

SPECIAL DIRECTIVE 18-03

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: JOHN K. SPILLANE 
Chief Deputy District Attorney

SUBJECT: ASSEMBLY BILL 208, CONVERTING THE DEFERRED ENTRY OF
JUDGMENT PROGRAM TO PRETRIAL DIVERSION

DATE: MARCH 19, 2018

Effective January 1, 2018, Assembly Bill (AB) 208 enacted many changes to the program, formerly known as “Deferred Entry of Judgment” (DEJ), which serviced narcotics offenders. The primary stated purpose of AB 208 is to prevent adverse immigration consequences for non-citizen defendants who would plead guilty but subsequently complete the program successfully.

AB 208 converts the DEJ program to a pretrial diversion program. (See Penal Code (PC) §§ 1000, et seq.) A defendant who possesses narcotics for personal use, or commits one of the other offenses listed in PC § 1000(a), will no longer be required to plead guilty before beginning the program and must now plead *not* guilty prior to entering the program. (PC § 1000.1(b).)

While the prosecutor continues to evaluate a defendant’s eligibility for the program¹, the eligibility criteria have changed so that many more defendants will be eligible to participate in the new pretrial diversion program. In order to be eligible for the pretrial diversion program, the defendant must be charged with an enumerated offense, and must meet the eligibility criteria enumerated in

PC § 1000(a). PC § 1000(a) states:

1. Within five years prior to the alleged commission of the charged offense, the defendant has not suffered a conviction for any offense involving controlled substances other than the offenses listed in this subdivision.
2. The offense charged did not involve a crime of violence or threatened violence.
3. There is no evidence of a contemporaneous violation related to narcotics or restricted dangerous drugs other than a violation of the offenses listed in this subdivision
4. The defendant has no prior felony conviction within five years prior to the alleged commission of the charged offense.

¹ A defendant may not ask the court to overrule our determination of ineligibility. The sole remedy of a defendant who is found by the prosecution to be ineligible for pretrial diversion is a post-conviction appeal. (PC § 1000(b).)

In addition to expanding eligibility for the pretrial diversion program, AB 208 may restrict the court's discretion to determine the defendant's suitability for the program by eliminating the language that permits criminal proceedings to continue when the court "does not deem the defendant a person who would be benefited by deferred entry of judgment." Since the statutory language continues to require the court to determine whether the defendant "should" be granted pretrial diversion, deputies may argue that a defendant should not be granted pretrial diversion in an appropriate case.

Additional statutory changes include:

1. The defendant must waive his or her right to a speedy preliminary hearing (if applicable), speedy trial, and jury trial. (PC § 1000.1(b).) This means that the defendant will be entitled only to a court trial, if terminated from the program.
2. The length of the Pretrial Diversion Program is now a range of 12 months to 18 months, with extensions of time available for good cause. (PC § 1000.2(c).) There is no stated limit on the number of extensions, nor the amount of time permitted per extension.
3. The defendant, the prosecutor, the court or probation officer may move to dismiss on the grounds that the defendant has completed the program. (PC § 1000.1(a)(3).)
4. There are fewer grounds to terminate the program. (PC § 1000.3(a).)
The defendant may be terminated from the program when he or she is:
 - (a) performing unsatisfactorily in the program,
 - (b) convicted of an offense that reflects the defendant's propensity for violence, or
 - (c) convicted of any felony. (PC § 1000.3.)

It is an open question whether a defendant who is currently on DEJ is entitled to withdraw their guilty plea and convert their program to pretrial diversion. Further guidance will be provided on this issue as the law is clarified. Deputies are encouraged to take motions to withdraw a plea as an opportunity to review the defendant's performance on DEJ and determine whether it is appropriate to move to terminate DEJ, enter judgment, or proceed to sentencing.

An updated Drug Program Eligibility form, reflecting the changes to the law pursuant to AB 208, has been uploaded to PIMS. This new form must be used by filing deputies in every narcotics case.

Changes to LPM §§ 15.04, et seq., will not be made at this time. The drug court eligibility criteria has been referred to the Drug Court Standards and Practices Committee of the Countywide Criminal Justice Coordination Committee (CCJCC) to consider possible changes to the criteria brought about by the new pretrial diversion statutes. Once changes are made, a subsequent memorandum will be prepared and promulgated.

LPM §§ 6.01.02 and 15.01 are amended to refer to “pretrial diversion for narcotics offenders pursuant to PC §§ 1000 et seq.” instead of Deferred Entry of Judgment.

