

LEXSTAT CAL PEN CODE § 1000

DEERING'S CALIFORNIA CODES ANNOTATED
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PENAL CODE
Part 2. Of Criminal Procedure
Title 6. Pleadings and Proceedings Before Trial
Chapter 2.5. Special Proceedings in Narcotics and Drug Abuse Cases

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Pen Code § 1000 (2007)

§ 1000. Cases governed by chapter; Programs eligible for referrals; Requirement of drug testing

(a) This chapter shall apply whenever a case is before any court upon an accusatory pleading for a violation of *Section 11350, 11357, 11364, 11365, 11377, or 11550 of the Health and Safety Code*, or subdivision (b) of *Section 23222 of the Vehicle Code*, or *Section 11358 of the Health and Safety Code* if the marijuana planted, cultivated, harvested, dried, or processed is for personal use, or *Section 11368 of the Health and Safety Code* if the narcotic drug was secured by a fictitious prescription and is for the personal use of the defendant and was not sold or furnished to another, or subdivision (d) of *Section 653f* if the solicitation was for acts directed to personal use only, or *Section 381* or subdivision (f) of *Section 647 of the Penal Code*, if for being under the influence of a controlled substance, or *Section 4060 of the Business and Professions Code*, and it appears to the prosecuting attorney that, except as provided in subdivision (b) of *Section 11357 of the Health and Safety Code*, all of the following apply to the defendant:

(1) The defendant has no conviction for any offense involving controlled substances prior to the alleged commission of the charged offense.

(2) The offense charged did not involve a crime of violence or threatened violence.

(3) There is no evidence of a violation relating to narcotics or restricted dangerous drugs other than a violation of the sections listed in this subdivision.

(4) The defendant's record does not indicate that probation or parole has ever been revoked without thereafter being completed.

(5) The defendant's record does not indicate that he or she has successfully completed or been terminated from diversion or deferred entry of judgment pursuant to this chapter within five years prior to the alleged commission of the charged offense.

(6) The defendant has no prior felony conviction within five years prior to the alleged commission of the charged offense.

(b) The prosecuting attorney shall review his or her file to determine whether or not paragraphs (1) to (6), inclusive, of subdivision (a) apply to the defendant. Upon the agreement of the prosecuting attorney, law enforcement, the public defender, and the presiding judge of the criminal division of the superior court, or a judge designated by the presiding judge, this procedure shall be completed as soon as possible after the initial filing of the charges. If the defendant is found eligible, the prosecuting attorney shall file with the court a declaration in writing or state for the record the grounds upon which the determination is based, and shall make this information available to the defendant and his or her attorney. This procedure is intended to allow the court to set the hearing for deferred entry of judgment at the arraignment. If the defendant is found ineligible for deferred entry of judgment, the prosecuting attorney shall file with the court a declaration in writing or state for the record the grounds upon which the determination is based, and shall make this information available to the defendant and his or her attorney. The sole remedy of a defendant who is found ineligible for deferred entry of judgment is a postconviction appeal.

(c) All referrals for deferred entry of judgment granted by the court pursuant to this chapter shall be made only to programs that have been certified by the county drug program administrator pursuant to Chapter 1.5 (commencing with Section 1211) of Title 8, or to programs that provide services at no cost to the participant and have been deemed by the court and the county drug program administrator to be credible and effective. The defendant may request to be referred to a program in any county, as long as that program meets the criteria set forth in this subdivision.

(d) Deferred entry of judgment for a violation of *Section 11368 of the Health and Safety Code* shall not prohibit any administrative agency from taking disciplinary action against a licensee or from denying a license. Nothing in this subdivision shall be construed to expand or restrict the provisions of Section 1000.4.

(e) Any defendant who is participating in a program referred to in this section may be required to undergo analysis of his or her urine for the purpose of testing for the presence of any drug as part of the program. However, urine analysis results shall not be admissible as a basis for any new criminal prosecution or proceeding.

HISTORY:

Added Stats 1972 ch 1255 § 17, effective December 15, 1972. Amended Stats 1975 ch 1267 § 1; Stats 1983 ch 1314 § 2; Stats 1987 ch 1367 § 3, effective September 29, 1987; Stats 1988 ch 1086 § 1; Stats 1990 ch 53 § 1 (SB 1030), effective April 20, 1990; Stats 1991 ch 469 § 2 (AB 154); Stats 1992 ch 1118 § 1 (AB 3555); Stats 1st Ex Sess 1993-94 ch 44 § 1 (AB 94 X), effective November 30, 1994; Stats 1996 ch 1132 § 2 (SB 1369); Stats 1998 ch 931 § 381 (SB 2139), effective September 28, 1998. Amended Stats 2001 ch 473 § 7 (SB 485); Stats 2002 ch 545 § 5 (SB 1852) (ch 545 prevails), ch 784 § 541 (SB 1316).

NOTES:

Amendments:

1975 Amendment:

Substituted the section for the former section which read: "(a) This chapter shall apply whenever a case is before any court upon an accusatory pleading for violation of *Section 11500, 11530, 11555, 11556, 11910, or 11990 of the Health and Safety Code* and it appears to the district attorney that all of the following apply to the defendant:

"(1) The defendant has no prior conviction for any offense involving narcotics or restricted dangerous drugs.

"(2) The offense charged did not involve a crime of violence or threatened violence.

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"(3) There is no evidence of a violation relating to narcotics or restricted dangerous drugs other than a violation of the sections listed in this subdivision.

"(4) The defendant has no record of probation or parole violations.

"(b) The district attorney shall review his file to determine whether or not paragraphs (1) to (4), inclusive, of subdivision (a) are applicable to the defendant."

1983 Amendment:

(1) Amended subd (a) by (a) adding "or *Section 11368 of the Health and Safety Code* if the narcotic drug was secured by a fictitious prescription and is for the personal use of the defendant and was not sold or furnished to another,"; and (b) substituting "Section 11357" for "Section 11356" near the end of the subdivision; and (2) added subd (c).

1987 Amendment:

Added (1) "or subdivision (d) of Section 653f if the solicitation was for acts directed to personal use only," in subd (a); (2) "or she" before "has been diverted" in subd (a)(5); and (3) "or her" after "shall review his" and after "defendant and his" in subd (b).

1988 Amendment:

Added the second, third, and fourth sentences of subd (b).

1990 Amendment:

Amended subd (b) by (1) substituting "set" for "hold" in the fourth sentence; and (2) adding the last sentence.

1991 Amendment:

Amended subd (a) by adding (1) "a" after "accusatory pleading for"; and (2) "*or Section 11370.1 of the Health and Safety Code* if the amount possessed is one-half gram or less of a substance containing cocaine base, one gram or less of a substance containing cocaine, one gram or less of a substance containing heroin, one gram or less of a substance containing methamphetamine, one-eighth gram or less of a crystalline substance containing phencyclidine, one milliliter or less of a liquid substance containing phencyclidine, one-half gram or less of plant material containing phencyclidine, or one hand-rolled cigarette treated with phencyclidine," after "furnished to another".

1992 Amendment:

(1) Amended the second sentence in subd (b) by (a) adding "and" after "the public defender,"; and (b) deleting "and the probation department of each county," after "by the presiding judge"; (2) deleted the former last sentence in subd (b)

which read: "Nothing in this subdivision shall be construed to affect the obligation of a probation department to conduct an investigation and make a report to the court, pursuant to subdivision (b) of Section 1000.1 and Section 1000.2."; (3) added subd (c); and (4) redesignated former subd (c) to be subd (d).

1994 Amendment:

Added subd (e).

