

# The Substance Abuse and Crime Prevention Act of 2000

aka Proposition 36,  
or “Four Strikes and Maybe You're Out”

## I. OVERVIEW OF THE LAW

## II. ISSUES IN THE COURTS

1. What is a nonviolent drug possession offense?
2. What is a drug related condition of probation?
3. Other threshold eligibility bars:
4. Who finds the facts which make D eligible or ineligible? Who has the burden of proof as to those facts?
5. Can the trial court strike disqualifying facts under section 1385?
6. Retroactivity: When does Prop. 36 eligibility kick in?
7. Another equal protection problem: probationers vs. parolees.

## I. OVERVIEW OF THE LAW

For once, the voters showed a good deal of sense and sympathy. By a 61 percent majority, they adopted a law that people should not be sent to prison for simple possession or use of drugs. Even people who possess or use drugs for a second or a third time may not be sent to prison, unless there is some other good reason for locking them up. Instead, they must get continued probation, and drug treatment.

The courts have reacted very cautiously to this experiment. Unlike the expansive interpretations given to, say, the Three Strikes Law or to Proposition 21 ( the 2000 Gang Violence and Juvenile Crime Prevention Act), the judicial interpretations of Proposition 36 have been extremely strict. The courts have assumed that the voters meant to keep the class of eligible defendants a narrow one. They have thus excluded from the law's coverage many people whose problem is clearly drug abuse – but who can be found to be outside a literal reading of its eligibility criteria.

When a defendant *is* eligible for Proposition 36 probation, however, its application is mandatory. A trial court simply has no discretion to imprison an eligible defendant. It cannot even summarily revoke his probation for a drug related violation. (*People v.*

*Mehdizadeh* (2003) 105 Cal.App.4th 995.) Unlike the deferred entry of judgment program (Pen. Code, § 1000, 1000.2-1000.3), the court cannot decide that a defendant is a poor candidate for drug treatment. If he's eligible, he gets his chance at it.

Even that bane of the appellate lawyer's practice, the failure to object to trial court error, does not apply here. "Placement of eligible defendants in Proposition 36 programs is not a discretionary sentencing choice made by the trial judge and is not subject to the waiver doctrine." (*People v. Esparza* (2003) 107 Cal.App.4th 691, 699.)

Of course, as *Esparza* points out, a finding that a defendant is not eligible for Prop. 36's mandatory probation does not mean he can't have probation at all. He may well be eligible for discretionary probation, under the normal probation statutes at section 1203 et seq. On the other hand, some defendants who are eligible for Prop. 36 probation are *not* eligible for discretionary probation – notably, defendants with five-year-old strike priors. If they can't make it into the class of Prop. 36 eligibles, they are barred from probation by the Three Strikes law, no matter how ancient their strike prior may be. (Compare § 1210.1(b)(1), the Prop. 36 eligibility provision, with § 1170.12(a)(2), the Three Strikes probation bar.)

Here, in rough outline, is the Proposition 36 program, as codified at Penal Code sections 1210.1 and 3063.1. (The funding provisions begin at Health and Safety Code section 11999.4.)

### **Eligibility**

Anyone convicted of a nonviolent drug possession offense (NVDPO) gets probation. Probation conditions *will* include "an appropriate drug treatment program". They *may* include other educational, counselling, and community service conditions. They *may not* include jail time. (§ 1210.1(a).)

"Only defendants who fall into a particular excluded category of persons may be incarcerated." (*People v. Murillo* (2002) 102 Cal.App.4th 1414, 1418.) The five classes of excludables are listed in section 1210.1(b), and include:

- Persons with "strike" priors that haven't "washed out" (§ 1210.1(b)(1).)
- Persons who in addition to their NVDPO are also convicted of a "misdemeanor not related to the use of drugs or any felony". (§ 1210.1(b)(2).)
- Persons who use a gun in connection with possession or use of various drugs. (§ 1210.1(b)(3).)

- Persons who refuse drug treatment as a condition of probation. (§ 1210.1(b)(4).)
- Persons who have two NVDPO's, have failed two drug programs, and have been found by clear and convincing evidence to be unamenable to “any and all forms of available drug treatment.” These persons shall be sentenced to 30 days in jail. (§ 1210.1(b)(5).)

**If you succeed ...**

Section 1210.1(d) authorizes “dismissal of charges upon successful completion of drug treatment.”

