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| Benjamin I. Salorio (SBN 221692)  Imperial County Public Defender  Wayland Chang (SBN 284140)  Deputy Public Defender  895 Broadway  El Centro, CA 92243  (442) 265-1705  (442) 265-1706 fax  waylandchang@co.imperial.ca.us  Attorney for Defendant DEFFIRST DEFLAST |  |
| Superior Court of California  County of IMPERIAL | |
| The People of the State of California,  Plaintiff;                       v.  DEFFIRST DEFLAST,  Defendant. | Case no.: CASENUMBER  **Notice of Motions and Motions for Court-Initiated Misdemeanor Diversion**  Date:  Time:  Dept: |

TO: The Honorable Judge, and the Imperial County District Attorney:

Please take notice that on the above date, time, and location, defendant DEFFIRST DEFLAST will move the court:

1. For Court-Initiated Misdemeanor Diversion under Penal Code section 1001.95.

This motion will be based on this notice, the attached memorandum of points and authorities, the attached exhibits, and on such oral and documentary evidence that may be presented at the hearing of this motion.

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| Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | Respectfully Submitted,  Benjamin Salorio  Imperial County Public Defender  By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Wayland Chang  Deputy Public Defender    Attorneys for Defendant  DEFFIRST DEFLAST |

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| Superior Court of California  County of IMPERIAL | |
| The People of the State of California,  Plaintiff;                       v.  DEFFIRST DEFLAST,  Defendant. | Case no.:CASENUMBER  **Memorandum of Points and Authorities in Support of Motion** |

# STATEMENT OF THE CASE

The Imperial County District Attorney filed a complaint against Ms. DEFFIRST DEFLAST on December 20, 2018. Count 1 of the complaint charges Vehicle Code section 23152, subdivision (a), driving under the influence of alcohol on May 25, 2018. Count 2 of the complaint charges Vehicle Code section 23152, subdivision (b), driving with a blood alcohol concentration of 0.08 or greater, on May 25, 2018. Ms. DEFFIRST DEFLAST was timely arraigned on February 8, 2019. She entered pleas of not guilty.

The last day to start trial is January 11, 2021.

# STATEMENT OF FACTS

***My client didn’t do anything wrong and is deserving of some mercy from the judge.***

# POINTS AND AUTHORITIES

## The Statute of Court-Initiated Misdemeanor Diversion

In 2020, the Legislature passed and the Governor signed Assembly Bill No. 3234 (AB3234), which created Chapter 2.96 of the Penal Code, titled “Court Initiated Misdemeanor Diversion.”

Penal Code section 1001.95 states:

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

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

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

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

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

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

(2) A violation of Section 273.5.

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

(4) A violation of Section 646.9.

Penal Code section 1001.96 states:

A defendant who is diverted pursuant to this chapter shall be required to complete all of the following in order to have their action dismissed:

(a) Complete all conditions ordered by the court.

(b) Make full restitution. However, a defendant’s inability to pay restitution due to indigence shall not be grounds for denial of diversion or a finding that the defendant has failed to comply with the terms of diversion.

(c) Comply with a court-ordered protective order, stay-away order, or order prohibiting firearm possession, if applicable.

Penal Code section 1001.97 states:

(a) Upon successful completion of the terms, conditions, or programs ordered by the court pursuant to Section 1001.95, the arrest upon which diversion was imposed shall be deemed to have never occurred. The defendant may indicate in response to any question concerning their prior criminal record that they were not arrested. A record pertaining to an arrest resulting in successful completion of the terms, conditions, or programs ordered by the court shall not, without the defendant’s consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate.

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

## DEFLAST is eligible for Court Initiated Misdemeanor Diversion

### DEFLAST is eligible under the statute.

Penal Code section 1001.95, subdivision (a) states: “A judge in the superior court in which a misdemeanor is being prosecuted may, at the judge’s discretion, and over the objection of a prosecuting attorney, offer diversion to a defendant pursuant to these provisions.”

DEFLAST is currently accused of two misdemeanor offenses, violations of vehicle Code section 23152, subdivisions (a) and subdivision (b), both of which are misdemeanors.

The prosecutor currently objects to DEFLAST being granted diversion. However, the statute specifically contemplates the judge using powers granted by the Legislature to order diversion “over the objection of a prosecuting attorney.” Opposition by the prosecutor explicitly is not a reason to deny diversion.

Penal Code section 1001.95, subdivision (e), lists several offenses for which diversion is not available:

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

(2) A violation of Section 273.5.

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

(4) A violation of Section 646.9.

Violations of Vehicle Code section 23152, subdivisions (a) and (b), are not any of the excluded offenses in subdivision (e) of Penal Code section 1001.95.

