

# **AN ANALYSIS OF PROPOSITION 36**

## **SUBSTANCE ABUSE AND CRIME PREVENTION ACT OF 2000**



### **The California Public Defenders Association's Proposition 36 Committee:**

**Michael Judge, CPDA President 2001 - 2002, Los Angeles County Public Defender**

**Gary Windom, CPDA President 2000 - 2001, Riverside County Public Defender**

**Barry Melton, Committee Co-Chair, Yolo County Public Defender**

**Lisa DewBerry, Deputy Public Defender, San Francisco County**

**James Egar, Santa Barbara County Public Defender**

**Margo George, Alameda County Assistant Public Defender**

**Jeff Thoma, Mendocino County Public Defender**

**Al Menaster, Committee Consultant, Deputy Public Defender, Los Angeles County**

**Garrick Byers, Committee Consultant, Senior Attorney, Fresno County Public Defender's Office**

**Stephanie Freidenreich, Committee Consultant, Deputy Public Defender, Los Angeles County**

**Michael E. Cantrall, Committee Assistant, CPDA Executive Director**

April 30, 2001

**THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION  
OFFICERS**

*President*

**Michael P. Judge**  
*Los Angeles County*

*1st Vice President*

**Joe Spaeth**  
*Marin County*

*2nd Vice President*

**Jeff Thoma**  
*Mendocino County*

*Secretary/Treasurer*

**Louis Haffner**  
*Sonoma County*

*Assist. Sec/Treasurer*

**Paulino Duran**  
*Sacramento County*

**Board of Directors**

**Kimiko Burton,**  
*San Francisco County*

**Donald Landis,**  
*Orange County*

**Kathleen Cannon,**  
*San Diego County*

**Gary Mandinach,**  
*Los Angeles County*

**James L. Crowder,**  
*Santa Barbara County*

**Michael McMahon,**  
*Ventura County*

**Lisa DewBerry,**  
*San Francisco County*

**Leslie McMillan,**  
*Los Angeles County*

**James Egar,**  
*Santa Barbara County*

**James McWilliams,**  
*Alameda County*

**Jean Farley,**  
*Ventura County*

**Barry Melton,**  
*Yolo County*

**Margo George,**  
*Alameda County*

**Barton Sheela,**  
*San Diego County*

**Thomas Havlena,**  
*Orange County*

# Analysis of Proposition 36

by

**The California Public Defenders Association**

April 30, 2001

## Table of Contents

<b>I. The California Public Defenders Association .....</b>	<b>6</b>
<b>II. What is a Proposition 36 Sentence? .....</b>	<b>7</b>
<b>A. The Basic Proposition 36 Sentence. ....</b>	<b>7</b>
<b>B. How a Person is Placed in a Proposition 36 Drug Treatment         Program.....</b>	<b>9</b>
<b>C. Proposition 36 “Drug Treatment Programs” are Defined by         Statute and Regulations. ....</b>	<b>11</b>
<b>D. Regulations Also Define Three Statutorily Permissible Terms of         Probation, “Vocational Training,” “Family Counseling,” and         “Literacy Training.” .....</b>	<b>13</b>
<b>E. The Probation Department’s Role in Proposition 36 Cases.....</b>	<b>14</b>
<b>F. Court Monitoring of Proposition 36 Cases. ....</b>	<b>15</b>
<b>G. Drug Testing as a Condition of Proposition 36 Probation. ....</b>	<b>16</b>

<b>III. Who is Eligible For a Proposition 36 Sentence? .....</b>	<b>17</b>
<b>A. Nonviolent Drug Possession Offenses (NDPOs). .....</b>	<b>18</b>
<b>B. Drug Offenses, and Drug-Related Offenses That Are Not NDPOs....</b>	<b>20</b>
<b>C. People Guilty of NDPOs Who Are Ineligible for         Proposition 36 Probation.....</b>	<b>20</b>
<b>1. Prior “Strikers” Who Do Not Meet the Saving Criteria.....</b>	<b>21</b>
<b>2. Non-NDPO convictions in the same case. ....</b>	<b>21</b>
<b>3. Gun “use” during certain NDPOs. ....</b>	<b>22</b>
<b>4. Refusal of Probation.....</b>	<b>24</b>
<b>5. Certain People Who Have Previously Received             Two Proposition 36 Sentences.....</b>	<b>24</b>
<b>D. The Court Has Discretion Under Penal Code Section 1385 to         Dismiss a Portion of the Action That Would Otherwise Prohibit         a Proposition 36 Sentence. ....</b>	<b>28</b>
<b>IV. The Triggering Event For A Proposition 36 Sentence Is a     Conviction That Occurs After July 1, 2001.....</b>	<b>30</b>
<b>A. Proposition 36, Codified Section 5, and Uncodified Section 8.....</b>	<b>30</b>
<b>B. The First Rule of Statutory Construction.....</b>	<b>31</b>
<b>C. Proposition 36 Speaks of “Committing” Crimes in Other Sections.         This Shows that Proposition 36 Did Not Use the Word “Conviction”         Intending It to Mean “Commission.”.....</b>	<b>32</b>
<b>D. The “Findings and Declarations,” the “Purpose, and Intent,”         and Proposition 36’s Structure, Show That the Delay         From November To July Was Not To Preserve A Greater         Punishment For “Early” Offenders, But Was Only To Implement         the Treatment Provisions.....</b>	<b>34</b>

E.	<b>The “Legislative History” of Proposition 36 Shows that Proposition 36 Sentencing is Triggered Not By the Commission Date, But By the Conviction Date.</b>	<b>37</b>
F.	<b>There are no meritorious countervailing considerations to the plain reading, that Proposition 36 means what it says by the word “convicted.”</b>	<b>38</b>
G.	<b>The Conviction Occurs At the Time of the Order Granting Probation.</b>	<b>39</b>
V.	<b>Violations of Proposition 36 Probation.</b>	<b>42</b>
A.	<b>The Consequences if Proposition 36 Probation is Revoked.</b>	<b>42</b>
B.	<b>Program Violations.</b>	<b>42</b>
C.	<b>Non–drug Related Probation Violations.</b>	<b>44</b>
D.	<b>Drug Related Probation Violations.</b>	<b>45</b>
E.	<b>On a First or Second Drug Related Violation, if the Defendant is Not Dangerous, and is Amenable to Further Treatment, the Court Must Permit Treatment to Continue.</b>	<b>46</b>
VI.	<b>Incarceration and Proposition 36.</b>	<b>48</b>
A.	<b>Incarceration Cannot Be an Additional Term of Proposition 36 Probation.</b>	<b>48</b>
B.	<b>Drug Treatment Programs Offered in a Prison or Jail Do Not Qualify As Proposition 36 Drug Treatment Programs.</b>	<b>48</b>
C.	<b>Qualified Parole Violators Cannot Have Parole Suspended or Revoked, and Must Receive Drug Treatment, Which Does Not Include Jail or Prison Programs.</b>	<b>49</b>

D.	The “Findings and Declarations,” and the “Purpose and Intent” of Proposition 36 Concerning Incarceration. ....	49
E.	Persons Apparently Eligible for Proposition 36 Probation, Before Guilty Plea or Trial. ....	50
F.	After a Jury Verdict or Plea of Guilty, Can an Apparently Eligible Person , Be Held in Custody Pending Placement on Proposition 36 Probation? .....	52
G.	When a Person is Suspected of Violating Proposition 36 Probation, Can, and if so, Should, the Person Be Brought to Court by Arrest, or Should This be Accomplished by Other, Noncustodial, Means.....	53
H.	Can, and if so, Should, a Suspected Violator of Proposition 36 Probation be Held in Custody Pending a Hearing? .....	53
I.	When a Violation is Found, But Probation is Not Revoked, or is Revoked and Reinstated, “A Court May Not Impose Incarceration as an Additional Condition of Probation”? .....	54
VII.	Dismissal After Successful Completion of Proposition 36 Drug Treatment.....	56
A.	Petition for Dismissal, and Finding of Completion.....	56
B.	The Relief That is Granted By a Dismissal. ....	57
C.	Exceptions to the Relief Provided by a Proposition 36 Dismissal. ....	60
VIII.	Special Provisions for People on Probation for NDPOs on July 1, 2001.....	62

**IX. Special Provisions For Parolees .....63**

**A. General Provisions. ....63**

**B. Provisions Applicable to People Already on Parole on July 1, 2001...66**

**C. Consequences if Parole is Revoked Under These Special Provisions. 66**

**X. Deferred Entry of Judgment Under Penal Code Section 1000.....67**

**A. D.E.J. Offenses That May Not Be NDPOs. ....68**

**B. NDPO Convicts Who Are Not Eligible For Proposition 36  
    Probation. ....68**

**C. People Who Are Eligible and Suitable For Both Proposition 36 and  
    P.C. 1000, Should, On Request, Be Placed In the Deferred  
    Entry of Judgment, or Pre-Plea Diversion, Program. ....69**

**XI. Requests to Set or Continue a Case Until After July 1. ....71**

**XII. Jury Trial on Request, and Proof Beyond a Reasonable Doubt,  
Are Both Required on Allegations of “Transportation for Other  
Than Personal Use,” ,” and For “Gun Use.”.....73**

**XIII. Substance Abuse Treatment Funding, and Implementation.....79**

## **I. The California Public Defenders Association**

The California Public Defenders Association (CPDA) is a membership organization consisting of over 3,000 public defenders and private defense counsel. It was established in 1969. CPDA members act as legal counsel for nearly 95 percent of the attorney–represented indigents accused of criminal conduct in California. CPDA is the state–designated continuing legal education provider for all local public defender offices in the state of California. CPDA also represents the interests of its members in legislative affairs, and on significant issues at the appellate court levels. CPDA members will be the defense attorneys for the majority of all Proposition 36 defendants.

CPDA was one of Proposition 36’s many proud endorsers at the General Election, November 7, 2000. Proposition 36 was enacted into law at that election by more than 61% of the voters. Now, to help ensure that Proposition 36 is implemented as fully and effectively as possible, CPDA offers this Analysis of Proposition 36.

## II. What is a Proposition 36 Sentence?<sup>1</sup>

### A. The Basic Proposition 36 Sentence.

The basic Proposition 36 sentence consists of probation and drug treatment. In addition, “A court may not impose incarceration as an additional condition of probation.”<sup>2</sup>

The basic sentencing provision of Proposition 36 is found at Penal Code section 1210.1, subdivision (a). For ease of reading, paragraphing has been added to this provision’s text, below:

“[A person receiving a Proposition 36 sentence] shall receive probation.”<sup>3</sup>

---

<sup>1</sup> The full text of Proposition 36, including its uncodified sections, is in the Ballot Pamphlet for the November 7, 2000, General Election. That Pamphlet is available in most County Law Libraries. It is also found at the Secretary of State’s web site, <http://vote2000.ss.ca.gov/VoterGuide/> .

The formal title of Proposition 36 is the Substance Abuse and Crime Prevention Act of 2000. It is often abbreviated as SACPA. In this Analysis, however, the name Proposition 36 is used throughout.

Proposition 36 added to the Penal Code sections 1210, 1210.1, and 3063.1. It also added to the Health and Safety Code sections 11999.4 to 11999.13. In addition, Proposition 36 also contains six uncodified sections. These are all discussed in this Analysis.

<sup>2</sup> Penal Code section 1210.1, subdivision (a).

<sup>3</sup> It is not stated whether this probation must be granted by suspending the imposition of judgment, or by imposing judgment and suspending its execution, or either way in the court’s discretion.

“As a condition of probation the court shall require participation in and completion of an appropriate drug treatment program.

“The court may also impose, as a condition of probation, participation in vocational training, family counseling, literacy training and/or community service.

“A court may not impose incarceration as an additional condition of probation.

“Aside from the limitations imposed in this subdivision, the trial court is not otherwise limited in the type of probation conditions it may impose.

“In addition to any fine assessed under other provisions of law, the trial judge may require any person convicted of a nonviolent drug possession offense who is reasonably able to do so to contribute to the cost of his or her own placement in a drug treatment program.”

The Proposition 36 treatment program cannot exceed twelve months, but aftercare as a condition of probation can be required for up to six months.<sup>4</sup>

Proposition 36 does not explicitly state whether, at the end of the treatment and any aftercare, the court can continue probation up to the length permitted under general law.<sup>5</sup> However the defendant can apply for dismissal of the case “at any time after completion of drug treatment.”<sup>6</sup>

---

<sup>4</sup> Penal Code section 1210.1, subdivision (c)(3).

<sup>5</sup> See Penal Code section 1203.1, subdivision (a) (felony probation can be up to the length of the underlying sentence, or five years, whichever is longer); Penal Code section 1203a (misdemeanor probation where the underlying sentence is less than three years, cannot exceed three years.) See generally Witkin & Epstein, California Criminal Law (3d ed. 2000), Ch. IX, Punishment, §§ 542 to 543 (period of felony and misdemeanor probation).

<sup>6</sup> Penal Code section 1210.1, subdivision (d)(1). See Part VII, below.

The defense attorney must be particularly careful in advising a Proposition 36 defendant who is not a United States citizen. The California Supreme Court recently held that providing misadvice to noncitizens on immigration and naturalization matters may be ineffective assistance of counsel.<sup>7</sup>

## **B. How a Person is Placed in a Proposition 36 Drug Treatment Program.**

Proposition 36 contains a schedule and timetable for placing the defendant in a Proposition 36 program.<sup>8</sup>

Within seven days of an order imposing [Proposition 36 probation], the probation department shall notify the drug treatment provider designated to provide drug treatment .... Within 30 days of receiving that notice, the treatment provider shall prepare a treatment plan and forward it to the probation department....

Proposition 36 does not state who designates the program. It is possible, under the statute, for the probation department to designate a provider, and to do so earlier than seven days after the order granting probation. This designation could be in the form of a recommendation to the court. Thus, the statute would permit the probation department to make that designation, or recommendation, before the court formally grants probation. For example, this could be part of the probation department's normal felony presentence report.

Proposition 36 also does not prohibit the designated treatment provider from preparing a treatment plan and forwarding it to the probation sooner than the 30 days permitted. Again, this could be done as part of the normal felony presentence report.

---

<sup>7</sup> *In re Resendiz* (Apr. 2, 2001, S078879) 25 Cal.4th 230, [105 Cal.Rptr. 431, 19 P.2d 1171]. *Caution:* The petitioner *filed* a petition for rehearing on April 16, 2001. Accordingly, this case is not yet final on appeal, as this Analysis goes to press.

<sup>8</sup> Penal Code section 1210.1, subdivision (c), first unnumbered paragraph.

Likewise, Proposition 36 does not change the existing procedure in felony cases, that after the plea or verdict, the court must refer the defendant to the probation department, and the sentencing hearing must occur within 20 court (28 calendar) days.<sup>9</sup> In most cases, the court will know, immediately upon the plea or verdict, if the defendant is eligible for a Proposition 36 sentence.<sup>10</sup>

The initial referral to the probation department should, therefore, generally, require the probation officer to designate, or recommend, a program, and to notify that program within seven days of the referral. That program, should, in turn, whenever possible, prepare a treatment plan and, forward it to the probation department in time for the normal sentencing date. At sentencing, the court will commonly accept the probation officer's recommendation. This procedure permits drug treatment to begin as soon as possible.

This expedited schedule will not work in all cases. As discussed in Part III, below, there will be some cases where Proposition 36 eligibility is not known when the plea or verdict occurs. There will also be some cases where the program tentatively selected will, after evaluation, turn out to be unsuitable. In these cases, Proposition 36 permits the treatment provider to be designated, and the provide to formulate the treatment plan, after the order granting probation.<sup>11</sup>

---

<sup>9</sup> The normal procedure is required by Penal Code section 1191, and section 1203, subdivision (b)(1).

<sup>10</sup> See Part III, below, "Who is Eligible for a Proposition 36 Sentence."

<sup>11</sup> Penal Code section 1210.1, subdivision (c).

**C. Proposition 36 “Drug Treatment Programs” are Defined by Statute and Regulations.**

This term is defined at Penal Code section 1210, subdivision (b). Paragraphing and bullets are added, for easier reading.

