A DEFENSE LAWYER'S GUIDE TO PROPOSITION 36

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Introduction.

For decades, the California criminal justice system has been battered and bruised by the initiative process. Proposition 8 gutted the state constitution as an independent bulwark against unreasonable searches and seizures, Proposition 115 turned preliminary hearings into shadow dances, Three Strikes filled our state prisons with drug offenders, and a succession of death penalty initiatives gave California the longest death row in America. But in November of 2000, the initiative process finally gave the criminal defense bar something to cheer about. The enactment of Proposition 36, by an overwhelming margin of 61%, marks a significant turning point in California policy governing drug offenders. The persistent abuse of drugs will henceforth be regarded as a medical problem to be treated, rather than a ticket for an endless carousel ride in and out of jails and prisons.

The most important provisions in Proposition 36 are the statements that define this new policy. As every component of the criminal justice system struggles to implement the monumental changes that the initiative mandates, we will need to constantly remind ourselves what we are setting out to achieve. In Section 2(b), the People of the State of California find and declare that "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." The math that supports this finding is disarmingly simple. It costs California taxpayers upwards of $25,000 per year to incarcerate a drug offender. We can provide excellent community-based drug treatment at an annual cost of

less than $7,000 per person. Currently, California is imprisoning drug offenders at the highest rate in the nation. In 1999, a total of 12,749 Californians were sent to prison for drug possession offenses. The average rate of drug offender incarceration in the United States in 1996 was 44.6 per 100,000 population. In California, the 1996 rate was 114.6.

These numbers also define the magnitude of the implementation effort Proposition 36 will require. Proposition 36 was modeled on a 1996 Arizona enactment known as Proposition 200. In 1996, their drug offender incarceration rate was 28.3 per 100,000 population. Arizona also had a satutorily mandated limit on the caseload of probation officers of 60 to 1. Many California counties have probation caseloads in excess of 200 to 1. Proposition 36 will not only require the creation of as many as 36,000 new treatment slots, to be added to the 80,469 publicly funded treatment slots currently available, but the hiring of hundreds of additional probation officers, who are entrusted by the initiative with the responsibility of monitoring the defendant's progress in the designated treatment program.

The initiative appropriates $60 million for a Substance Abuse Treatment Trust Fund for the current fiscal year, then $120 million for each of the next five fiscal years. The funds can be allocated to treatment programs, as well as reimbursement of probation department and court costs. Thus, there will be lots of political manuevering as counties line up for their slice of the pie. It is already apparent that the pie won't be big enough, and the legislature may have to pony up supplemental funds. There should be more than enough savings in correctional expenses to amply fund the program, but prying it loose from California's correctional budgets will require some real political muscle. The "Achilles' Heel" that could scuttle Proposition 36 may ultimately be a Governor who is so indebted to the Correctional Officers' Union that he lacks the

motivation to make it work. We will need to keep Governor Heel's feet to the fire!

One restriction on use of the Drug Treatment Trust Fund which engendered controversy during the campaign was the prohibition on funding "drug testing services of any kind." This is not a prohibition of drug testing, which is an essential component of any successful treatment regimen. It simply requires that the testing be funded from sources other than the Drug Treatment Trust Fund, a precautionary measure to prevent treatment funds being drained off to finance massive drug testing by probation departments. There should be little reason for probation departments to do drug testing, since they will not have responsibility for treatment decisions under Proposition 36. One of the key provisions in the initiative vests the determination of whether a defendant is "amenable to treatment" in the treatment program, *not* the probation department. "Amenabilty to treatment" is defined as a *medical* determination, to be made by the treatment provider.

Sentencing Provisions

The sentencing provisions of Proposition 36 will appear in Sections 1210 and 1210.1 of the California Penal Code. Proposition 36 mandates a sentence of probation for every eligible defendant convicted of a "non violent drug possession offense," which is defined to include possession or transportation for personal use of any controlled substance, or being under the influence of a controlled substance in violation of Health & Safety Code §11550. A condition of probation is participation in a treatment program for a period of up to twelve months, with a possible addition of six months of "aftercare." Probation can be revoked for failure in treatment only if the *treatment provider* notifies the probation department that the defendant is unamenable to any form of treatment.

