

Law Offices of Norton Tooby

California Post-Conviction Relief For Immigrants

eNewsletter

September, 2009



This eNewsletter contains selected recent developments in criminal immigration law occurring during July, 2009. For a complete report, see the July Report 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: Eliminating Immigration Consequences of Convictions Through Expungements
- Penal Code § 1016.5(a)
- Recent Developments
- Upcoming Events
- New Publications

Article

ELIMINATING IMMIGRATION CONSEQUENCES OF CONVICTIONS THROUGH EXPUNGEMENTS

By Norton Tooby

Introduction: The Problem. In California, few procedural vehicles remain available by which to vacate a conviction on a ground of legal invalidity after probation or parole has been completed. Coram nobis can no longer be based on ineffective assistance of counsel or the client's lack of understanding of the immigration consequences of the plea. (*People v. Kim.*) The Supreme Court, in effect, also eliminated nonstatutory motions to vacate, by calling them the equivalent of coram nobis, which is barred. (*Ibid.*) The only viable motion that remains after probation or parole has ended is a statutory motion to vacate under Penal Code § 1016.5, and the courts almost always ensure that the defendant receives the required advice concerning possible immigration consequences, so the grounds for this motion are rarely present.

A New Solution. We recently suggested that dismissals of conviction under Penal Code § 1385(a), if based in part, on a ground of legal invalidity, may be effective to eliminate the immigration effects of a conviction. See N. Tooby, *Immigration Effects of Dismissals Under Penal Code § 1385*, July, 2009 California Post-Conviction Relief for Immigrants eNewsletter. The same reasoning may make it possible to eliminate the immigration consequences of a conviction by obtaining an expungement under Penal Code § 1203.4(a), if the expungement is based, even in part, on a ground of legal invalidity.

Upcoming Events

Save the Dates!

October 3, 2009

San Francisco Crimes & Immigration Seminar

October 10, 2009

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Presented by: Kathy Brady and Norton Tooby

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This would be a valuable new California post-conviction tool for protecting immigrants against immigration consequences of convictions, because there is no time limit for filing a petition for expungement under Penal Code § 1203.4(a), there is no due diligence requirement to move promptly to investigate and secure this relief, and there is no bar to successive petitions if a petition has been denied. Courts are also far more willing, in general, to grant expungements, since the

conviction remains in existence for certain criminal purposes even after an expungement has been granted. The trick is to include in the grounds for the expungement – in addition to the equitable arguments – a ground for legal invalidity, so that the expungement is based, at least in part, on that ground.

Tooby's Guide to Criminal Immigration Law

By Norton Tooby

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Effective Orders Vacating Convictions. To eliminate the federal immigration consequences of a conviction, counsel must vacate it on some ground of legal invalidity that was in existence when the conviction first arose. If the conviction is vacated *solely* as a matter of rehabilitation, or to avoid immigration consequences, or for some other reason arising *after* the conviction came into existence, the conviction remains on the books for federal immigration purposes, even if it has ceased to exist under California criminal law.

In deportation proceedings, and certain other federal immigration contexts, the government bears the burden of proof that the conviction exists. If an order vacating a conviction is ambiguous as to whether it was based on a ground of legal invalidity or solely to avoid immigration consequences, and the government cannot

prove it was granted solely for immigration purposes, then the government cannot obtain a deportation order on the basis of the conviction. Therefore, if a ground of legal invalidity is included in the grounds for the expungement petition, and the order granting the expungement is silent as to the basis on which the court is granting the expungement, the ambiguous expungement order will cast sufficient doubt on the continuing existence of the conviction to preclude the government from proving it still exists by clear and convincing evidence. Under these circumstances, the immigration court cannot issue a deportation order on the basis of the expungement conviction. There are a number of other immigration contexts, as well, in which the government bears the burden of proof, and an ambiguous expungement order would preclude the government from imposing those forms of immigration damage as well on the basis of the expunged conviction.

Requirements for Expungement. Penal Code § 1203.4 provides that the court may grant an expungement of both felony and misdemeanor convictions in the interests of justice when the applicant was placed on probation and can show that no new criminal charges are pending, the defendant is not on probation, and the defendant is not serving a sentence for any new charge that occurred since the charge for which expungement is sought.

Limitations on Expungements. Penal Code § 1203.4(b) entirely precludes expungements for the following offenses:

- (a) Infractions.
- (b) Certain listed Vehicle Code violations.
- (c) Certain listed sex offenses, including violations of Penal Code §§ 286(c), 288, 288a(c), 288.5, 289(j), 261.5(d).

A bar to an expungement, however, cannot be applied to convictions occurring before the date of the legislation imposing the bar, since to do so would violate the Ex Post Facto prohibitions of the United States and California Constitutions.¹

¹ *People v. Arata* (2007) 151 Cal.App.4th 778, 60 Cal.Rptr.3d 160 (denial of a motion to expunge a conviction under Penal Code § 1203.4(a) for committing a lewd or lascivious act upon a child is reversed as it violates due process to apply a provision, enacted after defendant's conviction, that makes Penal Code § 1203.4 relief unavailable to one convicted of a violation of Penal Code § 288 because he entered into a plea agreement in reliance on the relief available under section 1203.4).

Any other Vehicle Code offenses may be expunged in the interests of justice. Offenses described in Vehicle Code § 12810(a)-(e).² (Penal Code § 1203.4(c).) This covers most if not all Vehicle Code violations.³

The prosecution must be given 15 days notice of the petition for an expungement. (Penal Code § 1203.4(e).)

