

# POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of  
Criminal Law Approved for Credit Toward California Criminal Law Specialization --  
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Week Of	Topic	Guests	General
Dec. 7 2020	Selected 2021 New Laws (Part I)		30 min

**This P&A is Part I of a summary of selected new laws and amended laws applicable to prosecutors, effective January 1, 2021.<sup>1</sup>**

## Probation

- **Penal Code sections 1203a and 1203.1 (amended):**

As a result of these amendments, the new probation period for most misdemeanors is one year and for felonies is two years, but there are exceptions.

## Misdemeanors

Existing law established the default maximum probation period for a misdemeanor as three years, with exceptions noted below. As amended, probation is limited on most misdemeanor crimes to one year. Additionally, a court can no longer impose a probation period that is as long as the defendants' maximum jail term. []

However, there is an exception for this one-year maximum term for misdemeanor probation. Penal Code section 1203a states that this one-year probation limit does not apply when the offense ITSELF "includes specific probation lengths within its provisions." For example, when a defendant is convicted of misdemeanor driving under the influence, or driving under the influence with injury, the Vehicle Code section expressly states a probation period of three to five years. So the probation term of three to five years in that statute controls, notwithstanding this new one-year probation period under Penal Code section 1203a. As another example, the statute for child endangerment, Penal Code section 273a, when prosecuted as a misdemeanor, has within its provisions a mandatory minimum probation

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<sup>1</sup> The author of the P&A handout acknowledges the CDAA Legislative Digest authored by Santa Clara Deputy District Attorney Kathy Storton and the Memorandum on Revision of the Maximum Term of Probation authored by Retired Judge Richard Couzens. Both documents were extremely helpful as I waded through statutes discussed in this P&A and their legislative history.

period of 48 months. So the maximum probation period remains 48 months, notwithstanding this new one-year probation period. The same with Health and Safety Code section 11550, which has a probation period up to five years. Also, domestic violence related crimes that come within provisions of Penal Code section 1203.097 require a minimum of three years probation when the victim is a person as defined in the applicable Family Code provision.

## **Felonies**

The statute that governs felony probation is Penal Code section 1203.1. Penal Code section 1203.1 also has been amended. Before these new amendments, the default maximum probation period for a felony was five years. The court also had the power to impose a probation period that was as long as the defendant's maximum jail or state prison sentence. Section 1203.1 has now been amended so that the maximum period for probation for most felony crimes is two years. As a result of these new amendments applicable to felonies, both the former five-year probation period and a probation period that is as long as the maximum sentence have both been eliminated, as to most felonies. The Legislature has made exceptions, however.

The first exception is any offense listed in Penal Code section 667.5, subd.(c), in other words, violent felonies. For these felonies, the probation can be as long as the maximum sentence in that case. The CDAA Legislative Digest gives this example. A violation of Penal Code section 245 with a great bodily injury is a violent felony. The maximum sentence in this instance is seven years: four years for the Penal Code section 245 conviction and three years for the great bodily injury enhancement. Under these new amendments, because this is a violent felony, the defendant can be placed on probation for seven years, which is the maximum sentence that would apply in those circumstances.

The second exception to the two-year probation period is any offense that includes a specific probation length within its provisions. In other words, the statute itself states the period of probation. For example, some statutes that specify the probation period include DUI's and domestic violence related crimes that come within the provisions of Penal Code section 1203.097. Other exceptions to the two-year limit include child endangerment and certain computer crimes, among others.

So as to these first two category of exceptions –violent felonies and crimes that include specific lengths of probation within their provisions -- the length of probation may be up to the maximum sentence in the case.

There is a third exception to the two-year limit on felony probation. The two-year maximum does not apply to a felony conviction for grand theft from an employer (Pen. Code, §487(b)(3)) or various embezzlement crimes (Pen. Code, §503), or making false financial statements (Pen. Code, §532) but only if the total value of the property taken exceeds \$25,000. The maximum probation period for these offenses is three years.

## **Penal Code section 745**

### **The California Racial Justice Act of 2020**

This new statute is in effect on January 1, 2021 and applies to cases in criminal court and adjudications and dispositions in juvenile court. The statute only applies to case in which judgment is entered on or after January 1, 2021.

#### **Establishing a violation of the statute:**

A violation is established if “the judge, an attorney in the case, a law enforcement office involved in the case, an expert witness, or the juror exhibited bias or animus towards the defendant because of the defendant’s race, ethnicity or a national origin.”

“During the defendant’s trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness or juror, used racially discriminatory language about the defendant’s race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of his race, ethnicity, or national origin, whether or not purposeful. This paragraph does not apply if the person speaking is describing language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect.”

“The defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who commit similar offenses and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant’s race, ethnicity, or national origin in the county where the convictions were sought or obtained.”

“A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant’s race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed” .

“A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases with victims of other races, ethnicities, or national origins, in the county where the sentence was imposed.”

