FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
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PROP 36 UNDER ATTACK?

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Recent Developments and Future Prospects of the Substance Abuse and Crime Prevention Act of 2000.

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Jeremy Price[1]
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When Proposition 36 ("Prop 36") was placed on the ballot in 2000, it succeeded with the statewide approval of 61% of the voters. By passing Prop 36, the Substance Abuse and Crime Prevention Act became law in California, thereby making treatment (and not incarceration) the default outcome for individuals convicted of the nonviolent possession of illegal drugs for personal use. The magnitude of this margin of support was particularly remarkable when viewed in light of the electorate's penchant for supporting ballot measures that purport to be "tough on crime."

Notwithstanding the broad support of the voters, Prop 36 faces an uncertain future. Appellate court decisions, pending bills in the legislature, and growing support for the drug court model offer competing visions for the future of confronting drug use in general and Prop 36 in particular.

The debate over Prop 36 mainly focuses on the respective benefits of community-based treatment programs and incarceration when dealing with drug offenders. Prior to delving into the debate over the future of Prop 36, however, it is important first to understand the parameters of the law itself and how the courts have interpreted the measure since its passage over five years ago.

I. OVERVIEW OF THE LAW

Prop 36 is premised on the notion that drug addiction is best combated through out-of-custody rehabilitation programs rather than incarceration. When presented to the voters, Prop 36 contained the following expression of purpose and intent:

> The People of the State of California hereby declare their purpose and intent in enacting this Act to be as follows:
>
> > (a) To divert from incarceration into community-based substance abuse treatment programs non-violent defendants, probationers and parolees charged with simple drug

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[1]These materials are an update of original materials prepared in January 2004 by FDAP Staff Attorney Kathy Kahn.

possession or drug use offenses;

(b) To halt the wasteful expenditure of hundreds of millions of dollars each year on the incarceration – and re-incarceration – of non-violent drug users who would be better served by community-based treatment; and

(c) To enhance public safety by reducing drug-related crime and preserving jails and prison cells for serious and violent offenders, and to improve public health by reducing drug abuse and drug dependence through proven and effective drug treatment strategies.

With these guiding principles in mind, the Prop 36 program, as codified at Penal Code sections 1210.1 and 3063.1,[2] is comprised of the following elements:

Initial Eligibility

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

When a defendant is eligible for Prop 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 s/he's eligible, s/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

[2]The funding provisions of Prop 36 begin at Health and Safety Code section 11999.4.

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.)

Initial Ineligibility

"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 NDPO 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 NDPOs, 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).)

Successful Completion of Treatment

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 determination appears to be left up to the discretion of the trial court. The court may find, for example, that treatment was not successful if the court lacked reasonable cause to believe the defendant would not abuse drugs in the future. (*People v. Hinkel* (2005) 125 Cal.App.4th 845, 851-52.) "Mere completion of the program is not enough; the court must also find the program was, for the individual defendant, effective to the point that, post-completion, reasonable cause exists to believe that the defendant will not abuse controlled substances in the future." (*Id.* at p. 851.)

Therefore, in practical terms, when seeking dismissal of charges upon completion of a treatment program pursuant to Prop 36, defendants (and their lawyers) should assemble as much evidence as possible to demonstrate successful completion - that is, reasonable cause to believe defendant will not abuse drugs in the future.

Revocation of Prop 36 Probation

Probationers

The probation revocation scheme is set out at section 1210.1(e) and is the same whether the underlying NDPO 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 probation 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 probation 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 probationer's 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 NDPO 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 NDPO. They can be on parole for anything other than a serious or violent felony. (§ 3063.1(b)(1).) An equal protection challenge to this seemingly inconsistent application of Prop 36 was recently rejected by the California Supreme Court (*People v. Guzman* (2005) 35 Cal.4th 577) and is discussed in greater detail below.

II. ISSUES IN THE COURTS

1. What is a nonviolent drug possession offense? More importantly, what is not?

Cultivation of Marijuana For Personal Use

People v. Sharp (2003) 112 Cal.App.4th 1336, holds that cultivation of marijuana, even for personal use, "does not meet the statutory definition [of a NDPO] . . . 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*, the Third District acknowledged the defendant's arguments that cultivation for personal use ought logically to be covered by Prop 36, as it fits under the express purpose of the statute and 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:

Earlier diversion cases, according to *Sharp*, "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." (*People v. Sharp*, *supra*, 112 Cal.App.4th at p. 1342.)

