Law Offices of Norton Tooby

California Post-Conviction Relief For Immigrants

eNewsletter

July, 2009

This eNewsletter contains selected recent developments in criminal immigration law occurring during May and June, 2009. For a complete report, see the May and June Reports sent to Premium Members of www.NortonTooby.com.

The coded references following each case summary refer to the title and section number in our practice manuals in which the subject of the recent development is discussed more fully. For example, CD 4.19 refers to N. TOOBY & J. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 4.19 (2008), with monthly updates online at www.NortonTooby.com.

Inside this Issue:

Article: Immigration Effects of Dismissals Under Penal Code § 1385

By Norton Tooby

A trial court has authority to dismiss a criminal action, or a portion of an action, in the interests of justice. Penal Code § 1385(a). This standard "requires consideration of the constitutional rights of the defendant and the interests of society. Courts are empowered to fashion a remedy for deprivation of a constitutional right to suit the needs of the case."[1] The test is to balance many factors, including the interests of the defendant and the interests of society.[2] An order of dismissal may thus be based on a ground of legal invalidity, or on equitable factors, or a combination.

This article will discuss the immigration effects of dismissals of conviction under Penal Code § 1385(a). Counsel seeking a dismissal order, for the purpose of eliminating the immigration effects of a conviction, must therefore present to the court at least some grounds of legal invalidity, that were in existence at the time the conviction arose, and seek the court's order granting the dismissal in part for that reason.

The reasons for the dismissal must be documented in a court order that is entered on the minutes of the criminal case. *People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 502-503 [446 P.2d 138]; *People v. Ingram* (1985) 174 Cal.App.3d 1161, 1163, 220 Cal.Rptr. 346; *People v. Franklin* (1978) 84 CallApp.3d Supp 13, 15, 149 Cal.Rptr. 229. "Minutes have been interpreted to include a filed and signed written memorandum opinion." CALIFORNIA CRIMINAL DEFENSE PRACTICE § 51.22[2][b], p. 51-59 (Erwin, Millman, Monroe, Sevilla, & Tarlow, eds. 2009), citing *People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 504-505 [446 P.2d 138]. If that is done, and the dismissal is based at least in part on a ground of legal invalidity, the dismissal order should be effective to eliminate the conviction for all immigration purposes, even if the government does not have the burden of proving the conviction.

If the dismissal order is ambiguous as to whether it was granted on a ground of legal invalidity, it will still be effective to eliminate the immigration effects of a conviction, wherever the government has the burden of proving the existence of a conviction for purposes of triggering immigration consequences such as removal. *Cardozo-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. Aug. 21, 2006) ("for the government to carry its burden in establishing that a conviction remains valid for immigration purposes, the government must prove "with clear, unequivocal and convincing evidence, that the Petitioner's conviction was quashed *solely* for rehabilitative reasons or reasons related to his

[1] *People v. Orin* (1975) 13 Cal.3d 937, 945, 120 Cal.Rptr. 65; *People v. Thorbourn* (2004) 121 Cal.App.4th 1083, 1088, 18 Cal.Rptr.3d 77; *People v. Superior Court (Flores)* (1989) 214 Cal.App.3d 127, 144, 262 Cal.Rptr. 576, citing *In re Pfeiffer* (1968) 264 Cal.App.2d 470, 477.

[2] *People v. Fretwell* (1970) 8 Cal.App.3d 37, 40.

immigration status, i.e., to avoid adverse immigration consequences.") (original emphasis), citing *Pickering v. Gonzales*, 454 F.3d 525 (6th Cir. 2006).

The Ninth Circuit reached this conclusion as to a dismissal order under Penal Code § 1385 in an unpublished decision:

> We conclude that the Government has not met its burden to show that Marmolejo is removable. A vacated conviction can serve as the basis of removal if the conviction was vacated for reasons "unrelated to the merits of the underlying criminal proceedings," that is, for equitable or humanitarian reasons. *575 *Matter of Pickering*, 23 I. & N. Dec. 621, 624, 2003 WL 21358480 (BIA 2003). But a conviction vacated because of a "procedural or substantive defect" is not considered a "conviction" for immigration purposes and cannot serve as the basis for removability. *Id.* It is unclear from the record why Marmolejo's original conviction was vacated by the Superior Court of Santa Barbara County. The minute orders show that the conviction was vacated under California Penal Code § 1385, "in the interest of justice," an amorphous concept that encompasses a broad range of relief. *See People v. Superior Court (Romero)*, 13 Cal.4th 497, 53 Cal.Rptr.2d 789, 917 P.2d 628, 648 (1996). Given this ambiguity, we do not believe the Government has met its burden to show that Marmolejo's conviction was vacated for equitable or humanitarian reasons.[3]

