THE LAW OFFICES OF
NORTON
TOOBY

Crimes & Immigration Newsletter

April, 2015

This Newsletter contains selected recent developments in criminal immigration law occurring during April, 2015. The full version , which includes *all* monthly updates, is available here.

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 (2007), with monthly updates online at NortonTooby.com.

INSIDE

Recent Case Decisions

RECENT DEVELOPMENTS

Articles

ARTICLE -- CAL POST CON – STATE REHABILITATIVE RELIEF – EXPUNGEMENTS THAT DO NOT COMPLETELY ERASE A CONVICTION FOR SOME PURPOSE DO NOT BLOCK LATER POST-CONVICTION RELIEF THAT DOES

If an Expungement Will Not Solve the Particular Immigration Problem, It is Still Possible to Pursue Other Post-Conviction Relief After an Expungement Has Been Obtained.

Because expunged convictions continue to exist for some purposes, it is still possible, even after an expungement under Penal Code § 1203.4(a) has been obtained, to attack the conviction through other post-conviction vehicles, such as a petition for a writ of coram nobis. (*People v. Wiedersperg* (1975) 44 Cal.App.3d 550, 118 Cal.Rptr. 755.) Even after expungement has been granted, the court still has jurisdiction to reduce an alternative felony misdemeanor to a misdemeanor under Penal Code § 17. (*Meyer v. Superior Court* (1966) 247 Cal.App.2d 133, 55 Cal.Rptr. 350.) The same should logically hold true for other forms of post-conviction relief, such as habeas corpus and the like.

In *Meyer v. Superior Court* (1966) 247 Cal.App.2d 133, a Penal Code § 17(b) motion

to reduce a conviction from a felony to a misdemeanor was granted after relief under Penal Code § 1203.4 had already been obtained. The defendant had been convicted of an alternative felony/misdemeanor ("a wobbler") as a felony in 1960, and his conviction had subsequently been expunged pursuant to Penal Code § 1203.4(a). He then tried to have his felony reduced to a misdemeanor pursuant to Penal Code § 17(b), which had been modified in 1963 to include the reduction language and probation language that Penal Code § 17(b)(3) contains today. The trial court refused, stating it had no jurisdiction because an expungement under Penal Code § 1203.4(a) had already been granted. The appellate court ruled that the statute, while arguably not retroactive, was merely restating the power that a judge in California already possessed, and that a conviction may be reduced even well after a granting of a Penal Code § 1203.4 expungement. Penal Code § 17(b) states that a felony may be reduced to a misdemeanor "at any time."

Neither the probation statutes nor the cases applying them support a holding that expiration of the probationary period terminates the court's jurisdiction of the subject matter. The statutes themselves contemplate that the court's fundamental jurisdiction continues, for they provide for the court's determination of certain matters after the end of the probationary term. (*In re Griffin* (1967) 67 Cal.2d 343, 62 Cal.Rptr. 1.)

Penal Code § 17 provides, "Where a court grants probation to a defendant without imposition of sentence upon conviction of a crime punishable in the discretion of the court by imprisonment in the state prison or imprisonment in the county jail, the court may at the time of granting probation, or, on application of defendant or probation officer thereafter, declare the offense to be a misdemeanor." The court's power and duty to pass on such an application for reduction of the offense to a misdemeanor continues after the end of the probationary term. (*In re Griffin* (1966) 67 Cal.2d 343, 347.)

The court is empowered to change a crime from a felony to a misdemeanor, and it may do so after the probationary period has expired, and after the probationer has had his record expunged under Penal Code § 1203.4. (Meyer v Superior Court (1966) 247 Cal.App.2d 133.)

