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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

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**Bill No:** AB 1352                      **Hearing Date:** July 14, 2015  
**Author:** Eggman  
**Version:** May 19, 2015  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** JM

**Subject:** *Deferred Entry of Judgment: Withdrawal of Plea*

### HISTORY

**Source:** Drug Policy Alliance; Immigrant Legal Resource Center

**Prior Legislation:** SB 1369 (Kopp), Chapter 1132, Statutes of 1996

**Support:** American Civil Liberties Union of California (Co-Sponsor); Coalition for Humane Immigrant Rights of Los Angeles (Co-Sponsor); Mexican American Legal Defense and Education Fund (MALDEF) (Co-Sponsor); National Council of La Raza (Co-Sponsor); African Advocacy Network; Asian Americans Advancing Justice – Asian Law Caucus; Asian Americans Advancing Justice – L.A.; Asian Law Alliance; California Attorneys for Criminal Justice; California Immigrant Policy Center; California Partnership; California Public Defenders Association; California Rural Legal Assistance Foundation; Californians for Safety and Justice; Californians United for a Responsible Budget; Central American Resource Center – Los Angeles; Chinese for Affirmative Action; Community United Against Violence; Congregations Building Community; Del Sol Group; Dolores Street Community Services; Faith in Action Kern County; Friends Committee on Legislation of California; Harvey Milk LGBT Democratic Club; Human Rights Watch; Immigration Action Group; Institute for Justice; Lawyers' Committee for Civil Rights of the San Francisco Bay Area; Legal Services for Prisoners with Children; Los Angeles Regional Reentry Partnership; Justice Not Jails; MAAC; Mujeres Unidas y Activas; National Association of Social Workers – California Chapter; National Day Laborer Organizing Network; National Immigration Law Center; Pangea Legal Services; PICO California; Placer People of Faith; Presente.org; Progressive Christians Uniting; Red Mexicana de Lideres y Organizaciones Migrantes; Santa Clara County Public Defender's Office; Silicon Valley De-Bug; Solutions for Immigrants William C. Velasquez Institute; Vital Immigrant Defense Advocacy and Services (VIDAS); One private individual

**Opposition:** California District Attorneys Association; California State Board of Pharmacy; California State Sheriffs' Association

Assembly Floor Vote:

42 - 33

## PURPOSE

*The purpose of this bill is to allow any person who has successfully completed a deferred entry of judgment (DEJ) treatment program to obtain dismissal of the plea upon which DEJ was granted, on the basis that the guilty or no-contest plea underlying DEJ may result in a denial of employment benefit, license or certificate, or have adverse immigration consequences, in conflict with the statement in the governing statute that the plea shall not result in “denial of any employment, benefit, license, or certificate.”*

*Existing law:*

Provides that a defendant may qualify for DEJ of specified non-violent drug possession offenses if the following apply to the defendant:

- The defendant has no prior conviction for any offense involving controlled substances;
- The offense charged did not involve a crime of violence or threatened violence;
- There is no evidence of a violation relating to narcotics or restricted dangerous drugs other than a violation of the specified deferrable drug offenses;
- The defendant's record does not indicate that probation or parole has ever been revoked without thereafter being completed;
- The defendant's record does not indicate that he or she has successfully completed or been terminated from diversion or deferred entry of judgment pursuant to this chapter within five years prior to the alleged commission of the charged offense;
- The defendant has no prior felony conviction within five years prior to the alleged commission of the charged offense. (Pen. Code § 1000, subd. (a).)

States that a prosecutor has a duty to determine whether a defendant is eligible for DEJ. The prosecuting attorney shall file with the court a declaration in writing or state for the record the grounds upon which the determination is based, and shall make this information available to the defendant and his or her attorney. This procedure is intended to allow the court to set the hearing for DEJ at the arraignment. (Pen. Code § 1000, subd. (b).)

