
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 208 **Hearing Date:** July 11, 2017
Author: Eggman
Version: March 8, 2017
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Deferred Entry of Judgment: Pretrial Diversion*

HISTORY

Source: American Civil Liberties Union of California
California Immigrant Policy Center
Coalition for Humane Immigrant Rights
Drug Policy Alliance
Immigrant Legal Resource Center
Mexican American Legal Defense and Education Fund

Prior Legislation: AB 1351 (Eggman) Vetoed 2015
AB 994 (Lowenthal) Vetoed 2013
SB 513 (Hancock) Ch. 798, Stats. of 2013
SB 599 (Perata) Ch. 792, Stats. of 2003
SB 1369 (Kopp) Ch. 1132, Stats. of 1996

Support: Alameda County Public Defender; Asian Americans Advancing Justice – California; California Access Coalition; California Attorneys for Criminal Justice; California Council of Community Behavioral Health Agencies; California Public Defenders Association; Californians for Safety and Justice; County Behavioral Health Directors Association of California; Courage Campaign; Ella Baker Center for Human Rights; Human Impact Partners; National Association of Social Workers, California Chapter; Southern California Coalition; Students for Sensible Drug Policy; United Food and Commercial Workers, Western States Council

Opposition: Board of Registered Nursing; California District Attorneys Association; California State Board of Pharmacy (unless amended); Respiratory Care Board of California; San Diego County District Attorney

Assembly Floor Vote: 46 - 27

PURPOSE

The purpose of this bill is to convert the existing deferred entry of judgment (DEJ) program for specified drug offenses into a pretrial drug diversion program.

Existing law provides that a defendant may qualify for DEJ for specified non-violent drug offenses if the following apply to the defendant:

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- d) The defendant's record does not indicate that probation or parole has ever been revoked without thereafter being completed;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

Existing law specifies the offenses that are eligible for DEJ, which include possession for personal use of specified controlled substances, possession of certain drug paraphernalia, being under the influence of a controlled substance, cultivation of marijuana for personal use, and being present in a place where controlled substances are being used. (Pen. Code, 1000, subd. (a).)

Existing law requires a prosecutor to review files to decide whether the defendant is eligible for DEJ. If the defendant is found eligible, the prosecuting attorney is required to file with the court a declaration in writing or state for the record the grounds upon which the determination is based, and is required to 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).)

Existing law requires all referrals for DEJ granted by the court pursuant to this chapter to 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).)

Existing law requires the court to hold a hearing and, after consideration of any information relevant to its decision, to determine if the defendant consents to further proceedings and if the defendant should be granted DEJ. If the court does not deem the defendant a person who would be benefited by DEJ, or if the defendant does not consent to participate, the proceedings shall continue as in any other case. The period during which DEJ is granted shall be for no less than 18 months nor longer than three years. The probation department is required to file progress reports with the court as directed by the court. (Pen. Code, § 1000.2.)

Existing law requires, if the defendant has performed satisfactorily during the period in which DEJ was granted, at the end of that period, the criminal charge or charges to be dismissed. If the defendant does not perform satisfactorily, the prosecuting attorney, the court, or the probation

department may make a motion for entry of judgment. After notice to the defendant, the court is required to hold a hearing to determine whether judgment should be entered. (Pen. Code, § 1000.3.)

Existing law provides that if the court finds that the defendant is not performing satisfactorily in the assigned program, or that the defendant is not benefiting from education, treatment, or rehabilitation, or the court finds that the defendant has been convicted of a misdemeanor that reflects the defendant's propensity for violence or has been convicted of a felony, or that the defendant has engaged in criminal conduct rendering him or her unsuitable for DEJ, the court shall render a finding of guilt to the charge or charges pled, enter judgment, and schedule a sentencing hearing as otherwise provided in the Penal Code. (Pen. Code, § 1000.3.)

Existing law provides that upon successful completion of a DEJ program, the arrest upon which the judgment was deferred shall be deemed to have never occurred. 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 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).)

Existing law 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 if so agreed upon in writing by the presiding judge of the superior court, or a judge designated by the presiding judge, together with the district attorney and the public defender. If the defendant is not performing satisfactorily in the program, the court may reinstate the criminal charge or charges. 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.)