'The expungement of the record under section 1203.4 is also a reward for good conduct and has never been treated as obliterating the fact that the defendant has been convicted of a felony. [Citation.]' '. . . The power of the court to reward a convicted defendant who satisfactorily completes his period of probation by setting aside the verdict and dismissing the action operates to mitigate his punishment by restoring certain rights and removing certain disabilities. But it cannot be assumed that the legislature intended that such action by the trial court under section 1203.4 should be considered as obliterating the fact that the defendant had been finally adjudged guilty of a crime. . . .' (*Meyer v. Superior Court* (1966) 247 Cal.App.2d 133, 139-140.)

Although a conviction has been expunged, a person should not be barred from later pursuing a more suitable remedy, particularly where the final decision as to whether he is worthy rests within the sound discretion of the superior court. (*Meyer v. Superior Court* (1966) 247 Cal.App.2d 133, 139-140.)

Similarly, the court of appeal held that the expungement of a conviction under Penal Code § 1210, after successful completion of Prop. 36 drug treatment, did not render her appeal from the judgment of conviction to be moot, holding she is "entitled to an opportunity

Publication Announcement

California Criminal Defense of Immigrants Newsletter (CEB 2014)
By Norton Tooby

We are happy to announce a new newsletter, the *California Criminal Defense of Immigrants E-Newsletter*. Continuing Education of the Bar is kind enough to publish this new online newsletter, beginning with the October 2014 issue. This newsletter will cover the relevant national immigration law that affects criminal defense of immigrants in California, as well as the California law on the subject. The case summaries and other developments will be cross-referenced to the relevant sections of the new CEB practice manual, *California Criminal Defense of Immigrants*, so the newsletter will serve as a cumulative indexed update from the research cutoff date for the printed volume of the current edition to the present on an ongoing basis. You may subscribe to this newsletter from Continuing Education of the Bar.

The Law Offices of Norton Tooby will continue to publish monthly online updates to the 3000-page, three-volume Criminal Defense of Immigrants, along with all of our other practice manuals, through our Premium Web Updates. These updates are keyed to our practice manuals, making it easy for you to check each month to see if a new development has occurred concerning the particular practice manual, and section number, that is relevant to your work, to ensure you are aware of the most recent legal authorities on each topic.

While this office is discontinuing its California Post-Conviction Relief for Immigrants newsletter, those interested may obtain the same content, and more, by subscribing to the new CEB newsletter, *California Criminal Defense of Immigrants E-Newsletter*. In addition to the California developments on post-conviction relief for immigrants, this new newsletter will cover other topics of great importance to immigrants, including safe havens that can be used as replacement convictions when a problematic conviction is vacated, and the actual immigration consequences of most of the most common California convictions, which can be very useful in establishing claims of ineffective assistance of counsel. Subscribers to our California post-conviction relief newsletter are urged to consider subscribing to the new CEB newsletter, *California Criminal Defense of Immigrants E-Newsletter*.

to clear her name and rid herself of the stigma of criminality." (*People v. Delong* (2002) 101 Cal.App.4th 482, 124 Cal.Rptr.2d 293.)
CPCR 10.52

Practice Advisories

RELIEF – DEFERRED ACTION – EXPUNGEMENTS
DHS has stated that individuals with expunged convictions did not categorically fall outside the enforcement priorities. Rather, ICE has internal guidance that instructs them to weigh the expungement in determining whether to exercise prosecutorial discretion. ICE officers have the ability to implement this guidance in such a way where an individual's expunged conviction would not make them an enforcement priority. This determination is made on a case-by-case basis. DHS stated that expungement essentially functions as a positive equity and community members who potentially fall within the enforcement priorities because of one or more convictions should obtain expungements.

Thanks to Jose Magaña-Salgado
CD4:24.25;AF:2.37;CMT3.36

BIA

INADMISSIBILITY – PROSTITUTION – SOLICITING A SINGLE ACT FOR ONESELF
Matter of Gonzalez, 24 I&N Dec. 549 (BIA 2008) (a single act of soliciting an act of prostitution on one's own behalf does not fall within INA § 212(a)(2)(D)(ii), 8 U.S.C. § 1182(a)(2)(D)(ii), where this case involved a disorderly conduct conviction relating to soliciting an act of prostitution).