Specifically, “successful” completion allows a defendant to petition the court for expungement. (§ 1210.1(d)(1).) “[T]he defendant shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted” – *except* that s/he cannot own or possess a gun (§ 1210.1(d)(2)), and s/he must disclose the conviction on any application for public office, for a peace officer job, or in a license application. (§ 1210.1(d)(3).)

What is a “successful” completion? This appears to be left up to the trial court, which may find that a defendant who had a few relapses was not successful. There has not yet been any case law defining “successful completion.”

**If at first you don't succeed ...**

The probation revocation scheme is set out at section 1210.1(e), and is the same whether the underlying NVDPO conviction predates or postdates the enactment of Proposition 36. If a probation violation is not drug-related, the court must hold a hearing, and may revoke probation under the ordinary rules. (§ 1210.1(e)(2).)

But if the probation violation *is* drug-related, the law recognizes that “drug abusers often initially falter in their recovery” and “gives offenders several chances at probation before permitting a court to impose jail time.” (*In re Taylor* (2003) 105 Cal.App.4th 1394, 1397.)

- On a first drug-related violation, the court cannot revoke unless the prosecution proves by a preponderance that the defendant “poses a danger to the safety of others.” The court may, however, “intensify or alter” the treatment plan. (§ 1210.1(e)(3)(A) [for Prop. 36 probationers] and (D) [for

defendants already on probation at the time Prop. 36 took effect].)

- On a second drug-related violation, the court can revoke if the prosecution proves by a preponderance *either* that the defendant poses a danger to the safety of others *or* that s/he is unamenable to drug treatment. Again, the court may “intensify or alter” the treatment plan, if it may not revoke. (§ 1210.1(e)(3)(B) and (E).)
- On a third drug-related violation, “the defendant is not eligible for continued probation under subdivision (a).” (§ 1210.1(e)(3)(C) and (F).) (This does *not* say that s/he is ineligible for probation under § 1203, the regular probation statute. But that statute, unlike § 1210.1, subd. (a), allows the court to impose jail time as a condition.)

### **Parolees**

Parolees get two chances, compared to the probationers' three. (§ 3063.1(d)(3)(A)-(D).) Like probationers, they are excludable if they commit a “misdemeanor not related to the use of drugs or any felony” other than a NVDPO while on parole. (§ 3063.1(b)(2).) They are also excludable if they refuse drug treatment as a condition of parole. (§ 3063.1(b)(3).)

The major difference between parolees and probationers works in favor of parolees: their underlying offense does *not* have to be an NVDPO. They can be on parole for anything other than a serious or violent felony. (§ 3063.1(b)(1).) This difference is the basis of an equal protection claim by probationers, now pending in the California Supreme Court. (See Issues, part 7, below.)

[back to top](#)

## **II. ISSUES IN THE COURTS**

**1. What is a nonviolent drug possession offense? More importantly, what is not? What is a “misdemeanor not related to the use of drugs” (§ 1210.1(b)(2)), for which a conviction “in the same proceeding” as the NVDPO bars Prop. 36 eligibility?**

**Cultivation:** *People v. Sharp* (2003) 112 Cal.App.4th 1336: Cultivation of marijuana, even for personal use, “does not meet the statutory definition [of a NVDPO] ... because it is not 'possession, use, or transportation for personal use' or 'being under the influence' of a controlled substance. (Pen. Code, § 1210, subd. (a).) Rather, cultivation

falls within the excluded offenses of 'possession for sale, production, or manufacturing....”

In *Sharp*, CA3 acknowledged D's arguments that cultivation for personal use ought logically to be included, since it fits under the express purpose of the statute, and since it does not disqualify a defendant for deferred entry of judgment. However, the court refused to budge past the literal language of the statute. Perhaps in tacit recognition of the fact that Prop. 36 was a carefully crafted compromise measure, with each provision tested before focus groups to ensure that it would not threaten the law's passage, the court held back from any enlargement:

“These [earlier diversion] cases teach that where a statutory scheme designed to provide treatment for nonviolent drug offenders fails to include a particular nonviolent drug offense, it is for the Legislature, not the courts, to amend the statute to add the missing offense.”