This should be the case even if there is some question about the validity of the dismissal order.[4] The immigration courts are bound by the Full Faith and Credit doctrine to respect final state court orders that have not already been set aside on some basis.[5]

This is the majority circuit rule in those circuits ruling on question. The BIA, DHS, and Immigration Judges sometimes state the burden is on the respondent, in deportation proceedings, to establish that a conviction no longer exists because post-conviction relief has been obtained sufficient to eliminate its immigration consequences. The proper rule, however, is to the contrary wherever the government bears the general burden of proof. If the order vacating the conviction is ambiguous as to whether it was issued on a ground of legal invalidity, or issued as a matter of rehabilitative relief, the government cannot sustain its burden of proof in deportation proceedings.

The government also bears the burden of proof where it claims the immigrant is an arriving alien seeking admission. While the government bears the burden of establishing removability for a noncitizen who has been lawfully admitted to the United States,[6] a noncitizen seeking admission normally bears the burden to show s/he is admissible.[7] However, since a returning lawful permanent resident is not considered an applicant for admission *unless* he or she fits into one of the six exceptions,[8] the government bears the burden of showing whether the returning lawful permanent resident fits into one of those exceptions, and is therefore subject to the grounds of inadmissibility and forced to bear the burden of proof.[9] In a recent unpublished index decision, the BIA held that the government has the burden, in the case of a returning lawful permanent resident, of showing that s/he comes within one or more of six exceptions,[10] since that section creates a presumption that the government must overcome.[11]

The only exception is where the noncitizen has already been ordered deported, the removal order has become final, and the 90-day period for reopening the matter has elapsed: at that point, the burden is on the noncitizen to show that good cause exists to reopen the case.[12]

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3 *Marmolejo v. Gonzales*, 173 Fed.Appx. 573, 574-575 (9th Cir. March 10, 2006).

[4] *Rashtabadi v. INS*, 23 F.3d 1562 (9th Cir. 1994) (all presumptions normally operating in favor of the judgment operate *in favor of* the validity of a Judicial Recommendation Aagainst Deportation, and the burden is on the government to prove the criminal resentencing was granted solely to enable the court to issue a timely JRAD or else the JRAD would be held effective).

[5] See N. TOOBY & J. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 11.5 (2007).

[6] INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A).

[7] INA § 240(c)(2)(A), 8 U.S.C. § 1229a(c)(2)(A).

[8] See *In re Collado*, 21 I. & N. Dec. 1061, 1064 (BIA 1998).

[9] *Matter of Kane*, 15 I. & N. Dec. 258, 264 (BIA 1975) (citing *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953)); cf. *Toro-Romero v. Ashcroft*, 382 F.3d 930 (9th Cir. Aug. 30, 2004)(failing to decide burden of proof).

[10] INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C).

[11] *Matter of Luna*, A74 317 521, at 5 (BIA May 24, 2000) (index decision) http://www.usdoj.gov/eoir/vll/intdec/indexnet00/luna.pdf.

[12] *Rumierz v. Gonzales*, 456 F.3d 31 (1st Cir. August 3, 2006)(where noncitizen files a belated motion to vacate an order of removal, and placing the burden of showing a deportable conviction on the noncitizen accords with the usual BIA rules that the burden is on the noncitizen to show that

In deportation proceedings, the government must prove a noncitizen's deportability by clear, convincing and unequivocal evidence.[13]

Because the Ninth Circuit has become more conservative, a survey of the law of the other circuits on these issues may be useful inassessing the chances of prevailing here.

In *Cruz-Garza v. Ashcroft*,[14] the Tenth Circuit applied the rule of *Woodby v. INS*[15] to the question whether a conviction had been eliminated, by post-conviction relief, so it no longer triggered a ground of deportation. The court held that the government must establish by clear and convincing evidence that the conviction was still in existence for immigration purposes before a valid removal order could be premised on it.