Requires that all DEJ referrals for DEJ shall be made only to programs that have been certified by the county drug program administrator, or to programs that provide services at no cost to the participant and have been deemed by the court and the county drug program administrator to be credible and effective. The defendant may request to be referred to a program in any county, as long as that program meets the criteria specified. (Pen. Code § 1000, subd. (c).)

Provides that the court shall hold a hearing and, after consideration of any information relevant to its decision, shall determine if the defendant consents to further proceedings and if the defendant should be granted DEJ. If the court does not find that the defendant would be benefit by deferred entry of judgment, or if the defendant does not consent to participate, the proceedings shall continue as in any other case. Deferred entry of judgment shall be granted for no less than 18 months, but no longer than three years. Progress reports shall be filed by the probation department as directed by the court. (Pen. Code § 1000.2.)

Requires, if the defendant has performed satisfactorily in the DEJ program, the criminal charge or charges shall be dismissed. If the defendant does not perform satisfactorily, the court shall find the defendant guilty pursuant to his or her plea, enter judgment and set a sentencing hearing. (Pen. Code § 1000.3.)

States that upon successful completion of DEJ, the arrest that led to the defendant's plea shall be deemed to have never occurred. The defendant may state that he or she was not arrested or granted deferred entry of judgment for the offense, except as specified for employment as a peace officer. A record pertaining to an arrest resulting in successful completion of a DEJ program shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate. (Pen. Code § 1000.4, subd. (a).)

Authorizes counties to establish and conduct a preguilty plea drug court program wherein criminal proceedings are suspended without a plea of guilty for designated defendants. The presiding judge, the district attorney and the public defender must agree to establish a preguilty plea diversion program. If the defendant is not performing satisfactorily in the program, the court may reinstate criminal proceedings. If the defendant has performed satisfactorily during the period of the preguilty plea program, at the end of that period, the criminal charge or charges shall be dismissed. (Pen. Code § 1000.5.)

Provides that where a defendant has fulfilled the terms of probation, or been discharged from probation, the defendant shall, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with any offense, be granted the following relief: The court shall dismiss the conviction or allow the defendant to withdraw his or her guilty plea. The court shall then dismiss the accusations against the defendant. Where the person has successfully completed probation, but he or she did not fulfill all terms of probation throughout the probationary term, the court may grant the relief in the interests of justice. (Pen. Code § 1203.4, subd. (a).)

Provides that a person who was convicted of a felony and served a felony jail sentence pursuant to Penal Code Section 1170, subdivision (h), may apply for dismissal of his her conviction or withdrawal of his or her plea in the underlying case, in the discretion of the court and in the interests of justice. (Pen. Code § 1203.41.)

Provides that the court may only dismiss the conviction of person who served a felony jail sentence after the lapse of one year following the petitioner's completion of the sentence, provided that the petitioner is not under post-release community supervision pursuant to realignment or is not serving a sentence for, on probation for, or charged with the commission of any offense. (Pen. Code § 1203.41.)

Specifies that a non-citizen may be deported if he or she has been convicted of a violation of any law or regulation of a state, the United States, or a foreign country relating to a controlled substance, as defined, other than a single offense involving possession for one's own use of 30 grams or less of marijuana. (8 U.S.C.S. § 1227, subd. (a)(2)(B)(i).)

Provides that a defendant's plea of guilty is valid only where it is knowingly and voluntary made. In order that a defendant's plea be knowing, the defendant must understand and explicitly waive his or her constitutional rights to a jury trial, confront witnesses and the 5<sup>th</sup> Amendment privilege against self-incrimination. The defendant may withdraw a plea that was not knowingly

and voluntarily made. (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3rd 122, 130.)

Provides that in accepting a plea of guilty or no-contest, the court must advise the defendant that if he or she is not a citizen, the plea may result in adverse immigration consequences. (Pen. Cod § 1016.5) Section 1016.5 does not refer to programs or statutes under which a defendant's arrest or conviction would be dismissed.

