

## EXPUNGEMENT

If you have been sentenced to felony probation or probation. I want to inform you of a statute that allows persons who have successfully completed probation to obtain a dismissal of the case and relief from certain "penalties and disabilities." This is Penal Code section 1203.4. A copy of the statute is attached.

The basic rule of the statute is that unless an activity is expressly excepted from section 1203.4 relief, that activity is permissible following the grant of relief. Put another way, unless the legislature has specifically spoken to bar relief in an area (for example, gun possession is still barred after 1203.4 relief), a defendant is relieved of the penalties and disabilities following the judicial order.

The great benefit of this relief is that it affords the "[r]emoval of the blemish of a criminal record." (People v. Johnson (1955) 134 Cal. App. 2d 140, 143.) While it is not total relief, it is significant as I discuss next.

A. Relief is Mandatory once you have completed probation and fulfilled its conditions. This means the judge does not have discretion to deny relief. Once probation has been successfully completed, it must be granted. (See People v. Johnson, supra at 144 [the word "shall," as used in this section, was intended by Legislature to be mandatory, and if, on evidence and record, the court finds the defendant has fulfilled probation conditions for the entire period thereof or has been discharged from probation prior to termination, he is entitled as a matter of right to benefits prescribed in this section]; People v. Municipal Court (1956) 145 Cal App. 2d 767, 775 ) [word "shall," in first sentence of section, is mandatory, and it would be inconsistent to hold that the word is merely directory.] The court may not deny this relief on the ground that the probationer failed to pay reimbursement of the costs of probation or court-appointed attorney fees because those cannot be conditions of probation. (People v. Bradus (2007) 149 Cal. App. 4th 636.)

B. Benefits of Relief.

1. Employment. Relief would enable one to "truthfully represent to friends, acquaintances and private sector employers that he has no conviction." (People v. Acuna (2000) 77 Cal. App.4th 1056, 1060.) For example, People v. Smith (1989) 215 Cal. App.3d 230, the defendant had been convicted of felony grand theft. The charge was later reduced to a misdemeanor and dismissed pursuant to section 1203.4. Some time later, Smith was charged with failure to inform potential investors of his prior felony conviction. At trial, the judge dismissed the related counts, and this was affirmed on appeal. "The purpose of Penal Code section 1203.4 'is to relieve from further punishment, and to restore rights to, one whose probation has resulted in his reformation.' [Citation] Smith's record of conviction has been 'wiped clean, subject only to reinstatement when, and only when, [he] commits another and subsequent crime' or other exceptional circumstances. [Citation] Smith cannot be prosecuted for failing to voluntarily disclose this misdemeanor conviction." (Id. at 238-39.)

Private employers may not even require an answer to the question of whether you were ever convicted and obtained 1203.4 relief. (See Cal Lab Code §§ 432.7a): "No employer, whether a public agency or private individual or corporation, shall ask an applicant for employment to disclose, through any written form or verbally, information concerning an arrest or detention that did not result in conviction....")

That being said, the internet is full of information. If your arrest made the news, you can be

assured that an employer will find it. Further, anyone can check the court records online. 1203.4 does not erase any court records. Your record would simply show that at its conclusion you obtained this relief. So you should be aware that many companies will check online to see if you show up.

2. Witness. If you were to become a witness in a civil or criminal case, the Legislature has precluded your impeachment as a witness with a felony conviction dismissed under section 1203.4. This immunity does not apply to a defendant witness. (See Evid. Code §§ 788(c).)

3. Further Relief Enabler. If convicted of a felony or misdemeanor sex offense, section 1203.4 relief would enable you to file a petition for a certificate of rehabilitation at the earliest possible time. (Penal Code §§ 4852.01, subd. (c) [""Any person convicted of a felony or any person who is convicted of a misdemeanor violation of any sex offense specified in Section 290, the accusatory pleading of which has been dismissed pursuant to Section 1203.4, may file a petition for certificate of rehabilitation and pardon pursuant to the provisions of this chapter if the petitioner has not been incarcerated in any prison, jail, detention facility, or other penal institution or agency since the dismissal of the accusatory pleading and is not on probation for the commission of any other felony, and the petitioner presents satisfactory evidence of five years residence in this state prior to the filing of the petition""].)

B. What 1203.4 Won't do.

1. No guns. In the areas of weapon possession, the Legislature has specifically stated that relief under section 1203.4 does not permit relief from these disabilities. ""Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under section 12021 [possession of a firearm by a felon.]""

