

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 |
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| Dec. 14 2020 | Selected 2021 New Laws (Part 2) | | 30 min |

This P&A is Part 2 of a summary of selected new laws and amended laws applicable to prosecutors, effective January 1, 2021.¹

Court Initiated Misdemeanor Diversion

- **Penal Code sections 1001.95- 1001.97**

These new Penal Code sections authorizes a judge, at his or her discretion, to offer diversion to a misdemeanor defendant, over the objection of the prosecutor. The statute contains no language requiring the court to consider the opinions of the district attorney, nor does it make any reference to the defense attorney. The statutes contain no guidelines for the court to consider in deciding whether or not to grant the diversion. The statute simply says the judge must order the defendant to comply with terms, conditions, or programs that the court deems appropriate “based on the defendant’s specific situation.”

The length of the diversion program is limited to 24 months, but there is no minimum period, indicating that the program could be shorter if the judge decides a shorter period is appropriate. There is no limit stated in the statute as to how many times a defendant can be placed on this diversion. However, a defendant cannot be diverted if he or she is currently charged with any of the following crimes:

- 1) any offense that requires registration as a sex offender under Penal Code section 290;
- 2) a violation of PC 273.5, domestic violence, corporal injury resulting in a traumatic condition;
- 3) a violation of Penal Code section 243(e), domestic violence battery, and
- 4) a violation of Penal Code section 646.9

¹ The author of the P&A handout acknowledges the CDAA Legislative Digest authored by Santa Clara Deputy District Attorney Kathy Storton. The Legislative Digest was were extremely helpful in explaining the new laws discussed in this P&A, Part 2.

All other misdemeanor defendants are eligible for diversion, including for example, a first time DUI, DUI causing injury, burglary, assault with a deadly weapon, firearms offenses, and every other misdemeanor not on this list of four misdemeanor offenses.

[Note: The Legislative Digest discusses the effects of this new law. Defendants who are diverted on misdemeanor crimes for which a conviction would prohibit them from possessing a firearm for 10 years will avoid this firearms prohibition. Defendants diverted on driving under the influence and any other priorable offense will not be treated as a repeat offender. That first-time violation of Vehicle Code section 23152 or 23153 does not count as a prior. When Governor Newsom signed the bill into law, he authored a letter saying he was concerned that it did not exempt driving under the influence offenses, and said he planned to address this issue with urgency at the start of the next legislative session in 2021.]

In addition to the conditions imposed by the court, which are based on the defendant's specific situation, the defendant must make restitution and comply with any protective or stay-away order, or an order prohibiting firearm possession if applicable.

If the defendant successfully completes diversion, Penal Code section 1001.97, subd. (a) states: "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 to deny any employment, benefit, license or certificate." However, the defendant *must* disclose the arrest in a questionnaire or application to be a police officer.

If the court finds the defendant did not comply with the terms and conditions of diversion, the court may end the diversion and order that criminal proceedings be resumed.

There is no mention in the statute whether it is retroactive. The statute will apply to every qualifying misdemeanor pending on January 1, 2021, and to every qualifying misdemeanor committed on and after January 1, 2021. The author of the Legislative Digest states that this new diversion statute is also likely to apply to every case not yet final on appeal as of January 1, 2021.

Diversion of Defendants with Developmental Disabilities

Penal Code sections 1001.20 - 1001.29

The misdemeanor diversion program that is already in existence for defendants with cognitive developmental disabilities is expanded to defendants charged with felony crimes. The term "cognitive" has been deleted so that the program applies to felony or misdemeanor defendants with a "developmental disability."

There are no disqualify misdemeanor crimes. The following felony crimes disqualify a defendant for eligibility. They are the same crimes that disqualify a defendant from mental disorder diversion under Penal Code section 1001.36:

1) murder; 2) voluntary manslaughter; 3) convictions requiring Pen. Code section 290 registration, except Pen. Code section 314, indecent exposure; 4) rape; 5) lewd or lascivious act on a child under 14; 6) assault with intent to commit rape, sodomy or oral copulation in violation of Pen. Code section 290; 7) rape or sexual penetration in concert with a violation of Pen. Code section 264.1; 8) continuous sex abuse of a child in violation of Pen. Code section 288.5; 9) using or employing a weapon of mass destruction (Pen. Code section 11418(b) or (c)).

