



AB 1352

ELIMINATING THE UNINTENDED IMMIGRATION CONSEQUENCES OF PRIOR POST-PLEASE DIVERSION PROGRAM DISPOSITIONS, PENAL CODE § 1203.43

SUMMARY

Assembly Bill 1352 added section 1203.43 to the California Penal Code, effective January 1, 2016. The law was designed to eliminate the very harsh immigration consequences of a person's successful completion of a post-plea diversion program. The California diversion program known as Deferred Entry of Judgment ("DEJ") was available between 1997 and 2017 to qualifying defendants who were charged with certain minor drug offenses. See former California Penal Code § 1000, et seq. The DEJ statute provided that a defendant must plead guilty in order to participate in DEJ, but that the guilty plea would not be a conviction for any purpose if the person successfully completed the program. If the person completed DEJ, the drug charges would be dismissed; the DEJ disposition would not be a conviction "for any purpose"; the person would have the right to state that the arrest never took place; and the event could not be used to cause any denial of employment, certificate, license, or benefits.

The problem was that federal immigration law considers even successfully-completed DEJ to be a dangerous drug conviction. For immigration purposes, a conviction exists as there is a guilty plea or finding of guilt, plus some court-imposed penalty or restraint. See 8 U.S.C. § 1101(a)(48)(A). For immigration purposes, a conviction is not eliminated by state "rehabilitative" relief, for example relief granted because the person successfully completed certain conditions. Therefore, even though under California law a successful DEJ participant had no conviction or arrest record, for federal immigration purposes the successful participant faced extraordinary penalties for having a controlled substance conviction. Thousands of California noncitizens who completed DEJ in good faith, many with long-standing family and community ties, were subjected to detention and deportation based on their guilty pleas.

The purpose of Pen C 1203.43 was to eliminate these "convictions" in a way that immigration authorities would accept. For immigration purposes, a conviction must be eliminated *based on some legal error*, as opposed to rehabilitative factors. See, e.g., *Matter of Pickering*, 23 I&N 621 (BIA 2003). The DEJ guilty pleas were based on a legal error, at least for noncitizens defendants. The DEJ statute misrepresented the real benefits of DEJ, in order to persuade defendants to give up their right to trial and plead guilty. Section § 1203.43(a) acknowledges this error, stating that the "Legislature finds and declares" that the DEJ statute "constitutes misinformation about the actual consequences of making a plea in the case of some defendants, including all noncitizen defendants," and that "based on this misinformation and the potential harm, the defendant's prior plea is invalid."

In § 1203.43(b), the legislature created a new legal vehicle that permits some DEJ participants to seek relief. Effective January 1, 2016, once a court has dropped the charges under former Pen C § 1000.3 because the individual successfully completed DEJ (which does not eliminate the conviction for immigration purposes), the person is further entitled to withdraw their guilty plea on grounds of legal invalidity under Pen C § 1203.43(b) (which does eliminate the conviction for immigration purposes).

AB 1352 was co-sponsored by the Drug Policy Alliance, ILRC, American Civil Liberties Union of Northern California,

Mexican American Legal Defense and Educational Fund (“MALDEF”), and National Council of La Raza. Assemblywoman Susan Talamantes Eggman authored this bill and Governor Jerry Brown signed it into law in 2015.

RESPONSE OF IMMIGRATION AUTHORITIES

Although Pen C § 1203.43 appears to fulfill all legal requirements for vacating a conviction for immigration purposes, ICE attorneys contested it in removal proceedings. In several unpublished decisions, the BIA held that Pen C § 1203.43 eliminate the DEJ “conviction” for immigration purposes. In August 2018, the Board of Immigration Appeals (BIA) solicited amicus briefing on the issue of whether § 1203.43 in fact eliminates these convictions. This action indicates that the BIA plans to publish an opinion on the matter. Advocates submitted briefs on the issue. See, e.g., the amicus brief filed on behalf of ILRC and other groups, including as an appendix copies of three unpublished BIA decisions upholding the effect of Pen C § 1203.43, at <https://www.ilrc.org/ilrc-amicus-brief-arguing-validity-cal-penal-code-120343-vacatur>.

Advocates hope and trust the BIA solicited briefing because it wants to publish an opinion to clear up the question and stop further litigation, and not because it intends to find § 1203.43 to be ineffective for immigration purposes. However, immigrants who are relying on § 1203.43 being effective, and who can afford to wait to file an affirmative immigration application, may decide to avoid possible problems or litigation and wait to file until the BIA publishes a decision on the issue.

