THE LAW OFFICES OF
NORTON TOOBY

Crimes & Immigration
Newsletter

December, 2016

This Newsletter contains selected recent developments in criminal immigration law occurring during December, 2016. 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.

Andrew J. Phillips, Esq.
Editor

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RECENT DEVELOPMENTS

Resources

INADMISSIBILTIY – FALSE CLAIMS TO US CITIZENSHIP

USCIS issued guidance to address false claims to U.S. citizenship under INA § 212(a)(6)(C)(ii).

https://www.uscis.gov/policymanual/Updates/20161214-FalseClaim.pdf

CD4:18.10

RELIEF – T-VISA

New Interim Regulations re: Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status

https://www.federalregister.gov/documents/2016/12/19/2016-29900/classification-for-victims-of-severe-forms-of-trafficking-in-persons-eligibility-for-t-nonimmigrant

CD4:24.16;AF:2.27;CMT3:3.26

NEW LEGISLATION FOR 2017

Summary of New Laws for 2017 – The most important new statutes, initiatives, and rules for California criminal and juvenile

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delinquency law
2016-12-28 14:03:49-05
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http://www.claraweb.us/archives/26151?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Claraweb-CpdaMembersWebsite+%28Claraweb+-+CPDA+Members+Website+News%29

CCDOI1.17

RESOURCES – POST-TRUMP IMMIGRATION RESOURCES

President-elect Trump's anti-immigrant rhetoric throughout the campaign has immigrant families worrying that they could be targeted, detained, or deported. In order to ensure immigrants are informed, prepared, and protected, the ILRC has released the following resources, and will continue to create and disseminate more like them.

Post-Election Talking Points and Resources
https://www.ilrc.org/daca-talking-points

Post-Election Resource for Schools
https://www.ilrc.org/post-election-resource-schools

Know Your Rights and What Immigrant Families Should Know
https://www.ilrc.org/know-your-rights-and-what-immigrant-families-should-do-now

Post-Election Q&A for Advocates and Attorneys Serving Immigrant Survivors of Gender-Based Violence

https://www.ilrc.org/post-election-qa-advocates-and-attorneys-serving-immigrant-survivors-gender-based-violence

Post-Election Community Information Sheet

https://www.ilrc.org/post-election-community-information-sheet

Family Preparedness Plan

https://www.ilrc.org/family-preparedness-plan

The ILRC continues to produce and disseminate Red Cards, sturdy plastic cards that provide critical information on how to assert these rights, along with an explanation to ICE agents that the individual is indeed asserting those rights. The demand for cards has increased significantly since the election, and we have responded by increasing our orders and fulfilment, as well as providing the design and information on executing these rights here:
https://www.ilrc.org/red-cards

We ask you to please share these resources widely with your partners and colleagues, so that we can help preserve the progress in immigrants' rights we have fought so hard for, and protect our neighbors during this challenging time.

Thanks to Angie Junck, Immigration Legal Resource Center

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CRIMES OF MORAL TURPITUDE – THEFT OFFENSES – RETROACTIVITY OF NEW THEFT DEFINITION – PRACTICE ADVISORY

In those states where theft was not a crime involving moral turpitude (CIMT) before 11/16/2016 because the statute lacked the intent to permanently deprive (IPD) the owner, but which became CIMTs after *Matter of Diaz-Lizarraga* 26 I&N Dec. 847 (BIA 2016) under the BIA's "updated jurisprudence," counsel should challenge the retroactivity of the new rule to pleas taken before 11/16/16 for the following reasons:

The BIA admitted it was changing a rule, not merely applying an old rule to a new situation. This new rule is not retroactively applicable to pleas taken before November 16, 2016, considering that reliance interests in taking a safe criminal plea are strong, the BIA has no special wisdom on retroactivity analysis, and they did not specifically hold the new rule was retroactive. This new rule "attach[es] new legal consequences to events completed before" its promulgation.

