CALIFORNIA SENTENCES AND IMMIGRATION

By Kathy Brady, ILRC

Table of Contents

In many cases, not only the type of conviction but the type and amount of sentence can cause immigration penalties. The good news is that an informed defender often can structure a sentence that gives the prosecution what they require, including prison time if needed, while still avoiding immigration penalties based on sentence. An immigration advocate needs to know how to recognize what happened in terms of sentence, and explain it to immigration judge or officer. This guide discusses various aspects of sentences that can affect immigrants, and strategies for defenders and immigration advocates.

- Parts I-III discuss imposed sentences. Certain offenses become "aggravated felonies" for immigration purposes only if a sentence of one year or more is imposed on a single count. A sentence of 364 days or less avoids the aggravated felony. Often, an informed defender can arrange for the defendant to serve the amount of jail or prison time required by the prosecution, without creating an aggravated felony conviction.

- Part IV discusses when the *potential* (maximum possible) sentence must be 364 days versus one year for a crime involving moral turpitude, and the current immigration treatment of PC § 18.5(a).

- Part V discusses when a noncitizen needs a misdemeanor versus a felony conviction, current challenges to PC § 17(b)(3) and Prop 47, and defense strategies in criminal and immigration proceedings.

- Part VI discusses when *actual* (served) custody time matters to immigration status. Spending an aggregate 180 days or more in actual custody as a result of a conviction, over a particular period of time, is a bar to establishing "good moral character," a requirement for relief such as naturalization, non-LPR cancellation, and VAWA.

- Part VII consists of three charts that provide annotated summaries of how California sentencing affects immigration.

As always, the type of offense also matters. Only certain offenses are crimes involving moral turpitude, or are aggravated felonies if a year is imposed, and therefore need these specific potential or imposed sentences. And some offenses have severe immigration consequences regardless of sentence.

Criminal defenders and immigration advocates should consult written resources and/or crim/imm experts in any complex cases. One free resource for these groups is the *California Quick Reference Chart*. Defenders and advocates can register for access to the *California Chart* at https://calchart.ilrc.org/registration/.

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I. How Immigration Law Evaluates California Sentences

A. When does the length of an imposed sentence matter for immigration purposes?

See also Chart 3 in Part VII, below, which summarizes how sentences cause immigration penalties.

Aggravated felonies. The most common sentencing issue involves "aggravated felonies" (AFs), as defined under immigration law. Generally, AFs have the worst immigration consequences. Certain offenses only become an AF if a sentence of one year or more is imposed.[1] The criminal defense strategy is to get a sentence of no more than 364 days on any single count, or to plead to a different offense that does not become an AF with a year's sentence.

CIMTs: The petty offense exception, and avoiding the bar to non-LPR cancellation. In two contexts, a noncitizen convicted of a single crime involving moral turpitude (CIMT) needs to have a sentence *imposed* of no more than six months. This is required in order to qualify for the petty offense exception to the CIMT inadmissibility ground, and to avoid a bar to eligibility for cancellation of removal for non-permanent residents. (In each of these cases there are additional requirements, including limits on the *potentia*l sentence for the offense. See Part IV, below.)

Five-year total sentences for two or more convictions. A person is inadmissible if in their lifetime they were convicted of two or more offenses of any type, with an aggregate sentence imposed of five or more years.[2]

B. What is the immigration definition of an imposed sentence?

See also Chart 1 in Part VII, below, which provides a summary of this material.

Federal immigration law has its own statutory definition of sentence: "Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."[3] Under this definition:

- ✓ The sentence is the period of incarceration that a judge *ordered* -- not the potential sentence, or the time actually served. Early release from custody based on good behavior or jail overcrowding does not reduce the sentence for immigration purposes.
- ✓ For a felony "split sentence" pursuant to PC § 1170(h)(5), where the sentence is split into custodial and supervisory components, the aggregate is considered the sentence for immigration purposes.

  Example: The judge imposes five years but "splits" it into six months in custody, followed by four years, six months on "mandatory supervision". For immigration purposes, the sentence is five years.

[1] See Part III, below, and see list of aggravated felonies, some with sentence requirement, at INA § 1101(a)(43), 8 USC § 1101(a)(43) and *§ N.6 Aggravated Felonies* at www.ilrc.org/chart.

[2] INA § 212(a)(2)(B), 8 USC § 1182(a)(2)(B).

[3] See INA § 101(a)(48)(B), 8 USC § 1101(a)(48)(B).

- ✓ Suspending the *execution* of a sentence offers no immigration advantage. Immigration law includes the entire sentence ordered, even if all or part has been suspended.[4] But when *imposition* of sentence is suspended, the only sentence for immigration purposes is the period of jail time ordered by a judge as a condition of probation (if any).

  Example: The judge imposes a sentence of two years but suspends execution of all but 13 months. For immigration purposes, the sentence is two years.

  Example: The judge imposes a sentence of two years but suspends execution. She orders 180 days' custody as a condition of probation. For immigration purposes, the sentence is two years.

  Example: The judge suspends imposition of sentence and orders three years' probation, with eight months of custody ordered as a condition of probation. For immigration purposes, the sentence is eight months.

  Example: The judge suspends imposition of sentence and orders three years' probation, with no custody time required. For immigration purposes, no sentence is imposed.

- ✓ For most immigration provisions, including the definition of an aggravated felony, the measure is the sentence that was imposed on an individual offense. Multiple consecutive or concurrent sentences on different offenses are not added together.

  Example: Sections 273.5 and 496 both become an aggravated felony if a year is imposed. If the defendant is sentenced to seven months on each of these offenses, to run consecutively, there is no aggravated felony conviction: while the total sentences equal 14 months, a sentence of a year or more is not imposed on a single count. In contrast, a sentence of a year on both, to run concurrently, would create two aggravated felony convictions.

- ✓ Time imposed pursuant to an enhancing provision (recidivist and/or conduct enhancement or alternative sentencing scheme, e.g., petty with a prior) is part of the total sentence imposed.[5]

- ✓ Time imposed on the original offense after a probation or parole violation will be added to the original time for that count.[6] ***Sentence bargaining at a probation violation hearing is a crucial part of defending immigrants.*** See Part II.B, below, for defense strategies.