By the strict terms of the statute itself, violations of Vehicle Code section 23152, subdivisions (a) and (b) are eligible for diversion.

### Driving under the influence is eligible for diversion.

When the Legislature passed AB3234, and the Governor signed AB3234, both of those branches of government specifically contemplated that driving under the influence offenses were eligible for diversion. In addition, since the Judicial Council wrote to the Legislature about DUIs being eligible for diversion under AB3234, all three branches of government considered DUIs eligible for diversion under AB3234.

When Governor Newsom signed AB3234 into law on September 30, 2020, he issued a signing statement, attached as Exhibit A, and available at <https://www.gov.ca.gov/wp-content/uploads/2020/09/AB-3234.pdf>

His signing statement included the following paragraph:

However, I am concerned that the crime of driving under the influence was not excluded from the misdemeanor diversion program. I will seek to expeditiously remedy this issue with the Legislature in the next legislative session.

Governor Newsom in his signing statement expressed his understanding that in signing AB3234 into law, that as the Legislature had written AB3234, driving under the influence offenses were eligible for misdemeanor diversion. That Governor Newsom would need to “remedy this issue with the Legislature in the next legislative session” indicates that a new bill passed by the Legislature and signed by the Governor would be needed to categorically exclude driving under the influence offenses from Court Initiated Misdemeanor Diversion.

The Legislature in drafting AB3234 intentionally avoided excluding driving under the influence offenses. As noted by many sources, the model for AB3234 was the Los Angeles County Pilot Program created by AB2124, passed into law as Statutes and Amendments to the Code, chapter 732. (Letter from Judicial Council to Governor Newsom dated September 10, 2020 and to Assembly Member Ting dated August 26, 2020, attached as Exhibit B, available at <https://www.courts.ca.gov/documents/ga-position-letter-19-20-assembly-ab3234-ting.pdf>) The pilot program listed a number of offenses that were excluded, including violations of Section 23152 or 23153 of the Vehicle Code, which is noted in a chart that the Judicial Council had put together for the Governor. The Judicial Council’s letter also notes that as initially drafted, AB3234 did not have any exclusions. The Judicial Council’s letter also states that only after concerns by organizations such as the Judicial Council, the four exclusions that are part of the current law were added into the bill on August 24, 2020. In a separate letter to Assemblymember Phillip Ting, the author of AB3234, the Judicial Council opposed AB3234 because it contains no exclusions for driving under the influence offenses unlike the Los Angeles pilot program. (Attached as part of Exhibit B.) In the Judicial Council’s own words

AB 2124 excluded misdemeanor DUI offenses, misdemeanor domestic violence charges, and certain misdemeanors relating to firearms. In contrast, AB 3234 would extend to these and all misdemeanors, with four exceptions

Thus, the judges of California told the Legislature that AB3234 as written would only have four exclusions, and that DUI offenses would be eligible under AB3234.

The Legislature was responsive to the Judiciary’s previous concern about AB3234 having no exclusions at all. But when the Judiciary raised concerns about the lack of exclusions for DUIs, the Legislature did not respond. The versions of the AB3234 on August 3rd, August 11th, August 24th, or September 4th, did not exclude driving under the influence offenses, so at no point did the Legislature consider excluding driving under the influence offenses. Since the Legislature was explicitly given information about how DUIs were included in AB3234 as written and the Legislature decided not to explicitly add on more exclusions, the inescapable conclusion is that the Legislature intended that driving under the influence offenses be eligible for diversion under AB3234.

It was also the understanding of other interested parties that AB3234 would include driving under the influence offenses. Tulare County District Attorney Tim Ward opposed AB3234 and publicly told his constituents to urge Governor Newsom to veto AB3234 because it would allow for diversion in driving under the influence cases. (“DA Urges Residents To Contact Gov. Over Diversion Bill,” The Recorder (Sept. 18, 2020), available online at <https://www.recorderonline.com/news/da-urges-residents-to-contact-gov-over-diversion-bill/article_ed0e8188-f9d2-11ea-83bf-eff1185f5fe5.html>)

A published Court of Appeal decision indicates that the Legislature did not intend to exclude driving under the influence offenses from Court Initiated Misdemeanor Diversion. *Tellez v. Superior Court* (2020) 56 Cal.App.5th 439, was a decision about whether driving under the influence offenses were eligible for mental health diversion under Penal Code section 1001.36. The issue in *Tellez* was a different diversion scheme, but as dicta, the court wrote “The Legislature expressly excluded certain offenses from eligibility under Assembly Bill 3234, but DUI offenses are not on that list of exclusions.” (*Tellez*, at p. 450.) The court in *Tellez* noted that when the Legislature wanted to exclude driving under the influence offenses from diversion, it has in the past expressly done so. (*Ibid*.) So, for AB3234, *Tellez* concludes: “In view of that history, the Legislature’s failure to expressly exclude DUI offenses this time around is a good indicator that it intended DUI offenses to be eligible for the new misdemeanor program. (*Ibid*.)

