

<p><b>California Criminal Justice Reform 2021 Update Women Lawyers Association</b></p>	
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<p><b>Brief recap of 2017 Update</b></p> <ul style="list-style-type: none"> <li>• “Public Safety Realignment,” AB 109 (Oct. 1, 2011): created “County Jail Prison” rather than State Prison for some felonies; shifted some Parole (post-prison) supervision to County Probation Departments; increased conduct credits</li> <li>• “Safe Neighborhood and Schools Act” Proposition 47 (Nov. 5, 2014): redefined many felonies to be misdemeanors</li> <li>• “The Public Safety and Rehabilitation Act of 2016” Proposition 57 (Nov. 9, 2016): limited circumstances when a juvenile can be prosecuted in adult court; allows qualifying prison inmates to be released early through increased conduct credits and early parole</li> <li>• “The Control, Regulate and Tax Adult Use of Marijuana Act” Proposition 64 (Nov. 9, 2016) Legalized the possession and cultivation of small amounts of marijuana, reduced selling to a misdemeanor, and reduced many juvenile marijuana offenses to infractions.</li> </ul>	
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## SB 1437 / PC 1170.95 effective January 1, 2019

Limits first degree murder liability in some situations e.g. felony murder:

- A participant in the perpetration or attempted perpetration of a felony specified in P.C. 189 in which a death occurs, is liable for murder only if one of the following is proven:
  - the person was the actual killer;
  - the person was not the actual killer, but with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree; or
  - the person was a major participant in the underlying felony and acted with reckless indifference to human life.

Retroactive:

- May petition to have a prior murder conviction vacated and re-sentenced (often requires litigation of the facts).
- Applies to murder convictions of any age, and regardless of whether the defendant is in or out of custody or has completed the sentence. There is no specified deadline for filing such a petition.

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## AB 1793 Retroactive Application of Proposition 64 effective January 1, 2019

*Affirmative duty to implement retroactive remedies*

California Department of Justice (DOJ) maintains statewide criminal history records (AKA rap sheets.)

- By July 1, 2019, DOJ was required to review entire database to identify any conviction which might be eligible for reduction or dismissal. DOJ provided a list to every DA's Office.
- DA's Office to notify court and Public Defender's Office of any challenge to any case on the list by July 1, 2020.
- Court to reduce or dismiss eligible convictions.

In San Luis Obispo County:

- DA's Office compiled a more complete list, supplementing DOJ list with local databases
- DA's Office did not challenge any, and dismissed all prior marijuana offenses: over 9500 adult convictions and over 900 juvenile charges.

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## SB 384 Sex Offender Tiering effective January 1, 2021

PC 290 Sex Offender registration was a lifetime requirement.

Now, depending on the offense:

- Adults: 10 years, 20 years, or lifetime
- Juveniles: 5 years or 10 years

Law passed in 2017, but three-year implementation window was granted for DOJ to re-classify qualifying registrants. Starting July 1, 2021 registrants may petition the court for a shorter period of registration.

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## AB 1950 Shorter Probation Terms effective January 1, 2021

Changed default length of probation for a misdemeanor to one year (formerly three years.) Penal Code 1203a

Changed default length of probation for a felony to two years (formerly five years.) Penal Code 1203.1

- Unintended consequence: Drug Court programs lost participants, and had offer shorter treatment plans (similarly, Prop. 47 reduced incentive to participate in court supervised treatment, because former felony offenses are now misdemeanors.
- San Luis Obispo: Court, Probation, and DA's Office are working together to implement retroactively and terminate probation when a longer length was previously imposed, without waiting for probationer to file a petition.

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## Retroactive application of statutory changes

The general default rule is that a change in a criminal law applies prospectively unless the law expressly declares that it applies retroactively. (P.C. 3; and *People v. Brown* (2012) 54 Cal.4th 314, 319.)

The **exception** to the default rule is that when a new law mitigates punishment, it will be presumed to apply to convictions that are not yet final unless the Legislature expresses a contrary intent. (*In re Estrada* (1965) 63 Cal.2d 740, 745.)

- Not yet final = appeal or time to appeal is complete; sentence is complete
- Lots of litigation: Prop. 47, changes in sentencing enhancements for prior convictions, what defines mitigation of punishment, does the DA have the option to unwind a negotiated plea?