This bill changes the existing deferred entry of judgment (DEJ) program for specified drug offenses into a pretrial drug diversion program.

This bill establishes the following eligibility requirements for the pretrial drug diversion program:

- a) The defendant must not have a prior conviction for a drug offense within five years other than those offense which may be diverted;
- b) The charged offense did not involve violence or a threat of violence;
- c) There is no evidence of a contemporaneous violation relating to narcotics or restricted dangerous drugs other than those offenses which may be diverted; and,
- d) The defendant must not have a prior conviction for a serious or violent felony, as specified, within the past five years.

This bill retains provisions in current DEJ law that are consistent with pretrial diversion.

This bill requires eligible defendants to be advised of the procedures for pretrial diversion, including that the defendant will be waiving the right to a speedy preliminary hearing and speedy trial; that if the defendant does not perform satisfactorily in the program, the prosecuting attorney, probation department, or court may make a motion to terminate pretrial diversion and schedule the matter for further proceedings; and an explanation of criminal record retention and disposition resulting from participation in the pretrial diversion program and the defendant's rights relative to answering questions about his or her arrest and pretrial diversion following successful completion of the program.

This bill provides that a defendant's participation in pretrial diversion does not constitute a conviction or an admission of guilt for any purpose.

This bill sets the length of the pretrial diversion program from six months to one year, but allows the court to extend that time for good cause.

This bill provides that the prosecutor, the court, or the probation department may move to terminate diversion if the defendant is performing unsatisfactorily, or he or she has been convicted of a felony or an offense reflecting propensity for violence.

This bill provides that if pretrial diversion is terminated, either due to unsatisfactory performance or because of specified convictions, then the court shall schedule the matter for further proceedings.

This bill provides for dismissal of charges if the defendant completes pretrial diversion, and deems arrest for the charges never to have occurred.

This bill allows a person participating in a pretrial diversion program to use medications to treat substance use disorders under the direction of a licensed health care practitioner if the participant allows release of his or her medical records to the court for the limited purpose of determining whether he or she is using the medications under the direction of a licensed health care practitioner and is complying with the rules of the pretrial diversion program.

COMMENTS

1. Need for This Bill

According to the author:

California law provides for deferred entry of judgment (DEJ) for minor nonviolent drug offenses, most involving possession or use of drugs. A defendant is required to plead guilty, waive his or her right to a speedy trial, and complete a drug treatment program. If the program is completed, the criminal case is dismissed and the state no longer recognizes or acknowledges the conviction. Defendants are often led to believe that once the case is dismissed they will not be denied any benefit and the arrest will be deemed never to have occurred. Unfortunately, noncitizen defendants charged with minor drug offenses, including misdemeanors, are often incorrectly advised or believe that pleading guilty with a deferred entry of judgment will not count as a conviction for any purpose. However, under federal immigration laws, post-plea deferred entry

of judgment programs, as provided currently under (California Penal Code 1000 et. Seq), are still considered a conviction for immigration purposes, even if the defendant successfully completed the program, the case dismissed, and the conviction no longer exists under state law.

This dismissal does not protect defendants from federal consequences. Indeed, consequences for immigrants are harsh, including denial of U.S. citizenship for those who are legal permanent residents to deportation and separation from family for undocumented immigrants. According to the Transactional Records Access Clearinghouse at Syracuse University, since 2008, over 250,000 people have been deported from the U.S. for nonviolent drug offenses. In fact, a nonviolent drug offense was the cause of deportation for more than one in every ten people deported in 2013 for any reason.

Even for U.S. citizens that complete the terms of court-ordered diversion, convictions can carry long-term negative consequences, including loss of federal housing and educational benefits.

2. DEJ and Pretrial Diversion

Under existing law, a defendant charged with violations of certain specified drug offenses 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 is 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.

Pretrial diversion suspends the criminal proceedings without requiring the defendant to enter a plea. Pretrial 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 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.

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.

3. Implications for Immigration Law

Diversion of an offense is preferable to DEJ in order to avoid adverse immigration consequences because the defendant is not required to plead guilty in order to participate in the program. Having a conviction for possession of a controlled substance, even if it has been dismissed, could initiate 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 offenses by re-establishing a pretrial diversion program.