Note: In California, prostitution is defined as sexual intercourse for a fee, while Penal Code § 273(b) covers asking for, offering, or providing lewd conduct for a fee. Lewd conduct is more broadly defined than intercourse, and the statute is not divisible. A conviction under this statute therefore does not trigger the prostitution ground of inadmissibility, under INA § 212(a)(2)(D)(ii), 8 U.S.C. § 1182(a)(2)(D)(ii), because the minimum conduct sufficient to constitute the offense does not necessarily match the generic definition of this ground of removal. In addition to arguing that the client's conviction was based on one-time conduct which did not amount to engaging in the practice of prostitution, the noncitizen can also argue that a conviction of this offense cannot trigger this ground. See Kepilino v. Gonzales, 454 F.3d 1057 (9th Cir. 2006).

Where the government has the burden of proof, e.g., re-entry of an LPR accused of making a new admission where he or she is inadmissible for prostitution, the Ninth Circuit held that where a conviction is the only evidence of the "conduct ground" prostitution, then the categorical approach applies: if the offense is not categorically prostitution, the conduct is not proved. Kepilino, supra. If the noncitizen must answer questions concerning what happened (whether he was the customer or the sex worker, whether it was intercourse or mere lewd conduct), this defense may not work.
Thanks to Katherine Brady.
CD4:18.24

JUDICIAL REVIEW – IMMIGRATION JUDGE HAS DISCRETION TO CONTINUE REMOVAL PROCEEDINGS TO ALLOW PENDING DIRECT APPEAL TO BE CONCLUDED
Matter of Montiel, 26 I&N Dec. 555 (BIA Apr. 17, 2015) (immigration judge has discretion to delay removal proceedings, where warranted, pending the adjudication of a direct appeal of a criminal conviction); following *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012).
Cal Crim Def 21.24, 20.28
CD4:15.37;AF:2.19;CMT3:3.18

THE LAW OFFICES OF
NORTON
TOOBY

Consultations

Since 1989, the Law Offices of Norton Tooby have offered expert advice and highly successful services to immigration attorneys, criminal attorneys, and clients. Our nationwide law practice assists foreign nationals in avoiding adverse immigration consequences of crimes anywhere in the country.

Immigration Lawyers
We investigate criminal histories nationwide, and analyze them to provide (a) cutting-edge immigration-court arguments why a given conviction does not trigger removal, and (b) post-conviction efforts to vacate criminal convictions to avoid immigration consequences.

Criminal Lawyers
We investigate criminal and immigration histories nationwide and offer strategies for obtaining (a) immigration-safe dispositions, and (b) post-conviction relief to eliminate immigration damage.

Individuals
We investigate your situation to (a) advise your criminal lawyer what plea will avoid deportation, (b) advise your immigration lawyer on new immigration-court arguments to avoid removal, and (c) erase convictions in criminal court to avoid immigration damage.

Testimonials:

"If you are an immigration lawyer with a defendant who has criminal issues, you only need to know two words: Norton Tooby." - Dan Kowalski

"Brilliant legal strategies."
-Ann Benson, Directing Attorney, Washington Defender Association's Immigration Project

For Mr. Tooby's biography click here.

Interested in our services? Contact our office at (510) 601-1300 or submit our Intake Form to begin the preliminary review process. Once we receive your Intake Form, we will contact you and let you know if we feel we can help. Consultations can be in person or by phone. Visit www.NortonTooby.com to download the Intake Form.