The Supreme Court stated:

The Court of Appeals, relying primarily on the analysis in our opinion in *Landgraf v. USI Film Product* [ ] held, contrary to the INS' arguments, that Congress' intentions concerning the application of the "Cancellation of Removal" procedure are ambiguous and that the statute imposes an impermissible retroactive effect on aliens who, in reliance on the possibility of § 212(c) relief, pleaded guilty to aggravated felonies. We agree.

INS v. St. Cyr, 533 U.S. 289, 315 (2001). Pleading to a conviction that does not makes you inadmissible or deportable "in deciding whether to forgo the[ ] right to a trial" would be relied on with at least as much certainty, as "almost certainly" relying on be able to seek INA § 212(c) relief if you *were* deportable. *Id.* at 325.

Among the considerations that enter into a resolution of the problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents 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 imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Montgomery Ward & Co. v. FTC, 691 F.2d 1322, 1333 (9th Cir.1982).

But precisely because it is an agency, we join the Ninth Circuit in rejecting "the government's position that the [Board], as the authoritative interpreter of an ambiguous statute, has issued an interpretation ... that is comparable to a judicial construction of a statute and is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." . . . Rather, as we would with any agency rule,

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California Criminal Defense of Immigrants Newsletter

(CEB 2016)
By Norton Tooby

Continuing Education of the Bar began publishing our *California Criminal Defense of Immigrants E-Newsletter*. This newsletter covers 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 are 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 for 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 continues 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 your particular issue, ensuring you are aware of the most recent legal authorities on each topic.

While this office no longer publishes the *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 newsletter covers 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 the most common California convictions, which are especially useful in establishing ineffective assistance of counsel grounds for relief.

we start from the premise that the Board "may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests." [ ] The only exception is retroactive application to the litigant whose case gave rise to the new rule: that person had an opportunity to present argument to the agency and ran the risk that the agency would use his case to announce a rule. For others, however, a new agency rule announced by adjudication is no different from a new agency rule announced by notice-and-comment rulemaking, for purposes of retroactivity analysis.

Velasquez-Garcia v. Holder, 760 F.3d 571, 580–81 (7th Cir. 2014), *reh'g denied* (9th Cir. Oct. 10, 2014).

For these reasons, the new definition of theft for CMT purposes cannot be retroactive. In states where the theft statute lacks the intent to permanently deprive, but now is a CIMT anyway, if there is proof that immigration agencies and lawyers advised immigrants using the old test requiring an intent permanently to deprive the owner of the property, before a theft offense would be considered moral turpitude, that should establish reliance. It should not be necessary to prove reliance in every individual case.

Thanks to Jonathan Moore.

CD4:20.5, 15.37;CMT3:8.3, 3.18;SH:7.121;AF:2.19

AGGRAVATED FELONY – CRIME OF VIOLENCE – MANSLAUGHTER – RECKLESSNESS – PRACTICE ADVISORY

With regard to manslaughter as an aggravated felony crime of violence, the BIA requires an offense must have a *mens rea* of more than recklessness to be crime of violence under 18 U.S.C. § 16(a). *Matter of Velasquez*, 25 I&N Dec. 278, 283 (2010). If the Supreme Court does not hold that 16(b) is void for vagueness this term, then the BIA has held that a reckless mental state can satisfy 16(b) under certain circumstances. *Matter of U. Singh*, 25 I&N Dec. 670 (BIA 2012). The Third and Fifth Circuits also take the position that recklessness may be enough for 16(b). *United States v. Sanchez-Espinal*, 762 F.3d 425, 431 (5th Cir. 2014); *Aguilar v. Att'y Gen*., 663 F.3d 692, 696 (3d Cir. 2011). The Ninth, Tenth, and Eleventh Circuits require more than recklessness. *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008); *Jimenez-Gonzalez*, 548 F.3d at 560; *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006).

Because of the Supreme Court's decision in *Voisine*, recklessness can satisfy 18 U.S.C. § 922(g)(9) everywhere. In *Voisine*, the Court interpreted the phrase "misdemeanor crime of domestic violence." You might see the DHS cite to *Voisine* as authority for the crime of domestic violence ground of deportability. Since the misdemeanor crime of domestic violence ground of deportability uses 18 U.SC. § 16 as its touchstone, *Voisine* doesn't apply because the Court expressly reserved that question. Until the Supreme Court reaches that issue, the case law governing 18 U.S.C. § 16, and not *Voisine*, should continue to control whether a conviction satisfies the

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misdemeanor crime of domestic violence ground of deportability.

