

Nos. 16-71196, 21-631

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOSE ADALBERTO ARIAS JOVEL,
Petitioner,

v.

MERRICK GARLAND, Attorney General,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE BOARD OF IMMIGRATION APPEALS • AGENCY NO.
A092-142-072

**AMICI CURIAE BRIEF IN SUPPORT OF
PETITIONER**

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DISCLOSURE STATEMENT

None of the amici curiae is a corporation subject to Federal Rules of Appellate Procedure 26.1(a) or 29(a)(4)(A).

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STATEMENT OF INTEREST

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality enshrined in the U.S. Constitution.

The ACLU of Southern California, the ACLU of Northern California, and the ACLU of San Diego and Imperial Counties are the California affiliates of the ACLU. This case raises issues of significant concern to the ACLU and its California affiliates. For decades, the ACLU affiliates in California have advocated for the right of criminal defendants to be accurately advised of the immigration consequences of criminal convictions.

California Attorneys For Criminal Justice (“CACJ”) is the second largest organization of criminal defense lawyers in California. It is the largest statewide affiliate of the National Association of Criminal Defense Lawyers, a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. CACJ has more than 1,500 members, most of whom are lawyers practicing throughout California. CACJ’s members include public defenders and private

practitioners. Among CACJ's stated purposes is the defense of individuals' rights under the U.S. and California Constitutions.

The **California Public Defenders Association ("CPDA")** is the largest association of criminal defense attorneys and public defenders in California. CPDA has a membership of approximately 4,000 and is an important voice of the criminal defense bar.

The **Immigrant Legal Resource Center ("ILRC")** is a nonprofit legal organization whose mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. The ILRC seeks to improve immigration law and policy, expand the capacity of legal service providers, and advance immigrant rights. The ILRC provides support and legal representation to noncitizens in motions for post-conviction relief under California Penal Code section 1473.7. The ILRC has a strong interest in the guidance this Court would bring by issuing an opinion clarifying the interpretation of section 1473.7.

* * *

All of the amici presenting this brief cosponsored the bill that became California Penal Code section 1473.7, the statute at issue in this appeal.

STATEMENT OF COMPLIANCE WITH RULE 29(a)(4)(E)

All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person or entity except amici or their counsel contributed money to fund the preparation or submission of this brief.

INTRODUCTION

Jose Arias Jovel pleaded *nolo contendere* to possession of a controlled substance. He was not given accurate legal advice about the possible immigration consequences of his plea. Under longstanding California law, that lack of accurate advice rendered his conviction invalid—it should never have been entered in the first place. Consequently, a California court later vacated his unlawful conviction. Because he was not in custody when he moved to vacate his unlawful conviction, the vacatur motion was filed and granted under California Penal Code section 1473.7.

The federal government now seeks to deport Arias Jovel based on his plea by questioning the impact of the later vacatur. But as Arias Jovel's opening brief shows, vacated convictions for legal deficiencies should not support deportation, and the basis for vacatur here was a statute that was narrowly targeted to address legally deficient convictions for citizens and noncitizens alike. (AOB 14–41.)

This brief explores the relationship between state post-conviction relief under section 1473.7 and immigration proceedings in the federal courts. Amici cosponsored the legislation that became section 1473.7.

They are uniquely positioned to help this Court analyze the statute's purpose, legislative history, and enforcement in the larger context of post-conviction relief procedures in California.

Section 1473.7 is a procedural vehicle for individuals to vacate unlawful convictions after they leave state custody. Prior to section 1473.7's enactment, no such post-custodial mechanism existed. Under state law, an individual could pursue vacatur of an unlawful conviction while still in state custody, but many could not once their custody concluded. Section 1473.7 filled that procedural gap.

Section 1473.7 is not rehabilitative in nature, and it does not seek to help defendants avoid the immigration consequences of lawful convictions. It is simply a post-conviction tool to vacate unlawful convictions. Section 1473.7 happened to solve a procedural problem often faced by immigrants. The gap filled by section 1473.7 disproportionately impacted immigrants because they were more likely to be unaware that their convictions were invalid until long after they served their sentences. But that does not mean convictions are vacated under section 1473.7 for equitable, rehabilitation, or immigration hardship reasons.

