



SB 1310 & SB 1242

MISDEMEANOR SENTENCING, PENAL CODE 18.5

SUMMARY

Prior to enacting Senate Bills 1310 and 1242, California law defined a misdemeanor as a crime punishable for up to 365 days, whereas federal immigration law defines a misdemeanor as a crime punishable for up to 364 days. Due to this one-day disparity, several low-level California misdemeanors were treated as felonies for immigration purposes. A single California misdemeanor conviction could trigger severe, automatic, unnecessary immigration consequences due to the one-day glitch between federal and state definitions. This was true even if no jail sentence was imposed and the person never served any time.

California decided to protect their noncitizen residents by changing their states' definition of misdemeanor by one day, so that the maximum possible sentence for a misdemeanor is 364 days rather than one year. California created Penal Code § 18.5, which provides that where any provision throughout the code refers to a potential sentence "not exceeding one year," the actual potential sentence is one "not exceeding 364 days." See SB 1310, effective January 1, 2015.

This measure was so beneficial that two years later, the legislature made two additions to Pen C § 18.5. See SB 1242, effective January 1, 2017.

- SB 1242 provided that the 364-day maximum potential sentence applies retroactively to all California misdemeanors, and not just to convictions on or after January 1, 2015 (the effective date of the first bill, SB 1310). See Pen C § 18.5(a).
- SB 1242 also provided that if a person with a misdemeanor conviction from before January 1, 2015 was sentenced to one year, the person can request the court to reduce their sentence by one day, to 364 days. Pen C § 18.5(b). This section addressed another consequence of the one-day disparity between federal and state definitions of misdemeanor, which was that many misdemeanor convictions could be classed as "aggravated felonies." These modifications help thousands of immigrants overcome the threat of deportation, inability to naturalize or obtain legal status.

SB 1310 was sponsored by California Attorneys for Criminal Justice, Californians for Safety and Justice, CHIRLA, Latino Coalition for Healthy California, and MALDEF. Senator Ricardo Lara authored this bill and Governor Jerry Brown signed it into law in 2014, effective January 1, 2015. SB 1242 was co-sponsored by California Attorneys for Criminal Justice, Coalition for Humane Immigrant Rights Los Angeles ("CHIRLA"), ILRC, Latino Coalition for Healthy Communities, Los Angeles District Attorney's Office, and the Mexican American Legal Defense Fund ("MALDEF"). Senator Ricardo Lara authored this bill and Governor Jerry Brown signed it into law in 2016, effective January 1, 2017. Notably, this amendment was supported by law enforcement such as the California Sheriff's Association and the Office of the Los Angeles District Attorney. ILRC staff were closely involved in drafting, testifying, and meeting with Committee staff on both of these bills.

WHY WAS THIS NEEDED?

Two severe immigration penalties, that are intended to apply only to more serious crimes, were being imposed based on California misdemeanors because the misdemeanors had a potential sentence of 365 rather than 364 days.

Potential sentence and crimes involving moral turpitude. First, many relatively minor offenses are classed as “crimes involving moral turpitude” (“CIMT”) for immigration purposes. Offenses that range from shoplifting, theft, or passing bad checks, to less-serious violent crimes, are included. Before California passed these laws, a single CIMT misdemeanor conviction could destroy a family, even if the conviction took place twenty years ago, no jail time had been imposed, and the person had completed probation. This could happen in two ways.

1. A lawful permanent resident who is convicted of a single misdemeanor CIMT can become automatically deportable as long as the offense has a potential sentence of up to 365 days (regardless of any actual sentence). The person can lose their green card and be detained and deported.
2. An undocumented person whose parent, spouse, and/or child are U.S. citizens or lawful permanent residents can apply for a discretionary waiver of deportation, if they prove that their deportation would cause their relative to suffer “exceptional and extremely unusual hardship.” The hardship test here is high, and generally cases are granted when the noncitizen is primary support to a citizen or permanent resident who has a serious medical or other conditions. Again, a single misdemeanor conviction of a CIMT, even if no jail time was ever imposed and the person completed probation, will disqualify the family from even applying to avoid the caregiver’s deportation.