Thanks to Dan Kesselbrenner

CD4:19.40;AF:5.22;SH:7.49

BIA

AGGRAVATED FELONIES – PERJURY OFFENSES

Matter of Alvarado, 26 I&N Dec. 895 (BIA 2016) (California conviction of perjury, under Penal Code § 118(a), is categorically an offense relating to perjury under INA § 101(a)(43)(S), 8 U.S.C. § 101(a)(43)(S), since it meets the aggravated felony definition of "perjury" requires that an offender make a material false statement knowingly or willfully while under oath or affirmation where an oath is authorized or required by law).

http://go.usa.gov/x9gcf

CD4:19.81;AF:5.64, A.32, B.49

REMOVAL PROCEEDINGS – NOTICE TO APPEAR – PROPER SERVICE – RIGHT TO CONTINUANCE

Matter of W-A-F-C-, 26 I&N Dec. 880 (BIA 2016) (where the Department of Homeland Security seeks to re-serve a respondent to effect proper service of a Notice to Appear that was defective under the regulatory requirements for serving minors under the age of 14, a continuance should be granted for that purpose); following *Matter of E-S-I-*, 26 I&N Dec. 136 (BIA 2013).

http://go.usa.gov/x8e4m

CD4:15.24

First Circuit

OVERVIEW – REMOVAL PROCEEDINGS – MOTION TO SUPPRESS

Corad-Arriaza v. Lynch, __ F.3d __ (1st Cir. Dec. 19, 2016) (petitioner did not present a prima facie case that ICE's arrest of him during an investigation into an unrelated person who worked at the same restaurant violated the Fourth Amendment).

CD4:15.24

Third Circuit

REMOVAL PROCEEDINGS – DUE PROCESS – RIGHT TO NOTICE OF THE BASIS FOR REMOVAL

Rodriguez v. Attorney General United States, 844 F.3d 392, 399 (3d Cir. Dec. 19, 2016) ("To remove Rivas on the basis of a deferred adjudication in 2015 would base his removal on an entirely different factual ground from that set forth in the Notice to Appear and would violate Rivas's due process rights to notice of the bases for his removal.").

CD4:15.24

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POST CON RELIEF – IMMIGRATION CONSEQUENCES OF ORDER VACATING CONVICTION

Rodriguez v. Attorney General United States, 844 F.3d 392, 397 (3d Cir. Dec. 19, 2016) ("If the order explains the court's reasons for vacating the conviction, the [IJ]'s inquiry must end there. . . . If the order does not give a clear statement of reasons, the [IJ] may look to the record before the court when the order was issued. No other evidence of reasons may be considered. Thus, the IJ may rely only on reasons explicitly stated in the record and may not impute an unexpressed motive for vacating a conviction. . . . Put simply, "[w]e will not ... permit[ ] ... speculation ... about the secret motives of state judges and prosecutors." *Pinho*, 432 F.3d at 214–15.")

The court stated:

Here, both the IJ and the BIA opined that the state court likely vacated Rivas's convictions to allow him to avoid the conviction's immigration consequences. To support this conclusion, the IJ relied on the facts that Rivas's trial counsel testified at the PCRA hearings that he did advise his client of the immigration consequences of a potential conviction, and that the state court denied Rivas's PCRA petition. However, these facts do not show that the state court vacated the convictions to allow Rivas to avoid their immigration consequences. Moreover, though trial counsel's testimony might have weakened Rivas's ineffective-assistance-of-counsel claim, the record fails to show that his counsel's alleged ineffectiveness was not the reason the convictions were vacated. We know only that the application to vacate was based on two ineffective-assistance-of-counsel claims stemming from the alleged failure of Rivas' counsel to advise him of the immigration consequences of his convictions and advice to forgo appealing his convictions, and that the convictions were in fact vacated. See *Pinho*, 432 F.3d at 211–13 (holding that where the record shows that the state did not answer a pending ineffective-assistance-of-counsel claim before agreeing to settlement, this supports the conclusion that the settlement was reached as a result of the constitutional claim). [Footnote omitted.] In addition, the IJ did not point to any evidence undermining the conclusion that the Commonwealth settled because of Rivas's pending ineffectiveness claim with respect to his trial counsel's failure to advise him to appeal the convictions. In fact, the IJ repeatedly asserted that the state court record was not clear as to the reasons why the prosecutor agreed to settle Rivas's claim and why the court vacated his convictions. Moreover, the BIA failed to confine itself to the factual record. Beyond adopting the IJ's findings, it also quoted the following passage wherein the state court addressed Rivas and discussed the vacatur of his convictions:

[B]ecause you know the consequences of what would have happened with the conviction that you had.... Everybody understands it, what would have happened over a possession conviction for PCP. You have been given an incredible opportunity here, and I think it's the right opportunity, and I think it's the right result, but you need to understand it is that opportunity. And if there [are] temptations, go the other way,

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criminal activity, drug use, anything, there's no margin for error. If you want to be here with your family and you want to move forward in your life and do things, then you need to understand that.

App. I 5 (alterations, other than the ellipses, in original). The BIA found that these statements showed that the court vacated Rivas's convictions to allow him to avoid the resultant immigration consequences. In reaching this finding, however, it speculated as to the unexpressed motives of the state court—an analysis which we barred in *Pinho*. 432 F.3d at 215. It is not plain in the above passage that the consequences of convictions to which the court refers are immigration consequences, as opposed to penal consequences flowing from a conviction. Moreover, even if the passage addresses the immigration consequences of the convictions, it does not indicate the reasons why the court vacated the convictions and does not show that the court vacated the convictions because of those consequences. Thus, like the IJ, the BIA erred in failing to restrict itself to the factual record and impermissibly speculated about the "secret motives of state judges and prosecutors." *Pinho*, 432 F.3d at 215.

In sum, Rivas met his burden to show that his convictions were vacated for purposes of the immigration laws, and the record does not show that Rivas's convictions were vacated to avoid their immigration consequences.

(*Id*. at 397-398.)

The court distinguished an adverse case as follows:

Contrary to the Government's argument, Rumierz v. Gonzales, 456 F.3d 31 (1st Cir. 2006), does not apply to Rivas's vacatur. There, because the petitioner's motion for post-conviction relief did not specify any substantive reasons to vacate his conviction, the court held that the petitioner could not show that his conviction was vacated on substantive grounds where it was vacated pursuant to an agreement and the record was otherwise silent as to the reason for the vacatur. *Id.* In contrast, Rivas's motion for post-conviction relief did specify substantive grounds upon which he challenged his convictions, and so *Rumierz* is inapplicable.

(*Id*. at 398, n.3.)

CD4:11.6;AF:6.4;CMT3:10.4;SH:4.28

Fourth Circuit

JUDICIAL REVIEW – *CHEVRON* DEFERENCE – DEFECTIVE ANALYSIS BY BIA

Larios-Reyes v. Lynch, 843 F.3d 146 (4th Cir. Dec. 6, 2016) (BIA decision that Maryland conviction for third-degree sex offense, under Maryland Criminal Law Article § 3-307, qualified as sexual abuse of a minor aggravated felony, under INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A), was not entitled even to *Skidmore* deference, because the BIA's analysis was defective in many ways).

The court stated:

Ultimately, we conclude that the BIA's decision on this question is not entitled to Skidmore deference. While we recognize that

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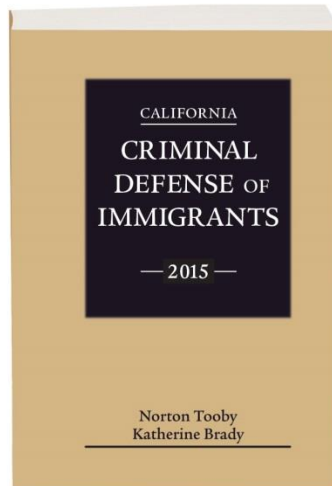
Publication Announcement

California Criminal Defense of Immigrants (CEB 2016)

By Norton Tooby & Katherine Brady



Details

We are happy to announce the publication of the new 600-page CEB book, California Crimes and Immigration, written by Norton Tooby and Katherine Brady.

