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Proposition 36 Eligibility: Are Courts and Prosecutors following or Frustrating the Will of Voters

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TABLE OF CONTENTS

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I. INTRODUCTION

The people typically arrested for simple drug possession are drug users who posses an illegal drug for their own personal use.[1] Since the only person that a drug user hurts through his immediate drug use is himself, possession of a small amount of drugs is a relatively minor offense.[2] In California, simple drug possession has been treated leniently since the early 1970's.[3] Continuing in this tradition, the Substance Abuse and Crime Prevention Act of 2000 ("Proposition 36")[4] mandates probation and drug treatment instead of jail for persons convicted of "nonviolent" drug possession or drug possession for personal use.[5] Proposition 36 applies to any qualifying conviction for nonviolent drug possession.[6] It does not apply to drug users whose drug use endangers public safety or threatens

1. *See, e.g.*, CAL. PENAL CODE § 1210(a) (West Supp. 2004) (characterizing "possession for personal use" as a "nonviolent drug possession offense").

2. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11377 (West 1991 & Supp. 2004) (setting one-year in state prison as the maximum penalty for violation of the offense of "unlawful possession"); *infra* Part II.B (comparing drug diversion with Proposition 36).

3. *E.g.*, *id.* § 11350(d)(1) (recommending, in addition to any other punishment a judge prescribes, a fine or community service for a first offense of drug possession "[e]xcept in unusual cases"); *see also* CAL. PENAL CODE § 1000 (West 1985 & Supp. 2004) (allowing first offenders to receive "drug diversion" instead of a jail or prison sentence for drug possession); *infra* Part II.B (comparing Proposition 36 with drug diversion); Telephone Interview with Stacie Lawson, Deputy District Attorney, Santa Clara County (Nov. 3, 2003) [hereinafter Lawson Interview] (notes on file with *McGeorge Law Review*) (stating that, absent special circumstances, no one convicted of simple drug possession as a first offense would receive prison as a sentence).

4. CAL. PENAL CODE §§ 1210, 1210.1 (West Supp. 2004); CAL. HEALTH & SAFETY CODE §§ 11999.4 - 11999.13 (West Supp. 2004).

5. CAL. PENAL CODE § 1210.1(a) (West Supp. 2004).

6. *See infra* Part II.A (discussing the provisions of Penal Code sections 1210 and 1210.1).

others.[7] This Comment considers whether prosecutors and the courts have fairly administered Proposition 36.

California voters intended Proposition 36 to place drug addicts into community-based treatment, without letting violent or dangerous drug users back onto the street.[8] Proposition 36 grants "diversion" to repeat drug offenders, mandating a sentence of probation instead of incarceration.[9] Under prior law, a drug user was not eligible for diversion after the first offense; repeat drug offenders were sentenced to jail, not drug treatment.[10] By comparison, Proposition 36 makes available county drug treatment programs to habitual drug users, affording them opportunities to recover formerly reserved to first offenders.[11]

However, many people arrested for minor drug possession do not qualify for Proposition 36 diversion, despite the initiative drafters' attempt to include a wide range of minor drug offenses within the definition of a nonviolent drug offense.[12] In spite of varying implementation of Proposition 36 by prosecutors,[13] Proposition 36 interpretation by appellate courts appears to be striking the appropriate balance.[14] Drug offenders walk a fine line depending upon the jurisdiction; a prosecutor may exclude nearly anyone under the right circumstances.[15]

After explaining the specific aspects of Proposition 36, Part II compares the technical framework of Proposition 36 to other drug diversion programs. Part III summarizes arguments for and against Proposition 36. These arguments remain

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7. *See infra* Part V (providing examples of concurrent offenses that disqualify drug offenders from Proposition 36 diversion).

8. *See infra* Part III (comparing the opposing ballot arguments with the statements of purpose and intent underlying the 2000 initiative).

9. Proposition 36, Substance Abuse and Crime Prevention Act of 2000, § 3, Purpose and Intent, subd. (a) [hereinafter Proposition 36], *reprinted in* CAL. DIST. ATTY'S ASS'N, *Implementing Proposition 36*, A-2 (n.d.), *at* http://www.cdaa.org/prop_36.pdf [hereinafter CDAA] ("[t]o divert from incarceration into community-based substance abuse treatment programs nonviolent defendants . . . charged with simple drug possession or drug use offenses.").

10. *See infra* Part II.B (contrasting Proposition 36 with drug diversion under Penal Code section 1000).

11. *See* CAL. PENAL CODE § 1210.1 (West Supp. 2004) (requiring drug treatment for nonviolent drug abusers); CAL. HEALTH & SAFETY CODE §§ 11999.4-11999.13 (West Supp. 2004) (establishing the "Substance Abuse Treatment Trust Fund" enacted by Proposition 36); Telephone Interview with Judy Curry, Deputy Public Defender, Los Angeles County Public Defender's Office (Nov. 13, 2003) (notes on file with *McGeorge Law Review*) (stating that Los Angeles County has the widest sampling of drug treatment programs of any county in the state).

12. *Compare infra* Part III (examining the policy behind Proposition 36), *with infra* Part V (illustrating the problem of eligibility for drug treatment).

13. *See infra* Part IV (outlining the results of the student survey of Proposition 36 eligibility conducted by the author).

14. *See infra* Part V (analyzing the decisions of appellate courts interpreting the eligibility criteria of Proposition 36 and concluding that Proposition 36 is roughly achieving its main purpose of diverting drug offenders out of jail and into treatment).

15. *See infra* Part V.7 (reporting prosecutors' remarks that a concurrent conviction for any misdemeanor offense will disqualify someone under Penal Code section 1210.1(b)(2)).

the basis for appellate interpretation of Proposition 36. Part IV discusses the author's interviews with prosecutors and public defenders. Finally, Part V compares various offenses that either qualify or disqualify an individual for diversion under Proposition 36. The article summarizes Proposition 36 eligibility, and concludes that Proposition 36 does what it promised to do: it provides drug addicts a second chance at treatment rather than sending them to jail or prison.

II. PROPOSITION 36

Proposition 36 makes diversion available to repeat drug offenders, with probation (rather than jail) being the mandatory sentence for a nonviolent drug offense.[16] Those eligible for Proposition 36 receive drug treatment as a condition of probation.[17] Proposition 36 is only available to drug offenders who satisfy the qualifying provisions including conviction of a personal use drug offense,[18] the absence of specific collateral conduct,[19] and the lack of any recent felony on their criminal records.[20] Additionally, the defendant must want to be treated,[21] and must be "amenable" to treatment.[22] Proposition 36 differs from other forms of drug diversion, which are limited to first time drug offenders: a defendant may be eligible for Proposition 36 diversion despite having failed drug treatment for an earlier offense.[23]

A. *How Proposition 36 Works*

Proposition 36 imposes a sentence of probation and drug treatment instead of incarceration for eligible drug offenses.[24] These sentencing provisions apply only to qualifying nonviolent drug users.[25] A "nonviolent drug possession offense" is defined in Penal Code section 1210(a) as:

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16. CAL. PENAL CODE § 1210.1(a) (West Supp. 2004).

17. *Id.* § 1210.1(c).

18. *See id.* § 1210.1(a) (mandating probation for any defendant who is "convicted of a nonviolent drug possession offense" and who is not disqualified by subdivision (b)); *see also id.* (defining "nonviolent drug possession offense").

19. *See id.* § 1210.1(b)(2) (disqualifying persons who are "convicted in the same proceeding of a misdemeanor not related to the use of drugs or any felony"); *see also id.* § 1210.1(b)(3) (excluding anyone who possesses certain controlled substances "[w]hile using a firearm").

20. *See id.* § 1210.1(b)(1) (listing the first of five disqualifying criteria).

21. *See id.* § 1210.1(b)(4) (excluding "[a]ny defendant who refuses drug treatment as a condition of probation").

22. *See id.* § 1210.1(b)(2) (disqualifying persons who are "convicted in the same proceeding of a misdemeanor not related to the use of drugs or any felony").

23. *See infra* Part II.B (comparing Proposition 36 and drug diversion under Penal Code section 1000.1)

24. *E.g.*, *In re* Varnell, 30 Cal. 4th 1132, 1135 (2003).

25. CAL. PENAL CODE § 1210.1(a) (West Supp. 2004) ("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.").

> [T]he unlawful personal use, possession for personal use, or transportation for personal use of any controlled substance identified in [Schedules I-IV of the Controlled Substances Act], or the offense of being under the influence of a controlled substance in violation of Section 11550 of the Health and Safety Code. The term "nonviolent drug possession offense" does not include the possession for sale, production, or manufacturing of any controlled substance ....[26]

Accordingly, *only* defendants who are convicted of *personal use* offenses are eligible for Proposition 36.[27] Furthermore, Proposition 36 incorporates five eligibility requirements that narrow the scope of the program by disqualifying persons who do not meet specific criteria.[28]

The first requirement is the five-year "washout" provision,[29] which excludes certain defendants who have a violent history.[30] These defendants are disqualified from Proposition 36 diversion if (during the previous five years) they either were incarcerated in prison or committed a serious misdemeanor[31] or felony.[32]

The second requirement disqualifies defendants "convicted in the same proceeding of a misdemeanor not related to the use of drugs or any felony."[33] A "misdemeanor not related to the use of drugs" is defined in Penal Code section 1210(d) as "a misdemeanor that does not involve (1) the simple possession or use of drugs or drug paraphernalia, or (2) any activity similar to those listed in paragraph (1)."[34] Although this language suggests a broad base of possible "drug-related" offenses,[35] the implementation of the provision has proven to be quite narrow.[36]

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26. *Id.* § 1210(a).

27. *Id.*

28. *See id.* § 1210.1(b) (listing the qualifying criteria, including violent history, carrying a weapon, and being convicted in the same proceeding of a concurrent offense not related to simple drug use).

29. *Id.* § 1210.1(b)(1).

30. *See id.* (defining violent history as being "convicted of one or more serious or violent felonies in violation of subdivision (c) of Section 667.5 or 1192.7").

31. Defined as a misdemeanor "involving physical injury or the threat of physical injury to another person" *Id.*

32. Other than a nonviolent drug possession offense. *Id.*

33. CAL. PENAL CODE § 1210.1(b)(2) (West Supp. 2004).

34 Id. § 1210.1(d).

35. *See* People v. Canty, 32 Cal. 4ths 1266, 1276 (2004) (outlining the defendant's contention that "driving while under the influence of drugs constitutes an activity *similar to* 'simple possession or use of drugs'" therefore qualifying the defendant for drug treatment) (emphasis added); CAL. PUB. DEFENDER'S ASS'N., *Analysis of Proposition 36*, 22 (2001), *at* http://www.cpda.org/publicarena/CPDAProp36Analysis.pdf [hereinafter CPDA] (suggesting that the interpretation of Penal Code section 1210(d) "should be guided by Proposition 36's purpose and intent"); Appellant's Brief at 15-21, People v. Canty, No. S109537, WL 1918459, (Cal. Jan. 31, 2003)., ((suggesting that driving under the influence of drugs is within the drafters' intent).