By changing the potential sentence of a misdemeanor to a maximum 364 days, Penal Code § 18.5(a) protects California families, and does not lessen criminal penalties for a misdemeanor in any significant way.

Imposed sentence and aggravated felonies. The same one-day disparity applies to an even more serious penalty, which is based on an imposed, not potential, 365-day sentence. “Aggravated felony” convictions, defined at 8 USC 1101(a)(43), cause terrible immigration penalties – but despite the name, they include offenses that are neither felonies nor aggravated. Many misdemeanors are classed as “aggravated felonies” if a sentence of a year or more (including a suspended sentence) is imposed. Section 18.5(b) permits a California defendant to ask a judge to reduce an imposed sentence from before January 1, 2015 to 364 days. For many offenses, that is enough to take it out of the aggravated felony category.

LITIGATION: BOARD OF IMMIGRATION APPEALS’ RESPONSE TO PEN C § 18.5(A)

The Board of Immigration Appeals (BIA) is the national administrative appeals body that hears most immigration decisions. In a controversial decision, the BIA held that as a federal authority, it would not give effect to the clear retroactivity language in California Pen C § 18.5(a), the provision that changed the maximum *potential sentence* from 365 days to 364. The BIA will treat California misdemeanor convictions from before January 1, 2015 as having a potential sentence of 365, not 364, days. The BIA agrees that convictions from January 1, 2015 and after have a potential sentence of only 364 days. See *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA Oct. 4, 2018).

Advocates are appealing *Matter of Velasquez-Rios* to the Ninth Circuit Court of Appeals, and are optimistic that the court ultimately will overturn the BIA. In the meantime, however, immigrants with convictions from before 2015 who are harmed by *Velasquez-Rios* should consider seeking post-conviction relief. Note that *Velasquez-Rios* does not affect Pen C § 18.5(b), which permits a judge to reduce an *imposed* sentence to 364 days. *Velasquez-Rios* only pertains to retroactive changes to *potential* sentences. See discussion and defense advice in ILRC, *Practice Advisory: Matter of Velasquez-Rios and 364-Day Misdemeanors* (Oct. 15, 2015) at <https://www.ilrc.org/matter-velasquez-rios-and-364-day-misdemeanors>.

ORIGINAL STATUTORY LANGUAGE

The California Legislature publishes each version of a bill, showing the additions and deletions made to the text as the bill moves through committees and floor votes in the legislature. For advocates considering similar bills, be sure to view the original legislative text of SB 1242 and SB 1310.

View the original legislative text of SB 1242 as amended in the Senate on March 28, 2016 here: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB1242.

View the original legislative text of SB 1310 as introduced on February 21, 2014 here: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB1310.

FINAL STATUTORY LANGUAGE

View the final statutory text of the current law, California Penal Code § 18.5, effective January 1, 2017, here: https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=18.5.&lawCode=PEN.

FACT SHEET

See [here](#) for the California Senator Lara’s 2014 Fact Sheet for SB 1310.

TALKING POINTS

See the Fact Sheet above for more talking points. Our main points were:

- California is the most immigrant-rich state in the country. One out of four persons living here were born in another country. One out of two children here resides in a household headed by at least one foreign-born person.
- Mass deportation is destroying families and shattering communities of color. For technical reasons, due to a one-day difference between federal and state law, a parent can be deported for just one minor misdemeanor conviction, e.g., shoplifting, even if they never went to jail.
- The federal government is paralyzed. California and other states need to step up and help our families by making this one-day change.

MEDIA ARTICLES

The lead ILRC attorney on these bills, Kathy Brady, published an op-ed that demonstrates with direct impact stories how SB 1310 remedies the glitch between federal and state law. Katherine Brady, [SB 1310: What a Difference a Day Makes](#), L.A. Daily Journal, July 31, 2014.

[Senator Lara Introduces Bill to Prevent Unnecessary Deportation of Legal Immigrants for Misdemeanors, Long Beach Post](#), March 31, 2016. This article provides a brief overview of what SB 1242 is, its connection to SB 1310, and statements of support for the bill.