Provides that in order to provide effective assistance of counsel under the 6<sup>th</sup> Amendment, an attorney for a criminal defendant must advise a defendant of the consequences of a plea of guilty or no contest. Specifically, failure to advise a defendant of the possible adverse immigration consequences of a plea constitutes ineffective assistance of counsel that may be prejudicial. Prejudice in this context essentially means that in the absence of the incorrect advice, the defendant would not have entered the plea. (*Padilla v. Kentucky* (2010) 130 S.Ct.1473

*This bill:*

Provides that in any case in which a defendant was granted deferred entry of judgment (DEJ), on or after January 1, 1997, after pleading guilty or nolo contendere to the charged offense, the defendant shall be permitted by the court to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty if the defendant attests to and both of the following:

- The charges were dismissed after the defendant performed satisfactorily during the DEJ period; and,
- The plea may result in the denial or loss to the defendant of any employment, benefit, license, or certificate, including, but not limited to, causing a noncitizen defendant to potentially be found inadmissible, deportable, or subject to any other kind of adverse immigration consequence.

Directs the Judicial Council to develop a form for use by persons seeking the relief authorized by this bill to attest to the information required for such relief.

Requires a defendant seeking relief under this bill to submit documentation, as specified, of dismissal of charges pursuant to successful completion of DEJ, in addition to attesting to information required for relief.

Requires the court to dismiss the complaint or information against the defendant if the defendant shows that he or she performed satisfactorily under DEJ and that the plea underlying DEJ may result in a denial of employment benefit, license or certificate, or have adverse immigration consequences.

States the following legislative findings and declarations:

- The statement in Penal Code Section 1000.4, that "successful completion of a DEJ program shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate" constitutes misinformation about the actual consequences of the plea underlying DEJ.

- Specifically, in the case of some defendants, including all noncitizen defendants, the disposition of the case may cause adverse consequences, including adverse immigration consequences.
- Because of this misinformation and the potential harm of the plea, the defendant's prior plea is invalid.

#### RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity." (Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14)). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

## COMMENTS

### 1. Need for This Bill

According to the author:

AB 1352 provides a minor expungement procedure to prevent the needless disruption of thousands of California families. The expungement proposed by this bill does not retroactively change the effect of the person's DEJ disposition under California law. Instead, it will eliminate the disposition as a conviction for federal immigration purposes. It also will make right the injustice inadvertently committed against the immigrant defendants who relied upon PC 1000.4 in deciding to enter a guilty plea.

This bill will prevent terrible harm to California families and immigrant communities. The last several years have seen mass deportations from the U.S. Of deportations based on criminal conviction, the largest number has been for minor, non-trafficking drug offenses. This especially affects California, the nation's most immigrant-rich state, where one out of two children lives in a household headed by at least one foreign born person (and the great majority of the children are U.S. citizens). Deportation of a parent devastates a family emotionally and economically and can drain state resources as U.S. citizen children go into foster care, homes go into foreclosure, and remaining citizen family seek public benefits.

### 2. True Expungement of Conviction in Contrast with Dismissal Granted Under Penal Code Section 1203.4

To "expunge" is to erase or destroy. The expungement of a record is the removal of a conviction from a person's criminal record. (*United States v. Hayden* (9th Cir. 2001) 255 F.3d 768, 771.) In California, Penal Code section 1203.4 is the statute typically referred to as the expungement statute. Defendants who have successfully completed probation can petition the court to set aside a guilty verdict or permit withdrawal of the guilty or nolo contendere plea and dismiss the complaint, accusation, or information. (Pen. Code, §1203.4.) However, the relief under Penal Code section 1203.4 does not actually provide expungement of the defendant's records. The prior conviction may still be used in a "subsequent prosecution of the defendant for any other offense," and if plead and proven, "shall have the same effect as if probation had not been granted or the accusation or information dismissed." (Pen. Code, § 1203.4, subd. (a).) Instead, there will be an entry made on the record that states that the case was dismissed. The records still remain fully a public document.