- ✓ The sentence must be ordered by a judge, as a penalty for a conviction; pre-hearing custody does not count unless the person claims it at sentencing, as credit for time served. A good immigration strategy is to waive credit for custody time accrued *before sentencing*, as part of a bargain to obtain a shorter prospective sentence. See Part II.A, below.

- ✓ A judge's order reducing an imposed sentence will *not* be given immigration effect unless the order was based on legal error in the prior proceeding.[7] This rule took effect in October 2019. It means that a PC

[4] *Ibid.*

[5] See *United States v. Rodriquez*, 128 S. Ct. 1783 (2008).

[6] See, e.g., *United States v. Jimenez*, 258 F.3d 1120 (9th Cir. 2001).

[7] See *Matter of Thomas and Matter of Thompson*, 27 I&N Dec. 674 (AG 2019).

§ 18.5(b) reduction no longer has immigration effect, although a change based on legal error, for example pursuant to PC § 1473.7, does have effect. See Part II.C, below.

II. How to Obtain an Imposed Sentence of 364 Days or Less

Obtaining a sentence of 364 days or less will prevent certain offenses (see Part III, below) from becoming aggravated felonies for immigration purposes. Defenders must consider this at three junctures: at initial sentencing, when there is a probation violation, and as part of post-conviction relief. Immigration advocates need to explain the significance of this to the adjudicator. See also Chart 1 in Part VII, below, which provides a summary of these strategies.

Criminal Defense Practice Tip: Get as far below 364 days as possible. A sentence of 364 days will achieve the critical goal of avoiding an aggravated felony – for the moment. However, best practice is to obtain a sentence of significantly less than 364 days, because of the risk that the defendant will violate probation and get additional time on the original count that brings the total sentence up to 365 days or more.

Or plead to a different offense. The best practice where the client may violate is to plead to a substitute, or additional, offense that will not become an aggravated felony, and take the time on that. For example, PC § 496 and Veh C § 10851 become an aggravated felony if a year is imposed, but PC §§ 459/460 and 530.5 do not. In that way, they are safer pleas. (But be sure to consider any other immigration consequences, if any, of the proposed alternative. Check the *California Chart* and talk with an expert.)

A. At Initial Sentencing

The goal is to obtain a sentence of 364 days or less on each count, if one year will make the particular offense become an aggravated felony. Informed counsel can negotiate a disposition that will result in more than a year in custody, while structuring a "sentence" of less than a year.

Assume your client Felipe must plead guilty to criminal threat, PC § 422. That offense becomes an aggravated felony if a year or more is imposed. To get to a sentence of 364 days or less for immigration purposes, counsel could do one or more of the following:

- Bargain for 364 days (or hopefully less) on a single count. To do this:
  a) Plead to a misdemeanor, which has a maximum sentence of 364 days
  b) Plead to a misdemeanor for actual time, by waiving the future accrual of goodtime/work time credits
  c) Plead to a felony for a felony probationary sentence of 364 days or less (not one year)
  d) Plead to a felony for a felony probationary sentence of 364 days of actual time (waiving the accrual of goodtime/work time credits)
  e) Take two or more of any of the above and run them consecutively
- Waive pre-hearing credit for time served in order to get a shorter sentence.

Example: Say that the DA requires a sentence of two years for the § 422. Bargain to plead guilty, but to continue the sentencing hearing while Felipe spends time in custody. In six months, hold the sentencing hearing and waive credit for the time already served. This will eliminate that time, which never was ordered by a judge, as part of the sentence imposed for immigration purposes. Accept an order of 364 days' (or less) custody as a condition of probation. To get even more time in actual custody, waive the accrual of any goodtime / worktime credits on the time served as a condition of probation. Some DA's might not agree to do all that is necessary to reach a two-year sentence in this manner – but they might agree in the case of a 16-month sentence.

- Best: Plead to a different offense that does *not* become an aggravated felony if a sentence of a year or more is imposed. This could be along with, or better yet instead of, the original offense.

Practice Tip: Check the *California Quick Reference Chart* to find felonies that can take a sentence of a year or more without becoming an aggravated felony, such as residential or commercial burglary (PC § 459/460), vandalism (§ 594), theft (§ 487), fraud offenses that do not have forgery or counterfeiting as an element, possession of a weapon, and probably felony false imprisonment (§ 236/237). For example, if Felipe could accept a two-year sentence for §§ 459/460(a) instead of pleading directly to § 422, the conviction would have few or no immigration consequences. Or, keep the original charge but plead to an additional offense. For example, Felipe could plead to felony PC § 422 and misdemeanor PC § 236, and take felony probation and six months on the § 422 plus six months consecutive on the § 236 – or any combination that did not result in one year on the § 422.

- Work with felony consecutive sentencing. If one third of the middle term[8] on a potential aggravated felony is less than one year, arrange for that offense to become the consecutive, subordinate, term rather than the principle term.

Example: The prosecution demands that Felipe plead guilty to a strike and go to state prison. In this case, Felipe also destroyed property during the incident. Offer an additional felony: try to negotiate to designate PC § 594 (vandalism) as the principle term and the § 422 as the subordinate term. Felipe could be sentenced to the low, middle or high term on the § 594 and would be sentenced to eight months on the § 422. If that is not possible, offer felony §§ 236/237 as the principle term with § 422 as the subordinate. A different and perhaps more realistic option, if the incident took place in the victim's home, is to have Felipe to plead to § 459/460(a) as the principle term and § 236/237 or § 594 as the subordinate term.

Extra credit*:* Try to get a disposition that not only avoids an aggravated felony, but also avoids other immigration consequences. For example, felony §§ 136.1(b)(1) or 236/237 are better choices than § 422 for the subordinate term, because § 422 is a crime involving moral turpitude and a potential crime of domestic violence for immigration purposes, while the other offenses don't carry those penalties. The *California Chart* will provide this information about each offense and suggest alternative pleas.

