PRACTICE ADVISORY[1]
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NEW CALIFORNIA DRUG PROVISION HELPS IMMIGRANTS:
PLEA WITHDRAWAL AFTER DEFERRED ENTRY OF JUDGMENT (DEJ)

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Effective January 1, 2016, a new California drug law will help defendants avoid catastrophic immigration consequences for minor offenses. The text of the new law, California Penal Code § 1203.43, is set out in **Appendix I**.

Anyone who has successfully completed deferred entry of judgment (DEJ) will be able to withdraw the plea, in a way that is expected to work for immigration purposes. To withdraw the plea, the person only needs to show that DEJ was successfully completed and the case was dismissed. There is no requirement to show prejudice. People who previously completed DEJ, and those who complete DEJ in the future, will qualify for this relief.

Our profound thanks go to Assemblymember Susan Talamantes Eggman, who championed this bill in the California legislature. The ILRC and our colleagues at the Drug Policy Alliance, ACLU, MALDEF, CHIRLA, NCLR, and Human Rights Watch were co-sponsors and drafters of the bill.

1. Background

Since 1997, California law has permitted a criminal court judge to offer deferred entry of judgment (DEJ) to qualifying defendants charged with a first, minor drug offense.[2] See P.C. § 1000 et seq.

Under DEJ, the defendant agrees to enter a guilty plea and then is given from 18 to 36 months to complete a drug program. The program, which could be completed in less than six months, might include classes, attendance at NA/AA, counseling, or other requirements. If the defendant

[1] The Immigrant Legal Resource Center is a national, nonprofit resource center that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The mission of the ILRC is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. For the latest version of this practice advisory, please visit www.ilrc.org. For questions regarding the content of this advisory, contact Kathy Brady at kbrady@ilrc.org.

[2] DEJ may be offered to defendants who are not disqualified due to prior dispositions or other current charges, and who are charged with Cal H&S §§ 11350, 11357, 11364, 11365, 11375(b)(2), 11377, 11550; VC § 23222(b); H&S § 11358 if the marijuana is for personal use; H&S 11368 if the drug was secured by fictitious prescription and is for the personal use of the defendant; PC § 653f(d) if for acts directed to personal use only; PC §§ 381, 647(f) if for being under the influence of a controlled substance; B&P § 4060 charges or prior dispositions. See PC § 1000(a).

successfully completes the requirements, the statute provides that he or she will have an entirely clean slate: the court will dismiss the charges, there is no conviction "for any purpose," the person is legally entitled to deny that the arrest and diversion occurred, and no denial of any license, employment, or benefit may flow from the incident. See P.C. §§ 1000.1(d), 1000.3, 1000.4.

Tragically, for noncitizens this statutory promise is utterly untrue. Under federal immigration law, a successfully completed DEJ remains an extremely damaging drug "conviction." It causes deportability and inadmissibility, triggers mandatory immigration detention without possibility of bond, and makes it impossible for a spouse or child of a U.S. citizen to get lawful status.

Since 1997, tens of thousands of noncitizen California residents who were charged with very minor drug offenses have accepted the offer of DEJ and pled guilty, relying on the promise that if they fulfilled all requirements they would not have a conviction for any purpose. Unfortunately, these people are subject to severe immigration consequences based on their DEJ "conviction." Thousands of these people already have been deported, and thousands more are at risk of deportation.

The new law provides a simple way for immigrants to eliminate their California DEJ "convictions" for immigration purposes, so that the promise in the DEJ statute will be fulfilled.

2. New Withdrawal of Plea After DEJ

Immigration law provides that a conviction occurs once there is a guilty plea or finding of guilt, coupled with any punishment or restraint, including fines or assignment to drug programs. See 8 USC § 1101(a)(48)(A). The fact that California says that there is no conviction because the person later fulfilled certain requirements does not change this. To eliminate a conviction for immigration purposes, the plea must be withdrawn *for cause*, based on some legal error in the proceedings.[3]

In P.C. § 1203.43 the Legislature acknowledges that the DEJ statute misinformed defendants, including all non-citizens, about the consequences of the guilty plea, and for that reason deems the plea legally "invalid." Withdrawal of the guilty plea is thus for cause, based on this legal defect.

New Penal Code § 1203.43(a) provides:

> (a) (1) The Legislature finds and declares that the statement in Section 1000.4, that "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" constitutes 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. (2) Accordingly, the Legislature finds and declares that based on this misinformation and the potential harm, the defendant's prior plea is invalid.