1996 Amendment:

(1) Substituted "prosecuting attorney" for "district attorney" wherever it appears; (2) deleting "or *Section 11370.1 of the Health and Safety Code* if the amount possessed is one-half gram or less of a substance containing cocaine base, one gram or less of a substance containing cocaine, one gram or less of a substance containing heroin, one gram or less of a substance containing methamphetamine, one-eighth gram or less of a crystalline substance containing phencyclidine, one milliliter or less of a liquid substance containing phencyclidine, one-half gram or less of plant material containing phencyclidine, or one hand-rolled cigarette treated with phencyclidine," before "or subdivision (d)" in the introductory clause of subd (a); (3) substituted "successfully completed or been terminated from diversion or deferred entry of judgment pursuant to this chapter within five years prior to the alleged commission of the charged offense" for "been diverted pursuant to this chapter within five years prior to the alleged commission of the charged divertible offense" in subd (a)(5); (4) deleted "divertible" after "of the charged" in subd (a)(6); (5) amended subd (b) by (a) substituting "apply" for "are applicable" after "subdivision (a); (b) substituting "hearing for deferred entry of judgment" for "diversion hearing" in the fourth sentence; (c) adding "for deferred entry of judgment" in the fifth sentence; and (d) adding the last sentence; (6) amended subd (c) by (a) substituting "for deferred entry of judgment" for "to diversion" after "All referrals" near the beginning; (b) substituting "shall be made only to programs that" for "on or after January 1, 1995, shall be made only to diversion programs which"; (c) deleting "diversion" after "Title 8, or to"; (d) substituting "that" for "which" after "or to programs"; and (e) deleting the former last sentence which read: "Prior to January 1, 1995, all referrals to diversion granted by the court shall, to the maximum extent possible, be made to diversion programs which have been certified by the county drug program administrator pursuant to Chapter 1.5 (commencing with Section 1211) of Title 8, or to diversion programs which provide services at no cost to the participant and have been deemed by the court to be credible and effective."; (7) amended subd (d) by substituting (a) "Deferred entry of judgment" for "Successful completion of diversion"; and (b) "Section 1000.4" for "Section 1000.5" at the end; and (8) amended subd (e) by substituting (a) "Any defendant who is participating in a program referred to in this section may be required" for "Any jurisdiction that provides diversion under this chapter may require a divertee"; and (b) "the" for "a treatment and supervision" after "as part of".

1998 Amendment:

Added "of the superior court in a county in which there is no municipal court, or" before "a judge designated" in the second sentence of subd (b).

2001 Amendment:

Substituted "Section 4060" for "Section 4230" after "controlled substance, or" in the introductory clause of subd (a).

2002 Amendment:

(1) Added "subdivision (b) of *Section 23222 of the Vehicle Code*, or" in the introductory clause of subd (a); and (2) substituted "superior court" for "municipal court or of the superior court in a county in which there is no municipal court" after "criminal division of" in the second sentence of subd (b).

Note

Stats 1972 ch 1255 provides:

SEC. 28.5. This act shall be known and may be cited as the Campbell-Moretti-Deukmejian Drug Abuse Treatment Act.

Stats 1992 ch 1118 provides:

SEC. 5. If any provision of this act or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Law Revision Commission Comments:**1998**

Section 1000 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. v.I, § 5(e).

2002

Subdivision (b) of Section 1000 is amended to reflect unification of the municipal and superior courts pursuant to Article v.I, Section 5(e), of the California Constitution.

Cross References:

Payment of administrative fee, as part of enrollment fee in a diversion program, by defendant accused of felony, to cover processing cost for diversion pursuant to this chapter: *Pen C § 1001.15*.

Establishment of minimum requirements, criteria, and fees to ensure the quality of drug diversion programs provided pursuant to this chapter: *Pen C § 1211*.

Applicability of juvenile intake program: *CRC Rule 1404*.

Collateral References:

Witkin & Epstein, Criminal Law (3d ed), Pretrial Proceedings §§ 342, 343, 344, 346, 347, 351, 353.

Cal Jur 3d (Rev) Criminal Law §§ 2371, 2372, 2376, Delinquent and Dependent Children § 74, Druggists § 10.

2 Witkin Cal. Evidence (4th ed) Witnesses § 265.

Cal Criminal Defense Prac., ch 51, "Diversion and Dismissal in Interest of Justice".

Law Review Articles:

Divisions from the criminal process. *62 ABAJ 1145.*

Proposition 36 Eligibility: Are Courts and Prosecutors Following or Frustrating the Will of Voters? *36 McGeorge LR 627.*

Diversion and the judicial function. *5 Pacific LJ 764.*

California's experience with pretrial diversion. *7 Southwestern U LR 418.*

The single convention on narcotic drugs vs. Decriminalization of marijuana. *49 St BJ 524.*

Diversion of drug offenders in California; operation of, and problems under, the diversion statute. *26 Stan LR 923.*

Barristers Tips: Deferred Entry of Judgment for Criminal Defendants. *29 LA Law 10* (November, 2006).

Attorney General's Opinions:

County may not establish nonstatutory pretrial diversion program for defendants charged with sales of small amounts of marijuana. *68 Ops. Cal. Atty. Gen. 1.*

The voters' adoption of Proposition 36, effective July 1, 2001, does not repeal the deferred entry of judgment program for narcotics and drug abuse cases. *84 Ops. Cal. Atty. Gen. 85.*

Annotations:

Sufficiency of random sampling of drug or contraband to establish jurisdictional amount required for conviction. *45 ALR 5th 1.*

Hierarchy Notes:

Pt. 2, Tit. 6 Note

Pt. 2, Tit. 6, Ch. 2.5 Note

NOTES OF DECISIONS 1. In General 2. Constitutionality 3. Offenses Subject to Diversion 4. Determination of Eligibility 5. Review and Appeal

1. In General

Pen. Code, §§ 1000 to 1000.4, authorize the courts to divert from the normal criminal process persons who are formally charged with first-time possession of drugs, and not yet gone to trial, and are found to be suitable for treatment and rehabilitation at the local level. *People v. Superior Court of San Mateo County* (1974) 11 Cal 3d 59, 113 Cal Rptr 21, 520 P2d 405, 1974 Cal LEXIS 278, superseded by statute as stated in *People v. Barrajas* (1998, Cal App 5th Dist) 62 Cal App 4th 926, 73 Cal Rptr 2d 123, 1998 Cal App LEXIS 267.

Pen C §§ 1000 to 1000.4 authorize the courts to divert from the normal criminal process persons who are formally charged with first-time possession of drugs, have not yet gone to trial, and are found to be suitable for treatment and rehabilitation at the local level. The purpose of such legislation, which has been adopted with variations in several of California's sister states, is two-fold: first, diversion permits the courts to identify the experimental or tentative user before he becomes deeply involved with drugs, to show him the error of his ways by prompt exposure to educational and counseling programs in his own community, and to restore him to productive citizenship without the lasting stigma of a criminal conviction; second, reliance on this quick and inexpensive method of disposition, when appropriate, reduces the clogging of the criminal justice system by drug abuse prosecutions and thus enables the courts to devote their limited time and resources to cases requiring full criminal processing. *People v. Superior Court of San Mateo County* (1974) 11 Cal 3d 59, 113 Cal Rptr 21, 520 P2d 405, 1974 Cal LEXIS 278, superseded by statute as stated in *People v. Barrajas* (1998, Cal App 5th Dist) 62 Cal App 4th 926, 73 Cal Rptr 2d 123, 1998 Cal App LEXIS 267.

District attorney had sole authority under former *Pen C* § 1000 to deny defendant pretrial placement in a diversion program based upon information within his knowledge and not known to the court prior to trial, and § 1000(b) directed the attorney to review his file to determine the facts. *Sledge v. Superior Court of San Diego County* (1974) 11 Cal 3d 70, 113 Cal Rptr 28, 520 P2d 412, 1974 Cal LEXIS 279.