The term “drug treatment program” or “drug treatment” means a licensed and/or certified community drug treatment program, which may include one or more of the following:

- outpatient treatment,
- half-way house treatment,
- narcotic replacement therapy,
- drug education or prevention courses and/or
- limited inpatient or residential drug treatment as needed to address special detoxification or relapse situations or severe dependence.
- The term “drug treatment program” or “drug treatment” does not include drug treatment programs offered in a prison or jail facility.

The phrase “half–way house treatment” appears to permit what are commonly known as “sober living” and “clean living” houses, if they are part of, or perhaps closely affiliated with, a licensed or certified treatment provider.

The separate phrases, “half–way house treatment,” and “limited inpatient or residential drug treatment,” imply that a term of probation may be such that it would violate probation for the person to leave the treatment facility during the “limited inpatient or residential” period.

If such a term is permitted, Proposition 36 does not designate a maximum permissible time for such limited residential and inpatient treatment. The word “limited,” implies, however, that short stays should be the rule. Perhaps the greatest flexibility in length should be in cases of severe dependence. In any case, the

terms of the limited inpatient or residential treatment must not be so onerous, or so long in duration, as to amount to prohibited incarceration.

The California Department of Alcohol and Drug Programs (ADP), has promulgated emergency regulations to implement Proposition 36. The regulations are found at Cal. Code Regs. tit. 9 §§ 9500 to 9545. Regulations section 9505, subdivision (a)(5), requires that Proposition 36 Drug Treatment Programs must be licensed or certified by ADP.

The regulations do not prohibit coordination with programs, that provide “P.C. 1000 deferred entry of judgement services.” Certification of these programs is governed by Penal Code section 1211. That section specifies minimum program requirements, contents, and standards, minimum initial–assessment criteria, cost standards including indigent fee–waivers, and other matters. It seems likely that many programs providing P.C. 1000 D.E.J. services will seek to provide Proposition 36 drug treatment also.

**D. Regulations Also Define Three Statutorily Permissible Terms of Probation, “Vocational Training,” “Family Counseling,” and “Literacy Training.”**

These three terms of probation are expressly permitted by Penal Code section 1210.1, subdivision (a), which was quoted in Subpart A, above.

The ADP regulations discussed in Subpart C, above, define these three concepts.

“Family counseling” means counseling with individuals, couples, or groups which examines interpersonal and family relationships. Such counseling shall be provided by [licensed Marriage, Family, and Child Counselors.]<sup>[12]</sup>

“Literacy training” means instruction and information presented in an individual or group setting to increase literacy skills and reading comprehension.<sup>[13]</sup>

“Vocational training” means instruction and information presented in a group setting to increase opportunities for gainful employment.<sup>[14]</sup>

---

<sup>12</sup> Cal. Code Regs., tit. 9, § 9505, subdivision (a)(8).

<sup>13</sup> Cal. Code Regs., tit. 9, § 9505, subdivision (a)(10).

<sup>14</sup> Cal. Code Regs., tit. 9, § 9505, subdivision (a)(13).

## **E. The Probation Department's Role in Proposition 36 Cases.**

The drug treatment provider must provide to the probation department, for each Proposition 36 probationer, a quarterly progress report.<sup>15</sup> Although Proposition 36 does not prohibit reports more frequently, the specification to report quarterly does imply that the probation department is not required to micromanage, or play a major role in, drug treatment. The major treatment role is for the designated drug treatment provider. Only a lesser treatment role is apparently contemplated for the probation department.

This lesser role for probation departments, and major role for drug treatment providers, also follows from the funding structure for Proposition 36. As will be seen in Part XIII, below, state Proposition 36 funds are reserved primarily for "drug treatment programs," and for vocational, family, and literacy counseling. Probation costs are only an "additional" item for which these monies can be used.

---

<sup>15</sup> Penal Code section 1210.1, subdivision (c), unnumbered first paragraph, last sentence.

## F. Court Monitoring of Proposition 36 Cases.

“[C]ourt monitoring costs” are an expressly permitted use of monies in the state Substance Abuse Treatment Trust Fund (SATF). Likewise, ADP’s emergency regulations provide that monies can be used by “... courts ....”<sup>16</sup>

As with the probation department, however, as discussed in subpart II E, immediately above, the court is not given a major role in Proposition 36 drug treatment. Although the drug treatment provider must make quarterly reports to the probation department, no reports are required to be sent to the court.<sup>17</sup> Likewise, court-monitoring costs are not designated as a major use of state Proposition 36 funds, but only as a permitted “additional” cost.<sup>18</sup>

The term “court monitoring” seems to connote something different from, and additional to, pre-sentencing proceedings, sentencing hearings, and hearings on alleged program or probation violations.

It is important also to note the difference between “monitoring” and “supervising.” A “monitor” is one that “admonishes, cautions, or reminds, especially with respect to ... conduct.”<sup>19</sup> To “supervise” is to “have the charge and direction of.”<sup>20</sup> Accordingly, Proposition 36 seems to permit limited “drug court” proceedings, but not for the purpose of taking charge of, or directing treatment, only to admonish, caution, or remind.

---

<sup>16</sup> Cal. Code Regs., tit. 9, § 9530, subdivision (c)(2).

<sup>17</sup> Penal Code section 1210.1, subdivision (c), unnumbered first paragraph, last sentence.

<sup>18</sup> Health and Safety Code section 11999.6. See Part X, below.

<sup>19</sup> The American Heritage Dictionary (4th ed. 2000), p. 1136.

<sup>20</sup> The American Heritage Dictionary (4th ed. 2000), p. 1738.

## **G. Drug Testing as a Condition of Proposition 36 Probation.**

Proposition 36 prohibits the use of its Substance Abuse Treatment Funds (SATF) funds for “drug testing services of any kind.”<sup>21</sup> This helps ensure that Proposition 36 probation consists of real treatment, not just passive monitoring.

Proposition 36 does not, however, contain any other explicit prohibition on drug testing. Nor does it prohibit the use of non-Proposition 36 monies to pay for testing.

Proposition 36 does provide that the court can require any Proposition 36 probationer “who is reasonably able to do so to contribute to the cost of ... placement in a drug treatment program.” “Placement” probably includes also the treatment itself. If drug testing is part of that treatment, then this can apparently be paid for as part of the probationer’s overall contribution.

There is no explicit authority in Proposition 36 permitting the court to order a Proposition 36 probationer to pay for drug testing that is not a part of treatment, such as for punitive, or for pure monitoring, purposes.

---

<sup>21</sup> Health and Safety Code section 11999.6, second sentence, last phrase.

### III. Who is Eligible For a Proposition 36 Sentence?

If a defendant meets the statutory criteria for Proposition 36, and does not refuse Proposition 36 probation,<sup>22</sup> the defendant “shall” receive Proposition 36 probation.<sup>23</sup> This contrasts sharply with the PC 1000 Deferred Entry of Judgement program. In D.E.J., if a person meets the eligibility criteria, the court then holds a hearing at which the court decides if “the defendant [is] a person who would be benefited by [D.E.J.]” The court denies D.E.J. if it finds the person “would [not] be benefited.”<sup>24</sup> In Proposition 36, by contrast, there is no hearing to determine if the person would “benefit.” Statutorily eligible people “shall” receive Proposition 36 probation.

Because Proposition 36, like D.E.J., is “a creature of statute,”<sup>25</sup> the “court may not impose [eligibility] conditions beyond those specified in the statute, absent a “compelling necessity.”<sup>26</sup> Therefore, even if someone might think that a particular defendant is unsuitable for Proposition 36 probation, if the defendant is statutorily eligible, then absent a “compelling necessity,” Proposition 36 probation must be granted.<sup>27</sup>

---

<sup>22</sup> Refusal by the defendant is authorized by Penal Code section 1210.1, subdivision (b)(4). See Subpart III B 4, below.

<sup>23</sup> Penal Code section 1210.1, subdivision(a).

<sup>24</sup> Penal Code section 1000.2.

<sup>25</sup> *Terry v. Superior Court* (1999) 73 Cal.App.4th 661, 665 [86 Cal.Rptr.2d 653] (The D.E.J. program does not authorize the court to impose additional conditions, such as agreement to search, that are not authorized by Penal Code section 1000 et seq.)

<sup>26</sup> *People v. Cisneros* (2000) 84 Cal.App.4th 352, 357 [100 Cal.Rptr.2d 784] (the court cannot categorically exclude “illegal aliens,” from D.E.J. because the statutory criteria do not mention that factor.)

<sup>27</sup> *Compare People v. Cisneros, supra*, 84 Cal.App.4th at 359 (court could hold hearing “to exercise its discretion [granted by Penal Code section 1000.2] in determining if deferral is appropriate in the case of an “illegal alien.”)

## A. Nonviolent Drug Possession Offenses (NDPOs).

The basic rule is that people “convicted”<sup>28</sup> of NDPOs are eligible for Proposition 36 sentencing. An NDPO, defined in Penal Code section 1210, subdivision (a), is the

- possession,
- use,
- transportation for personal use of almost any controlled substance, or
- being under the influence of any substances listed in Health and Safety Code section 11550.

The list of covered controlled substances, where possession, use, or personal– use transportation are concerned, covers almost every abusable substance except alcohol, toluene and nitrous oxide.<sup>29</sup> The list consists of anything in any of the five schedules in the Uniform Controlled Substances Act. Those five schedules are found in Health and Safety Code sections 11054, 11055, 11056, 11057, and 11058, each section covering one schedule.

This list of substances where being under the influence is concerned, is a somewhat more limited list, just those drugs listed in Health and Safety Code section 11550. That list, however, does include most of the drugs listed in the above five schedules.

---

<sup>28</sup> Penal Code section 1210.1, subdivision (a).

<sup>29</sup> As relevant here, toluene (found in many glues and paints) and nitrous oxide are regulated by Penal Code section 381. They are not listed in the five Health and Safety Code schedules discussed above, nor listed in Health and Safety Code section 11550. See generally, Witkin & Epstein, California Criminal Law (2nd Ed.) § 998. Violation of Penal Code section 381 can be, however, a divertable offense. See the discussion of P.C. 1000 Deferred Entry of Judgment in Part X, below.

The operative word for Proposition 36 to apply to an NDPO offense is “convicted.”<sup>30</sup> As shown in Part IV, subpart G, below, regardless of whether the person pled guilty or suffered an adverse jury verdict, a “conviction” for Proposition 36 purposes, does not occur until the time of sentencing.

Also, since it is the “conviction” that counts, the original charges are not relevant to the determination of eligibility. For example, if a person is charged with possession of both burglary tools and drugs, but convicted only of possessing the drugs, the person stands convicted only of an NDPO.<sup>31</sup>

Proposition 36 does not explicitly mention attempts, soliciting, conspiracy, or aiding and abetting an NDPO.

Surely, an attempt to commit an NDPO comes within Proposition 36. In *People v. Barrajas*,<sup>32</sup> the court of appeal held that an attempt to commit an offense listed in P.C. 1000 does come within P.C. 1000, even though “attempt” is not specifically listed.<sup>33</sup> The court said that a statute “should not be given its literal meaning if that would result in absurd consequences the Legislature did not intend.” Instead, the court said, a statute should be construed with a view toward promoting rather than defeating its general purpose and the policy behind it.<sup>[34]</sup>

Accordingly, the court concluded,

There is no apparent reason ... to treat persons who attempted a divertible offense differently from those who completed it.<sup>[35]</sup>

That same reasoning should apply to attempted NDPOs under Proposition 36.

---

<sup>30</sup> Penal Code section 1210.1, subdivision (a) [added by Section 5 of Proposition 36, provides, in relevant part as follows.

Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a nonviolent drug possession offense shall receive probation. As a condition of probation the court shall require participation in and completion of an appropriate drug treatment program. (Underline added.)

<sup>31</sup> In the case of conviction possession of burglary tools, in addition to drug possession, See Part I C 2, below, “Non-NDPO convictions in the same case.

<sup>32</sup> *People v. Barrajas* (1998) 62 Cal.App.4th 926 [73 Cal.Rptr. 123].

<sup>33</sup> *People v. Barrajas, supra*, 62 Cal.App.4th 926 [73 Cal.Rptr. 123].

<sup>34</sup> *People v. Barrajas, supra*, 62 Cal.App.4th at 929.

<sup>35</sup> *People v. Barrajas, supra*, 62 Cal.App.4th at 930.

This same reasoning may also apply to soliciting, conspiracy, and aiding and abetting an NDPO. In general, whether considering any drug charge, the question should be whether the offense of conviction is more like an NDPO, or more like an offense that is expressly excluded from being an NDPO.

**B. Drug Offenses, and Drug-Related Offenses That Are Not NDPOs.**

Proposition 36 explicitly states that the following drug offenses are not NDPOs.

- possession for sale,
- production, or
- manufacturing of any controlled substance.<sup>36</sup>

Many drug offenses are neither expressly listed as NDPOs, nor clearly excluded from the NDPO definition. One such offense, attempted possession, was discussed in Subpart B, above, as surely coming within the definition of an NDPO.

As noted in Subpart A, above, the key question should be whether the offense of conviction is closer to the listed NDPO offenses, or the listed non-NDPO offenses. For example, mere “dr[ying]” of marijuana<sup>37</sup> seem very similar to simple nonviolent possession, and so should be considered as NDPOs. Likewise, cultivation of marijuana for personal use<sup>38</sup> seems very similar to simple possession and use.

**C. People Guilty of NDPO’s Who Are Ineligible for Proposition 36 Probation.**

There are five categories of people who are ineligible for Proposition 36 probation, even though they were adjudicated guilty solely of NDPO charges.

---

<sup>36</sup> Penal Code section 1210, subdivision (a).

<sup>37</sup> Health and Safety Code section 11358.

<sup>38</sup> Health and Safety Code section 11358.

1. *Prior “Strikers” Who Do Not Meet the Saving Criteria.*<sup>39</sup>

Unless they meet certain saving criteria, people with prior “strikes”<sup>40</sup> are not eligible for Proposition 36 sentences. The saving criteria, that will make a prior striker eligible, are the following.

[T]he [NDPO must have] occurred 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 [i] physical injury or [ii] the threat of physical injury to another person.

The definition of “free of ... prison custody” probably should be the one found in Penal Code section 667.5, subdivision (d), even though that definition states that it is “[f]or the purposes of this section [667.5]....” The definition is that the person is deemed to remain in custody “...until the official discharge from custody or until release on parole, whichever first occurs....” The five years must be a continuous period.<sup>41</sup>

2. *Non-NDPO convictions in the same case.*<sup>42</sup>

Proposition 36 sentencing is not allowed if the defendant was

---

<sup>39</sup> Penal Code section 1210.1, subdivision (b)(1).

<sup>40</sup> Three Strikes law is found at Penal Code section 667, subdivisions (b) to (i), and section 1170.12. Strikes, that is, violent or serious felonies are defined in Penal Code section 667.5, subdivision (c) and 1192.7, subdivision (c).

<sup>41</sup> *People v. Young* (1987) 192 Cal.App.3d 812, 816 [237 Cal.Rptr. 703].

<sup>42</sup> Penal Code section 1210.1, subdivision (b)(2). See also Part I B, above.

“convicted in the same proceeding of a misdemeanor not related to the use of drugs or any felony.”

The phrase “any felony” must, of course, mean any non–NDPO felony.

Proposition 36 carefully defines the term “misdemeanor not related to the use of drugs.”<sup>43</sup> This means (paragraphing has been added, for ease of reading):

[a] misdemeanor that does not involve

(1) the simple possession [of drugs]

or [simple] use of drugs

or [simple possession] of drug paraphernalia,

[or] being present where drugs are used,

or failure to register as a drug offender, or

(2) any activity similar to those listed in paragraph (1).

The determination of whether an “activity” is “similar” to those specifically listed, should be guided by Proposition 36’s purpose and intent. The purpose and intent are discussed in detail in Parts IV and VI, below. Briefly, it is

[T]o divert from incarceration, into ... treatment ... nonviolent defendants ... charged with drug possession or drug use ....<sup>44</sup>

3. *Gun “use” during certain NDPOs.*<sup>45</sup>

Proposition 36 probation is not available to any defendant who was in possession of, or was under the influence of, certain drugs “while using a firearm”

---

<sup>43</sup> New Penal code section 1210, subdivision (d).