[8] See PC § 1170.1

B. After a Probation Violation

If more time will be imposed due to a probation violation, bargain to avoid getting to a year or more *in total* on the original conviction, if that will cause the conviction to become an aggravated felony. Or, take a new conviction that hopefully is immigration neutral, and put the time on that.

> **Example:** Karen was convicted of PC § 496 and received a sentence of 8 months as a condition of probation. Section 496 is an aggravated felony if a sentence of one year or more is imposed. Karen is arrested for PC § 487. The prosecutor is willing to violate Karen's probation and suggests adding 4 months to her § 496 probationary sentence to fill out the year.
>
> Don't do it -- this will reach a total sentence of one year and create an aggravated felony. Instead, bargain for a probation violation where the additional sentence on the § 496 is three months and 25 days, or less, rather than four months. Or, suggest taking a new conviction for the 4 months. The sentence for her new conviction can be run consecutively to her § 496 sentence and it will not turn the § 496 into an aggravated felony. Be sure to check the immigration consequences of any new proposed offense.

Do not agree to waive credit for time served on the original sentence and take a new sentence at a probation violation hearing as a way to remain on felony probation, if immigration consequences are a priority. Assume that immigration law still will add the original sentence to the new sentence on the count, because a judge ordered both sentences. (Compare this to waiving credit for time that was served *before* the judge ordered it at the initial sentencing hearing, which is a good immigration strategy.)

> **Example**: Let's say that when Karen violated probation on the § 496 by committing theft, the DA wanted an additional seven months rather than additional four months in custody. They offered to let her waive credit for time served on the § 496 and take a new seven-month sentence on the offense, so that she could avoid exceeding one year and remain on felony probation. This is not a good immigration strategy. Immigration authorities will add the original sentence of eight months to the new P.V. sentence of seven months, so there will be a total of 15 months imposed on the § 496. Instead, bargain to take the time on a new offense. Or, Karen could remain in custody *before* being sentenced in the P.V. hearing, and then waive the credits for that new custody time. For immigration purposes, the key is to waive credits for time that a judge never ordered the person to serve.

C. Post-Conviction Relief to Change a Sentence

One can seek post-conviction relief to vacate or reduce a sentence. However, in 2019 Attorney General Barr held that immigration authorities will not accept a judge's order reducing an imposed sentence, unless the order is based on *legal error* in the original hearing, in *Matter of Thomas and Matter of Thompson.*[9] Before *Thomas/Thompson*, a judge's order shortening a sentence was held to have immigration effect regardless of the basis.

[9] See *Matter of Thomas and Matter of Thompson*, 27 I&N Dec. 674 (AG 2019), reversing *Matter of Song*, 23 I&N Dec. 173 (BIA 2001) and its progeny, and see ILRC, *Resources for Challenging Matter of Thomas and Matter of Thompson* (August 2020) at https://www.ilrc.org/amicus-brief-zaragoza-v-barr-challenging-thomas-thompson.

Under *Thomas/Thompson*, **PC § 18.5(b),** which permits a judge to reduce an imposed sentence to 364 days, no longer has immigration effect. That will change only if *Thomas/Thompson* is fully overturned, or is held not to have retroactive effect on orders from before the date it was published, October 25, 2019. Or, an § 18.5(b) order might have effect if the judge explicitly based it on some legal error (which would be rare, since that is not required).

Instead of § 18.5(b), use other vehicles to reduce/vacate the sentence or vacate the conviction, such as PC § 1473.7. See materials on post-conviction relief at www.ilrc.org/immigrant-post-conviction-relief.

III. Offenses that Become an Aggravated Felony if a Sentence of One Year or More is Imposed

Federal law sets out the categories of offenses that are "aggravated felonies" for immigration (and federal criminal law) purposes.[10] These have extremely harsh immigration consequences. For some of these categories, the offense becomes an aggravated felony only if a sentence of a year or more is imposed.

Never assume that a state offense is or is not an aggravated felony, because results can be surprising. Some misdemeanors or even infractions are aggravated "felonies," and some strikes are not. An offense that sounds like an aggravated felony might not be for technical reasons. For example, California residential or commercial burglary (PC § 459) is not a "burglary" aggravated felony. Always check the *California Chart* and/or do research.[11]

The following categories of offenses are aggravated felonies only if a year or more is imposed.[12]

- A crime of violence as defined at 18 USC § 16(a) (includes, e.g., §§ 243(d), 245, 273.5, 422)
- Theft (*not* including § 487, but assume it includes § 10851)
- Receipt of stolen property (§ 496)
- Bribery of a witness
- Commercial bribery
- Counterfeiting
- Forgery
- Obstruction of justice (under Ninth Circuit law, PC § 32 is not, and PC 136.1(b)(1) and Veh C § 10851 arguably are not, obstruction, but counsel still should try hard to obtain 364 days or less on each count[13])

[10] See INA §101(a)(43), 8 USC § 1101(a)(43), and see § *N6. Aggravated Felonies* at www.ilrc.org/chart.

[11] See also, ILRC, *How to Use the Categorical Approach* (December 2019) at https://www.ilrc.org/how-use-categorical-approach-now

[12] See INA §101(a)(43), 8 USC § 1101(a)(43), subsections (F), (G), (P), (R), and (S).

[13] The Ninth Circuit held that PC § 32 is not an aggravated felony as obstruction because it reaches interfering with an initial arrest. *Valenzuela Gallardo v. Barr*, 968 F.3d 1053 (9th Cir. 2020). A petition for rehearing and reconsideration was denied, but at this writing DHS is considering whether to file a petition to the Supreme Court.

- Trafficking in vehicles which have had their VIN numbers altered
- Perjury, subornation of perjury
- Falsifying immigration documents or trafficking in false documents (with an exception for a first offense that involved helping only the person's spouse, child or parent)
- Burglary (*not* including § 459/460, first or second degree, which means that no California burglary conviction is an aggravated felony; but an out-of-state burglary conviction could be)

Remember that other types of offenses are aggravated felonies regardless of sentence imposed. Obtaining a sentence of 364 days or less will not help in those cases. Check the *California Quick Reference Chart* or other materials.

