

California's Ramshackle Restoration Provisions

by
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California law provides a wide range of methods for avoiding a criminal conviction to prevent collateral consequences, or for relieving the effects of a conviction which has already occurred. However, the structure has developed ad hoc over decades, in response to individual exigencies and issues. On some occasions, the gaps and inconsistencies have led California courts to find restoration provisions irrational and unconstitutional.¹

The current system would benefit both from technical fixes to existing provisions and consideration of a ground-up revision. This section summarizes the major forms of relief.²

Avoiding Disqualifying Convictions

In several ways, California law makes it possible to avoid a conviction even for those who have not managed to avoid interaction with the criminal justice system entirely.

Wobblers. "Under California law, certain offenses may be classified as either felonies or misdemeanors. These crimes are known as 'wobblers.'"³ A wobbler is an offense which is punishable either by a felony or misdemeanor sentence. (Note that under Penal Code 1170(h), some felony sentences of more than a year are served in county jails; a sentence to "county jail prison" is a felony punishment). A wobbler can become a misdemeanor rather than a felony based on the imposition of a probationary sentence, or a determination by the judge or prosecutor at the time of charge. Pen. C. 17(b). If probation is granted, a conviction may be reduced "at the time of granting probation, or on application of the defendant or probation officer thereafter." Pen. C. 17(b)(3). If reduced, the conviction "is a misdemeanor for all purposes." Pen. C. 17(b).

Deferred Entry of Judgment and Pre-Plea Diversion. Under a Deferred Entry of Judgment program, an individual with no prior drug convictions charged with a nonviolent drug offense may be allowed to plead guilty to the charges but have entry of judgment suspended. Pen. C. 1000. If the program is successfully completed, "the arrest upon which the judgment was deferred shall be deemed to have never occurred" and "[t]he defendant may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or granted deferred entry of judgment for the offense" except for an application for a position as a peace officer. Pen. C. 1000.4(a). "A record pertaining to an arrest resulting in 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." Pen. C. 1000.4(a)

Participating in a Deferred Entry of Judgment program may result in immigration consequences. Accordingly, as it does in several ways, California has accommodated the interests of non-citizens. Penal Code 1000.5 authorizes the creation of pre-plea drug court programs; successful completion has the effect provided in Penal Code 1000.4.

Misdemeanor Sentencing. Another provision designed to avoid collateral consequences is the misdemeanor sentencing statute, Penal Code 18.5(a), which provides that "[e]very offense

which is prescribed by any law of the state to be punishable by imprisonment in a county jail up to or not exceeding one year shall be punishable by imprisonment in a county jail for a period not to exceed 364 days.” Under federal law, a number of grounds of removal apply based on a conviction for which there is a potential or actual sentence of one year or more.⁴ California misdemeanors will no longer satisfy those requirements.

Eliminating Collateral Consequences of Existing Convictions

There are three main methods of avoiding collateral consequences for convictions: set-aside and dismissal under Penal Code 1203.4 et seq., a Certificate of Rehabilitation under Penal Code 4852.01 et seq., and a Pardon.

Set-aside and Dismissal. The set-aside mechanism was originally associated with the probation system.⁵ It still includes defendants sentenced to probation (Penal Code 1203.4), but has expanded to include those convicted of misdemeanors and not granted probation (Penal Code 1203.4a), those convicted of felonies and sentenced to terms of years in county jails under Penal Code 1170(h) (Penal Code 1203.41), and, as of January 1, 2018, those sentenced to state prison who, under current law, could have been sentenced to felony terms in county jail under Penal Code 1170(h) (Penal Code 1203.42). There is also special set-aside provision for veterans whose offense is associated with injury in the service. Penal Code 1170.9(h).

When granted, “the court shall set aside the verdict of guilty” and “shall thereupon dismiss the accusations or information against the defendant,” and the recipient “shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted” (Penal Code 1203.4(a)(1)). However, there are a number of exceptions, such as firearms and office-holding ineligibility.⁶

Certificate of Rehabilitation. The Certificate of Rehabilitation (COR) was created in 1943 for defendants released from state prison, who could only apply directly to the governor for a pardon. Governor Earl Warren, long interested in criminal justice reform, proposed a procedure which became the COR. The purpose of the certificate was to “establish the fact of such rehabilitation by judicial action and earn restoration of rights of citizenship and thus become eligible for service with the armed forces and for employment in essential war industries.”⁷ It also serves as an automatic recommendation for a pardon. Penal Code 4852.16.⁸

A COR may be sought by a person discharged from state prison or county jail prison. Penal Code 4852.01(a). In addition, a person convicted of a felony or misdemeanor sex offense who has received relief under 1203.4 may seek a COR. Penal Code 4852.01(b).