<sup>44</sup> Proposition 36, uncodified section 3, subdivision (a).

<sup>45</sup> Penal Code section 1210.1, subdivision (b)(3).

The drugs involved are cocaine base, cocaine, heroin, methamphetamine, or phenylcyclidine (PCP).

It seems likely that these particular drugs, and no others, were chosen because they are the drugs listed in Health and Safety Code section 11550, subdivisions (e) and (f). Those two subdivisions enhance the misdemeanor punishment for being under the influence of those drugs “while in the immediate personal possession of a loaded, operable firearm.”

The gun “use” that makes the person ineligible for Proposition 36 should be more than the “immediate personal possession” of a gun. The drafters of Proposition 36 would have used that same term if that had been what they had meant. By using the word “use,” the drafters obviously meant to proscribe something different, and more than, mere immediate personal gun possession.

As to what constitutes gun “use,” See, generally, Witkin & Epstein, California Criminal Law (3d ed. 2000), Chapter IX, Punishment, §§ 327 – 330. See also Penal Code section 1203.06, subdivision (b)(3) and (b)(4), defining “used a firearm” and “armed with a firearm” for purposes of that section.

The California District Attorneys Association (CDAА), in its paper “Implementing Proposition 36,” contends that an actual “conviction” of gun use is not necessary to come within this exception.<sup>46</sup> CDAА also implies that it may not even be necessary to specifically charge a firearm use enhancement. CDAА does admit, however, that the prosecution “probably” bears the burden of proving the factual basis of gun use. The California Public Defenders Association believes that specific pleading, proof beyond a reasonable doubt, and jury verdicts are required. A more detailed discussion of these topics is found in Part XIII, below, concerning transportation for personal use. However, there are so many existing gun crimes, it would be a rare case in which there would be a factual basis for gun use, without there also being a factual basis for the charge of a crime that would preempt a defendant from Proposition 36 eligibility.

---

<sup>46</sup> California District Attorneys Association, “Implementing Proposition 36,” Part II C, page 12, second paragraph, available at CDAА’s web site, <http://www.cdaa.org/>.

4. *Refusal of Probation.*<sup>47</sup>

Proposition 36 sentencing is not available to any defendant “who refuses drug treatment” as a condition of probation.

The CDAA, in its Proposition 36 paper contends that this refusal does not have to occur at the time of sentencing. The CDAA contends that the refusal can occur later, and can be manifested by such things as “failure to attend or comply with drug treatment programs.”<sup>48</sup> That position is untenable.

Proposition 36 contains a carefully written, complex, schema for handling violations of probation. This schema is explained in detail in Part V, below. If the CDAA position were correct, the court could ignore this meticulous schema. All the court would have to do is to say that a particular violation was not a violation at all, but was a refusal. To be sure, if a person is back before the court on a violation of probation, the person can then refuse probation. But it would be both absurd, and would violate the voter’s intent, to say that the court can bypass the Proposition 36 violation of probation schema by declaring that a probation violation is actual a refusal. Absurd interpretations, of course, should be avoided.<sup>49</sup>

5. *Certain People Who Have Previously Received Two Proposition 36 Sentences.*<sup>50</sup>

People who meet all three of the following criteria are not eligible for Proposition 36 probation.

(A) The person “has two separate convictions for [NDPOs].”

---

<sup>47</sup> Penal Code section 1210.1, subdivision (b)(4).

<sup>48</sup> CDAA, “Implementing Proposition 36,” Part III D 1, page 13.

<sup>49</sup> *Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization* (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281]. (A statute should not be interpreted so as to cause or permit absurd results).

<sup>50</sup> Penal Code section 1210.1, subdivision (b)(5).

- (B) The person “has participated in two separate courses of [Proposition 36] drug treatment..., and”
- (C) The person “is found by the court, by clear and convincing evidence, to be unamenable to any and all forms of available drug treatment.”

This is the provision of Proposition 36 that contains the much-discussed provision of getting 30 days jail. This subdivision ends by stating that

“Notwithstanding any other provision of law, the trial court shall sentence such defendants to 30 days in jail.”<sup>51</sup>

This provision is unlikely ever to apply to many people. First, the “two separate convictions,” and the two Proposition 36 treatment programs must obviously also be separate prior convictions and programs. That requirement alone will diminish the applicability of this provision. Notice, also, that the person must have actually “participated” in a drug treatment program. People who never had Proposition 36 drug treatment because they refused it, did not “participat[e]” in drug treatment.

The second, and more important reason why this 30-day provision will rarely apply, is that the unamenability requirement is so difficult to meet. Some of the criteria that the court may consider in determining unamenability are listed in Penal Code section 1210.1, subdivision (e)(3)(B), discussed in this Analysis at Subpart V B. Few people will ever become third-time Proposition 36 losers and also be currently unamenable to “any and all available treatment.”

If the time ever does come when this provision applies, the court should apply it exactly as written. The nonviolent, but incorrigible, drug offender must, by the terms of this provision, receive a 30-day jail sentence.

This limitation to a 30-day sentence furthers one of the important “[p]urpose[s] and [i]ntent[s]” of Proposition 36, namely “to reserve jail and prison cells for violent offenders.”<sup>52</sup>

---

<sup>51</sup> Penal Code section 1210.1, subdivision (b)(5), last sentence.

<sup>52</sup> Proposition 36, uncodified section 3, subdivision (c).

The California District Attorneys Association contends that the 30–days is only a minimum sentence, and that “the statute does not foreclose the court from imposing a county jail sentence that exceeds 30 days.”<sup>53</sup> That contention is wrong.

One reason that contention is wrong is that the 30–day provision contains no phrase, such as “at least” or “not less than”<sup>54</sup> that would connote it to be a minimum that can be exceeded.

Absurd results would follow if the 30–day sentence were considered to be only a minimum sentence that the court can exceed at will.<sup>55</sup> Because this provision states that it applies “notwithstanding any other law,” if the 30 days were only a minimum, then no law would specify a maximum sentence.

The phrase “Notwithstanding any other law . . .,” it has been held, expresses a legislative intent to have the specific statute control despite the existence of other law which might otherwise govern.<sup>[56]</sup>

The CDAA paper requires the absurd result that any jail sentence at all could be given, without any top. Under the CDAA interpretation, the court could give a multi–year jail sentence on a misdemeanor or an even longer county jail sentence on a felony. This multi–year sentence would have to be in jail, not prison, under the CDAA interpretation. The CDAA paper admits that a prison sentence is not authorized by the 30–day “jail” provision.<sup>57</sup> But the phrase “Notwithstanding any other provision of law,” would mean that Penal Code section 19.2, which limits the county jail sentence on a single count to a year, would not apply, making a multi–year county jail sentence possible. Those absurd results cannot be what the voters intended.<sup>58</sup>

---

<sup>53</sup> “Implementing Proposition 36,” *supra*, Part III E 3, page 16, second paragraph.

<sup>54</sup> The CDAA paper concedes this much, in “Implementing Proposition 36,” *supra*, art III E 3, page 18, middle. See, e.g., Health and Safety Code section 11550, subdivision (a), using the language “... at least 90 days in ... jail.” See also Penal Code section 647, subdivision (k)(2), second unnumbered paragraph, providing that upon a second conviction of violating Penal Code section 647, subdivision (b), the person must receive “not less than 45 days.”

<sup>55</sup> *Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization* (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281]. (A statute should not be interpreted so as to cause or permit absurd results).

<sup>56</sup> *People v. Franklin* (1997) 57 Cal.App.4th 68, 73 – 74 [66 Cal.Rptr. 742] (interpreting that phrase in three–strikes law).

<sup>57</sup> See text at footnote 53, above.

<sup>58</sup> *Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization*, *supra*,

The CDAA paper also raises the specter that if the sentence can only be thirty days, this would, by operation of Penal Code section 17, subdivision (b)(1), reduce non-wobbler felonies down to misdemeanors.<sup>59</sup> CDAA has misread Penal Code section 17, subdivision (b). The introductory clause to that subdivision clearly states that it applies only in the case of a wobbler. Accordingly, the 30-day sentence could not reduce a non-wobbler felony to a misdemeanors.

What the 30-day sentence does is to treat the nonviolent but incorrigible addict in a similar way to how our courts treat alcoholics who are incorrigible but nonviolent. For them, our courts generally impose short jail sentences, under Penal Code section 647, subdivision (f), while preserving prison and jail cells for serious and violent offenders. The 30-day Proposition 36 provision does the same for nonviolent incorrigible drug addicts.

---

22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281]. (A statute should not be interpreted so as to cause or permit absurd results).

<sup>59</sup> CDAA “Implementing Proposition 36,” *supra*, page 17, last paragraph.

**D. The Court Has Discretion Under Penal Code Section 1385 to Dismiss a Portion of the Action That Would Otherwise Prohibit a Proposition 36 Sentence.**

Penal Code section 1385, subdivision (a) provides, in part, that

The judge or magistrate may ... in furtherance of justice, order an action to be dismissed.

Caselaw holds that this power includes two subsidiary powers. First, it includes the lesser power to strike factual allegations relevant to sentencing, such as the allegation that a defendant has prior felony convictions [including prior strike allegations].<sup>60</sup>

Thus, under this first subsidiary power, in a Proposition 36 case, the court could strike an allegation of a prior strike, or a prior threatening–misdemeanor. The court could thereby render eligible a prior striker who would otherwise not be eligible under Penal Code section 1210.1, subdivision (b)(1).

Under this first subsidiary power, also, the court could probably also strike an allegation that drugs were transported for other than personal use, thus converting a non–NDPO conviction into an eligible NDPO conviction.

Second, this power includes the power to strike some of the counts in a multi–count accusation, without striking them all.<sup>61</sup> Thus, under this second subsidiary power, the court may dismiss a conviction to a non–drug related misdemeanor, such as a petty theft.<sup>62</sup>

---

<sup>60</sup> See, e.g., *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504 [53 Cal.Rptr. 789, 917 P.2d 628] (the court has the power to dismiss an allegation of a prior “strike,” in a second or third strike case).

<sup>61</sup> See, e.g., *People v. Tanner* (1979) 24 Cal.3d 514, 526 [156 Cal.Rptr. 450, 596 P.2d 328]; and *People v. Burke* (1956) 47 Cal.2d 45, 50 [301 P.2d 241].

<sup>62</sup> Violation of Penal Code section 488.

The legislature or the voters can, of course, prohibit a court from dismissing an action or a portion of one.<sup>63</sup> Moreover, it is not necessary for the legislature or voters to refer expressly to Penal Code section 1385 to remove this power. But the California Supreme Court has long held that absent an express statement, there must be, at least, a “clear legislative direction to the contrary.”<sup>64</sup>

No such clear legislative direction appears in Proposition 36.<sup>65</sup> Proposition 36 contains only generalized definitional and sentencing language. The California Supreme Court has consistently found that generalized sentencing language does not constitute the kind of clear direction that shows the legislature intended to limit the court’s “1385 power.” The court explained the reason for this in the *Romero* case:

... [T]he statutory power to dismiss in furtherance of justice has always coexisted with statutes defining punishment and must be reconciled with the latter. For this reason, we will not interpret a statute as eliminating courts’ power under section 1385 ‘absent a clear legislative direction to the contrary.’<sup>66</sup>

Accordingly, the court has discretion under Penal Code section 1385 to strike factual allegations, enhancements, and entire counts, that would otherwise make a defendant ineligible for Proposition 36 sentencing.

---

<sup>63</sup> See, e.g., *People v. Superior Court (Romero)* (1996) 13 Cal.4th at 504 (stating the rule, and holding that this had not been done in either the initiative or the legislative version of the Three Strike law).

<sup>64</sup> See, e.g., *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at 518 (citing cases, and holding that no such clear direction is found in either the legislative or initiative version of the Three Strikes law).

<sup>65</sup> That is, a case where Penal Code section 1210.1, subdivision (a), the provision stating the crimes of conviction that are eligible for a Proposition 36 sentence, does not apply.

<sup>66</sup> *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at 518.

#### **IV. The Triggering Event For A Proposition 36 Sentence Is a Conviction That Occurs After July 1, 2001.**

##### **A. Proposition 36, Codified Section 5, and Uncodified Section 8.**

Penal Code section 1210.1, subdivision (a), provides as follows:

Notwithstanding any other provision of law ... every person convicted of [an NDPO] shall receive probation [under the provisions of Proposition 36].”

Uncodified section 8 of Proposition 36<sup>67</sup> provides that

“ ... the provisions of this act shall become effective July 1, 2001, and its provisions shall be applied prospectively.

It is elementary, of course, that the legislature can determine whether an ameliorating statute is retrospective or prospective. The California Supreme Court has repeatedly so held.<sup>68</sup>

Applying that rule to this statute, the meaning is plain. People convicted before July 1 are not entitled to a Proposition 36 sentence, because the statute does not apply until the person is “convicted,” and it is “prospective” only. But, by those same terms, regardless of when the crime was committed, any eligible person who is convicted after July 1 is entitled to an initial Proposition 36 sentence.

No other reading of these provisions is tenable. The California District Attorneys Association contends that Proposition 36 probation is only permitted if the offense was committed after July 1.<sup>69</sup> CDAA’s interpretation is incorrect.

---

<sup>67</sup> See Ballot Pamp., General Election (Nov. 7, 2000), p. 69; also available at the Secretary of State’s web site, <http://vote2000.ss.ca.gov/VoterGuide/>.

<sup>68</sup> See, e.g., *People v. Nasalga* (1996) 12 Cal.4th 784, 793; *In re Estrada* (1965) 63 Cal.2d 740, 747, 748.

<sup>69</sup> CDAA, “Implementing Proposition 36,” *supra*, Part I, page 3.

## B. The First Rule of Statutory Construction.

This first rule of statutory construction is that if the statute is clear, then the plain meaning governs. This rule, applied equally to statutes enacted by the legislature and by voter initiative,<sup>70</sup> is stated in myriad cases. As the California Supreme Court recently said in *People v. Tindall*,

If there is no ambiguity in the language of the statute, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs. Where the statute is clear, courts will not interpret away clear language in favor of an ambiguity that does not exist.[Citations and internal quotation marks omitted]<sup>[71]</sup>

Proposition 36 is clear: "... [E]very person convicted of [an NDPO] shall receive probation ...."<sup>72</sup> This is ... "effective July 1, 2001 ...."<sup>73</sup> This provision "... shall be applied prospectively...." Thus, a person convicted before July 1, is not eligible for a Proposition 36 sentence, but a person convicted afterward is eligible.

The only way that the statute could be interpreted to mean that the person is not eligible unless the offense was committed after July 1, is to rewrite the word "convicted" in Penal Code section 1210.1, subdivision (a), to read "commits." The *Tindall* case prohibits that, because the word "convicted" clearly and unambiguously does not mean "commits."

---

<sup>70</sup> See e.g., *In re Lance W.* (1985) 37 Cal.3d 873, 886 [210 Cal.Rptr. 631, 694 P.2d 744] (applying this rule to the interpretation of a statute passed by ballot initiative).

<sup>71</sup> *People v. Tindall* (Dec. 28, 2000) 24 Cal.4th 767, 772 [14 P.3d 207, 102 Cal.Rptr. 533] (finding the language of Penal Code section 1025 clear, that the same jury that tries the issue of guilt also tries the priors).

<sup>72</sup> Penal Code section 1210.1, subdivision (a).

<sup>73</sup> Proposition 36, uncodified Section 8. See Ballot Pamp., General Election (Nov. 7, 2000), p. 69; also available at the Secretary of State's web site, <http://vote2000.ss.ca.gov/VoterGuide/>.

**C. Proposition 36 Speaks of “Committing” Crimes in Other Sections. This Shows that Proposition 36 Did Not Use the Word “Conviction” Intending It to Mean “Commission.”**

It is a commonplace of statutory construction, equally applicable to legislative enactments and voter initiatives,<sup>74</sup> that when the Legislature uses different words or phrases in the same statute, the Legislature meant two different things.

