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California Committee on Revision of the Penal Code

Re: **Need for Pretrial Diversion Programs Following a Plea of "Not Guilty" Rather Than a Plea of "Guilty"**

Dear Members of the Committee,

The Immigrant Legal Resource Center (ILRC) is a national nonprofit, headquartered in San Francisco, CA, with over forty years of expertise in the complex interplay between immigration and criminal law. The ILRC has extensively analyzed, written about, taught, and advised on the immigration effect of California crimes and sentences. We have worked closely to educate and advise California public defenders, prosecutors, superior court judges, and stakeholders in delinquency proceedings about immigration consequences. Among other forms of technical assistance, we provide regular trainings to California Judicial Council, the California Public Defender Association, the California District Attorney Association, and the County Welfare Directors Association about the unique needs of system-impacted noncitizens.

In the past six years, the ILRC has helped to draft and advocate for the passage of several California laws that affect this area. See, for example, California Penal Code §§ 18.5, 1016.2, 1016.3, 1203.43, 1473.7 and the amendment of Penal Code § 1000, reforming pretrial drug diversion.[1]

Understanding the immigration consequences of the criminal code is especially important in California, which has the largest noncitizen population in the United States, both in percentage of the population and in total numbers. Over 25% of people residing in California were born in another country. Mixed immigration status households are the norm; over 50% of all children in our state reside in a household headed by at least one foreign-born person, and the great majority of these children are U.S. citizens.[2]

Immigration law has evolved over time so that now "[t]he 'drastic measure' of deportation or removal, *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948), is [] virtually inevitable for a vast number of noncitizens convicted of

[1] You can access our advisories about these new laws available at www.ilrc.org/crimes.
[2] US Census 2010, *available at* https://www.census.gov/quickfacts/CA (last accessed June 2020).

crimes." *Padilla v. Kentucky*, 559 U.S. 356 (2010). Immigration law can function in bizarre and counterintuitive ways; some misdemeanors and infractions carry deportation consequences, while some felony strike offenses do not carry any immigration impact whatsoever. Some of the most immigration damaging misdemeanors or infractions include Pen. C. §§ 245(a) (assault with a deadly weapon); 273.5 (domestic violence); 422 (criminal threats); and 484 (petty theft); and Health & Safety Code §§ 11358 (cultivation of marijuana); 11350 (possession of a controlled substance); 11377 (possession of a controlled substance). Examples of common immigration neutral dispositions, whether classified as felonies or misdemeanors, include Pen. C. §§ 32 (accessory after the fact); 136.1(b)(1) (witness dissuasion); 207 (kidnapping) 236 (false imprisonment); 242 (assault); 243(e) (domestic assault); 459 (burglary).[3]

We understand that the Committee is currently considering recommendations regarding diversion. We write to underscore the critical distinction for noncitizen defendants of pretrial diversion, as compared to post-guilty plea diversion. In short, regardless of what state law may provide:

- Any state diversion program that requires a guilty plea followed by any program requirement (e.g., to attend a class, pay a fine, or complete probation conditions) is a conviction for immigration purposes, leading, in many cases, to mandatory deportation, regardless of the classification of the charged offense. This is true even if the guilty plea is later vacated for rehabilitative purposes as it can be in post-plea diversion program.[4]
- In contrast, a state diversion program that diverts the person after a plea of not guilty, or before any plea, is not a conviction for immigration purposes.

This is because federal immigration law has its own statutory definition of when a conviction occurs, which is not dependent on the convicting jurisdiction's characterization. Federal statute provides that in the case of alternative dispositions even where there is no formal judgment of conviction there nonetheless is a conviction for immigration purposes as long as (a) there is a plea or judicial finding of guilt or of facts sufficient for guilt, and (b) the judge imposes any penalty, punishment, or restraint.[5] A later dismissal of the plea or conviction does not matter for federal immigration law if that dismissal is done for rehabilitative purposes as it would be in a diversion program.[6]

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[3] For a list of immigration neutral offenses see *Public Facing Chart: Selected Immigration Defenses for Selected California Crimes, available at* https://www.ilrc.org/sites/default/files/resources/pub_facing_ca_chart-20190312v2.pdf (last accessed June 2020).

[4] *See Matter of Roldan*, 22 I&N Dec. 512, 523 (1999) (holding that that an immigrant would still be deportable "notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative procedure.").

[5] See 8 USC 1101(a)(48)(A) and see, e.g., *Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017).

[6] See *Matter of Adamiak*, 23 I&N Dec. 878, 879 (BIA 2006) ("In our decisions addressing the effect of State court orders vacating convictions, we have distinguished between situations in which a conviction is vacated based on post-conviction events, such as rehabilitation, and those in which a conviction is vacated because of a defect in the underlying criminal proceedings.").