ARGUMENT

- I. **California Penal Code section 1473.7 created a mechanism for defendants to vacate legally invalid convictions after their custody has ended, filling a critical procedural gap in California law that was particularly (but not exclusively) harmful to immigrants.**
 - A. **Before section 1473.7 was enacted, defendants with legally invalid convictions who were not in custody lacked a procedural avenue for post-conviction relief. The statute is a remedy to fill that void.**

Defendants who seek to challenge an unlawful conviction have different avenues for relief depending on the procedural postures of their cases. The most immediate method is, of course, a direct appeal. But an appeal cannot help every defendant due to its limited scope. Defendants in California must file a notice of appeal within sixty days of the judgment, Cal. R. Ct. 8.308, and an appeal is limited to reviewing issues preserved in the record. Defendants may also file a writ of habeas corpus to challenge the legal validity of their convictions, but they must do so while they are still in custody. Cal. Penal Code § 1473 (West Supp. 2021); see *People v. Villa*, 45 Cal.4th 1063, 1069–72 (2009) (holding that a defendant held in immigration custody as a collateral consequence of a criminal conviction is not in “custody” for habeas corpus purposes).

Other statutes provide post-conviction relief to some defendants but have a narrow reach. California Penal Code section 1018 permits vacatur within six months of the granting of probation. *People v. Perez* 233 Cal.App.4th 736, 741–42 (2015). California Penal Code section 1016.5 provides post-custodial relief in cases in which *the court* fails to advise the defendant of immigration and naturalization consequences before accepting a plea. *See People v. Patterson*, 2 Cal.5th 885, 895–96 (2017); Ingrid Eagly et al., *Restructuring Public Defense After Padilla*, 74 Stan. L. Rev. 1, 17 n.73 (2022).

While these procedural vehicles (appeal, habeas corpus, statutory vacatur in other contexts) provide post-conviction relief for many defendants with legally invalid convictions, they do not cover one significant category: defendants who have not discovered legal deficiencies in their convictions before their time to appeal expires, who are not in custody, who are not within six months of being granted probation, and whose challenge does not relate to the trial court’s failure to make a required advisement.

Until 2009, defendants in this position could seek redress by filing a common law writ of coram nobis. *See People v. Wiedersperg*, 44

Cal.App.3d 550, 552, 555 (1975); *People v. Shipman*, 62 Cal.2d 226, 229–30 (1965) (en banc); *People v. Thomas*, 52 Cal.2d 521, 527 n.2 (1959) (en banc). That year, the California Supreme Court eliminated this option and held that coram nobis was not applicable to post-custodial defendants. *People v. Kim*, 45 Cal.4th 1078, 1099–1101 (2009); *see, e.g., People v. Shokur*, 205 Cal.App.4th 1398, 1405–06 (2012) (denying a noncitizen’s nonstatutory motion to vacate filed after the defendant was no longer in custody and thus could not bring a writ of habeas corpus). The court held that coram nobis was not available to this class of defendants because those individuals had, but failed to invoke, an earlier remedy such as an appeal or writ of habeas corpus—“even though such failure accrued *without fault or negligence on his part.*” *Kim*, 45 Cal.4th at 1099 (emphasis added) (citation omitted). In short, after *Kim* was decided, unless a defendant became aware of a legal deficiency in his or her conviction almost immediately after it occurred, was still in custody at the time the legal error was discovered, or fit the narrow eligibility requirements of California Penal Code sections 1018 or 1016.5, he or she had no course of redress.

Recognizing the unfairness of this result, the California Supreme Court invited the legislature to “enact[] statutory remedies to fill the void.” *Kim*, 45 Cal.4th at 1106.