The statute continues to provide that diversion shall not be ordered when the defendant had previously been diverted under this statute “within two year prior to the present criminal proceedings.” The statute also continues to provide that diversion can occur at any stage of the criminal proceeding, and the court need only “consult” with the prosecutor, defense attorney, probation department, and the appropriate regional center in determining whether a defendant may be diverted.

The statute continues to require that the defendant waive speedy trial rights in order to accept diversion. The reasons for terminating diversion and reinstituting criminal proceedings, in addition to the defendant’s performance on diversion and being charged with a felony while on diversion, include being charged with a misdemeanor crime during diversion that demonstrates a propensity for violence, or engaging in criminal conduct that makes the defendant unsuitable for diversion.

Domestic Violence Restraining Orders Expanded

Family Code section 6320

The Legislature amended Family Code section 6320 to add a detailed and expanded definition of “disturbing the peace,” which is one of the grounds for obtaining a domestic violence restraining order. The amended statute expands the definition of disturbing the peace to include “coercive conduct.”

Drawing on relevant case law, the amended statute defines the term “disturbing the peace of the other party” under Section 6320 as conduct that, based on the totality of the circumstances, “destroys the mental or emotional calm of the other party”. The amended statute specifies that such conduct may be committed directly or indirectly, including through the use of a third party, and by any method or through any means including, but not limited to, telephone, online accounts, text messages, internet-connected devices, or other electronic technologies.

The amended statute also provides that disturbing the peace includes, but is not limited to, “coercive control,” which is defined as a pattern of behavior that in purpose or effect unreasonably interferes with a person’s free will and personal liberty.

The amended statute provides examples of coercive control that include, but are not limited to *unreasonably* engaging in any of the following:

- a) Isolating the other party from friends, relatives, or other sources of support.
- b) Depriving the other party of basic necessities.
- c) Controlling, regulating, or monitoring the other party's movements, communications, daily behavior, finances, economic resources, or access to services.
- d) Compelling the other party by force, threat of force, or intimidation, including threats based on actual or suspected immigration status, to engage in conduct from which the other party has a right to abstain or to abstain from conduct in which the other party has a right to engage.

The legislative history points out that laws on domestic violence have predominantly focused on discrete instances of physical assault. By including coercive control, the state also recognizes other kinds of conduct as being domestic violence.

Use Immunity in Sexual Assault Cases

Penal Code section 1324.2

Penal Code section 1324.2 provides use immunity for specified witnesses in sexual assault cases. This law prohibits the victim or a witness's testimony about the use or possession of alcohol or drugs from being used against that victim or witness in a separate prosecution for offenses such as illegal drug use or underage drinking, if the testimony is given in a felony prosecution for a violation or attempted violation of these sexual offenses: Penal Code sections 220, 243.3, 261, 261.5, 286, 287, 288 or 289. The use immunity applies to testimony about the use or possession of alcohol or drugs "at or around the time of" the sex crime. The statute provides that evidence that the testifying victim or witness unlawfully possessed or used a controlled substance or alcohol is not excluded in any felony sex crime prosecution. The jury can be told that the witness received this use immunity, (and so the defendant can introduce it if the prosecution does not elicit it.) The legislative history states that the purpose behind this use immunity is to eliminate the fear of liability or prosecution for the illegal use or possession of alcohol or drugs that sometimes prevents victims or witnesses from reporting sexual assault crimes and cooperating with the prosecution.

Tracking Devices

Penal Code section 1534

The amended language adds “software” to the definition of “tracking device” so that a “tracking device” is now defined as any electronic or mechanical device, or “software,” that permits the tracking or movement of a person. The Legislative Digest points out that Penal Code section 1534 is not a section that authorizes the obtaining of a tracking device warrant. Penal Code section 1524 is the authorizing section. Penal Code section 1534 “simply specifies how search warrants are handled once they are obtained and sets forth some particular requirements for tracking device search warrants.”

