OVERVIEW OF CALIFORNIA POST-CONVICTION RELIEF FOR IMMIGRANTS

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Tens of thousands of noncitizens in California are at risk of removal or cannot qualify for immigration relief because they have unlawfully imposed criminal convictions. The good news is that there are several options under California law to eliminate these convictions for immigration purposes, using post-conviction relief (PCR).

The purpose of this Advisory is to help advocates identify which of these forms of California PCR might help your client, and direct you to more resources about how to obtain it. If you are new to this field, be sure to get support or mentoring from local experts or a resource center. You will need to understand aspects of three areas of law: immigration, criminal, and post-conviction relief, and how to apply them to your particular client's case. Free written materials are available. For an online manual on California post-conviction relief, see ILRC and California for Safety and Justice, *Helping Immigrant Clients with Post-Conviction Legal Options* (June 2019)[1] and see additional resources listed in each section below. For legal updates, consult experts and see materials at https://www.ilrc.org/immigrant-post-conviction-relief.

I. Important Points about Post-Conviction Relief for Immigrants

The section reviews some points to keep in mind in each case. First, know which California dispositions are not "convictions" for immigration purposes, and therefore don't need PCR. Second, when you obtain PCR, make sure that it is the type that immigration authorities will accept. Usually, that means it will require a clear statement that the PCR is based on a legal error in the original proceedings. Third, a person who has obtained effective PCR for a conviction should not be found inadmissible based on an "admission" of the same conduct.

A. California Dispositions that are Not Convictions for Immigration Purposes, Including New Pretrial Diversion Programs

Our first step is to determine whether there actually is a "conviction" of a crime for immigration purposes. If there is no conviction, there is no need to eliminate it with post-conviction relief.

Immigration law has its own definition of a criminal conviction. Under INA § 101(a)(48)(A), a conviction occurs if there is a formal judgment of guilt entered by a court. It also occurs if adjudication of guilt is withheld, and:

> (i) a judge or jury has found the [noncitizen] guilty or the [noncitizen] has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

[1] https://www.ilrc.org/helping-immigrant-clients-post-conviction-legal-options-guide-legal-services-providers. See also ILRC, and *12 Questions to Spot California Post-Conviction Relief* (Sept. 2020), https://www.ilrc.org/12-questions-spot-california-post-conviction-relief.

> (ii) the judge has ordered some form of punishment, penalty, or restraint on the [noncitizen's] liberty to be imposed.

In sum, a conviction for immigration purposes requires a plea or a finding in court that the person committed a crime, and the court must have imposed some form of penalty.

The following California dispositions do not result in a conviction for immigration purposes. For a more in-depth discussion of this topic, see ILRC practice advisories.[2]

Juvenile court. A court's finding in juvenile as opposed to adult proceedings is not a conviction, because it involves civil juvenile delinquency, not a "crime."[3] Juvenile dispositions can be considered for discretionary purposes, and immigration adjudicators often ask for details about the disposition. However, California law protects confidentiality of juvenile dispositions, including for noncitizens.[4]

Conviction on direct appeal of right. The Board of Immigration Appeals (BIA) held that a conviction does not have a sufficient degree of finality for immigration consequences to attach until the right to direct appellate review of the merits of the conviction has expired or been waived. *Matter of J. M. Acosta*, 27 I&N Dec. 420 (BIA 2018). If the time for filing a direct appeal has passed, a presumption arises that the conviction is final. To rebut that presumption, a respondent must show that an appeal "that relates to the issue of guilt or innocence or concerns a substantive defect in the criminal proceedings" was filed within the deadline, "including any extensions or permissive filings" granted by the court. *Id*. at 432. While the BIA asserts that federal courts should defer to its position, in future it is possible that the Ninth Circuit would decline to defer. *See Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011).

Pretrial (no guilty plea) diversion. A conviction for immigration purposes requires a plea or finding of guilt. See INA § 101(a)(48)(A)(i), above. California has multiple diversion programs. Some are pretrial diversion, and permit a plea of *not guilty* before the person is diverted; these are not convictions for immigration purposes. if it appears the person can complete the program, criminal defenders should seek these resolutions for noncitizens. These include:

> Penal Code § 1001.95 for misdemeanors (effective January 1, 2021). A judge may offer diversion over the prosecutor's objection to persons charged with

[2] See ILRC, *§N.2 Definition of Conviction* (2019), https://www.ilrc.org/chart. For more on California diversion laws, see ILRC, *2021 California Laws that can Help Immigrants Charged with or Convicted of Crimes* (2021), https://www.ilrc.org/2021-california-laws-can-help-immigrants-charged-or-convicted-crimes. Nationally, see ILRC, *Immigration Consequences of Diversion and Pretrial Intervention Agreements* (2021), https://www.ilrc.org/sites/default/files/resources/pretrial_diversion_practice_advisory_final_0.pdf

[3] *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).

[4] See W&I C § 831 and see ILRC, *Confidentiality of Juvenile Records in California* (2016) and ILRC, *DACA and Juvenile Delinquency Adjudications and Records* (2021), both at https://www.ilrc.org/immigrant-youth

misdemeanor offenses, except for charges where sex registration may be required (PC § 290) or certain domestic violence or stalking offenses (PC §§ 243(e), 273.5, 646.9). Some California courts have held that § 1001.95 is not available for DUI charges,[5] but state legislation that would permit this under certain circumstances is pending in 2022 (see SB 1021).

Penal Code § 1001.20, developmental disabilities. A court can offer diversion for misdemeanor and, effective January 1, 2021, most felony charges to a defendant who was evaluated by a regional center and found to have a developmental disability. Note that in removal proceedings, noncitizens with developmental disabilities may qualify for free representation and other advantages under the *Franco* settlement.[6]

Penal Code § 1001.36, mental health issues. This pretrial diversion covers a variety of misdemeanors or felonies. The person also may be able to get free representation in removal proceedings under *Franco,* discussed above.

Penal Code § 1000, drug charges. As of 2018, California amended PC § 1000 to change it from a "deferred entry of judgment" proceeding that required a guilty plea before diversion, to pretrial diversion where the person pleads not guilty before being diverted. Note that PC § 1000 also was pretrial diversion before January 1, 1997. (See Part II, below, for a discussion of PC § 1000 during the time that it was deferred entry of judgment, from 1997 through 2017.)

If instead a proceeding requires the defendant to plead guilty before being diverted, they do have a conviction for immigration purposes. See, e.g., PC § 1210.1 ("Prop 36"), discussed at Part II, above.

The court imposed absolutely no penalty, fine, etc. Under INA § 101(a)(48)(A)(ii), a disposition is not a conviction unless the court has ordered some "punishment, penalty, or restraint on … liberty" to be imposed. Because the BIA interprets this broadly, it is difficult to create a disposition with absolutely no penalty for this purpose.[7]

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[5] *Grassi v. Superior Court* (2021) 73 Cal.App.5th 283; *Tan v. Superior Ct. of San Mateo Cty* (2022) 76 Cal. App. 5th 130 (review filed).