A dismissal under section 1203.4 does not constitute "expungement" as defined in the Federal Sentencing Guidelines, and therefore may be considered as a prior conviction when calculating a defendant's criminal history. (*Hayden, supra*, 255 F3d at p. 774.) In *Hayden*, the court looked at the specific language contained in 1203.4 to find that because the statute expressly authorizes the dismissed case to be used as a prior conviction in a subsequent prosecution, it is clear that the prior conviction is not expunged or erased so it could be considered for federal immigration purposes. (*Id.* at p. 772.)

In order to constitute an actual expungement, the withdrawal of the plea and dismissal of the case must not be allowed to be used for any purpose. Because immigration is the purview of the federal government, state laws cannot mandate what the federal government can consider in immigration proceedings. However, the state can craft a statute that avoids or minimizes a person's exposure to adverse immigration consequences. One of the circumstances that may trigger deportation proceedings is a conviction related to controlled substances. (8 U.S.C.S. § 1227, subd. (a)(2)(B)(i).) This bill allows a person to withdraw a guilty or nolo contendere plea that exposed the person to adverse immigration consequences and requires the court thereafter to dismiss the case. The intended outcome is that the person would not have a "conviction" as interpreted under federal law to cause the person to be deported. However, the bill is silent as to whether, after the case is re-dismissed, the records are expunged or completely erased from a person's record. Therefore, it is unclear whether the dismissal created under this bill prevents the federal government from accessing those records for immigration purposes.

### **3. Deferred Entry of Judgment**

In a DEJ program, a defendant enters a guilty plea, but entry of judgment on the plea is deferred pending successful completion of a program. If the defendant successfully completes DEJ, the arrest shall be deemed to never have occurred. The Legislature intended the benefits and protections of a successful completion of DEJ be given the broadest possible application. (*B.W. v. Board of Med. Quality Assurance* (1985) 169 Cal.App. 3d 219.) A defendant who completes DEJ and has his or her case dismissed cannot have the offense used against him or her to deny any employment benefit, license or certificate unless the defendant consents to the release of his or her record. (Pen. Code § 1000.3.)

The most common form of DEJ allows non-violent drug offenders to participate in drug treatment programming and probation supervision rather than being subject to sentencing, imprisonment and other consequences of conviction. The purpose of dismissal upon successful completion of DEJ is to allow offenders to avoid the adverse consequences and stigma of a criminal conviction so that they can get or retain jobs and become or remain productive members of society. However, a dismissal after completion of a DEJ program for a drug offense may subject a non-citizen to immigration consequences such as deportation. (*Paredes-Urrestarazu v. U.S. INS* (9th Cir. 1994) 36 F3d. 801.)

This bill requires a court to allow a defendant to withdraw his or her guilty or nolo contendere plea upon a showing that charges were dismissed after successful completion of DEJ period, and that the plea may lead to a denial of a benefit, including adverse immigration consequences. A defendant's lack of knowledge of immigration consequences can constitute good cause to withdraw a guilty plea. (*People v. Superior Court (Giron)* (1974) 11 Cal. 3d 793.)

### **4. Withdrawal of a Plea from a Dismissed Case**

This bill grants a court limited jurisdiction to accept the withdrawal of a guilty or nolo contendere plea by a person whose underlying case was dismissed after successful completion of DEJ. To qualify for this relief, the defendant must show that the plea may result in the denial or loss of any employment, benefit, license, or certificate, including adverse immigration consequences such as deportation.