### Vehicle Code section 23640 does not bar Court-Initiated Misdemeanor Diversion for Driving Under the Influence offenses.

A prosecutor objecting to diversion of a driving under the influence offense could argue it’s in violation of Vehicle Code section 23640. Vehicle Code section 23640 states a general rule against suspending or staying DUI proceedings:

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

The language of Penal Code section 1001.95 is very clear that it is “diversion”. It is not a suspension nor a stay of proceedings, unlike alternate procedures such as Penal Code section 270b or 1368, which clearly state they are a suspension of criminal proceedings.

If this court were to consider Penal Code section 1001.95 as a scheme that falls under Vehicle Code section 23640, then the clear legislative intent behind the specific Penal Code section 1001.95 and its later enactment should supersede the general rule of Vehicle Code section 23640. Supreme Court Justice Antonin Scalia wrote in his book *Reading Law*, “[a] provision that flatly contradicts an earlier-enacted provision repeals it.” (Scalia and Garner, Reading Law: The Interpretation of Legal Texts (2012) p. 327.) The California Supreme Court has said, “later enactments supersede earlier ones.” (*State Dept. v. Superior Court* (2015) 60 Cal.4th 940, 960.)

Despite the exact language of Vehicle Code section 23640, a prosecutor would probably analogize Court-Initiated Misdemeanor Diversion to court interpretations of how Vehicle Code section 23640 affects military diversion under Penal Code section 1001.80 and mental health diversion under Penal Code section 1001.36. However, a close examination reveals that is a false analogy.

When the Legislature created military diversion under Penal Code section 1001.80 with SB1227 in 2014, the text of Penal Code section 1001.80 was silent about its application to driving under the influence offenses. The silence resulted in two conflicting decisions about whether Vehicle Code section 23640 prevented military diversion for DUIs, *Hopkins v. Superior Court* (2016) 2 Cal.App.5th 1275, review granted, November 16, 2016, S237734, and *People v. VanVleck* (2016) 2 Cal.App.5th 355, review granted, November 16, 2016, S237219. The California Supreme Court did not have to resolve the conflict as the Legislature passed SB725 to render the issue moot.

The *VanVleck* court found that the general prohibition of Vehicle Code section 23640 forbade military diversion for DUIs. However, *Hopkins*, held that under canons of statutory interpretation and following the legislative intent of SB1227, DUIs were eligible military diversion. *Hopkins* quoted the Supreme Court’s statement that “later enactments supersede earlier ones.” (*Hopkins*, at p. 1284, quoting *State Dept. v. Superior Court* (2015) 60 Cal.4th 940, 960.) As such, the specifics of the military diversion statute in 2014 must have been meant to supersede the general provisions of Vehicle Code section 23640 whose antecedents were in 1981. (*Hopkins*, at p. 1284.)

The *Hopkins* decision also examined the legislative history of SB1227 and held that the Legislature intended to have DUIs eligible for military diversion despite the prohibition of Vehicle Code section 23640. (*Hopkins*, at pp. 1287–1288.) Nonetheless, *Hopkins* urged the Legislature to make its intent clear. (*Hopkins*, at p. 1279.) The Legislature did so swiftly with SB725 in 2017, whose only subject was about whether DUIs were eligible for military diversion. Senator Jackson in his author comments said that SB725 was needed to “clarify” that DUIs were eligible for military diversion. (Sen. Com. on Public Safety, Analysis of Sen. Bill. No. 725 (2017–2018 Reg. Sess.) April 17, 2017, p. 2.) The American G.I. Forum of California more succinctly stated the need for SB725:

In enacting Penal Code section 1001.80, while it was clearly the intent of the legislature to carve out an exception to the bar on diverting Vehicle Code section 23152 and 23163 offenders who met the criteria for inclusion, the differing interpretations by courts have necessitated SB 725.  
(Sen. Rules Com. Off. Of Sen. Floor Analyses, 3d reading analysis of No. 725 (2017–2018 Reg. Sess.) July 19, 2017, p. 5.)

SB725 was passed and signed into law as urgency legislation taking effect immediately, to clarify how the courts misinterpreted the Legislature’s intentions about the application of Vehicle Code section 23640.