[6] *See Franco-Gonzalez v. Holder*, No. CV–10– 02211 DMG (DTBx), 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) and see ACLU of Southern California, *Franco v. Holder*, https://www.aclusocal.org/en/cases/franco-v-holder. See ILRC, *Advocating For and Representing Clients with Mental Illness in Detained Removal Proceedings* (June 2022), https://www.ilrc.org/sites/default/files/resources/removal_proceedings_clients_mental_ilness_advisory_june_2022.pdf

[7] See, e.g., *Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017), but see *Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010). See also ILRC, *Immigration Consequences of Diversion and Pretrial Intervention Agreements* (2021), cited above.

B. Requirements for Effective Post-Conviction Relief for Immigrants

When we obtain post-conviction relief in state court, we must be sure that the court's order will be given effect in immigration proceedings. Here we distinguish between "rehabilitative relief" and a vacatur based on legal error.

Rehabilitative relief is based on humanitarian or rehabilitative factors. An example is that under PC § 1203.4, a judge may permit a person to withdraw their guilty plea if they have completed probation or as a matter of discretion. Section 1203.4 has immigration effect in only two situations: It will eliminate certain older drug convictions for immigration purposes under *Lujan-Armendariz,* although only in immigration proceedings within the Ninth Circuit (see Part II, below) and it will eliminate a conviction for purposes of DACA (see Part III, below). A pardon is another form of rehabilitative relief that has some immigration effect (see Part III).

Otherwise, immigration authorities will give effect to PCR only if the criminal court vacated the conviction based on legal error. This is referred to as the *Pickering* rule, after *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). Under *Pickering,* a conviction is not eliminated for immigration purposes if the court vacated it for reasons "solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings." *Id.* at 621. For that reason, other than the above exceptions a dismissal under PC § 1203.4 does not have immigration effect.[8]

Our most important PCR goal is to *make the record clear that the court vacated the conviction because of a substantive or procedural error in the original proceeding*. In moving papers and in the proposed order you draft for the criminal court judge's signature, identify and emphasize the legal error. In addition, when discussing the client's equities, place them in the context of the error. You can describe them to show that the error caused the required prejudice to the client, and if the error was failure to warn of immigration consequences, use them to show that it is likely that the client would not have accepted the plea offer if they had been properly informed. One might say, e.g., "At the time of the plea, 35-year-old Mr. Rodriguez had lived in the United States since he was 6 years old. His entire family, including his wife and U.S. citizen child, lived in the United States. Given his deep connection to the United States and desire to remain with his wife and child, there is a reasonable probability that Mr. Rodriguez would have bargained for an immigration-neutral plea or risked going to trial to avoid certain deportation."[9]

In some cases, ICE asserts that because the noncitizen's *motivation* for vacating the conviction is to avoid adverse immigration consequences, that means that the vacatur itself

[8] *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

[9] See standard at *People v. Vivar*, 11 Cal. 5th 510, (2021); *see also People v. Rodriguez*, 68 Cal. App. 5th 301 (2021)(explaining what constitutes prejudicial error). See discussion of PC § 1473.7 in Part III, below.

fails the *Pickering* test because it is just "for purposes of immigration." ICE tries to confuse the person's reason for seeking a vacatur (to avoid removal), with the legal basis upon which the court vacated the conviction (a legal error). Don't let them do that. The BIA has held that it does not matter that the motivation for seeking the relief is to avoid immigration penalties, as long as the court's ruling is based at least partially on a legal defect.[10] In fact, anyone who files for post-conviction relief does so because the conviction threatens to cause some kind of harm: a jail sentence, an immigration penalty, loss of a professional license, loss of child custody, or of reputation, etc. The harm the conviction causes to the person is different from the issue of whether the conviction is invalid due to legal or procedural error.

A legal error that is related to immigration consequences is a qualifying error, and is a good basis to vacate the conviction. The U.S. Supreme Court, California courts, and the BIA have found that, e.g., a defense attorney's failure to advise a noncitizen defendant of the immigration consequences of a plea can be reversible error in criminal court.[11]

C. If the Conviction is Vacated, the Person Should Not be Found Inadmissible for "Admitting" the Same Conduct

Not only a conviction, but making a qualifying admission that one committed a drug offense or crime involving moral turpitude can make a noncitizen inadmissible. INA § 212(a)(2)(A)(i). In several older opinions, the BIA held that if a criminal court has heard charges relating to an incident, and the final disposition of the case is something less than a conviction – meaning that the charges were dropped, or the person got pretrial diversion, or the conviction occurred but later was eliminated by effective post-conviction relief -- then the person cannot be found inadmissible for admitting that same conduct.[12] This is true even if the person independently admits the crime to immigration officials.[13] See online resources for further discussion of this inadmissibility ground.[14]

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[10] See, e.g., *Matter of Pickering*, 23 I&N Dec. at 624, 625; *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000); *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (criminal court's failure to provide the immigration advisal under Ohio Revised Code 2943.031 is a legal basis for vacatur).

[11] For examples of this, see *Padilla v. Kentucky*, 559 U.S. 356 (2010), *People v. Soriano*, 194 Cal. App. 3d 1470 (1987) and other decisions at PC § 1016.2, and see BIA decisions in the above footnote.

[12] See *Matter of E.V.*, 5 I&N Dec. 194 (BIA 1953); *Matter of G*, 1 I&N Dec. 96 (BIA 1942); *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968); *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980).

[13] See *Matter of C.Y.C.*, 3 I&N Dec. 623, 629 (BIA 1950) (dismissal of charges overcomes independent admission); *Matter of E.V.*, *supra*, note 6 (Calif. PC § 1203.4 expungement (when that had effect) controls even where admission is made to an immigration judge).

[14] See, e.g., discussion in ILRC, *All Those Rules About Crimes Involving Moral Turpitude* (May 2021), Part II.C., https://www.ilrc.org/all-those-rules-about-crimes-involving-moral-turpitude.

II. California Post-Conviction Relief for (Minor) Drug Convictions

A. Did the Conviction Occur on or Before July 14, 2011? *Lujan-Armendariz*

In immigration proceedings within the Ninth Circuit only, some convictions of minor drug offenses from on or before July 14, 2011 can be eliminated for immigration purposes by mere "rehabilitative" relief, with no requirement of a finding of error in the original proceedings. For example, PC §§ 1203.4, 1210.1(e), or former 1000.3 will eliminate the conviction. This is relief under *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). For further discussion of this relief, see ILRC practice advisory.[15] The requirements for this relief are that:

- With no prior drug conviction or drug pretrial diversion,
- On or before July 14, 2011, the person pled guilty to, or arguably was convicted at trial of,
- Simple possession of a controlled substance, possession of paraphernalia, and/or a "lesser offense" (but *not* being under the influence), after which the person
- Completed probation without violating a condition of probation
- And at any time up to the present has obtained post-conviction relief including "rehabilitative relief" (which immigration officials often refer to as "expungements") such as PC §§ 1203.4, 1210.1, former 1000.3, etc.