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## AB 2542 California Racial Justice Act (Penal Code 745) effective January 1, 2021 (not retroactive)

The California Racial Justice Act of 2020. Prohibits the state from seeking or obtaining a criminal conviction, or imposing a sentence, on the basis of race, ethnicity, or national origin.

Violations based on:

- Participant in the case exhibits racial bias or animus towards the defendant
- During trial, use of racially discriminatory language
- Statistical evidence that people of one race are disproportionately charged or convicted of a specific crime
- Statistical evidence that people of one race received more severe sentences

Possible remedies:

- Mistrial, discharge jury and empanel a new jury, reduce charges, dismiss enhancements, vacate a conviction and/or sentence;
- If violation of PC 745 the death penalty is prohibited.

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## AB 3070 Jury Selection / Peremptory Challenges (CCP 231.7) effective January 1, 2022 (not retroactive) ... and to civil trials as of January 1, 2026

Changes the system for claims of bias in the exercise of peremptory challenges (Batson/Wheeler), by:

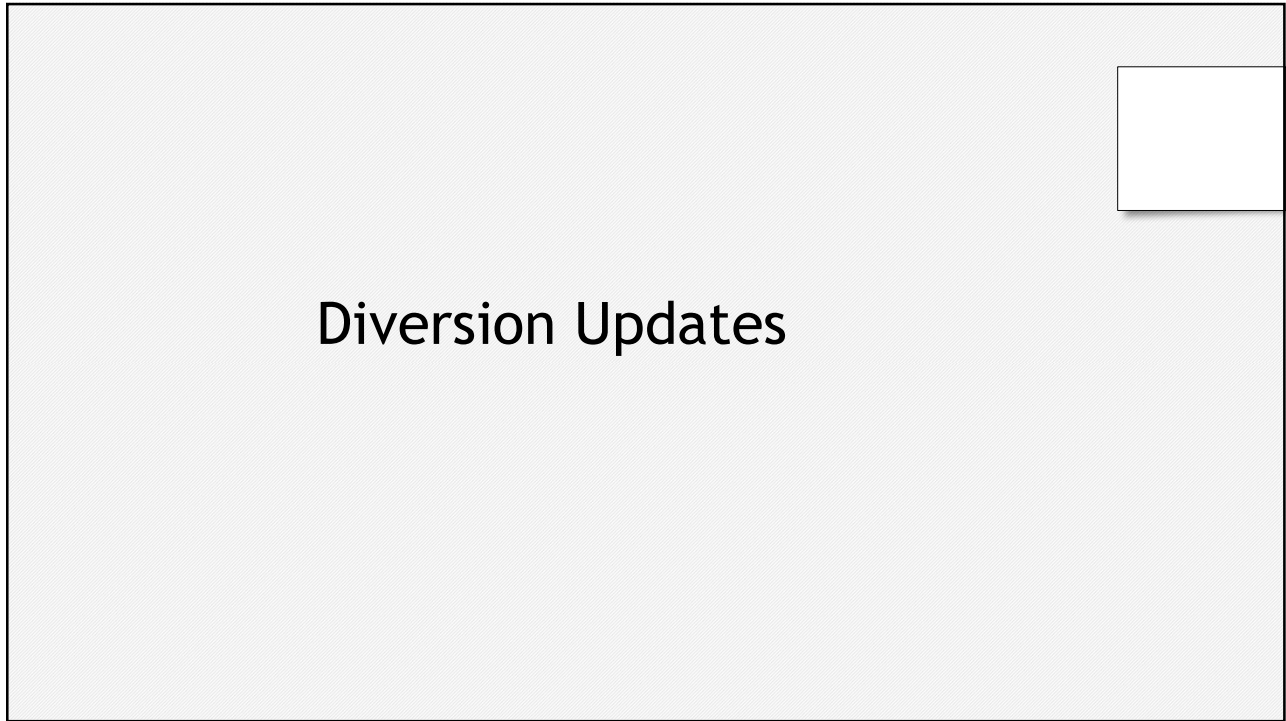
- creating a list of reasons that are presumptively invalid,
- by eliminating the requirement that objecting counsel make a prima facie case of discrimination, and
- by providing that the court need not find purposeful discrimination in order to find a peremptory challenge improper