A prime example of this in a criminal case is the 1991 California Supreme Court case of *People v. Tillbury*.<sup>75</sup> In *Tillbury*, a defendant who had been found not guilty by reason of insanity wanted a jury trial on whether he could receive outpatient status. One section of the insanity statute required the court to hold a “hearing” on outpatient status. Other sections of the insanity statute required the court to hold a “jury trial” on certain issues, such as recommit a person at the end of his term.<sup>76</sup>

Because the statute used two different phrases, the court concluded that the legislature did not intend the outpatient hearing to be a jury trial. The court said,

If the Legislature had intended to require juries at placement hearings, it knew how to say so clearly. In the same statutory scheme the Legislature expressly provided for juries at the sanity phase of criminal trials.<sup>[77]</sup>

The situation is the same with Proposition 36. In Penal Code section 1210.1, subdivision (b)(1), Proposition 36 carefully distinguishes between the commission of a crime, and being convicted.<sup>78</sup> The Subdivision speaks about the defendant “commi[tting]” an offense that results in a “felony conviction other than

---

<sup>74</sup> See, e.g., *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 252 [279 Cal.Rptr. 325, 806 P.2d 1360] (the voters’ explicit adoption of a supermajority requirement in one section of a tax initiative showed that the voters did not implicitly adopt that requirement in another section: they “knew how” to do so if they wanted).

<sup>75</sup> *People v. Tillbury* (1991) 54 Cal.3d 56 [284 Cal.Rptr. 288, 813 P.2d 1318].

<sup>76</sup> *People v. Tillbury, supra*, 54 Cal.3d at 61.

<sup>77</sup> *People v. Tillbury, supra*, 54 Cal.3d at 61.

<sup>78</sup> That Subdivision, discussed in Part III, subpart C 1, above, concerns the savings clause for prior strikers.

a[n] [NDPO] or ... a [qualified] misdemeanor ... ” Thus, the drafters of Proposition 36 carefully distinguished between the commission of an offense, and a possible resulting conviction.

Moreover, in Penal Code section 3063.1, Proposition 36 speaks four separate times of committing new crimes. (This Section is discussed in Part IX, below.) Underlining is added in the statutory quotes below. References are to Penal Code section 3063.1.

1. “ ... [P]arole may not be suspended or revoked for commission of [an NDPO]....” Subdivision (a), unnumbered paragraph 1.
2. “The Parole Authority may require any person on parole who commits [an NDPO] to contribute to the cost of his or her own placement in a drug treatment program.” Subdivision (a), unnumbered paragraph 3.
3. “[Proposition 36 parole provisions do not apply to:] ... Any parolee who, while on parole, commits one or more nonviolent drug possession offenses and is found to have concurrently committed a misdemeanor not related to the use of drugs or any felony.” Subdivision (b)(2).
4. “Within seven days of a finding that the parolee has ... committed [an NDPO] ... the Parole Authority shall notify the [designated] treatment provider....” Subdivision (c).

Obviously, this refers to parolees who are found by the Board of Prison Terms to have committed an offense, even though they are not taken to court, where they might be charged and convicted. Thus, again, the drafters of Proposition 36 carefully distinguished between commits, and convicted.

Thus, in *Tillbury*'s words, “If the Legislature had intended to [mean ‘commits,’ instead of ‘convicted’ in Penal Code section 1210.1,] it knew how to say so clearly.”

**D. The “Findings and Declarations,” the “Purpose and Intent,” and Proposition 36’s Structure, Show That the Delay From November to July Was Not To Preserve A Greater Punishment For “Early” Offenders, But Was Only To Implement the Treatment Provisions.**

Another commonplace of statutory interpretation, equally applicable to legislative enactments and voter initiatives,<sup>79</sup> is that meaning can be discerned by examining statutory findings, purpose clauses, and similar preambles, that were enacted along with the rest of the statute.

One example of this is found in the 1994 California Supreme Court case of *In re Pedro T.*<sup>80</sup> In *Pedro T.*, a minor was convicted of, and sentenced for, car-taking in violation of Vehicle Code section 10851 during a three-year period that the legislature had temporarily increased the punishment. But, before his sentence became final on appeal, the higher punishment sunsetted. The minor’s claim, that his sentence should be correspondingly reduced, was rejected.<sup>81</sup>

The Supreme Court relied on “a[n uncodified] preface to the statute” that contained a “statement of purpose[, and] find[ing]s and declar[ation]s.” These referred to “the rapid increase in motor vehicle theft has reached crisis proportions ...[,] and to the lack of any serious deterrent to this crime....” The Court said that by these findings, the Legislature had thereby stated its “... belie[f] that it is in the best interest for public safety to enhance the penalties for the[se] crimes ....” This led the Supreme Court to conclude that the legislature had expressly declared that increased penalties were necessary.<sup>[82]</sup>

---

<sup>79</sup> See e.g., *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276 [87 Cal.Rptr.2d 222, 980 P.2d 927] (“We must also consider the object to be achieved and the evil to be prevented by the legislation. This guiding principle applies equally to the interpretation [of the Legislature’s statutes and to] voter initiatives. [Internal quote marks and citations omitted]. See also, *Thompson v. Superior Court* (1997) 53 Cal.App.3d 480, 487 [61 Cal.Rptr. 785] (examining the preamble to Proposition 115 to discover voter intent.)

<sup>80</sup> *In re Pedro T.* (1994) 8 Cal.4th 1041.

<sup>81</sup> *In re Pedro T.*, *supra*, 8 Cal.4th at 1043 – 1044.

<sup>82</sup> *In re Pedro T.*, *supra*, 8 Cal.4th at 1046 (italics in original). The legislative findings and purpose from which the court quoted were, like the findings and

*Pedro T.* shows, that in looking for the Legislative intent in Proposition 36, we should look to Proposition 36’s “Findings and Declarations,” and “Purpose and Intent.”

Doing that, we find that Proposition 36’s purpose, in delaying the sentencing provision’s effective date from November 7, 2000, to July 1, 2001, was not to preserve a greater punishment for those who offended before July 1. On the contrary, the Findings, and the Purpose (discussed in detail below), show a Legislative intent to cover as many people as possible, but also to provide a period for Proposition 36’s treatment to be implemented in an orderly fashion.

Before discussing the findings and purposes, note that the treatment provisions are Proposition 36’s heart. This is manifest from the structure of Proposition 36, which provides that the first \$60 million for implementation do not wait until July 1, 2001, but are appropriated immediately.<sup>83</sup> That implementation is proceeding apace, but it is not something that can be done instantly. It takes time to implement such large-scale changes. The reason for the delay from November to July was not to keep the old punishment in place for another eight months, but simply because the court could not be sentencing people to treatment programs that did not yet exist.

The “Findings and Declarations,” and the “Purpose and Intent” of Proposition 36 plainly show that Proposition 36, unlike *Pedro T.*, was not concerned with preserving a greater punishment. On the contrary, they show that Proposition 36 is concerned with saving money and preserving custody for serious and violent offenders, and with promoting public health and safety, by getting as many people as possible into treatment.

---

purpose of Proposition 36, had not been codified; in that case they are found at Stats. 1989, ch. 930, § 1, pp. 3246-3247.

<sup>83</sup> Health and Safety Code section 11999.5, added by Proposition 36, section 7, provides that the first \$60 million is appropriated immediately. Likewise, the effective-date section of Proposition 36, uncodified Section 8, provides that the effective date of July 1 only applies “except as otherwise provided.”

The “Findings and Declarations” for Proposition 36 are found at its uncodified Section 2.<sup>84</sup> Paragraph (a) of Section 2 finds and declares that NDPO offenders

“who receive drug treatment are much less likely to abuse drugs and commit future crimes, and are likelier to live healthier, more stable and more productive lives.

Paragraph (b) of Section 2 finds and declares that

Community safety and health are promoted, and taxpayer dollars are saved, when [NDPO offenders] are provided appropriate community-based treatment instead of incarceration.

Finally, paragraph (3) of Section 2 describes the successful law in Arizona that is similar to Proposition 36.

The “Purpose and Intent,” which are found at uncodified Section 3 of Proposition 36, are likewise.<sup>85</sup> Paragraph (a) of Section 3 states the purpose and intent “[t]o divert from incarceration into community-based substance abuse treatment programs [NDPO convicts].” Paragraph (b) of Section 3 states the purpose and intent “[t]o halt the wasteful expenditure of hundreds of millions of dollars each year on the incarceration ....” And Paragraph (c) of Section 3 states the purpose and intent:

To enhance public safety by ... preserving jails and prison cells for serious and violent offenders, and to improve public health ... through proven and effective drug treatment strategies.

All these findings and purposes would be impaired if we were to read “convicted” in Penal Code section 1210.1 to mean “commits.” Money will be wasted on incarcerating more people under the old sentences. Jail cells will not be quickly freed up for serious and violent offenders. Public safety and health will not be promoted by getting people into treatment. In short, the Findings and Purposes show that the drafters of Proposition 36 said exactly what they meant, in using the word “convicted.”

---

<sup>84</sup> Ballot Pamp., General Election (Nov. 7, 2000), Proposition 36, Text of Proposed Law, p. 66; see also the Secretary of State’s web site, <http://vote2000.ss.ca.gov/VoterGuide/>.

<sup>85</sup> Ballot Pamp., General Election (Nov. 7, 2000), Proposition 36, Text of Proposed Law, p. 66.

**E. The “Legislative History” of Proposition 36 Shows that Proposition 36 Sentencing is Triggered Not By the Commission Date, But By the Conviction Date.**

It is well known that a court should not examine legislative history unless the court first finds that the statute as written is ambiguous or unclear.<sup>86</sup> Proposition 36 is unambiguous and crystal clear on this point. But, if it were unclear, then legislative history should be examined. That history is quite simple, plain, straightforward, and clear.

The “legislative history” of an initiative enacted by the voters is the Ballot Pamphlet prepared by the Secretary of State.<sup>87</sup>

The legislative history of Proposition 36 is, if anything, even more clear than the statute. The “Argument in Favor of Proposition 36,” contained in the November 7, 2000, Ballot Pamphlet, starts out with the following.

If Proposition 36 passes, nonviolent drug offenders convicted for the first or second time after 7/1/2001, will get mandatory, court-supervised, treatment instead of jail.

Again, the Argument in Favor did not say people who commit NDPOs for the first or second time after July 1 get a Proposition 36 sentence. It said people who are “convicted” for the first or second time after July 36 get a Proposition 36 sentence. This is very clear.

---

<sup>86</sup> See, e.g., *People v. Thomas* (1999) 21 Cal.4th 1122, 1125 [90 Cal.Rptr.2d 642, 988 P.2d 563] (because the statute is clear, regarding a particular provision of three-strikes law, resort to legislative history is not needed.)

<sup>87</sup> See, e.g., *White v. Davis* (1975) 13 Cal.3d 757, 775 fn. 11 [120 Cal.Rptr. 94, 533 P.2d 222] (“California decisions have long recognized the propriety of resorting to ... election brochure arguments as an aid in construing legislative measures and constitutional amendments adopted [by] a vote of the people.” [Citations omitted]).

**F. There are no meritorious countervailing considerations to the plain reading, that Proposition 36 means what it says by the word “convicted.”**

It might appear, at first blush, that two closely connected countervailing considerations could show that “convicted” should be read as “commits.” The first consideration is that a defendant might seek a continuance past July 1 simply for delay. The second one is that one defendant’s sentence might be greater than another’s by reason of the date of conviction.

An examination of those considerations shows that they are more than counterbalanced by the wise use of judicial discretion in determining continuance motions. Therefore, those considerations have insufficient merit to overcome Proposition 36’s plain language and meaning.

Improper delay was found to be an additional reason for the holding in the *Pedro T.* case, discussed above, but that consideration is much weaker here.

The *Pedro T.* court said that

a rule that [the defendant gets the lower punishment] would provide a motive for delay and manipulation .... When the Legislature signals, three years in advance, its intention to reduce the punishment ... defendant and counsel have a strong incentive to delay the ... judgment [to] ... receiv[e] the lessened ... term. .... The Legislature could not have intended to encourage such machinations.<sup>[88]</sup>

One reason that consideration is much weaker here is, of course, that the voters did not signal their intention three years in advance, it was only eight months in advance. Many cases arising before July 1 would naturally not reach adjudication until after July 1, so we are only talking about a relatively small number of cases.

More important, with Proposition 36, the court can easily identify and properly deal with, cases of improper delay. For example, the person who is charged with both qualifying and disqualifying offenses, and seeks a delay past July 1,

---

<sup>88</sup> *In re Pedro T.*, *supra*, 8 Cal.4th at 1046 – 1047.

July 1, claiming he can “beat” the disqualifying charges, may be seeking an improper delay. Likewise, the out-of-custody person who seeks a delay but is not enrolling in any treatment while waiting, may also be seeking an improper delay. The court could simply deny abusive motions for continuances in those cases.

But the person who is already qualified and eligible, and who is currently enrolled in appropriate treatment, is probably seeking a proper delay; that continuance should be granted. These are the types of distinctions that our courts are skilled at making.

For the same reason, there is no serious concern that people who commit their qualifying crimes before July 1 may receive different sentences based on the fortuity of their conviction dates. Before July 1, qualified and eligible defendants who desire Proposition 36 probation will apply for appropriate continuances. Our courts are well equipped to determine whether a continuance request is for improper delay, or is within the purposes and intent of Proposition 36. Thus, the concern about disparate sentences also melts away upon due consideration.

#### **G. The Conviction Occurs At the Time of the Order Granting Probation.**

It is clear from Subparts A to F, above, that regardless of the date of commission, if the plea or verdict does not occur until after July 1, 2001, the person must receive a Proposition 36 sentence.

What about the person who pleads guilty or nolo contendere, or who suffers a guilty verdict before July 1, but is not sentenced until after July 1? That person is also entitled to a Proposition 36 sentence.

In California, there is not a uniform rule as to whether a conviction occurs at the verdict or guilty plea, or occurs at the time of the judgment or order granting probation.<sup>89</sup>

---

<sup>89</sup> See, e.g., *Boyll v. State Personnel Bd.* (1983) 146 Cal.App.3d 1010, 1073 [194 Cal.Rptr. 717], and cases there cited (Defendant was not convicted of felony, and could be a peace officer, despite guilty plea to felony drug offense, because case was dismissed after successful completion at California Rehabilitation Center).

For many purposes, such as determining whether a prior conviction has occurred, a conviction is said to occur at the time of the plea or verdict.<sup>90</sup>

For other purposes, however, the conviction does not occur until the time of pronouncing judgment or granting probation.

For example, “the time of conviction”, for the purpose of determining whether a wobbler is a felony or a misdemeanor,” is not until sentencing.<sup>91</sup> The reason is that it is not until sentencing that the court can exercise its discretion under Penal Code section 17, subdivision (b)(1)<sup>92</sup> to reduce a wobbler to a misdemeanor.

A similar rule should apply in Proposition 36 cases. Proposition 36 probation is not like other probation, it is *sui generis*. (Its *sui generis* nature is discussed in detail in Part XII, below). The person can refuse Proposition 36 probation, or there might be other reasons why it cannot be determined until sentence if the court will grant Proposition 36 probation. As with PC 17 reduction to a misdemeanor, because it cannot be determined for certain until sentencing if the court will grant Proposition 36 probation, the person cannot be considered convicted, for Proposition 36 purposes, until sentencing.

Another point showing that in Proposition 36 cases, the date of conviction is the date of sentencing is that civil consequence in Proposition 36 cases, that even after dismissal, it is possible that the person will not longer be able to serve

---

<sup>90</sup> See, e.g., *People v. Williams* (1996) 49 Cal.App.4th 1632, 1637 – 1639 [57 Cal.Rptr.2d 448] (defendant sentenced under “three strikes” law for his new felony; his prior strike was the serious felony to which he had already pled guilty when he committed his new offense, even though he had not yet been sentenced on that “prior.”)

<sup>91</sup> *People v. Trausch* (1995) 36 Cal.App.4th 1239 [42 Cal.App.3d 836]; *People v. Vessell* (1995) 36 Cal.App.4th 285, 291 – 294 [42 Cal.Rptr. 241] (both: the defendant was not convicted of a felony just because his wobbler was charged as a felony when he pled guilty; the defendant was only convicted of a misdemeanor because the court so-declared it at the time of sentencing). *Accord, People v. Franklin, supra*, 57 Cal.App.4th 68 (distinguishing *Vessell* and *Trausch* where the wobbler is reduced later, well after the initial sentencing).