Note: There is no logical reason why the immigration court does not also have discretion to postpone removal proceedings when other requests for post-conviction relief are pending.
CRIMES OF MORAL TURPITUDE – DEADLY CONDUCT
Matter of Hernandez, 26 I&N Dec. 464 (BIA 2015) (Texas conviction of "deadly conduct," in violation of Texas Penal Code § 22.05(a), is categorically a crime involving moral turpitude).
CD4:20.7;CMT3:8.7, 9.15, CHART

First Circuit

AGGRAVATED FELONY – CRIME OF VIOLENCE – ASSAULT – INTENT
Villanueva v. Holder, 784 F.3d 51 (1st Cir. Apr. 24, 2015) (Connecticut conviction for assault in the third degree, under Conn. Gen.Stat. § 53a–61, did not constitute a crime of violence aggravated felony, under INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F), where the record of conviction did not indicate the subdivision under which the noncitizen was convicted, since two of the three sections involved only recklessness or negligence which are insufficient intent to constitute a crime of violence under 18 U.S.C. § 16).
CD4:19.40;AF:5.22, A.14, B.9;SH:7.49, 8.10

Second Circuit

JUDICIAL REVIEW – RETROACTIVE APPLICATION OF BIA DECISIONS
Lugo v. Holder, 783 F.3d 119 (2nd Cir. Apr. 9, 2015) ("Whether an agency decision may permissibly be applied retroactively is determined by looking at five factors: (1) whether the case is one of first impression, (2) whether the new rule presents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order places on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard. *N.L.R.B. v. Oakes Mach. Corp*., 897 F.2d 84, 90 (2d Cir. 1990); accord, e.g., *Velasquez–Garcia v. Holder*, 760 F.3d 571, 581 (7th Cir. 2014); *Miguel–Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007).")
CD4:15.37;AF:2.19;CMT3:3.18

Third Circuit

DETENTION – MANDATORY DETENTION
Chavez-Alvarez v. Warden York County Prison, ___ F.3d ___, ___, 2015 WL 1567019 (3d Cir. Apr. 9, 2015) (granting habeas corpus and ordering prompt immigration bond hearing: "we are convinced that, beginning sometime after the six-month timeframe considered by *Demore*, and certainly by the time Chavez–Alvarez had been detained for one year, the burdens to Chavez–Alvarez's liberties outweighed any justification for using presumptions to detain him without bond").
CD4:6.42;AF:2.11;CMT3:3.11

Fifth Circuit

RELIEF – CANCELLATION OF REMOVAL – CONTINUOUS RESIDENCE – STOP-TIME RULE
Calix v. Lynch, 784 F.3d 1000 (5th Cir. Apr. 28, 2015) (lawful permanent resident seeking cancellation of removal who committed an offense that would make him or her inadmissible if actually seeking admission, within seven years of lawful admission, is barred from applying for cancellation of removal under the stop-time rule, INA § 240A(d)(1)(B), 8 U.S.C. § 1229b(d)(1)(B)).
CD4:24.6;AF:2.6;CMT3:3.6

Ninth Circuit

POST CON RELIEF – FEDERAL – STATUTE OF LIMITATIONS – EQUITABLE TOLLING – INEFFECTIVE ASSISTANCE OF COUNSEL

Luna v. Kernan, ___ F.3d ___, 2015 WL 1903794 (9th Cir. Apr. 28, 2015) (counsel's professional misconduct was extraordinary circumstance that prevented petitioner from timely filing petition, as required for equitable tolling; case remanded to district court to address whether petitioner had diligently pursued his rights).

PCN:5.34

POST CON RELIEF – FEDERAL – MOTION FOR NEW TRIAL

United States v. Mazarella, __ F.3d __ (9th Cir. Apr. 20, 2015) (motion for new trial granted where: (1) the government withheld exculpatory evidence in violation of *Brady v. Maryland*; (2) defendant's right to be free of unreasonable searches under the Fourth Amendment were violated; and (3) the district court erred in its denial of defendant's request for an evidentiary hearing and for discovery).

