



# 2021 CALIFORNIA LAWS THAT CAN HELP IMMIGRANTS CHARGED WITH OR CONVICTED OF CRIMES

By Kathy Brady

Multiple California criminal reform laws went into effect on January 1, 2021. These laws were passed to help all defendants regardless of immigration status, but they can be of special help to noncitizens.

- California created new, shorter time periods for probation. See Penal Code §§ [1203a](#) and [1203.1 \(AB 1950\)](#). With several exceptions, the maximum probation period for a misdemeanor conviction is one year, and for a felony is two years.  
  
Significantly, people with convictions from before January 1, 2021 can apply to have their probation term reduced to be consistent with the new law. Besides other benefits of being off probation, this can help noncitizens if they are applying for naturalization or if they need to obtain some forms of California post-conviction relief. See **Part A**.
- Under Penal Code § [1001.95 \(AB 3234\)](#) the court can offer a new form of pretrial diversion to defendants charged with certain misdemeanors. This can help immigrants because a true pretrial diversion, i.e., where the defendant pleads not guilty before being diverted, is not a conviction for immigration purposes. In addition, an existing pretrial diversion for people with developmental disabilities was expanded to include some felony charges. See Penal Code § [1001.21](#) and **Part B**.
- California passed groundbreaking legislation with the Racial Justice Act, under Penal Code § [745 \(AB 2542\)](#). This can provide relief for people who are victims of investigations, prosecutions, or punishments that are motivated by race, ethnicity, or national origin. See **Part C**.
- California also passed AB [2321](#) and AB [2426](#), which improve access to the U visa for immigrant victims of crimes. The bills expedite the certification process for survivors and clarify certification procedures. See discussion of Penal Code § [679.10](#) and Welfare and Institutions Code §§ [781](#), [786](#) in a separate advisory, ILRC, *California State Laws on the U Visa* (June 2021) at [www.ilrc.org](http://www.ilrc.org).

## I. With Some Exceptions, the Maximum Period of Probation a Court May Impose is One Year for a Misdemeanor and Two Years for a Felony; This Can Apply Retroactively to Shorten Existing Probation Periods

Effective January 1, 2021, a court can impose a maximum one year of probation for a misdemeanor conviction and two years of probation for a felony. See amendments to Penal Code §§ [1203a](#) and [1203.1](#). There are several exceptions in each category. See Part 1, below. The new law applies automatically to all qualifying convictions going forward.

Significantly, ***people who were sentenced to probation before January 1, 2021 can apply to have their probation shortened to be consistent with the new law.*** See Part 2, below. Helping your client to get a shorter term of probation, i.e., to get off probation sooner, may enable them to more quickly apply for naturalization. It also may help them qualify more quickly to apply for California post-conviction relief such as a vacatur under Penal Code § 1473.7, an “expungement” (for purposes of DACA) under § 1203.4, or to reduce a felony to a misdemeanor under § 17(b)(3), which in turn may make them eligible to qualify for immigration relief or avoid an immigration penalty. See Part 3 below.

This section will provide an overview. For a more in-depth discussion, see Couzens, *Memorandum: Revision of the Maximum Term of Probation [AB 1950] [Amended]* (Nov. 18, 2020) (hereafter “Couzens Memo”).<sup>1</sup>

### A. California Offenses That Do Not Qualify for the Reduced Probation Terms

The new probation terms apply to all felonies and misdemeanors, with the following exceptions. A helpful list of all excepted offenses appears in Appendix I of the [Couzens Memo](#).

Under Penal Code § [1203a](#), a misdemeanor will have a one-year maximum term of probation, *unless* the criminal statute itself sets a longer term. Several California offenses do set out a longer period of probation. See [Couzens Memo](#), Appendix I. For example, this includes DUI convictions, for which probation is imposed from three to five years per Vehicle Code §

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<sup>1</sup> The Couzens Memo is available at [http://www.adi-sandiego.com/news\\_alerts/pdfs/2021/Probation\\_Length\\_AB\\_1950\\_11\\_2020\\_Couzens.pdf](http://www.adi-sandiego.com/news_alerts/pdfs/2021/Probation_Length_AB_1950_11_2020_Couzens.pdf). See also, e.g., *People v. Quinn*, 1st Appellate District (January 11, 2021) (unpublished) at <https://www.courts.ca.gov/opinions/documents/A156932.PDF>

23600(b), and “a crime in which the victim is a person defined in Section 6211 of the Family Code,” which has a minimum three-year probation period, per Penal Code § 1203.097.

Under Penal Code § [1203.1](#)(m), a felony will have a two-year maximum term of probation, *unless* the offense is listed in Penal Code § 667.5(c), or the criminal statute sets out a longer length of probation. Also, certain theft offenses (Penal Code §§ 487(b)(3), 503, 532a) where the value taken exceeds \$25,000 can have probation for up to three years. See Appendix I of the [Couzens Memo](#).

