



AB 208

DEFERRED ENTRY OF JUDGMENT: PRETRIAL DIVERSION, PREVENTING UNINTENDED IMMIGRATION CONSEQUENCES FOR CERTAIN PENDING AND FUTURE DRUG OFFENSES

SUMMARY

Federal immigration law applies its own definition of “conviction” when it decides how to evaluate state diversion programs. For immigration purposes, a conviction occurs if there is a guilty plea or finding of guilt, and some form of penalty or restraint. 8 USC § 1101(a)(48)(A). Diversion programs that require a guilty plea before being diverted are counted as convictions for immigration purposes, even if the state gives every guarantee that they are not convictions. Under the former California Deferred Entry of Judgment (DEJ) statute, Penal Code § 1000 et seq. (1997-2017), the defendant pled guilty based upon the promise that if they completed all requirements, they would have no conviction for any purpose, they could state they never had been arrested, and the incident could cause no denial of legal benefits, license, etc. But for immigration purposes, the disposition was an extremely damaging “controlled substance conviction” that made the person deportable, inadmissible, and subject to mandatory detention. In contrast, diversion that does not require a guilty plea is not a “conviction” for immigration purposes.

Assembly Bill 208, effective January 1, 2018, amended former California Penal Code § 1000 to make it a true pretrial drug diversion program, in which a qualifying defendant charged with a minor drug offense will plead “not guilty,” instead of “guilty,” before being diverted to a drug education or treatment program. The person must also waive right to jury trial. Other than that, the procedure for the pretrial diversion is exactly the same as for DEJ. Upon successful completion of various requirements (dictated by the drug treatment program), the drug charges will be dropped, and no conviction or adverse consequences will result from the incident - immigration or otherwise. If the person does not successfully complete diversion, they may be brought back to face the charges, and at that time they will not have the right to trial by jury. This change ensures qualifying defendants can safely access drug rehabilitation programs for minor drug offenses without being subject to unwarranted immigration or other consequences resulting from post-plea DEJ programs. An earlier bill, AB 1352 (discussed in this same toolkit) created a means to eliminate prior DEJ “convictions” for immigration purposes, under Pen C 1203.43.

AB 208 was co-sponsored by the American Civil Liberties Union of Northern California, California Immigrant Policy Center, CHIRLA, Drug Policy Alliance, ILRC, and MALDEF. Assemblymember Susan Talamantes Eggman authored this bill and Governor Jerry Brown signed it into law in 2017. An earlier version of this bill, AB 1351, had been passed by the legislature in 2015, but Governor Brown had vetoed it.

ORIGINAL STATUTORY 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 208 as introduced on January 23, 2017 here: https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB208.

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MODEL STATUTORY LANGUAGE

View the final statutory text of the law as chaptered on October 14, 2017 here: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB208.

FACT SHEET

See [here](#) for the legislative fact sheet used as a lobbying tool for AB 208.

SUPPORT LETTERS

See [here](#) for a sample support letter for AB 208 to help you draft model support letters for other organizations or individuals to easily fill out and submit.

MEDIA ARTICLES

Below is an article providing an overview of the technical change AB 208 provided and why it was necessary.

[Governor Brown Protects California Immigrants, Preventing Needless Deportations and Advancing Smart Drug Policy Reform](#), ILRC, October 15, 2017.

EXAMPLES OF OTHER STATES' SIMILAR LAWS

Arizona: Ariz. Rev. Stat. § 11-361 requires deferral prior to guilty plea or trial. View this law here: <https://www.azleg.gov/viewdocument/?docName=https://www.azleg.gov/ars/11/00361.htm>.

Kentucky: Ky. Rev. Stat. § 218A.14151 provides that a defendant charged with certain drug offenses may be eligible for deferred pleas. View this law here: <http://lrc.ky.gov/statutes/statute.aspx?id=40911>.

New Jersey: N.J.S.A. 2C:43-12 does not require a guilty plea for first-time drug offenders who are eligible and successfully complete a pretrial intervention program. View this law here: <http://lis.njleg.state.nj.us/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>.

New York: N.Y. Crim. Proc. L. § 216.05(4) provides a guilty plea except where the District Attorney consents or there are "exceptional circumstances" due to severe collateral consequences. View this law here: <http://public.leginfo.state.ny.us/lawsrch.cgi?NVLWO>.

Texas: Tex. Gov't Code Ann. § 76.011(a)(1) makes room for a deferred guilty plea as a condition of a pretrial intervention program but is limited on a case-by-case basis because it requires a court-approved written agreement between the defendant and prosecutor. View this law here: <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.76.htm>.