OTHER STATES’ SIMILAR LAWS

Some states like New Jersey, Illinois, and New Mexico already have a maximum penalty for misdemeanors or equivalent offenses of 364 days or less. Other states have passed similar laws specifically in order to assist immigrants by remedying the glitch between federal and state law:

Washington: In 2011, Washington state enacted Senate Bill 5168 to reduce the state’s maximum sentence for a gross misdemeanor from 365 days to 364 days since the once year sentence triggers deportations even where the sentence is suspended. The law corrects the disproportionate punishment for those convicted of a felony sentence of less than one year. This change took effect on July 22, 2011 and applies to any offense committed on or after that date. For information, contact Jonathon Moore at Jonathan@defensenet.org.

Nevada: In 2013, Nevada enacted Senate Bill 169 to reduce the maximum penalty for a “gross misdemeanor” from one year to 364 days to minimize the risk of deportation. Nev. Rev. Stat. § 193.140. This applies to individuals sentenced on or after October 1, 2013 and permits individuals with prior gross misdemeanor convictions to petition the sentencing court to reduce the sentence from one year to 364 days.

New York: On April 2, 2019, the New York legislature passed the “One Day to Protect New Yorkers Act” as part of a budget process. The Act will take effect immediately upon the governor’s signature. See discussion at Defending Immigrants Project, *Legal Alert: One Day to Protect New Yorkers Act Passes in NY State* (April 2, 2019) at <https://fortunesociety.org/wp-content/uploads/2019/04/One-Day-bill-bullets-4.2.19.pdf>. This is the most comprehensive 364-day legislation to date. It has three parts:

- The New York legislation makes the change in potential sentence automatic and retroactive to convictions from before the effective date. See NYPL § 70.15(1) and (3), as amended by the Budget Bill, Part OO, § 1, and NYPL § 70.15(1-a)(a), as added by the Budget Bill, Part OO, § 2. (This is very similar to California Pen C § 18.5(a). It is likely that the BIA will oppose retroactive effect of the reduction of the potential sentence, under Matter of Velasquez-Rios discussed above at Part D.
- The New York legislation provides that any sentence imposed for a past New York Class A or unclassified misdemeanor conviction that is a definite sentence of imprisonment of one year shall *automatically*, by operation of law, be changed to a sentence imposed of 364 days. (California Pen C 18.5(b) provides that a person convicted of a misdemeanor and sentenced to 365 days can *request* the court to reduce the imposed sentence to 364 days.) The defendant is entitled to a court a certificate of conviction setting forth the reduced sentence. See NYPL § 70.15(1-a)(c), as added by the Budget Bill, Part OO, § 2.
- The New York legislation also provides that if a sentence of less than one year was imposed on a misdemeanor, the sentence can be set aside, and the person re-sentenced, based on a showing that the past judgment and sentence is likely to result in collateral consequences. See NYPL § 70.15(1-a)(d), as added by the Budget Bill, Part OO, § 2, as amended. This can help in a few situations. For example, to qualify for the “petty offense exception” to the inadmissibility ground based on crimes involving moral turpitude (CIMT), an immigrant must have been convicted of just one CIMT with a potential sentence of one year or less, and a sentence imposed of *six months* or less. See 8 USC 1182(a)(xxx). Or, to avoid a “significant misdemeanor” conviction that is a bar to DACA, the person must not have been sentenced to 90 days or more for any misdemeanor. In these instances, the person could ask the judge to set aside a prior damaging misdemeanor sentence and impose the required lower sentence, upon a showing of adverse consequences.
- In addition to the sentencing provisions, the New York legislation provides a vehicle to vacate certain misdemeanor convictions that cause harmful collateral consequences. A misdemeanor conviction can be vacated under new NYCPL § 440.10(1)(j) if it satisfies the § 440.10(1)(h) ground that the judgment was obtained in violation of a state or federal constitutional right. The legislation provides that there is a rebuttable presumption that a misdemeanor conviction

by plea was not knowing, voluntary and intelligent based on ongoing collateral consequences, including potential or actual immigration consequences, and that a conviction by verdict of such an offense constituted cruel and unusual punishment based on such consequences. Upon the granting of such a motion, the court may either (1) with the consent of the prosecution, vacate the judgment or reduce it to one of conviction for a lesser offense; or (2) vacate the judgment and order a new trial wherein the defendant enters a plea to the same offense in order to permit the court to resentence the defendant under the new law. See NYCPL § 440.10(1) (j), as added by the Budget Bill, Part OO, § 3, as amended.