**Driving:** CA 3's two earlier efforts to expand eligibility have resulted in grants of review. In *People v. Canty* (CA3, 2002) 100 Cal.App.4th 903, **rev. gtd. 10/16/2002, S109537**: “The misdemeanor offense of driving under the influence of drugs does not involve the 'simple possession or use of drugs' since it requires the additional element of impaired driving.” Thus it is a “misdemeanor not related to the use of drugs” as defined in section 1210(d), and bars Prop. 36 eligibility under section 1210.1(b) – even if the concurrent felony conviction would render D eligible. (Same holding: *People v. Walters* (CA 2/3, 2002) 103 Cal.App.4th 936, rev.gtd. S112291; *Trumble v. Superior Court* (CA4/1, 2002) 103 Cal.App.4th 1011, rev. gtd. S112339; *People v. Garcia* (CA5, 2002) 103 Cal.App.4th 1228, rev. gtd. S112688; *People v. Campbell* (CA6, 2003) 106 Cal.App.4th 808, rev. gtd. S115020.)

*People v. Goldberg* (2003) 105 Cal.App.4th 1202 also held that a concurrent DUI conviction (driving under the influence of meth) disqualified a drug defendant for Prop. 36 treatment, under section 1201.1(b). *Goldberg* is apparently final on appeal.

**Theft? Review was also granted** in CA3's *People v. Garcia* (2002) 99 Cal.App.4th 38, which held that petty theft of drugs, followed by their immediate consumption, *was* a misdemeanor involving the use of drugs, and was therefore not a Prop. 36 disqualifier. “[B]eing the sole purpose of the theft, the possession and immediate use of the stolen drug is a component part of the theft.” (**Rev. gtd. 8/28/2002, S108472** – but the case was then abated on 1/15/03, due to Garcia's death; the court noted the pendency of *Canty* in dismissing the grant of review.)

**Alcohol:** Driving under the influence of *alcohol*, as opposed to a controlled substance, is a “misdemeanor not related to the use of drugs” under section 1210.1(b)(2). *People v. Cantu* (CA6, 2003) 112 Cal.App.4th 729, pet. rev. filed 11/19/03, held that “Proposition 36 targets for treatment only nonviolent, non-dangerous offenders and excludes those who may pose a danger to others ... Unlike simple drug possession and use offenses, driving under the influence poses a substantial danger to the health and safety of others.”

**Resisting arrest:** CA4/1 held that a D who resisted his arrest for simple possession was disqualified for Prop. 36 treatment because section 148 is a “misdemeanor not related to the use of drugs.” *People v. Ayele* (2002) 102 Cal.App.4th 1276, **rev. gtd. S111522, briefing deferred behind *Canty*.**

**Can the trial court avoid the bar of section 1210.1(b)(2) by severing the NVDPO from the other offense(s)?** Probably not. *People v. Superior Court (Jefferson)* (2002) 97 Cal.App.4th 530, 537-538.

[back to top](#)

## **2. What is a drug related condition of probation?**

Under section 1210.1(e), a defendant can stay on Prop. 36 for his first two probation violations – so long as (1) the violations are of drug related conditions of probation; (2) the defendant is on probation for an NVDPO in the first place; and (3) the trial court does not find s/he is a danger to the public (for a first violation) and/or is unamenable to treatment (for a second violation.)

Which violations qualify as “drug related”? The statutory definition of a “drug related condition of probation” is at section 1210.1(f). It includes “a probationer's specific drug treatment regimen, employment, vocational training, educational programs, psychological counseling, and family counseling.”

**DUI does not qualify:** In *People v. Campbell* (CA6, 2003) 106 Cal.App.4th 808, **rev. gtd. S115020**, the Court of Appeal held that driving under the influence of drugs not only failed as a NVDPO, and as a misdemeanor related to the use of drugs, it also failed to qualify as a “drug-related probation violation” under section 1210.1(e)(3).

**Failure to report for testing does qualify:** *In re Taylor* (CA2/8, 2003) 105 Cal.App.4th 1394, rev. den. 5/21/03, held that a “drug treatment regimen” was a drug related condition, and since testing is part of the drug treatment regimen, and since

testing requires showing up for the test ... “it follows that a drug treatment regimen includes appearing for tests. Appearing (or failing to appear) for a drug test thus satisfies the definition of a drug-related condition of probation. (See § 1210.1, subd. (f).)” (See also *People v. Mehdizadeh* (2003) 105 Cal.App.4th 995, 1001. *People v. Atwood* (2003) 110 Cal.App.4th 805 held that failure to participate in a drug treatment program is a drug related condition of probation, but failure to “follow all orders” may not be. However, *Atwood* held, the burden of proof that a condition is *not* drug related is on the People.)