IV. Potential Sentence and Crimes Involving Moral Turpitude: Penal Code § 18.5(a)

Crimes involving moral turpitude (CIMTs) are unusual in immigration law, in that a single conviction of a CIMT does not always trigger a penalty. Instead, once we have determined that an offense actually *is* a CIMT for immigration purposes,[14] we must look at various factors to see if it makes the particular person inadmissible, deportable, or barred from relief. These factors are set out in federal statute, and can include the number of CIMTs, date of commission, sentence, and the *potential* sentence of the offense. Because CIMT penalties are extremely common and can be devastating to immigrants, it's important to understand how potential sentence affects them. For more information on all CIMT rules and defense strategies, see online ILRC materials.[15]

This section will discuss when we need a CIMT to have a potential sentence of just 364 days as opposed to one year, and the immigration effect of PC § 18.5(a). See also Part IV, which warns that some ICE lawyers are arguing that a § 17(b)(3) or Prop 47 redesignation as a misdemeanor no longer has immigration effect.

When is it important for a CIMT to have a maximum possible sentence of 364 days or less? In two important contexts, a CIMT must have a *potential* (maximum possible) sentence of 364 days or less in order to avoid an immigration penalty. See also Chart 3 in Part VII, below, which provides a summary of this material.

1) A noncitizen is deportable if convicted of a single CIMT, committed within five years of admission, if it has potential sentence of *a year or more*.[16] A 364-day limit protects against this.
2) A person is barred from applying for non-LPR "10-year" cancellation if convicted of one CIMT conviction, if it has a potential sentence of *a year or more*.[17] A 364-day limit avoids this. (Also, a sentence of more than six months must not be imposed; see Parts I and II on imposed sentence.)

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[14] To determine whether a California offense is a CIMT, start with the *California Chart* or other resources, and then check for new cases. Whether an offense is a CIMT is determined by federal immigration, not state, cases.

[15] See ILRC, *All Those Rules About Crimes Involving Moral Turpitude* (June 2020) at https://www.ilrc.org/all-those-rules-about-crimes-involving-moral-turpitude and ILRC, *Flow Charts on Penalties for Crimes Involving Moral Turpitude* (June 2020) at https://www.ilrc.org/flow-chart-penalties-crimes-involving-moral-turpitude

[16] See the petty offense exception at INA § 237(a)(2)(A)(i), 8 USC § 1227(a)(2)(A)(i).

[17] See *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010) addressing INA § 240A(b)(1)(C), 8 USC §1229b(b)(1)(C).

Note: The "petty offense exception" to the CIMT inadmissibility ground does <u>not</u> need the 364-day limit. It is not affected by the below discussion of *Velasquez-Rios* or PC § 18.5(a). The requirement is that the CIMT has a potential sentence of a year or less.[18] Any California misdemeanor conviction, including from before January 1, 2015, comes within the exception as long as it is the only CIMT the person has committed and the judge did not impose a sentence of more than six months. See Part I, above.

How do immigration authorities treat California Penal Code § 18.5(a)? The bottom line is that currently a California misdemeanor conviction from on or after January 1, 2015 has a maximum possible sentence of 364 days or less for immigration purposes, while a misdemeanor from before that date has a maximum possible sentence of one year. (Of course, this does not apply to misdemeanors that have a lower statutory maximum, e.g., of six months.)

Discussion. As of January 1, 2015, PC § 18.5 has provided that no California misdemeanor has a potential sentence of more than 364 days. Effective January 1, 2017, PC § 18.5(a) has provided that this 364-day top applies retroactively to all misdemeanor convictions, including those from before January 1, 2015.[19] However, in the *Velasquez-Rios*[20] decisions, the BIA and a Ninth Circuit panel found that federal immigration authorities should not give effect to the retroactivity clause in § 18.5(a). For immigration purposes, the 364-day top applies to convictions received on or after January 1, 2015, but not to earlier convictions. Advocates will file a petition for rehearing and reconsideration in the case, but meanwhile we must assume that the rule will continue to be the following:

- ✓ If a California misdemeanor conviction occurred on or after January 1, 2015, for immigration purposes it has a potential sentence of 364 days. This is not contested.

- ✓ If the misdemeanor conviction occurred before January 1, 2015, for immigration purposes it will be held to have a potential sentence of 365 days, despite § 18.5(a). If a client is at risk due to the pre-2015 misdemeanor, one must try to vacate the conviction for cause under PC § 1473.7 or other vehicle, and replead to a different offense (preferably a non-CIMT).

- ✓ If the conviction was a wobbler or a felony that later was declared a misdemeanor under PC § 17(b)(3) or Prop 47, we assume that the BIA will hold that the date of conviction, as opposed to date of redesignation, controls, e.g., assume that the BIA will find that a wobbler conviction from before 2015 that is classed as a misdemeanor after 2015 will have a potential sentence of a year.

  But see discussion at Part V, below, of the DHS attack on giving immigration effect at all to misdemeanor designations under PC § 17(b)(3) or Prop 47.

[18] See INA § 212(a)(2)(A)(ii)(II), 8 USC § 1182(a)(2)(A)(ii)(II).

[19] Effective January 1, 2015, Penal Code 18.5 provided, "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." Effective January 1, 2017, PC § 18.5(a) included that language plus a retroactivity clause: "This section shall apply retroactively, whether or not the case was final as of January 1, 2015." In effect, the *Velasquez-Rios* decisions refuse to give effect to the 2017 amendment making § 18.5 retroactive.

[20] See *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018), and *Velasquez-Rios v. Barr, Desai v. Barr*, –F.3d– (9th Cir. Oct. 28, 2020).

V. DHS Challenges to Effectiveness of Misdemeanor Designations Under PC § 17(b)(3) and Proposition 47

California law permits a judge to designate certain offenses as a misdemeanor after the initial conviction and sentence hearing, for example under PC § 17(b)(3) or Proposition 47.[21] However, ICE is asserting that these have no effect in immigration proceedings. Advocates have strong arguments that § 17(b)(3) designations do have effect. See Part A. For Proposition 47, the threat by ICE is more severe. See Part B. In both cases, defenders should try to act conservatively and find alternative defense strategies.