Forgery of a Prescription to Procure Drugs

In *People v. Foreman* (2005) 126 Cal.App.4th 338 and *People v. Wheeler* (2005) 127 Cal.App.4th 873, the First and Third Districts, respectively, held that the offense of forging a prescription in order to obtain drugs illegally for personal use is not an NDPO. As a result, such a conviction prevents eligibility under Prop 36.

2. 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 NDPO bars Prop. 36 eligibility?

Driving Under the Influence of Illegal Drugs

In *People v. Canty* (2004) 32 Cal.4th 1266, the California Supreme Court held that "a conviction of misdemeanor driving while under the influence of drugs constitutes 'a misdemeanor not related to the use of drugs' that, pursuant to section 1210.1, subdivision (b) (2), disqualifies a defendant from receiving the alternative disposition provided in section 1210.1, subdivision (a)."

In reaching this conclusion, the Court relied on: (1) the different degrees of impairment required for conviction for being under the influence and driving under the influence; (2) the differences between the conduct that is the central focus of the statutes prohibiting being under the influence and driving under the influence; (3) the different interests society seeks to protect by criminalizing being under the influence and driving under the influence; and (4) the voters' intent to strictly limit Prop 36 to simple possession of drugs and for Prop 36 not to change other criminal laws. (*Id*. at 1278-81.)

While *Canty* specifically dealt with driving under the influence of a controlled substance, it appears to have articulated the analytical framework under which the phrase "misdemeanor not related to the use of drugs" will be evaluated going forward.

Driving Under the Influence of Alcohol

Driving under the influence of alcohol is a "misdemeanor not related to the use of drugs" under section 1210.1(b)(2). *People v. Cantu* (2003) 112 Cal.App.4th 729. Although the Supreme Court granted review in this case, after *Canty*, it dismissed review and remanded the case back to the Sixth District.

In *Canty*, the Court noted that "[a]n interpretation of section 1210.1, subdivision (b)(2) permitting a defendant convicted of a misdemeanor driving while under the influence of drugs to receive probation and drug treatment under section 1210.1, subdivision (a), would afford drivers impaired by drugs more lenient treatment than that afforded drivers impaired by alcohol." (*People v. Canty*, *supra*, 32 Cal.4th at p. 1283.) It is clear, then, that driving under the influence of alcohol constitutes a Prop 36 disqualifier.

Theft of Drugs for Personal Use

In *People v. Garcia* (2002) 99 Cal.App.4th 38, the Third District 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. The Supreme Court granted review, but the case was subsequently abated due to Garcia's death.

In dismissing the grant of review, the court noted the pendency of *Canty*. Subsequent to *Canty*, given the Court's interpretation of the phrase "misdemeanor not related to the use of drugs," it would appear that such a theft would disqualify a defendant from Prop 36 eligibility for the following reasons: (1) the central focus of the theft statute is not similar to that of the laws making possession of controlled substances illegal and (2) to hold otherwise would alter the punishment scheme for certain theft crimes (which would presumably, according to the Court, run counter to the intent of the voters in enacting Prop 36).

Resisting Arrest in Simple Possession Cases

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*. After *Canty*, the Court dismissed review and remanded to the Fourth District, thus leaving in tact the *Ayele* court's holding that resisting arrest for simple possession is a Prop 36 disqualifier.

3. 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 NDPO 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 Not a Drug Related Probation Condition

In *People v. Campbell* (2003) 106 Cal.App.4th 808, *rev. gtd*. S115020, the Sixth District held that driving under the influence of drugs not only failed as a NDPO and as a misdemeanor related to the use of drugs, but it also failed to qualify as a "drug-related probation violation" under section 1210.1(e)(3). In October 2004, the Court dismissed its grant of review per rule 29.3(b) and remanded the case to the Sixth District, thus leaving in tact the Sixth District's holding.

Failure to Report for Testing Does Qualify as a Drug Related Probation Condition

In re Taylor (CA2/8, 2003) 105 Cal.App.4th 1394, *rev. den.* 5/21/03, held that "[a]ppearing (or failing to appear) for a drug test . . . satisfies the definition of a drug-related condition of probation. (See § 1210.1, subd. (f).)" because drug testing is part of the "drug treatment regimen."

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, according to *Atwood*, the burden of proof that a condition is not drug related is on the People.