If while on treatment the defendant is rearrested for another non-violent drug possession offense, revocation of probation is not automatic. Upon the first such arrest, probation can be revoked only if the prosecution proves the defendant is a danger to others. Upon the second such arrest, probation can be revoked only if the prosecution proves *either* that the defendant is a danger to others *or* that he is not amenable to drug treatment. Upon the third such arrest, probation can be revoked upon proof of just the probation violation. Thus, the initiative recognizes that relapse is not unusual, and even repeated failures are not justification to terminate treatment.

If probation is revoked, the defendant is subject to the otherwise applicable sentencing provisions, including incarceration. The sentencing of those whose probation is revoked should not be confused with the limit of 30 days in jail which Proposition 36 imposes for defendants who have previously been convicted of two separate drug possession offenses, and twice participated in treatment programs mandated by the initiative. These defendants won't be placed on probation at all, if the judge makes a finding they are unamenable to any and all forms of available drug treatment. But rather than a long term of imprisonment, the initiative limits their incarceration to thirty days. They will still be stuck in the "revolving door", but the initiative makes the door revolve faster, as it does for incorrigible drunks.

If a defendant successfully completes the mandated treatment program, his conviction will be set aside and the indictment or information dismissed. The arrest is expunged, and the defendant is lawfully permitted to indicate that he was not arrested or convicted for the offense that triggered his treatment. It will still be disclosed, however, in response to a peace officer application request or law enforcement inquiry.

Comparing Penal Code §1000.

Defense lawyers representing drug clients after July 1, 2001, which is when Proposition 36 takes effect (the measure applies only prospectively), will want to carefully compare the advantages and disadvantages of Proposition 36 with the existing provisions for diversion or deferred entry of judgment under Penal Code §1000 *et seq.* The biggest difference, of course, is that Proposition 36 is available to all eligible defendants *after conviction*, even if they assert their right to trial by jury. Penal Code §1000 requires a plea of guilty and a waiver of time limits for entry of judgment. There is a special provision for drug court programs to admit defendants prior to their guilty pleas, which is the way the diversion provisions operated prior to 1997, but the same eligibility criteria apply, and most drug courts still insist upon the entry of a guilty plea as a prerequisite to participation. In comparing Proposition 36 to Penal Code §1000, four questions should be asked:

[1] Are there defendants who are NOT eligible for Penal Code §1000 diversion or deferred entry of judgment who will be eligible for Proposition 36?

The answer, of course, is yes -- many. Penal Code §1000 is limited to first offenders. But prior convictions for drug offenses, even sales, will not disqualify a defendant under Proposition 36. The *only* prior conviction that excludes a defendant under Proposition 36 is one for a serious or violent felony listed in Penal Code sections 667.5(c) or 1192.7. But even that exclusion can be avoided if the defendant has remained free of all but drug possession offenses for five years. Thus, the good news for some “three strikes” offenders is that Proposition 36 can save them from three strikes if their third strike is a drug possession offense and their prior strikes are more than five years old. There are currently 230 inmates serving life sentences in California whose third

strike was a drug possession offense. Proposition 36 promises no more.

Defendants who are *charged* with other non-drug offenses are not eligible for Penal Code §1000. Prosecutors can exclude a defendant by simply "tacking on" another charge. But under Proposition 36, eligibility turns on the offenses of which the defendant is convicted, regardless of what he was charged with. Thus, a defendant charged with burglary and possession of the heroin found in his pocket when he was arrested is ineligible for diversion, even if the burglary charge is not supported by strong evidence. If he goes to trial and is acquitted of the burglary, but is convicted of the heroin possession, he will qualify for the probation mandated by Proposition 36.

