant Misdemeanor

Conviction of just one "significant misdemeanor" is a bar to DACA. A significant misdemeanor is a term that applies only to DACA and DAPA. It appears not to be subject to the categorical approach (the federal standard for comparing elements of an offense to a technical definition). There is no strict uniformity or court review of the definition of the term.

What is a "significant misdemeanor"? A DACA "misdemeanor" (an offense punishable by at least five days but not more than one year) becomes "significant" in either of two ways:

- (1) A sentence of more than 90 days was imposed, excluding suspended sentences, or

- (2) The offense (and sometimes, just the charge) comes within any of the following six categories:

- domestic violence
- sexual abuse
- firearms possession
- burglary
- drug trafficking
- driving under the influence of drugs or alcohol

Significant Misdemeanor: Sentence exceeds 90 days.

Any misdemeanor is a "significant misdemeanor," and a bar to DACA, if the sentence imposed was at least 91 days, *not* including suspended sentences. (*Note that the same standard applies to applications for DAPA, except that a sentence of 90 days or more is a bar.*)

Examples of misdemeanors that will *not* be "significant" for DACA *unless* a 91-day or more sentence is imposed include assault, battery, trespassing, vandalism, disturbing the peace, possession of a drug, being under the influence of a drug, fraud, theft and possession of stolen property. With a sentence of 91 days or more, all of these will be significant misdemeanors, unless the sentence is suspended.

DACA and DAPA *do not* include suspended sentences, so evaluating the length of a sentence imposed is somewhat different than in other immigration law contexts. For DACA and DAPA, the criminal court judge must have actually told the client to spend time in jail, as a penalty for a conviction, for it to count.

Advise your client to check with an expert — determining whether a sentence exceeding 90 days has been imposed, excluding suspended sentences, can be a challenge.

Solutions for sentence exceeding 90 days. Expunging a significant misdemeanor removes it as an automatic bar, although the DACA (or DAPA) application still could be denied as a matter of discretion.

⁷ USCIS DACA FAQ 64.

Example:

Juan is convicted of misdemeanor theft. The judge gives him three years' probation, suspends imposition of sentence, and as a condition of probation orders him to go to jail for 95 days. With credit for good behavior, Juan serves only 60 days. Juan is ineligible for DACA, because the judge ordered him to spend the 95 days in jail. The fact that he got out early does not change the sentence that the judge gave him.

Example:

Simone is convicted of misdemeanor theft and receives probation and a one-year suspended sentence. The suspended sentence means that the judge is not telling her to go to jail now. Simone is eligible for DACA, because the judge has not ordered her to go to jail at all yet. If Simone violates probation in the future, the judge might order her to actually go to jail, and that time would count for DACA.

Proposition 47 may be useful. If a felony is reclassified as a misdemeanor, it may be possible to get the court to change the sentence imposed to 90 days or less, especially if the sentence already is served.

Significant Misdemeanor: Particular offenses. The following types of misdemeanor offenses will be held to be “significant” **even without a sentence that exceeds 90 days.** (*This same definition applies in DAPA cases.*)

- **Domestic violence.** Any domestic violence (DV) conviction is very dangerous, no matter how minor the offense. For example, a conviction of simple battery against a spouse, under California Penal Code § 243(e), generally does not have bad immigration consequences because it can be violated by very minor behavior. However, it is not a safe plea for DACA (or DAPA). Offenses that aren't specifically DV offenses – for example, false imprisonment or plain battery – will be viewed as DV offenses if the victim had a domestic relationship with the defendant.

Furthermore, in some DACA cases, the application was denied because the *original charge* was a domestic violence offense, even though the person later pled guilty to a non-DV offense, such as disturbing the peace.

For DAPA, it is a mitigating (positive) factor if the convicted applicant was also a victim of domestic violence. This beneficial rule might also apply to DACA.

- **Sexual abuse or exploitation.** This would include violent sexual offenses such as sexual battery or rape. It is not clear whether it would include an offense such as consensual sex with a minor (Penal Code § 261.5).
- **Unlawful possession or use of a firearm.** A misdemeanor firearms offense is considered a “significant misdemeanor” for the purposes of barring DACA. Conservatively assume that the “antique firearms exception” – under which certain California firearms offenses are not considered deportable – is *not* available for a DACA or DAPA applicant.
- **Drug sales (distribution or trafficking).** A misdemeanor conviction for drug *possession* is not necessarily a bar to DACA (or DAPA). However, unless expunged through a California Penal Code § 1203.43 petition, a misdemeanor drug possession will prevent the applicant from ever gaining lawful permanent resident status (a green card) through family members, if the specific controlled substance is identified on the record.
- **Burglary (Prop. 47 solution).** A burglary conviction probably will serve as a bar even if, like in California, the offense can include shoplifting. In California a person can be convicted of commercial burglary for entering a Walmart during business hours and stealing \$40 worth of clothing – a crime usually known as shoplifting.