If the person meets these requirements, then in immigration proceedings arising within the Ninth Circuit only this is not a conviction for *any* immigration purpose,[16] whether deportability, inadmissibility, or eligibility for relief. *Lujan-Armendariz* applies to convictions and rehabilitative relief from other states and countries,[17] if the immigration proceedings arise within Ninth Circuit jurisdiction. Arguably, the requirements of not having gone through a prior pretrial drug diversion, and of completing probation with no violation, do not apply to people who meet the above requirements *and* committed the offense while under age 21.[18]

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[15] See ILRC, *Lujan and Nunez, July 14, 2011* (2011), https://www.ilrc.org/practice-advisory-lujan-nunez-july-14-2011, discussing *Lujan, supra,* and *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc).

[16] It is not a conviction "for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose." See 18 USC § 3607(b) and see ILRC, *Lujan and Nunez,* cited above.

[17] See *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001).

[18] *Lujan-Armendariz* relief is based on whether the person would have been eligible for relief under the Federal First Offender Act (FFOA), had their case been handled in federal proceedings. The FFOA has separate provisions for people who committed the offense while under age 21, which don't include those two bars. See 18 USC § 3607(c) and discussion in the ILRC *Lujan and Nunez* Advisory.

The benefits of *Lujan-Armendariz* relief are that an "expungement" (rehabilitative relief) often is easy to obtain. And while the conviction must have occurred on or before July 14, 2011, the expungement can take place at any time, including today. The downside of *Lujan-Armendariz* relief is that it has effect only in immigration proceedings arising within the Ninth Circuit. If the person is placed in immigration proceedings outside the Ninth Circuit, they will have a drug conviction. Traveling to other states, or taking a trip outside the country and, e.g., flying back in through Miami, is not advised until the person becomes a U.S. citizen. For more geographic security, consider a vacatur under PC §§ 1473.7, 1016.5, or other relief.

B. Was the Case Handled Under Prop 36 (PC § 1210.1) or the former Deferred Entry of Judgment (DEJ) (PC § 1000 from 1997-2017)?

Both the current Prop 36 and the former PC § 1000 DEJ require a guilty plea, so both result in convictions for immigration purposes. But special post-conviction relief may be available.

Prop 36. Proposition 36 ("Prop 36") appears at Penal Code § 1210.1 et seq. It requires a guilty plea before diversion and thus is a drug conviction.

Former DEJ under PC § 1000. California PC §§ 1000-1000.4 has gone through changes over time. Until January 1, 1997, and again going forward from January 1, 2018, to the present, it is a true pretrial diversion in which the defendant pleads *not guilty* before being diverted. It is not a conviction for immigration purposes and there is no need to obtain PCR.

But from January 1,1997 through December 31, 2017, PC § 1000 was deferred entry of judgment (DEJ), which required a *guilty plea* before diversion. This is a conviction for immigration purposes and the person needs to obtain post-conviction relief (unless, perhaps, the only punishment was an unconditionally suspended fine[19]). To see PC § 1000 as it appeared in 2017, see *Appendix.*

There are good options to obtain post-conviction relief for a Prop 36 or DEJ "conviction."

1. *Lujan-Armendariz* for Certain Convictions on or Before July 14, 2011

If the plea hearing occurred on or before July 14, 2011 and the person has or can obtain any kind of rehabilitative relief (e.g., PC §§ 1203.4, 1210.1, former § 1000.3), they might qualify for the *Lujan-Armendariz* benefit. See Part A, above. However, recall that it is a bar to *Lujan-Armendariz* relief if the person violated probation. If the client failed DEJ and went on to Prop 36, or if they went straight to Prop 36 and failed it, or if they ultimately succeeded in one of the

[19] *Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010) (an unconditionally suspended fine, without more, is not punishment as required under INA §101(a)(48)(B). The BIA probably would disagree with this. See, e.g., *Matter of Mohamed*, 27 I&N 92 (BIA 2017), *Matter of Cabrera*, 24 I&N Dec. 459, 460−62 (BIA 2008).

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programs but only after having a violation, assume that authorities will find they do not qualify for *Lujan-Armendariz*. (This might not apply to people who committed the drug offense while under age 18. See Part A, above.) But these people may have other options, described below.

2. Penal Code § 1473.7(e)(2)

Section 1473.7 is discussed in more detail at Part III, but we want to highlight one subsection here. For people who completed or now can complete the program under either Prop 36 or the former DEJ, section 1473.7(e)(2) sets out a presumption that their guilty plea was invalid:

> (2) There is a presumption of legal invalidity for the purposes of paragraph (1) of subdivision (a) if the moving party pleaded guilty or nolo contendere pursuant to *a statute that provided that, upon completion of specific requirements, the arrest and conviction shall be deemed never to have occurred,* where the moving party complied with these requirements, and where the disposition under the statute has been, or potentially could be, used as a basis for adverse immigration consequences. (emphasis supplied)

Section 1473.7(e)(2) should apply to dispositions under Prop 36 and the former DEJ because both statutes promise that if the person pleads guilty and satisfactorily completes the program, the conviction and arrest will be deemed never to have occurred.[20] As always with PCR for immigrants, the moving papers and proposed court order should make a strong, specific statement of legal error. The person should declare and the court order should find (if this is true) that the person believed that when the statute said there would be "no conviction," that included no conviction for immigration purposes, and they relied on that when they agreed to plead guilty and participate.

If the person did not and cannot now complete the program, advocates can consider bringing a § 1473.7(a)(1) motion without the presumption. Among other errors, one can cite the fact that the statute affirmatively misadvised the defendant, who without being properly advised of alternatives may have relied on DEJ or Prop 36 as the only way to avoid deportation, and entered a program they were unable to complete.

3. Penal Code § 1203.43 for DEJ

If the person has completed, or now can reopen and complete, DEJ and can get an order dismissing charges under former PC § 1000.3, they also can obtain an order from the criminal court judge to vacate the conviction under PC § 1203.43. This option is for DEJ, not Prop 36.

[20] For DEJ, see former PC § 1000.1(d), 1000.4(a), text reprinted in **Appendix** (DEJ "shall not constitute a conviction for any purpose" and the arrest "shall be deemed to never have occurred"). For Prop 36, see PC § 1210.1(e)(1) ("both the arrest and the conviction shall be deemed never to have occurred.")