California diversion statutes such as drug diversion under Penal Code § 1000 et. seq (as of January 1, 2018) and mental health diversion under Penal Code § 1001.36 do not require a guilty plea. Therefore, a successful diversion participant in these programs does not have a "conviction" for immigration purposes. But programs such as drug diversion under Penal Code § 1210 (Proposition 36), or the former deferred entry of judgment, Penal Code § 1000 et seq. (1997-2017), do require a guilty plea and do create a conviction for immigration purposes, even for successful participants who are found to have satisfactorily completed all requirements, and whose criminal charges therefore are "dismissed." Individuals who participate in these programs are deportable, even if the offense charged was classified as an infraction or misdemeanor.

The importance of this can be illustrated by the process of changing Penal Code § 1000 from a post-guilty plea "deferred entry of judgment" ("DEJ") program, to a post-not guilty plea pretrial diversion program. Between 1997 and 2017, all defendants who were offered DEJ were informed that if they successfully completed all requirements, they would have no conviction "for any purpose," have no arrest record, and could not be denied any legal benefit based on the incident. See former Penal Code §§ 1000.1(d), 1000.3, 1000.4 (1997-2017). However, in direct conflict with that statutory promise, noncitizens who successfully completed the program emerged with an extremely damaging "drug conviction" for immigration purposes. We estimate that this caused thousands of noncitizen Californians to be deported,[7] and it may have caused U.S. citizens to be denied other federal benefits. To address this, the Legislature took two steps:

- In 2015, the Legislature passed AB 1352 to undo some of the damage that was done to DEJ participants based on the misadvice set out in former Penal Code § 1000. This bill created Penal Code § 1203.43, a post-conviction relief vehicle that permits a person who completed DEJ requirements to vacate their guilty plea for cause, based on the misadvice about reach of a DEJ dismissal. Immigration authorities require vacaturs to be based on legal or procedural defect to eliminate convictions for immigration purposes.[8] Since Penal Code § 1203.43 became law in 2016, thousands of Californians have obtained this relief; over 1,000 such applications were filed in Santa Clara County alone.
- In 2017, the Legislature passed AB 208, which changed Penal Code § 1000 from DEJ to a true pretrial, no guilty plea, diversion statute. That is the program in effect today.

[7] See Human Rights Watch, *A Price Too High: Detention and Deportation of Immigrants in the US for Minor Drug Offenses* (June 2015), *available at* https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses.

[8] See *Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017) (finding that a Texas pretrial diversion program that required an admission of guilt resulted in a conviction for immigration purposes notwithstanding the subsequent dismissal of the guilty plea); *Matter of Roldan*, 22 I&N Dec. 512, 528 (1999) (finding petitioner deportable on the basis of a charge that had been dismissed based on a state rehabilitative statute, holding that "state rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding are of no effect in determining whether an alien is considered convicted for immigration purposes."); *Matter of Pickering*, 23 I&N Dec. 621, 624 (2003) ("[I]f a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A). If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes.)

Why did the Legislature make these changes? First, the Legislature wanted to protect the due process rights of California defendants and ensure that they did not agree to plead guilty and enter diversion based on misrepresentation. Successful completion of diversion promises erasure of criminal records, and that is simply inaccurate for noncitizens unless the program does not require a guilty plea.

Second, the Legislature was concerned that the lack of any feasible diversion program for the large noncitizen population resulted in clogging the courts, and inhibited access to much needed diversion programing. Immigrant defendants who understood the adverse immigration consequence of DEJ had to turn down DEJ offers, and instead engaged in aggressive plea negotiation strategies appropriate to a far more serious charge. These individuals were forced to turn down potentially helpful DEJ programming in exchange for a non-deportable disposition.

Finally, there was growing consensus about the need to stem the human and economic toll caused from even "dismissed" diversion convictions. Mass deportations fracture communities and deplete state resources. It is estimated that from 2008 to 2015, approximately 50,000 parents of U.S. citizen children who reside in California were deported. Besides the human cost, removing these parents from their children has a fiscal impact on courts handling dependency, delinquency, foreclosure, bankruptcy, and other proceedings, and on the welfare system and other social services.

As this Committee considers reforms to diversion, in order to preserve access for noncitizen defendants, it is imperative that the diversion program be pre-arrest, pre-charge, or pre-trial (after a plea of not guilty), without requiring an admission of guilt. If that is not done, the statute must contain some warning that it will result in a conviction for noncitizens and potentially U.S. citizens who apply for certain federal benefits.

If it is useful, ILRC staff would be happy to provide any additional information to the Committee or consult on this or any other matter about the penal code's impact on noncitizens.

Sincerely,

Rose Cahn

Rose Cahn
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