The mandatory 90-day sentence imposed for violations of *Health & Saf. Code*, § 11550, does not constitute cruel and unusual punishment under *Cal. Const.*, art. I, § 17. The mandatory nature of the provision does not divest the trial court of its discretion to divert qualified individuals under *Pen. Code*, § 1000, or to initiate commitment proceedings. *Bosco v. Justice Court* (1978, Cal App 5th Dist) 77 Cal App 3d 179, 143 Cal Rptr 468, 1978 Cal App LEXIS 1201.

Though one legislative objective of diversion from criminal proceedings pursuant to *Pen. Code*, § 1000 et seq., is to show a defendant the error of his ways, the means provided for achieving this goal is to expose a defendant to current educational and counseling measures aimed at a future understanding and awareness, not by requiring that a defendant admit the commission of the past offense. Thus, defendant charged with possession of marijuana and possession of smoking paraphernalia (*Health & Saf. Code*, §§ 11357, 11364) was improperly denied the benefits of diversion from criminal proceedings on the sole ground that she had not admitted that she was guilty of the offenses charged, where a report prepared by the probation department indicated that she was "an excellent candidate for diversion." *Parra v. Municipal Court* (1978, Cal App 1st Dist) 83 Cal App 3d 690, 148 Cal Rptr 203, 1978 Cal App LEXIS 1801.

The fact that the statutory scheme for diverting persons accused of marijuana possession and other drug related offenses from criminal prosecution (*Pen. Code*, § 1000 et seq.) provides an accused with protection from self-incrimination during the diversion investigation (*Pen. Code*, § 1000.1, subd. (c)) does not mean that the accused is compelled by the statute to admit the offenses charged. *Parra v. Municipal Court* (1978, Cal App 1st Dist) 83 Cal App 3d 690, 148 Cal Rptr 203, 1978 Cal App LEXIS 1801.

Diversion legislation is to be liberally construed to promote its general objectives, which are to restore the experimental or tentative drug user to productive citizenship through educational and counseling programs without the lasting stigma of a criminal conviction, and to reduce the clogging of the criminal justice system. These objectives

would be frustrated if such a drug user were denied diversion merely because he had committed a crime of violence or threatened violence that was unrelated, other than in time, to an offense specified in *Pen. Code, § 1000*, subd. (a). The diversion statute should be construed to avoid exclusion of such users from diversion. An offense specified in *Pen. Code, § 1000*, does not "involve" a crime of violence or threatened violence unless the drug offense played some part in the commission of the violent crime. *People v. Macafee (1980, Cal App 1st Dist) 109 Cal App 3d 808, 167 Cal Rptr 495, 1980 Cal App LEXIS 2202*.

The purpose of *Pen. Code, § 1000* (permitting pretrial diversion for drug treatment and education for certain offenses) is twofold. First, diversion permits the courts to identify the experimental or tentative user before he or she becomes deeply involved with drugs, to show him the error of his ways by prompt exposure to educational and counseling programs in his own community, and to restore him to productive citizenship without the lasting stigma of a criminal conviction. Second, reliance on this quick and inexpensive method of disposition, when appropriate, reduces the clogging of the criminal justice system by drug abuse prosecutions and enables the courts to devote their limited time and resources to cases requiring full criminal processing. *People v. Duncan (1990, Cal App 4th Dist) 216 Cal App 3d 1621, 265 Cal Rptr 612, 1990 Cal App LEXIS 20*.

The primary purpose of the diversion statutes is rehabilitation, and the intent underlying the eligibility requirement contained in *Pen. Code, § 1000*, subd. (a)(4) (defendant's record must indicate that probation or parole has never been revoked without thereafter being completed), is to identify those individuals who are most likely to benefit from the diversion program. The probation statutes also have a rehabilitative purpose. Since both diversion and probation depend upon the defendant's cooperation in a program of rehabilitation, it follows that a person who shows willingness to abide by the terms of probation and complete the rehabilitative process is likely to benefit from diversion. *People v. Bishop (1992, Cal App 6th Dist) 11 Cal App 4th 1125, 15 Cal Rptr 2d 539, 1992 Cal App LEXIS 1453*.

A trial court may not require an applicant for drug diversion pursuant to *Pen. Code, § 1000* et seq. (eligible drug offenders may be considered for a diversion program in lieu of criminal prosecution), to submit to reasonable, but warrantless, searches as a condition of a grant of diversion. Since a search and seizure condition is not expressly authorized by statute, its exclusion is to be negatively implied, although there is no logical reason why the trial court should not have the discretion to impose such conditions on diversion, thereby fulfilling the statutory purpose of treatment and rehabilitation. *People v. Fleming (1994, Cal App 2d Dist) 22 Cal App 4th 1566, 28 Cal Rptr 2d 78, 1994 Cal App LEXIS 178*, review denied (1994, Cal) *1994 Cal LEXIS 2706*.

Pen C §§ 1000 to 1000.5 allowed trial courts to divert from the normal criminal process first time drug offenders who were formally charged with certain specified offenses, who had not yet gone to trial, and who were found to be suitable for treatment or rehabilitation at the local level. *People v. Barrajas (1998, Cal App 5th Dist) 62 Cal App 4th 926, 73 Cal Rptr 2d 123, 1998 Cal App LEXIS 267*.

Pen C § 1000 set out the eligibility criteria for diversion and left it to the district attorney to determine whether the defendant met them, and if the defendant did not meet the criteria, the district attorney was required to file with the court a declaration in writing or state for the record the grounds upon which the determination was based and to make the information available to the defendant and his attorney. *People v. Barrajas (1998, Cal App 5th Dist) 62 Cal App 4th 926, 73 Cal Rptr 2d 123, 1998 Cal App LEXIS 267*.

Defendant appealed an order granting him deferred entry of judgment under *Penal C § 1000* following his guilty plea to one count of possession of cocaine, a controlled substance (*H & S § 11350(a)*). The trial court erred in denying defendant's motion for application of § 1000 as it existed on the date of his offense, rather than as it existed on the date of the filing of the complaint. The amendments changed the statutory program from pretrial diversion, without a guilty plea requirement, to deferred entry of judgment conditioned on a defendant's guilty plea. Concluding that the statutory amendments apply prospectively to conduct committed on or after their effective date, the court held that (1) statutes are presumed to operate prospectively, when the amendments contain no express language that the Legislature intended them to apply retrospectively; (2) application of the amended § 1000 to conduct committed before its effective date

arguably violates the constitutional prohibition against ex post facto laws; and (3) a general principle of statutory construction is that a penal statute must be construed in a manner most favorable to a defendant. *People v. Perez* (1998, Cal App 4th Dist) 68 Cal App 4th 346, 80 Cal Rptr 2d 188, 1998 Cal App LEXIS 1004.

The plain objective of *Penal C § 1000* is to permit the courts to identify the experimental or tentative user before he becomes deeply involved with drugs, to show him the error of his ways by prompt exposure to educational and counseling programs in his own community, and to restore him to productive citizenship without the lasting stigma of a criminal conviction and thereby reduce the clogging of the criminal justice system. The statute's lofty purpose is borne out by studies that conclude that proper and effective drug treatment results in a decrease in crime. *Terry v. Superior Court* (1999, Cal App 2d Dist) 73 Cal App 4th 661, 86 Cal Rptr 2d 653, 1999 Cal App LEXIS 663.

An allegation of a prior conviction within the meaning of the Three Strikes law (*Pen C § 667(c)(4)*; *Pen C § 1170.12(a)(4)*) does not render a defendant ineligible for participation in the deferred entry of judgment program (*Pen C § 1000* et seq.). Because the statutory provisions regarding the deferred entry of judgment program do not conflict with the Three Strikes law, and because the Three Strikes law does not preclude participation in deferred entry of judgment, the plain meaning of the words of the respective statutes indicates that an otherwise eligible strike defendant may participate, notwithstanding an allegation of a prior serious or violent felony. *People v. Davis* (2000, Cal App 2d Dist) 79 Cal App 4th 251, 93 Cal Rptr 2d 905, 2000 Cal App LEXIS 212.