This is because the immigration authorities have the burden of proof by "clear and convincing evidence" that petitioner's conviction fell within the aggravated-felony ground of deportation and thus supported removal.[16]

> The BIA never acknowledged this burden. On the contrary, as the quoted passage reflects, the BIA approached the case as if petitioner bore the burden of disproving that his conviction qualified him for removal. See also *id*. At 2 (finding petitioner "failed to establish that his conviction was vacated on the basis of a procedural or substantive defect in the underlying proceedings.").
>
> While formal error regarding the ascription of the burden of proof can, in itself, undermine the validity of a BIA decision, see *Sandoval*, 240 F.3d at 581; *Murphy v. INS*, 54 F.3d 605, 610, 612 (9th Cir. 1995), that is not the basis of our disposition here. Rather, as explained below, we conclude in more direct fashion that the evidence of record is legally insufficient to satisfy the INS's stringent burden of proof and, thus, that the order for removal must be reversed. See *Sandoval*, 240 F.3d at 583 (reversing removal order where record relating to reduction of alien's initially qualifying conviction to a non-qualifying offense was insufficient to support removal under clear and convincing evidentiary standard); see also *Cortez-Acosta v. INS*, 234 F.3d 476, 480-83 (9th Cir. 2000) (reversing removal order that had been based on suggestive but inconclusive indications of alien's removable activity (assisting illegal entry of another alien), "because the weakness of the administrative record does not satisfy the stringent [clear and convincing] evidentiary standard for deportation").[17]

The court indicated the record before it was susceptible to two inferences: (a) that the felony conviction had been reduced to a misdemeanor, on the basis of an error in the original proceedings, so that it would no longer constitute a felony for immigration purposes, or (b) that the conviction had been reduced solely on the basis of considerations that arose after the conviction first came into existence, such as rehabilition or to avoid immigration consequences, and would therefore still constitute a felony for immigration purposes.

The court concluded:

> Given the vagaries of the evidentiary record and, more importantly, the plain implication of the state statute authorizing reduction of petitioner's felony conviction to a Class B misdemeanor, we hold "that the INS did not prove by clear, unequivoval, and

there is a reason to reopen or to reconsider the case, the BIA was not compelled to find that the noncitizen had met the burden, and the remaining claims were barred by the exhaustion doctrine).

[13] 8 U.S.C. § 1229a(c)(3)(A); 8 C.F.R § 242.14(a) (1997); 8 C.F.R. § 1240.8 (as amended by 68 Fed. Reg. 9824, 9839 (Feb. 28, 2003); *Woodby v. INS*, 385 U.S. 276, 286, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966) (requiring "clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true"); *Hernandez-Robledo v. INS*, 777 F.2d 536, 539 (9th Cir. 1985); *Hernandez-Garza v. INS*, 882 F.2d 945 (5th Cir. 1989) (reversing deportation order where smuggling "for gain" had not been established by *Woodby v. INS*, 385 U.S. 276 (1966) standard).

[14] *Cruz-Garza v. Ashcroft*, 396 F.3d 1125 (10th Cir. Feb. 2, 2005)(Utah conviction of attempted theft by deception, a third-degree felony, with a suspended sentence and a term of probation, was not sufficiently proved to establish a ground of deportation, because the record of post-conviction proceedings did not establish with sufficient clarity and certainty that the conviction was still in existence).

[15] *Woodby v. INS*, 385 U.S. 276 (1966).

[16] 8 U.S.C. § 1227(a)(2)(A)(iii); 8 U.S.C. § 1229a(c)(3)(A); see *Evangelista v. Ashcroft*, 359 F.3d 145, 149-50 (2d Cir. 2004); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886 (9th Cir. 2003).

[17] *Cruz-Garza v. Ashcroft*, 396 F.3d 1125 (10th Cir. Feb. 2, 2005).

> convincing evidence that [petitioner] was convicted of [a qualifying felony under §§ 1101(A)(43) and 1227(a)(2)(A).]" *Sandoval*, 240 F.3d at 583. "Thus we are compelled to grant the petition for review, because the weakness of the administrative record does not satisfy the stringent evidentiary standard for deportation." *Cortez-Acosta*, 234 F.3d at 483.[18]

Therefore, the court reversed the BIA's decision and vacated the order for petitioner's removal.