However, Proposition 47 and California Penal Code § 17(b) may be useful in these cases. If the client committed shoplifting, and the goods did not exceed \$950, but he or she was convicted of *felony* commercial burglary, that person may be able to have the offense reclassified as *misdemeanor* shoplifting (California Penal Code § 459.5). Like other kinds of theft, shoplifting is not a significant misdemeanor as long as a sentence exceeding 90 days is not imposed.

- **Driving under the influence of alcohol or drugs.**

Driving under the influence (DUI, or sometimes called Driving While Intoxicated, DWI) is an automatic significant misdemeanor. In some cases, California reckless driving with alcohol (“wet reckless”) has *not* been held to be a significant misdemeanor, although similar offenses from other states may be. The immigration effect of reckless driving may change depending upon the elements of your state’s law.

Solution: Expungement. An expungement will eliminate conviction of one or more significant misdemeanors as a bar to DACA. However, a DACA grant could be denied as a matter of discretion. Still, many persons with an expunged DUI conviction have been granted DACA. (For more on expungements, see Chapter 2, Section II.)

d. Gang Activity

In DACA cases, gang “membership” is not a bar, but it qualifies as a national security or public safety threat and has been used to support discretionary denial for “risk to public safety.” USCIS has relied on reports from local police departments, school gang contacts or arrest records to determine gang membership. The DACA application question, “Are you NOW or have you EVER been a member of a gang?” indicates that *any* gang membership or involvement, including the applicant’s self-identification, may trigger a bar.

People who did not actually participate in gang activity but ended up on gang databases have routinely been denied DACA. Suspected gang members are at a high risk of referral to removal proceedings.

At this time there is no good solution, except to be sure to investigate whether a client might be on a gang database or otherwise be flagged as a gang participant. If such is the case, warn your client against applying for DACA. The exception is if the person already is in removal proceedings; in this situation there is no downside to applying and fighting the case.

VI. HELP FOR UNDOCUMENTED PERSONS: DEFERRED ACTION FOR PARENTS OF AMERICANS AND LAWFUL PERMANENT RESIDENTS (DAPA)

A. Might Your Client Be Eligible for DAPA, if That Program Goes Forward?⁸

Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) will help some undocumented immigrants, if the program is permitted to go forward. Like DACA, it will provide employment authorization so that the immigrant can work legally, open a bank account and take advantage of other benefits. It will provide temporary protection against deportation, but will not provide a green card or other lawful status.

Due to a pending federal lawsuit before the U.S. Supreme Court, it is not possible to apply for DAPA at the time of this writing. It still is useful to let clients know that they might be eligible for DAPA and help them prepare. It is especially useful to begin the process of clearing up a client’s criminal record, so that he or she will be eligible for DAPA if and when the program begins. You can help clients gather information about their criminal record and either help them, or refer them to help, if they need to take advantage of Proposition 47 or clean slate assistance.

⁸ See also Appendix X, National Immigration Project of the National Lawyers Guild, *Practice Advisory for Criminal Defenders*, (outlining the basic requirements for DAPA, criminal defense strategies to preserve a client’s possible eligibility for DAPA and overview of criminal bars to DAPA).

Even if you are not an immigration expert, you can help clients determine if they *might* be eligible for DAPA, and refer them to a qualified immigration services provider.

Even after the program begins, advise clients not to submit a DAPA application until they have consulted with a DAPA specialist (assuming you are not one). Especially for someone with any criminal conviction, this could be very dangerous.

Eligibility requirements. To be eligible for DAPA the client:

- Must have been the parent of a U.S. citizen or legal permanent resident as of November 20, 2014.
- Must have resided continuously in the U.S. since January 1, 2010, and as of November 20, 2014, had undocumented status.
- Must not have been apprehended attempting to enter the U.S. unlawfully after January 5, 2015.
- Must not have received a removal order since January 1, 2014.
- Must not have significantly abused the visa or visa waiver programs.
- Must not have been convicted of a crime that is a bar to DAPA (those bars are somewhat broader than the crimes bars to DACA).