Where (1) a defendant committed a nonviolent drug offense within the meaning of the Substance Abuse and Crime Prevention Act of 2000 (Proposition 36) prior to the Act's July 1, 2000 effective date; (2) the trial court deferred entry of judgment under *Pen C § 1000* et seq.; and (3) the defendant was sentenced after the effective date of the Act, the defendant was convicted within the meaning of the Act when the previously deferred judgment was entered and sentence was imposed, and was entitled to be sentenced under the Act (*Pen C § 1210.1*). *In re Scoggins* (2001, Cal App 2d Dist) 94 Cal App 4th 650, 114 Cal Rptr 2d 508, 2001 Cal App LEXIS 3181.

In defendant's prosecution for drug offenses, under *Pen C § 1000*, the trial court lacked authority to implicitly overrule the prosecutor's initial determination of ineligibility for pretrial diversion. *People v. Wright* (2002, Cal App 6th Dist) 99 Cal App 4th 201, 121 Cal Rptr 2d 419, 2002 Cal App LEXIS 4360, review denied (2002, Cal) 2002 Cal LEXIS 6608.

Under *Pen C § 1000* et seq., eligible adult drug offenders may be considered for a diversion program in lieu of criminal prosecution. *In re Sergio R.* (2003, Cal App 1st Dist) 106 Cal App 4th 597, 131 Cal Rptr 2d 160, 2003 Cal App LEXIS 267.

Conviction for possession of a controlled substance while armed with a loaded, operable firearm was not a "nonviolent drug possession offense" under Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, *Pen C §§ 1210, 1210.1, 3063.1*. The court reasoned in part that the deferred entry of judgment statutes, *Pen C § 1000* et seq. were in some ways analogous to Proposition 36 and that *H & S C § 11370.1* expressly denied violators the benefits of *Pen C § 1000* et seq. *In re Ogea* (2004, Cal App 4th Dist) 121 Cal App 4th 974, 17 Cal Rptr 3d 698, 2004 Cal App LEXIS 1377, modified (Cal App 4th Dist) 2004 Cal App LEXIS 1418.

Inmate's claim that he was not allowed to participate in a drug treatment program did not state a claim under 42 *USCS § 1983* because participating in such programs was not protected by the Due Process Clause itself; the claim was dismissed pursuant to 28 *USCS § 1915A*. *In re Lopez* (2003, ND Cal) 2003 US Dist LEXIS 18548.

Defendant on diversion pursuant to *Pen C § 1000* has not been released "on his own recognizance," and thus cannot be guilty under *Pen C § 1320* for failure to appear. *People v. Orihuela* (2004, Cal App 3d Dist) 122 Cal App 4th 70, 18 Cal Rptr 3d 427, 2004 Cal App LEXIS 1489.

Notwithstanding that a box checked on a minute order form indicated that defendant was released on defendant's own recognizance, defendant was not, but was diverted pursuant to *Pen C § 1000*; thus, the court reversed defendant's

conviction of felony failure to appear under *Pen C § 1320. People v. Orihuela (2004, Cal App 3d Dist) 122 Cal App 4th 70, 18 Cal Rptr 3d 427, 2004 Cal App LEXIS 1489.*

2. Constitutionality

The district attorney's determination under *Pen. Code, § 1000*, of the eligibility of a defendant for the diversionary program available to certain first-time drug offenders, based on information peculiarly within his knowledge and in accordance with the standards prescribed by the statute, does not constitute an exercise of judicial authority and hence does not violate the constitutional requirement of separation of powers in *Calif. Const., art. III, § 3. Sledge v. Superior Court of San Diego County (1974) 11 Cal 3d 70, 113 Cal Rptr 28, 520 P2d 412, 1974 Cal LEXIS 279.*

Pen. Code, § 1000, enumerating narcotic and drug offenses subject to diversion proceedings, is not subject to attack on the grounds of absence of a rational basis or absence of a compelling state interest in excluding from the diversion program cases involving illegal possession of controlled substances for personal use where there is evidence of obtaining possession by a fictitious prescription. *People v. Koester (1975, Cal App 1st Dist) 53 Cal App 3d 631, 126 Cal Rptr 73, 1975 Cal App LEXIS 1594.*

3. Offenses Subject to Diversion

Under *Pen Code, § 1000*, subd (a)(2), barring diversion when the offense charged involves "a crime of violence or threatened violence," the Legislature apparently intended to refer to some additional offense committed as part of or concurrently with the narcotics offense, since none of the Health & Safety Code violations enumerated in the diversion statute involve violence. However, a defendant charged with possession of marijuana and burglary, a crime associated with possibilities of violence, was not barred from diversion where defendant was arrested on the burglary charge about 24 hours after the alleged burglary occurred, and a bag of marijuana was found on his person when he was booked at the county jail, which possession formed a basis of the marijuana charge, and where the prosecution's return conceded that the marijuana offense did not involve violence or threatened violence. *Harvey v. Superior Court (1974, Cal App 3d Dist) 43 Cal App 3d 66, 117 Cal Rptr 383, 1974 Cal App LEXIS 1298.*

Defendant, charged with possession of marijuana for sale and convicted of the lesser included offense of possession of marijuana, was not eligible for diversion to a special rehabilitation treatment center under *Pen Code, § 1000*. Possession of marijuana for sale is not one of the offenses specified in that statute, which refers to a case before a court on an "accusatory pleading" and there is no provision for diversion after trial. *People v. Wright (1975, Cal App 2d Dist) 47 Cal App 3d 490, 120 Cal Rptr 899, 1975 Cal App LEXIS 1041.*

A physician charged with issuing fictitious prescriptions for narcotic drugs in violation of *Health & Saf. Code, § 11368*, is not entitled to the benefit of the diversion proceedings set forth in *Pen. Code, § 1000* et seq., inasmuch as *Pen. Code, § 1000*, subd. (a)(3), requires that there be no evidence of a violation of an offense other than those enumerated therein which do not include violation of *Health & Saf. Code, § 11368. People v. Koester (1975, Cal App 1st Dist) 53 Cal App 3d 631, 126 Cal Rptr 73, 1975 Cal App LEXIS 1594.*

In enumerating, in *Pen. Code, § 1000*, only certain narcotic and drug offenses as being subject to diversion proceedings, the Legislature intended to exclude others. *People v. Koester (1975, Cal App 1st Dist) 53 Cal App 3d 631, 126 Cal Rptr 73, 1975 Cal App LEXIS 1594.*

Defendant, convicted of cocaine possession, was properly denied diversion for rehabilitation under *Pen. Code, § 1000*, subd. (a)(1), based on his prior conviction of marijuana possession under *Health & Saf. Code, § 11357*, subd. (b). Despite the leniency of *§ 11357*, subd. (b), marijuana is a controlled substance and a conviction for possession of even a small amount disqualifies a defendant from diversion. Although *Pen. Code, § 1000*, subd. (a), was amended to provide an exception as to the provisions of *Health & Saf. Code, § 11357*, subd. (b), the Legislature did not mean that a prior *§ 11357*, subd. (b), conviction will not disqualify a person from diversion, as could have been accomplished by inserting

the language of exception in *Pen. Code*, § 1000, subd. (a)(1), rather than in the introductory paragraph; the exception means that persons falling within the provisions of *Health & Saf. Code*, § 11357, subd. (b), are excepted entirely from the district attorney's determination of eligibility for diversion. The favorable treatment provided for marijuana possession is reserved for those, unlike defendant, whose offenses do not indicate a pattern of increasingly serious drug use. *People v. Paz* (1990, *Cal App 6th Dist*) 217 *Cal App 3d* 1209, 266 *Cal Rptr* 468, 1990 *Cal App LEXIS* 96.