**But failure to meet a general reporting requirement is not drug related:**

*People v. Dixon* (CA3, 2003) 113 Cal.App.4th 146 held that a defendant who failed to report by mail, as ordered, had violated a non-drug-related condition. “This method of reporting could not have involved a drug test nor was there anything else about reporting by mail that was peculiar to defendant's drug problems or drug treatment.” (Same: *People v. Goldberg* (2003) 105 Cal.App.4th 1202, 1209; *People v. Johnson* (2003) – Cal.App.4th – [2003 WL 22928866]. See also *Atwood*, above.)

[back to top](#)

**3. Other threshold eligibility bars:**

**Refusal to accept drug treatment** (§ 1210.1(b)(4)): This bar cannot be based on “a past refusal of drug treatment in some other case, let alone a refusal to take a drinking driver class [in a previous case].” *People v. Espinoza* (CA 1/1, 2003) 107 Cal.App.4th 1069.

But it can be based on skipping out on an initial assignment to a program, following the grant of probation. In *People v. Guzman* (2003) 109 Cal.App.4th 341, the defendant, upon being placed on probation, went to Mexico for five months rather than to his assigned drug program. When he was brought back to court, the judge viewed this as an initial refusal of drug treatment, under section 1210.1(b)(4), rather than as a violation of a drug related probation condition, under section 1210.1(e)(3). The Court of Appeal upheld the judge: “We hold that the eligibility requirements continue to apply even after the initial grant of probation.... Such a defendant [as Guzman] is to be distinguished from a defendant who commences drug treatment and thereafter falters by violating conditions of probation.” (109 Cal.App.4th at p. 350.)

See also *People v. Johnson* (2003) – Cal.App.4th – [2003 WL 22928866], holding that a paranoid schizophrenic defendant who “repeatedly violated her probation by failing to report to the probation officer and by never enrolling in the court-ordered drug program” was ineligible under section 1210.1(b)(4). (The court did not discuss whether

the voters in enacting Prop. 36 really intended to send schizophrenics to prison.)

**Illegal immigration status:** While there is no explicit statutory basis for excluding illegal aliens, CA1/1 finds that “the strong probability that defendant will be deported before he can satisfy the drug treatment condition of his probation would entirely frustrate the objectives of Proposition 36.” *People v. Espinoza* (2003) 107 Cal.App.4th 1069.

**A prison sentence in another case:** In *People v. Esparza* (2003) 107 Cal.App.4th 691, CA3 held that a court imposing a prison sentence in a non-drug case was not required to grant Prop. 36 probation in the drug case: “Defendant had, through his prison sentence for the vandalism case, become unable to participate in those programs or to comply with mandatory probation conditions.... We conclude that a defendant is 'unamenable' when he is unavailable to participate in Proposition 36 programs within the statutory time periods because of his prison sentence.”

**Priors which haven't washed out:** Prop. 36 partially overrides the Three Strikes law, which bars probation for anyone with a “strike” prior, no matter how old the prior may be. (§ 667(c)(2).) Under Prop. 36, probation can be granted to an otherwise eligible defendant, if his strike prior is old enough. Specifically, if the new NVDPO occurs “after a period of five years in which the defendant remained free of both prison custody and the commission of an offense that results in (A) a felony conviction other than a NVDPO, or (B) a misdemeanor conviction involving physical injury or the threat of physical injury to another person” (§ 1210.1(b)(1)), he is eligible for Prop. 36 probation.

However, the five clean years must immediately precede the NVDPO. It is not enough to have any five clean years following the strike conviction: *People v. Superior Court (Martinez)* (2002) 104 Cal.App.4th 692; *People v. Superior Court (Henkel)* (2002) 98 Cal.App.4th 78; *People v. Superior Court (Turner)* (2002) 97 Cal.App.4th 1222 (relying in part on the promise which the Legislative Analyst made in the ballot language, that no serious or violent felon would get probation unless s/he was free of custody or new offenses “during the five years before he or she committed a NVDPO”); and *People v. Superior Court (Jefferson)* (2002) 97 Cal.App.4th 530.

However, if the defendant never went to prison following the strike conviction, does the washout period start at the time the prior offense was committed? Or is it washed out regardless of how much time has passed? *People v. Johnson* (2003) – Cal.App.4th – [2003 WL 22928866], in a very unclear passage, suggests that if there was no custody, there is no disqualifying strike prior.