B. What Are the Crimes Bars to DAPA? How Can Prop. 47 and Related Laws Help?

The criminal bars to DAPA include all those from DACA (with slightly different definitions), plus some additional ones. As with DACA, the applicant must not be convicted of a felony, three misdemeanors from three separate incidents, or a significant misdemeanor. In addition, DAPA requires that the applicant:

- Not have been convicted of an aggravated felony (a legal term that includes certain misdemeanors).
- Not have been convicted of, or participated in, certain gang-related activities (this acts as an informal bar to DACA, but it is formalized in DAPA). The applicant must not be a public safety or terrorism threat.

WARNING:

Any undocumented person who falls within the bars to DAPA also falls within the 2014 immigration “enforcement priorities.” Immigration authorities generally will target such persons for arrest, detention and removal. Warn clients who come within these categories that ICE (immigration police) may go to their last-known address to find them. This is true even if the conviction is old. For example, in 2014 many people were picked up at their homes based upon a DUI conviction from several years ago.

Review each of the bars to DAPA below. *(If the definition matches the bar in DACA, please refer to the description of those bars in Section IV.B. of this chapter.)*

1. Conviction of Any Felony

As with DACA, conviction of any felony is a bar to DAPA, which defines a felony slightly differently than DACA: If a state indicates that the offense is a felony, DAPA will treat it as a felony, regardless of the potential length of sentence.

This difference between the two definitions of felony usually does not affect California residents. However, two cases where it might are:

- (a) Under California law, a conviction for an attempt to commit a felony is a felony even if the potential sentence is less than a year. This might be considered a bar to DAPA, but not DACA.
- (b) Some states, such as Maryland and Massachusetts, have “misdemeanor” offenses that carry a sentence of more than a year. These would be felonies for DACA, but not DAPA.

The same advice applies in DAPA as in DACA. First, attempt to change the felony to a misdemeanor under Proposition 47 or California Penal Code § 17(b)(3). Once that is completed, or if that is not successful, attempt to expunge the offense. (See discussion of these steps in Section IV.B. of this chapter.)

2. Conviction of Three Misdemeanors from Separate Incidents

Like DACA, DAPA is barred by conviction of three misdemeanor offenses that arise from three separate incidents. A minor traffic offense will not be considered a misdemeanor. With a few exceptions, DACA and DAPA treat the three-misdemeanor rule the same. (See the detailed discussion of the three-misdemeanor rule for DACA, in Section V.B.b. of this chapter.)

3. Conviction of One Significant Misdemeanor

As with DACA, conviction of just one “significant misdemeanor” is a bar to DAPA. For the most part they are defined identically, and the same defense strategies apply. (For a detailed discussion of significant misdemeanors, see Section V.B.c. of this chapter.) For DAPA, any misdemeanor with a sentence imposed of at least 90 days is a significant misdemeanor, with the exception of a suspended sentence. For DACA, the sentence must be at least 91 days. While this one-day difference between the two programs may have been a mistake, authorities appear unlikely to correct it.

4. Conviction of an Aggravated Felony

An “aggravated felony” is a federal law term, defined at INA § 101(a)(43), 8 USC § 1101(a)(43). Conviction of an aggravated felony brings the most severe penalties under immigration laws. The conviction triggers mandatory deportation and bars eligibility for most kinds of relief, including DAPA. (While it is not an official bar to DACA, it is quite likely to trigger a denial and result in the person being placed in removal proceedings.)

Any felony conviction is a bar to DAPA, so why do we need to discuss “aggravated” felonies? Strangely, courts have interpreted the aggravated felony definition to include some misdemeanor offenses — including ones that are not

even “significant” misdemeanors. Be on the lookout for any misdemeanor that does not come within other bars, but could qualify as a so-called aggravated felony.

Some offenses are aggravated felonies only if a sentence of a year or more has been imposed. In contrast to DAPA and DACA, a *suspended* sentence counts for aggravated felony purposes. For example, the following offenses, whether misdemeanor or felony, are “aggravated felonies,” if a sentence of one year was imposed, **even if it was suspended**:

- Theft (California PC §§ 484, 487, 666; Vehicle Code § 10851)
- Receipt of stolen property (California PC § 496)
- Forgery (California PC § 470)
- Perjury (California PC § 118)
- Obstruction of justice (which may include accessory after the fact, California PC § 32)
- “Crime of violence” as defined under 18 USC § 16 (e.g., California PC § 245)

TIP: A reduction to a misdemeanor under Proposition 47 or California Penal Code s. 17(b) should decrease the maximum sentence to 364 days or less, and may, in some instances, eliminate the offense as an “aggravated felony.”

