
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 1351 **Hearing Date:** July 14, 2015
Author: Eggman
Version: June 1, 2015
Urgency: No **Fiscal:** Yes
Consultant: JM

Subject: *Deferred Entry of Judgment: Pretrial Diversion*

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: 47 - 30

PURPOSE

The purpose of this bill is to: 1) convert the existing system of deferred entry of judgment (DEJ) for qualified drug possession offenders - generally those with no prior convictions or non-drug current charges - to a true diversion system, under which eligible defendants are admitted to an education and treatment program prior to conviction and granted of a dismissal of the charges upon successful completion of the program; 2) allow persons previously convicted of a drug possession offense, or who have previously participated in a diversion or DEJ program, or those for whom parole or probation has been revoked may participate in a diversion program; and 3) set the length of the program from six months to one year, except that the court can extend that time for good cause.

Existing law:

Provides that the entry of judgment may be deferred for a defendant charged with specific controlled substance offenses if the defendant meets specific criteria, including that he or she has no prior convictions for any offense involving a controlled substance and no prior felony convictions within five years. (Pen. Code § 1000.)

Provides that upon successful completion of a deferred entry of judgment, the arrest upon which the judgment was deferred shall be deemed to never have occurred. The defendant may in response to any question in regard to his or her prior criminal record that he or she was not arrested or granted deferred entry of judgment, except as specified. (Pen. Code § 1000.4, subd. (a).)

States that a record pertaining to an arrest resulting in successful completion of a deferred entry of judgment 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).)

Requires that a defendant be advised that regardless of his or her successful completion of a deferred entry of judgment program, the arrest upon which the case was based, may be disclosed by the Department of Justice (DOJ) in response to any peace officer application request, and that the defendant is obligated to disclose the arrest in response to any direct question on the application. (Pen. Code § 1000.4, subd. (b).)

Provides that a superior court may administer a pre-plea drug diversion program if the court, the county district attorney and the public defender agree. (Pen. Code § 1000.5.)

This bill:

Changes the existing deferred entry of judgment (DEJ) program for specified offenses involving personal use or possession of controlled substances into a pretrial drug diversion program.

Requires, to be eligible for diversion, that the defendant must not have a prior conviction for a controlled substance offense other than the offenses that may be diverted; the offense charged must not have involved violence or threatened violence; there must be no evidence in the current incident that the defendant committed a drug offense other than an offense that may be diverted; and the defendant must not have any conviction for a serious or violent felony, as define, within five years of the current charges.

Provides that a defendant's participation in pretrial diversion shall not constitute a conviction or an admission of guilt in any action or proceeding.

Changes the minimum time allowed prior to dismissal of the case from 18 months to six months, and the maximum time the proceedings in the case can be suspended from three years to one year, except the court can extend the length of the program for good cause.

Provides that if the prosecuting attorney, the court, or the probation department believes that the defendant is performing unsatisfactorily in the program, or that he or she has been convicted of an offense that indicates the defendant is prone to violence, or the defendant is convicted of a felony, the prosecuting attorney, the court, or the probation department may move for termination of diversion.

Provides that if the court finds that the defendant is not performing satisfactorily in the assigned program, or the court finds that the defendant has been convicted of a specified type of crime, the court shall reinstate the criminal charge or charges and schedule the matter for further proceedings.

States if the defendant has completed pretrial diversion, at the end of that period, the criminal charge or charges shall be dismissed. Upon successful completion of a pretrial diversion program, the arrest upon which the defendant was diverted shall be deemed to have never occurred.

Retains provisions in the current DEJ law that are consistent with to pre-trial diversion.

States that a participant in a pretrial diversion program or a preguilty plea program shall be allowed, under the direction of a licensed practitioner, to use medications - including but not limited to methadone, buprenorphine and levoalphacetylmethadol (LAAM) - to treat substance use disorders if the participant allows release of his or her medical records to the court for the limited purpose of determining whether or not the participant is using such medications under the direction of a licensed practitioner and is in compliance with the pretrial diversion or preguilty plea program rules.

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:

This bill seeks to limit harsh consequences to immigrants by changing the current process for nonviolent, misdemeanor drug offenses from deferred entry of judgment (DEJ) to pretrial diversion. While the current DEJ process eliminates a conviction if a defendant successfully completes DEJ, the defendant may still face federal consequences, including deportation if the defendant is undocumented, or the prohibition from becoming a U.S. citizen if the defendant is a legal permanent resident. This is systemic injustice to immigrants in this country, but even U.S. citizens may face federal consequences, including loss of federal housing and educational benefits.