36. *See infra* Part V.B (discussing the rationale employed by various courts to exclude facially "drug-related" misdemeanors from Proposition 36 eligibility).

The third classification of ineligible defendants includes those who were "using a firearm" while in possession or under the influence of certain substances.[37] The fourth restriction disqualifies any defendant who refuses drug treatment as a condition of probation.[38] The final criterion disqualifies defendants who are "unamenable to any and all forms of available treatment."[39] Defendants must be found unamenable "by clear and convincing evidence" after suffering two separate Proposition 36 drug convictions and participating in two courses of drug treatment.[40]

B. Proposition 36 Compared to Ordinary Drug Diversion

Proposition 36 is not the first California law to provide drug treatment as an alternative to traditional sentencing. In 1972, California created a program for first-time drug offenders known as drug diversion (Penal Code section 1001) or "deferred entry of judgment" (Penal Code section 1000).[41] Rather than passing through a traditional process of judgment and incarceration, diversion participants receive drug treatment as a condition of probation.[42] Diversion was set up to screen "experimental" users from the criminal justice system and give them an opportunity to rehabilitate or reform.[43] As with Proposition 36 diversion, once a defendant successfully completes drug diversion or deferred entry of judgment,[44] the charges are dismissed and may not be used against the defendant in the future.[45]

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37. CAL. PENAL CODE § 1210.1(b)(3) (West Supp. 2004).

> Any defendant who: (A) While using a firearm, unlawfully possesses any amount of (i) a substance containing either cocaine base, cocaine, heroin, methamphetamine, or (ii) a liquid, non-liquid, plant substance, or hand-rolled cigarette, containing phencyclidine [or] (B) While using a firearm, is unlawfully under the influence of cocaine base, cocaine, heroin, methamphetamine or phencyclidine [is ineligible for probation].

Id.

38. CAL. PENAL CODE § 1210.1(b)(4).

39. *Id.* § 1210.1(b)(5).

40. *Id.*

41. *Id.* §§ 1000-01 (West 1985 & Supp. 2004).

42. *See* William E. Gagen, Jr., *Deferred Entry of Judgment, Diversion, and Preplea Probation Report*, *in* CONTINUING EDUC. OF THE BAR, CALIFORNIA CRIMINAL LAW PROCEDURE & PRACTICE 190 (6th ed., 2002):

> Deferred entry of judgment is the suspension of criminal proceedings for a prescribed time period with certain conditions after a defendant's guilty plea. If the defendant is unsuccessful, criminal proceedings resume, and the defendant, having already pled guilty, is sentenced. If the defendant is successful in complying with the terms of the deferred entry of judgment, the criminal charges are dismissed[,] and the defendant may, with certain exceptions, legally answer that he or she has never been arrested for or charged with the diverted offense.

43. People v. Superior Court (On Tai Ho), 11 Cal. 3d 59, 61 (1974) (finding that "diversion [under Penal Code section 1000] permits 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 in his own community, and to restore him to productive citizenship without the lasting stigma of a criminal conviction").

44. CAL. PENAL CODE § 1000.4 (West 1985 & Supp. 2004) ("Upon successful completion of a deferred

While Proposition 36 is often administered through the same "drug court" as drug diversion,[46] it serves a much larger number of offenders because everyone who commits an eligible offense automatically receives Proposition 36 diversion, regardless of prior drug convictions.[47] By comparison, only one in twenty drug offenders is eligible for traditional diversion, which is only available to first offenders.[48] Under drug diversion, the defendant enters a guilty plea but is not *convicted* until he or she fails to complete the drug treatment program.[49] Thus, treatment in traditional drug diversion is given *in lieu of* criminal adjudication.[50] However, under the typical Proposition 36 disposition, a defendant is immediately sentenced to probation once he or she pleads guilty to the nonviolent drug possession charge,[51] and the standard jail or prison sentence is suspended pending successful completion of drug treatment and all other terms of probation.[52]

In both Proposition 36 diversion and drug diversion under Penal Code section 1001, the court may bifurcate the proceedings in order to handle the drug offense separately from other charges.[53] However, under Proposition 36, any

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entry of judgment program, the arrest upon which the judgment was deferred shall be deemed to have never occurred."); *see also id.* § 851.90(a) (West Supp. 2004) (indicating that one who successfully completes their course of treatment under drug diversion may petition the court to have his or her records sealed, and any employer who intentionally uses the fact of a divertee's drug arrest as a factor in denying a job opportunity commits a misdemeanor offense); Gregory A. Forest, *Sealing the Record: Helping Rehabilitated First-Time Drug Offenders to Get Jobs*, 35 MCGEORGE L. REV. 597 (2004) (discussing the 2003 enactment of Penal Code section 851.90 by Chapter 792).

45. CAL. PENAL CODE § 1210.1(d) (West Supp. 2004) ("Dismissal of charges upon successful completion of drug treatment.").

46. *See* EVALUATION, *infra* note 106, at 55 (noting that "19% of counties used a drug court approach to handle all SACPA offenders").

47. *See* Uelmen et al., *Substance Abuse and Crime Prevention Act of 2000*, Progress Report (Drug Policy Alliance, Sacramento, CA.), 2002, at 14 [hereinafter Drug Policy Alliance] (stating that drug courts have been criticized for admitting disproportionate numbers of white offenders, even though most drug offenders are not white).

48. *See id.* (reporting that "drug courts admit only three to five percent of those offenders who are eligible for admission into drug court"); Maxine Waters, *Rebuttal to Argument Against Proposition 36, reprinted in* CDAA, *supra* note 9, at B-7 (claiming that "drug courts . . . serve less than 5% of drug offenders").

49. *See* Gerald F. Uelmen, *A Defense Lawyer's Guide to Proposition 36*, 28 CACJ/FORUM 37, 39 (2001) [hereinafter Uelmen Guide] ("[e]ven 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.").

50. *See* CAL. PENAL CODE § 1000.1 (West Supp. 2004) (describing how the entry of judgment is deferred pending successful completion of the treatment program).

51. *See id.* § 1210.1(c) (providing mandatory timelines for the initiation of diversion and drug treatment services upon entry "of an order imposing probation"); Uelmen Guide, *supra* note 49, at 40 (noting that "[f]or most clients, a plea of guilty and immediate sentencing to probation will be the best possible outcome"); Telephone Interview with Jeff Rubin, Deputy District Attorney, Alameda County District Attorney's Office (Nov. 3, 2003) (notes on file with *McGeorge Law Review*) (stating that his expectation that Proposition 36 would cause a surge in trials in drug cases did not occur).

52. CAL. PENAL CODE § 1210.1(a) (West Supp. 2004) ("As a condition of probation the court shall require that the participation in and completion of an appropriate drug treatment program . . . Probation shall be imposed by suspending the imposition of sentence.").

53. *Id.* § 954; People v. Superior Court (Jefferson), 97 Cal. App. 4th 530, 537 (2002) (remarking that, in

decision to sever counts must be made *before* the defendant enters a guilty plea or is convicted.[54] Otherwise, any nonviolent drug offenses will not be heard in a separate proceeding from the accompanying charges that are "not related to the use of drugs."[55]

III. PRINCIPLES AND POLICIES BEHIND PROPOSITION 36

The California Ballot Pamphlet for the November 7, 2000 General Election included the text of Proposition 36, along with arguments for and against the measure.[56] In addition to the new Penal Code sections implemented by Proposition 36, the measure also made specific findings and declarations concerning underlying policies.[57] These ballot statements reflect the rationale behind Proposition 36: (1) drug abuse is medically treatable;[58] (2) incarcerating nonviolent drug offenders is wasteful;[59] and (3) community safety is best served by diverting drug offenders out of incarceration and into treatment.[60] Backers justified the initiative on the ground that it would be specifically limited to *nonviolent* drug offenders, and crafted a system of qualifiers to screen out violent offenders.[61]

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a Proposition 36 case, "the trial court could sever the counts 'in the interests of justice' and 'for good cause shown'") *see also* Gagen *supra* note 42, at 193 (referring to drug diversion).

54. People v. Valenzuela, No. F039735, 2002 WL 31682045, (Cal. Nov. 27, 2002) at *3 (quoting Trial Court Judge Loretta M. Begen for the position that a Proposition 36 offense could not be separated from other criminal counts: "basically what the legislation has told us, is that they want to keep it as a package, and either the person qualifies or does not qualify. And it's unlike the diversion program, where he can divert on one count and get criminal sanctions on another count. [It] [j]ust seems that with [section 1210] paragraph (d) they've taken it out of that type of theory").

55. *See* Part V.B.2, *infra* (discussing the meaning of "the same proceeding" under SACPA).

56. CPDA, *supra* note 35, at 7 n.1. The Pamphlet is available on the secretary of State's website at http://vote2000.ss.ca.gov/VoterGuide/. *Id.*

57. Proposition 36, *supra* note 9, *reprinted in* CDAA, at A-1-12. Proposition 36 is comprised of the following ten sections: Title (Section 1), Findings and Declarations (Section 2), Purpose and Intent (Section 3), new code sections related to nonviolent drug possession (Sections 4 thru 6), new funding for drug treatment (Section 7), the Effective Date (Section 8), provisions for adding amendments (Section 9), and Severability (Section 10). *Id.*

58. *Id.* at § 2, Findings and Declarations, subd. (a) *reprinted in* CDAA, at A-2 ("[s]ubstance abuse treatment is a proven public safety and health measure.").

59. *Id.* at § 3, Purpose and Intent, subd. (b) *reprinted in* CDAA, at A-3 (stating as a goal of the initiative "[t]o halt the wasteful expenditure of hundreds of millions of dollars each year [incarcerating] nonviolent drug users").

60. *Id.* at § 2, Findings and Declarations, subd. (b) *reprinted in* CDAA, at A-2 ("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."); *id.* § 3, Purpose and Intent, subd. (c) *reprinted in* CDAA, at A-3 (pledging "[t]o enhance public safety by reducing drug-related crime and preserving jails and prison cells for serious and violent offenders, and to improve public health by reducing drug abuse and drug dependence through proven and effective drug treatment strategies").

61. *Id.* at § 3, Purpose and Intent, subd. (a) *reprinted in* CDAA, at A-2 ("[t]o divert from incarceration into community-based substance abuse treatment programs *nonviolent* defendants, probationers and parolees charged with *simple* drug possession or drug use offenses") (emphasis added); *see also infra* Part V (detailing the qualifying provisions).