Section 1203.43(a) provides that the DEJ statute provided "misinformation about the actual consequences of making a plea in the case of some defendants, including all noncitizen defendants, because the disposition of the case may cause adverse consequences, including adverse immigration consequences" and therefore "the defendant's prior plea is invalid." Section 1203.43(b) provides a PCR vehicle: based on error described in section (a), the court "shall" permit any person who was found to have completed the program under former § 1000.3 to withdraw their guilty plea and enter a plea of not guilty. The person does not need to prove individual reliance. If no records exist, this can be done upon the declaration of the defendant. See discussion of § 1203.43 at ILRC, *Definition of Conviction* (April 2019).[21]

A § 1203.43 order is easily obtained, but the downside is that some ICE attorneys assert that it does not eliminate a conviction based on error (the *Pickering* standard), because it does not require a showing of individual reliance. After multiple unpublished BIA decisions held that § 1203.43 eliminates the DEJ "conviction," in 2020 another unpublished BIA decision, written after BIA oral argument, found that the "blanket" order under § 1203.43 does not eliminate a conviction, and remanded the case for the person to present evidence of individual reliance to the immigration judge.[22] In light of this, the current recommendation for § 1203.43 is:

- It appears that USCIS *does* accept § 1203.43 orders in affirmative applications. But be prepared to submit a client's declaration, per below, if there are problems.
- In removal proceedings, to avoid possibly having to litigate § 1203.43 effectiveness, get relief under PC § 1473.7(e)(2) or another PCR option.
- If you proceed with the § 1203.43 order, include a declaration by the client that, based on the information they were given about DEJ, they believed that if they completed DEJ they would not have a conviction for any purpose, including immigration purposes, and that is a reason that they decided to accept the offer of DEJ (if this is true). Include details as in any declaration, rather than a rote statement. That ought to address ICE's objection.
- If you are obtaining a § 1203.43 order in criminal court, consider appending a declaration by the defendant describing their reliance (if that is true) and asking the court to refer to the person's declaration in their order.
- If you are litigating the effectiveness of a § 1203.43 order, see sample brief.[23]

[21] https://www.ilrc.org/sites/default/files/resources/n.2_definition_of_conviction-0613.pdf.

[22] See Amicus Brief arguing that 1203.43 (without evidence of individual reliance) meets Pickering. The brief Appendix includes sample unpublished BIA decisions giving effect to § 1203.43 as written. At that page, see also the June 26, 2020 unpublished BIA decision that remanded for proof of individual reliance, at https://www.ilrc.org/sites/default/files/resources/ilrc_amicus_cal_120343_vacaturs-20181025.pd.

[23] See amicus brief, cited above.

C. Was the Person Convicted of a Marijuana Offense Before November 9, 2016?

On November 9, 2016, California voters legalized adult use of marijuana by approving Proposition 64 ("Prop 64"). Prop 64 included some post-conviction relief provisions for convictions from before its passage. Under H&S C § 11361.8(e)-(h), to the extent that a prior conviction is for conduct that under Prop 64 no longer is unlawful, a person who has completed their sentence can file an application "to have the conviction dismissed and sealed because the prior conviction is now legally invalid." As of this writing, immigration authorities have not ruled on whether they will give effect to this as a vacatur under *Pickering*. Section 1473.7, 1016.5, and other options described in this advisory are much safer at this time.

III. California Post-Conviction Relief that Applies to Any Conviction

A. Note on Sale and Possession for Sale of a Controlled Substance

California prohibits possession with intent to sell, or "possession for sale." See H&S C §§ 11351, 11359, 11378. We mention possession for sale because it is well-established that it is error to advise a noncitizen to plead to California possession for sale (which is an automatic "aggravated felony" for immigration purposes) without advising them of the immigration benefit of pleading up to offering to distribute or sell (which is not an aggravated felony in cases arising in the Ninth Circuit).[24] That error ought to support motions to vacate such as PC §§ 1018 or 1473.7, or a finding of ineffective assistance of counsel for purposes of habeas corpus.

B. Is the Person Applying for DACA? PC § 1203.4

Immigration Effect. This is one of the two instances where a PC § 1203.4 "expungement" or almost any rehabilitative relief will eliminate a conviction for immigration purposes. (The other instance is relief under *Lujan-Armendariz*, described in Part II.A, above). An expungement will eliminate the conviction as an absolute bar to DACA, although it still can be considered a factor in discretion.[25] Note, however, that a proposed regulation on DACA did not include the

[24] See *U.S. v. Rivera–Sanchez* , 247 F.3d 905 (9th Cir. 2001) (solicitation or "offering" is not a drug trafficking aggravated felony) and see, e.g., *People v. Bautista*, (2004) 115 Cal.App.4th 229, *In re Bautista*, H026395, 2005 WL 2327231, (September 22, 2005) (counsel's failure to advise noncitizen defendant of advantage of pleading up from § 11359 to § 11360 was ineffective assistance of counsel).

[25] USCIS, *DACA Frequently Asked Questions*, Q #68 https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions#criminal_convictions.

expungement provision, and the final regulation has not been published as of this writing.[26] For updates on DACA and criminal convictions, see materials at https://www.ilrc.org/daca.

Requirements. The defendant is entitled to relief pursuant to PC § 1203.4 if they have fulfilled the conditions of probation, or have been discharged prior to the termination of the period of probation, or are no longer on probation for any case. The court also has broad discretion to grant § 1203.4 in the interests of justice. If granted, the court will withdraw the guilty plea or conviction after trial, and enter a plea of not guilty. The judge has jurisdiction to terminate probation early under PC § 1203.3 when the "ends of justice" will be served. If probation was imposed before 2021, ask the court at least to conform to new laws that (with many exceptions) set a maximum two years for felony probation and one year for misdemeanor. See PC §§ 1203a and 1203.1.

C. Is There No Evidence that the Judge Gave the PC § 1016.5 Advisement? Were the Court Records Destroyed? PC § 1016.5

Immigration Effect. The BIA has held that this type of vacatur, based on failure to give the required judicial advisement, eliminates the conviction for all immigration purposes. See *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (Ohio statute).

Requirements. Under PC § 1016.5(a), a judge must give the following advisement to all defendants, whether or not the defendant is a noncitizen, prior to taking a plea to any crime other than an infraction: "If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." Section 1016.5(b) provides that the court "shall" vacate the judgment if after January 1, 1978 the court failed to give this advisement to a defendant, and the person shows that the conviction may cause their deportation, exclusion, or denial of naturalization.

Regarding the burden of proof, § 1016.5(b) provides, "Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement." One can present court records or transcripts to show that they do not demonstrate that the advisement was given.

In older cases, court records may have been lost or destroyed. Under § 1016.5(b), this alone should create a presumption that the motion should be granted if it means that there is no "record that the court provided the advisement."

[26] For more information see ILRC, *Crim/Imm Problems in the Proposed DACA Regulation* (October 2021), https://www.ilrc.org/crimimm-problems-proposed-daca-regulation.

D. Was Probation Imposed within the Last 180 Days? PC § 1018

Immigration Effect. This vacatur eliminates the conviction for all immigration purposes.

Requirements. Under PC § 1018, a court may allow a defendant to withdraw their guilty plea "for good cause shown" before judgment is entered or within six months after the defendant is placed on probation. Thus, when a noncitizen has been placed on probation with imposition of the sentence suspended, they may file the § 1018 motion at any time within six months. They must demonstrate by clear and convincing evidence that there is "good cause" for the withdrawal of the plea.[27] The California Supreme Court held that a defendant's ignorance of immigration consequences of a plea can constitute "good cause" for this purpose.[28] This is in keeping with the general rule that "mistake, ignorance or inadvertence" supports withdrawal of a plea. As always, it is critical to ensure that the court's order shows that the plea is withdrawn on grounds of legal invalidity due to error.