This new practice manual was written specifically for California criminal defense attorneys, to assist them in representing foreign national defendants by (1) preventing the criminal disposition from triggering an immigration disaster, and (2) preventing the immigration status, and an immigration hold, from sabotaging all criminal dispositions that depend on the client actually emerging into freedom.

The heart of the book consists of nine chapters outlining "safe haven" pleas and sentences in general, and in specific areas such as Assault and Battery Offenses and Burglary Offenses. These chapters describe the specific immigration threats and their antidotes, making it easier for counsel to comply with the *Padilla* requirement of giving accurate immigration advice at plea, for a wide range of California offenses. In addition, safer alternate pleas are offered, that give equivalent convictions and sentences, but avoid damaging immigration consequences.

the agency has a wealth of immigration expertise, we find that the BIA was neither thorough in its analysis, valid in its reasoning, nor consistent with precedent in the BIA or the Fourth Circuit. See *Amos*, 790 F.3d at 521 (citing *Skidmore*, 323 U.S. at 140, 65 S.Ct. 161). Accordingly, we proceed to consider this question of law de novo, without deferring to the BIA's determinations in this case.

(*Id*. at 158.)

CD4:15.37;AF:2.19;CMT3:3.18

AGGRAVATED FELONY – SEXUAL ABUSE OF A MINOR – THIRD DEGREE SEX OFFENSE

Larios-Reyes v. Lynch, 843 F.3d 146 (4th Cir. Dec. 6, 2016) (Maryland conviction for third-degree sex offense, under Maryland Criminal Law Article § 3-307, did not qualify as sexual abuse of a minor aggravated felony, under INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A), because the statute does not necessarily require proof that the victim was a minor, and may be committed with intent to abuse, rather than for sexual gratification).

CD4:19.88;AF:5.71, A.38, B.73;SH:7.97, 8.77

AGGRAVATED FELONY – SEXUAL ABUSE OF A MINOR – DEFINITION

Larios-Reyes v. Lynch, 843 F.3d 146, 159 (4th Cir. Dec. 6, 2016) ("under the INA, "'sexual abuse of a minor' means the 'perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification.' "); quoting *United States v. Diaz–Ibarra*, 522 F.3d 343, 351-352 (4th Cir. 2008) (defining 'sexual abuse of a minor' for purposes of the sentencing guidelines, and adopting *Padilla-Reyes* definition); *United States v. Padilla–Reyes*, 247 F.3d 1158, 1163 (11th Cir. 2001) (defining 'sexual abuse of a minor' for purposes of the aggravated felony ground of removal).

CD4:19.87;AF:5.70;SH:7.96

Fifth Circuit

IMMIGRATION OFFENSES – ILLEGAL REENTRY – SENTENCE – PRIOR COURT FINDING OF AGGRAVATED FELONY PRECLUDED LATER CHALLENGE

United States v. Piedra-Morales, ___ F.3d ___, 2016 WL 7232128 (5th Cir. Dec. 13, 2016) (per curiam) (defendant could not challenge charge of illegal reentry after conviction of aggravated felony, even though it is now clear the conviction was not an aggravated felony, since his guilty plea in a prior illegal reentry case precluded him from now raising this issue); following *United States v. Gamboa–Garcia*, 620 F.3d 546, 548-549 (5th Cir. 2010) (defendant's guilty plea expressly eliminated the question whether his prior illegal reentry conviction constituted an aggravated felony, for purposes of imposing an eight-level sentence enhancement on an illegal reentry sentence, in accordance with USSG § 2L1.2(b)(1)(C), even though it arose after a conviction for accessory to murder, which was incorrectly characterized as an aggravated felony).

CD4:CHAPT13

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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.

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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.