A. *Substance Abuse Is a Medical Condition That Requires Treatment*

In response to the flood of new drug cases in the late 1980's, many states established special drug courts to expedite the disposition of drug cases.[62] Some of these courts embraced a "therapeutic" model that attempted to address the underlying cause of the defendant's criminal behavior.[63] Advocates of this drug court model believe that the greater societal problem of illegal drug abuse is best dealt with by treating (rather than incarcerating) repeat drug offenders.[64] After all, addicts consume more illegal drugs than recreational users.[65]

In a recent report, California's independent Little Hoover Commission[66] recommended a "three-pronged" approach to reducing substance abuse by integrating law enforcement, drug treatment, and prevention techniques.[67] The Commission reported that the societal impact of drug and alcohol abuse remains at epidemic proportions, with an annual economic impact of several hundred billion dollars at the national level.[68] In California, drug and alcohol abuse drains $32.7 billion from the economy each year.[69]

Advocates of drug courts also argue that the nature of drug addiction makes the repeat drug offender unresponsive to traditional criminal sentencing.[70] Critics of drug courts respond that diversion robs the criminal justice system of its

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62. Hon. Peggy Fulton Hora, et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement*, 74 NOTRE DAME L. REV. 439, 462-63 (1999).

63. *See id.* at 463-464. "Through a therapeutic, treatment-based approach to the problem of drug abuse, [drug treatment courts] attack the [biological, psychological and social] cause[s] of repeated drug use and addiction." *Id* at 464.

64. *Id.* at 466-68. "Addicted drug users will not respond to incarceration or loosely supervised parole or probation because these actions do not address the drug user's addiction." *Id.* at 467.

65. *Id.* at 465.

66. *About the Commission, at* http://www.lhc.ca.gov/lhcdir/about.html (last visited on Mar. 26, 2004):

> The Little Hoover Commission . . . is an independent state oversight agency that was created in 1962. The Commission's mission is to investigate state government operations and—through reports, recommendations and legislative proposals—promote efficiency, economy and improved service. By statute, the Commission is a balanced bipartisan board composed of five citizen members appointed by the Governor, four citizen members appointed by the Legislature, two Senators and two Assembly members.

Id.

67. LITTLE HOOVER COMM'N, FOR OUR HEALTH & SAFETY: JOINING FORCES TO DEFEAT ADDICTION 40 (Mar. 2003) *at* http://www.lhc.ca.gov/lhc.html (last visited on September 27, 2004) [hereinafter LHC] (suggesting that "California could benefit from a multidisciplinary body that includes prevention, treatment, and law enforcement authorities from the state and local level" and "[s]tate and local leaders need to come together to link alcohol and drug prevention, treatment and law . . . enforcement efforts into a statewide strategy guiding a three-pronged attack on substance abuse").

68. *Id.* at 5-6 (citing the estimates of the Office of National Drug Control Policy published in September 2001 and listing "lost productivity, health care expenses, social service costs, criminal justice costs and losses due to crime" among the "maladies" stemming from the problem of drug and alcohol abuse).

69. *Id.* at 6.

70. Hora, *supra* note 61 (suggesting that the psychological, biological and social aspects of drug addiction mean that "no amount of jail time, probation, fines, or other types of traditional criminal justice sanctions will prevent the addict from repeating drug abuse behavior").

deterrent effect.[71] However, recent research shows that drug courts actually reduce drug offender recidivism.[72] Some experts estimate that medical treatment of drug abuse is *seven times* more cost-effective than incarceration.[73] For example, New York's drug courts have saved the state $254 million in corrections costs.[74]

Proposition 36 encourages the integration of treatment providers in the criminal justice system, potentially leading to a consolidated drug control strategy.[75] By increasing the number of drug offenders who receive treatment, Proposition 36 has had a positive impact on the drug problem.[76] Drug treatment gives people an opportunity to overcome their addictions, improve their lives, and contribute to their families, thus filling an essential role in California's drug control strategy.[77]

B. *Incarceration of Drug Addicts Is Wasteful*

Arguing that the war on drugs is a "failure,"[78] Proposition 36 proponents suggest that the incarceration of drug addicts is "wasteful."[79] Initiative sponsors claimed that increased incarceration of nonviolent drug users forced the prison

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71. *See* Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1477-79 (2000) (deriding court-ordered drug treatment as a misplaced judicial effort at "social-tinkering" violative of the proper function of courts under the separation of powers doctrine); Andrew D. Leipold, *The War On Drugs and the Puzzle of Deterrence*, 6 J. GENDER RACE & JUST. 111, 126 (2002) (criticizing Proposition 36 for its failure to distinguish casual or first-time drug possessors from hardened addicts).

72. *See* Paul von Zielbauer, *Courts' Drug Treatment System Is Found to Help Offenders Steer Clear of Crime*, N.Y. TIMES, Nov. 9, 2003, at New York Report on 28 (discussing a recent New York study by the Center for Court Innovation that found "the rearrest rate among drug offenders who had completed a court-monitored treatment plan was 29-percent lower over three years than the rate for the same type of drug offenders who opt for prison time without treatment").

73. Bluthenthal, *The Social Impact of Drugs & the War on Drugs: Public Health vs. Criminalization Policies, in* THE WAR ON DRUGS: ADDICTED TO FAILURE 87 (Benson et al. eds., 2000).

74. von Zielbauer, *supra* note 72, at 28.

75. *See* LHC, *supra* note 67, at 65 (concluding that "initial results [of Proposition 36 implementation] are promising and illustrate the effectiveness of integrating various services" and "Proposition 36 implementation [is] facilitating service integration [through] 1. A shared commitment to collaboration among state and local treatment and criminal justice agencies. 2. Leadership by the courts through the Statewide Proposition 36 Workgroup. 3. Funding that allows the provision of a full continuum of treatment and supportive services without which treatment outcomes would be sharply limited. 4. Special services for dual diagnosis clients [ie persons with drug addiction and mental health problems] [and] 5. Co-location of all the treatment and supportive services required to address the issues of substance abuse, mental illness, trauma, HIV/AIDS and other health related issues").

76. *See, e.g.*, Interview with Hon. Gary Ransom, Superior Court Judge, Sacramento County Superior Court (Jan. 9, 2004) (notes on file with *McGeorge Law Review*) (declaring that Proposition 36 is successfully turning peoples' lives around and saving the State millions of dollars).

77. *See id.*; *see also* LHC, *supra* note 67, at 63 (advocating drug treatment as part of an integrated strategy of social services).

78. Maxine Waters, et al., *Rebuttal to Argument Against Proposition 36, reprinted in* CDAA, *supra* note 9, at B-7.

79. Proposition 36, *supra* note 9, at § 3 Purpose and Intent, subd. (b), *reprinted in* CDAA, at A-3.

system to grant early release to violent criminals in order to make room for nonviolent offenders.[80] Indeed, beginning in the 1980's, the prevailing governmental response to the drug problem was punishment for drug activity through the imposition of serious criminal penalties.[81]

Today there are more than 2.1 million Americans incarcerated, which is four times greater than in 1980.[82] Modern drug laws largely account for this rise.[83] In California for instance, the number of prisoners quadrupled between the 1980's and the 1990's.[84] This is because the penalties for drug offenses increased more than all other categories of crime.[85] Of all the states, California has made the biggest commitment to incarceration over the last twenty years, building twenty-one new prisons, including eight maximum-security prisons between 1984 and 1994.[86] The California Department of Corrections' current budget is $5.3 billion (or 6.2 % of the state General Fund), and the department maintains the largest staff of any single agency in the state with 49,729 employees.[87] According to the most recent statistics, there are over 150,000 prisoners in California, or nearly four times the prison population of just twenty years ago.[88] One in five prisoners is a drug offender, and housing drug offenders in prison costs the state of California $1.3 billion per year.[89]

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80. Peter Banys, et al., *Argument in Favor of Proposition 36, reprinted in* CDAA, at B-2 (reporting 19,300 people were being stuffed into "overcrowded" prisons for minor drug possession offenses each year).

81. *See* LHC, *supra* note 67, at 29 (noting that, despite a gradual inclusion of drug treatment and prevention in the drug control strategy of the federal government, "67 percent of the $19 billion drug control budget [is spent on] supply reduction or enforcement activities, compared to 33 percent on demand reduction, prevention and treatment" and "[a]t state and local levels an estimated 80 percent of spending is devoted to enforcement").

82. Fox Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y. TIMES, Nov. 10, 2003, at A16.

83. FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 162-64 (Oxford U. Press 1995).

84. See *id.* at 162 (noting "[t]he number serving sentences for drug offenses increased *fifteenfold* in twelve years") (emphasis added).

85. *See id.* at 164 ("The sanctions for drug offenders expanded more rapidly than for any other offender group between 1985 and 1990.").

86. Eric Schlosser, *Prison-Industrial Complex*, 282 ATLANTIC MONTHLY 51 (Dec. 1998).

87. CAL. DEPT. OF CORRECTIONS, *Facts and Figures Fourth Quarter 2003, available at* http://www.corr.ca.gov/CommunicationsOffice/facts_figures.asp (last visited September 27, 2004).

88. CAL. DEPT. OF CORRECTIONS, *Spring 2000 Prison Populations*, at T13; *and* CAL. DEPT. OF CORRECTIONS, *Facts and Figures Fourth Quarter 2003* (noting that once the newest maximum-security institution is completed (Delano II), the total capacity of the California correctional system will be 176,500. One half of the prison population is serving time for a crime committed against a person, while 22 percent are incarcerated for a drug offense, and 21 percent for a property crime).

89. CAL. DEPT. OF CORRECTIONS, *Fact Sheet "About the Department"* (First Quarter 2003), *reprinted in* LHC, *supra* note 67, at 10.

C. *Community Safety Is Best Served by Diverting Nonviolent Drug Offenders out of Incarceration and into Treatment*

Critics of the "war on drugs" expressed skepticism with the policy of prohibition and incarceration of drug offenders.[90] Contrary to the belief that longer sentences deter drug crime, harsher penalties have had no effect on the rate of drug abuse over the last twelve years.[91] Instead, many states are now learning the value of reducing the number of non-violent drug offenders in correctional facilities.[92] For example, Michigan expects to save $41 million in just the first year after abolishing its mandatory minimum drug laws.[93]

Saving tax revenue was a principal goal of Proposition 36.[94] As the number of people committed to prison continued to grow, many questioned the increased spending of public revenue for the incarceration of drug offenders.[95] Criminologists criticized the invocation of public fear of violent crime as a pretext for building new prisons filled with nonviolent drug offenders.[96] Proposition 36 embodies a rejection of the "wasteful expenditure of millions of dollars" spent punishing nonviolent drug addicts.[97]

The overwhelming majority of California voters agreed with the initiative, as Proposition 36 passed with a sixty-one percent approval rating.[98] Proposition 36 proponents demanded that California "try a different approach with nonviolent drug offenders,"[99] and the success of Proposition 36 in the election sent a message to California legislators to pursue more treatment-based approaches to drug abuse.[100]

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90. *See, e.g., Drug Policy in America—A Continuing Debate: Report of the Task Force on the Use of Criminal Sanctions to the King County [Washington] Bar Association Board of Trustees*, 30 FORDHAM URB. L.J. 499, 531 (January, 2003) (arguing that incarceration "has not proven to be cost-effective as a means to reduce the societal costs of drug abuse").