E. Has the Person Completed Probation or Parole, Or Could Probation be Terminated? See PC § 1473.7

Immigration Effect: This relief eliminates the conviction and/or eliminates or modifies the sentence for all immigration purposes. Section (a)(1) is especially for immigrants, but see the additional sections below.

Requirements: Section 1473.7 is available if the person is no longer in actual or constructive criminal custody, meaning they are no longer in jail or on probation or parole. If the person currently is on probation, consider moving to terminate probation early[29] in order to qualify for § 1473.7. The person can file a motion to vacate a sentence or conviction arising from a plea or, as of January 1, 2022, from trial, for any of the following reasons.

1. Error causing immigration harm, PC § 1473.7(a)(1)

The conviction or sentence is found legally invalid due to prejudicial error that affected the noncitizen defendant's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of the conviction or sentence. There is no time limit for filing the motion, except for a requirement of due diligence after the person receives a Notice to Appear or notice of adverse immigration decision based on the conviction. PC § 1473.7(b). See ILRC resources on bringing § 1474.7(a)(1) motions based on error relating

[27] *People v. Nance*, 1 Cal.App. 4th 1453 (1991).

[28] See *People v. Patterson*, 2 Cal. 5th 885, 889 (2017); *People v. Giron*, 11 Cal. 3d 793, 797 (1974).

[29] The judge has discretion to terminate probation early in the interests of justice. PC § 1203.3. If probation was imposed before 2021, ask the court at least to conform to new laws that (with many exceptions) set a maximum two years for felony probation and one year for misdemeanor. See PC §§ 1203a and 1203.1.

to immigration consequences.[30] Note that in some cases ICE will wrongly assert that §1473.7 does not identify an error or meet the *Pickering* standard. Be prepared to oppose this.[31]

- A finding of legal invalidity may, but *need not*, include a finding of ineffective assistance of counsel. PC § 1473.7(a)(1). Some examples of legal error are that defense counsel did not adequately investigate or advise the defendant regarding the immigration consequences, or failed to defend against them by attempting to plea bargain for an immigration-safe alternative disposition, and/or the defendant failed to meaningfully understand the immigration consequences due to a cognition deficit of which parties were unaware, lack of competent interpreter, or other circumstances surrounding the plea, so that the plea was not knowing and intelligent in violation of the Fifth Amendment.
- To show prejudice, one must demonstrate "a reasonable probability that the defendant would have rejected the plea if the defendant had correctly understood its actual or potential immigration consequences. When courts assess whether a petitioner has shown that reasonable probability, they consider the totality of the circumstances. Factors particularly relevant to this inquiry include the defendant's ties to the United States, the importance the defendant placed on avoiding deportation, the defendant's priorities in seeking a plea bargain, and whether the defendant had reason to believe an immigration-neutral negotiated disposition was possible."[32] Demonstrating prejudice in this way provides a way to discuss the person's equities in a manner that supports the finding of error, while avoiding ICE (incorrect) assertions that the order was granted only for humanitarian purposes without basis in error.

2. New evidence of innocence, PC § 1473.7(a)(2)

Newly discovered evidence of actual innocence supports a vacatur of the conviction or sentence.

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[30] See resources such as ILRC and UCLA School of Law Criminal Defense Clinic, *§1473.7 Motions to Vacate a Conviction or Sentence in California*, (September 2020), https://www.ilrc.org/14737-motions-vacate-conviction-or-sentence-california; ILRC, *Helping Immigrant Clients with Post-Conviction Legal Options: A Guide for Legal Services Providers,* (June 2019), https://www.ilrc.org/helping-immigrant-clients-post-conviction-legal-options-guide-legal-services-providers; and ILRC webinar*, Post-Conviction Relief For Immigrants: New Laws, New Developments, New Advice* (Dec. 2021), https://www.ilrc.org/webinars/post-conviction-relief-immigrants-new-laws-new-developments-new-advice.

[31] See ILRC, NIPNLG, and AILA Letter to OPLA (March 15, 2022) regarding ICE attorneys' arguments opposing effectiveness of § 1473.7(a)(1) vacaturs, https://www.ilrc.org/ilrc-nipnlg-and-aila-letter-opla-re-14737-vacaturs. See also ILRC, *Using and Defending Cal. Penal Code § 1473.7* (April 2020), https://www.ilrc.org/using-and-defending-california-penal-code-%C2%A7-14737-vacaturs-immigration-proceedings-sample-memorandum.

[32] *People v. Vivar*, 11 Cal. 5th 510, 529-30 (2021) (citation omitted). See also *People v. Rodriguez*, 68 Cal. App. 5th 301 (2021)(explaining what constitutes prejudicial error).

- Some examples of newly discovered evidence include new scientific results such as DNA testing; new proof that another person admitted the crime; or facts that call into question the evidence that was used to convict the person, such as problems at a crime lab or new reason to doubt a key witness's testimony.

3. Charged, convicted, or sentenced on the basis of race, ethnicity, or national origin (Racial Justice Act, PC § 745), PC § 1473.7(a)(3).

As of January 1, 2021, the California Racial Justice Act (RJA) provides a vehicle to change or vacate charges, convictions, or sentences where bias is shown.

- Some examples of proof of bias include transcripts or testimony showing statement by prosecutor or court that reveals racial bias, or data revealing that certain race/ethnicities are prosecuted at higher rates than their white counterparts for similar offenses.

F. Is the Person Still in Custody or on Probation or Parole? Habeas Corpus

Immigration Effect: This relief eliminates the conviction for all immigration purposes.

Requirements: A writ of habeas corpus may be granted where there was a fundamental constitutional or jurisdictional error in the conviction. "Jurisdictional" errors supporting issuance of the writ have been found where: (1) the accusatory pleading or commitment was defective; (2) material false evidence was introduced against the petitioner; (3) the guilty plea was entered under a misapprehension of law including where defendant was not advised of the immigration consequences of the plea; (4) improprieties occurred regarding the granting or revoking of probation or parole; or (5) the sentence imposed was unauthorized, excessive, or unconstitutional. Because habeas corpus presents procedural and substantive difficulties, consider other relief, including helping your client to qualify for PC § 1473.7 by terminating probation under PC § 1203.3.

G. Did the Person Commit the Offense Because they were a Victim of Domestic Violence or Human Trafficking? PC §§ 236.14, 236.15

Immigration Effect: Sections 236.14 and 236.15 provide a vacatur of conviction of non-violent offenses for some victims of "intimate partner violence or sexual violence" or human trafficking. In 2022, these vacaturs do not necessarily eliminate a conviction for immigration purposes, because legal invalidity is not a requirement. However, §§ 236.14 and 236.15 likely will be amended effective January 1, 2023 to include a basis for legal invalidity, which is that the victims lacked the *mens rea* to commit the offenses. See AB 2169 (2022).