Having a misdemeanor rather than a felony conviction is always preferable. Further, it can help noncitizens in two critical ways:

- ***Avoid felony bars to relief.*** Eligibility for some forms of immigration relief, *now including asylum,* is barred by conviction of any felony. Conviction of any felony is a bar to eligibility for asylum under a new regulation that applies to convictions received on or after November 20, 2020[22]; Temporary Protected Status (TPS)[23]; and Deferred Action for Childhood Arrivals (DACA)[24]. (A felony conviction is not the only bar to these forms of relief. See the materials referenced in the footnotes, or consult with an expert, for more information.)

- ***Avoid a penalty for a crime involving moral turpitude*** (CIMT). A California "one-year" misdemeanor has a potential sentence of 364 days (if the conviction was on or after 1/1/15) or 365 days (if before) for immigration purposes. In some cases, this avoids coming within a CIMT penalty. See Part IV, above.

A. Penal Code § 17(b)(3)

Under PC § 17(b)(3), a judge in some cases can declare a California wobbler to be a misdemeanor at any time after probation is imposed. The Ninth Circuit and BIA consistently have held that the offense becomes a misdemeanor for immigration purposes -- even if the § 17(b)(3) order was made was years after the original conviction, and after removal proceedings had started.[25]

Now, some ICE attorneys are challenging this rule based on *Matter of Thomas/Thompson*.[26] As discussed in Part II.C, above, *Thomas/Thompson* held that a state court order changing the length of an imposed sentence has no immigration effect unless it was based on legal error in the original proceeding. ICE is trying to extend that and argue that an order changing offense level and potential sentence also has no immigration effect if, like § 17(b)(3), it is not based on legal error in the original proceeding.

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[21] Proposition 64 also permits resentencing as a misdemeanor for some marijuana offenses, but because the potential or imposed sentence of a controlled substance offense does not change its immigration effect, we do not discuss it.

[22] See 85 FR 6702 (Oct. 21, 2020), effective Nov. 20, 2020, and see discussion of nearly identical proposed regulation in NIPNLG, *Practice Alert: Proposed Criminal Bars to Asylum* (July 9, 2020) at https://nipnlg.org/PDFs/practitioners/practice_advisories/crim/2020_09Jul_prop-criminal-bars-asylum.pdf.

[23] See, e.g., https://www.uscis.gov/humanitarian/temporary-protected-status .

[24] DACA may or may not continue in its current form. See updates at www.ilrc.org/daca. Because DACA uses unique immigration definitions, it is unclear whether challenges to § 17(b)(3) and Prop 47 will apply here.

[25] See *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 845 (9th Cir. 2003), overruled in part and reaffirmed in part by *Ceron v. Holder*, 747 F.3d 773, 777-778 (9th Cir. 2014) (en banc), and see, e.g., *Lafarga v. INS,* 170 F.3d 1213, 1216 (9th Cir. 1999) (same result for Arizona wobbler), *Matter of Cortez,* 25 I&N Dec. 301, 306 (BIA 2014) and discussion in *Ewing v. California*, 538 U.S. 11, 16 (2003).

[26] *Matter of Thomas and Matter of Thompson*, 27 I&N Dec. 674 (AG 2019) (a judge's order shortening an imposed sentence has immigration effect only if the order was based on legal error, as opposed to rehabilitative factors).

There are strong arguments against applying this to § 17(b)(3)[27] but, as always, no guarantee of winning. For that reason, defenders must act conservatively and try to devise an immigration strategy that does not rely on a future § 17(b)(3) misdemeanor designation.

- ✓ Try to have the offense declared a misdemeanor at the plea or sentence hearing, under § 17(b)(1), (3). This will have immigration effect. Some defenders have been able to accomplish this by putting off the sentencing hearing for some period of time, during which the defendant meets certain conditions in order to persuade the prosecutor and judge to designate the offense as a misdemeanor at sentencing.

- ✓ If that is not possible, try to plead to a different felony that is not a CIMT, if that is the issue. But if the issue is eligibility for asylum, DACA, or TPS, *any* felony conviction is a bar.

- ✓ Remember that the defendant can serve a lot of time, including more than a year, if that is what is required to obtain a misdemeanor. For example, they can waive credit for time served, or serve consecutive misdemeanor sentences. See Parts I, II, above. As always, make sure that the new arrangement does not cause other immigration problems, and consult with an expert if needed.

- ✓ If the person has a prior wobbler conviction that was not designated a misdemeanor at plea or sentence hearing, and the conviction would harm them if it was considered a felony, they need to get help before they have any contact with immigration or border authorities. Consider helping them to obtain a vacatur for cause such as PC § 1473.7, or to find another party to do this.

Again, current Ninth Circuit precedent squarely holds that § 17(b)(3) misdemeanor designations have effect. Advocates will assert this governing case law in removal proceedings. But ICE may appeal such cases to try to create a new rule, so defenders should act conservatively to try to avoid the fight.

B. Proposition 47

On November 4, 2014, California voters passed Proposition 47 ("Prop 47"). Prop 47 recharacterized drug possession, and several property offenses involving $950 or less, as misdemeanors rather than felonies or wobblers in criminal cases going forward.[28]

With some exceptions, Prop 47 also directed courts to redesignate prior felony convictions as misdemeanors upon request, if the prior felony conviction was based on what now would be a misdemeanor under Prop 47. See PC § 1170.18(f), (g). Generally, immigration authorities have given effect to these redesignations under Prop 47. Now, however, it is riskier to rely on a Prop 47 reduction for immigration purposes..