Oregon: In 2019, the Oregon legislature is considering changing their diversion program to pretrial diversion, to protect immigrants. The Oregon ACLU and immigrant and criminal justice groups are supporters.

See HB 3201 <https://olis.leg.state.or.us/liz/2019R1/Measures/Overview/HB3201> and see news article at https://amp.statesmanjournal.com/amp/3204310002?__twitter_impression=true.

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 goal was to create a true diversion alternative for all California residents, including the large population of noncitizens who live in the state. Because DEJ required a guilty plea, even a successful participant would end up with a dangerous drug conviction for immigration purposes, so that DEJ was not a viable alternative for this large population. There was evidence that DEJ also hurt U.S. citizens in terms of eligibility for some federal benefits.

The guilty plea requirement created two problems, both of which frustrated the legislative intent in enacting DEJ. First, the DEJ program was causing mass deportations of California residents who had been charged with a first, minor drug offense. This destroyed California families and fractured immigrant communities. It seemed especially unfair to people who in good faith had completed all requirements of diversion, relying on the promise that they would have no conviction or adverse consequences.

Second, as more defense attorneys came to realize that DEJ was not a reasonable option for any noncitizen, they began to refuse DEJ for those clients. This left no diversion program, and no reasonable option for noncitizen defendants charged with a minor drug offense. This clogged the courts. Rather than being diverted to a program, defendants were fighting minor drug charges as if they were capital crimes – because the punishment was banishment and permanent separation from family.

Both these problems are resolved by changing DEJ to a pretrial diversion program, where the defendant can plead not guilty rather than guilty before being diverted.

What challenges did you face in passing the bill? How did you overcome them?

We originally introduced a pretrial diversion bill as Assembly Bill 1351 in 2015, but the Governor vetoed it. AB 1351 was the companion bill to AB 1352, which created Pen C § 1203.43 as post-conviction relief to help noncitizens (and others) who had taken DEJ. This is described elsewhere in this Toolkit. The Legislature passed both 1351 and 1352, and our group had understood from staff that the Governor would sign both bills. However, the Governor vetoed AB 1351 (pretrial diversion), although he signed AB 1352 (creating Pen C § 1203.43). Apparently District Attorneys and law enforcement agencies at the last minute had persuaded the Governor that pretrial diversion does not work: unless there is a guilty plea to hold over the heads of defendants, defendants will not complete a diversion program. Diversion needs more of a “hammer.”

Making 1352, but not 1351, law created an absurd result. The California DEJ statute continued to entice noncitizens and others to participate in the program by misrepresenting that they would not have a conviction for any purpose. Once they completed the program, Pen C § 1203.43 would permit them to withdraw that guilty plea for legal invalidity under Pen C § 1203.43, based on the misrepresentation. It was not only absurd, but dangerous: because the person could not get Pen C § 1203.43 relief until 18-36 months after the guilty plea (the earliest date that the court could find the person completed diversion), the person was exposed to deportation during that period.

We came back two years later to make another attempt to change DEJ, with AB 208. In fact, we started the conversation for AB 208 right after AB 1351 was vetoed.

We conferred with criminal defenders throughout the state to determine how we could respond to District Attorney and the Governor’s concerns without undermining our goal. We were contemplating either waiving the right to a jury trial or committing to not challenge evidence introduction, and after discussion with various parties, we opted to waive the right to a jury trial. That meant that a defendant who did not succeed in diversion and who was brought back to face the drug charges could ask for a court trial by the judge, but not a jury trial.

While some defenders opposed waiving the right to jury trial, many agreed with us and the major associations supported the bill. This is a sensitive issue, because the right to a jury trial is so important. Some defenders were concerned that this would be a “slippery slope”: while giving up right to jury trial might not hurt people in this situation, it could trigger demands to waive that right in other legislation. Others thought this fear was not

realistic, and that the benefit outweighed the risks. Any group considering this legislation must have careful conversations with all parties, who may have very different reactions. As a comparison, note that Oregon advocates are promoting a similar pretrial diversion bill in 2019, and their bill gives up the right both to jury trial and to contest evidence. See discussion of Oregon AB 3201 at Section G, above.

We were challenged by the District Attorneys' concerns and were turned down at the Senate Public Safety Committee hearing, but we just kept clarifying the bill's purpose and did not give up.