Until the statutes are amended, the better practice is to file a PC § 1473.7(a)(1) motion. There, if needed, counsel can assert that unbeknownst to the parties, the trauma prevented the victim from being able to understand the immigration consequences of the plea and that the plea was not knowing or intelligent. Or, that it was error for counsel to fail to assert that the trauma made it impossible for the defendant to form the *mens rea* to commit the crime. This should be presented in conjunction with other errors, if possible, such as failure to advise on immigration consequences.

Requirements: Under PC §§ 236.14 and 236.15, if a person was arrested for or convicted of any nonviolent offense committed while they were a victim of either human trafficking or "intimate partner violence or sexual violence," the person may petition the court for vacatur of their convictions (and arrests). The person shall establish, by clear and convincing evidence, that the arrest or conviction was the direct result of being a victim of human trafficking or intimate partner or sexual violence. The new amendment to the statutes, if AB 2169 becomes law, will base the vacatur on the person's inability to form the required mental state to commit the offense, as a result of being a victim of human trafficking or intimate partner or sexual violence. Note that even with this amendment, it will remain important that the moving papers and the order that you draft for the judge's signature describe the specific basis of legal invalidity that occurred in the individual's case.

Criminal defense: In some cases, being a victim of human trafficking or of intimate partner or sexual violence supports a defense against criminal charges. See PC §§ 236.23, 236.24.

H. Could the Person Obtain a Gubernatorial Pardon?

Immigration Effect: A full and unconditional pardon by a state governor for a state offense will eliminate the conviction as a basis for *deportability* under the *aggravated felony and moral turpitude grounds*. It will not eliminate the conviction for purposes of other deportation grounds, for example, as a deportable crime of domestic violence or a controlled substance offense. A pardon will have effect for purposes of naturalization.[33] A pardon should be considered in serious cases where a PC §1473.7 may not be an option, and where the person has demonstrated rehabilitation and strong equities.

Requirements: There are two ways to obtain a pardon in California. The first way is to first obtain a Certificate of Rehabilitation from the Superior Court. To qualify, the applicant must reside continuously in California for a minimum of five years prior to applying. When the Certificate of Rehabilitation is granted by the Superior Court judge, it automatically converts to a pardon application that is submitted to the Governor. The second way is to apply directly to the Governor for a pardon, without pursuing a Certificate of Rehabilitation. Persons living

[33] See 8 CFR § 316.10(c)(2). Significantly, it will eliminate a conviction of an aggravated felony as a permanent bar to establishing the good moral character required for naturalization.

outside of California and persons seeking a pardon of a misdemeanor must apply directly. Others may wish to apply directly because their situation is too urgent to wait for the Certificate of Rehabilitation process. People who have more than one felony from two or more separate prosecutions also apply directly to the Governor, under special rules. See online advisories and a recorded webinar for more information about California pardons.[34]

I. Is the Case on Direct Appeal of Right?

Immigration effect: Appeals are discussed further at Part I.A, above, as a disposition that is not yet a conviction for immigration purposes. In sum, the BIA held that a conviction that is on direct appellate review of the merits, or where the right to appeal has not yet expired or been waived, is not a conviction for immigration purposes because it lacks a sufficient degree of finality. *Matter of J. M. Acosta*, 27 I&N Dec. 420 (BIA 2018). If the time for filing a direct appeal has passed, a rebuttable presumption arises that the conviction is final. Possibly in the future the Ninth Circuit could decline to follow the BIA and could find that a conviction on appeal is a conviction for immigration purposes. *See Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011).

J. Would Reducing a Felony "Wobbler" Conviction to a Misdemeanor Save the Immigration Case? PC § 17(b)(3)

Immigration effect: Many offenses in California can be designated alternatively as either felonies or misdemeanors. These are referred to as "wobblers." In some cases, a felony conviction for a wobbler offense can be reduced to a misdemeanor under PC § 17(b)(3). For more information see ILRC, *California Sentences and Immigration* (Nov. 2020).[35]

There are two ways that a § 17(b)(3) reduction can save the immigration case. First, both TPS and DACA are barred by conviction of a single felony. Changing the felony to a misdemeanor under PC § 17(b)(3) eliminates the felony as a bar.

Second, changing a felony to a misdemeanor under § 17(b)(3) potentially can avoid three different penalties based on conviction of a crime involving moral turpitude (CIMT). However, two of the three penalties are avoided only if the new misdemeanor has a maximum possible sentence of 364 days, rather than a year (365 days).

The three CIMT penalties are discussed below, but first we must consider when a California misdemeanor has a potential sentence of 364 days or less. Under PC §18.5(a) (2015, 2017), all California misdemeanors that are listed in the codes as having a potential sentence of one

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[34] See ILRC, UCLA School of Law Criminal Defense Clinic, *Gubernatorial Pardons in California (*June 2019), https://www.ilrc.org/sites/default/files/resources/gubernatorial_pardons_in_california_ilrc_cdc_2019.pdf. See also ILRC webinar, *California Pardons and Post-Conviction Relief, (*May 2022*),* https://www.ilrc.org/webinars/california-pardons-and-post-conviction-relief.

[35] https://www.ilrc.org/california-sentences-and-immigration.

year actually have a potential sentence of 364 days, and this applies retroactively, *regardless of the date of the conviction*. But in *Velasquez-Rios v. Wilkinson*, 988 F.3d 1081 (9th Cir. 2021), the Ninth Circuit refused to give immigration effect to the PC § 18.5(a) retroactivity clause. It held that for federal immigration purposes, despite § 18.5(a), a "one year" misdemeanor conviction that occurred before January 1, 2015 still has a potential sentence of a year, while a misdemeanor conviction that occurs on or after January 1, 2015 has a potential sentence of just 364 days. See further discussion in advisories.[36]

Velasquez-Rios addressed cases involving conviction of a "straight" misdemeanor, not of a felony wobbler that was reduced to a misdemeanor under § 17(b)(3). Immigration authorities likely will hold that a § 17(b)(3) reduction will result in a misdemeanor with a potential sentence of 364 days only if the original felony conviction occurred on or after January 1, 2015. But advocates can investigate arguments that if the § 17(b)(3) *reduction* took place on or after January 1, 2015, the misdemeanor has a potential 364 days regardless of the date of the original felony conviction. (We also may need to argue that authorities must give effect to § 17(b)(3) at all. See discussion below.)