Given that President Obama has publicly called for immigration officials to focus on violent, dangerous felons, this bill will have a profoundly positive impact on more than \$2 million undocumented immigrants and the more than 3 million legal permanent residents living in California by eliminating the draconian consequences faced by immigrants who participate in diversion programs in good faith. This bill will keep families together, help people retain eligibility for U.S. citizenship, and also preserve access to other benefits for those who qualify.

2. DEJ as Compared to Diversion

Under existing law, a defendant charged with violations of certain specified drug may be eligible to participate in a DEJ program if he or she meets specified criteria. (Pen. Code §§ 1000 et seq.) With DEJ, a defendant must enter a guilty plea and entry of judgment on the defendant's guilty plea is deferred pending successful completion of a program or other conditions. If a defendant placed in a DEJ program fails to complete the program or comply with conditions imposed, the court may resume criminal proceedings and the defendant, having already pleaded guilty, would be sentenced. If the defendant successfully completes DEJ, the arrest shall be deemed to never have occurred and the defendant may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or granted pretrial diversion for the offense.

Diversion on the other hand suspends the criminal proceedings without requiring the defendant to enter a plea. Diversion also requires the defendant to successfully complete a program and other conditions imposed by the court. Unlike DEJ however, if a defendant does not successfully complete the diversion program, criminal proceedings resume but the defendant, having not entered a plea, may still proceed to trial or enter a plea. If diversion is successfully completed, the criminal charges are dismissed and the defendant may, with certain exceptions, legally answer that he or she has never been arrested or charged for the diverted offense.

In order to avoid adverse immigration consequences, diversion of an offense is preferable to DEJ because the defendant is not required to plead guilty in order to participate in the program. Having a conviction for possession of controlled substances, even if dismissed, could trigger deportation proceedings or prevent a person from becoming a U.S. citizen. (*Paredes-Urrestarazu v. U.S. INS* (9th Cir. 1994) 36 F3d. 801.) This bill seeks to minimize the potential exposure to adverse immigration consequences for persons who commit minor drug possession offenses by re-establishing a pretrial diversion program for minor drug possession.

Prior to 1997, the program pursuant to Penal Code § 1000 et seq. was a pretrial diversion program. SB 1369 (Kopp), Chapter 1132, Statutes of 1996, changed the diversion program to a DEJ program. Proponents of SB 1369 and its DEJ provisions argued that DEJ would provide more effective drug treatment than diversion courts. While many involved in DEJ and drug court programs believe in the effectiveness of the programs, research has not established the superiority of DEJ or drug court programs over other forms of drug treatment. SB 1369 did include a provision allowing any county to elect to operate a drug possession diversion program, with the approval of the presiding judge, the district attorney and the public defender. It is unknown whether studies have been done comparing the effectiveness of DEJ and true diversion, including long-term outcomes.

3. Drug Treatment in the Courts

Recent research has considered the effectiveness of varying forms of court-based drug treatment with other forms or sources of treatment demand.¹ UCLA studies of the effectiveness of SACPA – Proposition 36 of 2000 were released in 2003 and 2006.² SACPA requires drug treatment without incarceration for non-violent drug possession. UCLA found that the SACPA model was

¹ Much of the basis for this comment is a report or monograph written by Senate Fellow, Bethany Renfree at the request of Senator Jackson.

² http://www.uclaisap.org/prop36/documents/sacpa_costanalysis.pdf

as effective as drug court or voluntary treatment models and produced \$2.50 in savings from every dollar spent. Improvements in funding allocations and programs would have produced better results.

State funding for SACPA ended in 2006. Individual counties must bear the costs of the program. The California Society of Addiction Medicine has more recently found that SACPA produced positive results, including for participants who did not complete the full program.

An extensive 2007 study of 474 drug offenders in drug court in Maricopa County Arizona (the Phoenix area) compared the outcomes in drug court treatment for persons who were subject to jail sanctions against those who were not subject to sanctions. The study found that the threat of jail sanctions did not affect the participant's rate of retention in or completion of the program.

There has been some published research concluding that specific drug court models may be effective in reducing drug abuse, at least in the short term. The model is the HOPE program in Hawaii, in which the court engages in very close, direct and constant monitoring of participants in the program. Participants are drug tested frequently and must follow program conditions or be subject to immediate, short-term incarceration.