LPM §§ 11.03.09, 11.06.04, 12.03.04, 12.04.02, and 12.14.01 address the circumstances where a deputy is required to prepare a disposition report when a defendant is sentenced pursuant to Proposition 36 or receives pretrial diversion. The third paragraphs of §§ 11.03.09 and 11.06.04, and the second paragraphs of §§ 12.03.04, 12.04.02, and 12.14.01, are modified to read as follows:

Disposition reports are to be completed at the conclusion of every felony case with the following exceptions. Cases in which the defendant receives pretrial diversion, pursuant to Penal Code § 1000 et seq., or is sentenced pursuant to Proposition 36 are exempt from this requirement, except where one or more counts or one or more special allegations are dismissed in order to render a defendant eligible for those programs. Under those circumstances, a disposition report shall be completed. Disposition reports shall be reviewed and signed by the Head Deputy or the Head Deputy’s designee.

Upon successful completion of pretrial diversion, and dismissal of the case, a disposition report need not be prepared.

The title and text of LPM § 15.02 (formerly entitled “Deferred Entry of Judgment”) is deleted and replaced as follows:

15.02 PRETRIAL DIVERSION FOR NARCOTICS OFFENDERS

Pretrial diversion is an alternative to criminal prosecution available to a defendant charged with an offense listed in Penal Code § 1000(a).

Deferred Entry of Judgment (DEJ) formerly required the defendant to plead guilty prior to entry into the program. Effective January 1, 2018, the statutes providing for DEJ were amended to change the program to “pretrial diversion.” A guilty plea is no longer required. It is Office policy that Penal Code §§ 1000 et seq., as amended, applies to defendants regardless of when their applicable crime was committed.

Under Penal Code §§ 1000 through 1000.4, a court may summarily grant pretrial diversion or may refer the defendant to the Probation Department for its evaluation and recommendations if a court determines that a defendant should be granted pretrial diversion, and if the defendant:

- consents to the procedure;
- pleads not guilty to the charge(s);
- waives his or her rights to a speedy trial and a speedy preliminary hearing (if applicable); and
- waives his or her right to a jury trial.

If the defendant is granted pretrial diversion, the length of the program is between 12 months and 18 months. Extensions are available to defendants, pursuant to Penal Code § 1000.2(c), upon a

showing of “good cause.” If the defendant successfully completes the drug program, the court dismisses the charge(s). A motion to dismiss may be made by the defendant, the prosecutor, the Probation Department, or the court itself. If the defendant performs unsatisfactorily in the drug program, is arrested and convicted of any felony or a misdemeanor which reflects a propensity for violence, or is convicted of any felony, the court may terminate the program and return the case to the pre-trial stage of proceedings. A motion for termination may be made by the prosecutor, the Probation Department, or the court itself. As set forth in Penal Code §§ 1000 to 1000.4, a court may only make referrals to designated programs certified by the county drug program administrator.

15.02.01 PRETRIAL DIVERSION ELIGIBILITY

The requirements for pretrial diversion eligibility are set forth in Penal Code § 1000(a). A defendant is eligible for pretrial diversion if all of the following apply:

- Within the last five years, the defendant has no conviction for any offense involving controlled substances other than the offenses that are eligible for pretrial diversion.
- The offense charged did not involve a crime of violence or threatened violence.
- There is no evidence of a contemporaneous violation relating to narcotics or restricted dangerous drugs other than a violation of the offenses that are eligible for pretrial diversion.
- The defendant has no prior felony conviction within five years prior to the alleged commission of the charged offense.

15.02.02 WRITTEN NOTICE

A deputy shall give written notice to the court, counsel, and the defendant whenever the defendant is eligible for pretrial diversion. (PC § 1000(b).) The defendant shall also be given an explanation of the procedure and the role of the prosecuting attorney, the court, and the Probation Department.

The evaluation of a defendant's eligibility for pretrial diversion is to occur as soon as possible after the initial filing of the charges. Therefore, each defendant's eligibility shall be reviewed as part of the filing process. Filing deputies shall complete a declaration. This declaration evaluates both eligible and ineligible defendants and provides the explanation of pretrial diversion procedures. The form shall be provided to the defendant and his or her attorney.

If a defendant is ineligible for pretrial diversion, Penal Code § 1000(b) allows a deputy to give either written notice to the defendant or make a statement on the record reflecting ineligibility. It is Office policy to issue a written notice of ineligibility in every case. The sole remedy available to a defendant who is found ineligible for pretrial diversion is a post-conviction appeal.

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