## B. Apply to Shorten a Probation Term Imposed Before January 1, 2021

People who are still on probation that was imposed before January 1, 2021 can ask for the probation period to be shortened to conform with the new law. Authorities appear to agree that the new law applies retroactively to these people,<sup>2</sup> and advocates report that such requests have been routinely granted. This can make a real difference in probation time.

*Example:* In February 2020, Steve was placed on misdemeanor probation for three years. If the offense qualifies under the new law, he can ask to terminate probation now, because a one-year probation period would have ended in February 2021.

If instead in February 2020 Steve was placed on felony probation for five years, and the offense qualifies under the new law, he could apply to shorten probation to two years. Steve’s probation could end in February 2022 rather than February 2025.

Currently it appears that each person must file an individual application, although advocates report that some jurisdictions, such as Santa Clara County, are investigating how to act across-the-board without such an application. To submit the application, low-income clients may be able to get free help from their local public defender office, or free or low-cost help from a local Clean Slate nonprofit. Because such practitioners have experience in the local court, they are likely the best people to handle such applications. If there are many applicants and a waiting period, be sure to highlight any time urgency, e.g., a need to qualify for post-conviction relief to avoid removal.

<sup>2</sup> See discussion in *People v. Quinn*, *supra*, and [Couzens Memo](#), pp. 3–5.

## C. How Does Having a Shorter Period of Probation Help Immigrants?

Being off probation can provide special legal benefits to noncitizens.

- *Naturalization.* A noncitizen cannot attend their naturalization interview while on probation. In addition, being on probation during the period for which good moral character must be shown can be used as a negative factor in discretion.<sup>3</sup>
- *“Expunge” convictions for DACA (Deferred Action for Childhood Arrivals).* A criminal conviction is not an absolute bar to DACA if it is eliminated by an “expungement” (rehabilitative relief awarded because the person completed probation or met other requirements, e.g., those delineated under Penal Code § 1203.4).<sup>4</sup> Generally, probation must be completed or terminated to expunge under § 1203.4.
- *California post-conviction relief: Penal Code § 1473.7.* Section 1473.7 is an essential vehicle to vacate a legally invalid conviction but is not available to people in actual or “constructive” custody, which includes people still on probation.<sup>5</sup> Shortening probation enables the person to more quickly become eligible to use § 1473.7 to vacate a conviction, rather than having to file a habeas corpus petition, which can be problematic.
- *California post-conviction relief: Reducing a “wobbler” felony to a misdemeanor under Penal Code § 17(b)(3).* A judge can reduce a wobbler at any time but is most likely to do so after probation is complete or nearly complete. The BIA and the Ninth Circuit have held that reducing a felony to a misdemeanor can help the person qualify for forms of relief that are barred by a felony conviction (e.g., DACA, Temporary Protected Status) and can avoid some penalties based on conviction of a crime involving moral turpitude.<sup>6</sup> (Note that ICE

<sup>3</sup> See 8 C.F.R. § 316.10(c)(1).

<sup>4</sup> See USCIS, *DACA: Frequently Asked Questions*, Question #68, [https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions#criminal\\_convictions](https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions#criminal_convictions) (“Expunged convictions and juvenile convictions will not automatically disqualify you.”).

<sup>5</sup> See Penal Code § 1473.7(a).

<sup>6</sup> See, e.g., *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 846 (9th Cir. 2003) (Penal Code § 17(b)(3) reduction has immigration effect), partially overruled on other grounds by *Ceron v. Holder*, 747 F.3d 773, 778 (9th Cir. 2014) (en banc). It can help the person qualify for the petty offense exception to the moral turpitude inadmissibility ground (INA § 212(a)(2)(A)(ii)(II)), and avoid the deportation ground based on conviction of one crime involving moral turpitude committed within five years of admission (INA § 237(a)(2)(A)(i)). For the latter, the conviction must have been on or after January 1, 2015. See discussion in ILRC, *All Those Rules About Crimes Involving Moral Turpitude* (May 2021), <https://www.ilrc.org/all-those-rules-about-crimes-involving-moral-turpitude>.

might assert that a § 17(b)(3) reduction no longer has immigration effect, despite this precedent. Consult ILRC or other expert if you want assistance to counter this argument.)

## II. New Pre-Trial Diversion for Some Misdemeanor Charges, and Expansion of Diversion for Persons with Developmental Disabilities

For further discussion of which criminal court dispositions are “convictions” for immigration purposes, see ILRC Practice Advisories.<sup>7</sup>

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.<sup>8</sup> This is why immigrants need access to “pretrial” diversion programs: procedures where, before being diverted, the person pleads “not guilty,” or at least there is no finding or admission of facts. That is not a conviction for immigration purposes.

In the last few years California has enacted four pretrial diversion programs, described below. In each of these, the person pleads “not guilty” before being diverted (or could and should do so; defense counsel should carefully monitor to make sure this occurs). If the person successfully completes diversion, the charges are dropped, the case ends, and there is no conviction for state or immigration purposes. If the person fails the program, they return to “regular” criminal court to face the original charges.