The Legislature responded to that invitation, aided by amici. Together, the Legislature drafted and amici cosponsored Assembly Bill 813, 2015–2016 Leg., Reg. Sess. (Cal. 2016) (“AB 813”), which is now codified as California Penal Code section 1473.7. Assemb. Comm. on Pub. Safety, Background Information Request, 2015–2016 Leg., Reg. Sess., at 1 (Cal. 2016). The text of the statute and the legislative history make clear that AB 813 was intended to provide a statutory remedy replacing the common-law writ of coram nobis and allowing relief from an unlawful conviction—nothing more. Assemb. Comm. on Pub. Safety, Background Information Request, 2015–2016 Leg., Reg. Sess., at 2–3 (summarizing the holding of *Kim* and noting that AB 813 “will fill a gap in California criminal procedure by providing a means for people to challenge their legally invalid convictions.”). Relief under section 1473.7 (as under prior writ practice) is confined to convictions that are *already* legally invalid under existing law; the statute did not create a basis for relief from lawful convictions. *See* Assemb. Comm. on Pub. Safety,

Background Information Request, 2015–2016 Leg., Reg. Sess., at 2 (Cal. 2016). It simply provided an avenue to vacate the invalid convictions of defendants no longer in custody following the California Supreme Court’s decision in *Kim*.

In enacting section 1473.7, California joined many other states in providing post-conviction relief from legally defective convictions for defendants not in custody. Assemb. Comm. on Pub. Safety, Background Information Request, 2015–2016 Leg., Reg. Sess., at 2 (Cal. 2016) (“California lags far behind the rest of the country in its failure to provide its residents with a means of challenging unlawful convictions after their criminal sentences have been served.”); *see, e.g.*, Colo. R. Crim. P. 32(d) (Colorado); Ind. R. of Post-Conviction Remedies 1 (Indiana); Ky. R. Civ. P. 60.02 (Kentucky); Mass. R. Crim. P. 30(b) (Massachusetts); Mich. Ct. R. 6.501–6.509 (Michigan); Minn. Stat. §§ 590.01–590.05 (2021) (Minnesota); N.Y. Crim. Proc. Law § 440.10 (McKinney Supp. 2022) (New York). The legislative history demonstrates that AB 813 was designed to bring California in line with the procedural protections offered by other states. Assemb. Comm. on

Pub. Safety, Background Information Request, 2015–2016 Leg., Reg. Sess., at 2 (Cal. 2016).

Section 1473.7 was not envisioned as furnishing a new means to provide relief from a valid conviction. Rather, its purpose was to provide an avenue to vacate a conviction that existing law already rendered invalid, even after a defendant has been released from custody.

B. Before section 1473.7 was enacted to fill the procedural gap, immigrants were often disproportionately affected by the lack of a post-custodial remedy.

While section 1473.7 is a vehicle available to many people with legally invalid convictions, it particularly benefits immigrants with claims that their convictions were defective because they were not given accurate information about the immigration consequences of their conviction. The procedural void that existed before its enactment, therefore, tended to disproportionately harm immigrant defendants.

For decades, California law has recognized the rights of the accused to receive accurate information about the immigration consequences of the charges they face. In 1987, a California appeals court held that a defendant could sustain a claim of ineffective assistance of counsel if counsel failed to advise the defendant of the

adverse immigration consequences of accepting a plea or failed to provide accurate advice. *People v. Soriano*, 194 Cal.App.3d 1470, 1482 (1987).¹ Since then, California courts have continued to reaffirm and elaborate on the right of the accused to accurate advice about immigration consequences before accepting a plea. See *People v. Barocio*, 216 Cal.App.3d 99 (1989) (affirming vacatur of sentence where defendant's counsel failed to be aware of a particular deportation procedure and to advise defendant of it, denying defendant his right to effective counsel); *In re Resendiz*, 25 Cal.4th 230, 235 (2001) (establishing that counsel's affirmative but incorrect advice about the immigration consequences of a defendant's plea could constitute ineffective assistance of counsel); *In re Bautista*, 115 Cal.App.4th 229 (2004) (same). And, in 2010, the U.S. Supreme Court held that the Sixth Amendment to the U.S. Constitution required defense counsel to

¹ For a decade prior to *Soriano*, beginning in 1977, a defendant had a clear entitlement to advice from the *trial court* about immigration consequences before it could accept a plea. 1977 Cal. Stat. 3495 (codified at Cal. Penal Code § 1016.5(a)). Defendants deprived of this right do not benefit from section 1473.7, however, because section 1016.5 provides its own mechanism for relief. Cal. Penal Code § 1016.5(b) (providing that if a court fails to advise the defendant, it “shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere”).

affirmatively and correctly advise on immigration consequences.