91. *Id.* at 501 (declaring that rates of drug abuse have "remained relatively steady or have increased" despite the imposition of tougher sanctions for drug offenses under state and federal law).

92. *See* Butterfield, *supra* note 82, at A16 (comparing the movement to expand parole and reduce mandatory minimum sentencing schemes among 25 states including liberal states like New York and conservative states such as Alabama, and concluding that many states are recognizing the expense a ballooning prison population represents, particularly in the current climate of fiscal crises).

93. *Id.*

94. Proposition 36, *supra* note 9, at § 3, Purpose and Intent, subd. (b) *reprinted in* CDAA, at A-3 (stating that the purpose of the initiative is "[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").

95. *See, e.g.*, THE REAL WAR ON CRIME 16-17 (Steven R. Donziger ed., 1996) (attributing the rise in state and federal prison populations to an increase in the criminalization of minor offenses and incarceration for nonviolent offenses such as drug possession).

96. *See, e.g., id.* at 18-19 (citing Franklin Zimring and Gordon Hawkins who describe the phenomenon in California as a "bait and switch," and attribute the rise in state and federal prison populations to an increase in the criminalization of minor offenses and incarceration for nonviolent offenses such as drug possession).

97. Proposition 36, *supra* note 9, at § 3, Purpose and Intent, subd. (b) *reprinted in* CDAA, at A-3.

98. Drug Policy Alliance, *supra* note 47, at 3.

99. Peter Banys, et al., *Argument in Favor of Proposition 36, reprinted in* CDAA, *supra* note 9, at B-2.

100. People v. Letteer, 103 Cal. App. 4th 1308, 1322, n.8 (2002) ("Proposition 36 dramatically changed

Proposition 36 set aside funding for local treatment programs[101] and included monitoring through the release of annual reports by the State Department of Alcohol and Drug Programs ("ADP").[102] The ADP designated the Integrated Substance Abuse Programs Office at University of California, Los Angeles ("UCLA") to conduct a comprehensive study of the effects of Proposition 36 over a four-year period.[103] By the end of the four years, the study may tell whether Proposition 36 has achieved its goal of "reducing drug related crime."[104] The study already has shown how counties have met the short-term goal of diverting drug possession offenders "into community-based treatment programs."[105] In the first twelve months of implementation, more than 30,000 drug users were diverted from jail or prison sentences into drug treatment.[106]

D. Proposition 36 Is Limited to Nonviolent Drug Offenders Only

Proposition 36 drew a line between "nonviolent" drug possession and other drug crimes, such as sale, production, and distribution.[107] The latter are outside the scope of Proposition 36 and remain punishable with mandatory prison terms.[108] The differences in sentencing between drug offenses that do and do not qualify for Proposition 36 are substantial; once the defendant is eligible for diversion under Proposition 36, he or she cannot be sent to jail or prison.[109] Instead, qualifying nonviolent drug offenders *must* be given probation.[110]

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the penal consequences for those convicted of nonviolent drug possession offenses."); *see also* CALIFORNIA DEPARTMENT OF ALCOHOL AND DRUG PROGRAMS, *Substance Abuse and Crime Prevention Act of 2000 (SACPA—Proposition 36) First Annual Report to the Legislature*, at i (Nov. 2002) (stating that Prop 36 "represented a major shift in the state's policy regarding nonviolent drug related use and possession offenses"); Gerald F. Uelmen, *Formulating Rational Drug Policy in California*, 33 MCGEORGE L. REV. 769, 775-76 (2002) (describing Proposition 36 as a "turning point" in California drug policy).

101. Drug Policy Alliance, *supra* note 47, at 4 (reporting that the initiative appropriated "$120 million each year for five years to the Substance Abuse and Treatment Trust Fund [administered] by the California Department of Alcohol and Drug Programs").

102. *Id.*

103. *Id.*

104. Proposition 36, *supra* note 9, at § 3(c), *reprinted in* CDAA, at A-3.

105. *Id.* at § 3(a), *reprinted in* CDAA, at A-3.

106. DOUGLAS LONGSHORE, PH.D. ET AL., EVALUATION OF THE SUBSTANCE ABUSE AND CRIME PREVENTION ACT 2002 REPORT 5 (July 7, 2003) [hereinafter EVALUATION].

107. *See* CAL. PENAL CODE § 1210(a) (West Supp. 2004) (defining "nonviolent drug possession offense" as "the unlawful personal use, possession for personal use, or transportation for personal use of any controlled substance identified in [schedules I-IV of the Imitation Controlled Substances Act], or the offense of being under the influence of a controlled substance in violation of Section 11550 of the Health and Safety Code" and providing that "the term 'nonviolent drug possession offense' does not include the possession for sale, production, or manufacturing of any controlled substance").

108. *See id.* (mandating that "any person convicted of nonviolent drug possession shall receive probation"); *see also id.* ("The term 'nonviolent drug possession offense' does not include the possession for sale, production, or manufacturing of any controlled substance."); *e.g.*, CAL. HEALTH & SAFETY CODE §§ 11351 (possession for sale), 11370 (enhancement for prior offenses), 11383 (possession [of methamphetamine precursor] with intent to manufacture) (West 1991 & Supp. 2004).

109. CAL. PENAL CODE § 1210.1(a) (West Supp. 2004) ("Notwithstanding any other provision of law,

According to arguments advanced in the ballot literature, Proposition 36 would distinguish "simple" drug users from those who sold drugs or committed violent acts.[111] The proposition also purported to "only" affect "simple drug possession" without changing any other laws.[112] The initiative promised that someone who was "dealing drugs," and one who was charged with committing "a violent or serious felony," would not be able to participate.[113] In *In re Varnell*, the California Supreme Court recognized these "strict limits."[114]

The next section of this comment discusses the interviews of Proposition 36 practitioners conducted by the author, along with the research data collected by the State's official study of Proposition 36. In Part V, the qualifying provisions of Proposition 36 are explored in greater detail, with examples of eligible offenses and disqualifying collateral offenses taken from published California appellate cases, unreported opinions, notes from interviews with prosecutors and defense attorneys, and the results of the epidemiological study by UCLA.

IV. PROPOSITION 36 RESEARCH RESULTS

This Comment is an outgrowth of an internship that the author had in the summer of 2003 with a public defender's office in a small county. Attorneys insisted that their clients were being unfairly screened from Proposition 36 by prosecutors' charging decisions. Over the next year the author investigated whether, in fact, prosecutors were charging Proposition 36 offenses differently from one county to the next.[115] The author eventually spoke to over twenty prosecutors and public defenders assigned to Proposition 36 cases, and one superior court judge.

The objective of the interviews was to gauge the experience of defense attorneys and prosecutors concerning the initial phases of charging and plea-bargaining Proposition 36 cases. The author wanted to see if prosecutors in some counties were

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and except as provided in subdivision (b), any person convicted of a nonviolent drug possession offense shall receive probation.").

110. *See id.* (stating "[a] court may not impose incarceration as an additional condition of probation.").

111. *See* Peter Banys, et al., *Argument in Favor of Proposition 36, reprinted in* CDAA, *supra* note 9, at B-2:

> Proposition 36 is strictly limited. It only affects those guilty of simple drug possession. If previously convicted of violent or serious felonies, they will not be eligible for the treatment program unless they've served their time and have committed no felony crimes for five years. If convicted of a non-drug crime along with drug possession, they're not eligible. If they're convicted of selling drugs, they're not eligible.

112. *Id.*

113. *Id.* at B-3.

114. *In re* Varnell, 30 Cal. 4th 1132, 1144 (2003).

115. Initially the author asked different counties whether they had adopted formal charging guidelines for Proposition 36 offenses. The author found that some counties used checklists in the processing of Proposition 36 cases, but the author found none that had formal instructions regarding what offenses prosecutors should or should not charge in drug possession cases.

charging drug offenders with minor offenses, such as invalid vehicle registration, solely to keep eligible drug offenders from getting Proposition 36 diversion. In one very small county the District Attorney acknowledged that he could prevent every defendant charged with drug possession from qualifying for Proposition 36 by charging an additional misdemeanor offense.[116] The prosecutor admitted that he initially took a hard line approach to Proposition 36 cases, but once the county provided his office with the necessary funding he accepted Proposition 36 as a new variant of drug court.[117] The author found that the experience of smaller counties was significantly different than in large urban areas because of the intimate nature of the community.[118] Prosecutors in larger counties were under more pressure to divert minor drug cases.[119]

In large and medium-sized counties prosecutors indicated that they would not charge cases differently in order to keep people out of Proposition 36.[120] In counties with a large volume of total cases, it is impractical to screen out more than a few nonviolent drug offenders because there are simply not enough resources to prove minor incidental charges beyond a reasonable doubt.[121] In one small county where prosecutors were routinely charging minor vehicle offenses in Proposition 36 cases, the public defender said attorneys in her office would try to get the prosecutors to sever the charges in order to make the defendant eligible for Proposition 36.[122]

Prosecutors in some counties have taken creative approaches in drug cases involving traffic stops. For example, in some counties, drug offenders who are charged with driving without a license are allowed to receive Proposition 36 probation after clearing the violation with the DMV.[123] A prosecutor told me that

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116. *See* Telephone Interviews with John Poyner, District Attorney, Colusa County (Jan. 13 and June 15, 2004) (notes on file with the *McGeorge Law Review*) (explaining that in the first ten months of Proposition 36 implementation only four defendants qualified for Proposition 36. Today, ten to fifteen defendants get Proposition 36 sentencing every month).

117. *Id.*

118. For example, in Colusa County the District Attorney explained to the author that he probably knew fifty of the approximately seventy-five defendants in the Proposition 36 program, and that he would occasionally see them around town. *Id. See also* Telephone Interview with Jeffrey Tuttle, District Attorney, Calaveras County (Jan. 15, 2004) (notes on file with *Mc George Law Review*) (remarking that in a small county the District Attorney tends to know each of the Proposition 36 defendants and makes eligibility determinations on a more individualized basis).