**Some strike priors do not disqualify a defendant for Prop. 36, regardless of**

**washout:** Under the Three Strikes law, some juvenile offenses count as strikes. (§ 667(d)(3).) However, under Prop. 36 a defendant is disqualified only if s/he “has been *convicted* of one or more serious or violent felonies in violation of subdivision (c) of section 667.5 or section 1192.7.” (§ 1210.1(b)(1).)

A juvenile offense, even if it is a strike, is not a *conviction*. Thus, it does not bar a defendant from Prop. 36 eligibility. There is no need to worry about meeting the washout requirement in such a case. *People v. Westbrook* (2002) 100 Cal.App.4th 378.

[back to top](#)

#### **4. Who finds the facts which make D eligible or ineligible? Who has the burden of proof as to those facts?**

A NVDPO may be “transportation for personal use.” (§ 1210(a).) There is no such offense in the Health and Safety Code; transportation offenses do not distinguish between transportation for personal use and for sale. So a conviction for “transportation” does not in itself answer the question of Prop. 36 eligibility.

In *People v. Glasper* (2003) --- Cal.App.4th — [CA6, 10/31/03], defendants were acquitted of possession for sale, but convicted of simple possession and transportation. They argued that the jury's verdict was binding on the trial court, which could not deny them Prop. 36 treatment by finding that the transportation was really for sale. The Court of Appeal held that the jury was not required to find the facts regarding eligibility; the judge was free to make the findings. The facts (here, transportation *for sale*) do not have to be pled and proven, under *Apprendi v. New Jersey* (2000) 530 U.S. 466: “Apprendi does not apply here because ‘the issue concerns a sentencing provision which lightens, rather than increases, punishment for crime.’” (Quoting *People v. Barasa* (2002) 103 Cal.App.4th 287, 294.)

*Barasa* held that *Apprendi* does not apply to Prop. 36 eligibility findings, because Prop. 36 does not involve a sentencing enhancement. It rejected the argument that Prop. 36 created an offense of transportation for personal use, with “not for personal use” constituting a sentencing enhancement.

Looking at the statutory language, *Barasa* found that the *defendant* had the burden of proof to show that the transportation was for personal use. (Evid. Code § 500: “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence

or nonexistence of which is essential to the claim for relief or defense that he is asserting ....”)

*People v. Atwood* (2003) 110 Cal.App.4th 805 distinguished *Barasa* when the findings were about whether a probation violation was drug related, rather than about whether a defendant met the initial eligibility criteria. “Here, the People want to send defendant to prison. In order to satisfy the statutory criteria, they have to show that at least one condition of probation violated was not 'drug-related.' That fact is 'essential to the claim for relief ... that [the People] are asserting.' (Evid. Code, § 500.)”

“The difference between *Barasa* and this case is this: in *Barasa*, defendant was seeking a grant of probation and was therefore asserting a 'claim for relief' within the meaning of Evidence Code section 500. In the instant case, the People are seeking a revocation of probation and incarceration and are therefore asserting a 'claim for relief' within the meaning of the same Evidence Code section.” (110 Cal.App.4th at p. 810.)

[back to top](#)

## **5. Can the trial court strike disqualifying facts under section 1385?**

No. The Supreme Court has held that “trial courts may not use section 1385 to disregard 'sentencing factors' that are not themselves required to be a charge or allegation in an indictment or information.” (*In re Varnell* (2003) 30 Cal.4th 1132, 1135.)

In *Varnell*, the defendant was charged with a drug possession offense, and with a strike prior which would disqualify him for Prop. 36 treatment. (The prior was not old enough to have washed out, under § 1210.1(b)(1).) The trial court struck the prior for purposes of the Three Strikes law – but nonetheless found that the *fact* of the prior conviction rendered D ineligible for Prop. 36.

The Supreme Court upheld this reasoning. Section 1385, it held, may be used to dismiss sentencing allegations which must be pled and proven. But the facts which make a defendant ineligible for Prop. 36 do not have to be pled and proven; they do not increase the maximum sentence for an offense (cf. *Apprendi v. New Jersey* (2000) 530 U.S. 466) and they do not even make a defendant absolutely ineligible for probation. (Cf. *People v. LoCicero* (2003) 71 Cal.2d 1186.) “A ruling that section 1385 could be used to disregard sentencing factors, which ... are not included as offenses or allegations in an accusatory pleading would be unprecedented.” (30 Cal.4th at p. 1137.) Besides, it would be inconsistent with the intent of the voters. (*Id.*, at p. 1143-1144.)