Failure to Report to the Mental Health "Gatekeeper" Qualifies as a Drug Related Probation Condition

In *People v. Dagostino* (2004) 117 Cal.App.4th 974, as part of defendant's Prop 36 probation, he was ordered to meet with a mental health "gatekeeper" who would evaluate his circumstances and determine the proper course of treatment. Defendant failed to show up for his initial evaluation. The Fifth District held that "[s]ince a person cannot be placed in the appropriate drug treatment program without being evaluated, it follows that a drug treatment regimen includes the initial evaluation, and appearing or failing to appear for that evaluation 'thus satisfies the definition of a drug-related condition of probation.'" (*Id*. at 993, quoting *In re Taylor*, *supra*, 105 Cal.App.4th at p. 1398.)

Failure to Meet a General Reporting Requirement Is Not Drug Related

People v. Dixon (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."

4. Do drug-related violations of non-Prop 36 probation negatively affect future eligibility for Prop 36 probation?

As noted above, offenders remain presumptively eligible for Prop 36 probation through two drug-related violations of their Prop 36 probation. Upon engaging in a third drug-related violation, however, defendants are no longer eligible for Prop 36.

In *People v. Bowen* (2004) 125 Cal.App.4th 101, the Third District held that drug related violations of non-Prop 36 probation count toward eligibility for future Prop 36 probation. Therefore, even though defendant was not on Prop 36 probation at the time of his third drug-related probation violation, his three drug-related probation violations rendered him categorically ineligible for treatment pursuant to Prop 36 probation. So, the phrase "probation" in 1210.1(e)(3)(F) is not limited to Prop 36 probation.

5. Does a third drug-related violation automatically disqualify defendants from Prop 36 eligibility?

Not exactly. In *People v. Tanner* (2005) 129 Cal.App.4th 223, 237, the Fourth District held that "the trial court erred in prematurely revoking Tanner's probation under Proposition 36 solely for three violations of drug-related conditions of his probation after only two motions by the state and two hearings for revocation." According to Penal Code Section 1210.1(e)(3)(F), the relevant inquiry is the number of times the state has moved for revocation of defendant's probation, not the number of violations admitted by the defendant. While in most cases, these numbers will correspond to one another, when they do not, and the state has not brought a third noticed motion to revoke probation, there is an issue ripe for appeal.

6. When does a prior conviction involve a threat of physical injury to another person and therefore preclude eligibility for Prop 36 probation?

Under Penal Code Section 1210.1.(b)(1), any defendant who has been previously convicted of a "misdemeanor conviction involving physical injury or the threat of physical injury to another person" is ineligible for Prop 36 probation, unless that offense occurred after Prop 36's five year washout period.

Misdemeanor DUI Involves the Threat of Physical Injury to Another Person

In *People v. Eribarne* (2004) 124 Cal.App.4th 1463, appellant argued that his previous misdemeanor DUI should not disqualify him for Prop 36 probation because there was no proof that the offense involved a threat of physical harm to another person. The Fifth District disagreed and concluded "that the very reason why driving with a blood-alcohol level of 0.08 percent or higher has been criminalized is precisely because such conduct presents a threat of physical injury to other persons." Therefore, the court held that a misdemeanor DUI per se precludes eligibility for Prop 36 probation.

7. 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* (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) 114 Cal.App.4th 284, 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, the First District 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.

Plea Bargains

In *People v. Chatmon* (2005) 129 Cal.App.4th 771, defendant pleaded no contest to a charge of cocaine possession. In exchange for dropping other charges and receiving non-Prop 36 probation instead of jail time, defendant agreed to waive his right to appeal. Subsequently, defendant's probation was revoked for failing to conform with a number of probation conditions. Defendant appealed, claiming that he should have been sentenced to Prop 36 probation in the first place. The First District was unpersuaded and disposed of his challenge in the following manner: "Chatmon did . . . receive the benefit of probation and dismissal of a charge that, were he convicted, would have disqualified him from treatment under Proposition 36. (Penal Code, § 1210.1, subd. (b)(2).) As part of the bargain, he agreed to waive his right to appeal. Now, having violated his probation, he appeals from the ensuing judgment, asking us to recast the terms of his plea bargain. We will not entertain such a request." (*People v. Chatmon*, *supra*, 129 Cal.App.4th at p. 773.)

A Prison Sentence in Another Case

In *People v. Esparza* (2003) 107 Cal.App.4th 691, the Third District 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." (*Id*. at 699.)