Ninth Circuit

CAL POST CON – PROP 47 – REDUCTION OF FELONY TO MISDEMEANOR PREVENTS A PRIOR FELONY CONVICTION FROM CONSTITUTING A PRISON PRIOR IN A NEW CASE TO BE A FELONY IF IT IS DONE BEFORE THE PRIOR IS ADJUDICATED IN THE NEW CASE

People v. Kindall (CA3, 12-22-16, C078996) 2016 WL 7406425 (getting a prison prior reduced pursuant to Proposition 47 prior to adjudication of the prior on a new case prevents use of that former prison prior to enhance the sentence).

CCDOI20.64

CAL POST CON – PROP 47 – REDUCTION OF FELONY TO MISDEMEANOR PREVENTS A PRIOR FELONY CONVICTION FROM CONSTITUTING A PRISON PRIOR IN A NEW CASE TO BE A FELONY IF IT IS DONE BEFORE THE JUDGMENT IN THE NEW CASE BECOMES FINAL

People v. Evans (CA4/2, 12-15-16, E064243) 2016 WL 7241407 (getting the prison prior reduced from a felony to a misdemeanor before the judgment in the new case becomes final required the court to dismiss the prison prior).

CCDOI20.64

People v. Gonzales (CA3, 12-19-16, C078960) 2016 WL 7336716:

While people convicted of both §530.5 and forgery are ineligible to have the forgery reduced, §473(b), the convictions must be transactionally related for the exclusion to operate.

Blank checks "come within the amibit of section 473(b)."

People v. Franske (CA3, 12-19-16, C081591) 2016 WL 7338557:

Any entry with intent to commit a theft that meets the statutory definition qualifies for proposition 47. The CTA rejected the AG's argument that entry to commit a theft from an employee's wallet rendered the defendant ineligible.

The really odd part about <u>*Franske*</u> is how the CTA dealt with the §12022.1 (out-on-bail) enhancement. While the CTA upheld the court having resentencing the defendant as a misdemeanor, the CTA also upheld the trial court's imposition of the §12022.1 enhancement in the same case. Thus, if this decision stands, a court may resentence a person to a misdemeanor but reimpose enhancements that specifically call for a felony. A different district of the CTA, dealing with a similar issue, had held that a reduction of the primary offense to a misdemeanor entitles the defendant to resentencing on the secondary offense. *People v. Buycks* (CA2/8, 10-20-15, B262023) 241 CA4th 519, rev. granted, lead case 1-20-16, S231765.

People v. Elizalde (CA2/6, 12-19-16, B267479) 2016 WL 7336697

A court is not required to hear a Proposition 47 petition before ruling on an alleged PRCS violation.

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Granting a Proposition 47 petition automatically terminates PRCS and any terms imposed for violating PRCS. The trial court erred in keeping the defendant incarcerated on the PRCS violation after the court granted her petition.

The CTA never expressly held that the trial court is required to hear a Proposition 47 petition before *sentencing* a person on a PRCS violation, although that is arguably implied by the ruling. See also *People v. Amaya* (2015) 242 CA4th 972 [trial court erred by not ruling on defendant's oral Proposition 47 petition motion made prior to sentencing on VOP].

Where a controlled substance offense does not require registration when the offense is a misdemeanor, the post-conviction reduction pursuant to Proposition 47 relieves the defendant of the obligation to register as a drug offender.

CCDOI20.64

The most significant decision since the previous version is that the CTA has held: "Proposition 47 applies to Section 667.5(b) enhancements in judgments that have not yet become final." (*People v. Evans* (CA4/2, 12-15-16, E064243) 2016 WL 7241407.) A decision is "final," for purposes of retroactivity, when the matter is no longer pending before higher courts and the time for petitioning for a writ of certiorari to the United States Supreme Court has passed. (*People v. Nasalga* (1996) 12 Cal.4th 784, 790, fn. 5.) I still strongly recommend that trial attorneys do everything practical to get the cases used as prison priors reduced to misdemeanors prior to sentencing on any new offenses where those prison priors are being used as enhancements.

CCDOI20.64

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