119. The case of Marin County is illustrative. An attorney in the Public Defender's office told the author that, at the outset of Proposition 36 implementation, the District Attorney asked to be notified if any of the deputy district attorneys ever charged a defendant unfairly in order to disqualify that person from Proposition 36. In more than two years no such notification has ever been required. Telephone Interview with Jose Varela, Marin County Public Defender's office (Nov. 3, 2003) (notes on file with the *McGeorge Law Review*).

120. *See, e.g.*, Telephone Interview with Anastasia Rozinski, Deputy District Attorney in Santa Cruz County (Nov. 3, 2003) (notes on file with *McGeorge Law Review*) (stating that "we don't monkey around with charges just to make people ineligible").

121. *Id.*

122. *See* Telephone Interview with Toni Healy, Lassen County Public Defender (Jan. 30, 2004) (notes on file with *McGeorge Law Review*).

123. Telephone Interview with Patrick McGrath, District Attorney, Yuba County (Jan. 16, 2004) (notes on file with *McGeorge Law Review*).

he allows drug offenders to take Proposition 36 despite a concurrent conviction for driving on a suspended license.[124] Then, if the defendant subsequently picks up a second offense for driving on a suspended license the district attorney can impound (and either sell or destroy) the offender's car.[125] Overall, the interviews indicated that the cooperation of prosecutors is essential to making Proposition 36 work as intended.

The first annual report on Proposition 36 includes a chapter devoted to the issue of changes in the criminal justice system in response to the new law.[126] Comparing data on arrests for drug offenses and charging practices in drug possession prosecutions, the study did not find that the initiative resulted in a significant change for either.[127] Researchers gathered arrest data from public records of four California counties to gauge whether the number of arrests for drug possession and personal use decreased after the passage of the initiative.[128] While the number of arrests for these offenses declined following the passage of Proposition 36, the study attributed the reduction to the continuation of a downward trend that predated enactment of the law.[129]

The UCLA study commissioned qualitative interviews with criminal justice representatives from a sample of California counties regarding their perceptions of drug possession prosecutions post-Proposition 36.[130] The study did not find any systematic change in the charging practices of prosecutors in reaction to the initiative, but the study did find "considerable variability" in the "strictness" of prosecutors when charging drug possession offenses.[131] From the outset of this research the author wanted to uncover whether prosecutors in different counties considered different drug offenses Proposition 36 eligible, and whether the same drug offender would be disqualified for the same misdemeanors in different counties. The UCLA study found that charging practices could differ between counties without any such change being noticed statewide.[132] The UCLA study researched whether different drug offenses were considered eligible for Proposition 36.[133] The largest percentage of respondents considered simple drug possession[134] to be a Proposition 36 eligible offense, while respondents disagreed

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124. CAL. VEH. CODE § 14601 (West Supp. 2004).

125. Telephone Interview with David Wellenbroch, Deputy District Attorney, San Joaquin County (Mar. 4, 2004) (notes on file with *McGeorge Law Review*).

126. EVALUATION, *supra* note 106, at 55.

127. *Id.* at 65.

128. *See id.* at 63 (stating that the four counties are Kern, Los Angeles, Santa Clara, and Ventura).

129. *See id.* at 64 ("[S]ome observers expected that law enforcement might respond to SACPA by reducing the number of arrests for SACPA-eligible offenses, and a reduction is indeed what occurred. However, it is entirely consistent with the declining trend that predated SACPA by four years.").

130. *Id.* at 58.

131. *Id.* at 65.

132. *Id.* at 66 (stating that the "findings suggest that SACPA [Proposition 36] may lead to detectable change in arrest or charging practices in some counties even if no such change occurs statewide").

133. *Id.* at 56.

134. CAL. HEALTH & SAFETY CODE § 11350 (West Supp. 2004).

as to which of the other offenses, such as possession of paraphernalia,[135] were subject to the law.[136]

A limitation of the UCLA study was that it overlooked a technical aspect of Proposition 36 qualification. The study did not indicate which misdemeanors would disqualify a defendant from Proposition 36 if charged concurrently with a nonviolent drug possession offense.[137] From conversations with prosecutors, the author learned that a serious charge, such as a battery,[138] would uniformly disqualify a defendant from diversion under Proposition 36.[139] However, many felt that "any" concurrent misdemeanor would keep a person out of Proposition 36, even if relatively minor.[140] Based on conversations that the author had with prosecutors in over a dozen counties, it is fair to say that the drug treatment regime enacted by Proposition 36 fails to satisfy prosecutors in all but a few counties.

From this research, the author concluded that Proposition 36 does what it purports to do: it places habitual drug users into treatment, without allowing violent or dangerous drug offenders to take advantage of diversion. While there is the potential for prosecutors to abuse their discretion by being overly strict in charging drug offenses, practical limitations on resources prevent them from systematically undermining Proposition 36.[141] Although the probation and treatment aspects of Proposition 36 were not the focus of the author's research, the success or failure of Proposition 36 will depend upon how many drug addicts come clean.[142]

V. QUALIFYING FOR PROPOSITION 36 DIVERSION

Even though Proposition 36 applies only to convictions, which are assessed at sentencing, the initial charges that a district attorney files in a complaint obviously set the parameters for each case. According to California law, multiple offenses may be charged in the same pleadings if they were committed in the same event or are of the same type.[143] If an individual is charged only with

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135. *Id.* at § 11364 (West 1991).

136. EVALUATION, *supra* note 106, at 56.

137. *See generally id.*

138. CAL. PENAL CODE § 242 (West 1999).

139. Telephone Interview with Johnathan Skillman, Deputy District Attorney, Tehama County (Jan. 15, 2004) (notes on file with *McGeorge Law Review*).

140. One deputy district attorney noted that two offenses, invalid vehicle registration and throwing a cigarette on a highway (Cal. Vehicle Code sections 4000 and 23111), could *never* disqualify a person because the offenses are infractions and not misdemeanors. Lawson, *supra* note 3.

141. *See supra* notes 119-22 and accompanying text (discussing the ability of defense counsel to challenge spurious charges by requesting severance or demanding a trial).

142. Prosecutors routinely expressed frustration at the ineffectiveness of drug treatment programs and the lack of funding for probation. *E.g.*, Rubin, *supra* note 51 (lamenting the lack of funding for drug treatment and the overall failure of probation).

143. *See* CAL. PENAL CODE § 954 (West 1985) (explaining that in a case where the defendant is charged

offenses that are Proposition 36 eligible, he or she will likely enter a guilty plea and receive diversion at an early stage of the proceedings. However, if the same individual is also charged with a misdemeanor not related to the use of drugs, he or she will be ineligible for Proposition 36 diversion unless the unrelated charge is dropped or a jury rejects it.[144]

Therefore, prosecutors enjoy broad prosecutorial discretion[145] in Proposition 36 cases.[146] However, as the number of drug cases has grown in recent years, so has the pressure to quickly resolve nonviolent cases.[147] These pressures compound the ethical choices that shape the charging decision. For example, ethical rules encourage prosecutors to offer "diversion" for certain cases and to "be familiar with the resources of social agencies" like counselors and substance abuse treatment providers.[148] A managing prosecutor is not supposed to pressure a subordinate prosecutor to file charges that contain a reasonable doubt.[149] Likewise, prosecutors must not file more charges "than are necessary to fairly reflect the gravity of the offense."[150] Therefore, filing an additional charge simply to thwart Proposition 36 diversion is unethical.[151]

A. Nonviolent Drug Possession: Personal Use

Proposition 36 does nothing to change existing drug laws other than allow repeat drug offenders another chance at rehabilitation by postponing the imposition of incarceration for qualifying offenses.[152] Eligible offenses are sometimes lumped into the general category of "simple" drug possession for

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with multiple offenses, the court may order that the offenses be tried separately "in the interests of justice and for good cause shown").

144. Practical considerations militate against the addition of charges, since doing so inhibits the speedy resolution of cases and necessitates extensive preparation by the attorneys and their supporting staff members.

145. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 162-63 (1969) (discussing the prevalence of police and prosecutorial discretion as a distinguishing feature of the American criminal justice system).

146. *See* Part IV, *supra* notes 135-36 and accompanying text (giving examples of the exercise of prosecutorial discretion in Proposition 36 cases).

147. *See* Uelmen Guide, *supra* note 49, at 40 (commenting on the need for defense attorneys and prosecutors in the criminal justice system to work together to expedite the processing of cases).

148. STANDARDS FOR CRIMINAL JUSTICE § 3-3.8(b) (American Bar Association, 3d ed. 1993).

149. *Id.* § 3-3.9(c) ("A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused.").

150. *Id.* § 3-3.9(f).

151. *See supra*, Part V.B (providing examples of minor misdemeanors, such as Vehicle Code section 12500 (driving without a valid license), that could technically disqualify a defendant from Proposition 36 diversion under Penal Code section 1210.1(b)(2) if he or she is also convicted (in the same proceeding) of a nonviolent drug possession offense).

152. *See supra*, Part III (explaining the basic functioning of Proposition 36 diversion upon entry of judgment for a qualifying offense); Lawson, *supra* note 3 (explaining that drug possession before Proposition 36 was punishable by probation with some days in county jail and participation in drug treatment); Rubin, *supra* note 51 (stating that, even before Proposition 36, first time offenders were *never* sent to prison and even second and third time offenders were rarely sent to prison absent unusual circumstances).

personal use.[153] The definition of a "nonviolent drug possession offense" includes "personal use, possession for personal use and transportation for personal use," and could encompass a range of minor drug offenses.[154] Other than the crime of being under the influence of a controlled substance there is no definitive list of Proposition 36 eligible offenses.[155]

1. Unlawful Possession

Proposition 36 was intended to apply to the offense of "simple" drug possession.[156] The original definition of "nonviolent drug possession" in Proposition 36 was "the unlawful possession, use or transportation for personal use of any controlled substance."[157] Believing this definition was ambiguous, opponents of Proposition 36 argued that the words "for personal use" applied only to "transportation," not "possession," making the definition broad enough to encompass possession of controlled substances for purposes other than one's own consumption.[158]

However, in its implementation guide to Proposition 36, the California District Attorney's Association ("CDAA") recognized that "personal use" referred not only to transportation, but also to possession and use.[159] Thus, someone carrying a drug for purposes other than his or her own consumption "would be prosecuted under [existing] laws" and receive a typical sentence of incarceration if convicted.[160] In 2003 the legislature clarified the definition of "nonviolent drug possession" to reflect this understanding.[161] Currently,

153. CAL. PENAL CODE § 1210(a) (West Supp. 2004) ("The term 'nonviolent drug offense' does not include the possession for sale, production, or manufacture of any controlled substance.").

154. *Id.*

155. EVALUATION, *supra* note 106, at 56 ("There is no single, complete, and authoritative list of drug-related offenses governing SACPA eligibility throughout the state.").