Priors That Have Not 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 NDPO 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 NDPO, 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 NDPO. 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 NDPO"); 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) 114 Cal.App.4th 284 294, 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.)

8. Who finds the facts that make a defendant eligible or ineligible for Prop 36?

Transportation For Personal Use

A NDPO may be "transportation for personal use." (§ 1210(a).) However, 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. Dove* (2004) 124 Cal.App.4th 1, a jury acquitted defendant on the charge of possession for sale. Nevertheless, at sentencing, the trial court found that the drugs were

not for personal use and held defendant ineligible for Prop 36 probation. The Fourth District held that "neither *Apprendi* nor *Blakely* prohibited the trial court from deciding, based on the preponderance of the evidence, whether defendant's possession or transportation was for personal use for purposes of Proposition 36." (*Id*. at p. 11.)

In reaching this conclusion, the court relied on *People v. Glasper* (2003) 113 Cal.App.4th 1104 and *People v. Barasa* (2002) 103 Cal.App.4th 287.

In *Glasper*, 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.

9. Who has the burden of proof as to those facts?

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." (*People v. Atwood*, *supra*, 110 Cal.App.4th at p. 810.)

10. 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 defendant 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. "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." (*In re Varnell*, *supra*, 30 Cal.4th at p. 1137.) Besides, it would be inconsistent with the intent of the voters. (*Id*. at p. 1143-1144.)

11. May courts unilaterally force defendants to waive statutorily required custody credits for time spent in a Prop 36 drug treatment program?

Yes. *People v. Thurman* (2005) 125 Cal.App.4th 1453 held that the court has the discretion to include such a term in the defendant's probation conditions. According to the Court, "Proposition 36 offers nonviolent drug offenders the 'opportunity' to participate in a structured drug treatment program 'in lieu of incarceration' (*Esparza*, *supra*, 107 Cal.App.4th at p. 696), if the defendant submits to reasonable probation limitations imposed by the trial court. It does not eliminate the defendant's right to reject this opportunity and decline probation if he or she finds the terms and conditions to be too onerous or intolerable. ([Citations.]) ¶As the People point out, defendant 'had the choice of accepting the waiver of custody credits condition and avoiding a prison sentence or rejecting the condition and being incarcerated.' Defendant chose to accept probation on the terms dictated by the trial court, and he does not claim that his waiver of custody credits was not knowing and intelligent. Consequently, for the reasons stated above, the

trial court did not err in requiring defendant as a condition of probation to waive custody credits for time spent in a residential drug treatment program."

12. 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.

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.

13. Another equal protection problem: probationers vs. parolees.

A defendant who violates probation by committing a NDPO, 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 NDPO. 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 NDPO, 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? While the Sixth District thought there was, the California Supreme Court recently weighed in on this issue and decided otherwise.

In *People v. Guzman* (2005) 35 Cal.4th 577, 593, the California Supreme Court held "that with respect to the Act's legitimate purposes . . . , a probationer like defendant, who commits an NDPO while still on probation for a non-NDPO, is not similarly situated to a parolee who commits an NDPO after completing a prison term for the non-NDPO. Defendant's equal protection claim therefore fails."

In support of this holding, the Court distinguished probation from parole in the following manner: "It is true that for purposes of determining their initial eligibility for mandatory probation under the Act, such probationers and parolees are similarly situated; both have committed and been convicted of a non-NDPO that rendered them ineligible for such mandatory probation. However, for purposes of *ending* their ineligibility, they are not similarly situated. As previously explained, parolees have had sentence imposed and have completed the prison terms prescribed by law for their non-NDPO. In other words, they have 'served their time' in prison for the non-NDPO's. [Citation] Probationers have not; as explained above, they have had imposition or execution of sentence suspended and have been given an opportunity to avoid serving their time in prison by completing a period of conditional release in the community in lieu of the prison terms prescribed by law for their underlying convictions." (*Ibid*., italics in original.)

Parole, according to the Court, is mandatory from the offender's point of view and separate from the offender's prison term. Probation, on the other hand, is voluntary and operates as a substitute for a prison term. As a result, such offenders are not similarly situated, a required finding to proceed with an equal protection argument.