Other misdemeanor offenses can be aggravated felonies even if no sentence was imposed. For example, conviction of “sexual abuse of a minor;” any crime involving deceit or fraud (e.g., welfare fraud, credit card fraud, passing bad checks, forgery), where the loss to the victim exceeds \$10,000; or failure to appear to face certain felony charges, regardless of how the charge was resolved could all be considered an aggravated felony regardless of the sentence.

5. Participation in, or Conviction of, Gang Activity

DAPA specifically bars individuals convicted of gang activity or suspected of participating in gangs. Noncitizens “not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang” are ineligible for DAPA. So are noncitizens who are “convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a).” In practice, any person who might be in a gang database, or has been viewed as participating in a gang, or who might have a conviction relating to gangs is at great risk.

TIP: Whether a specific offense is an aggravated felony is judged under a very strict and technical standard called the categorical approach. If you fear that an offense is an aggravated felony, refer the person to an expert in immigration and crimes. Sometimes there are surprising defenses. To find out more about the categorical approach, consult online Practice Advisories.⁹

VII. SPOTTING IMMIGRATION SOLUTIONS OTHER THAN DACA AND DAPA

Many undocumented immigrants are, in fact, eligible to apply for some lawful status or benefit, including benefits beyond DACA and DAPA. Some immigrants who think they are undocumented are actually U.S. citizens and don't know it. We will refer to all of these possibilities as potential immigration “relief.”

If you are not licensed to provide immigration advice, never advise clients that they *are or are not* eligible to apply for some relief.

However you can provide an invaluable service if you:

- Use a screening questionnaire to see if the person *might* be eligible for specific relief.
- Refer the person to an immigration provider (if you are not one) to get help.

A. Helping the Client to Complete the Relief Questionnaire

The Immigration Relief Screening Questionnaire appears at Appendix H (§ 17.2).

The questionnaire asks factual questions about the client's life. The client could complete the questionnaire alone or with someone else — agency staff or a relative, for example.

Many of the questions are basic, but some cover sensitive areas. For example, they ask if the person has been a victim of abuse, or is afraid to return to the home country. People who have been through traumatic experiences can feel stressed or even re-traumatized when asked to discuss the events. Immigrants who are undocumented in the U.S. may feel traumatized by being asked to admit the truth about their life.

Here are some suggestions that may help your client feel comfortable enough to complete the questionnaire:

- Assure the client that all information is absolutely confidential. Tell him or her that you and your agency will not share the document or any conversation with anyone without permission. Emphasize that your agency does not work with police or immigration authorities, but is there to serve only the client's interest.
- Tell the client that the questionnaire is designed to help identify eligibility to get some immigration benefit or status. If it looks like the client might be eligible, you will give a referral to a legal professional who can look into this further.
- After giving the client some details on the content of the questionnaire, the client can decide whether to complete the form alone or with help.

⁹ For a hands-on summary of the categorical approach, see Katherine Brady, Immigrant Legal Resource Center, *How to Use the Categorical Approach Now*, at: ilrc.org/resources/how-to-use-the-categorical-approach-now. For more in-depth analyses of the cases, go to niplng.org/publications.htm or ilrc.org/crimes and search separately for each of the following case names: *Descamps*, *Moncrieffe*, *Chairez*, or *Rendon*.

- If the client is not sure of an answer, advise the client to say “maybe” instead of saying “no,” because it may be possible to find out additional information.
- Warn the client that while most questions are basic, some cover sensitive topics: “The questions ask if you were a victim of abuse, or a crime, or if you are afraid to return to your country. If any of that might apply, and if you would like extra support in completing the questionnaire, I would like to help you complete the questionnaire or get another staff person to help you. I say this because some immigration laws specifically protect people in these situations — it is possible that it will help you, but only if you are able to talk about it.”

B. Reviewing the Answers, Getting a Good Referral

What you do next depends upon what kind of help you can offer, and how much information you have.

Remember that a “yes” to a question on the Immigration Relief Screening Questionnaire does *not* mean the person is eligible for that relief. It means that the person *might* be eligible and it is worth conducting further research or referring him or her to an immigration specialist.

The Immigration Relief Screening Questionnaire can assist you in making an effective referral. Some agencies help with applications for some types of relief but not others. For example, some agencies will help with asylum (fear of returning to the home country) while others may specialize in family visas or in VAWA (victim of domestic abuse). In trying to identify a successful referral, it may be useful to have an idea of what relief the person seeks.