Pen. Code, § 1000, which permits certain drug offenders to be diverted to drug rehabilitation programs, does not provide for such diversion for a person convicted of possession for sale. The focus of the diversion program is the tentative or experimental user who possesses only a small amount of drugs for personal use. Diversion permits a court to identify the experimental or tentative user before he becomes deeply involved with drugs, to show him the error of his ways by prompt exposure to educational and counseling programs in his own community, and to restore him to productive citizenship without the lasting stigma of a criminal conviction. *People v. Edwards* (1991, *Cal App 1st Dist*) 235 *Cal App 3d* 1700, 1 *Cal Rptr 2d* 631, 1991 *Cal App LEXIS* 1339.

The trial court erred in denying a request for a diversion hearing (*Pen. Code*, § 1000 et seq.) by a defendant convicted of possession of less than one ounce of marijuana, a misdemeanor (*Health & Saf. Code*, § 11357, subd. (b)). *Pen. Code*, § 1000, subd. (a), lists the offenses for which diversion is permitted, and specifically lists *Health & Saf. Code*, § 11357, with no exception for subd. (b) thereof. Although *Health & Saf. Code*, § 11357, subd. (b), provides a separate scheme for diversion for offenses involving small amounts of marijuana, and provides mandatory diversion for persons with three or more convictions within a two-year period, other persons convicted under the subdivision may choose diversion or the criminal penalty. *People v. Squier* (1993, *Cal App 3d Dist*) 15 *Cal App 4th* 235, 18 *Cal Rptr 2d* 536, 1993 *Cal App LEXIS* 442.

Even though defendant committed an attempt, rather than a completed drug offense, it did not disqualify him for drug diversion because the program under *Pen C* § 1000 was designed to benefit those who both attempted and completed eligible offenses. *People v. Barrajas* (1998, *Cal App 5th Dist*) 62 *Cal App 4th* 926, 73 *Cal Rptr 2d* 123, 1998 *Cal App LEXIS* 267.

4. Determination of Eligibility

Under *Pen. Code*, § 1000, subd. (a), subsec. (3) specifying that there must be "evidence" that a defendant is a member of the class of persons ineligible for diversionary treatment for a drug offense, "evidence" means more than mere suspicion or rumor; it means, in the context, reports of actual instances of trafficking or other information showing that defendant has probably committed offenses in addition to those listed in the statute. However, the inquiry need not be limited to information admissible at a full-fledged criminal trial and may include relevant hearsay information derived from investigation into criminal activity. *Sledge v. Superior Court of San Diego County* (1974) 11 *Cal 3d* 70, 113 *Cal Rptr* 28, 520 *P2d* 412, 1974 *Cal LEXIS* 279.

Pen Code, § 1000.1, requires the district attorney to refer a case to the probation department if a defendant, who has previously been determined eligible for diversion to a drug education and treatment program under *Pen Code*, § 1000, consents to diversion and waives his right to a speedy trial at any time prior to the commencement of trial. Defendants eligible for diversion may tender usual pretrial motions prior to their expression of consent to consideration for diversion. Thus, an eligible defendant was entitled to consent to diversion after denial of his pretrial motion to suppress evidence, and the trial court was required to refer his case to the probation department to determine if he would benefit from the diversion program. *Morse v. Municipal Court for San Jose-Milpitas Judicial Dist.* (1974) 13 *Cal 3d* 149, 118 *Cal Rptr* 14, 529 *P2d* 46, 1974 *Cal LEXIS* 200.

Although the diversion treatment provisions for first time drug offenders of *Pen Code*, § 1000, et seq., were not enacted until after defendant had pleaded not guilty to drug possession charges, she would have been entitled to have been considered for such treatment had she or the prosecutor taken the initiative in that respect after the effective date of the provisions and before trial. However, where neither she nor he took such initiative during that period, she was not

entitled to wait until after trial before asserting that the prosecutor should have reviewed her file, pursuant to *Pen Code*, § 1000, subd (b), to determine whether she was eligible for diversion. *People v. Haycock* (1975, *Cal App 1st Dist*) 45 *Cal App 3d* 90, 119 *Cal Rptr* 179, 1975 *Cal App LEXIS* 1667.

A court lacks the inherent power to add as a condition to an order of diversion an express waiver of a fundamental constitutional right that is neither specified nor implied in the statutes authorizing diversion. Thus, an order of a trial court was invalid that conditioned the diversion of an eligible defendant on his agreement to permit his person, residence, automobile and possessions to be inspected or searched for contraband during the period of the diversion without prior notice. The fact that similar or identical conditions may constitutionally be applied to probationers and narcotic addicts on outpatient status does not make the condition valid, since a person eligible for diversion is not one "deeply involved with drugs," but rather "the experimental or tentative user." *Frederick v. Justice Court* (1975, *Cal App 2d Dist*) 47 *Cal App 3d* 687, 121 *Cal Rptr* 118, 1975 *Cal App LEXIS* 1059.

The statutory scheme for diverting persons accused of marijuana and other relatively minor drug related offenses from criminal prosecution (*Pen. Code*, § 1000 et seq.) is designed to include those who can be motivated into future conformity with the law. Thus, defendant accused of possession of marijuana and possession of smoking paraphernalia (*Health & Saf. Code*, §§ 11357, 11364) was eligible for diversion from criminal proceedings, even though she denied drug usage or experimentation, where a probation department investigation showed defendant was an excellent candidate for diversion. *Parra v. Municipal Court* (1978, *Cal App 1st Dist*) 83 *Cal App 3d* 690, 148 *Cal Rptr* 203, 1978 *Cal App LEXIS* 1801.

In a prosecution for possession of cocaine (*Health & Saf. Code*, § 11350), which was submitted on the preliminary hearing transcript, it was reversible error for the prosecutor to make a prior determination that defendant was not eligible for diversion (*Pen. Code*, § 1000) on the basis that the offense charged involved a crime of violence or threatened violence. The prosecutor's assertion that defendant's possession of cocaine involved a crime of violence because he possessed the cocaine at the time he committed a battery was incorrect, since defendant's possession of the cocaine apparently played no part in the commission of the alleged battery and there was no evidence that he was under the influence of cocaine at the time. *People v. Macafee* (1980, *Cal App 1st Dist*) 109 *Cal App 3d* 808, 167 *Cal Rptr* 495, 1980 *Cal App LEXIS* 2202.

On remand after reversal of defendant's conviction of possession of cocaine (*Health & Saf. Code*, § 11350) on the grounds that the prosecution erred in determining that defendant was ineligible for diversion, charges of disorderly conduct (*Pen. Code*, § 647, subd. (f)) and battery (*Pen. Code*, § 242), which had been dismissed by the prosecution as part of a negotiated settlement, could not be reinstated, where the determination that defendant was ineligible for diversion was not included in the settlement, and where, to the contrary, when defendant agreed to submission of the drug count on the preliminary hearing transcript, his attorney had expressly stated that he would take an appeal challenging the determination that defendant was ineligible for diversion. *People v. Macafee* (1980, *Cal App 1st Dist*) 109 *Cal App 3d* 808, 167 *Cal Rptr* 495, 1980 *Cal App LEXIS* 2202.

Defendant was not entitled to withdraw his guilty plea to a charge of cultivating marijuana despite a claim of ineffective assistance of counsel. Although defendant was denied diversion under *Pen. Code*, § 1000, because he had been convicted of a felony, receiving stolen property, within five years before commission of the charged offense, and although defendant's prior conviction was a "wobbler," punishable either as a felony or a misdemeanor, and could have been reduced to a misdemeanor pursuant to *Pen. Code*, § 17, subd. (b)(3), if defendant's counsel had made such a motion and the trial court had been inclined to grant it, it would not have changed the fact that at the time of the commission of the marijuana offense he had a prior felony conviction within five years. The fact that the offense may have been reduced to a misdemeanor after the commission of the marijuana offense did not retroactively render defendant eligible for diversion under *Pen. Code*, § 1000. *People v. Marsh* (1982, *Cal App 5th Dist*) 132 *Cal App 3d* 809, 183 *Cal Rptr* 455, 1982 *Cal App LEXIS* 1665.