The limited jurisdiction of a court over a dismissed case was confirmed in the context of another drug-treatment law. In *People v. DeLong* (2002), 101 Cal. App. 4th 482, the defendant successfully completed drug treatment pursuant to a SACPA<sup>1</sup> program. Thereafter, her conviction was set aside and the court dismissed the complaint against her. The statute authorizing the dismissal states that "the conviction is deemed never to have occurred" and the defendant is "released from all penalties and disabilities" resulting from the conviction. (*Id.*, at p. 491; Pen. Code § 1210.1, subd. (e)(1).) DeLong subsequently appealed her conviction and the prosecution argued that the appeal was moot because the case had been dismissed. The court held that the appeal was not moot because the conviction continues to exist for certain purposes, and the defendant "continues to suffer disadvantageous and prejudicial collateral consequences therefrom. . ." (*Id.*, at pp. 491-492) Similarly, in cases dismissed pursuant to DEJ, the conviction continues to exist for certain purposes and may disadvantage the defendant, even though the defendant is advised that the completion of the program "shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate." (Pen. Code § 1000.4, subd. (a).)

## 5. Argument in Support

The American Civil Liberties Union argues in support:

AB 1352 will allow persons who have successfully completed deferred entry of judgment for minor drug offenses to expunge the guilty plea from their record. AB 1352 will eliminate the harsh and unintended federal consequences that flow from minor drug offenses, including deportation. This bill will keep California families together, support the law's rehabilitation goals, and promote equal justice.

Current California law provides for deferred entry of judgment (DEJ) for minor drug offenses. Under the program, a defendant is required to plead guilty, waive his or her right to a speedy trial, and complete a drug treatment program. If the defendant successfully completes the program, the charges against the defendant are dismissed. Participants are told that once the charges are dismissed, there will be no conviction for any purpose, the arrest will be deemed never to have occurred, and they will not be denied any legal benefit based on the disposition. Unfortunately, the dismissal of the charges following completion of deferred entry of judgment does not, in fact, protect defendants from certain federal consequences. This is because the guilty plea remains on their record and counts as a "conviction" for certain purposes under federal law. Even for U.S. citizens, these guilty pleas can carry long-term negative consequences, including loss of federal housing and educational benefits. For noncitizens, the consequences can be immediate and devastating, including deportation, mandatory detention, and permanent separation from families.

This is particularly devastating to families in California, which is the most immigrant-rich state in America. One out of every four persons living in the state is foreign-born. Half of California's children live in households headed by at least one foreign-born parent – and the majority of these children are U.S. citizens. It is estimated that 50,000 parents of California U.S. citizen children

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<sup>1</sup> The Substance Abuse and Crime Prevention Act of 2000 - Proposition 36.



were deported in a little over two years, leaving many children parentless. Deportation due to minor drug offenses destroys California families.

## 6. Argument in Opposition

The California District Attorneys Association argues in opposition:

We must object, on principle, to the idea of allowing people to withdraw pleas (some dating back nearly 20 years) that were obtained lawfully as a condition of their participation in a deferred entry of judgment program. California law, and the Sixth Amendment of the Constitution, provides many safeguards to ensure that defendants are made aware of the potential consequences before entering a guilty plea.

Beyond the constitutional right to effective defense counsel, who has an obligation to ensure that a defendant understands the terms and ramifications of a plea, Penal Code 1016.5 already requires the court to administer an advisement to the defendant about potential adverse immigration consequences prior to accepting a guilty plea.

Allowing defendants to petition the court for this form of relief, simply because those consequences ultimately occurred, would create tremendous workload issues within the criminal justice system in terms of calendaring and preparing for hearings. By making this remedy available to anyone who was granted deferred entry of judgment since 1997, tens of thousands of individuals will be eligible for a determination on whether they may withdraw their pleas – many of whom have suffered no adverse consequences at all.

For those whose pleas may trigger some immigration action, certainly any adverse consequences – immigration, employment, or otherwise – would have already been suffered in the intervening 18 years. Conversely, if those adverse consequences have not yet occurred, perhaps the problem that AB 1352 seeks to address is not as prevalent as initially thought.

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