<sup>7</sup> See ILRC, *Immigration Consequences of Pretrial Diversion and Intervention Agreements* (May 2021) available at <https://www.ilrc.org/immigration-consequences-pretrial-diversion-and-intervention-agreements-0> and ILRC, *What Qualifies as a Conviction for Immigration Purposes?* (April 2019) available at <https://www.ilrc.org/what-qualifies-conviction-immigration-purposes>.

<sup>8</sup> See, e.g., *Matter of Cabrera*, 24 I&N Dec. 459, 460–62 (BIA 2008); *Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017).

## A. New Misdemeanor Pre-Trial Diversion, Penal Code § 1001.95

Effective January 1, 2021, Penal Code § [1001.95](#) provides that a judge may offer diversion to persons charged with misdemeanor offenses, and may do so over the prosecutor’s objection. Defenders should ask the court to grant this pretrial diversion. The case may be continued for the diversion program no longer than 24 months.

There are some exceptions. Diversion is not available to persons charged with a misdemeanor offense for which sex registration may be required (Penal Code § 290) or some commonly charged domestic violence or stalking offenses (Penal Code §§ 243(e), 273.5, and stalking, 646.9). While Governor Newsom has stated that he wants to exclude misdemeanor DUI charges from this diversion,<sup>9</sup> that has not happened yet and there are some reports of misdemeanor DUI diversion being granted.

*Warning:* The terms of section 1001.95 do not specify that this must involve a plea of “not guilty.” Some judges might ask the defendant to plead guilty, and that *will* constitute a conviction for immigration purposes. To avoid a conviction, noncitizens must be permitted to plead “not guilty,” and to not admit facts that would support a finding of guilt, before being diverted. If that is not possible, seek other alternatives such as an informal arrangement with the District Attorney.<sup>10</sup>

## B. 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). 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. Note that in removal proceedings, noncitizens with developmental disabilities may qualify for free representation under the *Franco* settlement.<sup>11</sup>

<sup>9</sup> See signing statement for AB 3234, a letter from Gov. Newsom to the State Assembly, September 30, 2020, at <https://www.gov.ca.gov/wp-content/uploads/2020/09/AB-3234.pdf>.

<sup>10</sup> See discussion of such arrangements at Part D of ILRC, *Immigration Consequences of Pretrial Diversion and Intervention Agreements*, *supra*.

<sup>11</sup> See *Franco-Gonzalez v. Holder*, No. CV–10– 02211 DMG (DTBx), 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014). See also ACLU of Southern California, *Franco v. Holder*, <https://www.aclusocal.org/en/cases/franco-v-holder>.



### C. Reminder: Existing Pre-Trial Diversion for Persons Suffering from Mental Disorders and for Certain Drug Offenses

Effective January 1, 2018, California created Penal Code § [1001.36](#), a pretrial diversion for people with mental health issues who are charged with a variety of misdemeanors or felonies. They also may be able to get free representation in removal proceedings under *Franco, supra*.

Effective January 1, 2018, California amended Penal Code § [1000](#), a provision for relatively minor drug charges, to change it from a “deferred entry of judgment” procedure that required a guilty plea before diversion, to a true pretrial diversion procedure, where the person pleads “not guilty” and then is diverted.

### III. The Racial Justice Act

The groundbreaking California Racial Justice Act (“RJA”) became effective on January 1, 2021. See Penal Code § [745](#) ([AB 2542](#)). The RJA prohibits the state from seeking or obtaining a criminal conviction, or seeking, obtaining, or imposing a sentence, on the basis of race, ethnicity, or national origin. The RJA does not provide special protection against bias based on immigration status, but many noncitizens are subject to unfair treatment based on the above categories and they can benefit from the RJA.

Before judgment, the defendant can file a motion for a hearing on whether the RJA has been violated. After judgment, they can file a motion for appropriate relief in a petition for habeas corpus, or, if they are no longer in actual or constructive custody, a motion under Penal Code § 1473.7(a)(3), a new subsection added by the RJA. Among the bases for relief are if the person was charged or convicted of a more serious offense, or given a longer or more severe sentence, than similarly situated individuals of other races, ethnicities, or national origin, or if “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 the defendant’s race, ethnicity, or national origin, whether or not purposeful.”<sup>12</sup> The law applies to adjudications and dispositions in the juvenile delinquency system.<sup>13</sup>

Currently, the RJA applies only prospectively, in cases in which judgment was entered on and after January 1, 2021.<sup>14</sup> However, in 2021 there is a legislative effort to make the RJA retroactive to judgments that were final before January 1, 2021. See [AB 256](#).

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<sup>12</sup> Penal Code § 745(a).

<sup>13</sup> Penal Code § 745(f).

<sup>14</sup> Penal Code § 745(j).



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