[3] See, e.g., *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (concluding that in light of the language and legislative purpose of the definition of a "conviction" at section 101(a)(48) of the Act, "there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of postconviction events, such as rehabilitation or immigration hardships"); see also *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) (according full faith and credit to a New York court's vacation of a conviction on the merits); see also *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (conviction vacated for failure to give legislatively required advisal of immigration consequences is eliminated for immigration purposes).

Procedure. The application can be granted without a hearing. Section 1203.43(b) provides that the court "shall, upon request of the defendant" withdraw the plea in any DEJ case in which the charges were dismissed after completion of the DEJ requirements, and then shall dismiss the case again. If the court records showing the resolution of the DEJ case are no longer available, the applicant will submit a sworn declaration that charges were dismissed based on successful completion of DEJ. The declaration will be presumed to be true if the person also submits a California DOJ record that either shows successful completion of DEJ or does not show a final resolution of the DEJ case.

Section 1203.43 has different immigration effect from a general expungement (as immigration authorities call it) such as P.C. § 1203.4(a). In most cases[4] expungement under § 1203.4 will not eliminate a conviction for immigration purposes, because it is mere "rehabilitative" relief that the person earns by completing probation. By contrast, § 1203.43 does eliminate the conviction for immigration purposes, because the plea is deemed invalid due to the fact that the DEJ statute provided "misinformation about the actual consequences of making a plea."

Section 1203.43 will be in effect as of January 1, 2016. Pending creation of a government application form, advocates will provide a model form. Check at www.ilrc.org/crimes.

3. Advice for Criminal Defenders: Past and Current Cases

Prior cases. Past DEJ recipients who may benefit from § 1203.43 relief need to know about this relief. Until their application is granted, these people have a drug "conviction" making them subject to arrest, detention, and deportation. It may make sense to combine review of cases for § 1203.43 relief with case review for Prop 47 purposes. The target population is:

- ✓ All noncitizen defendants who successfully completed DEJ requirements.
- ✓ Depending on the county and the case, some noncitizen defendants who dropped out of DEJ may be able to return to the process or even to re-open a termination, and complete the program. If the court dismisses charges based on successful completion of DEJ requirements, these people should be eligible for § 1203.43. Section 1203.43 does not include a time limit or requirement that there must never have been a termination order.

Current charges. For new charges, criminal defenders should continue to make every effort to obtain an immigration-neutral disposition other than DEJ. Or, they should construct the DEJ plea carefully so that even if it becomes a "conviction," it will not have immigration consequences.

DEJ is never optimal, because the defendant might not successfully complete the requirements and then will have a real conviction. Moreover, even a successful defendant is exposed to risk of arrest and detention by immigration authorities up until the § 1203.43 application approved. Immigration authorities can commence removal proceedings as soon as a guilty plea and referral to a diversion program is made, i.e. before the program is completed. A defendant in immigration detention cannot complete the DEJ requirements. Even if the defendant does complete the program, it appears that

[4] If certain conditions are met, immigration effect will be given to withdrawal of plea under § 1203.4, Prop 36, or other rehabilitative relief relating to a single conviction for possession of a drug or possession of paraphernalia that occurred before July 15, 2011. *Nunez-Reyes v. Holder,* 646 F.3d 684 (9th Cir. 2011) (en banc). This relief also can be useful in applications for prosecutorial discretion and deferred action, including Deferred Action for Childhood Arrivals (DACA), and in avoiding treatment as an "enforcement priority." See memos at www.ilrc.org/crimes.

a criminal court judge cannot end DEJ and dismiss the charges until the DEJ period (at least 18 months) has passed.

Alternatives to DEJ include a plea to P.C. § 32 or other non-drug offense, a negotiated informal pretrial diversion without a guilty plea, or misdemeanor pretrial diversion at P.C. § 1001 with no guilty plea. Or, craft a guilty plea, including a guilty plea under DEJ, to involve an unspecified, or specific non-federal, substance. See **Appendix 2** for information about alternate pleas.

If an alternative to DEJ is not feasible, request that diversion be 18 months (the minimum) rather than 36 months (the maximum). Advise the non-citizen defendant not to travel outside the U.S., apply for a renewal of a green card, apply for naturalization, or apply for any other immigration benefit, because the person is likely to be placed in removal proceedings. There are some exceptions for certain forms of humanitarian immigration relief, as long as it was not a drug trafficking offense,[5] but immigration counsel should be consulted.