In a prosecution for cultivation of marijuana (*Health & Saf. Code*, § 11358), the district attorney was without

authority to find, for the purpose of determining whether defendant was eligible under *Pen. Code, § 1000*, for diversion from prosecution, that the marijuana was not for personal use, a condition of eligibility, but instead was for commercial use. The determination of defendant's claim of personal use required an evaluation of defendant's credibility and a resolution of conflicting inferences, which are judicial functions. Hence, the determination of the intended use was a function for the trial court as part of the diversion hearing to be conducted pursuant to *Pen. Code, § 1000.2*. The district attorney's action deprived the trial court of its authority, and since defendant pled guilty upon the erroneous denial of diversion, the Court of Appeal reversed. *People v. Williamson (1982, Cal App 3d Dist) 137 Cal App 3d 419, 187 Cal Rptr 107, 1982 Cal App LEXIS 2102*.

The district attorney's determination that a defendant charged with possession of cocaine (*Health & Saf. Code, § 11350*) was ineligible for diversion from prosecution was not supported by evidence, as required by *Pen. Code, § 1000*, subd. (b), where the declaration stated merely that defendant was engaged in "sales," but failed to provide any evidentiary basis for the conclusion. The evidence required need be nothing more than information in the form of reports or documents in the possession of the district attorney or available to him, but means more than mere suspicion or rumor. Accordingly, defendant was entitled to have his conviction set aside and the matter remanded to permit him to withdraw his plea of guilty. *People v. Hayes (1985, Cal App 6th Dist) 163 Cal App 3d 371, 209 Cal Rptr 441, 1985 Cal App LEXIS 1498*.

Pen. Code, § 1000, subd. (a)(4) (probation completion requirement for drug diversion), requires a satisfactory or successful termination of probation. Thus, the superior court did not err in denying defendant's motion to compel referral for drug diversion following his conviction for possession of cocaine. At the time defendant committed the underlying offense, his probation grants had been summarily revoked and he was subject to a no bail warrant. In one case, he had failed to report for his jail sentence and he had not paid either of the court-imposed fines. Defendant's probation was therefore not terminated upon the fulfillment of all conditions of probation or because termination was warranted by his good conduct and reform. Rather, the municipal court reinstated probation, cancelled the remaining conditions, terminated probation and remanded defendant to custody. *People v. Martinsen (1987, Cal App 6th Dist) 193 Cal App 3d 843, 238 Cal Rptr 530, 1987 Cal App LEXIS 1943*.

After a conviction of possession of cocaine (*Health & Saf. Code, § 11350*), and an acquittal of possession of cocaine for sale (*Health & Saf. Code, § 11352*), the trial court erred in granting defendant's motion for diversion of proceedings for rehabilitation under *Pen. Code, § 1000*, notwithstanding that defendant had requested diversion prior to trial. Defendant was not eligible for diversion to a special rehabilitation treatment prior to trial since the § 11352 count alleged a nondivertible offense. Defendant was not entitled to postconviction diversion since the statute does not provide for diversion after trial. *People v. Alonzo (1989, Cal App 5th Dist) 210 Cal App 3d 466, 258 Cal Rptr 263, 1989 Cal App LEXIS 454*.

Pen. Code, § 1000, subd. (a)(3), providing that an arrestee is not eligible for diversion for drug treatment if there is evidence that he or she has committed a drug related offense other than those listed in subd. (a), is clear and unambiguous and must be applied according to its plain meaning. Therefore, defendant, who was charged both with being under the influence of a controlled substance (*Health & Saf. Code, § 11550*) and with driving under the combined influence of alcohol and a controlled substance (v. eh. Code, § 23152, subd. (a)), an offense not listed in *Pen. Code, § 1000*, was properly denied pretrial diversion for drug treatment and education on the Health and Safety Code violation. The Vehicle Code offense with which defendant was charged was a drug related offense-being under the influence of "any drug" was one of its essential elements-and there was significant evidence that she was under the influence of cocaine while driving (a blood test showed the presence of cocaine). *People v. Duncan (1990, Cal App 4th Dist) 216 Cal App 3d 1621, 265 Cal Rptr 612, 1990 Cal App LEXIS 20*.

After the district attorney determined that defendant, charged with cocaine possession, was ineligible for diversion under *Pen. Code, § 1000*, subd. (a)(1), because of his prior conviction for marijuana possession, the trial court properly denied defendant's motion to compel diversion without hearing the merits. The district attorney's preliminary screening for eligibility under the statutory criteria is not a judicial function, and no trial court hearing is needed unless

determination of eligibility requires resolution of factual issues. Once the district attorney finds that a defendant has a prior conviction for an offense involving a controlled substance the defendant's exclusion from the diversion program is automatic; there is no provision for the exercise of judicial discretion. The amendment of *Pen. Code*, § 1000, subd. (a), creating an exception for those charged with marijuana possession under *Health & Saf. Code*, § 11357, subd. (b), did not create an ambiguity requiring statutory construction by the trial court; since defendant was charged with cocaine possession, the exception did not apply to him. *People v. Paz* (1990, *Cal App 6th Dist*) 217 *Cal App 3d* 1209, 266 *Cal Rptr* 468, 1990 *Cal App LEXIS* 96.

In a prosecution for possession of cocaine (*Health & Saf. Code*, § 11350, subd. (a)) and being under the influence of cocaine (*Health & Saf. Code*, § 11550), defendant was ineligible for a drug diversion program on the ground that he had previously had his summary probation revoked, even though the eligibility requirement of *Pen. Code*, § 1000, subd. (a)(4) (defendant's record must indicate that probation or parole has never been revoked without thereafter being completed), refers only to probation and not to summary probation, or "conditional sentence," as it is now called. The word "probation" as it was used by the Legislature in enacting the diversion statutes in 1972 encompassed both formal and summary probation. Amendments to *Pen. Code*, §§ 1203, subd. (a), and 1203b, which substituted "conditional sentence" for "summary probation" or "court probation" did not alter the concept of summary probation but simply relabeled it. *People v. Bishop* (1992, *Cal App 6th Dist*) 11 *Cal App 4th* 1125, 15 *Cal Rptr 2d* 539, 1992 *Cal App LEXIS* 1453.

In a prosecution in which defendant was found guilty of being under the influence of cocaine (*Health & Saf. Code*, § 11550, subd. (a)), the prosecutor correctly determined defendant was ineligible for diversion, since, pursuant to *Pen. Code*, § 1000, former subd. (a)(5), he had not completed his previous diversion program five years before the new arrest. Under *Pen. Code*, § 1000, former subd. (a)(5), defendant would have been eligible if his record did not show he had been diverted within five years of the new arrest. *Pen. Code*, § 1000, former subd. (a)(5), requires the five years to commence upon completion of the prior program, rather than upon the initial grant of diversion, since a person who completes the process and remains free of new offenses for five years is more likely to benefit from a second diversion. The word "diverted" means the entire period of the diversion program. It is presumed, absent anything in the statute to the contrary, that a repeated phrase or word in a statutory scheme is used in the same sense throughout. And, when a word in a statute has a well-established legal meaning, it will be given that meaning in construing the statute. Although the length of a diversion program can vary, such a reading of the statute was both reasonable and equitable, indicating that a defendant is ineligible if he or she has been in a diversion program within the previous five years, rather than that five years is the entire length of the ineligibility period. *People v. Burns* (1997, *Cal App 6th Dist*) 53 *Cal App 4th* 1171, 62 *Cal Rptr 2d* 211, 1997 *Cal App LEXIS* 229.