An expungement cannot be granted in the interests of justice under Penal Code § 1203.4(a) unless the defendant was placed on probation.⁴ Moreover, this

² Penal Code § 1203.4(c)(1)(January 1, 2008).

³ Penal Code §§ 191.5(b) [vehicular manslaughter while intoxicated]; 192(c) [vehicular manslaughter]; Vehicle Code §§ 2800.2 [attempting to evade a peace officer while driving recklessly]; 2800.3 [willful flight causing death or serious bodily injury]; 14601.1 [driving while privileges suspended pursuant to other offenses]; 14601.2 [driving while license suspended or revoked for DUI]; 14601.3 [habitual traffic offender]; 14601.4 [driving with suspended or revoked driver's license resulting in injury to another person]; 14601.5 [driving while privileges suspended for failure to take chemical test or for driving with specified blood alcohol level]; 20001 [hit and run driving with personal injury, etc.]; 20002 [hit and run driving with property damage only]; 21651(b) [driving on a highway other than to the right of an intermittent barrier or a dividing section which separates one or more opposing lanes of traffic]; 22348(b) [driving a vehicle upon a highway at a speed greater than 100 miles per hour]; 23103 [reckless driving]; 23103.5 [reckless driving with alcohol involved]; 23104 [reckless driving causing bodily injury]; 23105 [reckless driving causing *specified* bodily injury (unconsciousness; concussion; bone fracture; protracted loss or impairment of function or a bodily member or organ; a wound requiring extensive suturing; serious disfigurement; brain injury; paralysis)]; 23109(a) [motor vehicle speed contest]; 23109(c) [motor vehicle exhibition of speed]; 23109.1 [engaging in motor vehicle speed contest causing specified bodily injuries]; 23140(a) [driving with a BAC of 0.05 by a person under the age of 21]; 23140(b) [driving while UIA (0.05) by a person under the age of 21]; 14601 [driving while privileges suspended pursuant to certain offenses]; 23152 [driving a motor vehicle while under the influence of alcohol or drugs]; 23153 [driving a motor vehicle while under the influence of alcohol or drugs with personal injury]; 31602 [unlawful driving on a public highway for the purpose of transporting explosives].

⁴ A misdemeanor in which probation was not granted may be expungement under certain circumstances. Penal Code § 1203.4a(a). This relief, however, is not granted in the interests of justice, and therefore may not be granted on a ground of legal invalidity. Therefore, it is of no use to eliminate the immigration consequences of a conviction, except under the limited circumstances in which expungements of first-offense possession and other minor controlled substances are

type of expungement is precluded if a state prison sentence was imposed, even if execution was suspended.

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effective. See *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), and its progeny.

Recent Developments

These developments occurred in August and September, 2009.

CAL POST CON – GROUNDS – FAILURE TO INFORM DEFENDANT OF DIRECT CONSEQUENCES OF PLEA – UNCONSTITUTIONAL CONDITION OF PROBATION

Alhusainy v. Superior Ct. (People), ___ Cal.App.4th ___ (4th App. Dist. September 26, 2006)(trial court erred in denying order allowing defendant to withdraw his guilty plea on the basis that he was not told of its direct consequences, specifically that the condition he remove himself from the state was unconstitutional).

CAL POST CON – MOTION TO WITHDRAW PLEA – PENAL CODE 1018 MOTION MUST BE GRANTED SINCE CONVICTION WAS VOID – NO DISCRETION TO DENY MOTION

Alhusainy v. Superior Ct. (People), ___ Cal.App.4th ___ (4th App. Dist. September 26, 2006)(trial court had no discretion to deny motion to withdraw guilty plea where the plea was void).

CAL POST CON – PLEA – GROUNDS – DIRECT CONSEQUENCES – FAILURE TO WARN DEFENDANT OF UNCONSTITUTIONAL PROBATION CONDITIONS

People v. Quintero, ___ Cal.App.4th ___ (4th Dist. September 27, 2006)(imposition of probation after guilty plea to one felony count of possession of methamphetamine is vacated to the extent that one of the terms of probation, requiring defendant to keep the probation officer informed about pets, was invalid, but the vacation is without prejudice to modification of the terms of probation to include a term narrowly tailored to address the appropriate concern).

New Second Edition of Norton Tooby's CATEGORICAL ANALYSIS TOOL KIT

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- Many arguments for preserving it
- State of the art analysis
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- Save a great deal of time in research

Overview of the Tool Kit:

The new edition of this book has been completely rewritten since the First Edition in June and reflects the Supreme Court's new analysis in *Nijhawan v. Holder*, decided June 15, 2009. It contains a snap-shot of the current state of the law concerning categorical analysis, with many suggestions for arguments in favor of preserving it as well as taking advantage of the silver lining of some of the new rules. It also contains many cutting edge arguments that can be used to win cases, even under the new rules.

The categorical analysis has traditionally been used to examine whether a given conviction falls within a conviction-based ground of deportation or inadmissibility. The two critical limitations of the categorical analysis are (1) the limitation to the elements of the criminal offense, and (2) the limitation to the record of conviction in the criminal case. The reasons for using the categorical analysis of the elements of an offense, rather than an examination of the underlying facts, include avoidance of expensive relitigation of the facts of the criminal case, and uniformity of decision concerning removability.

The Supreme Court's decision in *Nijhawan* provides strong arguments to counter the BIA, Attorney General, and some circuit courts of appeal, which have recently been relaxing one or both of these requirements with respect to certain conviction-based grounds of removal.

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