ORIGINAL LEGISLATIVE LANGUAGE

The California Legislature publishes each version of a bill, showing the additions and deletions made to the text as the bill moves through committees and floor votes in the legislature. For advocates considering a similar bill, be sure to view the original legislative text of AB 1352 as introduced in the Assembly on February 27, 2015 here: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1352.

FINAL STATUTORY LANGUAGE

View the final statutory text of the law, California Penal Code § 1203.43, as chaptered on October 8, 2015 here: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1352.

INFOGRAPHIC AND COMMUNITY HANDOUT

See advocate-facing infographics in English and Spanish that summarize the various post-conviction relief vehicles available in California, including Pen C § 1203.43, at <https://www.ilrc.org/infographic-about-california-post-conviction-relief-vehicles>.

See a Community Information Sheet on Pen C § 1203.43 at page (X).

FACT SHEET

See page [here](#) to view the fact sheet for Penal Code § 1203.43, designed as an educational tool for this new law.

SUPPORT LETTERS

See page [here](#) for a sample support letter for the AB 1352 to help you draft model support letters for other organizations or individuals to easily fill out and submit.

MEDIA ARTICLES

The article below provides an overview of AB 1352 and AB 1351 (vetoed) and why both bills were needed.

[California Governor Vetoes Drug Conviction Bill, NPR, October 11, 2015.](#)

STORY OF THE BILL - INTERVIEW/FAQ

Below is an interview with Kathy Brady, expert on the intersection of immigration and criminal law, and lead ILRC attorney on this bill. This interview provides an overview of certain considerations for advocates considering similar bills in their state.

What was the primary goal and motivation behind this bill?

The purpose of Deferred Entry of Judgment (“DEJ”) was to help people with drug abuse access rehabilitative services to get back on track. However, the immigration effect, which survived despite these offenses supposedly being “dismissed,” torpedoed this purpose. This caused individuals who successfully completed a DEJ program and were functioning members of society to face severe immigration consequences. This had been happening for a long time, so this bill in conjunction with AB 1351 (vetoed), were intended to tackle this problem. The next year, AB 1351 was reintroduced as AB 208 and ultimately became law.

What research, if any, was necessary or helpful in drafting the bill?

We needed to address the DEJ misrepresentation to immigrants, which was that if you plead guilty and successfully complete a DEJ, your record will be expunged and will not pose as a bar to any benefits. However, under immigration law certain expungements, such as this, still count as a conviction for immigration purposes and thus continue to bar individuals from immigration benefits. So, we had to figure out a way to create a strong basis that would remedy the gap between state law and federal immigration law. We found that a means to legally invalidate the conviction was required to be considered erased under immigration law.

What was the process for writing the bill language?

We met with a private immigration attorney who specializes in post-conviction relief and consulted with several public defenders and practitioners working in criminal and immigration courts to see what would work on a practical level but still accomplish our goal.

What was the dream bill and what concessions were made?

Section 1203.43, created by AB 1352, was the dream provision that we wanted to eliminate these prior DEJ “convictions.”

However, we had proposed AB 1352 as part of a package with a companion bill, AB 1351. AB 1351 would have amended the DEJ statute to make it a true pretrial diversion, that did not require a guilty plea. Thus we would have eliminated the prior DEJ “convictions” with AB 1352, which was the Pen C 1203.43 bill, and also prevented new DEJ convictions going forward, with AB 1351. The legislature passed both bills, but the Governor vetoed AB 1351. He stated that he agreed with law enforcement who opposed AB 1351 on the grounds that a guilty plea was needed as a “hammer” to ensure that people really would complete DEJ.

This created an absurd situation. Under AB 1352, the California legislature stated outright that the DEJ statute was creating invalid pleas because it was affirmatively misrepresenting DEJ. At the same time, the DEJ mill just kept going along, obtaining new guilty pleas. Fortunately, two years later we returned and were able to pass a bill that changed Pen C 1000 into a true pretrial diversion program, with no guilty plea. See discussion of AB 208, which amended Pen C 1000 et seq as of January 1, 2018.

How did other organizations or individuals get involved and what were their roles?

We drafted the bill in consultation with many organizations, because many groups wanted to broaden their reach with both technical expertise and lobbying. The Drug Policy Alliance, the ACLU, and MALDEF were critical resources for organizing and lobbying the bill. We urge advocates in other states to do the same, and in particular to work with criminal justice allies. This is also a great opportunity to build these relationships locally if

they do not already exist.