The Eleventh Circuit had previously applied the same standard to rule that evidence of a conviction was insufficient to establish a firearms conviction ground of deportation.[19] The INS had relied exclusively on a single piece of evidence in support of its charge that Adefemi was deportable on the basis of a firearms conviction. This was a two-sided, preprinted document that would be colloquially termed a traffic "ticket." On the front appears a uniform citation form used to charge drivers with moving violations. On the reverse is boilerplate language for use in recording several types of action taken in the City Court of Atlanta, such as the receipt of a plea or the imposition of sentence, and the contents of the form itself were ambiguous as to the fact of conviction, the offense for which any conviction was entered, or any specific charge to which a guilty plea may have been entered. The Seventh Circuit, as well, had applied this standard to the question of proof of a conviction to justify deportation.[20]

In *Matter of Kaneda*,[21] the Attorney General stated:

> We have held that where a conviction is revoked and the charge dismissed by a trial judge that conviction cannot be used to sustain a finding of deportability. *Matter of G*, 7 I. & N. Dec. 171 (BIA 1956). We have also specifically held that when the Service claims that a trial judge lacked authority to dismiss a criminal charge after a conviction, such lack of jurisdiction must be affirmatively shown. *Matter of Sirhan*, 13 I. &N. Dec. 592 (BIA 1970); *Matter of O'Sullivan*, 10 I. &N. Dec. 320, 339 (BIA 1963). Here the Service has submitted no evidence that the trial judge lacked jurisdiction under Virginia law to rescind the respondent's conviction.

In the Seventh Circuit, as well, the government has the burden of proving that a conviction still exists after post-conviction relief has been granted. The court reasoned that in light of the ambiguous order and state court record, the burden to prove deportability remained on the government. Since the government failed to disprove the "most logical conclusion, which is that the Illinois judge must have vacated the original conviction and modified Sandoval's sentence accordingly," the respondent could not be deported.[22]

Because the consequences of deportation are so harsh, the government must bear the burden of showing deportability by clear, convincing and unequivocal evidence before removal will be ordered. Any ambiguity in whether an order vacating a conviction is sufficient to satisfy the *Pickering* or *Adamiak* standard

[18] *Cruz-Garza v. Ashcroft*, 396 F.3d 1125, 1132 (10th Cir. Feb. 2, 2005) (footnote omitted).

[19] *Adefemi v. Ashcroft*, 358 F.3d 828 (11th Cir. Jan. 29, 2004), vacating and withdrawing previous opinion, 335 F.3d 1269 (11th Cir. June 30, 2003) (BIA could not reasonably have concluded that government showed by clear and convincing evidence that noncitizen had been convicted of firearms offense, so as to be ineligible for 212(c) relief from deportation, where only evidence offered by government was traffic ticket that alleged unlawful possession of firearm, but contained many unfilled blanks, failed to specify basis for fine imposed, and did not explicitly indicate fact of conviction, offense of conviction, or charge to which alien might have pleaded guilty).

[20] *Dashto v. INS*, 59 F.3d 697, 701 (7th Cir. 1995) (certificate of conviction that noncitizen had used handgun was not satisfactory proof of weapons charge for purposes of finding him ineligible for discretionary relief, since it was nothing more than clerk of court's representation on what underlying court records reveal about nature of conviction, and there was no court record which confirmed that noncitizen had in fact used handgun in connection with armed robbery to which he pleaded guilty).

[21] *Matter of Kaneda*, 16 I. & N. Dec. 677, 679-680 (BIA 1979).

[22] *Sandoval v. INS*, 240 F.3d 577, 583 (7th Cir. 2001).

will be construed against the government, and result in an order terminating deportation proceedings.

The Third Circuit, in *Pinho v. Gonzales*,[23] held that a criminal conviction vacated for stated rehabilitative purposes or the stated purpose to avoid immigration consequences remains a conviction for immigration purposes, but convictions vacated because of underlying defects in the criminal proceedings are eliminated for immigration purposes:

> To determine the basis for a vacatur order, the agency must first look to the order itself. If the order explains the court's reasons for vacating the conviction, the agency's inquiry must end there. If the order does not give a clear statement of reasons, the agency may look to the record before the court when the order was entered. No other evidence of reasons may be considered.[24]

Under this standard, the inquiry stops at the face of the order vacating the conviction if it is sufficient to establish the conviction was vacated on a ground of legal invalidity.[25]

The Sixth Circuit recently reaffirmed the basic rule of *Pickering* concerning when an order vacating a conviction is effective to eliminate immigration consequences, and when it is not,[26] but reversed the BIA's judgment and remanded the case to the BIA for an order terminating deportation proceedings for failure to meet the burden of proof that a deportable conviction continued to exist. The Sixth Circuit applied the normal *Woodby* burden of proof on the government to the question of a conviction that may or may not effectively have been eliminated – for immigration purposes – by means of post-conviction relief.