Defense counsel should apply for relief under § 1203.43 for all non-citizen defendants who successfully complete DEJ, because every non-citizen defendant will be in jeopardy without it.

4. Advice for Immigration Counsel

See the discussion about prior cases in Part 3, above. Immigration counsel should assist any non-citizen defendant who has successfully completed DEJ, or who potentially could do so, to pursue a withdrawal of plea under new P.C. § 1203.43 *before* seeking any immigration benefit or relief from removal. Counsel should go through past cases to identify clients who were warned away from filing applications due to a DEJ "conviction," and advise them of the new option.

If a client is already in removal proceedings but has a DEJ pending, counsel should request that proceedings be continued or administratively closed pending completion of DEJ and withdrawal of plea pursuant to § 1203.43. Counsel may investigate arguments based on *Matter of Montiel*, 26 I&N Dec. 555 (BIA 2015), which held that for purposes of judicial efficiency, removal proceedings may be continued pending the adjudication of a direct appeal of a conviction by trial. The § 1203.43 motion arguably presents an even more compelling case: while an appeal might or might not be sustained, relief is automatic under § 1203.43 once the client has completed the program and the DEJ term has elapsed. If the client has not yet completed the drug program, show the IJ that the client is enrolled and doing well; investigate whether there is a way to complete it more quickly. Point out that because the guilty plea was invalid at inception (see P.C. § 1203.43(a)), it will be vacated as of the date it was entered and proceedings will need to be reopened to reconsider any removal order based in whole or in part upon the "conviction."

Counsel also may investigate arguments based on *Matter of Tinajero*, 17 I&N Dec. 424 (BIA 1980). This case was decided when a § 1203.4 (general) expungement was effective for immigration purposes, and it held that granting a continuance during the entire probationary period, in order to give the person the opportunity to qualify for the expungement, was appropriate.[6]

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[5] For more information on eligibility for relief from removal despite a possession conviction, see the free ILRC publication *Defenders' Immigration Relief Toolkit* at http://www.ilrc.org/files/documents/17_relief_toolkit_jan_2015_final.pdf

[6] *Tinajero* was based partly on the fact that INS had a policy in place that it should not bring removal proceedings in that circumstance. This could be analogized to current guidelines on prosecutorial discretion, which at least officially provide that a conviction, much less pending DEJ, of a possessory drug offense is not an "enforcement priority," and arguably proceedings should not be started solely on that basis.

If necessary, consider other post-conviction relief. A motion to withdraw the plea for good cause pursuant to P.C. § 1018 can be filed based on the same legal defect § 1203.43 recognizes, namely statutory misinformation. The six-month deadline should not be an issue. While a § 1018 motion must be filed "at any time before judgment or within six months after an order granting probation is made if entry of judgment is suspended," with a pending DEJ there has been neither a judgment nor an order granting probation, so the six-month period has not started.

If a person was removed in whole or in part because of a DEJ, immigration counsel can file a motion to reopen after withdrawing the plea pursuant to § 1203.43. Because the plea was deemed legally invalid at its inception, a removal based on the conviction should be held invalid.

5. Needed: Pretrial Diversion instead of DEJ

Until 1997, California had a successful pretrial diversion for first-time drug offenders. It operated identically to DEJ except that the defendant offered a not-guilty plea, rather than a guilty plea, before being diverted to a program. In 2015 the California legislature not only passed AB 1352 to create new P.C. § 1203.43, but also passed AB 1351, which would have eliminated DEJ and brought back pretrial diversion. Unfortunately Governor Jerry Brown vetoed AB 1351, although he signed AB 1352.

The result is that the false statement in Penal Code § 1000, providing that DEJ is not a conviction "for any purpose," remains in force, even as new § 1203.43 will continue to permit withdrawal of a DEJ guilty plea due to this misinformation.

California has a misdemeanor pretrial diversion law, although it never or rarely has been used for drug charges. See P.C. § 1001. Now that possessory offenses are misdemeanors under Prop 47, counsel may ask prosecutors to consider using § 1001 for this purpose for first-time minor offenders, perhaps coupled with waivers of right to jury trial, etc. Considering this option is in keeping with the prosecutor's duty to consider immigration consequences in order to reach a just solution. See new P.C. § 1016.3, effective January 1, 2016.