III. PROPOSED LEGISLATIVE AMENDMENTS TO PROP 36

As outlined above, since Prop 36 passed in 2000 with support from 61% of the statewide electorate, by and large the courts have strictly construed the measure to limit its applicability to a rather narrow class of drug offenders. As a result, many individuals convicted of NDPOs continue to face incarceration instead of the treatment programs available to offenders who are deemed eligible for Prop 36 probation. Despite its rather circumscribed reach, opposition in the legislature to Prop 36's prohibition on the imposition of jail time for NDPOs appears to be gaining steam. Interests groups on both sides of the debate have lined up in support and in opposition of the proposed legislative amendments to Prop 36.

1. Senate Bill 803

Senate Bill 803 ("SB 803"), sponsored by Senator Denise Moreno Ducheny, was introduced on February 22, 2005. Currently, the bill is awaiting a hearing date before the Public Safety Committee in the Assembly. Because the Substance Abuse and Crime Prevention Act was enacted by virtue of a voter adopted ballot measure - Prop 36 - 2/3 approval of both houses of the legislature is required to amend it. In addition, all amendments to it must further the Act and be consistent with its purposes.

SB 803 proposes several major changes to Prop 36.

<u>SB 803 Will Provide Courts With the Discretion to Impose Jail Time</u>

Most notably, and most controversially, SB 803 proposes to incorporate the use of limited terms of incarceration to effectuate the goals of Prop 36. In its original form, SB 803 sought to provide judges with the discretion to impose jail time as an initial condition of probation. The bill has since been amended. Although it no longer allows for jail time as an initial condition of probation, the current version of the bill (last amended on 8/18/05) does contemplate incarceration in the county jail for up to thirty days as "a tool to enhance treatment compliance" following certain probation violations. (Proposed sec.1210.1(f)(2)-(3).) In addition, under certain circumstances, the new version of the Act would authorize the court to "order that the defendant be confined in a county jail for detoxification purposes only, if the jail offers detoxification services, for a period not to exceed 10 days." (*Ibid*.)

Essentially, these provisions of the legislation are intended to restore to judges the discretion they lost under Prop 36 to incarcerate individuals convicted of nonviolent drug possession offenses without waiting for the offender to commit three separate Prop 36 probation violations. The rationale, according to the bill's supporters, is that many

offenders will not take seriously the required drug treatment programs without the threat of jail time for compliance failures.

More than any other provision in SB 803, empowering courts to impose jail terms for NDPOs may face the most difficulty surviving a challenge based on voter intent. It seems from the text of Prop 36 that voters expressed a clear opposition to such an authorization. And, as noted above, Prop 36 requires all future amendments to remain consistent with its stated purposes.

SB 803 Redefines "Successful Completion of Treatment"

One of the main benefits of Prop 36 probation is that if the defendant successfully completes the required treatment program, the charges against him or her are dismissed. Expungement of the offender's criminal record is a prime motivation to take the mandatory treatment programs seriously.

Under Prop 36 today, success is measured by whether after completing a treatment program there is reasonable cause to believe that the defendant will not abuse controlled substances in the future. If SB 803 were to pass, the new law would deem treatment successful if the defendant has "completed the proscribed course of drug treatment as recommended by the treatment provider and ordered by the court." (Proposed sec. 1210(c).) Furthermore, "[c]ompletion of treatment shall not require cessation of narcotic replacement therapy." (*Ibid*.)

In addition, the current version of Prop 36 permits defendants to seek dismissal of charges upon successful completion of drug treatment and substantial compliance with the general terms of probation. (Sec. 1210.1(d)(1).)

Under the new version, the court has to make a finding that the defendant has substantially complied with the terms of his or her probation, "including refraining from the use of drugs after completion of treatment." (Proposed sec. 1210.1(e)(1).)

SB 803 May Exclude From Eligibility Individuals Who Have Served Three Prior Prison Terms For Non-Drug-Related Felonies

Under the revised statute, the court may exclude from Prop 36 eligibility any "defendant who has previously been convicted of at least three non-drug-related felonies for which the defendant has served three separate prison terms within the meaning of subdivision (b) of Section 667.5 of the Penal Code" if the court finds that "the defendant poses a present danger to the safety of others and would not benefit from a drug treatment program." (Proposed sec. 1210.1(c).)

SB 803 Removes From Eligibility Individuals In Possession of Deadly Weapons While Under the Influence of or in Possession of Certain Drugs

Currently, Prop 36 excludes from eligibility anyone found to be unlawfully under the influence of certain controlled substances "[w]hile using a firearm." (Sec. 1210.1(b)(3)(B).)