For information, contact Manny Vargas at mvargas@defendingimmigrants.org.

Colorado: Colorado advocates and several legislators have actively pursued making this change, although to date without success. See, e.g., <https://www.denverpost.com/2018/04/10/364-days-in-jail-bill-colorado-immigrants/>. For information, contact Hans Meyers at hans@themeyerlawoffice.com.

STORY OF THE BILL - INTERVIEW/FAQ

Below is an interview with Kathy Brady, expert on the intersection of immigration and criminal law, and lead ILRC attorney on this bill. This interview provides an overview of certain considerations for advocates considering similar bills in their state.

What research, if any, was necessary or helpful in drafting the bill?

We needed to determine what the legislature was empowered to do. Regarding Pen C 18.5(b), which reduces an *imposed* sentence to 364 days, we had wanted the legislature to do that automatically, so that each person did not have to return to court to get a one-day reduction. However, some legislative staff thought that it would be a violation of separation of powers for the legislature to change a sentence imposed by a judge. We were not able to persuade them otherwise, so instead we drafted Pen C § 18.5(b) (SB 1242, effective Jan. 1, 2017) to create a vehicle for individuals to go back to criminal court and ask the judge to reduce the imposed sentence to 364 days. That does seem to be how many statutes like this work. Note, however, that the 2019 New York statute, discussed in Section I above, does provide for automatic reduction of one day of an imposed sentence; they apparently did not believe there was a separation of powers problem. See NYPL § 70.15(1-a)(c), added by Budget Bill, Part OO, § 2.

Regarding reducing the *potential* sentence by one day, that did not present any legal problems. In 2015 we asked the legislature to make the change, and make it apply retroactively, and they refused to include the retroactive provision. (SB 1310, Jan. 1, 2015) I don't believe that they thought there was a legal problem; it was a question of political will. But when we returned in 2017, they were willing to do that and the language was included in Pen C 18.5(a). Now, in *Matter of Velasquez-Rios*, the BIA is asserting that federal authorities do not have to accept that retroactive change to a potential sentence for immigration purposes, in *Velasquez-Rios*. This possibility never occurred to us, in light of similar cases and longstanding case law -- and in fact the BIA's decision seems to be clearly wrong.

What was the dream bill and what concessions were made?

In general we were pleasantly surprised that staff and legislators did not think one day makes a big difference. We were afraid that there would be more ideological resistance, but in many cases there was not because the ask was so small.

Potential sentence. As I said, at our first try with SB 1310, the legislature did not want to make the change to potential sentence retroactive. They said retroactive change was anathema. We compromised on that. But when we returned two years later with SB 1242, we were successful in getting it retroactively applied. The

argument was, we have made this important change going forward and the sky has not fallen. Now why should we penalize the even more deserving people who have old misdemeanors and have long ago successfully completed probation. Also, one of our arguments the first time had been that this automatic change will relieve crowding in the courts, because people will not have to come desperately seek post-conviction relief to fix a conviction so they can stay with their families. By the second time, as news of this relief had gotten out, people with pre-2015 convictions also had come to court looking for this. According to the lobbyist for the Los Angeles District Attorney, who supported the bill the second time around, the courts were getting clogged and making the small change retroactive was both humane and efficient. We finally got our dream bill for that provision (but a really unfortunate BIA decision in *Matter of Velasquez-Rios*.)