Padilla v. Kentucky, 559 U.S. 356, 360 (2010).

In sum, immigrant defendants’ substantive right to affirmative, accurate advice about their charges existed long before section 1473.7 was enacted in 2016. Section 1473.7 simply established a procedural vehicle those individuals can use to vindicate that existing right even after they are no longer in custody.

The procedural void created by *Kim* and solved by section 1473.7 was particularly harmful to immigrants, who were more likely to find themselves in the procedural no-man’s-land of discovering the invalidity of their conviction after leaving custody. Assemb. Comm. on Pub. Safety, Background Information Request, 2015–2016 Leg., Reg. Sess., at 2 (Cal. 2016) (“The omission has a particularly devastating impact on California’s immigrant community.”); *Criminal Procedure: Postconviction Relief: Hearing on Assemb. B. 2867 Before the S. Comm. on Pub. Safety*, 2017–2018 Reg. Sess. 4 (Cal. 2018). Indeed, an individual cannot discover that their defense counsel failed to advise them about immigration consequences until they themselves learn that their conviction carries immigration consequences—a fact that many

people will not have occasion to learn until after leaving state custody. Assemb. Comm. on Pub. Safety, Background Information Request, 2015–2016 Leg., Reg. Sess., at 2 (Cal. 2016) (“[T]he immigration penalty can remain ‘invisible’ until an encounter with the immigration system raises the issue.”). Thus, the other methods of challenging a conviction, such as appeals or writs of habeas corpus, are insufficient procedures for many immigrant defendants.

This lag time means that immigrants were hit especially hard by the gap in the law, and were particularly benefitted by the enactment of section 1473.7. But that does not mean the law is rehabilitative, or, as the Bureau of Immigration Appeals ruled in this case, that it was enacted “solely for immigration purposes.” Administrative R. 6 (quoting *In re Pickering*, 23 I. & N. Dec. 621, 625 (B.I.A. 2003), *rev’d sub nom. Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006)).² As explained,

² The standard articulated in *In re Pickering* was applied by the Bureau of Immigration Appeals in this case. In reciting that formulation here, amici do not mean to suggest that this is the proper standard for determining whether a state vacatur should eliminate related immigration enforcement. Amici merely intend to explain that, even if this Court were to adopt the standard as articulated in *In re Pickering*, vacatur under section 1473.7 is not “solely for immigration purposes” and instead goes to a “procedural or substantive defect in the underlying proceedings.” *In re Pickering*, 23 I. & N. Dec. at 624–25.

section 1473.7 provides procedural relief for people whose convictions *already* had a “procedural or substantive defect in the underlying proceedings.” *In re Pickering*, 23 I. & N. Dec. at 625.

Indeed, immigrants are not the only beneficiaries of this statute. Section 1473.7 also provides relief to defendants who can present newly discovered evidence of their actual innocence—another category of defendants that often cannot seek vacatur of their conviction until after they are released from custody. Cal. Penal Code § 1473.7(a)(2) (West Supp. 2021).³ Exonerating evidence, like information about adverse immigration consequences, often comes to light after many years. But the conviction is and always has been legally invalid because the defendant was factually innocent of the crime.

Thus, section 1473.7 provides a procedural mechanism to obtain relief that a defendant could have sought earlier, had he or she known the conviction was defective. Although immigrants may often find themselves in this situation because they usually do not discover the

³ In 2021, further amendments extended this procedural vehicle to provide post-custodial relief to individuals to raise claims that their “conviction or sentence was sought, obtained, or imposed on the basis of race, ethnicity, or national origin,” Cal. Penal Code § 1473.7(a)(3), which a separate statute renders legally invalid. Cal. Penal Code § 745.

legal invalidity of their conviction until after they leave state custody, the statute is not, and was never intended to be, a rehabilitative statute designed to avoid federal immigration consequences. The Bureau of Immigration Appeals erred when it ruled otherwise.

Contrasting section 1473.7 with statutes that *are* rehabilitative clarifies the distinction. For example, California Penal Code section 1203.4(a)(1) allows defendants who have fulfilled their probation terms to apply to be “released from all penalties and disabilities resulting from the offense,” which is mandatory for some violations and discretionary in others. Such relief from criminal consequences does not disturb the validity of the defendants’ underlying conviction; rather, it provides equitable relief when it is just to do so. On the other hand, a defendant who challenges his or her conviction based on a failure to understand its immigration consequences, or based on newly discovered evidence of actual innocence, seeks to overturn a conviction that was never legally valid.