<sup>92</sup> Penal Code section 17, subdivision (b)(1) provides that a wobbler is a misdemeanor “[a]fter a judgment imposing a punishment other than [prison].”

on a jury.<sup>93</sup> When a civil consequence is under consideration, normally the time of conviction is not the plea or verdict, but the judgment or order granting probation.<sup>94</sup>

Still another point showing that a Proposition 36 conviction does not occur until sentencing is to consider the special treatment that Proposition 36 gives to people already on probation for NDPOs as of July 1. As discussed in Part VIII, if such a person violates a drug-related condition of probation, Proposition 36 generally requires that probation be reinstated, with a Proposition 36 drug program added. It would not make sense that the voters would give Proposition 36-like treatment to people already on probation for NDPOs as of July 1, but deny Proposition 36 treatment to people who had pled guilty or suffered a verdict to an NDPO as of July 1, but not yet been sentenced.

Finally, finding the time of conviction to be the time of granting of Proposition 36 probation will also further the purposes of Proposition 36. Among those purposes, as was seen in subpart D, above, is to preserve jail cells for serious and violent offenders, and to get as many people as possible into drug treatment. That purpose is furthered by holding that a Proposition 36 conviction does not occur until sentencing.

---

<sup>93</sup> See Part VII, subpart C, below.

<sup>94</sup> See, e.g., *Boyll v. State Personnel Bd.*, *supra*, 146 Cal.App.3d at 1073 (person not convicted of felony, despite felony guilty plea, since case was dismissed after the person successfully completed CRC). *Helena Rubenstein, Internat. v. Younger* (1977) 71 Cal.App.3d 406, 411 [139 Cal.Rptr. 743] (A ‘conviction,’ that excludes one from holding public office, does not occur until judgment.)

## **V. Violations of Proposition 36 Probation.**

### **A. The Consequences if Proposition 36 Probation is Revoked.**

If the defendant violates Proposition 36 probation, then the court can modify probation or treatment, intensify treatment, or, in some cases, revoke probation.

If Proposition 36 probation is revoked, then Penal Code section 1210.1, subdivision (e)(1) provides that “the defendant may be incarcerated pursuant to otherwise applicable law.”

The word “may” leaves it clear, that the court is not required to impose incarceration if Proposition 36 probation is revoked.

The court, therefore, retains discretion for those cases where the person fails Proposition 36 probation, but execution of a jail or prison sentence is still not appropriate.

### **B. Program Violations.**

The text of Proposition 36 discusses program violations in a separate subdivision from other Proposition 36 probation violations. Program violations are discussed at Penal Code section 1210.1, subdivisions (c)(1) and (c)(2), while other probation violations are discussed at Penal Code section 1210.1, subdivision (e).

If the provider tells the probation department that the defendant is not amenable to that program, but may be amenable to another one, then the court, if the probation department asks, can modify probation.<sup>95</sup>

If the provider tells the probation department that the defendant is not amenable to any type of treatment, then the court “may,” if the probation department asks, revoke probation. But the court cannot revoke probation if the defendant proves, by a preponderance of the evidence, that there is another program for which the defendant is amenable.<sup>96</sup>

---

<sup>95</sup> Penal Code section 1210.1, subdivision (c)(1).

<sup>96</sup> Penal Code section 1210.1, subdivision (c)(2).

That provision, concerning proof by the defendant, to pass constitutional muster, must not be read as placing the initial burden on the defendant.<sup>97</sup> Accordingly, that provision must be interpreted so that first the prosecution must prove that the defendant is not amenable. If the prosecution does that, then the burden can shift to the defendant to show that there is a program to which the defendant is amenable.

The method of proving unamenability is not discussed in this subdivision of Proposition 36, but it is discussed in the probation violation subdivision. That method, found at Penal Code section 1210.1, subdivision (e)(3)(B), should be used here also.

Under Subdivision (e)(3)(B), [paragraphing added, for ease of reading]

In determining whether a defendant is unamenable to drug treatment, the court may consider, to the extent relevant, whether the defendant

- (i) has committed a serious violation of rules at the drug treatment program,
- (ii) has repeatedly committed violations of program rules that inhibit the defendant's ability to function in the program, or
- (iii) has continually refused to participate in the program or asked to be removed from the program.

---

<sup>97</sup> See, e.g., *People v. Rodriguez* (1990) 51 Cal.3d 437 [272 Cal.Rptr. 613, 795 P.2d 783] (standard of proof for a violation is on the prosecution, by a preponderance); and see generally Witkin and Epstein, *California Criminal Law* (3d ed. 2000) Ch. IX, Punishment, §§ 579 to 583.

### C. Non-drug Related Probation Violations.

Violations of probation that are not related to drugs, or that do not consist of a new NDPO, are handled in a similar fashion as violations under general law. Penal Code section 1210.1, subdivision (e)(2), covers such situations, because it covers

“violat[i]ons] ... either by being arrested for an offense that is not a[n NDPO] or [are] ... a non-drug- related condition of probation ....

For these non-drug related, or non-NDPO, violations, if “the state” seeks a hearing, the “court may modify or revoke probation if the alleged violation is proved.”

Again, this provision must be read in light of constitutional standards. Mere proof that the defendant was arrested is not, in itself, enough to justify the court in finding that the defendant has violated probation, since an arrest may be based on less than a preponderance of the evidence.<sup>98</sup> Under both the federal and state constitutions, however, the court cannot find a probation violation unless the prosecution proves it by at least preponderance of the evidence.<sup>99</sup> Accordingly, it must be shown, not merely that the defendant was arrested, but that a preponderance of the evidence shows that the defendant did commit the underlying offense, or at least, committed a probation violation.

Although the court can revoke Proposition 36 probation for a non-drug-related violation, it is not required to do so. The statutory text,<sup>100</sup> by using the word “may” leaves it clear, that the court is not required to do so.

---

<sup>98</sup> See, e.g., Witkin & Epstein California Criminal Law (3d ed. 2000) Ch. XII § 25. The CDAA paper, “Implementing Proposition 36”, at Pt. VI, subpts A and B, pp. 30 and 31, is in accord.

<sup>99</sup> See, e.g., *People v. Rodriguez* (1990) 51 Cal.3d 437 [272 Cal.Rptr. 613, 795 P.2d 783] (standard of proof for a violation is a preponderance). See generally Witkin and Epstein, *California Criminal Law* (3d ed. 2000) Ch. IX, Punishment, §§ 579 to 583.

<sup>100</sup> Penal Code section 1210.1, subdivision (2), last sentence.

#### **D. Drug Related Probation Violations.**

Recall, from Subpart B, above, that program violations and “drug–related violations” are treated separately in Proposition 36.<sup>101</sup> It follows, that a “drug–related” probation violation is not a mere program violation. Program violations, even drug–related ones, are handled separately.<sup>102</sup>

A separate, three part, violation scheme is laid out for drug–related probation violations. This separate scheme is at Penal Code section 1210.1, subdivision (e)(3)(A) to (C).

A first violation “either by being arrested for a nonviolent drug possession offense or by violating a drug-related condition of probation ...” is covered by Section 1210.1, subdivision (e)(3)(A). The court must revoke probation if the state proves both the violation<sup>103</sup> and also proves that “the defendant poses a danger to the safety of others.” However, if the violation is proven and probation is not revoked, then the court can “intensify or alter the drug treatment plan.”

A second violation “either by being arrested for a nonviolent drug possession offense, or by violating a drug-related condition of probation ...” is covered by new Penal Code section 1210.1, subdivision (e)(3)(B). The court must revoke probation if the state proves both the alleged violation,<sup>104</sup> and one of two other things. The state must also prove either “that the defendant poses a danger to the safety of others or is unamenable to drug treatment.”

No criteria are set out for proving that the defendant poses a danger to the safety of others. But extensive criteria are set out for proving that the defendant unamenable to treatment. These criteria have already been discussed, at Subpart V B, above.

---

<sup>101</sup> Penal Code section 1210.1, subdivisions (c)(1) and (c)(2) cover program violations. Penal Code section 1210.1, subdivision (e)(3) covers drug–related violations. See also the discussion in Subpart V B, above.

<sup>102</sup> See Subpart V B, above.

<sup>103</sup> Where the violation consists of an arrest, see the discussion in Subpart 3, above, for a discussion of what must be proved in addition to the arrest.

<sup>104</sup> An arrest, alone, cannot be a violation. See the discussion in Subpart C, above.

If a third drug-related violation is proved, then, under Penal Code section 1210.1, subdivision (e)(3)(C), “the defendant is not eligible for continued [Proposition 36] probation.”

Although the defendant is not eligible, after three drug-related violations, for continued Proposition 36 probation, Proposition 36 does not prohibit the court from imposing probation under general law. It does provide, that “[i]f [Proposition 36] probation is revoked the defendant may be incarcerated pursuant to [general] law....” The word “may” leaves it clear that the court is not required to impose incarceration. This leaves the court discretion when, despite having failed Proposition 36 probation, nonetheless execution of a jail or prison is not appropriate.

**E. On First or Second Drug Related Violation, if the Defendant is Not Dangerous, and is Amenable to Further Treatment, the Court Must Permit Treatment to Continue.**

Penal Code section 1210.1, subdivision (e)(3)(A), provides that if the defendant commits a first new NDPO, or, for the first time violates a drug related condition of probation, the court

shall revoke probation if the alleged probation violation is proved and the state proves ...that the defendant poses a danger to the safety of others.

Penal Code section 1210.1, subdivision (e)(3)(B) contains similar provisions for a second drug violation, adding that probation “shall” also be revoked if the defendant is “unamenable to drug treatment.”

Clearly these two subdivisions require the court to revoke probation if the defendant is dangerous to others (first or second time), or (second time only) if the defendant is unamenable to treatment.

The question on these first or second violations, is whether dangerousness and unamenability are the only circumstances permitting revocation for drug related violations. Or, does the court have discretion to revoke probation even if dangerousness or unamenability are not proven. The California District Attorneys

Association contends that the court does have discretion to revoke probation and sentence the person to prison.<sup>105</sup> The CDAA interpretation is incorrect.

Certainly, Proposition 36 does not explicitly state that probation can be revoked in other circumstances. Indeed, the natural reading of the revocation sentences in Penal Code sections 1210.1, subdivisions (e)(3)(A) and (B) is that the court cannot revoke probation except as specified.

To further assist in answering this question, courts should look to the purposes and intent of Proposition 36. Part IV, D, above, showed that Courts should interpret statutes so as to further the its purpose and intent.

The purpose and intent of Proposition 36 is found at uncodified Section 3. Subdivision (a) of that section states, in relevant part, that its purpose and intent is “[t]o divert from incarceration into community–based ... treatment programs non-violent defendants [and] probationers....” Likewise, Subdivision (b) states the purpose and intent is, in relevant part,

[t]o halt the wasteful expenditure of hundreds of millions of dollars each year on the incarceration – and reincarceration – of nonviolent drug users who would be better served by community–based treatment.

Similarly, Proposition 36, Section 3, subdivision (c) states the purpose and intent is, in relevant part, “[t]o ... preserv[e] jail ... cells for serious and violent offenders ....

Accordingly, it would conflict with the purpose and intent of Proposition 36 if probation could be revoked for drug violations beyond the circumstances listed.

Even if such revocations were permitted, the court would be required to exercise its sound discretion. That discretion would surely be abused if the court revoked probation in violation Proposition 36’s purpose and intent.

---

<sup>105</sup> CDAA “Implementing Proposition 36,” *supra*, Part V B 1, page 31, first paragraph.

## **VI. Incarceration and Proposition 36.**

### **A. Incarceration Cannot Be an Additional Term of Proposition 36 Probation.**

Penal Code section 1210.1, subdivision (a) provides that “A court may not impose incarceration as an additional condition of probation.”

### **B. Drug Treatment Programs Offered in a Prison or Jail Do Not Qualify As Proposition 36 Drug Treatment Programs.**

Every Proposition 36 probationer must, of course, “participat[e] in and complet[e] ... an appropriate drug treatment program.”<sup>106</sup>

“Drug treatment,” and “drug treatment program” are defined by Penal Code section 1210, subdivision (b).

“The term ‘drug treatment program,’ and ‘drug treatment’ does not include drug treatment programs offered in a prison or jail facility.”

---

<sup>106</sup> Penal Code section 1210.1, subdivision (a).

**C. Qualified Parole Violators Cannot Have Parole Suspended or Revoked, and Must Receive Drug Treatment, Which Does Not Include Jail or Prison Programs.**

The questions of who is a qualified parole violator, and what is a qualified parole violation, are discussed in Part IX, below.

In general, a parolee who commits a new NDPO, or drug-related violation, is qualified. The person is not qualified, however, if there was another offense or violation, there was gun use, the person is on parole for a strike, the person refuses, or the person has previously failed Proposition 36 drug treatment.<sup>107</sup>

Penal Code section 3063.1, subdivision (a), provides that for eligible parolees, "... parole may not be suspended or revoked..." It also requires that

the Parole Authority shall require participation in and completion of an appropriate drug treatment program

As explained in Subpart V B above, this drug treatment program, by definition, cannot be in a jail or prison.

**D. The "Findings and Declarations," and the "Purpose and Intent" of Proposition 36 Concerning Incarceration.**

These begin at uncodified Section 2 of Proposition 36,

The People of the State of California ... f[ound] and declare[d] [that]

....

(b) Community safety and health are promoted, and taxpayer dollars are saved, when nonviolent persons convicted of drug possession or drug use are provided appropriate community-based treatment instead of incarceration.

---

<sup>107</sup> A full discussion of these criteria, including being on parole for a strike, is found at Part IX, subpart A, below.

Also, at uncodified Section 3 of Proposition 36,

The People of the State of California ... declare[d] [their] purpose and intent in enacting [Proposition 36] to be as follows:

- (a) To divert from incarceration into community-based substance abuse treatment programs nonviolent defendants, probationers and parolees charged with simple drug possession or drug use offenses;
- (b) To halt the wasteful expenditure of hundreds of millions of dollars each year on the incarceration—and reincarceration—of nonviolent drug users ..., and
- (c) To ... preserv[e] jails and prison cells for serious and violent offenders ....

**E. Persons Apparently Eligible for Proposition 36 Probation, Before Guilty Plea or Trial.**

Proposition 36 does not address the question of whether such persons can be held in custody before Proposition 36 probation is granted.

In deciding such questions, courts should consider the following.

- The offenses charged are not violent.
- The person does not have a disqualifying prior criminal record.
- “[The] court [will not be] impos[ing] incarceration as an additional condition of probation,” and the drug treatment ordered “will not include drug treatment programs offered in a jail or prison.”<sup>108</sup>

Under the California Constitution,<sup>109</sup> (paragraphing and bullets added, for ease of reading),

---

<sup>108</sup> Penal Code section 1210.1, subdivision (a).

In fixing the amount of bail, the court shall take into consideration

- the seriousness of the offense charged,
- the previous criminal record of the defendant, and
- the probability of his or her appearing at the trial or hearing of the case.
- [Instead of bail,] A person may be released on his or her own recognizance in the court's discretion.

This Constitutional provision is expanded upon in Penal Code section 1275. Subdivision (a) of section 1275 states that in setting bail, “[t]he public safety will be the primary consideration.” Subdivision (b) specifies some considerations in drug cases, such as the quantity of drugs.

On felonies, Proposition 36 defendants are prime candidates, under both the Constitutional and the Statutory provisions, for very low bail or for own recognizance releases.

In terms of the Constitutional criteria set out above,

- NDPOs are not serious offenses: they are non-violent drug possession or use offenses.
- The person has no, or only remote, prior serious or violent offenses.
- Since the person cannot get jail or prison unless Proposition 36 probation is violated, the person is naturally more likely to appear than others who do face jail or prison.

In terms of the Statutory criteria in Section 1275, surely the defendant is not dangerous, because Proposition 36 charges are all nonviolent. And, since the defendant is not charged with, for example, possession for sale, surely the quantity of drugs is small.