156. CAL. HEALTH & SAFETY §§ 11350, 11357, and 11377 (West 1991 & Supp. 2004); Proposition 36, *supra* note 9, at § 3(a), *reprinted in* CDAA, at A-2: (naming "nonviolent defendants, probationers and parolees charged with simple drug possession or drug use offenses" as the persons subject to the law).

157. CDAA, *supra* note 9, at 3.

158. Californians United Against Drug Abuse / No on Prop. 36, *Compromising Public Safety* (one-page fact sheet), *quoted in* Campaign for New Drug Policies / Yes on Prop. 36, *Whoppers! Told by Opponents of Proposition 36, the Substance Abuse and Crime Prevention Act* (claiming that "sex offenders convicted of possessing 'date rape' drugs could escape a jail or prison term").

159 CDAA, *supra* note 9, at 4.

160. *See id.* (arguing that possession of a date rape drug intended for the commission of a sex crime is not "nonviolent drug possession" under SACPA).

161. *See* SENATE BILL 762, AT 1-2 (Aug. 1, 2003) (clarifying that "[t]he term 'nonviolent drug possession offense" [is] the unlawful personal use, possession for personal use, or transportation for personal use of any controlled substance . . . or the offense of being under the influence of a controlled substance"); SENATE APPROPRIATIONS COMMITTEE, COMMITTEE ANALYSIS OF SB 762, at 1 (May 19, 2003) ("SB 762 restricts the application of Proposition 36 by requiring non-violent drug possession of any controlled substance be limited to possession for personal use.").

Proposition 36 covers the "personal use, possession for personal use and transportation for personal use of a controlled substance."[162]

Other offenses are explicitly excluded from the meaning of nonviolent drug possession: possession for purposes of "sale, production, or manufacturing," or possession inside a correctional facility.[163] The offense of possession for sale is beyond the reach of Proposition 36,[164] and in cases where an intent to sell a drug is proven, the offender will be sentenced under the traditional sentencing scheme.[165]

2. *Transportation*

Possession for sale is an element of a number of drug offenses, the principal offenses being possession for sale and transportation.[166] Transportation occurs whenever an individual "transports, sells, furnishes, administers, or gives away" a controlled substance,[167] and can even be satisfied by walking down the street with drugs.[168] In cases where a defendant is charged with a combination of possession for sale and transportation, but is acquitted of the charge of possession for sale, he or she is not automatically eligible for Proposition 36 diversion for the lesser charge of transportation.[169] Instead, the defendant must convince the trial court at sentencing that the drug was transported for personal use.[170]

According to one prosecutor, the amount of the drug in question is only one factor among many that help determine intent.[171] For instance, the defendant's

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162. CAL. PENAL CODE § 1210(a) (West Supp. 2004).

163. *Id.* ("The term 'nonviolent drug offense' does not include the possession for sale, production, or manufacture of any controlled substance and does not include violations of [Penal Code] Section 4573.6 [unauthorized possession of controlled substances in prison, camp, jail, etc.] or 4573.8 [unauthorized possession of drugs or alcoholic beverages in prison, camp, jail, etc.].").

164. Peter Banys, et al., *Argument in Favor of Proposition 36, reprinted in* CDAA, *supra* note 9, at B-2 ("Proposition 36 is strictly limited. It only affects those guilty of simple drug possession. . . . If they're convicted of selling drugs, they're not eligible.").

165. *E.g.*, People v. Barasa, 103 Cal. App. 4th 287 (2002).

166. *E.g.*, CAL. HEALTH & SAFETY § 11351 (West 1991 & Supp. 2004) (unlawful possession for sale); *id.* § 11352 (Transportation, sale, giving away, etc., of designated controlled substances); *id.* § 11379 (transportation, sale or distribution of controlled substance); *id.* § 11360 (transportation of marijuana).

167. CALJIC 12.02 (2004).

168. People v. Ormiston, 105 Cal. App. 4th 676, 683 (2003).

169. People v. Barasa, 103 Cal. App. 4th 287 (2002).

170. *Id.*

171. *See* Letter from Thomas M. Wilson, Deputy District Attorney, San Luis Obispo County District Attorney's Office, (Feb. 17, 2004) (copy on file with *McGeorge Law Review*):

> The amount of a controlled substance is only one factor to consider in determining whether a substance is possessed for personal use or for provision/sale to others. For instance, if a defendant possessed an amount of a controlled substance that would be consistent with personal use but admitted in the course of the investigation that he or she intended to sell the substance (or transported the substance for the purpose of sale), the defendant could be deemed ineligible for Prop. 36 despite a small quantity of the substance.

Id. at 1.

admissions that he was dealing drugs, evidence of sales in the form of pay/owe sheets, packaging indicative of sales or a scale would refute a claim by the defendant that he possessed the drugs for his own personal use.[172] However, in *People v. Barasa*, the Fourth District Court of Appeal stated that "in *personal use amount* cases, a prosecutor may not avoid the application of Proposition 36 simply by charging the offense as a transportation rather than as a possession."[173]

In the UCLA study, the majority of counties considered transportation to be a Proposition 36 eligible offense.[174] In some counties transportation of a personal use amount is charged only as "possession" under Health and Safety section 11350, and is simply not charged as "transportation."[175] Transportation is often understood to involve conduct that is closer to drug trafficking or distribution, and thus outside the concept of "personal use."[176] In fact, in some counties, "transportation" is not considered Proposition 36 eligible under any circumstances, even where the amount in question is miniscule.[177]

3. *Possession of Drugs in Jail*

In 2001, the California legislature amended Proposition 36 with Chapter 721.[178] Among other revisions, the amendment added an exception to the definition of "nonviolent drug offense," excluding the offense of possessing a controlled substance in jail (e.g., Penal Code section 4573.8).[179] In their Proposition 36 implementation guide, the CDAA listed possession in jail as ineligible for Proposition 36.[180] Despite the legislature's agreement with the CDAA, in an unpublished opinion the Fourth District Court of Appeal ruled that

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172. *See, e.g., Barasa*, 103 Cal. App. 4th at 296 (remarking that "there is no possibility that Barasa could hope to persuade a sentencing judge the drugs he transported were for personal use only, as their quantity and their packaging, as well as Barasa's admissions, demonstrate the transportation of a significant quantity of drugs for purposes of sale, rather than personal consumption").

173. *Id.* at 295 (emphasis added); *accord* People v. Saenz, No. D039214, 2003 WL 133020, at *4 (Cal. Ct. App. Jan. 17, 2003) (remanding a case for reconsideration of Proposition 36 eligibility after correcting an error in the calculation of dosages).

174. EVALUATION, *supra* note 106, at 60.

175. *See* Lawson, *supra* note 3 (explaining that, in her office, the attorneys only charge Health and Safety Code section 11352 "transportation" with possession for sale, not personal use possession).

176. *See* CAL. HEALTH & SAFETY CODE § 11352(b) (applying to "any person who transports for sale any controlled substances specified in subdivision (a) within the state, from one county to another noncontiguous county"); CDAA, *supra* note 9, at 4 (arguing that "transportation of a controlled substance remains criminal conduct even after the passage of Proposition 36" and suggesting that prosecutors allege that "the defendant did not transport the controlled substance for personal use" in their pleadings).

177. *See* Telephone Interview with Lee Blumen, Orange County Public Defender's Office, Appellate Division, (Jan. 30, 2004) (notes on file with *McGeorge Law Review*) (discussing the case of a defendant convicted of transportation for bicycling with a personal use amount).

178. Drug Policy Alliance, *supra* note 47, at 12.

179. CAL. PENAL CODE § 1210(a) (West Supp. 2004)

180. CDAA, *supra* note 9, at 5 (arguing that, despite having a superficial link to drug abuse, possession in jail is ineligible for SACPA because it involves additional conduct, namely, "commission within a correctional setting").

the trial court's decision to disqualify a defendant for Proposition 36 diversion for possession of drugs in jail had been in error.[181]

4. *Possession of Drug Paraphernalia*

The CDAA also considered possession of drug paraphernalia to be a non-qualifying drug offense when charged *by itself*, because it "involve[s] more than the simple possession or use of drugs."[182] However, since possession of paraphernalia is explicitly excluded from the definition of "a misdemeanor not related to the use of drugs" a defendant who is charged with possession of paraphernalia *and* being under the influence of a drug is eligible for Proposition 36, assuming none of the other disqualifiers applies.[183]

While possession of paraphernalia will not disqualify an otherwise eligible defendant from Proposition 36, many prosecutors believe that possession of paraphernalia is not Proposition 36 eligible when charged on its own.[184] In Orange County when judges decided that a solo charge of possession of drug paraphernalia should be Proposition 36 eligible prosecutors challenged the decision.[185] The reviewing court rejected the prosecutors' interpretation of the statute as "absurd," holding instead that possession of drug paraphernalia is "inextricably linked" to nonviolent drug possession.[186] The court also recognized the fact that a prosecutor could defeat Proposition 36 merely by dropping a charge of possession of a controlled substance any time a defendant was also charged with possession of drug paraphernalia.[187]

5. *Public Intoxication from Drug Use*

The misdemeanor crime of being "under the influence" of a drug (Health and Safety Code section 11550) is automatically eligible for Proposition 36, as it is

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181. People v. Avila, No. G030362, 2003 WL 21419615 (Cal. Ct. App. June 20, 2003). Construing the pre-amendment version of SACPA, the court held that the defendant had been improperly excluded from probation since possession of drugs in jail was "necessarily" included in the definition of nonviolent drug offense. *Id.* at 4.

182. CDAA, *supra* note 9, at 5.

183. *See* CAL. PENAL CODE §§ 1210(d), 1210.1(a)-(b) (West Supp. 2004) (defining "misdemeanor not related to the use of drugs" to exclude possession of drug paraphernalia, and providing that "anyone convicted of a nonviolent drug possession offense shall receive probation," so long as he or she is not "convicted in the same proceeding of a misdemeanor not related to the use of drugs").

184. *See, e.g.*, Lawson Interview, *supra* note 3 (noting that the paraphernalia charge would only qualify for Proposition 36 if charged alongside a qualifying offense, e.g. drug possession for personal use).

185. People v. Superior Court (Stuart), No. 01CC08951, 2001 WL 1153451 (Cal. Ct. App. Aug. 15, 2001) (denying a request by the Anaheim City Attorney for a writ of mandate ordering the sentencing judge to revoke Proposition 36 diversion for nine individuals convicted solely of possession of drug paraphernalia).

186. *Id.* at *2.