II. Section 1473.7 was amended in 2018 to clarify the procedural requirements of motions for post-conviction relief under this statute. It did not change the core nature of the statute: a procedural vehicle for post-conviction relief.

Amici cosponsored an amendment to section 1473.7 in 2018.

Among other things, the amendment clarified that courts deciding post-conviction vacatur motions under section 1473.7 may, but need not, make a factual determination that defense counsel was legally ineffective under the high standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Rodriguez*, 68 Cal.App.5th 301, 310 (2021); *Criminal Procedure: Postconviction Relief: Hearing on Assemb. B. 2867*, *supra*, at 3–4. This amendment was prompted by confusion in the state trial courts when ruling on vacatur motions. The lower courts were unsure of the breadth of the claims they could consider—specifically, whether they were limited to claims of ineffective assistance of counsel, or could they also consider due process violations that may not have stemmed from defense counsel’s errors. *Criminal Procedure: Postconviction Relief: Hearing on Assemb. B. 2867*, *supra*, at 4 (the ACLU as sponsor of the bill explaining “[a]s these motions have been adjudicated [since the original statute was enacted],

courts have reached differing interpretations of the proper timing and grounds for the motions, and what notice must be provided to the petitioning individual’s prior defense counsel.”). As noted in the statute, such an ineffective assistance of counsel ruling requires the court to give the allegedly ineffective attorney advance notice of the motion and an opportunity to be heard, Cal. Penal Code § 1473(g). In adopting the amendment, the Legislature clarified that such notice was unnecessary to grant the defendant relief from the invalid conviction.

Instead, under the amendment, a court need only determine that there was an error impeding the defendant’s ability to “meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea.” *Criminal Procedure: Postconviction Relief: Hearing on Assemb. B. 2867, supra*, at 3. A court need not determine the *cause* of this lack of accurate advice that rendered the conviction legally invalid.

This clarification ensured post-conviction relief for legally invalid convictions where certain evidence of ineffective assistance of counsel is lacking or hard to come by. *People v. Camacho*, 32 Cal.App.5th 998, 1008–09 (2019). For example, a defendant may have been pressured to

waive counsel entirely, meaning no particular defense attorney failed to provide information about immigration consequences. Similarly, a defendant communicating with counsel through an interpreter may not meaningfully understand immigration advice due to faulty interpretation, rather than because his or her counsel's advice was ineffective. *See People v. Mejia*, 36 Cal.App.5th 859, 872–73 (2019).

This clarification aligns the relief available under section 1473.7(a)(2) for defendants who discover new evidence of actual innocence. Exonerating evidence, whenever it is discovered, undermines the legal validity of the original conviction, but it might not have anything to do with the effectiveness of defense counsel; evidence of actual innocence may have been unavailable or overlooked for a variety of reasons. *See People v. Hernandez*, No. F080886, 2021 WL 3010018, at *6 (Cal. Ct. App. July 16, 2021). Thus, the post-conviction relief mechanism enshrined in section 1473.7 logically need not be tied to an underlying finding of ineffective assistance of counsel, although it may be relevant in some cases. It is enough that a conviction is legally invalid.

In sum, the 2019 amendment clarified that a finding of ineffective assistance of counsel is not a prerequisite to vacatur. A conviction is “legally invalid due to prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence.” Cal. Penal Code § 1473.7(a)(1). This change did not disturb the core operation of the statute: it is, and always has been, a procedural vehicle for challenging convictions that were legally invalid and defective under existing law. *Criminal Procedure: Postconviction Relief: Hearing on Assemb. B. 2867, supra*, at 2–3 (explaining that the amendment “will help clarify the Legislature’s intent” when enacting the original statute, “and provide uniform interpretation of California Penal Code § 1473.7.”). The amendment did not, and was not intended to, transform the statute into a rehabilitative statute or one intended to relieve defendants with lawful convictions from the immigration consequences of those convictions.

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