If the person is charged only with misdemeanors, the person is generally entitled to an own recognizance release. The person is not entitled to an own recognizance release only if the court makes an on-the-record finding that an own re-

---

<sup>109</sup> Cal. Const. art. I § 12, subdivision (c), second unnumbered paragraph.

cognizance will compromise public safety or will not reasonably assure the appearance of the defendant. If an own recognizance release is denied, then bail must be set.<sup>110</sup> Own recognizance releases are virtually always appropriate in misdemeanors.

The court should also consider, in making release decisions, Proposition 36's purpose and intent, as set forth at length at Subpart D, above. Those purposes include preserving jail cells for serious and violent offenders. If Proposition 36 defendants were kept in jail pre-trial, that would interfere with the purpose and intent of Proposition 36.

In own-recognizance release cases, on an individualized basis, if circumstances warrant, the California Supreme Court has approved a condition of random drug testing and warrantless searches.<sup>111</sup>

**F. After a Jury Verdict or Plea of Guilty, Can an Apparently Eligible Person Be Held in Custody Pending Placement on Proposition 36 Probation?**

The analysis of this question is quite similar to the analysis of whether such a person can be held in custody before a guilty plea or verdict, as discussed in Subpart E, above.

To that analysis must be added that this person is more likely eligible for release than the pre-conviction defendant. This can be analogized to the practice under Penal Code section 1000, Deferred Entry of Judgment. Many courts normally grant releases to most people who have pled guilty under the terms of PC 1000. That practice should be extended to Proposition 36 cases as well.

---

<sup>110</sup> Penal Code section 1270.

<sup>111</sup> See generally, *In re York* (1995) 9 Cal.4th 1133 [40 Cal.Rptr.2d 308, 892 P.2d 804.] (approving a condition of random drug testing).

**G. When a Person is Suspected of Violating Proposition 36 Probation, Can, and if so, Should, the Person Be Brought to Court by Arrest, or Should This be Accomplished by Other, Noncustodial, Means.**

Penal Code section 1203.2 permits a peace officer or probation officer, without a warrant, to arrest a suspected probation violator and bring the person before the court. That section also permits a court to issue a warrant for the arrest of a suspected probation violator.

However, arrest has never been the exclusive method of bringing a suspected probation violator before the court. Traditionally, suspected probation violators have also been notified to appear in person or by letter.

Noncustodial proceedings further the purpose and intent of Proposition 36, as discussed in Subpart D, above. If the person is in treatment, this treatment will not be interrupted. Even if the violation is an alleged failure to comply with treatment, noncustodial notification helps preserve jail cells for serious and violent offenders.

This purpose and intent should also be considered by peace officers, probation officers, and by the court in deciding whether to bring the suspected violator to court by arrest or by other, noncustodial, means.

Likewise, whether the court is likely to revoke probation should be considered in deciding whether to bring the suspected violator in by arrest or by other means. “A court may not impose incarceration as an additional condition of probation.”<sup>112</sup> This prohibition should not be subverted by unnecessary arrests for technical violations that are unlikely to result in revocations.

**H. Can, and if so, Should, a Suspected Violator of Proposition 36 Probation be Held in Custody Pending a Hearing?**

The court, in determining whether to keep the suspected violator in custody pending a hearing, should consider the purpose and intent of Proposition 36, which is, in part, to preserve jail cells for serious and violent offenders. This purpose and intent are fully discussed at Subpart D, above. That purpose is not well-served if a suspected Proposition 36 probation-violator is kept in custody pending the violation hearing.

---

<sup>112</sup> Penal Code section 1210.1, subdivision (a).

Likewise, whether probation is likely to be revoked should be considered in deciding whether to incarcerate a suspected probation violator. “A court may not impose incarceration as an additional condition of [Proposition 36] probation.”<sup>113</sup> This prohibition should not be subverted by unnecessary arrests for technical violations that are unlikely to result in revocations.

**I. When a Violation is Found, But Probation is Not Revoked, or is Revoked and Reinstated, “A Court May Not Impose Incarceration as an Additional Condition of Probation”<sup>114</sup>?**

Another way to phrase this is, the court cannot impose such sanctions as a 30-day jail-dryout period as part of the defendant’s drug treatment.

The California District Attorneys Association contends that the court can incarcerate such a person.<sup>115</sup> The CDAA interpretation is incorrect.

Penal Code section 1210.1, subdivision (a) states that “A court may not impose incarceration as an additional condition of probation.” Subdivision (a) does not state that it becomes inoperative, or does not apply, if the court finds a violation of Proposition 36 probation but determines not to revoke probation. On the contrary, by using the word “additional,” Section 1210.1, subdivision (a) makes it clear that this prohibition applies throughout all phases of Proposition 36 probation.

If the requirements and restrictions of Penal Code section 1210.1, subdivision (a) did become inoperative, or did not apply, then absurd results would follow. In particular, the court could then no longer fulfill its obligation under that Subdivision to “require[ of the probationer] participation in and completion of an appropriate drug treatment program,” because that program cannot occur in jail.<sup>116</sup> It is, of course, a commonplace of statutory construction, that the court should avoid a construction that leads to absurd results.<sup>117</sup>

---

<sup>113</sup> Penal Code section 1210.1, subdivision (a).

<sup>114</sup> Penal Code section 1210.1, subdivision (a).

<sup>115</sup> CDAA, “Implementing Proposition 36,” *supra*, Part I, page 1, third paragraph; Part VI, page 28, first paragraph.

<sup>116</sup> Penal Code section 1210, subdivision (b) (defining drug treatment program).

<sup>117</sup> *Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization*, *supra*,

A construction of Proposition 36 that prohibits “[a] court [from] impos[ing] incarceration as an additional condition of probation” after a violation, is consistent with the purpose and intent of Proposition 36. That “purpose and intent,” is discussed in detail in Subpart D, above. It includes requiring treatment, and preserving jail cells for serious and violent offenders.

The Proposition 36 probationer can also be compared to a parolee. Under Penal Code section 3063, subdivision (a), generally,

“parole may not be suspended or revoked for commission of a [NDPO] or for violating any drug-related condition of parole.”<sup>118</sup>

This is a general rule, with several exceptions, as discussed in detail in Part IX, below. But if parole cannot generally be suspended or revoked for commission of an NDPO, or violating any drug related condition, then it would be absurd to think that probation can be.

Accordingly, to avoid a absurdity, and to further the purpose of Proposition 36, when a person violates Proposition 36 probation, but the court does not revoke probation, “[the] court may not impose incarceration as an additional condition of probation.” The court can, however modify or intensify probation. It might, for example, be appropriate, at this time, for the court to add family counseling, or vocational or literacy training.<sup>119</sup>

---

22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281]. (A statute should not be interpreted so as to cause or permit absurd results).

<sup>118</sup> Penal Code section 3063.1, subdivision (a).

<sup>119</sup> Penal Code section 1210.1, subdivision (a).

## **VII. Dismissal After Successful Completion of Proposition 36 Drug Treatment.**

### **A. Petition for Dismissal, and Finding of Completion.**

Penal Code section 1210.1, subdivision (d)(1) provides as follows.

At any time after completion of drug treatment, a defendant may petition the sentencing court for dismissal of the charges.

This Subdivision goes on to state the finding necessary for the court to dismiss the case.

If the court finds that the defendant successfully completed drug treatment, and substantially complied with the conditions of probation.

“[S]uccessful completion of drug treatment” is defined at Penal Code section 1210, subdivision (d). It means that the defendant

has completed the prescribed course of drug treatment and, as a result, there is reasonable cause to believe that the defendant will not abuse controlled substances in the future.

Proposition 36 does not explicitly state if the finding of “reasonable cause to believe that the defendant will not abuse controlled substances ...” is automatic upon a finding of “complet[ion] [of] the prescribed course of drug treatment,” or if these are two separate findings.

Because the “prescribed course of drug treatment” should lead to the defendant no longer abusing controlled substances, it seems that this should be one finding. Indeed, many programs are likely to incorporate such a finding into such documents as certificates of graduation.

However, if these are two separate findings, then the “reasonable cause” finding is one that should be made, in the first instance, by the program. It is not appropriate for the probation department to make this finding, because the program is in a better position to do so. The program finding, however, is apparently subject to the court’s discretion to confirm or reject it.

## **B. The Relief That is Granted By a Dismissal.**

When the court grants the defendant’s petition, Penal Code section 1210.1, subdivision (d)(1), provides that

the conviction on which the probation was based shall be set aside and the court shall dismiss the indictment or information against the defendant.

This phrase does not explicitly mention dismissal of a felony or misdemeanor complaint. This omission can only be explained as a drafter’s error. The drafter’s error doctrine, which allows the courts to correct statutory mistakes, can be used where a relatively simple correction is necessary to keep a statute from being absurd or meaningless.<sup>120</sup>

It would be absurd to permit dismissal of the information or indictment, but not have the simple addition of the word “complaint,” permitting the court to dismiss a complaint also. As was seen in Part III, above, Proposition 36 includes those convicted of misdemeanor “under the influence of drugs” in violation of Health and Safety Code section 11550, and other misdemeanors as well.<sup>121</sup>

---

<sup>120</sup> See, e.g., *People v. Garcia* (1999) 21 Cal.4th 1, 14 – 16 [87 Cal.Rptr. 114, 980 P.2d 829], and cases there cited. The CDAA has apparently made its own oversight here. In “Implementing Proposition 36,” Pt. V, page 26, first paragraph, the paper says, “presumably the complaint in misdemeanor convictions [is included].” They, too, forgot about felony complaints.

<sup>121</sup> See Part II, subpart A, above.

It would be absurd to think that Proposition 36 intended to provide dismissals to the felons charged by information, but not the misdemeanants charged by complaint.

Likewise, it would be absurd to think that Proposition 36 intended to give dismissals to those who fought their felonies past preliminary examination, but not to give dismissals to those who pleaded guilty to the original complaint.

Accordingly, the drafter's error doctrine must be applied, to add the word "complaint" to the phrase "information or indictment."

The dismissal section, Penal Code section 1210.1, subdivision (d), goes on to state "In addition, the arrest on which the conviction was based shall be deemed never to have occurred."

The phrase "deemed never to have occurred" was probably taken from Penal Code section 1000.4, subdivision (a). That Subdivision also provides that upon successful completion of the PC 1000 D.E.J. program, the arrest involved shall be "deemed never to have occurred."

That phrase, "deemed never to have occurred," establishes a "conclusive presumption," and the protection afforded is "at least as great as in the areas of evidentiary privilege ...."<sup>122</sup> However, an explicit exception to the relief concerning the arrest is discussed below.

The dismissal section next provides that

Except as provided in paragraph (2) or (3) [discussed below], the defendant shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted.

The "released from all penalties and disabilities ..." language was apparently taken from identical language in the dismissal statute for successful probationers, Penal Code section 1203.4.

Two more affirmative relief clauses are found in Penal Code section 1202.1, subdivision (d)(3). The first is the following.

---

<sup>122</sup> *Parmett v. Superior Court* (1989) 212 Cal.App.3d 1261, 1266, 1267 [262 Cal.Rptr. 387] (construing this language in a juvenile record-sealing statute).

Except as provided [this exception is discussed below], after an indictment or information is dismissed ... the defendant may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or convicted for the offense.

This clarity, that the defendant can indicate that no arrest or conviction occurred, is an improvement over Penal Code section 1203.4. Section 1203.4, the primary section of the Penal Code that provides relief from criminal convictions, contains no such explicit permission. It is generally assumed that after a “1203.4 dismissal” the person can, with certain statutory exceptions, respond “no” to such questions, but neither the statute, nor any case, explicitly says so.

The other clause providing affirmative relief is the following:

Except as provided below [this exception is discussed below], a record pertaining to an arrest or conviction resulting in successful completion of a [Proposition 36] drug treatment program ... may not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate.

Again, this is an improvement over Penal Code section 1203.4, which contains no similar clause or promise.

**C. Exceptions to the Relief Provided by a Proposition 36 Dismissal.**

The first exception is found in Penal Code section 1210.1, subdivision (d)(2):

Dismissal ... does not permit a person to own, possess, or have in his or her custody or control any firearm capable of being concealed upon the person or prevent his or her conviction under [Penal Code] Section 12021.

This exception repeats, almost word for word, an exception that is also in Penal Code section 1203.4, subdivision (a).

The second exception to the relief provided by a Proposition 36 dismissal is found in Penal Code section 1210.1, subdivision (d)(3).

[T]he arrest and conviction on which the probation was based may [still] be recorded by the Department of Justice and disclosed in response to any peace officer application request or any law enforcement inquiry.

This is similar to an exception to the relief provided by a dismissal under the Deferred Entry of Judgment statute, Penal Code section 1000.4, subdivision (b).

The third exception to a Proposition 36 dismissal is also found in Penal Code section 1210.1, subdivision (d)(3).

Dismissal ... does not relieve a defendant of the obligation to disclose the arrest and conviction in response to any direct question contained in any questionnaire or application for public office, for a position as a peace officer ..., for licensure by any state or local agency, for contracting with the California State Lottery, or for purposes of serving on a jury.

This exception is the same as the exception found in Penal Code section 1203.4, subdivision (a), but with one very important addition. Section 1203.4 does not contain the Proposition 36 provision that the defendant must still disclose the conviction for purpose of serving on a jury.

Before Proposition 36, jury service was prohibited to people who have been convicted of a felony, and “whose civil rights have not been restored.”<sup>123</sup> No reported case has interpreted the new statute. Presumably, however, a dismissal under Penal Code section 1203.4, would restore an ex-felon’s right to serve on a jury. Perhaps the Proposition 36 requirement to disclose the arrest for purposes of jury service also means that the person remains disqualified from service. If it does mean that, then perhaps, the person could apply for further relief under Penal Code section 1203.4

---

<sup>123</sup> Code of Civil Procedure, section 203, subdivision (a)(5).

## **VIII. Special Provisions for People on Probation for NDPOs on July 1, 2001.**

Although not eligible for a full Proposition 36 sentence, NDPO convicts on probation as of July 1, 2001, are eligible for special Proposition 36 treatment if they are arrested for a new NDPO, or violate a drug-related probation condition.

Penal Code section 1210.1, subdivision (e)(3)(D), provides that if a first such violation is proved, the court shall revoke probation if the person is a danger to others. Otherwise, the court can modify probation, and can require participation in a drug treatment program.

Penal Code section 1210.1, subdivision (e)(3)(E), provides that for a second such violation, in addition to the provisions of the preceding paragraph, the court shall revoke probation if the person is not amenable to any drug treatment.

If there is a third such violation, then Penal Code section 1210.1, subdivision (e)(3)(F), provides that the person is no longer eligible for probation.

Is the probationer now entitled to all the benefits of sentencing under Penal Code section 1210.1, subdivision (a), just as though the sentence were a full Proposition 36 sentence? The subdivisions for first and second time probation-violators, Penal Code section 1210.1, subdivisions (e)(3)(D), and (E), do not mention sentencing under Section 1210.1, subdivision (a), they only mention participation in a “drug treatment program.”

But Penal Code section 1210.1, subdivision (e)(3)(F), does state that a third violation renders the pre-July 1 probationer “not eligible for continued probation under [Penal Code section 1210.1] subdivision (a).”

That obviously means that on the first and second violations, the probationer was placed on probation under Penal Code section 1210.1, subdivision (a). It seems, therefore, that when (D) and (E) referred to “drug treatment,” this includes within it all applicable attributes of a full Proposition 36 sentence under Penal Code section 1210.1, subdivision (a).

Can the court revoke probation if the person is not dangerous, and is still amenable to treatment? The analysis of this question is essentially the same as the analysis in Part VI, subpart I above, for any Proposition 36 probationer.

## IX. Special Provisions For Parolees.

### A. General Provisions.

The general provisions, below, apply to all parolees, except for three groups.

The first group consists of parolees who have “been convicted of one or more serious or violent felonies [that is, strikes] . . . .”<sup>124</sup> Surely, this refers only to those currently on parole a strike. It would not make sense if this included all people convicted of a remote prior strike, for which they are not presently on parole. Recall, that prior strikes who meet the savings clause are eligible for Proposition 36 probation if convicted of a new NDPO.<sup>125</sup> It would be absurd, therefore, and would violate the purpose and intent of Proposition 36, if, when on parole a non-strike, remote-prior strikers were not be eligible for Proposition 36 parole.