Here are the three CIMT penalties, and how they may be affected by § 17(b)(3) reductions:

a) A noncitizen qualifies for the benefit of the petty offense exception to the CIMT inadmissibility ground if they are convicted of just one CIMT, which has a potential sentence of not more than one year.[37] A potential sentence of ***a year or less*** is sufficient to qualify. Reducing any wobbler to a misdemeanor, regardless of date, meets this potential sentence requirement. (Also, a sentence of more than six months must not be imposed.)

b) A noncitizen is barred from applying for non-LPR cancellation if convicted of one CIMT conviction that has a potential sentence of *at least one year*.[38] To avoid this, the misdemeanor must have a potential sentence of ***364 days or less***. Authorities are likely to say that a § 17(b)(3) reduction meets this requirement only if the felony conviction occurred on or after January 1, 2015, although advocates can investigate arguments that just the § 17(b)(3) reduction had to occur after that date. (Also, a sentence of more than six months must not be imposed.)

c) A noncitizen is deportable if convicted of a single CIMT, committed within five years of admission, if it has potential sentence of *at least one year*.[39] To avoid this, the conviction must have a potential sentence of ***364 days or less***. This is the same rule as for non-LPR cancellation: Authorities likely will hold that the potential sentence is 364 days only if the

[36] See ILRC, *All Those Rules About Crimes Involving Moral Turpitude (*June 2021), https://www.ilrc.org/all-those-rules-about-crimes-involving-moral-turpitude and ILRC, *California Sentences and Immigration, supra.*

[37] See INA § 212(a)(2)(A)(ii)(II), 8 USC § 1182(a)(2)(A)(ii)(II).

[38] See *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010) addressing INA § 240A(b)(1)(C), 8 USC §1229b(b)(1)(C).

[39] See the deportation ground at INA § 237(a)(2)(A)(i), 8 USC § 1227(a)(2)(A)(i).

felony conviction occurred on or after January 1, 2015, but advocates can investigate arguments that only the § 17(b)(3) had to occur after that date. (There is no requirement regarding sentence imposed.)

ICE Attacks on § 17(b)(3): In some cases, ICE is arguing that a PC § 17(b)(3) reduction does not have immigration effect.[40] Counsel should be prepared to argue that it does have effect, as the Ninth Circuit repeatedly has found.[41] Some federal courts, including the Ninth Circuit in *Velasquez-Rios, supra,* have taken the position that a new state law that (a) takes effect after the conviction occurred, and (b) retroactively changes the prior conviction, does not have effect in federal immigration or criminal proceedings. (This is why an ICE challenge to a Prop 47 redesignation as a misdemeanor may be successful.) But as the Ninth Circuit recently explained, § 17(b)(3) is distinguishable because it is not a new law exerting retroactive effect on a prior conviction. Rather, "the 'wobbler' statute permitted a range of possible classifications for the offense *at the time of conviction*." *Velasquez-Rios,* 988 F.3d at 1088 (emphasis added).

Defenders can help a defendant avoid this whole fight by bargaining for the offense to be designated a misdemeanor under § 17(b)(3) *at the time probation is imposed.* For example, negotiate an agreement where the defendant pleads guilty but the sentencing hearing is put off for weeks or months so that the defendant can show good behavior or meet goals set by the DA. In exchange, the DA will support designation as a misdemeanor under § 17(b)(3) at the sentencing hearing. ICE should not be able to challenge that disposition. The offense also can be designated a misdemeanor earlier in the case; see options at PC § 17(b).

It appears that USCIS is not contesting § 17(b)(3) reductions. Neither are all ICE attorneys.

Requirements: Section 17(b)(3) provides that a wobbler conviction is a misdemeanor "[w]hen the court grants probation to a defendant and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor." One can file the § 17(b)(3) application on the day that probation is imposed (sentencing hearing), or anytime afterwards. For example, in *Garcia-Lopez v. Ashcroft,* 334 F.3d 840 (9th Cir. 2003) the Ninth Circuit upheld the effect of a § 17(b)(3) reduction to a misdemeanor when the person reduced it years later and after their removal proceedings had begun. Granting the motion is a discretionary decision that may be based on the nature of the offense, the person's equities and rehabilitation, and other factors. Counsel should be prepared to present evidence showing that a discretionary grant is warranted.

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[40] See discussion in Part V of ILRC, *California Sentence and Immigration,* cited above.

[41] See *Garcia-Lopez v. Ashcroft*, in text, upholding immigration effect of § 17(b)(3) reduction, overruled and reaffirmed in part by *Ceron v. Holder*, 747 F.3d 773, 777-778 (9th Cir. 2014) (en banc), and see *Lafarga v. INS,* 170 F.3d 1213, 1216 (9th Cir. 1999) (upholding same immigration effect of Arizona wobbler). See *Velasquez-Rios v. Wilkinson*, in text, distinguishing its decision in *Garcia-Lopez* to give effect to § 17(b)(3) reduction from its decision not to give effect to the new PC § 18.5(a) retroactivity provision. See also *Matter of Cortez,* 25 I&N Dec. 301, 306 (BIA 2014) and discussion in *Ewing v. California*, 538 U.S. 11, 16 (2003).

Appendix: Text of Former Deferred Entry of Judgment Statute PC § 1000 et seq. as of 2017

From January 1, 1997 to December 31, 2017, California Penal Code §§ 1000 - 1000.4 set out a Deferred Entry of Judgment (DEJ) proceeding that required a guilty plea and thus created a conviction for immigration purposes. The statute as of 2017 is reprinted here for use in obtaining post-conviction relief, e.g., under PC §§ 1203.43, 1473.7(e)(2). See Part II, above. Effective January 1, 2018, the statute was amended to return to pretrial diversion, per AB 208 (2017). See current PC § 1000.

Cal. Penal Code § 1000 – 1000.4
Effective: January 1, 2015 to December 31, 2017

§ 1000. Application of chapter to certain violations

(a) This chapter shall apply whenever a case is before any court upon an accusatory pleading for a violation of Section 11350, 11357, 11364, or 11365, paragraph (2) of subdivision (b) of Section 11375, Section 11377, or Section 11550 of the Health and Safety Code, or subdivision (b) of Section 23222 of the Vehicle Code, or Section 11358 of the Health and Safety Code if the marijuana planted, cultivated, harvested, dried, or processed is for personal use, or Section 11368 of the Health and Safety Code if the narcotic drug was secured by a fictitious prescription and is for the personal use of the defendant and was not sold or furnished to another, or subdivision (d) of Section 653f if the solicitation was for acts directed to personal use only, or Section 381 or subdivision (f) of Section 647 of the Penal Code, if for being under the influence of a controlled substance, or Section 4060 of the Business and Professions Code, and it appears to the prosecuting attorney that, except as provided in subdivision (b) of Section 11357 of the Health and Safety Code, all of the following apply to the defendant:

(1) The defendant has no conviction for any offense involving controlled substances prior to the alleged commission of the charged offense.

(2) The offense charged did not involve a crime of violence or threatened violence.

(3) There is no evidence of a violation relating to narcotics or restricted dangerous drugs other than a violation of the sections listed in this subdivision.

(4) The defendant's record does not indicate that probation or parole has ever been revoked without thereafter being completed.

(5) 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.

(6) The defendant has no prior felony conviction within five years prior to the alleged commission of the charged offense.

(b) The prosecuting attorney shall review his or her file to determine whether or not paragraphs (1) to (6), inclusive, of subdivision (a) apply to the defendant. Upon the agreement of the prosecuting attorney, law enforcement, the public defender, and the presiding judge of the criminal division of the superior court, or a judge designated by the presiding judge, this procedure shall be completed as soon as possible after the initial filing of the charges. If the defendant is found eligible, 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 deferred entry of judgment at the arraignment. If the defendant is found ineligible for deferred entry of judgment, 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. The sole remedy of a defendant who is found ineligible for deferred entry of judgment is a postconviction appeal.

