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**AB-208 Deferred entry of judgment: pretrial diversion.** (2017-2018)

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**Assembly Bill No. 208**

**CHAPTER 778**

An act to amend Sections 1000, 1000.1, 1000.2, 1000.3, 1000.4, 1000.5, and 1000.6 of, and to add Section 1000.65 to, the Penal Code, relating to deferred entry of judgment.

[ Approved by Governor October 14, 2017. Filed with Secretary of State October 14, 2017. ]

**LEGISLATIVE COUNSEL'S DIGEST**

AB 208, Eggman. Deferred entry of judgment: pretrial diversion.

Existing law allows individuals charged with specified crimes to qualify for deferred entry of judgment. A defendant qualifies if he or she has no conviction for any offense involving controlled substances, the charged offense did not involve violence, there is no evidence of a violation relating to narcotics or restricted dangerous drugs other than a violation that qualifies for the program, the defendant's record does not indicate that probation or parole has ever been revoked without being completed, and the defendant's record does not indicate that he or she has been granted diversion, deferred entry of judgment, or was convicted of a felony within 5 years prior to the alleged commission of the charged offense.

Under the existing deferred entry of judgment program, an eligible defendant may have entry of judgment deferred, upon pleading guilty to the offenses charged and entering a drug treatment program for 18 months to 3 years. If the defendant does not perform satisfactorily in the program, does not benefit from the program, is convicted of specified crimes, or engages in criminal activity rendering him or her unsuitable for deferred entry of judgment, the defendant's guilty plea is entered and the court enters judgment and proceeds to schedule a sentencing hearing. If the defendant completes the program, the criminal charges are dismissed. Existing law allows the presiding judge of the superior court, with the district attorney and public defender, to establish a pretrial diversion drug program.

This bill would make the deferred entry of judgment program a pretrial diversion program. The bill would make a defendant qualified for the pretrial diversion program if there is no evidence of a contemporaneous violation relating to narcotics or restricted dangerous drugs other than a violation of the offense that qualifies him or her for diversion, the charged offense did not involve violence, there is no evidence within the past 5 years of a violation relating to narcotics or restricted dangerous drugs other than a violation that qualifies for the program, and the defendant has no prior conviction for a felony within 5 years prior to the alleged commission of the charged offense.

Under the pretrial diversion program created by this bill, a qualifying defendant would enter a plea of not guilty and waive his or her right to a trial by jury, and proceedings would be suspended in order for the defendant to enter a drug treatment program for 12 to 18 months, or longer if requested by the defendant with good cause. The bill would require the court, if the defendant does not perform satisfactorily in the program or is convicted of specified crimes, to terminate the program and reinstate the criminal proceedings. The bill would require the criminal charges to be dismissed if the defendant completes the program.

This bill would incorporate additional changes to Section 1000.4 of the Penal Code proposed by SB 393 to be operative only if this bill and SB 393 are enacted and this bill is enacted last.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

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## THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

### **SECTION 1.** Section 1000 of the Penal Code is amended to read:

**1000.** (a) This chapter shall apply whenever a case is before any court upon an accusatory pleading for a violation of Section 11350, 11357, 11364, or 11365, paragraph (2) of subdivision (b) of Section 11375, Section 11377, or Section 11550 of the Health and Safety Code, or subdivision (b) of Section 23222 of the Vehicle Code, or Section 11358 of the Health and Safety Code if the marijuana planted, cultivated, harvested, dried, or processed is for personal use, or Section 11368 of the Health and Safety Code if the narcotic drug was secured by a fictitious prescription and is for the personal use of the defendant and was not sold or furnished to another, or subdivision (d) of Section 653f if the solicitation was for acts directed to personal use only, or Section 381 or subdivision (f) of Section 647 of the Penal Code, if for being under the influence of a controlled substance, or Section 4060 of the Business and Professions Code, and it appears to the prosecuting attorney that, except as provided in subdivision (b) of Section 11357 of the Health and Safety Code, all of the following apply to the defendant:

- (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 relating 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.

(b) The prosecuting attorney shall review his or her file to determine whether or not paragraphs (1) to (4), inclusive, of subdivision (a) apply to the defendant. If the defendant is found eligible, the prosecuting attorney shall file with the court a declaration in writing or state for the record the grounds upon which the determination is based, and shall make this information available to the defendant and his or her attorney. This procedure is intended to allow the court to set the hearing for pretrial diversion at the arraignment. If the defendant is found ineligible for pretrial diversion, the prosecuting attorney shall file with the court a declaration in writing or state for the record the grounds upon which the determination is based, and shall make this information available to the defendant and his or her attorney. The sole remedy of a defendant who is found ineligible for pretrial diversion is a postconviction appeal.