In a prosecution for narcotics possession, the Court of Appeal was without jurisdiction to consider the defendant's petition for a writ of mandate challenging the correctness of the trial court's determination that he was ineligible for deferred entry of judgment within the meaning of *Pen C* § 1000 et seq. because there were allegations he was a recidivist. The express language of *Pen C* § 1000(b) permits appellate review of a determination that an accused drug offender is not eligible for deferred entry of judgment only on direct appeal after a conviction. *Butler v. Superior Court* (1998, *Cal App 2d Dist*) 63 *Cal App 4th* 64, 73 *Cal Rptr 2d* 504, 1998 *Cal App LEXIS* 327, review denied (1998, *Cal*) 1998 *Cal LEXIS* 4596.

To be found eligible for a drug treatment program under *Penal C* § 1000 a person must consent to various conditions. The submission to an unreasonable search and seizure is not one of those conditions. Thus, petitioner was entitled to relief by way of extraordinary writ to eliminate the drug testing and search terms the trial court imposed upon him as a condition of deferred entry of judgment in a proceeding for misdemeanor possession of less than one ounce of marijuana. The trial court could lawfully impose drug testing conditions, but it lacked the authority to impose search terms. *Terry v. Superior Court* (1999, *Cal App 2d Dist*) 73 *Cal App 4th* 661, 86 *Cal Rptr 2d* 653, 1999 *Cal App LEXIS* 663.

Inquiry into diversion begins with a preliminary screening for eligibility conducted by the district attorney under

the standards prescribed by *Pen C § 1000* et seq. If the defendant meets all criteria, the process of adjudication begins, during which a trial court will weigh relevant facts and make a decision either diverting or refusing to divert the defendant into a rehabilitation program. *In re Sergio R.* (2003, *Cal App 1st Dist*) 106 *Cal App 4th* 597, 131 *Cal Rptr 2d* 160, 2003 *Cal App LEXIS* 267.

Adjudicatory function to weigh the relevant facts and make a decision either diverting or refusing to divert the defendant into a rehabilitation program is vested in the trial court, and the trial court shall hold a hearing and, after consideration of the probation department's report and any information considered by the trial court to be relevant to its decision, shall determine if the defendant consents to further proceedings under this chapter and waives his right to a speedy trial and if the defendant should be diverted and referred for education, treatment, or rehabilitation. *In re Sergio R.* (2003, *Cal App 1st Dist*) 106 *Cal App 4th* 597, 131 *Cal Rptr 2d* 160, 2003 *Cal App LEXIS* 267.

In a prosecution for being under the influence of phencyclidine (*Health & Saf. Code, § 11550*), in which the district attorney had determined that defendant was not eligible for diversion under *Pen. Code, § 1000*, subd. (a), which prohibits diversion when the defendant has previously had his or her probation revoked, the trial court erred in refusing to hear the merits of defendant's motion to compel diversion, in which she claimed that the revocation of a conditional sentence is equivalent to probation revocation for purposes of the statute. While the district attorney's preliminary screening for diversion eligibility is not a judicial function and does not require a hearing unless there are factual issues to resolve, and challenges to the district attorney's determination must be taken up on postconviction appeal, the term "probation" as used in *Pen. Code, § 1000*, subd. (a), is arguably ambiguous, and the resolution of that ambiguity was a task for the trial court. *People v. Disibio* (1992, *Cal App Dep't Super Ct*) 7 *Cal App 4th Supp 1*, 9 *Cal Rptr 2d* 20, 1992 *Cal App LEXIS* 971.

The term "probation," as used in *Pen. Code, § 1000*, subd. (a)(4), prohibiting diversion in a narcotics case if the defendant has previously had his or her probation revoked, includes both summary and formal probation, and therefore includes the revocation of a conditional sentence. *Pen. Code, § 1203*, subd. (a), provides that probation, as used in the Penal Code, includes a conditional sentence, and the history of that provision indicates that the phrase "conditional sentence" was intended merely to rename the former summary probation procedure. There is no rational basis for excluding revocation of a conditional sentence from the list of disqualifying factors under *Pen. Code, § 1000*, subd. (a)(4), since rehabilitation is the primary goal underlying the diversion statute, which is designed to render eligible those persons most likely to benefit from diversion. A person who does not conform to the requirements of a conditional sentence, like a person who does not successfully complete probation, is unlikely successfully to complete diversion. *People v. Disibio* (1992, *Cal App Dep't Super Ct*) 7 *Cal App 4th Supp 1*, 9 *Cal Rptr 2d* 20, 1992 *Cal App LEXIS* 971.

Although the deferred entry of judgment statutes, *Pen C § 1000* et seq., were in some ways analogous to Cal. Proposition 36, *Pen C § 1210*, a violation of *Pen C § 23152(a)* was a drug-related offense that was not listed in *Pen C § 1000*. Nothing suggested that driving while under the influence of a controlled substance would constitute a drug use or drug possession offense for the purpose of a statutory scheme such as what was subsequently enacted by Cal. Proposition 36; therefore, defendant's conviction for driving under the influence of drugs and possession of drugs made her ineligible for probation or a diversionary program, pursuant to *Pen C § 1210.1*. *People v. Canty* (2004) 32 *Cal 4th* 1266, 14 *Cal Rptr 3d* 1, 90 *P3d* 1168, 2004 *Cal LEXIS* 4668.

In a case in which defendant was charged with two offenses, unlawfully possessing methamphetamine and unlawfully using and being under the influence of methamphetamine, the trial court properly determined that defendant was ineligible for deferred entry of judgment pursuant to *Pen C § 1000* where he had a federal case of a possession of a controlled substance to which he pleaded guilty prior to the current violation. In entering his plea of guilty in federal court, defendant necessarily admitted his involvement with a controlled substance, and it was the factual determination of that conduct that rendered him ineligible for diversion. *People v. Kirk* (2006, *Cal App 4th Dist*) 141 *Cal App 4th* 715, 46 *Cal Rptr 3d* 258, 2006 *Cal App LEXIS* 1129.

For the purposes of *Pen C § 1000*, "conviction" means the ascertainment of guilt, which occurs as soon as a

defendant pleads guilty (or a jury enters a guilty verdict) and does not require more. Thus, a guilty plea on which sentence has not been imposed constitutes a prior conviction for purposes of § 1000. *People v. Kirk* (2006, Cal App 4th Dist) 141 Cal App 4th 715, 46 Cal Rptr 3d 258, 2006 Cal App LEXIS 1129.

Although both Pen Pen C §§ 1210.1 and 1000 concern the fate of drug offenders, the focus and ultimate purpose of the two statutory schemes are not analogous. The basic goal of Pen C § 1210.1 is to provide drug treatment to as many nonviolent defendants as possible and the term "convicted" should be interpreted so as to give the initiative a broad application, while, in contrast, the legislature has intended Pen C § 1000 to have a limited application to only a small class of defendants, and it has specifically articulated narrow and stringent requirements for eligibility. *People v. Kirk* (2006, Cal App 4th Dist) 141 Cal App 4th 715, 46 Cal Rptr 3d 258, 2006 Cal App LEXIS 1129.

Pen C §§ 1000 to 1000.4 are clear and unambiguous and thus must be applied according to their plain meaning: the dismissal of a charge or charges against a defendant in a deferred entry of judgment program is triggered by successful completion of a drug treatment program, as specified in the statute, and not by the mere passage of three years. *People v. Popular* (2006, Cal App 5th Dist) 146 Cal App 4th 479, 52 Cal Rptr 3d 708, 2006 Cal App LEXIS 2098, review denied (2007, Cal) 2007 Cal LEXIS 3819.