> When the government seeks to deport a resident alien, it carries a heavy burden. *Berenyi v. District Director, Immigration and Naturalization Service,* 385 U.S. 630, 636 (1967). To support a determination that an immigrant is deportable, the government must establish its allegations by "clear, unequivocal, and convincing evidence." *Zaitona,* 9 F.3d at 434 (quoting *Woodby v. INS,* 385 U.S. 276, 285 (1966)). Once the INS has established its *prima facie* case, the burden of going forward to produce evidence of non-deportability then shifts to the petitioner. *Id.* (internal citations and quotation marks omitted). As an initial matter, the government has satisfied its *prima facie* case by pointing to evidence that the Petitioner was convicted of a drug crime. The Petitioner, for his part, has produced evidence that the conviction for which the government wishes to deport him has been vacated by a court of competent jurisdiction. This is sufficient to meet his burden under *Zaitona* of showing non-deportability. Accordingly, the Petitioner is deportable only if the government can show, with clear, convincing and unequivocal evidence, that the conviction was vacated solely for immigration reasons. *See id.; see also Cruz-Garza v. Ashcroft,* 396 F.3d 1125, 1130 (10th Cir.2005). To prove deportability in this case, the government must produce evidence of a conviction that remains valid for immigration purposes. In order to meet its burden, the government must prove, with clear, unequivocal and convincing evidence, that the Petitioner's conviction was quashed solely for rehabilitative reasons or reasons related to his immigration status, i.e., to avoid adverse immigration consequences. The government has failed to meet its burden. [27]

The Sixth Circuit pointed out the fundamental inconsistency of the BIA's reasoning in *Pickering*:

> In the instant case, because the Canadian court order made no reference to any legal authority, the BIA presumed that its decision was made solely for immigration purposes. J.A. at 38, 23 I &

[23] *Pinho v. Gonzales*, 432 F.3d 193 (3d Cir. December 20, 2005).

[24] *Pinho v. Gonzales*, 432 F.3d 193, 215 (3d Cir. December 20, 2005).

[25] *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) (according full faith and credit to a New York court's vacation of a conviction under a statute that was neither an expungement nor a rehabilitative statute).

[26] *Pickering v. Gonzales*, 454 F.3d 525, 527 (6th Cir. July 17, 2006), approving *Matter of Pickering*, 23 I. & N. Dec. 621, 624 (BIA 2003) on this point, while reversing the BIA's judgment and remanding to the BIA for an order terminating deportation proceedings for failure to meet the burden of proof that a deportable conviction continued to exist.

[27] *Pickering v. Gonzales*, 454 F.3d 525, 530 (6th Cir. July 17, 2006).

N Dec. at 625. While assuming that the Canadian court adopted the Petitioner's motive, the BIA has also assumed that it ignored the legal basis the Petitioner articulated for seeking to have his conviction quashed.

***4** In his notice of appeal to the Canadian court (J.A. at 58, ¶ 6), and in the affidavit in support of said appeal (J.A. at 61, ¶ 21), the Petitioner indicates that he is appealing his conviction pursuant to § 24(1) of the Canadian Charter of Rights and Freedoms. Section 24(1) provides that: "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied, may appeal to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just." Affidavit of Kent Roach, J.A. at 40, ¶ 7. The Petitioner presented expert testimony, via affidavit, which concluded that, in order to quash the Petitioner's conviction, the Canadian court "must have concluded that [his] rights under the Canadian Charter of Rights and Freedoms [had] been violated." *Id.* At 41, ¶ 8.