If you or your client would like to get more information about the specific form of relief desired, you can review a basic two-page summary of the relief that is available in Appendix H (*Client Relief Questionnaire in § 17.2*).

Once again: If you are not a qualified immigration professional, do not rely on the summary to determine whether the client really is or is not eligible for a particular type of relief. There may be details not discussed in the basic summary that make the difference. And certainly do not rely on the summary to decide whether the person’s *conviction* makes him or her ineligible. The interplay between immigration and criminal law goes beyond counterintuitive. The worst-looking criminal record may contain a surprise defense, and the most innocent misdemeanor or even infraction might spell defeat. Always use an expert.

VIII. “ENFORCEMENT PRIORITIES”: HOW TO HELP A CLIENT AVOID DEPORTATION

1. What Is an “Enforcement Priority”?

On November 20, 2014, President Obama announced that the Department of Homeland Security would have new “enforcement priorities.” The priorities are a list of factors, such as conviction of certain crimes or commission of certain immigration offenses that bar immigration relief and can lead to removal. This list also serves as bars to eligibility for the DAPA program, discussed at Section VI. of this chapter.

Coming within an enforcement priority brings penalties beyond being barred from DACA or DAPA. It means it is far more likely that an undocumented person will be targeted by ICE, arrested, detained, deported and denied

prosecutorial discretion in immigration proceedings. Thus, any undocumented person has a real interest in reducing a felony to a misdemeanor, or expunging a conviction, if that will remove him or her out of enforcement priorities. (See Chapter 2 for further discussion.)

Immigration authorities are supposed to target people who fall within the Priority Enforcement Program (PEP) as top priorities for arrest, detention, and removal.¹⁰ ICE personnel arrest persons whom they believe to be removable noncitizens (such as undocumented immigrants and permanent residents who have certain convictions). They decide whether the people should be charged in removal proceedings, and then prosecute the removal case.

A person who comes within an enforcement priority category will face multiple problems.

Arrest by immigration authorities. *ICE agents may come to the person's home or work to arrest him or her.* If ICE agents encounter the person in a jail, they may make a special effort to pick the person up upon release from jail. They may argue against release on bond from immigration detention.

No prosecutorial discretion to stop the removal proceeding. A person who is picked up by ICE, but who does not come within enforcement priorities, can ask for “prosecutorial discretion.” That means that immigrants can ask ICE not to begin removal proceedings and just let them go. In fact, the idea — if not the reality — is that generally ICE should grant this request if the person does not come within enforcement priorities. (This would be similar to a District Attorney deciding not to press charges against a minor offender, if office resources are needed for more serious cases.)

An immigrant who does not come within enforcement priorities has a better chance, although no guarantee, of release under prosecutorial discretion. A person who comes within the priorities will be put in removal proceedings *unless* certain high officials agree that the particular case merits favorable discretion.

2. What Are the Conviction-Based Enforcement Priorities? How Can Proposition 47 and Related Laws Help to Avoid Them?

The enforcement priorities include conviction of: one felony, one aggravated felony, one significant misdemeanor, or three misdemeanors of any kind that arise from three separate incidents. As previously noted, these also are the crimes bars to DACA (except for conviction of an aggravated felony) and DAPA. (See discussion in Sections V.B. and VI.B. of this chapter.)

Changing a felony conviction to a misdemeanor under Proposition 47 or California Penal Code § 17(b)(3) will mean that the conviction no longer counts as enforcement priority as a “felony.” Make sure that the conviction is not a “significant misdemeanor” or one of three misdemeanors, or it could make the client an enforcement priority under those provisions.

It is not clear whether getting an expungement or other rehabilitative relief to eliminate the conviction will result in the person no longer being an enforcement priority. Generally immigration authorities don't give effect to an expungement, except for DACA and DAPA. In some cases a conviction for simple drug possession before July 15, 2011, can also be expunged, eliminating it as a ground of removability. But authorities have indicated that an expungement might be given more weight in enforcement cases, allowing ICE officers *not* to arrest or target individuals who have secured expungements but would otherwise be an “enforcement priority.”

The relationship between immigration and criminal law can be very complex. As a general rule, legal service providers should advise immigrant clients not to travel outside of the country and not to apply for any specific immigration benefit until they consult with a qualified expert in immigration law. (See Appendix E.) Nevertheless, bridging the gap between immigration and Proposition 47 and clean slate service providers allows us to offer legal services that meet the needs of our clients and have the power to transform lives.

¹⁰ See U.S. Immigration and Customs Enforcement, Priority Enforcement Program, at: ice.gov/pep.