The revised version of Prop 36 seeks to exclude from eligibility anyone who "while armed with a deadly weapon unlawfully possesses, or is under the influence of" certain controlled substances. (Proposed sec. 1210.1(b)(4).)

Although the number of words changed in this instance is minimal, this revision substantially alters this subsection. First, it replaces the word "firearm" with the broader phrase "deadly weapon." Second, it targets not the more serious *use* of a weapon, but the possession of one instead. Third, the relevant inquiry would no longer be limited to whether the individual was under the influence of drugs; rather, going forward, mere possession would satisfy this statutory exclusion.

SB 803 Adds Mandatory Drug Testing

SB 803 would require mandatory drug testing for all Prop 36 participants. (Proposed sec. 1210.1(a).)

SB 803 Authorizes DOC to Extend the Length of Mandatory Drug Treatment for Parolees

In its current form, with respect to parolees, Prop 36 provides: "Drug treatment services provided by subdivision (a) as a required condition of parole may not exceed 12 months, provided, however, that additional aftercare services as a condition of parole may be required for up to six months." (Sec. 3063.1(c)(3).)

The revised version of Prop 36 would provide the following: "Drug treatment services provided by subdivision (a) as a required condition of parole may not exceed 12 months, unless the Department of Corrections Parole Division makes a finding supported by the record that the continuation of treatment services beyond 12 months is necessary for drug treatment to be successful. If that finding is made, the Department of Corrections Parole Division may order up to two six-month extensions of treatment services. The provision of treatment services under this act shall not exceed 24 months."

SB 803 Increases Annual Funding For Prop 36

SB 803 would up the annual funding for the administration of Prop 36 from $60,000,000

to $120,000,000. (Proposed H&S sec. 11999.5)

SB 803 Declares Its Provisions to be Severable From One Another

SB 803 declares: "The provisions of this act are severable. If any provision of this act or its application is held invalid because it has not been approved by the voters, that section shall be put before the voters of the State of California in the next available election."

SB 803 Has Drawn the Support and Opposition of Numerous Institutions

According to the legislative analysis prepared by the Assembly's Public Safety Committee, SB 803 has drawn the support of the following institutions:

American Federation of State, County and Municipal Employees
Asian American Drug Abuse Program
California Association of Alcohol and Drug Program Executive, Inc.
California District Attorneys Association
California Judges Association
California Narcotics Officers' Association
California Peace Officers' Association
California Police Chiefs Association
California Public Defenders Association
Chief Probation Officers of California
City of El Monte Police Department
City of Glendale Police Department
City of Manteca Police Department
City of National City Police Department
City of Palm Springs
County Alcohol and Drug Program Administrators Association of California
County of San Benito Probation Department
County of Tulare Probation Department
James Markunas Society
Livermore Police Department
San Bernardino County Sheriffs Department
Solano County Board of Supervisors
120 private citizens

According to the legislative analysis prepared by the Assembly's Public Safety Committee, SB 803 has drawn the opposition of the following institutions:

American Civil Liberties Union

California Attorneys for Criminal Justice
California Medical Association
Drug Policy Alliance Network
Friends Committee on Legislation of California
Progressive Christian Uniting
519 Private Citizens

A comprehensive articulation of the arguments against the original version of SB 803, which has since been amended on a number of occasions, can be found at:

http://www.drugpolicy.org/docUploads/Ducheny_opposition_letter.pdf

2. Senate Bill 556

An alternative set of revisions to Prop 36 are found in Senator Carole Migden's bill, SB 556. Unlike SB 803, which seeks to add incarceration to Prop 36 as a compliance tool, SB 556 focuses more on refining Prop 36's treatment provisions and would continue Prop 36's prohibition against the imposition of jail to gain compliance.

It should be noted that SB 556, to date, has not gained as much momentum in the legislature as SB 803. As of January 10, 2005, SB 556 is listed as inactive.

<u>SB 556 Does Not Automatically Exclude Individuals Who Violate Prop 36 Probation Three Times</u>

Perhaps the most novel aspect of SB 556 is that it replaces the current language making revocation mandatory after a third violation of Prop 36 probation.