Who were the likely and unlikely allies throughout the process?

All our partner organizations provided support. The Drug Policy Alliance was a great resource because this issue is tied to their interests in reducing mass incarceration through criminal sentencing reform. This presented a good opportunity for them to broaden their understanding and connection with immigrants and immigration groups. We urge immigration advocates to build these relationships with criminal justice groups, since mass incarceration and criminal reforms impact immigrants as they do other communities of color.

Advocates in other states should loop in local criminal justice partners when formulating a similar bill. Because state criminal law is state-specific, there may be state nuances that need to be considered in order to make such a bill effective where you live. In addition to local partners, the ILRC is also available to provide technical support, which is particularly important in a more technical bill such as this.

How did you frame the bill to get legislators on board? How did you address misconceptions or opposition to the bill?

We had to repeatedly explain that this bill was carrying out the will of the legislature. The express goal of the DEJ program was to encourage people with minor drug charges to get counseling, and if they did so to reward them with an absolutely clean slate, with no arrest or conviction record or any penalties, so they could succeed. But for the large population of noncitizens – including permanent residents, refugees, undocumented people, etc. – the Legislature’s goals were destroyed: success in DEJ only created life-destroying penalties.

We reminded staff and legislators that Pen C 1203.43 did not provide any new advantages under California law. With DEJ, the Legislature had done everything possible to ensure that the successful participant would suffer no legal loss based on DEJ. The immigrants who qualified for Pen C 1203.43 would already have had their convictions and arrest records erased for all state purposes. Our goal was to ensure that the federal government treated DEJ in the same manner. It is easy to forget these points – that the remedy was fulfilling, not frustrating, the clear point of the statute and was only aimed at federal policy – so we repeated this quite a bit.

We had to respond to some anti-immigrant opposition within the legislature, claiming that “we shouldn’t be giving immigrants something better.” Again, we explained that this was providing immigrants exactly what the legislature intended when it passed the DEJ statute. Some were moved by this reasoning, and others opposed it for ideological reasons.

How did you plan for the bill’s implementation?

We thought ahead to how this would work once the bill became law, and what problems might arise. Here, the procedure was the most important aspect, meaning the process to file a 1203.43 motion in order to have the drug offense vacated for immigration purposes as well. We provided some key procedural protections:

- The court is required to approve the motion if the person shows that they in fact successfully completed DEJ. The court has no discretion.
- The person must show that a court issued an order under former Pen C 1000.3 finding that they completed DEJ. Normally the court has these files, but because older files have been destroyed, we presented an alternative showing that would qualify if the court file was unavailable. See Pen C 1203.43(b).
- There was no fee and the motion was very simple: the practitioner could check a box on a prepared form, or if they wish, can create a more detailed motion and order for the judge to sign.

- There was no fee and no requirement for a hearing.
- Some judges routinely complete the 1203.43 order at the same time that they make the DEJ finding. Some defender offices or courts have gone through their records to locate prior DEJ cases and notify them.

What challenges did you face in passing the bill?

The bill passed fairly smoothly since we focused on reiterating that the current DEJ law lied to immigrant defendants who were doing exactly what the legislature had intended by rehabilitating themselves. In other words, this law protects the expectations of immigrant defendants who took DEJ to complete a drug treatment program, thereby avoiding a criminal conviction and the implications it would have on their immigration status.

In all of these bills we made sure to reach out to key staff ahead of time, including those on Public Safety committees and the Judicial Council.

Do you have any tips on lobbying for this particular bill?

It is important to reach out to other groups working on this issue or an overlapping issue, like the Drug Policy Alliance, to complement each other's areas of expertise. They provided lobbying expertise and we provided technical crim/imm expertise and knowledge of what was happening in immigration and criminal courts.

Immigration advocates in other states should be sure to loop in local criminal justice partners and experts on post-conviction relief when formulating a similar bill. Because state criminal law is state-specific, there may be state nuances that need to be considered in order to make such a bill effective where you live. In addition to local partners, the ILRC is also available to provide technical support, which is particularly important in a more technical bill such as this.

What was the biggest lesson learned and what would you do differently next time?

It was very unfortunate to lose the companion bill, AB 1351. We realized that although we were in contact with the Governor's office, something had gone amiss, as we did not expect the veto. It is definitely important to keep in close contact with officials, as well as to focus on grassroots organizing and expanding the collaborative reach among advocates.