(c) All referrals for deferred entry of judgment granted by the court pursuant to this chapter shall be made only to programs that have been certified by the county drug program administrator pursuant to Chapter 1.5 (commencing with Section 1211) of Title 8, 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 set forth in this subdivision.

(d) Deferred entry of judgment for a violation of Section 11368 of the Health and Safety Code shall not prohibit any administrative agency from taking disciplinary action against a licensee or from denying a license. Nothing in this subdivision shall be construed to expand or restrict the provisions of Section 1000.4.

(e) Any defendant who is participating in a program referred to in this section may be required to undergo analysis of his or her urine for the purpose of testing for the presence of any drug as part of the program. However, urine analysis results shall not be admissible as a basis for any new criminal prosecution or proceeding.

§ 1000.1. Determination of application of chapter; notification; deferred entry of judgment; investigation; final determination by court; admissibility of evidence; effect of guilty plea

Effective: January 1, 2011 to December 31, 2017

(a) If the prosecuting attorney determines that this chapter may be applicable to the defendant, he or she shall advise the defendant and his or her attorney in writing of that determination. This notification shall include all of the following:

(1) A full description of the procedures for deferred entry of judgment.

(2) A general explanation of the roles and authorities of the probation department, the prosecuting attorney, the program, and the court in the process.

(3) A clear statement that in lieu of trial, the court may grant deferred entry of judgment with respect to any crime specified in subdivision (a) of Section 1000 that is charged, provided that the defendant pleads guilty to each of these charges and waives time for the pronouncement of judgment, and that upon the defendant's successful completion of a program, as specified in subdivision (c) of Section 1000, the positive recommendation of the program authority and the motion of the prosecuting attorney, the court, or the probation department, but no sooner than 18 months and no later than three years from the date of the defendant's referral to the program, the court shall dismiss the charge or charges against the defendant.

(4) A clear statement that upon any failure of treatment or condition under the program, or any circumstance specified in Section 1000.3, the prosecuting attorney or the probation department or the court on its own may make a motion to the court for entry of judgment and 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 this code.

(5) An explanation of criminal record retention and disposition resulting from participation in the deferred entry of judgment program and the defendant's rights relative to answering questions about his or her arrest and deferred entry of judgment following successful completion of the program.

(b) If the defendant consents and waives his or her right to a speedy trial or a speedy preliminary hearing, the court may refer the case to the probation department or the court may summarily grant deferred entry of judgment if the defendant pleads guilty to the charge or charges and waives time for the pronouncement of judgment. When directed by the court, the probation department shall make an investigation and take into consideration the defendant's age,

employment and service records, educational background, community and family ties, prior controlled substance use, treatment history, if any, demonstrable motivation, and other mitigating factors in determining whether the defendant is a person who would be benefited by education, treatment, or rehabilitation. The probation department shall also determine which programs the defendant would benefit from and which programs would accept the defendant. The probation department shall report its findings and recommendations to the court. The court shall make the final determination regarding education, treatment, or rehabilitation for the defendant. If the court determines that it is appropriate, the court shall grant deferred entry of judgment if the defendant pleads guilty to the charge or charges and waives time for the pronouncement of judgment.

(c) No statement, or any information procured therefrom, made by the defendant to any probation officer or drug treatment worker, that is made during the course of any investigation conducted by the probation department or treatment program pursuant to subdivision (b), and prior to the reporting of the probation department's findings and recommendations to the court, shall be admissible in any action or proceeding brought subsequent to the investigation.

No statement, or any information procured therefrom, with respect to the specific offense with which the defendant is charged, that is made to any probation officer or drug program worker subsequent to the granting of deferred entry of judgment, shall be admissible in any action or proceeding, including a sentencing hearing.

(d) A defendant's plea of guilty pursuant to this chapter shall not constitute a conviction for any purpose unless a judgment of guilty is entered pursuant to Section 1000.3.

§ 1000.2. Hearing by court; determination of deferred entry of judgment; exoneration of bail; progress reports

Effective: [See Text Amendments] to December 31, 2017

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 under this chapter and if the defendant should be granted deferred entry of judgment. If the court does not deem the defendant a person who would be benefited by deferred entry of judgment, or if the defendant does not consent to participate, the proceedings shall continue as in any other case.

At the time that deferred entry of judgment is granted, any bail bond or undertaking, or deposit in lieu thereof, on file by or on behalf of the defendant shall be exonerated, and the court shall enter an order so directing.

The period during which deferred entry of judgment is granted shall be for no less than 18 months nor longer than three years. Progress reports shall be filed by the probation department with the court as directed by the court.

§ 1000.3. Unsatisfactory performance by defendant, or engagement in criminal conduct; motion for entry of judgment; notice and hearing; sentencing hearing; dismissal for satisfactory performance; defendant's financial obligation to program

Effective: January 1, 2001 to December 31, 2017

If it appears to the prosecuting attorney, the court, or the probation department that the defendant is performing unsatisfactorily in the assigned program, or that the defendant is not benefiting from education, treatment, or rehabilitation, or that the defendant is convicted of a misdemeanor that reflects the defendant's propensity for violence, or the defendant is convicted of a felony, or the defendant has engaged in criminal conduct rendering him or her unsuitable for deferred entry of judgment, the prosecuting attorney, the court on its own, or the probation department may make a motion for entry of judgment.

After notice to the defendant, the court shall hold a hearing to determine whether judgment should be entered.

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 crime as indicated above, or that the defendant has engaged in criminal conduct rendering him or her unsuitable for deferred entry of judgment, 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 this code.

If the defendant has performed satisfactorily during the period in which deferred entry of judgment was granted, at the end of that period, the criminal charge or charges shall be dismissed.

Prior to dismissing the charge or charges or rendering a finding of guilt and entering judgment, the court shall consider the defendant's ability to pay and whether the defendant has paid a diversion restitution fee pursuant to Section 1001.90, if ordered, and has met his or her financial obligation to the program, if any. As provided in Section 1203.1b, the defendant shall reimburse the probation department for the reasonable cost of any program investigation or progress report filed with the court as directed pursuant to Sections 1000.1 and 1000.2.

§ 1000.4. Successful completion of program; record; disclosure of arrest

Effective: [See Text Amendments] to December 31, 2017

(a) Any record filed with the Department of Justice shall indicate the disposition in those cases deferred pursuant to this chapter. Upon successful completion of a deferred entry of judgment 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 in subdivision (b). 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.

(b) The defendant shall be advised that, regardless of his or her successful completion of the deferred entry of judgment program, the arrest upon which the judgment was deferred may be disclosed by the Department of Justice in response to any peace officer application request and that, notwithstanding subdivision (a), this section does not relieve him or her of the obligation to disclose the arrest in response to any direct question contained in any questionnaire or application for a position as a peace officer, as defined in Section 830.

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