## **Procedures**

A defendant may file a motion in the trial court asserting a violation of the statute, or, if judgment has been imposed, file a petition for writ of habeas corpus. If the motion is filed in the trial court, and the defendant makes a prima facie showing of a violation, the trial court shall hold a hearing. At the hearing, evidence can be presented by either party, “including, but not limited to, statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses. The court may also appoint an independent expert.” The defendant has the burden of proving the violation by a preponderance of the evidence. The court must make findings on the record at the conclusion of the hearing.

## **Discovery**

The statute provides contains a discovery provision. The defense may file a motion requesting all evidence relevant to a violation in the control of the “state.” The word “state” is defined in the statute and includes the district attorney. The motion must describe the information or records sought.

“A defendant may file a motion requesting disclosure to the defense of all evidence relevant to a potential violation of subdivision (a) in the possession or control of the state. A motion filed under this section shall describe the type of records or information the defendant seeks. Upon a showing of good cause, the court shall order the records to be released. Upon a showing of good cause, and if the records are not privileged, the court may permit the prosecution to redact information prior to disclosure.”

**Note:** Kathy Storton in the CDAA Legislative Digest notes that this is a drafting error subdivision (d) of the statute. Subdivision (d) currently states: “Upon a showing of good cause, the court shall order the records released. Upon a showing of good cause, and if the records are not privileged, the court may permit the prosecution to redact the information prior to disclosure.” In other words, the current version of the statute requires the release of records even if privileged.

The Leg Digest author states the statute should instead read: “Upon a showing of good cause, and if the records are not privileged, the court shall order the records released. Upon a showing of good cause, ~~and if the records are not privileged~~, the court may permit the prosecution to redact information prior to disclosure.” This is how the sentences read in a version of Penal Code section 745 that did not become operative.

## **Remedies**

If the court finds by a preponderance of the evidence that a violation has occurred, it may impose a remedy specific to the violation as follows.

- **If judgment has not yet been entered:**

(A) Declare a mistrial, if requested the by defendant.

(B) Discharge the jury panel and empanel a new jury.

(C) If the court determines that it would be in the interest of justice, dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges.

• If a judgment has been entered:

(A) If the court finds that a conviction was sought or obtained in violation of subdivision (a), the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with subdivision (a). If the court finds that the only violation of subdivision (a) that occurred is based on paragraph (3) of subdivision (a) and the court has the ability to rectify the violation by modifying the judgment, the court shall vacate the conviction and sentence, find that the conviction is legally invalid, and modify the judgment to impose an appropriate remedy for the violation that occurred. On resentencing, the court shall not impose a new sentence greater than that previously imposed.

(B) If the court finds that only the sentence was sought, obtained, or imposed in violation of subdivision (a), the court shall vacate the sentence, find that it is legally invalid, and impose a new sentence. On resentencing, the court shall not impose a new sentence greater than that previously imposed.

**Definitions**

The statute in subdivision (h) provides definitions of its terms. Among them, a “prima facie showing means that the defendant produces facts that, if true, establish that there is a substantial likelihood that a violation of subdivision (a) occurred.

For purposes of this section, a “substantial likelihood” requires more than a mere possibility, but less than a standard of more likely than not.”

“Racial discriminatory language” is defined as “language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant’s physical appearance, culture, ethnicity, or national origin. Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory

**An aside: Code of Civil Procedure section 231.7, is on the horizon:**

Although Code of Civil Procedure section 231.7 becomes effective January 1, 2021, *it is not operative until January 1, 2022*. The statute expands the reasons that will support a claim of bias as to the exercise of peremptory challenges by identifying a list of reasons that are presumptively invalid. The objecting counsel is not required to make a prima facie case of discrimination, and the court does not have to find purposeful discrimination in order to find the peremptory challenge was improper.

**List of Peremptory Challenges That Will Be Presumed Invalid**

This statute states: “A peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror’s race,

ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case:

- (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 subdivision (a) or that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a).
- (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 group as listed in subdivision (a).
- (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 for peremptory challenge relying on this justification to be considered presumptively invalid."

The statute also lists these additional "Presumptively Invalid Reasons for Peremptory Challenges That Have Historically Been Associated With Improper Discrimination in Jury Selection and That Must Be Observed By the Court or Objecting Counsel"

- A) The prospective juror was inattentive, or staring or failing to make eye contact.
- (B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.
- (C) The prospective juror provided unintelligent or confused answers.

*Again, this statute is operative January 1st, 2022.*

## **Penal Code section 290**

The statute deletes several crimes from the list of offenses that requires registration as a sex offender. Perhaps most significantly, it converts lifetime registration into a tiered system of sex offender registration.

Crimes are eliminated that from the list of offenses that require registration as a sex offender if at the time of the offense the defendant was not more than 10 years older than the minor and if the conviction is the only one requiring the defendant to register. These offenses include Penal Code sections 286(b)(1), 286(b)(2), 287(b)(1), 287(b)(2), 289(h) and 289(i). The amendment it to equalize registration for requirements involving a minor that are often consensual and to equalize the treatment of same sex and heterosexual conduct. While Penal Code section 261.5, unlawful sexual intercourse with a minor, is not a mandatory registerable offense, other forms of non-forcible sexual conduct were not treated in a similar fashion. The statute remedies this disparity.