PCN:5.14

CONVICTION – NATURE OF CONVICTION – MODIFIED CATEGORICAL ANALYSIS – RECORD OF CONVICTION – FACTUAL BASIS FOR PLEA

United States v. Sahagun-Gallegos, ___ F.3d ___, ___, 2015 WL 1591446 (9th Cir. Apr. 10, 2015) (grand jury transcript and defense counsel's statement of factual basis for the plea could not be considered to establish that plea was to aggravated felony portion of a divisible statute, since "both this court and the Supreme Court have held that the factual basis for a plea must be assented to by the defendant for a sentencing court to rely on it when conducting the modified categorical approach, see Shepard, 544 U.S. at 26, 125 S.Ct. 1254; Alvarado, 759 F.3d at 1132, and there is no indication in the plea hearing transcript that Sahagun–Gallegos assented to the factual basis provided by his attorney, much less to the police detective's grand jury testimony.").

CD4:16.24;AF:4.23;CMT3:7.11

Law Offices of Norton Tooby

Publication & Subscription Order Form

____ Ship

____ Pick Up

Name_____ Date _____/_____/_____ Type of Law Practiced_____

Firm_____ Phone (_____)_____

Email (Required if purchasing a subscription, online edition, or PDF)_____

Shipping Address_____

City/State/Zip_____

Payment method: ❑ **Check *(Payable to: Law Offices of Norton Tooby)*** ❑ **Visa** ❑ **MasterCard** ❑ **American Express**

Card # _____ Exp. ____/____Code:_____ Signature _____

Billing Address (if different from Shipping) _____

City/State/Zip_____

How did you hear about us? ☐ Exhibit ☐ Online ☐ Mailing ☐ Word of Mouth ☐ Email

Practice Manuals (updated online monthly, unless published by CEB)	**Print**	**Online**	**Both**	**Quantity**	**Total**
Aggravated Felonies (2006)	☐ $285	☐ $175	☐ $285		
California Criminal Defense of Immigrants (CEB, 2014)	☐ $195				
California Post-Conviction Relief for Immigrants (2009)	☐ $285	☐ $135	☐ $285		
Criminal Defense of Immigrants (Volumes I, II, III) (2012)	☐ $485	☐ $335	☐ $485		
Criminal Defense of Immigrants (Volume III) (2012 Update)	☐ $245				
Post-Conviction Relief for Immigrants (2004)	☐ $245	☐ $135	☐ $245		
Safe Havens: How to Identify & Construct Non-Deportable Convictions (2005)	☐ $285	☐ $175	☐ $285		
Tooby's Crimes of Moral Turpitude (2008)	☐ $245	☐ $135	☐ $245		
Other Publications	**Print**	**PDF**	**Both**		
Winning *Padilla* Claims (2012)	☐ $245	☐ $195	☐ $245		
Tooby's Categorical Analysis Tool Kit (2009)	☐ $245	☐ $135	☐ $245		
Tooby's Checklists on Criminal Immigration Law (2010)	☐ $245	☐ $135	☐ $245		
Tooby's Guide to Criminal Immigration Law (2008)	☐ $45	FREE	☐ $45		
Subscriptions	**Price**				
Premium Resources Membership	☐ $19.95/month				

	Subtotal	
	15% Premium Resources Deduction	
	TOTAL SALE	
	CA residents, add 8.75% sales tax	
	$10 shipping & handling per volume	
	GRAND TOTAL	

Publications may be returned in their original condition within 30 days of purchase for a full refund. Please include a copy of the invoice and a reason for the return. Shipping and handling fees are nonrefundable.

Please note that shipping rates shown are only valid for the continental United States.
For shipping outside the continental United States or to foreign countries, please call (510) 601-1300.

To Place Your Order, Please Visit www.NortonTooby.com

By Mail: Send this form to Law Office of Norton Tooby, 2831 Telegraph Ave., Oakland, CA 94609, Attn: Publications
Fax: (510) 595-6772 Email: pubs@nortontooby.com Questions? Call: (510) 601-1300

Revised: 8/2014