2. Sex and Vehicle Code Offenses Excluded. There is no relief for ""any misdemeanor that is within the provisions of subdivision (b) of Section 42001 of the Vehicle Code [involving pedestrians who receive infraction offenses], to any violation of subdivision (c) of Section 286, Section 288, subdivision (c) of Section 288a, Section 288.5, or subdivision (j) of Section 289, any felony conviction pursuant to subdivision (d) of Section 261.5, or to any infraction.""

3. Driving Privileges. 1203.4 relief ""does not affect any revocation or suspension of the privilege of the person convicted to drive a motor vehicle under this chapter. Such person's prior conviction shall be considered a conviction for the purpose of revoking or suspending or otherwise limiting such privilege on the ground of two or more convictions."" (Veh Code §§ 13555.)

4. Must Disclose for Public Office, State, Local Agencies. The order does not relieve you of disclosing the ""conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery.""

5. Other Offenses Not Covered. No relief is afforded for ""any misdemeanor that is within the provisions of subdivision (b) of Section 42001 of the Vehicle Code ... or to any infraction.""

6. Another Prosecution. ""[I]n any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed.""

7. Federal Courts May Not Abide by the Relief. While it appears that the federal government will honor the decision of the state court to relieve its citizen of the felony convictions under most circumstances, any of the limitations which apply within the state will apply in the federal action

as well. (U.S. v. Potts (9th Cir. 1975) 528 F.2d 883, 884.) In certain deportation hearings, the federal government is not bound by the granting of relief due to Congress' power over aliens. (Kelly v. INS (1965) 349 F.2d 473.) It would also not erase a prior conviction for purposes of the U.S. Sentencing Guidelines Manual §§ 4A1.2(j). (U.S. v. Hayden (9th Circuit 2001) 255 F.3d 768.)

As you will note, there are many benefits as well as limitations on this relief. If you are in doubt about an issue of consequence pertaining to this relief, please call me.

#### CALIFORNIA PENAL CODE SECTION 1203.4

1203.4. (a) In any case in which 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, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted, except as provided in Section 13555 of the Vehicle Code. The probationer shall be informed, in his or her probation papers, of this right and privilege and his or her right, if any, to petition for a certificate of rehabilitation and pardon. The probationer may make the application and change of plea in person or by attorney, or by the probation officer authorized in writing. However, in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed. The order shall state, and the probationer shall be informed, that the order does not relieve him or her of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery. Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Section 12021. This subdivision shall apply to all applications for relief under this section which are filed on or after November 23, 1970. (b) Subdivision (a) of this section does not apply to any misdemeanor that is within the provisions of subdivision (b) of Section 42001 of the Vehicle Code, to any violation of subdivision (c) of Section 286, Section 288, subdivision (c) of Section 288a, Section 288.5, or subdivision (j) of Section 289, any felony conviction pursuant to subdivision (d) of Section 261.5, or to any infraction. (c) A person who petitions for a change of plea or setting aside of a verdict under this section may be required to reimburse the court for the actual cost of services rendered, whether or not the petition is granted and the records are sealed or expunged, at a rate to be determined by the court not to exceed one hundred twenty dollars (\$120), and to reimburse the county for the actual cost of services rendered, whether or not the petition is granted and the records are sealed or expunged, at a rate to be determined by the county board of supervisors not to exceed one hundred twenty dollars (\$120), and to reimburse any city for the actual cost of services rendered, whether or not the petition is granted and the records are sealed or expunged, at a rate to be

determined by the city council not to exceed one hundred twenty dollars (\$120). Ability to make this reimbursement shall be determined by the court using the standards set forth in paragraph (2) of subdivision (g) of Section 987.8 and shall not be a prerequisite to a person's eligibility under this section. The court may order reimbursement in any case in which the petitioner appears to have the ability to pay, without undue hardship, all or any portion of the cost for services established pursuant to this subdivision. (d) No relief shall be granted under this section unless the prosecuting attorney has been given 15 days' notice of the petition for relief. The probation officer shall notify the prosecuting attorney when a petition is filed, pursuant to this section. It shall be presumed that the prosecuting attorney has received notice if proof of service is filed with the court. (e) If, after receiving notice pursuant to subdivision (d), the prosecuting attorney fails to appear and object to a petition for dismissal, the prosecuting attorney may not move to set aside or otherwise appeal the grant of that petition. (f) Notwithstanding the above provisions or any other provision of law, the Governor shall have the right to pardon a person convicted of a violation of subdivision (c) of Section 286, Section 288, subdivision (c) of Section 288a, Section 288.5, or subdivision (j) of Section 289, if there are extraordinary circumstances.