ICE may assert that a Prop 47 redesignation of a prior felony as a misdemeanor does not have immigration effect. Prop 47 lacks a defense argument that § 17(b)(3) has: while PC § 17(b) governed all prior wobbler convictions from the outset, Prop 47 – like the retroactivity provision of PC § 18.5(a) – is a law that was passed

[27] See Ninth Circuit cases cited above and see forthcoming ILRC advisory, *Litigation Update: California Post-Conviction Relief* at www.ilrc.org/crimes. This is being developed, but some arguments are based on the fact that (a) states have authority to characterize offense level; (b) i*mposed* sentence, the subject of *Thomas/Thompson*, is different from offense level or potential sentence; it is governed by INA § 101(a)(48)(B), which was the statute AG Barr interpreted in *Thomas/Thompson*, a case that never implied that the rule should go on to offense level; and (c) § 17(b)(3) is distinguishable from some cases where federal courts have disapproved a new law that changes a conviction retroactively (e.g., PC § 18.5(a) or Proposition 47), because § 17(b) governed these convictions from their inception; the offense always had the potential to be a misdemeanor. The BIA and Ninth Circuit decisions in *Velasquez-Rios* distinguished § 17(b)(3) on this basis, in dicta.

[28] See PC § 1170.18 and see information at https://myprop47.org/, including links to immigration materials.

after the conviction being reduced, and it makes a retroactive change. A Ninth Circuit federal criminal case declined to give effect to a Prop 47 redesignation of a drug possession felony on this basis.[29] Along with other arguments against this, advocates can point out that the Prop 47 property offenses also are wobblers, and so all had the potential to be misdemeanors at the time of conviction. But best practice is:

- ✓ If your client has a prior felony conviction that endangers them, try to vacate the conviction for cause pursuant to PC § 1473.7 or other vacatur. Do this whether or not the offense already has been redesignated under Prop 47.
- ✓ If that is not possible, warn the client to have no contact with immigration or border officials until the legal question of the immigration effect of Prop 47 is resolved.
- ✓ If a vacatur based on legal error is not possible, then § 17(b)(3) is a better option than Prop 47 to redesignate the offense as a misdemeanor.

VI. 180 Days Actually in Custody as a Bar to Good Moral Character

A few immigration applications require applicants to demonstrate they have been persons of "good moral character" (GMC) for a certain period of time. For example, applicants for naturalization to U.S. citizenship must show they were of GMC for the previous five years (or less, in some cases) immediately before they submitted the application; for cancellation of removal for non-permanent residents it is ten years of GMC, and cancellation under the Violence Against Women Act requires three years.[30]

A noncitizen is barred from trying to establish GMC if, during the time for which GMC must be proved, they have come within certain categories. One such bar applies to a person who "during such period has been confined, as a result of conviction, to a penal institution for an aggregate period" of 180 days or more.[31] This GMC bar refers to time actually spent in custody. It has similarities and differences with "sentence imposed," discussed in Parts I and II, above.

- ✓ In contrast to "sentence imposed," here the 180 days means time actually spent in custody. Here, early release from jail for good behavior, jail overcrowding, etc., does decrease the time. To the extent that a sentence was suspended, so that the person did not serve time, the sentence does not count toward the 180 days of custody.
- ✓ In contrast to "sentence imposed," here the 180 days of custody must have occurred within a set time period. For example, with some exceptions, an applicant for naturalization must show GMC for the preceding five years. If during the last five years the person only spent 179 days in custody, they are not barred from trying to establish the required GMC.
- ✓ *Like* "sentence imposed," the time must be spent as a result of a conviction. If the person waives credit for time served before the sentencing hearing, that time does not count toward the 180 days in custody. If the conviction is vacated, the custody time also disappears.

[29] See *United States v. Diaz*, 838 F.3d 968 (9th Cir. 2016), cited in the *Velasquez-Rios* decisions, *supra.*

[30] See discussion of good moral character at ILRC, *N.17 Defenders' Relief Toolkit* (2018), www.ilrc.org/chart and see INA § 101(f), 8 USC § 1101(f).

[31] INA § 101(f)(7), 8 USC § 1101(f)(7).

Example: Harry is undocumented. He needs to apply for cancellation of removal for non-permanent residents. To do this he needs to establish that he has been a person of good moral character (GMC) for the preceding ten years.[32] Here are his priors, and their effect on the 180-day requirement:

- Twelve years ago, Harry served 20 days for a PC § 243(e). *This does not count toward the 180 days because it occurred outside of the ten years.*

- Five years ago, he was sentenced to 290 days for PC § 496(a), but he was released after 145 days. *This counts as 145 days toward the 180 days.*

Since then Harry found religion and has led a good life, except recently he was charged with theft when he tried to steal food for his disabled U.S. citizen children. The DA wants a 120-day sentence and will not budge. Assuming that Harry spends 60 days actually in custody for the 120-day sentence, that will take him up to 205 days total and destroy his ability to demonstrate GMC.

You get the DA to agree that if Harry pleads guilty, you can put off the sentencing hearing for two months while Harry is in custody. Then, Harry will waive credit for time served. That means that the prior 60 days of custody will not be as a result of a conviction and therefore will not count toward the 180 days actually in custody that bars GMC. At the sentencing hearing, Harry will be sentenced to probation and released. (Or, Harry could serve and/or waive less pre-hearing time, as long as he does not serve end up serving an additional 35 days in custody as a result of a conviction.)

[32] See INA § 240A(b)(1), 8 USC § 1229b(b)(1).