Pardon. Governor Brown, in his third and fourth terms, has granted a large number of pardons by historical measures, an annual average in the low three figures. However, the number convictions resulting from felony arrests between 2010 and 2015 ranged from 162,282 to 217,688 annually.⁹ In addition, pardons are generally available only to those with a crime-free record of 10 years after discharge from probation or parole. Accordingly, pardons, while exceedingly important to those who get them, are not a numerically significant piece of the reentry and reintegration system.

Standards for Relief. The standards for granting a COR are complex. The statute provides that before application, “[t]he person shall live an honest and upright life, shall conduct himself or herself with sobriety and industry, shall exhibit a good moral character, and shall conform to and obey the laws of the land.” Penal Code 4852.05. A court may award relief “if after hearing, the court finds that the petitioner has demonstrated by his or her course of conduct his or her rehabilitation and his or her fitness to exercise all of the civil and political rights of citizenship.” Penal Code 4852.13(a). Another standard is mentioned in the statute. There are waiting periods for the relief, but “a trial court hearing an application for a certificate of rehabilitation before the applicable period of rehabilitation has elapsed may grant the application if the court, in its discretion, believes relief serves the interests of justice.” Penal Code 4852.22.

The set-aside and dismissal statutes authorize relief when “a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section.” Penal Code § 1203.4(1).¹⁰ A 1971 amendment made subsequent criminal charges a ground for denial.¹¹

Relief when probation conditions have been fully satisfied, or early discharge is granted, is a matter of right.¹² Nevertheless, appellate courts have understood it as equivalent to a certificate of rehabilitation; for example, Justice Kennard wrote when on the Court of Appeals: “The expunging of the record of conviction [under section 1203.4] is, in essence, a form of legislatively authorized certification of complete rehabilitation based on a prescribed showing of exemplary conduct during the entire period of probation.”¹³ Similarly, Justice Arguelles when on the Court of Appeals considered the criteria for “a certificate of rehabilitation under section 4852.01” to be “substantially the same as and consistent with the lawful conduct criteria of section 1203.4.”¹⁴

Similarities and Differences: COR and set-aside have some similarities. First, neither precludes the conviction from being used as a predicate should the recipient be charged with another offense. In addition, the Business and Professions Code provides that a holder may not automatically be denied a license regulated by the code solely based on the conviction. Bus & Prof Code 480(b) & (c).

COR Advantages. In several ways, the COR process is advantageous to the applicant.

- A single application in the county of residence can lead to relief from convictions in all parts of the state. Penal Code 4852.06 & .07.
- There are no costs or fees, and counsel is appointed. Penal Code 4852.08 & .09.
- A COR is a step in the path to a pardon. Penal Code 4852.16.
- [A COR is required to be included in criminal record. Penal Code 4852.17.]

Set-aside advantages: In several ways, a set aside and dismissal has advantages over the COR.

- Protection from discrimination under Labor Code. Lab. Code 432.7(a)(1).

- No obligation to disclose conviction.
- No impeachment if testifying, other than as a defendant. Evid. C. 788(c).

Gaps. The COR provisions do not allow application from those who received set-asides under 1203.4a, 1203.41 or 1203.42. Evid. Code 788(c) only textually exempts those who received relief under 1203.4, not set-asides under other sections. Similarly, direct pardon without a COR does not relieve impeachment. Evid. Code 788(b).

Rationale. It is coincidence rather than the result of design that there are two judicial proceedings examining a similar question which have quite different processes and effects. The original distinction had to do with the seriousness of the offense committed, between former probationers and former prisoners. Now that former inmates and those who served county jail prison time are eligible for set-aside, it is hard to see a justification for the distinction.

Sealing

California law provides for the sealing of a number of criminal records, mostly in what should be described as special cases. They include remedies for juveniles, minor drug offenders, those who establish factual innocence, and those arrested but never tried. A new law recently signed in to law by Governor Brown authorizes sealing of arrest and other non-conviction records under certain circumstances.