(c) All referrals for pretrial diversion granted by the court pursuant to this chapter shall be made only to programs that have been certified by the county drug program administrator pursuant to Chapter 1.5 (commencing with Section 1211) of Title 8, or to programs that provide services at no cost to the participant and have been deemed by the court and the county drug program administrator to be credible and effective. The defendant may request to be referred to a program in any county, as long as that program meets the criteria set forth in this subdivision.

(d) Pretrial diversion for an alleged violation of Section 11368 of the Health and Safety Code shall not prohibit any administrative agency from taking disciplinary action against a licensee or from denying a license. This subdivision does not expand or restrict the provisions of Section 1000.4.

(e) Any defendant who is participating in a program authorized in this section may be required to undergo analysis of his or her urine for the purpose of testing for the presence of any drug as part of the program. However, urinalysis results shall not be admissible as a basis for any new criminal prosecution or proceeding.

### **SEC. 2.** Section 1000.1 of the Penal Code is amended to read:

**1000.1.** (a) If the prosecuting attorney determines that this chapter may be applicable to the defendant, he or she shall advise the defendant and his or her attorney in writing of that determination. This notification shall include all of the following:

- (1) A full description of the procedures for pretrial diversion.
- (2) A general explanation of the roles and authorities of the probation department, the prosecuting attorney, the program, and the court in the process.
- (3) A clear statement that the court may grant pretrial diversion with respect to any offense specified in subdivision (a) of Section 1000 that is charged, provided that the defendant pleads not guilty to the charge or charges, waives the right to a

speedy trial, to a speedy preliminary hearing, and to a trial by jury, if applicable, and that upon the defendant's successful completion of a program, as specified in subdivision (c) of Section 1000, the positive recommendation of the program authority and the motion of the defendant, prosecuting attorney, the court, or the probation department, but no sooner than 12 months and no later than 18 months from the date of the defendant's referral to the program, the court shall dismiss the charge or charges against the defendant.

(4) A clear statement that upon any failure of treatment or condition under the program, or any circumstance specified in Section 1000.3, the prosecuting attorney or the probation department or the court on its own may make a motion to the court to terminate pretrial diversion and schedule further proceedings as otherwise provided in this code.

(5) An explanation of criminal record retention and disposition resulting from participation in the pretrial diversion program and the defendant's rights relative to answering questions about his or her arrest and pretrial diversion following successful completion of the program.

(b) If the defendant consents and waives his or her right to a speedy trial, a speedy preliminary hearing, and to a trial by jury, if applicable, the court may refer the case to the probation department or the court may summarily grant pretrial diversion. When directed by the court, the probation department shall make an investigation and take into consideration the defendant's age, employment and service records, educational background, community and family ties, prior controlled substance use, treatment history, if any, demonstrable motivation, and other mitigating factors in determining whether the defendant is a person who would be benefited by education, treatment, or rehabilitation. The probation department shall also determine which programs the defendant would benefit from and which programs would accept the defendant. The probation department shall report its findings and recommendations to the court. The court shall make the final determination regarding education, treatment, or rehabilitation for the defendant. If the court determines that it is appropriate, the court shall grant pretrial diversion if the defendant pleads not guilty to the charge or charges and waives the right to a speedy trial, to a speedy preliminary hearing, and to a trial by jury, if applicable.

(c) (1) No statement, or any information procured therefrom, made by the defendant to any probation officer or drug treatment worker, that is made during the course of any investigation conducted by the probation department or treatment program pursuant to subdivision (b), and prior to the reporting of the probation department's findings and recommendations to the court, shall be admissible in any action or proceeding brought subsequent to the investigation.

(2) No statement, or any information procured therefrom, with respect to the specific offense with which the defendant is charged, that is made to any probation officer or drug program worker subsequent to the granting of pretrial diversion shall be admissible in any action or proceeding.

(d) A defendant's participation in pretrial diversion pursuant to this chapter shall not constitute a conviction or an admission of guilt for any purpose.

**SEC. 3.** Section 1000.2 of the Penal Code is amended to read:

**1000.2.** (a) The court shall hold a hearing and, after consideration of any information relevant to its decision, shall determine if the defendant consents to further proceedings under this chapter and if the defendant should be granted pretrial diversion. If the defendant does not consent to participate in pretrial diversion, the proceedings shall continue as in any other case.

(b) At the time that pretrial diversion is granted, any bail bond or undertaking, or deposit in lieu thereof, on file by or on behalf of the defendant shall be exonerated, and the court shall enter an order so directing.