VII. Charts on California Sentencing and Immigration

CHART 1: How Immigration Law Evaluates California Sentences

California Disposition	Sentence Imposed for Immigration Purposes
Suspended imposition of sentence, no custody time	No sentence for immigration purposes. "Suspended imposition of sentence, three years' probation" is zero sentence.
Suspended imposition of sentence with custody as a condition of probation	Custody time ordered as a condition of probation counts. "Suspended imposition of sentence, three years' probation, 30 days custody as a condition of probation" is a sentence of 30 days.
Suspended execution of sentence	The entire suspended sentence counts, even if the person spends no time in custody. "Two years in prison, execution suspended" is a sentence of two years.
Felony "Split Sentence" under Pen C § 1170(h)(5), where sentence is split between custodial and supervisory components	The entire sentence stated by the court will be considered the sentence for immigration purposes. "The sentence is five years, with the first six months to be served in county jail, and the remaining four years, six months to be served on mandatory supervision" is a sentence of five years.
Probation	Probation is not a sentence. "Three years of probation" is zero sentence
Probation violation	Additional time ordered for a PV is added to the original time on the count, to make the total sentence. If the original sentence was 8 months, an additional 4 months imposed on the original count for a PV brings the total to one year. PV hearings are dangerous because counsel may not realize that the particular offense will become an aggravated felony if the sentence reaches a year or more.
Taking credit for time served	Time in custody is part of the sentence. "I sentence you to 16 months, including 180 days credit" is a sentence of 16 months.
Waiving credit for time served before sentencing	The custody time will not count, and a shorter sentence can be negotiated. "I sentence you to four months and note that you waive credit for 180 days served" is a sentence of four months (because at no time was the 180 days "ordered by a court of law," since sentencing had not yet occurred and the time was waived).
At a probation violation hearing, waiving credit for time served in order to get a new sentence of a year or less pursuant to a sentence, e.g., in order to remain on felony probation	This is not a good immigration strategy, as all of the sentences will be added together, regardless of the waiver. "You completed the initial sentence of 8 months, but now you are facing an additional six months on the PV. If you waive CTS,

CHART 2: Which Ameliorative California Sentence Laws Still Have Immigration Effect

All of these issues are in litigation, so it is important to keep track of new developments. This is the situation as of October 2020.

California Statute	Potential Immigration Benefit	Current Immigration Effect
PC 18.5(a)	***Law:*** Regardless of the date of conviction, a California misdemeanor has a potential sentence of 364 days rather than one year. ***Benefit*:** A CIMT that carries a potential 364 days can avoid certain CIMT penalties. See next Chart.	***Split effect.*** The BIA and Ninth Circuit[33] held that for immigration purposes, misdemeanor convictions from on or after January 1, 2015 have a potential sentence of 364 days, but those from before that date still have a potential sentence of one year. Petition for rehearing will be filed. See Part IV.
PC 18.5(b)	***Law:*** A judge can reduce an imposed sentence to 364 days, in some cases. ***Benefit*:** Some offenses become aggravated felonies only if a year or more is imposed, so a 364-day sentence would prevent that.	***No effect***. AG Barr imposed new rule that a court's order changing a sentence must be based on legal error to have immigration effect, [34] so PC 18.5(b) orders have no effect (unless perhaps the court stated the reduction was based on legal error). In litigation.
PC 17(b)(3)	***Law:*** At any time after probation is imposed, judge can declare a wobbler conviction to be a misdemeanor ***Benefit:*** A misdemeanor (a) can avoid certain CIMT penalties, and (b) avoids the "one felony" bar to eligibility for asylum, DACA, and TPS.	***Under attack***. The Ninth Circuit has long held that 17(b)(3) reduction has immigration effect,[35] but ICE is asserting that it should not. While advocates have good arguments against this, the best practice is *not* to rely on 17(b)(3), and to seek a different defense strategy. See Part V.
Prop 47, as PC 1170.18	***Law:*** Redesignate a qualifying prior felony conviction as a misdemeanor ***Benefit:*** Same as PC 17(b)(3), above	***Under attack.*** ICE may assert that Prop 47 redesignations have no immigration effect.[36] In some ways this is more at risk than 17(b)(3). Do not rely on a Prop 47 redesignation; seek a different defense strategy. See Part V.
PC 1473.7, 1016.5, 1018, habeas corpus, etc.	***Law:*** Vehicles for court to vacate or change a prior conviction or sentence, based on legal defect. ***Benefit:*** Eliminates a conviction or sentence for all immigration purposes.	***Effective with a clear order.*** If the court's order is based on legal error, as opposed to humanitarian/rehabilitative factors, it has immigration effect.[37] The order must clearly state it is based on error.

[33] See *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018), and see *Velasquez-Rios v. Barr, Desai v. Barr*, --F.3d-- (9th Cir. Oct. 28, 2020) and see Part IV. A petition for rehearing en banc will be filed.

[34] See *Matter of Thomas, Matter of Thompson*, 27 I&N Dec. 674 (AG 2019) and see Part II.C. Case is on appeal.

[35] See *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 845 (9th Cir. 2003) and see Part V.

[36] See Part V.

[37] See, e.g., *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2013), *Matter of Thomas/Thompson, supra*.

Chart 3: How Imposed, Potential, and Served Sentences Cause Common Immigration Penalties

Imm. Penalty	Sentence Component	Defense Strategies under California Law
Aggravated felony conviction[38]	Certain offenses become an aggravated felony only if a sentence of a year or more is imposed.	See Parts I-III for how to avoid a year or more while still providing sufficient custody time. PC 18.5(b) sentence reductions do *not* have immigration effect, but vacaturs for cause do.
Inadmissible for one CIMT, *unless* it comes within the petty offense exception[39]	To qualify for this beneficial exception, one must have committed just one CIMT, that has a potential sentence of a year or less, and imposed sentence of 6 months or less	See Part IV regarding potential sentence. Any California misdemeanor, regardless of date, meets the requirement of having a potential sentence of a year or less. See Parts I-III regarding imposed sentence of 6 months or less.
Deportable for one CIMT conviction[40]	Deportable for one CIMT committed within 5 years of admission, that has a potential sentence of a year or more	See Part IV regarding the need for a potential sentence of 364 days or less. A misdemeanor conviction from on or after 1/1/15 has a 364- day max and avoids this penalty. Misdemeanor convictions from before 1/1/15 have a one-year max and trigger the penalty. For them, consider PC 1473.7 or other PCR.
Barred from non-LPR cancellation by one CIMT conviction[41]	Conviction of one CIMT, with potential sentence of a year or more, or imposed sentence of more than 6 months, is a bar.	Regarding potential sentence of 364 days, see box above and see Part IV. Regarding imposed sentence of 6 months or less, see Parts I-III.
Inadmissible for 5 yrs total sentence[42]	5 years imposed for 2 or more convictions, any type of offense	See Part I-III regarding imposed sentence.
Need a misdemeanor to avoid "one felony" bars to relief, or some CIMT penalties	Conviction of any felony is a bar to asylum, DACA, and TPS. See Part V. See above rows for CIMT penalties that depend on sentence.	See Part V. A reduction per PC 17(b)(3) has long been upheld for imm purposes, but now this is under attack. Try to have the wobbler declared a misd at sentencing rather than relying on a later order, until this question is resolved. Prop 47 is more vulnerable: do not rely on a redesignation of a prior for imm purposes until this is resolved.
180 days in actual custody during the GMC period[43]	180 days in custody as a result of a conviction during the time for which GMC must be proved bars a finding of GMC	GMC refers to good moral character, a requirement for certain forms of relief. See Part VI for more on GMC and on what counts as custody time for this purpose.