However, sealing is not generally available to adults convicted of felonies or misdemeanors, notwithstanding pardon, set-aside and dismissal, or receipt of a COR.

¹ *People v. Newland*, 566 P.2d 254 (Cal. 1977) (teacher convicted of felony could get rights restored and avoid disqualification; misdemeanor defendants could not); *People v. Chatman*, 206 Cal. Rptr. 3d 322, 331 (Ct. App. 2016) (probationers ineligible for relief if reincarcerated, but those sentenced to prison eligible), rev. granted Nov. 16, 2016; *Ayala v. Superior Court*, 194 Cal. Rptr. 665, 669 (Ct. App. 1983).

² For further details see *California Restoration of Rights, Pardon, Expungement & Sealing*, Restoration of Rights Project, Collateral Consequences Resources Center <http://ccresourcecenter.org/state-restoration-profiles/california-restoration-of-rights-pardon-expungement-sealing/>, and Garrick A. Byers, *Trial Counsel's Duties after Judgment; Cleansing and Sealing of Criminal Records*, Ch. 41, Part VI, in CALIFORNIA CRIMINAL LAW, PRACTICE AND PROCEDURE (2017 ed.).

³ *Ewing v. California*, 538 U.S. 11, 16 (2003).

⁴ See, e.g., 8 U.S.C. 1227(a)(2)(A) (crime involving moral turpitude).

⁵ See David H. Melnick, Note, *Probation in California: Penal Code Section 1203*, 50 Cal. L. Rev. 581, 581 (1962); *People v. Hainline*, 28 P.2d 16 (Cal. 1933). The set aside and dismissal remedy was added by 1909 Cal. Stats. ch. 232, 357 at 359.

⁶ A now old discussion of the operation of set aside and dismissal remains relevant for understanding the origins of the provision. Kenneth C. Zwerin, *Probation and Section 1203.4, Penal Code*, 36 J. St. B. of Cal. 94 (1961).

⁷ Helen R. McGregor, *Adult Probation, Parole, and Pardon in California*, 38 Tex. L. Rev. 887, 908 (1960) (quoting 1943 Cal. Stats. ch. 400, p. 1926). The Certificate of Rehabilitation's effect of restoring civil rights was removed in 1945. 1945 Cal. Stats. ch. 1072, 2069, at 2070.

⁸ See generally Stanley Mosk, *Certificates of Rehabilitation and the New Pardon Procedure*, 18 J. St. Bar of Cal. 172 (1943).

⁹ Table 38B, <https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd15/cd15.pdf>

¹⁰ The misdemeanor set aside and dismissal statute requires that an applicant "since the pronouncement of judgment, lived an honest and upright life and has conformed to and obeyed the laws of the land." Penal Code § 1203.4a(1).

¹¹ 1971 Cal. Stat. ch. 333, at 667. Courts previously understood the right to set aside as automatic even if additional criminal charges arose. *People v. Bradley*, 57 Cal. Rptr. 82, 84 (Ct. App. 1967) ("As defendant here had

successfully completed his probationary period, he was entitled to a dismissal.”); *People v. Johnson*, 285 P.2d 74, 77 (Cal. Ct. App. 1955) (“It was apparently intended that where a defendant has performed the requirements laid down in terms of probation the court should have no discretion but to carry out its part of the bargain with said defendant, even though it might appear at the time of application for said benefits that complete and permanent reformation or rehabilitation has not been accomplished.”)

¹² *People v. Johnson*, 149 Cal. Rptr. 3d 482, 488 (Ct. App. 2012).

¹³ *People v. Chandler*, 250 Cal.Rptr. 730 (Ct. App. 1988) (Kennard J.) (quoted with approval in *People v. Moreno*, 180 Cal. Rptr. 3d 522, 527–28 (Ct. App. 2014)). Courts have said that the effect is “with a few exceptions, to restore him to his former status in society to the extent the Legislature has power to do so” *People v. Mgebrov*, 82 Cal. Rptr. 3d 778, 781 (Ct. App. 2008) (quoting *People v. Field*, 37 Cal.Rptr.2d 803, 808 (Ct. App. 1995)).

¹⁴ *People v. Jones*, 221 Cal. Rptr. 382, 387 (Ct. App. 1985) (Arguelles, J.).