Instead, SB 556 includes the following discretionary language: " If a defendant receives probation under subdivision (a), and for the third time or subsequent time violates that probation either by committing a nonviolent drug possession offense, or by violating a drug-related condition of probation, and the state moves for a third time to revoke probation, the court shall conduct a hearing to determine whether probation shall be revoked. If the alleged probation violation is proved, the court may intensify or alter the drug treatment plan, or may find that the defendant is no longer eligible for continued probation under subdivision (a)." (Proposed sec. 1210(e)(3)(C).)

<u>SB 556 Adds Eligibility Protections for Individuals with Mental Health Disorders</u>

SB 556 seeks to add the following statement regarding the eligibility of individuals suffering from mental disorders: "No person shall be denied the opportunity to benefit

from the provisions of this section based solely on evidence of a co-occurring psychiatric disorder." (Proposed sec. 1210.1(a).)

This provision appears to be proposed legislative response to *People v. Johnson, supra,* 114 Cal.App.4th 284, which, as discussed above, held a paranoid schizophrenic individual to be ineligible for Prop 36 probation because of repeated failures to report to their probation officer and court-ordered drug treatment program.

SB 556 Redefines "Successful Completion of Treatment"

Under Prop 36 today, success is measured by whether after completing a treatment program there is reasonable cause to believe that the defendant will not abuse controlled substances in the future. If SB 556 were to pass, the new law would deem treatment successful if the defendant simply has "completed the proscribed course of drug treatment." (Proposed sec. 1210(c).)

Prop 36, as passed by the voters, did not expressly contemplate narcotics replacement treatment.

SB 556 also specifies the conditions under which a defendant undergoing narcotics replacement treatment would be deemed to have successfully completed treatment. Under SB 556: "In order to dismiss the charging document of a defendant undergoing narcotics replacement treatment, the court shall deem that the defendant has successfully completed treatment if he or she has been participating in an appropriate program or has been treated by a physician for at least three months, and the program or physician reports adequate compliance with all elements of the defendant's treatment program. Funding for that defendant's treatment may continue for up to 18 months even if the charging document is dismissed." (Proposed sec. 1210.1(d)(1)(B).)

SB 556 Authorizes Additional Treatment and Aftercare

Under the current law, drug treatment services are capped at 12 months and aftercare capped at 6 months.

Under SB 556, "[d]rug treatment services provided by subdivision (a) as a required condition of probation may not exceed 12 months, unless the court finds that the continuation of treatment services beyond 12 months is necessary for drug treatment to be successful. If a court makes that finding, the court may order up to two extensions of probation and the continuation of treatment and aftercare for up to an additional six months. The period of treatment and aftercare shall not exceed 24 months." (Proposed sec. 1210.1(c)(3)) Similar extensions are authorized for parolees as well. (Proposed sec.

3063.1(c)(3).)

SB 556 Seeks Greater Financial Accountability

SB 556 would prohibit a county from spending more than 25% of its allocation on costs associated with criminal justice activities, unless the county can demonstrate how such an expenditure would further the purposes of the Act and improve treatment outcomes. (Proposed H&S sec. 11999.6(b)(1).)

SB 556 Has Drawn the Support and Opposition of Numerous Institutions

According to the legislative analysis prepared by the Senate Health Committee, SB 556 has drawn the support of the following institutions:

California Nurses Association
California Public Defenders Association
Drug Policy Alliance Network
Protection and Advocacy, Inc.

According to the legislative analysis prepared by the Senate Health Committee, SB 556 has drawn the opposition of the following institutions:

California Narcotic Officers
California Peace Officers Association
California Probation, Parole and Correctional Association
California State Association of Counties
California State Sheriffs' Association
Chief Probation Officers of California

IV. DRUG COURTS

When first introduced, SB 803 included the following legislative finding:

> Drug dependent criminal offenders who receive drug treatment are far more likely to complete the drug treatment program if they are monitored and supervised by courts that use the drug court model through dedicated calendars and include a regimen of graduated sanctions and rewards, close collaboration between the court, treatment providers and probation, drug testing commensurate with treatment needs, and appropriate court monitoring and supervision of progress through frequent review hearings.

Although this language has since been removed from the bill, its underlying sentiment in favor of the drug court model is representative of that model's growing support, particularly among legislators, judges, and prosecutors. Notwithstanding the voter support for rehabilitation over incarceration - embodied by the passage of Prop 36 - many observers of and participants in the criminal justice system continue to favor arming the courts with the threat of incarceration as a tool for forcing compliance with drug treatment programs aimed at overcoming addiction and related criminal behavior.