Intellectual Disability and the Death Penalty

Penal Code section 1376

The amendments to this statute change the definition of “intellectual disability” for the purpose of decreasing the number of cases for which the death penalty can be legally sought by prosecutors. The statute now eliminates the requirement that the intellectual disability manifest itself before age 18. It provides instead that sub-average general intellectual functioning and deficits in adaptive behavior “manifest before the end of the developmental period, as defined by clinical standards.” The amended language does not define the age that constitutes “the end of the developmental period.”

Expungement of Convictions: Participation in California Conservation Camp

Penal code section 1203.4b

This new statute permits inmates who successfully participated in the California Conservation Camp program as an incarcerated individual hand crew member or successfully participated as a member of county incarcerated hand crew to petition to have their convictions dismissed as soon as they are out of custody, and even if they have not finished their period of parole, probation, or supervised release. The statute defines “successful participation.” Incarcerated individuals convicted at any time of certain enumerated disqualifying offenses are not eligible for relief.

Juveniles

Welfare and Institutions Code section 607

Welfare and Institutions Code section 607 lowers the age, from 25 to 23, at which the juvenile court loses jurisdiction over an offender who was found to have committed an offense under Welfare and Institutions Code section 707(b) unless the offender would have faced an aggregate sentence of seven years or more in adult court.

Welfare and Institutions Code section 731.5

Intake at the Division of Juvenile Justice (DJJ) will be closed effective January 1, 2021, with responsibility shifted to county governments. Beginning July 1, 2021, a ward shall not be committed to the DJJ, except in the following circumstance: The ward “is eligible to be committed under existing law and in whose case a motion to transfer the minor from juvenile court to a court of criminal jurisdiction was file.” As the Legislative Digest points out, “It appears that a DJJ commitment could happen after July 1, 2021, as long as DJJ has not yet closed and a motion to transfer the case to adult court is filed.

Welfare and Institution Code section 625.6

Before this amendment, the statute had required that, prior to a custodial interrogation, and before the waiver of any *Miranda* rights, a youth 15 years of age or younger must consult with legal counsel in person, by telephone, or by video conference. This consultation could not be waived. Now the statute has been amended to raise the age of the minor from 15 to 17. The result is that this statute now applies to all minors, and no minor may undergo custodial interrogation or waive *Miranda* rights without first consulting with legal counsel. The statute continues to state that this consultation cannot be waived.

The court, in determining whether the juvenile’s statements made to law enforcement will be admissible, is required to consider this lack of consultation with legal counsel. The lack of consultation with legal counsel can also be considered by the court in determining the credibility of any officer under Evidence Code section 780 who willfully failed to comply with the consultation requirement. The legislative history states: “The research suggests that because adolescents are more impulsive, are easily influenced by others (especially by figures of authority), and are less able to weigh in on the long-term consequences of their actions, they become more receptive to coercion. The context of custodial interrogation is believed to exacerbate these risks.”

The statute continues to provide certain exceptions for this legal consultation requirement. The first exception is in situations where the officer who questions a youth reasonably believes the information sought is necessary to protect life or property from an imminent threat, and the questions are limited to those reasonably necessary to obtain that information. The second exception applies to probation officers who are exempt from the legal consultation requirement in the normal performance of their duties. Provisions of the Welfare and Institutions Code require a probation officer taking minor into custody to advise the minor of his or her *Miranda* rights, including the right to have counsel present during the interrogation and that counsel will be appointed if the minor is unable to afford counsel.

Welfare and Institutions Code sections 781 and 786

There are amendments to Welfare and Institution Code sections regarding sealed records as they relate to applications for U-Visas and T-Visas. Welfare and Institutions Code section 781 has been amended to expand access by the prosecutor and judge to sealed juvenile Welfare and Institution

Code section 707(b) records for the purpose of certifying the victim's helpfulness on forms that are required when a victim who is not a citizen is seeking a U-Visa or T-Visa in order to stay in the United States.