(A related case, *People v. Ayele*, formerly at 102 Cal.App.4th 1276, held that a trial court did not abuse its discretion in refusing to strike, under section 1385, a concurrent “misdemeanor not related to the use of drugs”, which made D ineligible under § 1210.1(b)(2). *Ayele* assumed, without deciding, that in a proper case section 1385 *would* be available to strike that misdemeanor. Although *Ayele* noted the pendency of *Varnell*, review was actually granted behind *Canty*. (P v. Ayele, S111522; see Issue 1, above, for a summary of the *Canty* issue.) Thus, there is no answer yet to the *Varnell* question: since the disqualifying misdemeanor conviction presumably requires pleading and proof, could the trial court strike it under section 1385?)

[back to top](#)

## **6. Retroactivity: When does Prop. 36 eligibility kick in?**

*People v. Floyd* (2003) 31 Cal.4th 179: Prop. 36's right to an initial grant of probation is available only to defendants not yet sentenced on July 1, 2001. It is *not* available to a person who has been sentenced, but whose conviction is not yet final on appeal, by that date.

Normally, under *In re Estrada* (1965) 63 Cal.2d 740, when the Legislature or the voters act to reduce a criminal punishment, the courts will presume that they intended to apply the ameliorative measure retroactively. This means, at least, that anyone whose conviction is not yet final on appeal gets the benefit of the ameliorative measure.

But this presumption only has effect if there is no savings clause. Prop. 36 did have a savings clause, in its uncodified section 8. (“Except as otherwise provided, the provisions of this act shall become effective July 1, 2001, and its provisions shall be applied prospectively.”) The Supreme Court held in *Floyd* that “prospectively” meant that the drafters intended to avoid the *Estrada* rule – and that, therefore, Prop. 36 could not be extended to all persons whose convictions are not yet final on appeal.

Nor is there any equal protection problem, the Court held, in letting people like Tommy Lee Fryman (formerly at 97 Cal.App.4th 1315) do 25-life for an offense which would have gotten him mandatory probation, had he been sentenced a little later. (*Floyd*, part B.)

However, the Supreme Court has left standing those cases which held that a defendant who is *convicted* before July 1, 2001, but not sentenced until after that date, is entitled to Prop. 36 treatment: *In re DeLong* (2001) 93 Cal.App.4th 562 [for purposes of Prop. 36 eligibility, “convicted” means found guilty and sentenced, so a defendant not yet

sentenced on 7/1/01 has not yet been “convicted”]; *In re Scoggins* (2001) 94 Cal.App.4th 650 [same].

The Court has also left standing a case holding the contrary. *People v. Mendoza* (2003) 106 Cal.App.4th 1030 (rev. den. 5/14/03) held that “conviction” means only adjudication of guilt. A defendant who has been found guilty, but not yet sentenced, as of July 1, 2001, is “convicted” before the kick-in date, and is therefore ineligible for Prop. 36.

[back to top](#)

### **7. Another equal protection problem: probationers vs. parolees.**

A defendant who violates *probation* by committing a NVDPO, but whose original conviction is for some other felony (or who was additionally convicted of a disqualifying misdemeanor), is not eligible for Prop. 36's mandatory second and third chances as outlined in section 1210.1(e). Subdivision (e) sets out the scope of the right to continued probation, in the event of drug related violations – but it applies only to those defendants who initially received probation under subdivision (a). In other words, it applies only to those defendants on probation for a NVDPO. A defendant who is on regular probation, under section 1203, for some other offense is not covered by subdivision (e). (See, e.g., *People v. Esparza* (2003) 107 Cal.App.4th 691, 697.)

However, a *parolee* whose initial offense is not a NVDPO, and who violates *parole* by committing a drug related offense, *is* entitled to a few more chances. The parole violation rules are set out in section 3063.1(d)(3). The scheme does not exactly parallel the probation violation scheme of section 1210.1(e), but it does give the parolee at least one second chance before he may be reimprisoned.

Is there an equal protection violation here? The Sixth District thought there was, in *People v. Guzman*, formerly at 111 Cal.App.4th 57. Review was granted in *Guzman*, S119129, on November 12, 2003.

(Note: neither probationer Guzman nor the hypothetical similarly situated parolee was initially convicted of a serious or violent felony. A serious or violent felony would disqualify the parolee for Prop. 36 rules in the event of a violation, under § 3063.1(b)(1), and thereby destroy Guzman's equal protection argument. There is no washout period for serious or violent felonies for parolees.)