(c) The period during which pretrial diversion is granted shall be for no less than 12 months nor longer than 18 months. However, the defendant may request, and the court shall grant, for good cause shown, an extension of time to complete a program specified in subdivision (c) of Section 1000. Progress reports shall be filed by the probation department with the court as directed by the court.

**SEC. 4.** Section 1000.3 of the Penal Code is amended to read:

**1000.3.** (a) If it appears to the prosecuting attorney, the court, or the probation department that the defendant is performing unsatisfactorily in the assigned program, that the defendant is convicted of an offense that reflects the defendant's propensity for violence, or that the defendant is convicted of a felony, the prosecuting attorney, the court on its own, or the probation department may make a motion for termination from pretrial diversion.

(b) After notice to the defendant, the court shall hold a hearing to determine whether pretrial diversion shall be terminated.

(c) If the court finds that the defendant is not performing satisfactorily in the assigned program, or the court finds that the defendant has been convicted of a crime as indicated in subdivision (a), the court shall schedule the matter for further

proceedings as otherwise provided in this code.

(d) If the defendant has completed pretrial diversion, at the end of that period, the criminal charge or charges shall be dismissed.

(e) Prior to dismissing the charge or charges or terminating pretrial diversion, the court shall consider the defendant's ability to pay and whether the defendant has paid a diversion restitution fee pursuant to Section 1001.90, if ordered, and has met his or her financial obligation to the program, if any. As provided in Section 1203.1b, the defendant shall reimburse the probation department for the reasonable cost of any program investigation or progress report filed with the court as directed pursuant to Sections 1000.1 and 1000.2.

**SEC. 5.** Section 1000.4 of the Penal Code is amended to read:

**1000.4.** (a) Any record filed with the Department of Justice shall indicate the disposition in those cases referred to pretrial diversion pursuant to this chapter. Upon successful completion of a pretrial diversion program, the arrest upon which the defendant was diverted shall be deemed to have never occurred. The defendant may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or granted pretrial diversion for the offense, except as specified in subdivision (c). A record pertaining to an arrest resulting in successful completion of a pretrial diversion 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, except that, as specified in Section 492 of the Business and Professions Code, successful completion of a pretrial diversion program does not prohibit any agency established under Division 2 (commencing with Section 500) of the Business and Professions Code, or under any initiative act referred to in that division, from taking disciplinary action against a licensee or from denying a license for professional misconduct, notwithstanding that evidence of that misconduct may be contained in a record pertaining to an arrest leading to successful completion of a pretrial diversion program.

(b) Notwithstanding any other law, any licensing agency listed in Section 144 of the Business and Professions Code may request, and is authorized to receive, from a local or state agency certified records regarding referral to, participation in, successful completion of, and termination from, diversion programs described in this section.

(c) The defendant shall be advised that, regardless of his or her successful completion of the pretrial diversion program, the arrest upon which pretrial diversion was based may be disclosed by the Department of Justice in response to any peace officer application request and that, notwithstanding subdivision (a), this section does not relieve him or her of the obligation to disclose the arrest in response to any direct question contained in any questionnaire or application for a position as a peace officer, as defined in Section 830.

**SEC. 5.5.** Section 1000.4 of the Penal Code is amended to read:

**1000.4.** (a) Any record filed with the Department of Justice shall indicate the disposition in those cases referred to pretrial diversion pursuant to this chapter. Upon successful completion of a pretrial diversion program, the arrest upon which the defendant was diverted shall be deemed to have never occurred and the court may issue an order to seal the records pertaining to the arrest as described in Section 851.92. The defendant may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or granted pretrial diversion for the offense, except as specified in subdivision (c). A record pertaining to an arrest resulting in successful completion of a pretrial diversion 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, except that, as specified in Section 492 of the Business and Professions Code, successful completion of a pretrial diversion program shall not prohibit any agency established under Division 2 (commencing with Section 500) of the Business and Professions Code, or under any initiative act referred to in that division, from taking disciplinary action against a licensee or from denying a license for professional misconduct, notwithstanding that evidence of that misconduct may be recorded in a record pertaining to an arrest leading to successful completion of a pretrial diversion program.

(b) Notwithstanding any other law, any licensing agency listed in Section 144 of the Business and Professions Code may request, and is authorized to receive, from a local or state agency certified records regarding referral to, participation in, successful completion of, and termination from, diversion programs described in this section.