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### Presumptively Invalid Reasons for a Peremptory:

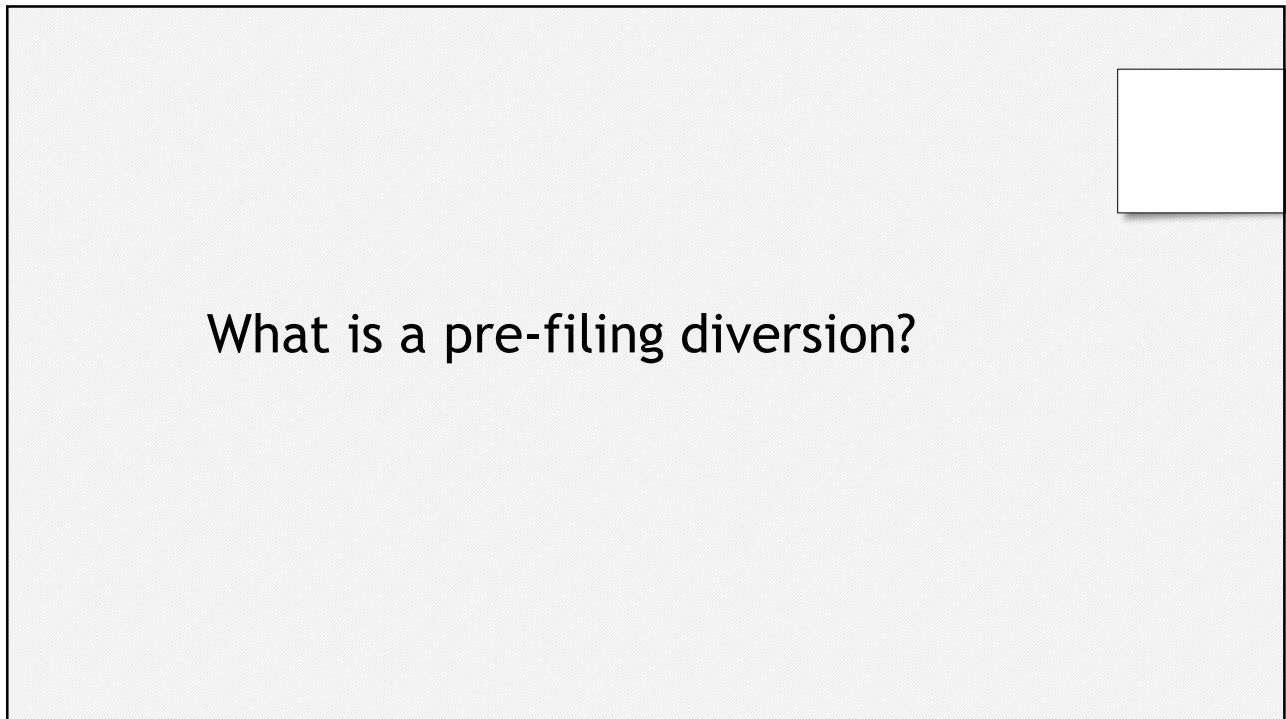
1. Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.
2. Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.
3. Having a close relationship with people who have been stopped, arrested, or convicted of a crime.
4. A prospective juror's neighborhood.
5. Having a child outside of marriage.
6. Receiving state benefits.
7. Not being a native English speaker.
8. The ability to speak another language.
9. Dress, attire, or personal appearance.
10. Employment in a field that is disproportionately occupied by members listed in any of the cognizable groups or that serves a population disproportionately comprised of members of a cognizable group.
11. Lack of employment or underemployment of the prospective juror or prospective juror's family member.
12. A prospective juror's apparent friendliness with another prospective juror of the same cognizable group.
13. Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror in order for a peremptory challenge relying on this justification to be considered presumptively invalid.

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Diversion Updates

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What is a pre-filing diversion?

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With successful completion, the person who completed the diversion never even gets charged with a crime by the prosecuting agency.