The second group consists of those who, while on parole, commit one or more NDPOs, and are “found to have concurrently committed a misdemeanor not related to the use of drugs, or any felony.”<sup>126</sup> By using the word “commit[s],” rather than the phrase “convicted of,” Proposition 36 makes it clear that this refers to those violations decided solely by, the Board of Prison Terms. This continues prior practice, where, often a parolee who could be charged criminally in court, is, instead, dealt with solely through the parole system.

The third group consists of those parolees who “refuse drug treatment as a condition of parole.”<sup>127</sup>

If the parolee is not disqualified under of the above three conditions, then

“parole may not be suspended or revoked for commission of a [NDPO] or for violating any drug-related condition of parole.”<sup>128</sup>

---

<sup>124</sup> Penal Code section 3063.1, subdivision (b)(1). Serious felonies are listed at Penal Code section 1192.7, subdivision (c). Violent felonies are listed at Penal Code section 667.5, subdivision (c).

<sup>125</sup> See Part III, Subpart C 1, above.

<sup>126</sup> Penal Code section 3063.1, subdivision (b)(2).

<sup>127</sup> Penal Code section 3063.1, subdivision (b)(3).

<sup>128</sup> Penal Code section 3063.1, subdivision (a).

As an additional condition of parole, the parolee must participate in, and “complet[e], an appropriate drug treatment program. Vocational training, family counseling and literacy training can also be imposed as additional parole conditions.<sup>129</sup>

Parolees who are reasonably able to do so can be required to contribute to the cost of their placement in drug treatment programs.<sup>130</sup>

The terms of the treatment program are decided in the same time frame as the terms of the program for a new offender. The drug treatment provider must be notified within seven days, and the provider must develop a program within thirty days. The program must make quarterly reports to the “Parole Authority”<sup>131</sup> and to the “agent [supervising the] parole[e].”<sup>132</sup>

Proposition 36 specifies the maximum length in such a way it is clear that parole cannot be extended to complete the program. Penal Code section 3063.1, subdivision (c)(3) is as follows.

Drug treatment ... as a required condition of parole may not exceed 12 months, provided, however, that additional aftercare services as a condition of probation [sic: should say ‘parole’] may be required for up to six months.

The statute, by specifying that drug treatment and aftercare are “condition[s] of parole” means that they are no longer conditions when parole is otherwise completed.

Violations of program terms are handled the same as program violations for new offenders. If, at any point, the treatment provider provides notice that the parolee is not amenable to that program, but may be amenable to another one, the parole terms can be modified.<sup>133</sup> And, if at any point the program notifies that the

---

<sup>129</sup> Penal Code section 3063.1, subdivision (a).

<sup>130</sup> Penal Code section 3063.1, subdivision (a).

<sup>131</sup> Presumably, this means the Board of Prison Terms. Penal Code section 3040 grants parole power to that Board. See also, “Analysis [of Proposition 36] by the Legislative Analyst” ‘Proposal’ ‘Parole Violators,” Ballot Pamp. Nov. 7, 2000, Gen. Election, p. 24 (referring to the Board of Prison Terms.)

<sup>132</sup> Penal Code section 3063.1, subdivision (c).

<sup>133</sup> Penal Code section 3063.1, subdivision (c)(1).

parolee is not amenable to any treatment, parole can be revoked, unless the parolee proves by a preponderance that there is a suitable drug treatment program.

If a parolee receives drug treatment under these special provisions, and, during that treatment, violates parole by being arrested for a non-NDPO, or a non-drug-related parole condition, parole can be modified or revoked.<sup>134</sup>

Drug-related parole violations for parolees on Proposition 36 treatment are handled similarly to, but more strictly than, drug-related probation violations for new offenders. On a first arrest of such a parolee for a new NDPO, or drug-related violation, if a parole revocation is sought, and the violation is proved, then parole must be revoked if the person is dangerous. If dangerousness is not proved, then parole can be intensified.<sup>135</sup> Only one chance, not two, is given. On a second violation, the parolee is no longer eligible for Proposition 36 parole and can be incarcerated.<sup>136</sup>

Can the parole be revoked, on a first violation, if the parolee is not dangerous and is amenable? The California District Attorneys Association contends that it can be.<sup>137</sup> The CDAA interpretation is incorrect. The analysis is similar to the analysis for a Proposition 36 probationer, as discussed in Part VI, subdivision I, above. Of course, the parolee is not on Proposition 36 probation under Penal Code section 1210.1, subdivision (a). But still, the parolee receives greater protection under the general rule, discussed in Subpart A, above, that parole cannot be revoked for such offenses.<sup>138</sup> Moreover, the policy and intent of Proposition 36, still applies here, to prohibit revocation unless dangerousness or unamenability is proven.

---

<sup>134</sup> Penal Code section 3063.1, subdivision (d)(2).

<sup>135</sup> Penal Code section 3063.1, subdivision (d)(3)(A).

<sup>136</sup> Penal Code section 3063.1, subdivision (d)(3)(B).

<sup>137</sup> CDAA “Implementing Proposition 36,” *supra*, Part VII, subpart D 2, page 45, second paragraph.

<sup>138</sup> Penal Code section 3063.1, subdivision (a).

## **B. Provisions Applicable to People Already on Parole on July 1, 2001.**

This provision<sup>139</sup> applies to a person on parole on July 1, 2001, who has not been convicted of a serious or violent felony. This disability for strikes surely refers only to the current conviction, for which the person is currently on parole. This is fully discussed in the second paragraph of Subpart A, above.

If the parolee is arrested, for a first time for an NDPO, or for a first time, violates a drug-related condition of parole, then the “Parole Authority”<sup>140</sup> can “act[ ] to revoke parole ....” If the Authority does, then parole must be revoked if the violation is proved and a preponderance of the evidence shows that the parolee poses a danger to the safety of others.

If parole is not revoked, then parole conditions can be modified to include participation in a drug treatment program. The terms of the treatment program are the same as were discussed in Subpart A, above.

Can parole be revoked, even if the parolee is amenable and not dangerous? No. See the discussion in Subpart A, above.

If the parolee is arrested for a second time for an NDPO, or violates another drug-related parole condition, and this is again proven, then the parolee is not eligible for continued Proposition 36 parole, and can be reincarcerated.<sup>141</sup>

## **C. Consequences if Parole is Revoked Under These Special Provisions.**

If parole is revoked under the special provisions discussed below, the parolee can be incarcerated according to otherwise applicable law.<sup>142</sup>

---

<sup>139</sup> Penal Code section 3063.1, subdivision (d)(3)(C).

<sup>140</sup> Footnote 131, above explained that this is the Board of Prison Terms.

<sup>141</sup> Penal Code section 3063.1, subdivision (d)(3)(D).

<sup>142</sup> Penal Code section 3063.1, subdivision (d)(1).

## X Deferred Entry of Judgment Under Penal Code Section 1000.

Proposition 36 makes no reference whatever to Penal Code section 1000. Nor did the entire Ballot Pamphlet on Proposition 36 make any reference to P.C. 1000. The question naturally arises, as to whether P.C. 1000 is still alive and well. At this writing, the California Attorney General is considering issuing Opinion 01–207 as to whether P.C. 1000 et seq. has been repealed.<sup>143</sup> CPDA believes that D.E.J. is alive and well. The California District Attorneys Association agrees.<sup>144</sup>

It is, of course, a time–honored rule of statutory construction that repeals by implication are disfavored.<sup>145</sup> Three reasons show that PC 1000 has not been repealed. First, there are at least three types of offenses listed in Penal Code 1000 as D.E.J. offenses that are not NDPOs. Second, there will be some NDPO convicts who will not be eligible for Proposition 36, but will be eligible for D.E.J. Third, there will be some people eligible for both Proposition 36 and P.C. 1000, who will prefer, and must, therefore receive, P.C. 1000 D.E.J.

Pre–plea diversion under Penal Code section 1000.5, has, by the same reasoning, also not been impliedly repealed.

---

<sup>143</sup> Letter, February 14, 2001, Rodney O. Lilyquist, Senior Assistant Attorney General, to Michael Cantrall, California Public Defenders Association.

<sup>144</sup> “Implementing Proposition 36,” *supra*, Part IV, subpart A, page 21, second paragraph.

<sup>145</sup> See, e.g., *People v. Hazelton* (1996) 14 Cal.4th 101 (“To overcome the presumption [against implied repeal] the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together.... [I]mplied repeal should not be found unless ... the later provision gives *undebatable evidence* of an intent to supersede the earlier....” [Internal quote marks and citations omitted]; holding that the initiative version of Three Strikes law did not impliedly repeal the earlier legislative version).

**A. D.E.J. Offenses That May Not Be NDPOs.**

The following offenses are listed in P.C. 1000, but may not be NDPOs.

- Possession of toluene, or its equivalent, with the intent of using it for intoxication, or knowingly using it to become intoxicated, in violation of Penal Code section 381. Toluene, an ingredient in many glues, paints, solvents, and similar items, is not listed by name in any of the Schedules in the Uniform Controlled Substances Act.
- Public intoxication in violation of Penal Code section 647, subdivision (f), if the intoxicant is a controlled substance.
- NDPOs combined with a non-drug related misdemeanor. For example, a person guilty of simple drug possession and petty theft are not eligible for Proposition 36, but are eligible for P.C. 1000.

**B. NDPO Convicts Who Are Not Eligible For Proposition 36 Sentencing.**

There are two groups of people who commit an NDPO and are not eligible for Proposition 36 sentencing, yet are eligible for PC 1000 D.E.J.

The first group consists of prior strikers who have remained felony-free for five years, but who, during those five years, committed a misdemeanor involving physical injury, or the threat thereof. Those people are not eligible for Proposition 36, because of the misdemeanor, but are eligible for P.C. 1000.<sup>146</sup>

---

<sup>146</sup> Compare Penal Code section 1210.1, subdivision (b)(1) [disqualifying prior strikers who have a misdemeanor involving injury or threat thereof in the last five years], with Penal Code section 1000, subdivision (a), items (1) to (6) [containing no such disqualification]. See also *People v. Davis* (2000) 79 Cal.App.4th 251 [93 Cal.Rptr.2d 905] (prior strike did not make defendant ineligible for P.C. 1000 deferred entry of judgment).

The second group consists of those people who commit both an NDPO and a non-NDPO, where the non-NDPO is a P.C. 1000 offense.<sup>147</sup>

It is also theoretically possible, that a person could be found ineligible for Proposition 36 sentencing because of gun “use,” but found eligible for P.C. 1000 deferred entry of judgment.<sup>148</sup>

**C. People Who Are Eligible and Suitable For Both Proposition 36 and P.C. 1000, Should, On Request, Be Placed In the Deferred Entry of Judgment, or Pre-Plea Diversion, Program.**

Even though the D.E.J., or the pre-plea diversion program<sup>149</sup> must last at least twice as long as the Proposition 36 program,<sup>150</sup> there will still be people eligible for both programs who prefer D.E.J. or pre-plea diversion.

Since P.C. 1000 has not been affected by Proposition 36, these people should receive D.E.J., or pre-plea diversion, just like before. The California District Attorneys Association’s position on D.E.J. and Proposition 36, essentially agrees.<sup>151</sup>

The provisions of Proposition 36 primarily deal with sentencing. P.C. 1000 Deferred Entry of Judgment comes before sentencing. Only if an eligible person refuses P.C. 1000, is found unsuitable by the court, or fails D.E.J., is the question of sentence ever reached.

The primary group that will prefer PC 1000 are those who will suffer unduly by having a drug conviction on their record while they go through drug treatment. A guilty plea under P.C. 1000 “shall not constitute a conviction for any pur-

---

<sup>147</sup> See Subpart A above, for a list of possible such offenses..

<sup>148</sup> See Part III, above, on “Gun ‘use’ during certain NDPOs.”

<sup>149</sup> Penal Code section 1000.5

<sup>150</sup> D.E.J. must last 18 to 36 months: Penal Code section 1000.2, third unnumbered paragraph. Proposition 36 treatment can only last up to 12 months, with up to six months aftercare.

<sup>151</sup> CDAA, “Implementing Proposition 36,” *supra*, Part IV, subpart A, page 21, second paragraph.

purpose” unless the person fails the program.<sup>152</sup> (Even under P.C. 1000, however, the arrest must be reported for peace officer applications.<sup>153</sup>) Proposition 36, on the other hand, requires a full conviction.<sup>154</sup> Even after the Proposition 36 case is “dismissed,” it remains on the person’s record for many purposes.<sup>155</sup>

This can be of critical importance to such people as (1) job seekers (2) college applicants and students, (3) seekers of licenses and certificates, (4) seekers of certain federal student and other loans and many other federal benefits,<sup>156</sup> and many other people as well. For such people, being able to answer “no” to questions about convictions on applications and questionnaires can be critical. These are among the people that PC 1000 was intended to benefit. The voters, in passing Proposition 36, did not intend to harm these people.

It makes perfect sense that the drafters of Proposition 36 left P.C. 1000 in place for these people, when eligible. Most people who will be unduly affected will be true first offenders, the very people that we for whom we most want full rehabilitation. These are also the very people for whom our courts have repeatedly said, P.C. 1000 is specifically intended.<sup>157</sup> Proposition 36 did not intend to diminish the extra rehabilitation that P.C. 1000 provides for this special group.

It furthers justice, for our courts to continue to deem such people, and any others who qualify, to be eligible for D.E.J., and to let them realize their full potential, along with their full rehabilitation. The extra length of treatment permitted under P.C. 1000 provides an extra margin of certainty that full rehabilitation has been achieved. This is commensurate with the greater relief that P.C. 1000 may afford to the defendant.

---

<sup>152</sup> Penal Code section 1000.1, subdivision (d).

<sup>153</sup> Penal Code section 1000.4, subdivision (b).

<sup>154</sup> Penal Code section 1210.1, subdivision (a).

<sup>155</sup> Penal Code section 1210.1, subdivision (d).

<sup>156</sup> See, e.g., 20 U.S.C.S. § 1091(r)(1) (student loans).

<sup>157</sup> See, e.g., *People v. Terry* (1999) 73 Cal.App.4th 661, 664 [86 Cal.Rptr.2d 653] (“The ... objective of [D.E.J.] is to permit ‘the courts to identify the experimental or tentative user before he becomes deeply involved with drugs, to show him the error of his ways by prompt exposure to educational and counseling programs..., and to restore him to productive citizenship without the lasting stigma of a criminal conviction ....” Citation and quotation marks omitted]

## **XI. Requests to Set or Continue a Case Until After July 1.**

Because it is the date of conviction that triggers Proposition 36, some people who commit NDPOs before July 1, 2001, will ask for their cases to be set or continued until after July 1. In ruling on such requests, the court should consider the policies that disfavor continuances, and weigh them against the policies behind Proposition 36. Increasingly, as we approach July 1, the policies and intent of Proposition 36 should prevail.

The policy reasons disfavoring continuances are found in Penal Code section 1050, subdivision (a). The heart of those reasons is threefold [paragraphing and bracketed numbers are added for ease of reading]:

Excessive continuances

[1] contribute substantially to [court] congestion and

[2] cause substantial hardship to victims and other witnesses.

[3] [They also] lead to longer periods of presentence confinement for those defendants in custody and the concomitant overcrowding and increased expenses of local jails.

If the defendant is out of custody, then one of the three reasons disfavoring continuances, jail overcrowding, obviously does not apply. If the defendant is in custody, the court should consider whether the defendant is combining the continuance request with a release request with a showing that the client will be entering an appropriate drug treatment program.

Another reason disfavoring continuances, witness-hardship, also will not apply in many drug cases. Many NDPO cases involve only one officer and one chemist, both of whom wrote reports. It is usually not a substantial hardship on these witnesses if the case is continued for two months.

Court congestion also is not be a major factor in Proposition 36 continuances, Many NDPO cases do not involve contested issues of fact, and are obviously going to result in guilty pleas. For example, in many NDPO cases, the drugs were found next to the car's driver, or in the defendant's pocket. The real issues

in such cases will be heard in suppression motions, which can take place while waiting for July 1. Thus, continuances, conditioned on litigating as many motions as possible before July 1, may actually help relieve court congestion.