Transportation of drugs is not an eligible offense under Penal Code §1000. But even a defendant convicted of transportation may be eligible for Proposition 36 if the transportation was "for personal use." This one is a bit tricky, since there is no such offense as "transportation for personal use." The defendant convicted of transportation will have to have a finding made that the transportation was for personal use. Still to be sorted out is the question of whether the finding should be made by the judge or by the jury. If the defendant pleads to transportation, the plea should be conditioned upon a finding that the transportation was for personal use.

[2] Are there defendants who will be eligible for Penal Code §1000 diversion or deferred entry of judgment who will NOT be eligible for Proposition 36?

Surprisingly, yes. The list of eligible offenses for Penal Code §1000 includes some crimes *other* than possession of drugs or being under the influence, the offenses to which Proposition 36 applies. Cultivation of marijuana for personal use [other then medical use exempted by Proposition 215], for example, in violation of Health and Safety Code §11358. Proposition 36 specifically excludes manufacture or production of controlled substances. Another example is

forging or altering a prescription in violation of Health and Safety Code §11368.

Penal Code §1000 also includes misdemeanor offenses like possession of drug paraphernalia [H.&S. Code §11364] or presence where drugs are being used [H.&S. Code §11365]. Proposition 36 provides that conviction of these offenses *along with* a conviction of possession does not defeat the defendant's eligibility for Propostion 36, but what if the defendant is charged with one of these misdemeanors alone? Under that circumstance, they would be eligible for Penal Code §1000, but not eligible for Proposition 36.

There are also some exclusions from Proposition 36 that would not affect a defendant's eligibility for Penal Code §1000. Proposition 36 excludes a defendant who possesses or is under the influence of specified drugs [cocaine, heroin, methamphetamine and PCP] "while using a firearm." Note that the use of the firearm does not itself have to be unlawful. If it were, and the defendant was charged with the firearms offense, he would be ineligible under Penal Code §1000 as well. But if the use of the firearm were not itself unlawful, there would be no reason to exclude the defendant from diversion or deferred entry of judgment.

Thus, Penal Code §1000 will not be completely supplanted by Proposition 36. There will be some defendants who qualify for diversion or deferred entry of judgment who will not be eligible for Proposition 36. Most defendants who are eligible for diversion or deferred entry of judgment, however, will also be eligible for Proposition 36. Conceivably, they could do both! If they fail in diversion, and are thus convicted of a charge of drug possession or being under the influence, they would still qualify for the probation mandated by Proposition 36.

[3] Is there any any rational reason for a defendant who is eligible for both to prefer diversion or deferred entry of judgment under Penal Code §1000 *over* Proposition 36?

In most cases, there would not be. Penal Code §1000 is more onerous than the treatment mandated by Proposition 36. It can last up to three years, with an minimum of 18 months. The maximum treatment period under Proposition 36 is twelve months, with the possibility of six more months of aftercare tacked on. Under Penal Code §1000, the defendant's liberty is subject to the discretion of prosecutors or probation officers, either of whom can initiate termination if, in their judgment, the defendant is not performing satisfactorily. Under Proposition 36, revocation other than pursuant to subsequent arrest requires notification *by the treatment provider* to the probation department that the defendant is unamenable to treatment.

There may be one significant advantage to Penal Code §1000, however. Even if the defendant has entered a plea of guilty, he is not yet *convicted* while undergoing treatment in a diversion or deferred entry of judgment program. Penal Code §1000.1(d) provides "A defendant's plea of guilty . . . shall not constitute a conviction for any purpose unless a judgment of guilty is entered." Thus, if a defendant faces immediate collateral consequences from a conviction, such as loss of a job or some disciplinary proceeding, Penal Code §1000 may be preferable to Proposition 36. While the conviction can be expunged under Proposition 36, the defendant remains a convicted felon during the period he is on probation and undergoing treatment. Under Penal Code §1000, the defendant can avoid conviction altogether. Unfortunately, that won't do him any good when it comes to the federal Immigration authorities. The I.N.S. utilizes the plea itself as a basis for immediate action, without waiting for a conviction. But a defendant might be spared other collateral consequences by opting for Penal Code §1000 rather than Proposition 36.