What is Drug Court?[3]

Drug courts preside over cases involving substance abuse: ranging from drug crimes to non-drug crimes that are considered to be a product of the offender's drug use. Because drug courts are generally run at the county level, the types of cases and remedies that characterize drug courts around the nation vary greatly. In general, though, drug courts tend to combine court supervision, drug testing, treatment services, sanctions (including incarceration), and incentives.

Some drug courts operate in a collaborative fashion, bringing together judges, prosecutors, defense counsel, substance abuse treatment specialists, probation officers, law enforcement and correctional personnel, educational and vocational experts, community leaders and others to deal with the offender and his or her substance abuse problem.

Drug Courts in California

Alameda County opened the first drug court in California in 1991. Today, there are over 200 drug courts in the state. The California Department of Alcohol and Drug Programs, a government agency that provides funding and assistance to drug courts throughout the state, espouses the following mission state:

- Reduce drug usage and recidivism;
- Provide court supervised treatment;
- Offer the capability to integrate drug treatment with other rehabilitation services to promote long-term recovery and reduce social costs; and
- Access federal and State support for local drug courts.

[3]Information for this section was culled from "Defining Drug Courts: The Key Components," a publication of the U.S. Department of Justice, which is available on the National Association of Drug Court Professionals' website (www.nadcp.org/whatis/).

The majority of drug courts in California are for adult offenders, but various counties around the state also run drug courts that specialize in juvenile and dependency cases.

There are four major models[4] for the state's drug courts:

(1) Per-plea models afford drug possession offenders a stay of prosecution if they participate in court-supervised treatment. Upon successful completion of the drug court program, the participant is discharged without a criminal record. However, failure to complete the program leads to the filing of charges and adjudication, thereby subjecting the participant to incarceration after only on program violation.

(2) Post-plea models require a defendant to enter a guilty plea before entering treatment. Treatment is from nine months to three years. Like the pre-plea model, upon successful completion of the drug court program, the participant is discharged without a criminal record. However, also like the pre-plea model, failure to complete the program leads to the filing of charges and adjudication, thereby subjecting the participant to incarceration after only on program violation.

(3) Post-adjudication models allow repeat drug offenders to enter treatment after their conviction but prior to serving their sentence. Successful completion of the drug court program allows these offenders to serve their sentence in treatment instead of custody. Unlike the previous two models, however, successful completion of treatment does not lead to a dismissal of the underlying charges. And, failure to complete the program leads directly to the activation of their sentence.

(4) Civil models allow individuals in civil actions (usually child custody) to enter treatment as a condition of retaining or regaining custody of their child(ren). Failure to complete the program leads to a permanent loss of custody.

V. CONCLUSION

When enacted, the provisions of Prop 36 represented a novel way of coping with substance abuse and associated criminal activities: rehabilitation outside the confines of a jail or prison. Not only did the resulting legislation forbid courts from incarcerating eligible offenders, but it also mandated staying this course in the face of various program violations.

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[4]The summaries of the four models are drawn from the California Department of Alcohol and Drug Programs' July 2005 "Fact Sheet: Drug Court Programs."

Drug courts also present a unique approach to handling substance abuse related offenses and offenders. Drug courts offer treatment programs as an alternative to traditional criminal sentences, backed up by a threat of incarceration should the participant fail to comply with the terms imposed by the court. The drug court model has become increasingly popular, both nationwide and throughout California.

As a result, there is a movement afoot in the California Legislature to infuse Prop 36 with elements of the drug court model, most notably the prospect of incarceration for program-related failures.

The passage of Prop 36, however, sent a clear message: in the context of nonviolent drug possession offenses, the people of the state of California prefer to address this constituency outside of jails and prisons.

Given the limiting construction the California courts have already placed on the scope of Prop 36, both in terms of initial eligibility and continued compliance, it is critical that any future legislation amending Prop 36 be crafted in a manner that keeps its terms consistent with the intent of the voters.

VI. SUGGESTED ADDITIONAL READING

For the annual report on Prop 36 prepared by UCLA:
http://www.uclaisap.org/Prop36/documents/sacpa080405.pdf

For a comprehensive report on drug courts in California prepared by the Drug Court Partnership:
http://www.adp.cahwnet.gov/DrugCourts/pdf/DCP_FinalReport_March2002.pdf

For a basic statistical comparison of drug courts and Prop 36 prepared by the Drug Policy Alliance:
http://www.prop36.org/pdf/summary_comparison.pdf