4. Governor's Veto Message

AB 1351 (Eggman) was nearly identical to this bill, and was vetoed by Governor Brown in 2015. In his veto message, the Governor wrote:

AB 1351 would transform the existing deferred entry of judgment program available to low level drug offenders to one that does not require a guilty plea. Instead, the offender would plead not guilty and when the program is completed, the charges would be dropped. If the offender fails to complete the program, the prosecutor would proceed with the charges at that time.

While I support the goal of giving low-level offenders a second chance, I am concerned that the bill eliminates the most powerful incentive to stay in treatment – the knowledge that judgment will be entered for failure to do so. The bill goes too far.

5. Arguments in Support

California Attorneys for Criminal Justice supports this bill, stating:

This bill would change deferred entry of judgment (DEJ) back into a pretrial program if the person has no prior drug convictions or no previous serious or violent felonies within the 5 years prior to the alleged charged defense.

...AB 208 will amend Penal Code 1000 to allow courts to order pretrial treatment, rather than require a guilty plea, for minor drug offenses, for any person who fails to adhere to conditions of a pre-trial treatment program, the court could reinstate the charges and schedule proceedings pursuant to existing law. This bill would create greater flexibility and efficiency, allowing judges to order pretrial diversion when the court believes it is in the best interest of justice, and best matches local resources. This is a more effective approach to handling those who are accused of using drugs. Treatment as a response is paramount and has increasingly been the preferred method of response in California. Just recently California reaffirmed this approach by passing Proposition 47 and 64. AB 208 builds on this treatment approach.

AB 208 is also an effective response to how immigration courts view California's drug laws. Currently, "drug diversion" can be treated as a serious crime with adverse effects. This measure rightfully recalibrates this law.

The Mexican American Legal Defense Fund, a co-sponsor of the bill, writes:

This bill will eliminate unintended federal consequences that flow from minor drug convictions including deportation or denial of reentry, and provide greater flexibility for courts.

... Convictions for minor drug offenses result in much harsher consequences for noncitizens, since these offenses automatically trigger deportation proceedings when a guilty plea is involved. Once in deportation proceedings, people are often imprisoned in private, for-profit prisons far from their families, without legal representation—all for an offense that the state of California no longer deems to exist.

AB 208 will amend Penal Code 1000 *et seq.* to allow courts to order pretrial diversion, rather than require a guilty plea to enter drug treatment. 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

The California District Attorneys Association writes:

This bill would make many changes to existing drug diversion programs, with the intent of relieving drug offenders from adverse immigration consequences. While we appreciate the intent of the bill, we do not support upending current law, which already provides counties with great discretion in the creation and structure of drug diversion programs, simply to help a small segment of offenders avoid collateral consequence.

The existing drug diversion process is both efficient and effective....

AB 208 would turn that process on its head, allowing the defendant to enter a treatment program after entering a plea of *not guilty*.... From a practical standpoint, this gives drug offenders two bites at the same apple – they can enter drug diversion and then, if they are unsuccessful, can go to trial with the not guilty plea they have already entered.

Additionally, AB 208 would reduce the length of drug treatment programs down to one-third of what they currently are, as it allows for only 6 to 12 months of treatment and supervision.... Reducing the length of the program might make it easier for people to complete the program, but it also reduces the likelihood of a truly positive outcome.

It is unclear how reducing the amount of drug treatment and supervision that someone receives would have any positive impact on their immigration consequences.

... Currently, a defendant must not have any prior drug convictions to qualify for drug diversion. Under AB 208, if the prior offenses were all diversion-eligible drug offenses (or more significant drug offenses that had occurred more than five years prior), there is no limit to the number of drug offenses someone could

accumulate while maintaining diversion eligibility. These requirements exist to ensure that individuals who are eligible for drug diversion are those who are likely to be successful in those programs....

Further, AB 208 changes the requirement that a defendant have no felony convictions in the previous five years, instead requiring only that the defendant not have any prior *serious or violent* felonies within the previous five years. If AB 208 is meant to address the negative immigration consequences of deferred entry of judgment programs, we fail to see why it is also necessary to expand eligibility to habitual drug offenders and other felons.

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