[38] Aggravated felonies are defined at INA 101(a)(43), 8 USC 1101(a)(43).

[39] CIMT refers to crime involving moral turpitude. See INA 212(a)(2)(A)(2)(ii), 8 USC 1182(a)(2)(A)(2)(ii).

[40] See deportation ground at INA 237(a)(2)(A)(2), 8 USC 1227(a)(2)(A)(2)xx

[41] See discussion in Part IV, and see INA 240A(b)(1), 8 USC 1227b(b)(1).

[42] INA 212(a)(2)(B), 8 USC 1182(a)(2)(B).

[43] See INA 101(f), 8 USC 1101(f) and see Part VI.

APPENDIX

For Immigration Advocates: Identifying a California Felony, Wobbler, and Misdemeanor

The potential (maximum possible) sentence of an offense, and in some cases whether the offense is a felony versus a misdemeanor, can determine the outcome of some immigration cases. See the review of immigration penalties in Chart 3, above. California law sets out four basic offense levels: felony, wobbler, misdemeanor, and infraction. This section discusses the first three, including how to recognize them in the criminal code. For more on infractions, see online resources.[44]

To identify the offense level and potential sentence, we look to language in the code section, e.g., the Penal Code or Vehicle Code.

Felonies. Almost[45] all California felonies have a potential sentence of more than a year. See PC § 17(a). Some California offenses are punishable as either a felony or a misdemeanor; these are referred to as "wobblers" and are discussed below. In contrast, a "straight" felony is punishable only as a felony.

> *Statutory language:* If the offense is a "straight" felony, there will be language in or near the code section defining the offense that says, e.g., "is guilty of a felony and shall be punished by imprisonment in the state prison for 5, 8, or 10 years."

A California felony conviction can bring adverse consequences if (a) the person needs to apply for relief that is barred by conviction of a felony, such as DACA, TPS, or, under contested new regulation, asylum, or (b) in some cases involving crimes involving moral turpitude. See Part VII, Chart 3, above.

Wobblers. Many California offenses are alternative felony/misdemeanors, often called "wobblers." The offense can be charged as a felony or a misdemeanor.

> *Statutory Language:* If the offense is a wobbler, there will be language in or near the code section defining the offense that says, e.g., "shall be punished in the state prison for a term of two, three, or four years *or* in the county jail for not exceeding one year," or "imprisonment in a county jail not exceeding one year *or* imprisonment pursuant to subdivision (h) of Section 1170 …." (emphasis added)

Misdemeanor "wobblers" are treated just like a "one-year" straight misdemeanor. As described below, for immigration purposes they have a potential sentence of 364 days if the conviction was on or after January 1, 2015, and a potential 365 days if before that date.

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[44] See PC § 17(d) and see ILRC, *Arguing that a California Infraction is Not a Conviction* (2012) at https://www.ilrc.org/arguing-california-infraction-not-conviction-test-non-misdemeanor-offenses . Note, however, that practitioners report that immigration authorities *are* treating California infractions as convictions. Some California offenses are "wobblerettes" – alternative misdemeanor/ infractions. See PC §§ 19.6, 19.8.

[45] There are a few exceptions. For example, attempt to commit a California offense can have a potential sentence of half of the offense, so that an attempted felony, punishable by 16 months, could have a potential sentence of eight months. See PC § 664.

If the defendant pled guilty to a felony wobbler, in some cases the conviction later can be reduced to a misdemeanor under PC § 17(b)(3). However, some ICE attorneys are contesting the immigration effect of this reduction. See Part V, above.

Misdemeanors. California misdemeanors can have different potential (maximum possible) sentences. If the code section does not name a sentence for the particular misdemeanor, the potential sentence probably is six months. See PC § 19. A few misdemeanor offenses have a potential sentence of just 90 days, or less. Obviously, six-month and 90-day misdemeanors have less than a 365-day potential sentence.

For other misdemeanors, the code states that the punishment is up to one year – but that statement is not always accurate. Under PC § 18.5(a), no California misdemeanor conviction carries a maximum possible sentence of 365 days; instead, the maximum is deemed to be 364 days. This is true regardless of the date of conviction. However, the BIA and the Ninth Circuit held that for immigration purposes, this 364-day limit only applies to convictions from on or after January 1, 2015. Convictions from before that date have a potential sentence of up to a year. See further discussion in Section IV, and in Chart 3, above.

Statutory language: If the offense is a wobbler misdemeanor, see the section on wobblers above. If the offense is a "straight" misdemeanor, the language may indicate the potential sentences. In or near the section defining the offense, the statute might state:

- The person "is guilty of a misdemeanor." Absent other language, this should mean a potential sentence of up to six months, per PC § 19.
- The statute might set out a lower sentence, e.g., "punishable by not more than 90 days."
- The language may be, e.g., the offense "is punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in a county jail for a period of not more than one year, or by both that fine and imprisonment." Again, for immigration purposes this means the offense is punishable by up to a year if the conviction was before January 1, 2015, and up to 364 days if it was on or after that date.

San Francisco
1458 Howard Street
San Francisco, CA 94103
t: 415.255.9499
f: 415.255.9792

Washington D.C.
1015 15th Street, NW
Suite 600
Washington, DC 20005
t: 202.777.8999
f: 202.293.2849

Austin
6633 East Hwy 290
Suite 102
Austin, TX 78723
t: 512.879.1616

San Antonio
500 6th Street
Suite 204
San Antonio, TX 78215
t: 210.760.7368

ilrc@ilrc.org www.ilrc.org

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