Of course, we met with the Governor's office, as well as legislative committee staff and others. The Governor indicated that waiving the right to jury trial was a sufficient "hammer." We also pointed out that Prop 47 in California had reduced these minor drug crimes to misdemeanors, so pretrial diversion was even more appropriate; and that under the new Trump administration, immigrants with minor offenses increasingly were being picked up. He signed AB 208 in 2017.

What was the process for writing the bill language?

Since this was a well-known problem and we already drafted AB 1351, we focused on how to expand the qualifying criteria and resolve the opposition's concerns. The main issue was addressing people's fears of pretrial diversion, and also creating a sufficient "hammer" for the governor. It was hard to find statistics or studies showing the different outcomes between post-guilty plea and pretrial diversion. One study is this

It was important to call this "pretrial" rather than "pre-plea" diversion. Without considering it, we first referred to pre-plea diversion. Judicial Council, the judges' lobbying group, opposed the bill because they thought this meant that the person did not enter a plea at all (as opposed to entering a not-guilty plea, which was our intent), and that would create a host of complexities. We met with Judicial Council to clarify this, and emphasize that the procedure would be exactly as it already was except that the plea would be "not guilty" rather than "guilty," and that satisfied them. The lesson is, meet early with judges' groups and determine what language they would like to use.

What was the dream bill and what concessions were made?

Aside from the jury trial waiver, we did not have to concede and we obtained what we were denied two years ago. We also were able to remove some bars to participating in the program, and were able to shorten the program, down from 18-36 months to 12-18 months.

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

We started with conference calls with several groups to define the major problems and gather ideas to address them. Defender groups collaborated with us to determine out what would be most practical. The Drug Policy Alliance took the lead in organizing lobbying appointments and activities. Staff from the ACLU of Northern California had extensive knowledge of criminal law and procedure, and they and the Coalition for Humane Immigrant Rights of Los Angeles, and the Mexican American Legal Defense and Educational Fund were great resources for lobbying and organizing support.

Who were the likely and unlikely allies throughout the process?

This issue is tied with other social issues or causes, so it is important to engage with a broad range of groups to complement efforts. In addition to the organizations mentioned above there were several legal, health, and youth organizations and providers that supported, including: the Ella Baker Center for Human Rights; Human Impact Partners; the California Chapter of National Association of Social Workers; different Counties' public defenders; California Society of Addiction Medicine; California Youth Empowerment Network; Californians for Safety and Justice; County Behavioral Health Directors Association of California; Courage Campaign; and Legal Services for Prisoners with Children.

How did you frame the bill to get legislators on board?

We learned through the failure of AB 1351 that a guarantee that defendants would complete the program, like the jury trial waiver, was necessary to appeal to District Attorneys, and ultimately the Governor.

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

It is crucial to consult with allies early and often throughout the process and keep a handle on spokespersons. Focus on grassroots organizing to soften the legislation and address overarching issues, such as the intersection of deportation with mass incarceration. Also, work with the individuals who create the court forms (needed to implement the bill once law), such as the state's judicial council, to figure out the most straightforward process that works with courts.

How did you address misconceptions or opposition to the bill?

The two years after AB 1351 was vetoed provided a learning curve that made it easy to address opposition. The increased enforcement really started to clog the courts, so we stressed that this would relieve that burden: it makes the courts more efficient by providing the defense with a reasonable plea alternative that does not tie up the courts. We provided one county's example, where defenders simply insisted on going to trial in all the cases rather than accepting DEJ for their clients, and ultimately the prosecution agreed to permit all noncitizens to plead to a different offense as a kind of legal fiction (accessory after the fact) if charged with a drug crime.

Other than the "slippery slope" threat, it appears that in a diversion context, waiving the right to jury trial is worth it and workable, even though it is never desirable. On the one hand, it does give prosecutors a "hammer": most drug possession charges are easy to prove, since a police officer is the witness. The only real power a defendant has is essentially the threat to take up resources by demanding a jury trial, and this removes that. On the other hand, for the defendant, actually going to trial for this type of charge is not a beneficial alternative in most cases, because they are nearly certain to lose and can face greater criminal penalties.

Once the bill became a law, how did you go about monitoring and implementation? Were there any implementation issues that arose and if so, how were they resolved?

We have contact with immigration units in public defender offices to keep up to date with any issues on the ground. We hold a monthly call with defenders and communicate on a listserv. We received some push back in immigration court but because we were in constant contact with groups and practitioners we could share briefs to help address certain issues.

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

One thing that we will remember is to collaborate with the Governor (and other parties) early on, and insist on having at least one meeting even if you are informed that there is no problem.