Imposed sentence. We made concessions in drafting Pen C 18.5(b), with SB 1242 (Jan 1, 2017). First, as I said, we had hoped that this could be done by operation of law, but that was not possible. Second, if judges were going to make individual decisions, we wanted to put in some standard for the judge to follow. I tried to input generous standards, like a rebuttable presumption to grant if there was evidence of potential adverse immigration consequences. But partly because of the press of other bills, the legislative counsel was not willing to do that and included weaker language, saying that the person “may submit an application” to the court to modify the sentence, with no standards. I have heard of at least one instance where a judge refused to give the one-day change, although apparently most people are getting it.

The staff also put in an effective date in that section (it applies to convictions from before January 1, 2015), which does not make sense given various complexities of California law. I believe that we will go back yet again and try to correct the effective date and possibly put in standards.

How did other organizations or individuals get involved and what were their roles?

The ACLU was a major partner and led the lobbying process, which was great because we could provide the technical expertise. They would take me to various committee staff groups and I would explain the law. The bill had many co-sponsors, including the California Attorneys for Criminal Justice; Coalition for Humane Immigrant Rights LA; Latino Coalition for Healthy Communities; Los Angeles District Attorney’s Office; and the Mexican American Legal Defense Fund. There were over thirty supportive non-profits and service providers and, in the end, there were no opposing groups.

Who were the likely and unlikely allies throughout the process?

The second time around, with SB 1242, the Los Angeles District Attorney’s Office and the San Francisco Sheriff’s office were the unlikely allies. They supported making the change to potential sentence apply retroactively, and in providing the vehicle to reduce an imposed sentence by one day. They said that they thought this would ease court clogging, as people were seeking more elaborate forms of post-conviction relief, and also was fair.

How did you frame the bill to get legislators on board?

See the “talking points” and Sen. Lara’s Fact Sheet, above. We had an official song for the bill, ‘*What a Difference a Day Makes*,’ and some legislators really liked that. We then just told stories about how this one day destroys families and explained that there is a glitch between state law and federal immigration law that treats California misdemeanors as if they were felonies. We stressed that Congress is jammed, so the states need to step in to remedy this defect.

The first time around, legislators refused to make it automatically retroactive because they said no one makes anything retroactive, but two years later they agreed. I think the first bill introduced the issue at hand and they got used to it, but also so many people were coming in for post-conviction relief for potential and imposed misdemeanor sentences. There were thousands of stories about misdemeanors from years ago continuing to have a tremendous impact on people today. Now, people can plead guilty to misdemeanors that they would

have been advised against years before (because the sentence would have made it dangerous for immigration purposes), which really smooths out the courts going forward.

What challenges did you face in passing the bill?

It is unusual to make a bill apply retroactively, so we had to explain it quite a bit. This involved trying to make complicated immigration law as clear as possible.

Do you have any tips on lobbying for this particular bill?

It's crucial to work with allies throughout the process who understand lobbying, and for us to provide the immigration knowledge in a clear form.

How did you address misconceptions or opposition to the bill?

We were constantly educating about the state and federal law discrepancy and the severity of its consequences.

Once the bill became a law, how did you go about monitoring and implementation? Were there any implementation issues that arose and if so, how were they resolved?

We had to advise immigration judges and attorneys to some extent. We had to remind people that while a conviction must be vacated based on legal error to have immigration effect, this is not true for a vacated or reduced sentence: immigration law has long provided that it will accept sentence changes for any reason the state wishes.

We had to clarify that states oversee sentencing, as is the case here, so immigration judges must follow California's change. Sometimes issues arise where U.S. Immigration Customs & Enforcement ("I.C.E.") tries to oppose the change by arguing it is preempted, but that does not work because it is a basic principle that states are empowered to impose or change sentences. A major issue now is that immigration judges across the country see so many unrepresented immigrants who may have prior California misdemeanor convictions but are unaware of this change. This law is really an invisible change because when you look up individual misdemeanors in the California Penal Code, the statutes still impose a potential year-long sentence. The reduction is implemented through a court form and there is no reason for anyone to look up Section 18, so we need to increase awareness.

Finally, 20 months after the law took effect, in October 2018, we got the *Velasquez-Rios* decision that refused to give the change retroactive effect.