The remaining question may be the most significant of all. Some prosecutors have voiced

concerns that Proposition 36 will dramatically increase the number of cases that have to be tried. If defendants are eligible for Propostion 36 after conviction, does a defendant have anything to lose by rolling the dice and going to trial first? If he wins an acquittal, he can walk away without every going through the treatment regimen. If he loses, he's still entitled to probation.

[4] If a defendant is eligible for Proposition 36, is there any rational reason for him to plead guilty?

Even under Proposition 36, there will be real advantages to pleading early, especially if there's not much prospect for an eventual acquittal. The biggest advantage a plea will offer is prompt disposition. The defendant can start putting his life back together. Waiting for a trial may mean putting your whole life on hold for more than twelve months, when you could be finished with the treatment program by then. If a defendant can't make bail pending trial, an immediate plea is a ticket out of jail and into a treatment program. It might even save the expense of bail altogether, if the defendant doesn't qualify for release on recognizance.

These advantages, of course, will require eliminating delays betweeen plea and sentence, and having treatment placements immediately available. Note that Proposition 36 does not require a treatment plan before probation is imposed. Thus, there will be no need for lengthy delays to prepare probation reports before sentencing. The defendant can be immediately released on probation. Then, the probation department has seven days to notify the drug treatment provider designated for treatment, and the treatment program has thirty days to prepare a treatment plan.

To the extent that Proposition 36 removes the pressure to plead guilty to get treatment even though the defendant has a plausible claim of innocence, it's a healthy change. Prosecutors should never have been given the power to coerce guilty pleas by denying access to treatment unless the defendant gives up his right to a jury trial. The initiative will also allow full litigation of suppression motions without imperiling the defendant's right to treatment. Nor can prosecutors coerce a waiver of the right to appeal as quid pro quo for treatment.

The goal of competent defense lawyers is to advance the best interests of their clients, not to throw sand in the gears of the criminal justice system. For most clients, a plea of guilty and immediate sentencing to probation and treatment will be the best possible outcome. For those who have realistic possibility of acquittal, there *should* be a trial. While Proposition 36 may slightly increase the number of trials, as well as the number of appeals, that should not be seen as a disadvantage. It is more accurately perceived as correcting the current imbalance in the scales of justice.

Concerns have been expressed that some prosecutors may seek to subvert Proposition 36 by charging drug defendants with additional non-drug related misdemeanors or felony counts that will render the defendant ineligible, such as resisting arrest or driving with a suspended license. Assuming there is adequate evidence to gain a conviction, Proposition 36 disqualifies any defendant who, in addition to one or more non-violent drug offenses, is convicted in the same proceeding of a misdemeanor not related to the use of drugs or any felony. The term "misdemeanor not related to the use of drugs" is defined to mean a misdemeanor that does not involve simple possession or use of drugs or drug paraphernalia, being present where drugs are used, failure to register as a drug offender, or any activity similar to these activities. If you find

yourself in a county where you believe prosecutors are "tacking on" charges in a conscious effort to subvert Proposition 36, the appropriate response may be a class action to assert the right of defendants to be free of vindictive and selective prosecution.

Parole Provisions.

Proposition 36 is also available to parolees who are charged with violating drug-related conditions of parole, or committing a non-violent drug possession offense while on parole. These provisions are contained in Section 3063.1 of the California Penal Code, and closely parallel the provisions for sentencing of drug offenders. Rather than returning the parole violator to prison, participation in a drug treatment program is added to the conditions for parole.

Conclusion.

To conclude, Proposition 36 promises a major change in the way we do business when it comes to drug offenders. Rather than casualties in a war, it promises to treat our clients like sick people who need medical treatment. But converting the promise to reality will take enormous cooperative effort from many quarters. We need to give this new approach adequate time and funding for implementation. The initiative provides for annual evaluations, and allocates up to $600,000 per year for a long term study by the University of California. There will be lots of other states watching and waiting. As more and more Americans recognize that the "war on drugs" has collapsed in complete failure, they will be looking for other alternatives. California can show the way.

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