187. *Id.*

included in the definition of a nonviolent drug offense.[188] However, public intoxication (Penal Code section 647(f)) is a separate crime under California law, and is a manifestation of the "disorderly conduct" misdemeanor.[189] While public intoxication is most often associated with the over-consumption of alcohol, the offense can be charged for public *drug* intoxication.[190] In either circumstance, the element of creating a public disturbance must be proven.[191]

The CDAA implementation guide did not mention public intoxication in its discussion of offenses not covered by the definition of nonviolent drug possession. However, the CDAA argued that any offense that requires proof of some "[a]dditional conduct," such as the element of driving in a driving under the influence of a drug offense,[192] is distinct from "straight" personal use, and should not be Proposition 36 eligible under Penal Code section 1210.1(a).[193] The California Public Defender's Association ("CPDA") analysis of Proposition 36 did not address public drug intoxication.[194] Less than half of respondents to the UCLA study considered public intoxication to be Proposition 36 eligible.[195]

6. *Marijuana Cultivation for Personal Use*

California Health and Safety section 11358 covers a range of marijuana related activities, from marijuana that is "plant[ed]," "cultivate[d]," or "harvest[ed]," to marijuana that is dried or "process[ed]."[196] The CPDA argued that, at the very least, one who is convicted merely of *drying* marijuana should be considered Proposition 36 eligible when the plant is dried for personal use.[197] Simple possession of marijuana[198] is considered Proposition 36 eligible. In fact,

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188. *See* CAL. PENAL CODE § 1210(a) (West Supp. 2004) (defining "nonviolent drug possession offense" to include "the offense of being under the influence of a controlled substance in violation of section 11550 of the Health and Safety Code").

189. *Id.* § 647 (West 1999 & Supp. 2004).

190. *Id.* § 647(f). The elements of the offense are, (a) being found in a public place, (b) under the influence of a drug or controlled substance, (c) in such a condition that one is either (i) unable to exercise care for his or her own safety and the safety of others, or (ii) interfering with the use of a public way. *Id.*

191. CALJIC 16.430 Disorderly Conduct—Drunk in Public Place:

> In order to prove this crime, each of the following elements must be proved: 1. A person was found in a public place; 2. That person was willfully under the influence of [alcohol or a drug] or any combination of [alcohol and a drug]; and 3. That person was in a condition that [he or she] was unable to exercise care for [his or her] own safety or the safety of others, or 4. That person, by reason of being under the influence, interfered with or obstructed or prevented the free use of any street, sidewalk, or other public way.

Id (internal brackets omitted).

192. CAL. VEH. CODE § 23152 (West 2000).

193. CDAA, *supra* note 9, at 5.

194. *Id.*; CPDA, *supra* note 35, at 20.

195. EVALUATION, *supra* note 106, at 62.

196. CAL. HEALTH & SAFETY CODE § 11358 (West 1991).

197. CDAA, *supra* note 35, at 20.

198. CAL. HEALTH & SAFETY CODE § 11357 (West 1991 & Supp. 2004).

possession of an ounce or less of marijuana is only an infraction, punishable by no more than a $100 fine.[199]

Furthermore, while Penal Code section 1210(a) lists the "production" of a controlled substance as an exception to nonviolent drug possession,[200] individuals who grow marijuana often rely on the advice of their physician under California's Compassionate Use Act.[201] Consistent with this interpretation, over 80 percent of participants in the UCLA study believed a violation of Health and Safety section 11358 was Proposition 36 eligible.[202]

In an unpublished opinion, the Fifth District Court of Appeal considered whether a defendant could receive Proposition 36 diversion for growing marijuana for personal use.[203] After failing to complete deferred entry of judgment for the offense under Penal Code section 1000,[204] the defendant argued that Proposition 36 should apply to him because he grew the plants for his personal use.[205] The court noted that because the cultivation of marijuana involves the "production" of a controlled substance, cultivation is not a "nonviolent drug possession offense" under Proposition 36.[206]

7. *Presumptively Ineligible Offenses: Drug-Related Conduct Other than Personal Use*

Penal Code section 1210(a) explicitly excludes some drug related conduct from its definition of nonviolent drug possession.[207] Specifically, the unlawful possession of a controlled substance for the purposes of "sale, production or manufacturing" is not covered by Proposition 36.[208] To help lawyers determine whether a given offense is Proposition 36 eligible, the CPDA recommends asking whether the given offense is closer to "personal use" or "sale, production or manufacturing."[209]

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199. *Id.* § 11357(b).

200. CAL. PENAL CODE § 1210(a) (West Supp. 2004) (excluding "possession for sale, production, or manufacturing" from the definition of "nonviolent drug possession offense").

201 CAL. HEALTH & SAFETY CODE § 11362.5(a) (West Supp. 2004) (stating that "this section shall be known ... as the Compassionate Use Act of 1996").

202. EVALUATION, *supra* note 106, at 62.

203. People v. Tiedje, No. F040510, 2003 WL 21949784, at *5 (Cal. Ct. App. Aug. 15, 2003). Defendant argued that he had a "recommendation" from his physician for the marijuana. *Id.*

204. *Id* at *1. The court noted that Tiedje did not present a viable Proposition 215 medical defense. *Id.* at *12.

205. *Id.* at *5. According to the record, Tiedje had a total of 122 plants, which he was adept at cloning, and had converted one of his closets into a grow chamber.

206. *Id.* at *8 (citing People *ex rel.* Lungren v. Peron, 59 Cal. App. 4th 1383, 1393, n.6 (1997)). The court explained how a person who meets the provisions of the Compassionate Use Act is granted a limited immunity from prosecution and thus would not come within the provisions of SACPA. *Id.* at *9-*10.

207 Cal. Penal Code § 1210(a) (West Supp. 2004).

208 *Id.*

209. CPDA, *supra* note 35, at 20.

The crimes of possession for sale and transportation both contain the element of distributing the drug to another,[210] and are treated as exclusive of nonviolent drug possession for "personal use" in circumstances where such intent is proven.[211] Likewise, furnishing a controlled substance is almost uniformly excluded from Proposition 36.[212] Another ineligible drug offense is the crime of "obtain[ing] [a] [prescription] controlled substance . . . by fraud, deceit, [or] misrepresentation."[213] In an unpublished opinion, the Third District Court of Appeal affirmed the exclusion of a defendant from Proposition 36, even though he obtained the substance (morphine) for his personal use.[214] The trial court declined to sentence the defendant to diversion, stating that it was less concerned with treating the defendant's drug addiction than with punishing him for "endangering other people because of his behavior."[215] In reaching its decision to exclude Health and Safety section 11173 from Proposition 36, the court reasoned that the "gravamen" of the crime was "fraud."[216] This conduct took the offense out of "simple" drug possession for personal use.[217]

B. Principal Disqualifier—Concurrent Misdemeanor Not Related to the Use of Drugs

In addition to the narrow definition of a nonviolent drug possession offense in Penal Code section 1210, Proposition 36 eligibility is restricted by the five exceptions listed in Penal Code section 1210.1(b).[218] For instance, Penal Code section 1210.1(b)(2) renders ineligible anyone who is convicted of "any felony" or "a misdemeanor not related to the use of drugs" along with a qualifying nonviolent drug possession offense.[219] Penal Code section 1210(d) defines

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210. *E.g.*, CAL. HEALTH AND SAFETY CODE § 11379 (West 1991 & Supp. 2004) ("Transportation, sale or distribution of specified [i.e. Schedule III, IV and V] controlled substances.").

211. *See id.* § 11351 (containing the element of possession for sale purposes); *id.* § 11352(a) (specifying that "every person who transports, imports into this state, sells, furnishes, administers, or gives away . . . any controlled substance . . . shall be punished by imprisonment").

212. *See id.* § 11170 ("[To] prescribe, administer, or furnish a controlled substance."); *see e.g.*, Wilson Letter, *supra* note 178 ("any charge that pertains to provision of [controlled] substances to other persons or aiding and abetting the provision to or use of those substances by other persons (Health & Safety Code section 11365) is not eligible [for Proposition 36].").

213. CAL. HEALTH AND SAFETY CODE § 11173 (West 1991 & Supp. 2004); People v. Finch, No. C043296, 2004 WL 65293, at *3 (Cal. Ct. App. Jan. 15, 2004).

214. *Finch*, 2004 WL 65293, at * 1.

215. *Id.* at *2. The defendant "restored an IV where there was a doctor's order [] discontinuing the IV," which resulted in the patient getting out of bed and badly injuring his head." *Id.* at *1. Other patients were endangered by the defendant's misrepresentation of morphine administration on their charts. *Id.* at *1-2.

216. *Id.* at *3.

217. *Id.*

218. CAL. PENAL CODE § 1210.1 (West Supp. 2004).

219. *Id.* § 1210.1(b)(2) ("Any defendant who, in addition to one or more nonviolent drug possession offenses, has been convicted in the same proceeding of a misdemeanor not related to the use of drugs or any felony [is ineligible for probation pursuant to subdivision (a)].").

"misdemeanor not related to the use of drugs" as "a misdemeanor that does not involve (1) the simple possession or use of drugs or drug paraphernalia, 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)."[220]

In California, a misdemeanor is any crime that is neither classified as an infraction nor punished by incarceration in state prison.[221] An infraction is a crime that is not punishable by incarceration.[222] Penal Code section 17 provides for some misdemeanors to be charged as infractions by the prosecutor or reduced to infractions at the discretion of the court.[223] In the Vehicle Code, all offenses are infractions unless specifically designated misdemeanors or felonies.[224] Several of these misdemeanors are reducible to infractions under Penal Code section 17.[225]

In addition to reducing certain misdemeanors to infractions, the trial judge also has the discretion to dismiss charges in order to do justice under Penal Code section 1385.[226] In its implementation guide, the CPDA argued that it was within the discretion of the trial court to strike a concurrent misdemeanor for the purposes of qualifying a defendant for Proposition 36 diversion.[227] While the California Supreme Court held that Penal Code section 1385 is inapplicable to the washout provision under Penal Code section 1210.1(b)(1),[228] in *In re Varnell* the court affirmed the authority of the trial court to dismiss misdemeanor offenses that would otherwise disqualify a defendant from Proposition 36.[229]

1. What Is a Drug-Related Misdemeanor?

Penal Code section 1210(d) excludes four misdemeanors from the definition of "misdemeanor not related to the use of drugs."[230] However, this does not mean that these offenses are Proposition 36 eligible. For example, the misdemeanor of

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220. *Id.* § 1210(d).

221. *Id.* § 17.

222. *Id.* § 19.6.

223. *Id.* § 17(d)(1)-(2).

224. CAL. VEH. CODE § 40000.1 (West 2000); People v. Oppenheimer, 42 Cal. App. 3d Supp. 4 (1974).

225. CAL. PENAL CODE § 17 (West 1999) (listing Vehicle Code sections 12500 (driving without a license); 14601.1 (driving with a suspended license); 40508 (absconding); § 42005 (failure to attend traffic school); and others).