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## Logistics of Pre-filing Diversion in SLO




1. Person meets criteria of eligibility based on criminal history and offense for which the person was arrested or cited.
2. Person receives offer of diversion.
3. Person accepts offer of diversion and successfully completes requirement.
4. Optimal outcome: case is never filed.
5. If the person was arrested, the person could bring a motion to seal the record of arrest pursuant to PC 851.91 after the statute of limitations has passed.

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What is a pre-trial (post-filing) diversion?

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The DA's Office files criminal charges against a person and this person, depending on criminal history and what offense is currently charged, may be eligible to seek a diversion in the criminal court.

The diversion terms oftentimes includes education classes and treatment, and if it's completed within the allotted time, it results in dismissal of the charges and avoiding jail.

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## Common Types of Post-Filing Diversions

- Drug Diversion under California Penal Code 1000
- Military Diversion under California Penal Code 1001.81
- Mental Health Diversion under California Penal Code 1001.36
- Misdemeanor Diversion under California Penal Code 1001.95

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## Misdemeanor Diversion under California Penal Code 1001.95 effective: January 1, 2021

West's Ann.Cal.Penal Code § 1001.95

§ 1001.95. Offer of diversion to misdemeanor defendant; dismissal of action; reinstatement of criminal proceedings; charged offenses not eligible for diversion

Currentness

**(a) A judge** in the superior court in which a misdemeanor is being prosecuted may, at the judge's discretion, and over the objection of a prosecuting attorney, offer diversion to a defendant pursuant to these provisions.

(b) A judge may continue a diverted case for a period not to exceed 24 months and order the defendant to comply with terms, conditions, or programs that the judge deems appropriate based on the defendant's specific situation.

**(c) If the defendant has complied with the imposed terms and conditions, at the end of the period of diversion, the judge shall dismiss the action against the defendant.**

(d) If it appears to the court that the defendant is not complying with the terms and conditions of diversion, after notice to the defendant, the court shall hold a hearing to determine whether the criminal proceedings should be reinstated. If the court finds that the defendant has not complied with the terms and conditions of diversion, the court may end the diversion and order resumption of the criminal proceedings.

**(e) A defendant may not be offered diversion pursuant to this section for any of the following current charged offenses:**

**(1) Any offense for which a person, if convicted, would be required to register pursuant to Section 290.**

**(2) A violation of Section 273.5.**

**(3) A violation of subdivision (e) of Section 243.**

**(4) A violation of Section 646.9.**

**Credits**

(Added by Stats.2020, c. 334 (A.B.3234), § 1, eff. Jan. 1, 2021.)

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## The Debate About Whether Those Facing DUIs Are Eligible for Diversion under California Penal Code Section 1001.95

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Effective: July 1, 1999

West's Ann.Cal.Vehicle Code § 23640

§ 23640. Participation in driver improvement or treatment programs; no suspension or stay of proceedings prior to acquittal or conviction of violation of Section 23152 or 23153; effect after conviction and sentencing

Currentness

**(a) In any case in which a person is charged with a violation of Section 23152 or 23153, prior to acquittal or conviction, the court shall neither suspend nor stay the proceedings for the purpose of allowing the accused person to attend or participate, nor shall the court consider dismissal of or entertain a motion to dismiss the proceedings because the accused person attends or participates during that suspension, in any one or more education, training, or treatment programs, including, but not limited to, a driver improvement program, a treatment program for persons who are habitual users of alcohol or other alcoholism program, a program designed to offer alcohol services to problem drinkers, an alcohol or drug education program, or a treatment program for persons who are habitual users of drugs or other drug-related program.**

(b) This section shall not apply to any attendance or participation in any education, training, or treatment programs after conviction and sentencing, including attendance or participation in any of those programs as a condition of probation granted after conviction when permitted.

**Credits**

(Added by Stats.1998, c. 118 (S.B.1186), § 84, operative July 1, 1999. Amended by Stats.1999, c. 22 (S.B.24), § 42, eff. May 26, 1999, operative July 1, 1999.)