The amendments add a tiered system of registration to replace the lifetime registration for sex offenders:

Tier One adult offenders must register for a minimum of 10 years;

Tier Two adult offenders must register for a minimum of 20 years;

Tier Three offenders must register for life.

Additionally, the amendments allow Tier One and Tier Two offenders to petition the court for termination of their registration requirement at the 10 or 20 year date. Offenders may seek continue to seek termination every one to five years if is denied. Tier Three offenders (lifetime registrants) may petition for termination of their registration after 20 years.

Penal Code section 290 continues to require registration as a sex offender for attempt convictions or conspiracy to commit convictions. Attempts and conspiracy crimes will usually be Tier One offenses, unless they qualify as serious felonies or violent felonies, in which they will be, at a minimum, Two Tier offenses. In certain circumstances, an attempt or conspiracy conviction might also qualify as a Tier Three offense.

## **Penal Code section 290.008**

This statute creates a tiered system of registration for juvenile sex offenders. Tier One offenders are required to register for a minimum of five years, and Tier Two offenders are required to register for a minimum of ten years.

Juvenile offenders can petition for registration termination after the five or ten-year registration period.

### **Penal Code section 290.5**

This statute sets forth the procedures for adult and juvenile sex offenders to petition the court to terminate the duty to register as a sex offender. The petition to terminate must be served on the registering law enforcement agency and on the district attorney in the county where the petition is filed. The statute authorizes the district attorney in the county where the petition is filed to request a hearing on the petition if the offender has not fulfilled the requirements for termination or if “community safety could be significantly enhanced” by the offender’s continued registration. The district attorney’s office must make this request within 60 days of receiving the report from the applicable registering agency.

### **Penal Code section 653y**

This statute is amended to create new misdemeanor and infraction crimes for misusing the 911 emergency system. A new subdivision (b) applies to using or knowingly allowing the use of 911 emergency system in order to harass another person. A first violation is an infraction, and later violations are misdemeanors. The new subdivision (c) applies when the harassment in the call amounts to a hate crime and this offense is a misdemeanor.

### **Penal Code section 647.9:**

This new misdemeanor law was in response to events that occurred following the helicopter crash that killed Kobe Bryant and others, when sheriff’s deputies took photos that had no investigative purpose. Under this new law, it is a crime for a first responder to photograph the image of a deceased person at the scene of an accident for any purpose other than for an office law enforcement purpose. This statute does not require that the first responder sell or distribute the photo. The simple act of taking the photo is a violation of the statute.

### **Welfare and Institutions Code section 625.6**

The prohibition of custodial interrogation of a minor without first consulting with legal counsel is expanded by raising the age of the minor from 15 years of age or younger, to 17 years of age or younger. Now the statute applies to all minors and no minor may be interrogated or waive *Miranda* rights without first consulting with legal counsel in person, by telephone, or by video conference. This consultation requirement cannot be waived.

In considering whether a juvenile’s statements made during a custodial interrogation should be admitted, courts are required to consider the effect of the failure to comply with the legal consultation requirement. Now the court must also consider “any willful violation of the [consultation requirement] in determining the credibility of a law enforcement officer under Section 780 of the Evidence Code.”

There are exceptions to the legal consultation requirement:

- The interrogating officer reasonably believes the information sought is necessary to protect life or property from imminent threat, and the questions are limited to those reasonably necessary to obtain that information.
- Probation officers are exempt from legal consultation requirements in the “normal performance” of their duties under the Welfare and Institutions Code.

A minor who is not in custody may be questioned without a legal consultation being held first

### **U-Visas**

There are two changes to U-Visas and T-Visas. First, the list of certifying agencies is expanded to include University of California and California State University campus officers and school district officers. Second, certifying officials are prohibited from refusing to complete the form that certifies helpfulness solely because the case has already been prosecuted or because the statute of limitations has expired.

### **Many Fees Eliminated**

Many fees that criminal defendants were required to pay have been eliminated. Assembly Bill 1869 eliminated numerous administrative fees, including fees that court were permitted to assess against a defendant or a minor in a criminal proceeding who were represented by a public defender or assigned or appointed counsel. Beginning July 1, 2021, no attorneys fees can be assessed. In addition, this legislation eliminated other fees including city and jail booking fees, drug diversion progress report fees, home detention and electronic monitoring fees, presentence report fees, probation supervision fees, work furlough fees and sheriff’s work program and weekend work program fees. Two new statutes, Government Code section 6111 and a new statute, Penal Code section 1465.9, cancel any debt that is still owned on these fees. Also effective July 1, 2021, costs for a drug diversion program investigation or progress report can no longer be assessed.

### **NEXT WEEK: More new laws will be discussed.**

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to P&A author deputy district attorney Mary Pat Dooley at (510) 272-6249. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist. Atty computer banks.

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