In 2018, the Legislature created mental health diversion under Penal Code section 1001.36 through Assembly Bill No. 1810 (AB1810). Since AB1810 did not contain specific language about the inclusion or exclusion of DUIs, the question of whether the general rule of Vehicle Code section 23640 applied again arose. *Tellez v. Superior Court* (2020) 56 Cal.App.5th 439, found that after an examination of the legislative history of AB1810 and Senate Bill No. 215, that the Legislature did not intend mental health diversion to supersede the general rule of Vehicle Code section 23640. However, as stated earlier, *Tellez* refused to make the same conclusions about Court Initiated Misdemeanor Diversion under Penal Code section 1001.95. Instead, “[i]n view of that history, the Legislature's failure to expressly exclude DUI offenses this time around is a good indicator that it intended DUI offenses to be eligible for the new misdemeanor program.” (*Id*. at p. 450.)

Vehicle Code section 23640 should not be considered a prohibition preventing DEFLAST from being eligible for Court Initiated Misdemeanor Diversion. Comparisons to the military diversion or military health diversion are not apt.

## DEFLAST is not just eligible, but suitable for diversion.

As stated by the author of AB3234, Assemblymember Ting:

AB3234 provides judges with the discretion to provide diversion to individuals charged with misdemeanors they deem appropriate for such a program. Diversion programs that are successfully completed allow a person to avoid the lifelong collateral consequences associated with a criminal record when they are seeking employment or housing. Diversion programs typically require individuals to fulfill strict requirements, including participating in a rehabilitation program. This proactive approach has shown to yield better recidivism rates than merely prosecuting and jailing an individual.  
(Off. Of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 3234 (2019-2020 Reg. Sess.) Aug. 31, 2020, p. 2.)

In this particular case, DEFLAST is amenable to any reasonable conditions that the court may impose, such as installation of an ignition-interlock device, donations to organizations that educate the public about drunk driving, community service, or attending driving-related education. Penal Code section 1001.96 places few restrictions on what the court may orders as conditions of diversion, other than requiring full restitution and applicable protective orders, so the court has the freedom to consider conditions truly appropriate and rehabilitative for DEFLAST.

Should the prosecutor suggest that Court Initiated Misdemeanor Diversion allows DEFLAST to escape punishment, any diversion by the Court for this criminal case would also not erase any administrative sanctions that the Department of Motor Vehicles have imposed or will impose on DEFLAST.

The court may also make part of the record of this case, the advisement under Vehicle Code section 23593:

You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle.   Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both.  If you continue to drive while under the influence of alcohol or drugs, or both, and, as a result of that driving, someone is killed, you can be charged with murder.

Such an advisement would comport with *People v. Watson* (1981) 30 Cal.3d 290, if future incidents of driving under the influence occurred.

It should be noted that by placing DEFLAST on Court-Initiated Misdemeanor Diversion, she would be on court supervision longer than if she were to enter a guilty plea. Under Court Initiated Misdemeanor Diversion, “a judge may continue a diverted case for a period not to exceed 24 months.” Under current law, probation for a misdemeanor is not to exceed one year. (Pen. Code, sec. 1203a.) The current offer of a plea to Vehicle Code section 23103, as punished under Vehicle Code section 23103.5, commonly known as a “wet reckless” would thus only have a probation length of one year.

***OK, add in good stuff about client here, such as first-time mistake, and don’t need to ruin someone’s life over this.***

# CONCLUSION

DEFFIRST DEFLAST asks that she be placed on Court Initiated Misdemeanor Diversion.

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| Dated: \_\_\_\_\_\_\_\_\_\_\_\_ | Respectfully Submitted,  Benjamin Salorio  Imperial County Public Defender  By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Wayland Chang  Deputy Public Defender  Attorneys for Defendant  DEFFIRST DEFLAST |

EXHIBIT A

EXHIBIT B

# PROOF OF SERVICE

**Case name: People v. DEFFIRST DEFLAST**

**Case number: ECM004322**

I am a citizen of the United States and a resident of the County of Imperial in the State of California. I am over 18 years old and am not a party to this action. My office address is:

Imperial County Public Defender

895 Broadway

El Centro, CA 92243

I served the following documents on Wednesday, February 17, 2021:

**Notice of Motion and Motions for Diversion**

I served the documents on the following people:

Imperial County District Attorney

County Administration Building

940 West Main St, Suite 102

El Centro, CA 92243

The documents were served by the following means:

by e-mail service to the assigned prosecutor, Imperial County Deputy District Attorney

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed in El Centro, California on February 17, 2021.

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|  | By:  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Wayland Chang  Attorney for Defendant  DEFFIRST DEFLAST |