According to the expert testimony provided by the Petitioner, which was undisputed by the government, a Canadian court can quash a conviction under § 24(1) of the Charter only for reasons related to a violation of rights granted Canadian citizens in the Canadian Charter of Rights and Freedoms. *Id.* At 41, ¶ 10. If the Canadian court acted pursuant to the legal authority cited and relied upon by the Petitioner, it could not have acted solely for immigration reasons. In presuming that the Canadian court quashed the conviction for immigration reasons, the BIA concluded that the Canadian court assumed the Petitioner's motives as stated in his affidavit and notice of appeal, but did not consider the legal authority he cited. [28]

Because the record did not include a record of the hearing in the post-conviction proceedings before the Canadian criminal court, it was incomplete, and the Sixth Circuit found it impossible to tell the extent to which the Canadian court relied upon Petitioner's motive, or even why the Canadian court acted in the manner it did.

Finally, the Sixth Circuit refused to remand to allow the government to introduce additional proof that the conviction continued to exist.[29]

Therefore, the circuits speaking on the issue are unanimous in applying the *Woodby* standard to the question whether a purportedly vacated conviction continues to exist for immigration purposes, and any ambiguity or failure of the record in this respect means the government has failed to meet its burden of proof that a deportable conviction exists.

Upcoming Events

Save the Dates!

- **September 26, 2009**
  New York Crimes & Immigration Seminar
  - Dan Kesselbrenner
  - Manny Vargas
  - Norton Tooby
- **October 3, 2009**
  San Francisco Crimes & Immigration Seminar
  - Kathy Brady
  - Norton Tooby
- **October 10, 2009**
  Los Angeles Crimes & Immigration Seminar
  - Kathy Brady
  - Norton Tooby

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[28] *Pickering v. Gonzales*, 454 F.3d 525, 529-530 (6th Cir. July 17, 2006).

[29] *Pickering v. Gonzales*, 454 F.3d 525 (6th Cir. July 17, 2006)(where immigration court lacked sufficient record of documents on which criminal court based decision to vacate conviction, and government therefore failed to show by clear and convincing evidence that the criminal court had vacated the conviction solely to avoid immigration consequences, removal proceedings ordered terminated without remand for consideration of additional evidence).

Recent Developments:

SENTENCE – GROUNDS – PROBATION VIOLATION DEFENSE OF IMPOSSIBILITY BASED ON IMMIGRATION CUSTODY

People v. Cervantes, ___ Cal.Rptr.3d ___, 2009 WL 1801244 (2d Dist. June 25, 2009)("The trial court knows that defendant is an undocumented alien and agrees it will suspend a state prison term and grant him probation if he pleads guilty to a charged criminal offense. Defendant pleads guilty to the charged offense and receives a grant of probation. He is unable to appear for a 30-day review hearing because he is in the custody of immigration authorities. Under these circumstances, defendant is not in violation of probation.").

VEHICLES – NONSTATUTORY MOTION TO VACATE – EVEN AFTER PEOPLE V. KIM, A NONSTATUTORY MOTION IS APPROPRIATE WHERE THE JUDGMENT IS VOID -- CONVICTION OF SENTENCE ENHANCEMENT WITHOUT OFFENSE IS VOID AND CAN BE VACATED AT ANY TIME

People v. Vasilyn (May 28, 2009) ___ Cal.App.4th ___, 94 Cal.Rptr.3d 260 (a nonstatutory motion brought in 2007 to vacate the 1994 judgment of conviction of violating Penal Code § 422.7 is the proper procedural vehicle to raise the defect of a lack of subject matter jurisdiction on the ground that statute does not define a criminal offense, but is simply a sentence enhancement statute changing a conviction under another listed statute from a misdemeanor to a felony, so the trial court had no jurisdiction to convict the defendant of a non-existent offense, vacating the judgment of conviction and plea of nolo contendere, and remanding with directions to amend or dismiss the information), distinguishing *People v. Kim* (2009) 45 Cal.4th 1078.

The court stated:

> It is fundamental and it cannot be questioned that a judgment that is void for lack of subject matter jurisdiction is subject to collateral attack. "Moreover, lack of jurisdiction will render the judgment void, and subject not only to reversal on appeal but to collateral attack, motion to vacate, or extraordinary writ. (See 2 *Cal. Proc.* (4th), *Jurisdiction*, § 387; 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*,§ 6 et seq.; 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §§ 39, 50; 6 *Cal.Crim. Law* (3d), *Criminal Writs*, § 85.)" (4 Witkin & Epstein, Cal.Criminal Law, *supra*, Jurisdiction and Venue, § 1, p. 86.) Lack of jurisdiction in its most fundamental sense means an entire absence of power to hear or determine the case, i.e., an absence of authority over the subject matter or the parties. When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and such a judgment is vulnerable to direct or collateral attack at any time. (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660, 16 Cal.Rptr.3d 76, 93 P.3d 1020.) This is a venerable rule of long standing. (E.g., *Conlin v. Blanchard* (1933) 219 Cal. 632, 635-636, 28 P.2d 12; *Chipman v. Bowman* (1859) 14 Cal. 157, 158-159.)