(c) The defendant shall be advised that, regardless of his or her successful completion of the pretrial diversion program, the arrest upon which the pretrial diversion was based may be disclosed by the Department of Justice in response to any peace officer application request and that, notwithstanding subdivision (a), this section does not relieve him or her of the obligation to disclose the arrest in response to any direct question contained in any questionnaire or application for a position as a peace officer, as defined in Section 830.

(d) The defendant shall be advised that, regardless of the defendant's successful completion of a pretrial diversion program, an order to seal records pertaining to an arrest made pursuant to this section has no effect on a criminal justice agency's ability to access and use those sealed records and information regarding sealed arrests, as described in Section 851.92.

**SEC. 6.** Section 1000.5 of the Penal Code is amended to read:

**1000.5.** (a) (1) The presiding judge of the superior court, or a judge designated by the presiding judge, together with the district attorney and the public defender, may agree in writing to establish and conduct a preguilty plea drug court program pursuant to the provisions of this chapter, wherein criminal proceedings are suspended without a plea of guilty for designated defendants. The drug court program shall include a regimen of graduated sanctions and rewards, individual and group therapy, urinalysis testing commensurate with treatment needs, close court monitoring and supervision of progress, educational or vocational counseling as appropriate, and other requirements as agreed to by the presiding judge or his or her designee, the district attorney, and the public defender. If there is no agreement in writing for a preguilty plea program by the presiding judge or his or her designee, the district attorney, and the public defender, the program shall be operated as a pretrial diversion program as provided in this chapter.

(2) A person charged with a misdemeanor under paragraph (3) of subdivision (b) of Section 11357.5 or paragraph (3) of subdivision (b) of Section 11375.5 of the Health and Safety Code shall be eligible to participate in a preguilty plea drug court program established pursuant to this chapter, as set forth in Section 11375.7 of the Health and Safety Code.

(b) The provisions of Section 1000.3 and Section 1000.4 regarding satisfactory and unsatisfactory performance in a program shall apply to preguilty plea programs, except as provided in Section 11375.7 of the Health and Safety Code. If the court finds that (1) the defendant is not performing satisfactorily in the assigned program, (2) the defendant is not benefiting from education, treatment, or rehabilitation, (3) the defendant has been convicted of a crime specified in Section 1000.3, or (4) the defendant has engaged in criminal conduct rendering him or her unsuitable for the preguilty plea program, the court shall reinstate the criminal charge or charges. If the defendant has performed satisfactorily during the period of the preguilty plea program, at the end of that period, the criminal charge or charges shall be dismissed and the provisions of Section 1000.4 shall apply.

**SEC. 7.** Section 1000.6 of the Penal Code is amended to read:

**1000.6.** (a) A person who is participating in a pretrial diversion program or a preguilty plea program pursuant to this chapter is authorized under the direction of a licensed health care practitioner, to use medications including, but not limited to, methadone, buprenorphine, or levoalphacetylmethadol (LAAM) to treat substance use disorders if the participant allows release of his or her medical records to the court presiding over the participant's preguilty plea or pretrial diversion program for the limited purpose of determining whether or not the participant is using such medications under the direction of a licensed health care practitioner and is in compliance with the pretrial diversion or preguilty plea program rules.

(b) If the conditions specified in subdivision (a) are met, the use by a participant of medications to treat substance use disorders shall not be the sole reason for exclusion from a pretrial diversion or preguilty plea program. A patient who uses medications to treat substance use disorders and participates in a preguilty plea or pretrial diversion program shall comply with all court program rules.

(c) A person who is participating in a pretrial diversion program or preguilty plea program pursuant to this chapter who uses medications to treat substance use disorders shall present to the court a declaration from his or her health care practitioner, or his or her health care practitioner's authorized representative, that the person is currently under their care.

(d) Urinalysis results that only establish that a person described in this section has ingested medication duly prescribed to that person by his or her physician or psychiatrist, or medications used to treat substance use disorders, shall not be considered a violation of the terms of the pretrial diversion or preguilty plea program under this chapter.

(e) Except as provided in subdivisions (a) to (d), inclusive, this section does not affect any other law governing diversion programs.

**SEC. 8.** Section 1000.65 is added to the Penal Code, immediately following Section 1000.6, to read:

**1000.65.** This chapter does not affect a pretrial diversion program provided pursuant to Chapter 2.7 (commencing with Section 1001).

**SEC. 9.** Section 5.5 of this bill incorporates amendments to Section 1000.4 of the Penal Code proposed by both this bill and Senate Bill 393. That section shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2018, (2) each bill amends Section 1000.4 of the Penal Code, and (3) this bill is enacted after Senate Bill 393, in which case Section 5 of this bill shall not become operative.