Appendix I. Text of Penal Code § 1203.43

(a) (1) The Legislature finds and declares that the statement in Section 1000.4, that "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" constitutes 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.

(2) Accordingly, the Legislature finds and declares that based on this misinformation and the potential harm, the defendant's prior plea is invalid.

(b) For the above-specified reason, in any case in which a defendant was granted deferred entry of judgment on or after January 1, 1997, has performed satisfactorily during the period in which deferred entry of judgment was granted, and for whom the criminal charge or charges were dismissed pursuant to Section 1000.3, the court shall, upon request of the defendant, permit the defendant to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty, and the court shall dismiss the complaint or information against the defendant. If court records showing the case resolution are no longer available, the defendant's declaration, under penalty of perjury, that the charges were dismissed after he or she completed the requirements for deferred entry of

judgment, shall be presumed to be true if the defendant has submitted a copy of his or her state summary criminal history information maintained by the Department of Justice that either shows that the defendant successfully completed the deferred entry of judgment program or that the record is incomplete in that it does not show a final disposition. For purposes of this section, a final disposition means that the state summary criminal history information shows either a dismissal after completion of the program or a sentence after termination of the program.

APPENDIX II CRAFTING A SAFER PLEA

For more information on defense strategies, see the online ILRC resource: *Note: Controlled Substances*.[7] This Appendix provides a brief explanation of how to craft a plea using the "specific non-federal substance" and the "unspecified substance" defenses. These defenses can be used in a regular plea, or in a guilty plea within a DEJ procedure, which might be an ideal solution.

Immigration law defines a controlled substance as a substance listed in *federal* drug schedules. The grounds of deportability and inadmissibility based on a conviction "relating to a controlled substance," and the definition of a "drug trafficking" aggravated felony, all provide that controlled substance is defined at 21 USC § 802.[8] If a state offense involves a substance not listed there, conviction will not trigger these penalties. The test is whether the substance was on the federal list at the time of the person's conviction. *Mellouli v. Lynch,* 135 S. Ct. 1980, 1982 (2015).

California statutes such as H&S Code §§ 11377-79 include some substances that are not on the federal schedules. This disparity gives rise to two defenses.

Unspecified substance defense. To set up this defense counsel must sanitize the entire record of conviction so that it contains no mention of a specific controlled substance (e.g., methamphetamines), but refers only to "a controlled substance." The record that must be sanitized includes the charge pled to; the plea colloquy or any plea agreement or form signed by the defendant; the judgment; or the factual basis for the plea. Thus counsel may need to bargain for a new or amended charge, and must take care with any factual basis for the plea.[9] Beware of written notations on documents, including abstract of judgment, that refer to the charge. The best plea is to § 11377, rather than §§ 11350 or 11354.

The unspecified substance defense works if the issue is deportability, but *not* if the issue is eligibility for lawful status or relief, at least under current law. Thus it will prevent a permanent resident who is not already deportable from becoming deportable for a drug conviction. But it will not help an undocumented person, or a permanent resident who already is deportable for a prior conviction, to remain eligible to apply for some relief or lawful status.

Specific non-federal substance defense. This may be quite difficult to obtain, but if you can obtain it, it will protect persons who need to apply for relief or lawful status. The person must plead to conduct relating to a specific California substance that is not on the federal list, such as § 11377

[7] See *§ N.8 Controlled Substances* in the California Chart and Notes section at www.ilrc.org/crimes.

[8] See 8 USC §§ 1227(a)(2)(B)(i) (deportability for controlled substance conviction), 1182(a)(2)(A)(i)(II) (inadmissibility for same), 1101(a)(43)(B) (drug trafficking aggravated felony).

[9] To avoid stipulating to any factual basis, see *People v. Palmer* (2013) 58 Cal.4th 110. If you must stipulate, choose documents that you have identified or created that do not include damaging information, for example a written plea agreement or sanitized complaint. See *People v. Holmes* (2004) 32 Cal.4th 432.

involving chorioinic gonadotropin.[10] In that case the conviction is not an inadmissible or deportable controlled substance conviction, or a drug trafficking aggravated felony, for any immigration purpose.

[10] Khat is another option. See *Quijada-Coronado v. Holder*, 759 F.3d 977, 983 and n.1 (9th Cir. 2014).