The policy reasons that disfavor continuances must be compared to the policy reasons behind Proposition 36. Those reasons are found in uncodified sections 2 and 3 of Proposition 36.<sup>158</sup>

The heart of Section 2 of Proposition 36, is the finding that drug treatment is a proven public safety and health measure that saves tax dollars. The heart of Section 3 is the purpose to divert nonviolent drug offenders into community-based drug programs, thereby halting the wasteful expenditure of millions of dollars on incarceration, and enhancing public safety and health. To fulfill these findings and purposes, the court should be liberal in granting continuances.

---

<sup>158</sup> Uncodified sections 2 and 3 of Proposition 36.

## **XII. Jury Trial on Request, and Proof Beyond a Reasonable Doubt, Are Required on Allegations of “Transportation for Other Than for Personal Use,” and For “Gun Use.”**

The discussion below concerns only transportation for personal use. A similar analysis would apply to gun–use questions as well,<sup>159</sup> but that analysis would be complicated by the many statutes that already govern firearm use.

A person convicted of transportation of drugs is eligible for Proposition 36 sentencing, if the transportation was for “personal use.”<sup>160</sup>

Until Proposition 36, the statutes proscribing transportation did not include a phrase such as “for other than personal use.”<sup>161</sup> Before Proposition 36, the general rule had been that where the statute does not require it, then the intended use of the drugs is not an element of the transportation charge.<sup>162</sup>

---

<sup>159</sup> Penal Code section 1210.1, subdivision (b)(3), discussed above, disqualifies persons who, during certain drug crimes, uses a gun.

<sup>160</sup> Penal Code section 1210.1, subdivision (a). See Part II A, above.

<sup>161</sup> These statutes, all from the Health and Safety Code, include the following.

- Section 11352, subdivision (a) (covering, most drugs, including heroin and cocaine),
- Section 11360 (covering marijuana and concentrated cannabis),
- Section 11379 (covering, e.g. amphetamines and methamphetamines),
- Section 11379.5 (covering, e.g., PCP),
- Section 11391 (e.g. certain mushrooms).

<sup>162</sup> See, e.g., *People v. Rogers* (1971) 5 Cal.3d 129, 135 [95 Cal.Rptr. 601, 486 P.2d 129] (the statute proscribing transportation of marijuana is not limited to transportation for any particular purpose); accord *People v. Eastman* (1993) 13 Cal.App.4th 668, 673 – 677 [ 16 Cal.Rptr.2d 608] (the statute proscribing transportation of methamphetamine does not requiring an intent to transfer possession); See generally, Witkin & Epstein, *California Criminal Law* (3d ed. 2000), Ch. VII, § 95.

Some statutes, however, have always required the prosecution to prove the purpose of the transportation. Health and Safety Code sections 11352, subdivision (b), 11379, subdivision (b), and 11379.5, subdivision (b), all require the prosecution to prove that the transportation, between noncontiguous counties, was for purpose of sale.

The statutes proscribing transportation, however, generally, do not distinguish between whether the transportation is for personal use or for some other use.<sup>163</sup> (Exceptions are the statutes that proscribe transportation between noncontiguous counties for sale, and transportation of large quantities of certain drugs to conceal certain facts and evade certain reporting requirements.<sup>164</sup>) The intended use of the drugs is, therefore, in most cases not an element of the transportation charge.<sup>165</sup> Proposition 36 is silent on how it will be determined whether the transportation was for personal use, and therefore how it will be determined whether or not the defendant is eligible for Proposition 36 probation.

---

<sup>163</sup> These statutes, all from the Health and Safety Code, include the following.

- Section 11352, subdivision (a) (covering, most drugs, including heroin and cocaine),
- Section 11360 (covering marijuana and concentrated cannabis),
- Section 11379 (covering, e.g. amphetamines and methamphetamines),
- Section 11379.5 (covering, e.g., PCP),
- Section 11391 (e.g. certain mushrooms).

<sup>164</sup> Statutes from the Health and Safety Code proscribing transportation between noncontiguous counties for sale include to following.

- Section 11352, subdivision (b) (covering, most drugs, including heroin and cocaine),
- Section 11379, subdivision (b), (covering, e.g. amphetamines and methamphetamines),
- Section 11379.5, subdivision (b) (covering phencyclidine).

Health and Safety Code section 11370.9 subdivisions (b) and (c) proscribe transportation or large amounts of some drugs to evade reporting and other requirements.

<sup>165</sup> *People v. Rogers* (1971) 5 Cal.3d 129, 135 [95 Cal.Rptr. 601, 486 P.2d 129] (construing statute proscribing transportation of marijuana as not being limited to transportation for any particular purpose); accord *People v. Eastman* (1993) 13 Cal.App.4th 668, 673 – 677 [ 16 Cal.Rptr.2d 608] (construing statute proscribing transportation of methamphetamine as not requiring an intent to transfer possession at the end of the transportation); see generally, Witkin & Epstein, California Criminal Law (2nd Ed.), § 1011 “Transportation [of drugs].”

This issue is not answered by the existing P.C. 1000 diversion precedent of *People v. Williamson*.<sup>166</sup> *Williamson* considered a similar problem, but in a very different statutory context. Under P.C. 1000, cultivation of marijuana is an eligible offense, if the marijuana is for personal use. But the underlying statute, Health and Safety Code section 11358, only outlaws cultivation, and does not speak about the marijuana's intended use.

*Williamson* held that the intended use of the marijuana is an "operative fact," and its determination is a "judicial function."<sup>167</sup> The *Williamson* court then looked at P.C. 1000 "to find a place for the exercise of this function." The court concluded that this must be done by the trial court "as a part of the diversion hearing conducted pursuant to Penal Code section 1000.2."<sup>168</sup>

Proposition 36 is different from P.C. 1000. The determination of eligibility for Proposition 36 treatment is a sentencing matter, and arises after a plea or jury verdict of guilty.<sup>169</sup> Thus, a defendant must receive Proposition 36 probation without reference to the means by which guilt is determined, and jury trials are permitted. Therefore, the *Williamson* analysis, which depended on the defendant being precluded from having a jury trial, does not apply to Proposition 36.

The provision of Proposition 36 that names as an NDPO the "transportation of drugs for personal use" has one of two effects. Either it creates a penalty provision, or, as the California District Attorneys Association asserts (discussed below), it creates a new substantive crime.

A penalty provision is a provision that does not create a substantive offense, or divides a statute into degrees, but, instead, "prescribes the circumstances under which a person convicted of [a substantive offense] will be subject to a [different penalty]."<sup>170</sup>

---

<sup>166</sup> *People v. Williamson* (1982) 137 Cal.App.3d 419 [187 Cal.Rptr. 107].

<sup>167</sup> *People v. Williamson, supra*, 137 Cal.App.3d at 422.

<sup>168</sup> *People v. Williamson, supra*, 137 Cal.App.3d at 422.

<sup>169</sup> See Subpart II A, above.

<sup>170</sup> *People v. Bright* (1996) 12 Cal.4th 652, 656 [49 Cal.Rptr.2d 732, 909 P.2d 1354] (deciding that the phrase "willful, deliberate, and premeditated" in Penal Code section 664, the attempted murder statute, did not create a substantive offense of first degree attempted murder, but, instead, merely described the circumstances under which attempted murder carried a greater base term; accordingly, the court determined that the phrase is merely a penalty provision).

The characteristics of a penalty provision are set out in the recent California Supreme Court case of *People v. Bright*, as follows:

A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged. [Citations omitted.] The jury does not decide the truth of the penalty allegation until it first has reached a verdict on the substantive offense charged.<sup>171</sup>

*Bright* makes it clear that the truth of a penalty provision is decided by the jury.

Although the penalty provision in *Bright* (for attempted murder that was willful, deliberate and premeditated) was, in that case, one that increased punishment, increased punishment is not a required characteristic of a penalty provision. It is sufficient that the penalty provision does what occurs in the case of Proposition 36: makes an alternative form of probation mandatory. In the Proposition 36 alternative form of probation, drug treatment is required, special provisions exist for violations of probation, and special dismissal provisions exist. This is sufficient for a penalty provision.

The California District Attorneys Association (CDAA) states that the “personal use” provision has created a new substantive offense. The Association’s paper, “Implementing Proposition 36,” Part II C, “Transportation for Personal Use,” discusses, in two paragraphs, the “the crime of ‘transportation for personal use of a controlled substance.’”<sup>172</sup>

Whether the “personal use” issue creates a penalty provision, as discussed above, or is a new substantive offense, as stated by CDAA, under either analysis the defendant is entitled to a jury trial and proof beyond a reasonable doubt.

---

<sup>171</sup> *People v. Bright, supra*, 12 Cal.4th at 661. See also *People v. Garcia* () 63 Cal.App.4th 820, 829 (citing *Bright*, paraphrasing this quote, and describing these as the basic characteristics of a penalty provision).;

<sup>172</sup> CDAA, “Implementing Proposition 36,” *supra*, page 5, paragraphs 1 and 2.

The CDAA analysis also seems to place the burden of proof on this issue squarely with the prosecution. The CDAA analysis suggests that “[I]n some instances,” to “[n]egat[e] a defense effort to bring a drug transportation case within the ... Proposition 36,”<sup>173</sup> the following pleading language can be used.

It is further alleged that in the commission of the above offense the defendant did not transport the controlled substance for personal use within the meaning of Penal Code 1210(a).<sup>174</sup>

CPDA agrees with this pleading suggestion; but CDAA, by suggesting that this pleading only be used “in some cases,” does not go far enough. Instead, whether this is a penalty provision or a new crime, a pleading like the one CDAA suggests must be used in all cases where the prosecution contends that the defendant did not transport the drug for personal use.

Since Proposition 36 has created either a penalty provision or a new substantive crime, the situation becomes like the difference between pleading simple drug possession, and drug possession with the intent to sell. In such a case, if there is no allegation of intent to sell, then the jury can only convict the defendant of simple possession. Or, as with the penalty provision for attempted murder, in the *Bright* case, if there is no allegation of willful, deliberate and premeditated attempted murder, the jury can only convict of simple attempted murder.<sup>175</sup>

Likewise, if the jury does not decide that “the defendant did not transport the controlled substance for personal use,” then what remains is that the defendant did transport the controlled substance for personal use. “Due process of law requires that an accused be advised of the charges against him ...”<sup>176</sup> See also the recent United States Supreme Court case of *Apprendi v. New Jersey*.<sup>177</sup> In *Apprendi*, the U.S. Supreme Court held that the constitution requires that the jury assess the facts of current charges that increase the range of penalties to which the defendant is exposed.

---

<sup>173</sup> CDAA, “Implementing Proposition 36,” *supra*, page 5, paragraph 3.

<sup>174</sup> “Implementing Proposition 36,” *supra*, page 5, paragraph 3.

<sup>175</sup> *People v. Bright*, *supra*, 12 Cal.4th 652; Penal Code section 664 (attempts, including attempted murder).

<sup>176</sup> Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Ch. XII, Pretrial Proceedings, § 177 [Requisites of Due Process], quoting *In re Hess* (1955) 45 Cal.2d 171, 175 [288 P.2d 5].

<sup>177</sup> *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435

CPDA also agrees with what CDAA seems to be saying by its suggested language, that the burden of proving this new substantive crime must rest with the prosecution. See Evidence Code section 520, which places on “[t]he party claiming that a person is guilty of a crime ... the burden of proof on that issue.” This is true whether the personal use provision creates a penalty provision or a new crime. Likewise, *Apprendi* held that facts that increase the range of penalties to which the defendant is exposed must be proven beyond a reasonable doubt.<sup>178</sup> This is true, whether we have a penalty provision or a new crime.

The defendant’s intent in transporting drugs is an evidentiary issue, like the evidentiary issue of the intent to sell. The intent is manifested by the circumstances connected with the offense.<sup>179</sup> This is something that the prosecution must prove to the jury, beyond a reasonable doubt, to show these “circumstances.” Again, this is true regardless of whether a penalty provision or a new crime has been created. As with the intent to sell, if possession is proven, but the prosecution’s claimed intent is not proven, then the defendant is guilty only of the lesser offense of transportation for personal use.

The parties and the court are not always required to go through a jury trial on all of the issues in the case. For example, the defendant may concede, in opening statement, or by a pretrial stipulation,<sup>180</sup> that the defendant was transporting, and was in possession. In that case, the only contested issue for the jury would be for the prosecution to attempt to prove, beyond a reasonable doubt, that the defendant did not transport the controlled substance for personal use.

---

<sup>178</sup> *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 490.

<sup>179</sup> Penal Code section 21: “The intent or intention is manifested by the circumstances connected with the offense.”

<sup>180</sup> *People v. Hall* (1980) 28 Cal.3d 143, 152 – 153 [167 Cal.Rptr. 844, 616 P.2d 826], (the prosecution must accept the defendant’s stipulation to an element of the charge, but evidence of that element can only be introduced if it has other relevance). *Hall* was partially abrogated by Proposition 8, in 1982, and partially overruled in *People v. Valentine* (1986) 42 Cal.3d 170, 177 [228 Cal.Rptr. 25, 720 P.2d 913], in regard to prior felony convictions only.

### **XIII. Substance Abuse Treatment Funding, and Implementation.**

Proposition 36 adds a new Division 10.8 to the Health and Safety Code, sections 11999.4 to 11999.13. That new Division creates, within the State Treasury, a “Substance Abuse Treatment Fund (S.A.T.F.).”<sup>181</sup>

Once Proposition 36 passed, last November, the first \$60 million was appropriated from the General Fund to the S.A.T.F., for the 2000 – 2001 fiscal year.<sup>182</sup>

On July 1 of each fiscal year, until the 2005 – 2006 fiscal year, an additional \$120 million is continuously appropriated from the General Fund to the S.A.T.F. Additional monies can also be appropriated.<sup>183</sup>

The Secretary of the Health and Human Services Agency (HHS) must distribute this money annually to HHS, and to the Counties. The money is to cover the costs of (a) drug treatment programs, (b) vocational training, family counseling and literacy training, and (c) additional costs. The additional costs can include probation department, court monitoring, and miscellaneous costs. However, the monies cannot be used for “drug testing services of any kind.”<sup>184</sup>

Provisions are also made for annual reports at the state and local level, for audits, and for outside evaluations.<sup>185</sup>

The period between November 2000 and July 1, 2001, is an implementation period. The California Department of Alcohol and Drug Programs (ADP) has promulgated emergency regulations, at CCR, tit. 9, §§ 9500 to 9545. These regulations require each county to set up a Trust Fund for Proposition 36 monies, and to designate a County Lead Agency. The Lead Agency is responsible for coordinating the development of a county plan to implement Proposition 36, and for related functions.

- \* -

---

<sup>181</sup> Health and Safety Code section 11999.4.

<sup>182</sup> Health and Safety Code section 11999.5.

<sup>183</sup> Health and Safety Code section 11999.5.

<sup>184</sup> Health and Safety Code section 11999.6.

<sup>185</sup> Health and Safety Code section 11999.9 to 11999.12.

The primary author of this paper is Garrick Byers, Senior Defense Attorney, Fresno County Public Defenders Office. Extensive editorial and content assistance was provided by the CPDA Proposition 36 Committee.

A portion of Part X, Subpart A has been adopted from a letter by Michael P. Judge, Los Angeles County Public Defender to Deputy Attorney General Jonathan R. Davis, dated March 13, 2001, concerning prospective Attorney General Opinion No. 01-207 on Deferred Entry of Judgment.

An electronic version of this document is available in Adobe Acrobat format, at CPDA's public website area at the following link on the Internet:

<http://www.cpda.org/PublicArea/CPDAProp36Analysis.pdf>

-----

**California Public Defenders Association**

**3273 Ramos Circle, Suite 100**

**Sacramento, California 95827**

<http://www.cpda.org/PublicArea/HomePublic.html>

Inquiries regarding any aspect of this publication may be directed to CPDA at the following phone numbers: 916-362-1686 x 303. Fax: 916-362-5498.

Inquiries via email may be sent to: [cpda@cpda.org](mailto:cpda@cpda.org)

- \* -