5. Review and Appeal

The decision of the district attorney that a defendant charged with a drug offense is ineligible for the diversionary treatment provided for first-time drug offenders by Pen. Code, §§ 1000-1000.4, on the ground he has committed narcotics offenses in addition to those listed in the statute, is subject to judicial review at the proper time. While a pretrial writ of prohibition or mandate will not lie, if the defendant goes to trial and is convicted, he may raise on appeal the question of whether there was "evidence" of his commission of other narcotics offenses within the meaning of Pen. Code, § 1000, subd. (a), subsec. (3), and if defendant prevails, the judgment must be set aside and the case remanded to permit the trial court to exercise its discretion to divert the defendant under the remaining portions of the statute. *Sledge v. Superior Court of San Diego County* (1974) 11 Cal 3d 70, 113 Cal Rptr 28, 520 P2d 412, 1974 Cal LEXIS 279.

A trial court order granting a drug offender diversion to a special rehabilitative treatment center under Pen Code, § 1000, is an appealable order analogous to a final judgment in a "special proceeding." *People v. Wright* (1975, Cal App 2d Dist) 47 Cal App 3d 490, 120 Cal Rptr 899, 1975 Cal App LEXIS 1041.

Where the superior court ordered a hearing to determine whether two persons, charged with cultivating marijuana, did so for their own personal use within the meaning of Pen. Code, § 1000 et seq. (providing that first offenders under specified circumstances, may be diverted for education, treatment, or rehabilitation), the People were entitled to a writ of prohibition directing the superior court to refrain from conducting such hearing. It is the district attorney's function to do the preliminary screening to determine eligibility for diversion (Pen. Code, § 1000, subs. (a), (b)), and his decision is not subject to judicial review prior to trial. *People v. Superior Court (Hayle)* (1977, Cal App 3d Dist) 74 Cal App 3d 604, 141 Cal Rptr 496, 1977 Cal App LEXIS 1950.

The determination of the district attorney that a defendant charged with a drug offense is ineligible for diversion from prosecution under Pen. Code, § 1000, subd. (a)(3), is subject to judicial review. If defendant goes to trial and is convicted, he may raise on appeal the question whether there was evidence of his commission of other narcotics offenses, and if he prevails, the judgment must be set aside and remanded to the trial court to exercise its discretion to divert defendant under the statute. *People v. Hayes* (1985, Cal App 6th Dist) 163 Cal App 3d 371, 209 Cal Rptr 441, 1985 Cal App LEXIS 1498.

In a prosecution for possession of cocaine (Health & Saf. Code, 11350, subd. (a)), the trial court properly refused to review prior to trial the district attorney's determination that, because of evidence that defendant possessed the cocaine for sale, defendant was ineligible for diversion (Pen. Code, § 1000, subd. (a)(3)). Determination of the district attorney pursuant to Pen. Code, § 1000, that a defendant is ineligible for diversion is not subject to pretrial review. Such

determination is a mere preliminary screening for eligibility and not an exercise of judicial power. *People v. McAlister* (1990, Cal App 6th Dist) 225 Cal App 3d 941, 275 Cal Rptr 229, 1990 Cal App LEXIS 1242, review denied (1991, Cal) 1991 Cal LEXIS 339.

In a prosecution in which defendant was convicted of being under the influence of a controlled substance (*Health & Saf. Code*, § 11550) and trespassing, after the district attorney found her ineligible for diversion on the ground that evidence indicated a disqualifying offense (possession of a controlled substance for sale) was involved, the appellate department of the superior court erred in ruling defendant was entitled to pretrial review of the finding of diversion ineligibility. The fact that defendant was not actually charged with the disqualifying drug offense and hence had no opportunity to contest that crime before a court did not entitle her to pretrial review. *Pen. Code*, § 1000, subd. (a)(3) (disqualifying offenses), was intended by the Legislature for those whom the district attorney cannot or does not choose to charge with trafficking. (Of course, if a defendant is charged with a disqualifying offense, he or she is not eligible for diversion even if later acquitted of that offense.) Pursuant to a prior California Supreme Court decision, a district attorney's determination of ineligibility is not subject to pretrial judicial review, and that holding was binding on the Court of Appeal and the appellate department. *People v. Brackett* (1994, Cal App 3d Dist) 25 Cal App 4th 488, 30 Cal Rptr 2d 557, 1994 Cal App LEXIS 528.

In deciding if a defendant accused of violating *Health & Saf. Code*, § 11358 (planting, cultivating, harvesting, or processing marijuana), is eligible for diversion (*Pen. Code*, § 1000 et seq.), determining the operative fact of "personal use" predicates the resolution of conflicting inferences of intended use, which is a judicial function. *Health & Saf. Code*, § 11358, itself does not distinguish between personal versus nonpersonal use. Thus, the question is whether the marijuana was for personal or nonpersonal use, and the task of making that determination is inherently a judicial one. Claimed authority by the district attorney to determine a commercial use under *Pen. Code*, § 1000, subd. (a)(3), conflicts with the judicial authority to resolve conflicting inferences of intended use under *Pen. Code*, § 1000.2, since it precedes and therefore preempts the judicial function. The judicial function must be preserved and, a fortiori, prevail. Pretrial review of a finding of ineligibility for diversion applies only when the question is whether the defendant is before any court upon an accusatory pleading for the commission of specified offenses (*Pen. Code*, § 1000, subd. (a)). That question, which is not assigned to the prosecutor, requires a judicial resolution, and hence a pretrial hearing. *People v. Brackett* (1994, Cal App 3d Dist) 25 Cal App 4th 488, 30 Cal Rptr 2d 557, 1994 Cal App LEXIS 528.

Pen. Code, § 1000, subd. (a)(3) (diversion; disqualifying offenses), authorizes the district attorney to perform a limited function, namely, to determine whether there is "evidence" permitting the inference that the defendant has committed a narcotic offense other than one listed in § 1000. This function does not involve the resolution of conflicting inferences or the determination of credibility, the hallmarks of fact finding. Although fact finding is a traditional judicial function, the task of the district attorney under the diversion statute is not to resolve conflicts, but instead to review the evidence in his or her files to determine whether they show that the defendant has probably committed narcotics offenses in addition to those listed in the statute. In making that determination, the district attorney need not have information sufficient to prove possession for sale in order to file a declaration of diversion ineligibility. If there is substantial evidence to support that determination, it will be upheld on appeal, even in close cases. If there is not, then the judgment must be set aside and the case remanded to permit the trial court to exercise its discretion to divert the defendant under the remaining portions of the statute. *People v. Brackett* (1994, Cal App 3d Dist) 25 Cal App 4th 488, 30 Cal Rptr 2d 557, 1994 Cal App LEXIS 528.

A district attorney's unilateral determination that a defendant was ineligible for deferred entry of judgment (*Pen C* § 1000) was not subject to judicial inquiry; the trial court had no power conduct a judicial review of the determination or to "overrule" the district attorney's determination. *People v. Sturiale* (2000, Cal App 5th Dist) 82 Cal App 4th 1308, 98 Cal Rptr 2d 865, 2000 Cal App LEXIS 644, review denied (2000, Cal) 2000 Cal LEXIS 8892.

An appeal was properly dismissed where defendant, who pleaded no contest to a drug offense following the denial of a motion to suppress evidence, entered a drug diversion program (*Pen C* §§ 1000 et seq.). Although *Pen C* § 1538.5(m) would permit an appeal from a final judgment of conviction, here entry of judgment was deferred and thus

there was no final judgment. This conclusion was consistent with the plain meaning of *Pen C* §§ 1237, 1237.5, since a deferred entry of judgment is neither a final judgment nor listed in § 1237 as one of the types of orders deemed to be final judgments for purposes of appeal. Although § 1237.5 lists the special conditions that will permit an appeal from a "judgment of conviction" following a plea of nolo contendere, that section has no application when, as here, there is not, as yet, a judgment of conviction. Lacking a judgment of conviction, defendant's no contest plea, standing alone, was insufficient to constitute an appealable final judgment. *People v. Mazurette* (2001) 24 Cal 4th 789, 102 Cal Rptr 2d 555, 14 P3d 227, 2001 Cal LEXIS 2.