(*Id.* at ___.)

The court continued:

We agree with the dissent that the petitions for writs of habeas corpus, *coram nobis* and *audita querela* are unavailable for the reasons stated by the dissenting opinion. Specifically, for the purposes of his petition for a writ of habeas corpus, appellant does not satisfy the requirement that he must be in custody or that he is otherwise deprived of his liberty. (*People v. Villa* (2009) 45 Cal.4th 1063, 1072, 90 Cal.Rptr.3d 344, 202 P.3d 427.) And, as noted in the dissent, the writ of error *coram nobis* is not available for the fundamental reason that this writ applies "where *a fact* unknown to the parties and the court existed at the time of judgment that, if known, would have prevented rendition of the judgment." (*People v. Kim* (2009) 45 Cal.4th 1078, 1093, 90 Cal.Rptr.3d 355, 202 P.3d 436.) The matter at hand is an error of law, which is not cognizable in a *coram nobis* proceeding. (*Ibid.*) We also agree with the dissent that ***268** it is questionable that *audita querela* is available in this case but we need not address this issue. Under the facts and circumstances of this case, a motion to vacate the judgment is the proper procedural vehicle to raise the defect of a lack of subject matter jurisdiction.

(*Id.* at 267-268.)

VEHICLES -- DISMISSAL UNDER PENAL CODE § 1385 – SUFFICIENT REASONS MUST BE ENTERED ON MINUTES

People v. Bonnetta (April 27, 2009) 46 Cal.4th 143, 92 Cal.Rptr.3d 370 (reversing trial court's order dismissing sentence enhancement in the furtherance of justice, under Penal Code § 1385, because of trial court's error in failing to set forth the reasons for dismissal in an order entered upon the minutes of the court, and remanding the case for the trial court to set forth its reasons in a written

order or to revisit its earlier decision).

VEHICLES – HABEAS – GROUNDS – NEWLY DISCOVERED EVIDENCE OF INNOCENCE

People v. Ebaniz, ___ Cal.App.4th ___, ___ Cal.Rptr.3d ___, 2009 WL 1532952 (5th Dist. June 3, 2009)(habeas corpus granted where defendant presented new, significant, and credible evidence of innocence that could not have been discovered with reasonable diligence prior to judgment and thus met burden required to obtain a new trial).

CAL POST CON – STATE REHABILITATIVE RELIEF – EXPUNGEMENT UNDER PENAL CODE § 1203.4 – DISCRETIONARY POWER TO DISMISS AFTER PROBATION VIOLATION

People v. McLernon, ___ Cal.App.4th ___, ___ Cal.Rptr.3d ___ (May 29, 2009)(reversing trial court's order denying defendant's motion to withdraw his guilty plea and dismiss his conviction despite fact that defendant violated probation).

> Under Penal Code section 1203.4 (section 1203.4), a defendant who has been convicted of a crime and granted probation is entitled to have his record expunged after the period of probation has terminated "if he comes within any one of three fact situations: (a) he has fulfilled the conditions of his probation for the entire period; (b) he has been discharged before the termination of the period of probation; or (c) in any case in which a court, in its discretion and the interests of justice, determines he should be granted relief. (*People v. Butler* (1980) 105 Cal.App.3d 585, 587, 164 Cal.Rptr. 475.) In this case, defendant Myrle Dennis McLernon moved under section 1203.4 to expunge his conviction for possession of a controlled substance for sale. Because he had violated his probation, his motion sought relief under the third situation and was supported by evidence of his conduct since his probation ended. The trial court "rejected" the motion because McLernon previously had submitted different petitions for relief that were denied for failure to successfully complete probation. McLernon appeals, arguing the trial court abused its discretion by denying relief in light of the evidence of post-probation conduct he presented. The Attorney General contends there was no abuse of discretion because, inter alia, when determining whether the interests of justice warrant relief under section 1203.4, the court may consider a defendant's conduct only during the period of probation. We hold that consideration of post-probation conduct is not precluded under the statute. Because it appears that the trial court did not consider the merits of McLernon's motion, we reverse the order and remand the matter to the trial court to determine whether, in the exercise of its discretion and the interests of justice, McLernon is entitled to relief under section 1203.4.