4. Deferred Entry of Judgment or Pre-Plea Diversion and the Substance Abuse and Crime Prevention Act of 2000 (SACPA – Proposition 36 of the 2000 General Election

Deferred entry of judgment and true pre-plea diversion (DEJ) are distinct programs from the Substance Abuse and Crime Prevention Act – SACPA (“Prop 36”) – program. After enactment of SACPA in 2000, the California Attorney General opined that SACPA did not repeal DEJ by implication. (84 Ops. Cal. Atty. Gen. 85 – 2001.) Deferred entry of judgment – as the name of the program denotes – applies prior to imposition of judgment and sentence. SACPA is a probation program under which a person convicted of a non-violent drug possession offense must be offered treatment, without incarceration, on probation. Further, the offenses covered by the two programs, while overlapping to a great extent, are not the same. The offenses covered under SACPA are broader than those included under DEJ.

The procedures for the programs are also different. The prosecutor determines if the defendant meets the eligibility requirements for DEJ. The trial court cannot overturn the prosecutor's determination of ineligibility. If the defendant disagrees with the prosecutor's determination, his or her only remedy is by appeal to the Court of Appeal. In contrast, the trial court determines whether a convicted defendant is eligible for probation under SACPA. A defendant must plead guilty before being placed in a DEJ program. A person who is convicted at trial of non-violent drug possession is eligible for SACPA, unless a disqualifying factor, such as possession of a weapon at the time of the offense. A defendant who fails in a DEJ program is subject to imposition of judgment and sentencing. However, if the defendant's conviction is for a non-violent drug possession offense, he or she shall be offered treatment on probation under SACPA. (*In re Scoggins* (2001) 94 Cal.App.4th 650, 652-658.) As the covered offenses and eligibility requirements are broader under SACPA than DEJ, it is most likely that a person who fails in DEJ would be eligible for SACPA.

5. Argument in Support

The Immigrant Legal Resource Center (ILRC) argues:

According to data published by Syracuse University, over 250,000 people have been deported from the U.S. for nonviolent drug offenses since 2008. A nonviolent drug offense was the cause of deportation for more than one in every ten people deported in 2013 for any reason.

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

AB 1351 will amend Penal Code 1000 et seq. to allow courts to order pre-trial diversion, rather than require a guilty plea. This was the way that PC 1000 worked until 1997. Because there will be no guilty plea, there will be no 'conviction' for federal immigration purposes. For any person who fails to adhere to conditions of a pre-trial diversion program, the court could reinstate the charges and schedule proceedings pursuant to existing law. Diversion will not be allowed for any person charged with drug sale, or possession for sale, nor will be allowed for persons who involve minors in drug sales or provide drugs to minors.

6. Argument in Opposition

According to the California District Attorneys Association:

AB 1351 would turn [the current] process on its head, allowing the defendant to enter a treatment program before entering a plea. If the program was not completed successfully, only then would criminal proceedings actually begin. From a practical standpoint, this creates tremendous problems for prosecutors, as it becomes much more difficult to locate witnesses and maintain evidence many months after the offense has occurred.

Additionally, AB 1351 would reduce the length of drug treatment programs down to one-third of what they currently are. Right now, someone participates in drug diversion for 18 months to 36 months. This bill would only allow 6 to 12 months of treatment. Much of the success of drug diversion is based on this long-term treatment. Reducing the required length of treatment might lead to more people completing their programs, but it also reduces the likelihood that those programs will actually have positive long-term outcomes for drug offenders. It's unclear how reducing the amount of drug treatment that someone receives would have any positive impact on their immigration consequences.

Further, AB 1351 removes many of the pre-requisites for participation in drug diversion. Currently, a defendant must not have any prior drug convictions in order to be eligible for drug diversion. Under AB 1351, as long as the prior

offenses were all diversion-eligible offenses, there is no limit to the number of drug offenses someone could accumulate while maintaining drug diversion eligibility. This bill also eliminates the requirement that a defendant have no felony convictions in the previous five years, instead only requiring that a defendant not have any prior serious or violent felonies.

7. Related Legislation

AB 1352 (Eggman) requires a court to allow a defendant to withdraw his or her guilty or nolo contendere plea and thereafter dismiss the case upon a finding that the case was dismissed after the defendant completed DEJ and that the plea may result in the denial of, or loss to, the defendant denial of any employment, benefit, license, or certificate, as specified. AB 1352 will be heard by this Committee today.

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