Likewise access to juvenile records sealed pursuant to Welfare and Institutions Code section 786 has been expanded for the purpose of certifying victim helpfulness for those victims who are not citizens when they are seeking a U-Visa or T-Visa.

Additionally Welfare and Institutions Code section 786 has been amended to permit a juvenile's sealed records to be accessed, inspected, or utilized by the probation department, the prosecuting attorney, counsel for the minor, and the court when a new petition has been filed against the minor in juvenile court for the purpose of assessing the minor's competency in the proceedings on a subsequent petition against the minor if the issue of competency has been raised.

Welfare and Institutions Code section 786.5

The statute has been amended to require the probation department to notify the arresting police agency to seal the arrest record of a minor when that minor has satisfactorily completed a program of diversion or informal supervision. These records may still be accessed by the prosecutor in order to meet *Brady* obligations. Upon sealing, the arrest or offense shall be deemed not to have occurred.

Welfare and Institutions Code section 827.9

New Welfare and Institutions Code section 827.9 provides that a law enforcement agency shall not release a copy of a juvenile police record if the subject of that record is a minor who has been diverted by police officers and is currently in a diversion program; or is a minor who has been counseled and released by police without arrest or citation or referral to probation or the district attorney; or a minor who does not fall within the jurisdiction of the juvenile delinquency court, for example a minor under the age of 12 who has committed an offense other than murder or forcible sexual assault crimes. The statute sets forth a detailed sealing procedure. Upon the sealing of the juvenile record, the offense "shall be deemed not to have occurred." However, records sealed under this statute may be still be accessed by the prosecution to meet its *Brady* obligations.

Welfare and Institutions Code section 601.3

The provision authorizing a district attorney or probation department to establish a truancy program is amended. The amended language now requires a district attorney and probation department to determine whether another public agency, or a community-based organization, or the district attorney, or the probation department, is best able to operate the program.

Price Gouging

Penal Code section 396

The amendment adds pandemics and epidemic disease outbreaks to the list of emergency events to which this statute applies. The amended language provides, in part “that upon the declaration of a state of emergency or local emergency resulting from an earthquake, flood, fire, riot, storm, or natural or manmade disaster, and for a period of 30 days following that declaration, it is unlawful for a person, contractor, business, or other entity to sell or offer to sell any consumer food items or goods, goods or services used for emergency cleanup, emergency supplies, medical supplies, home heating oil, building materials, housing, transportation, freight, and storage services, or gasoline or other motor fuels for a price of more than 10 percent above the price charged by that person for those goods or services immediately prior to the proclamation of emergency.”

The legislative history of this amendment provides states: “The COVID-19 pandemic has exposed inadequacies with state laws related to price gouging, or the criminal act in which sellers increase the cost of essential goods during an emergency.”

Penal Code section 667.16

Amendments to this statute expand the one-year enhancement in Penal Code section 667.16 for a felony violation of Penal Code sections 470 (forgery), 487 (grand theft) and 532 (defrauding of money and property by false representations) that involve defrauding an owner of a residential or nonresidential structure, mobile home, or manufactured home in connection with repairs for damage caused by a natural disaster, for which a state of emergency is proclaimed by the Governor or President of the United States. The amendments add the language “or by adding to, or subtracting from, grounds in connection therewith.”

Senior Citizens: Recission of Contracts

Business and Professions Code sections 7150, 7159, 7159.10

The legislative history of this bill explains that a substantial number of complaints are received from senior citizens about home improvement contracts (B&P 7159) and service and repair contracts (B&P 7159.10.) The homes of these seniors are placed at risk or lost to foreclosure as a result of high-pressure sales and contracts that are misrepresented or misunderstood. Amendments to these statutes extend the time for seniors to cancel these contracts from three business days to five business days. The five-day right to cancel applies to contracts entered into after January 1, 2021.

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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