(*People v. McLernon*, ___ Cal.App.4th ___, ___, ___ Cal.Rptr.3d ___ (May 29, 2009).)

POST CON RELIEF – NONCITIZENS FACING CHARGES MAY NOT BE DEPORTED

8 C.F.R. § 215.3(g)(defines an alien facing criminal charges as an alien whose departure "would be prejudicial to the interests of the United States," and, therefore, one whose removal would be illegal in violation of INA § 215(a)). ICE general counsel, however, has announced ICE is refusing to be bound by this regulation. ICE's interpretation is at odds with the plain language of 8 CFR § 215.3(g) and the operative language of § 215.2. There is no mention of wartime or national emergency in the regulations. And as Ingrid Eagly of UCLA points out, the INS deleted the prior regulations, which did mention wartime and national emergency exceptions, and specifically removed those limitations on the scope of the departure control order. 45 FED. REG. 65515 (Oct. 3, 1980). See *United States v. Lozano-Miranda*, No. 09-CR-20005, 2009 WL 113407 at *3 & n.13 (D. Kan. Jan. 15, 2009) (rejecting prosecution's argument that defendant posed flight risk because of ICE detainer and noting that 8 C.F.R. § 215.3 prevents departure unless prosecution consents); *United States v. Garcia-Gallardo*, No. 09-CF-20005, 2009 WL 113412 at *2 & n.13 (D. Kan. Jan. 15, 2009) (same); *United States v. Perez*, No. 08-CR-20114, 2008 WL 4950992 at *2 (D. Kan. Nov. 18, 2008) (same). Thanks to Dan Kesselbrenner.

AUTHORITIES WILL CHECK IMMIGRATION STATUS OF ALL PERSONS BOOKED INTO JAIL IN LOS ANGELES, VENTURA, AND SAN DIEGO COUNTIES

Los Angeles, Ventura and San Diego will become the first counties in California to begin checking the immigration status of all inmates booked into jail as part of a national effort to identify and deport more illegal immigrants with criminal records. The complete article can be viewed at: http://www.latimes.com/news/local/la-me-immigjail14-2009may14,0,7781561.story

POST CONVICTION RELIEF – STATE REHABILITATIVE RELIEF – MULTIPLE SIMULTANEOUS CONVICTIONS OF QUALIFYING OFFENSES MAY BE ELIMINATED FOR IMMIGRATION PURPOSES UNDER FFOA
CAL POST CON – STATE REHABILITATIVE RELIEF – MULTIPLE SIMULTANEOUS CONVICTIONS OF QUALIFYING OFFENSES MAY BE ELIMINATED FOR IMMIGRATION PURPOSES UNDER FFOA
Matter of Nuno Diaz, A036 642 997 - Los Angeles, CA (BIA August 5, 2008)(unpublished)(multiple simultaneous convictions of California misdemeanor conviction for "presence in a room or place where designated controlled substances [are] smoked or used," in violation of Health & Safety Code § 11365(a), can be eliminated for immigration purposes, because there is no prior conviction to disqualify the person from FFOA treatment.

POST CONVICTION RELIEF – STATE REHABILITATIVE RELIEF – BEING IN A PLACE WHERE DRUGS ARE USED QUALIFIES FOR FFOA TREATMENT
CAL POST CON – STATE REHABILITATIVE RELIEF – BEING IN A PLACE WHERE DRUGS ARE USED QUALIFIES FOR FFOA TREATMENT
Matter of Nuno Diaz, A036 642 997 - Los Angeles, CA (BIA August 5, 2008)(unpublished)(California misdemeanor conviction for "presence in a room or place where designated controlled substances [are] smoked or used," in violation of Health & Safety Code § 11365(a), qualifies for FFOA treatment, because the Controlled Substances Act, 8 U.S.C. § 844, contains no offense analogous to Health & Safety Code § 11365(a), and the offense is more minor than possession offenses), following *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000).

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