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## Split of Authority in the California Appellate Courts

Decision filed 7/27/21 Appellate Division, Superior Court, California

People v. Superior Court of Riverside County (Westlaw cite: 2021 WL 3617695)'s holding: "It therefore furthers the enacted policies of [section 1001.95](#) to hold – consistent with principles of statutory construction and the other legislative history – that the Legislature intended for defendants charged with misdemeanor DUI to be eligible for [section 1001.95](#) diversion as an exception to the prohibition embedded in [section 23640](#). If such was not the Legislature's intent they could and should have clearly said otherwise."

Decision filed 7/14/21 Appellate Division, Superior Court, California

People v. Superior Court of County of Los Angeles (Westlaw cite: 2021 WL 3288364)'s holding: "We therefore give effect to both statutes, by finding a person is eligible to be considered for a grant of diversion in all cases, *except* the ones specifically listed in [section 1001.95, subdivision \(e\)](#) (cases where a person must register as a sex offender, domestic violence, and stalking), *and* driving under the influence cases as provided in [Vehicle Code section 23640, subdivision \(a\)](#)."

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## Significance Misdemeanor Diversion under California Penal Code 1001.95

Those with Professional Licenses

Those who are NOT U.S. citizens

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## Significance Misdemeanor Diversion under California Penal Code 1001.95 for Defendants Who Hold Professional Licenses:

Effective: January 1, 2021

West's Ann.Cal.Penal Code § 1001.97

§ 1001.97. Status of arrest following completion of conditions; disclosure of arrest

### Currentness

(a) Upon successful completion of the terms, conditions, or programs ordered by the court pursuant to Section 1001.95, the arrest upon which diversion was imposed shall be deemed to have never occurred. The defendant may indicate in response to any question concerning their prior criminal record that they were not arrested. A record pertaining to an arrest resulting in successful completion of the terms, conditions, or programs ordered by the court 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.

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

### Credits

(Added by Stats.2020, c. 334 (A.B.3234), § 1, eff. Jan. 1, 2021.)

West's Ann. Cal. Penal Code § 1001.97, CA PENAL § 1001.97

Current with urgency legislation through Ch. 145 of 2021 Reg.Sess

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## Significance Misdemeanor Diversion under California Penal Code 1001.95 for Defendants Who Are Not U.S. Citizens:

“Immigration law has its own definition of a criminal conviction. Under INA § 101(a)(48)(A), a conviction occurs if there is a formal judgment of guilt entered by a court. But it also occurs in some alternative dispositions, if adjudication of guilt is withheld and “(i) a judge or jury has found the [noncitizen] guilty or the [noncitizen] has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the [noncitizen’s] liberty to be imposed.

The result is that if a person admits guilt as part of a diversion or other pretrial intervention program, it is very likely that they will be held to have a conviction for immigration purposes—even if the state (the convicting jurisdiction) says that there is no conviction.”

Immigrant Legal Resource Center June 2021 Practice Advisory by Kathy Brady citing *Matter of Cabrera*, 24 I&N Dec. 459, 460–62 (BIA 2008); *Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017)

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## Significance Misdemeanor Diversion under California Penal Code 1001.95 for Defendants Who Are Not U.S. Citizens, Continued:

So long as PC 1001.95 diversion is done with entry of a NOT GUILTY plea, the non-U.S. citizen who successfully completes this diversion does not have a conviction under CA state law and does not have a conviction for immigration purposes either.

The significance of a pre-trial diversion where no guilty plea is entered in contrast to a post-guilty plea diversion cannot be overstated.

PC 1000 -drug diversion as an example.

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## Expanded Pre-Trial Diversion for Persons with Developmental Disabilities Penal Code § 1001.20 et seq


“Under existing law, a court could offer diversion for a misdemeanor charge to a defendant who was evaluated by a regional center and found to have a developmental disability. Effective January 1, 2021, the statute includes diversion for any misdemeanor or felony charge (with exceptions for some serious crimes listed at Penal Code § 1001.21(b)). See Penal Code § 1001.20-1001.33 (AB 79).”

Applicability to the Non-U.S. Citizen Defendant:

“As always, counsel for noncitizen defendants must ensure that the person pleads “not guilty” or, if there is no plea, that the person does not admit facts supporting a finding of guilt to the court or prosecutor.”

Immigrant Legal Resource Center June 2021 Practice Advisory by Kathy Brady

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<p data-bbox="334 554 781 701">Thank you for your time</p>	