226. *Id.* § 1385 (West 2000 & Supp. 2004); People v. Superior Court (Romero) 917 P.2d 628 (1996) *cited in* People v. Ayele, 126 Cal. Rptr. 2d 262, 266 (2002).

227. CPDA, *supra* note 35, at 28-29.

228. *In re* Varnell, 30 Cal. 4th 1132 (2003).

229. *Id.* at 1143 (stating that "[i]n the absence of a charge or allegation . . . [disqualifying petitioner from Proposition 36] under subdivision (b) of 1210.1, there was nothing for a court, acting under section 1385, to dismiss that could render petitioner eligible for mandatory probation or treatment under Proposition 36").

230 CAL. PENAL CODE § 1210(d) (West Supp. 2004) (defining the term "misdemeanor not related to the use of drugs" as a "misdemeanor that does not involve (1) the simple possession or use of drugs or drug paraphernalia, 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)").

being present at a location where narcotic substances are being used (Health and Safety Code section 11365),[231] is a drug-related misdemeanor under Penal Code section 1210(d); however, it is not included within the definition of a nonviolent drug offense in Penal Code section 1210(a).[232] In fact, the hallmarks of "nonviolent drug possession"— use, possession, and transportation *for personal use*—are not elements of Health and Safety Code section 11365.[233] Likewise, "possession of [drug] paraphernalia"[234] is a drug-related misdemeanor for the purposes of Penal Code section 1210.1(b)(2), but is not included in the definition of an underlying nonviolent drug possession offense in Penal Code section 1210(a).[235] The same is true for "failure to register as a drug offender."[236] Therefore, under a strict interpretation of the statute, none of these offenses would *require* Proposition 36 diversion if charged seperately, despite the fact that each is drug-related.[237]

2. *The Same Proceeding*

In California, separate offenses may be charged in the same pleadings if they are "connected together in their commission" or are "of the same class of crimes or offenses."[238] According to Penal Code section 1210.1(b)(2), a person is disqualified from Proposition 36 diversion if he or she is "convicted *in the same proceeding* of a misdemeanor not related to the use of drugs or any felony."[239] Trial courts have the discretion to order that separate offenses in the same information be tried separately, whereby a conviction in one could be considered a separate proceeding for purposes of Proposition 36.[240]

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231. CAL. HEALTH & SAFETY CODE § 11365 (West 1991 & Supp. 2004).

232. *Compare* CAL. PENAL CODE § 1210(b) (West Supp. 2004) (mentioning "presence in a place where drugs are used") *with id.* § 1210(a) (defining "nonviolent drug possession offense" as involving "personal use").

233. CALJIC 16.050 (West 2004) ("Every person who knowingly, willfully and intentionally visits or is in any ... place where a controlled substance . . . is being unlawfully smoked or used, and who has knowledge that the unlawful activity is occurring, and who aids and abets the unlawful activity, is guilty of a violation of Health and Safety Code [section] 11365, subdivision (a), a misdemeanor.").

234. CAL. HEALTH & SAFETY CODE § 11364 (West 1991 & Supp. 2004).

235. *Compare* CAL. PENAL CODE § 1210 (a) (West Supp 2004) (defining a nonviolent drug offense as "the unlawful personal use, possession for personal use, or transportation for personal use of any controlled substance") *with id.* § 1210(d) (providing that a "misdemeanor not related to the use of drugs" does not include "the simple possession or use . . . of drug paraphernalia").

236. *See* CAL. HEALTH & SAFETY CODE § 11364 (West 1991 & Supp. 2004).

237. While Penal Code section 1210.1(a) is easy to apply in situations where a person is charged with *both* possession of a controlled substance *and* an accompanying misdemeanor (e.g. possession of drugs and drug paraphernalia), the question of whether any one of the three offenses would qualify as Proposition 36 eligible if charged *by itself* is a matter of some debate. *See supra*, Part II (comparing various interpretations of Penal Code sections 1210 and 1210.1).

238. CAL. PENAL CODE § 954 (West 1985).

239. *Id.* § 1210.1(b)(2) (West Supp. 2004) (emphasis added).

240. *Id.* § 954 (West 1985).

The Fourth District Court of Appeal examined whether a conviction for a non-drug-related misdemeanor by a separate guilty plea triggered the disqualifying provision of Penal Code section 1210.1(b)(2).[241] The defendant was charged with nonviolent possession of methamphetamine and an unrelated misdemeanor.[242] Because the trial court "exercised its discretion by creating two proceedings," the defendant contended that he was not "convicted in the same proceeding" within the meaning of Penal Code section 1210.1(b)(2).[243] The prosecution countered that the trial court had merely executed two plea agreements in a single proceeding.[244] The Fourth District agreed that the trial court had not made two proceedings out of one since "[b]oth charges arose from a single incident, were charged in the same information, share[d] the same case number, and the pleas were entered in the same hearing."[245]

In an unpublished opinion, the Fifth District Court of Appeal reached a similar interpretation of "in the same proceeding."[246] At trial, the defendant had argued that his offenses should be severed because they were "the result of actions that occurred on separate occasions" and were not "transactionally related."[247] The trial court denied the request for severance.[248] The defendant was convicted in a single trial on one information with one verdict, which made him ineligible for Proposition 36.[249]

Besides severance, defendants can avoid disqualification under Penal Code section 1210.1(b)(2) by convincing the trial court to strike the unrelated misdemeanor count,[250] perhaps by arguing that it was only added to defeat Proposition 36 diversion. While the California Supreme Court held that a trial court may not disregard the fact of a defendant's violent history for disqualification under the "washout" provision of Penal Code section 1210.1(b)(1),[251] it also reaffirmed the function of Penal Code section 1385 to allow for the dismissal of "individual charges and allegations in a criminal action."[252]

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241. People v. Superior Court (Jefferson), 97 Cal. App. 4th 530 (2002).

242. *Id.*

243. *Id.* at 537.

244. *Id.*

245. *Id.* at 538.

246. People v. Frausto, No. F040535, 2003 WL 22079973 (Cal. Ct. App. Sept. 9, 2003).

247. *Id.* at *1, *3 (noting that defendant was charged with possession of methamphetamine, driving under the influence of alcohol or drugs, driving with a blood alcohol content of .08% or greater and driving with a suspended license).

248. *Id.* at *4.

249. *Id.* (citing *People v. Roberto V.*, 93 Cal. App. 4th 1350, 1370 (2001)).

250. CPDA, *supra* note 35, at 28-29.

251. *See infra* Part IV.C (discussing the California Supreme Court's interpretation of Penal Code section 1385 in the context of the five-year washout provision of Penal Code section 1210.1(b)(1)).

252. *In re* Varnell, 30 Cal. 4th 1132, 1137 (2003) (citing *People v. Hernandez*, 22 Cal. 4th 512, 524 (2000)).

3. *Concurrent Possession of Drug Paraphernalia*

Penal Code section 1210(d) states that "[t]he term 'misdemeanor not related to the use of drugs' means a misdemeanor that does not involve . . . the simple possession . . . [of] drug paraphernalia."[253] In an unpublished opinion, the Second District Court of Appeal remanded a case for resentencing where the trial court found defendant ineligible for Proposition 36 diversion under Penal Code section 1210.1(b)(2) for possession of paraphernalia along with simple drug possession for personal use.[254] The Second District found that the trial court erred in disqualifying the defendant from Proposition 36, since there was "no question" that misdemeanor possession of a smoking device was a Proposition 36 eligible concurrent misdemeanor.[255]

4. *Theft of a Drug for Personal Use*

In *People v. Garcia*, an employee of a nursing home pled guilty of petty theft and possession of fentanyl.[256] The trial court found Garcia ineligible for Proposition 36, and sentenced him to six months in county jail.[257] On appeal, the Third District Court of Appeal remanded the case for resentencing, holding that since the *purpose* of the theft was to possess and consume fentanyl, the theft necessarily *involved* the "use" of the drug within the meaning of Proposition 36.[258] On appeal to the California Supreme Court, the government argued that the petty theft should not be considered drug-related because it encompassed the additional element of intent to deprive another of his or her property.[259] Unfortunately, the defendant died before the Supreme Court could hear his case, and the appellate opinion remains vacated by the grant of review.[260]

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253. CAL. PENAL CODE § 1210(d) (West Supp. 2004).

254. People v. Jones, No. B167398, 2004 WL 231786 (Cal. Ct. App. Feb. 9, 2004). A jury found that the defendant had possessed a single rock of crack cocaine weighing 0.06 grams and a glass cocaine pipe, and the trial judge sentenced him to two years in state prison for the possession offense and a concurrent 90-day term for the paraphernalia conviction. *Id.* at *1. The judge suspended the two-year sentence, placed the defendant on 36-month probation and ordered him to participate in a nine-month drug treatment program. *Id.*

255. *Id.* at *3.

256. *See* CAL. HEALTH & SAFETY CODE § 11055(c)(8) (West Supp. 2004) (listing fentanyl as a Schedule II opiate); *see also* People v. Garcia, 120 Cal. Rptr. 2d 725 (2002), *vacated by grant of Supreme Court review.* Co-workers found Garcia unconscious on the floor of a restroom with fresh needle marks on his right wrist and syringe in his right hand, and fentanyl patches lying on the floor next to him. *Id.* at 726.

257. *See* People v. Garcia, 120 Cal. Rptr. 2d 725 (2002).

258. *Id.* at 727 (reasoning that, as "the word 'involve' generally means 'to have . . . as a part of itself' to 'contain, include,' 'to require as a necessary accompaniment'. . . when a person steals an illicit drug for the sole purpose of consuming it and the person immediately ingests the drug, the theft necessarily 'involves' the simple possession or use of the drug").

259. Brief for Respondent at 11, People v. Garcia, 120 Cal. Rptr. 2d 725 (2005) (No. S108472).

260. Marc J. Nolan, *Proposition 36 Case Law*, 26 PROSECUTOR'S BRIEF 9, 13 n.2 (2004).

5. *Driving Under the Influence of a Drug*

In *People v. Canty*, the Third District Court of Appeal determined that because driving under the influence ("DUI") includes the element of impaired driving it is a misdemeanor sufficiently unlike "simple" drug possession to qualify a defendant for Proposition 36 diversion.[261] Upon review the California Supreme Court agreed, deciding that misdemeanor driving while under the influence of drugs disqualifies a drug offender from Proposition 36 diversion.[262] Impaired driving raises a different public policy concern than merely being under the influence because of the hazard to other motorists and passersby.[263]

Similarly, misdemeanors for reckless driving,[264] failing to yield,[265] and street racing[266] all involve some degree of dangerous or risky driving.[267] For example, a person commits the misdemeanor offense of failing to yield (Vehicle Code section 2800) if he or she "willfully flees or otherwise attempts to elude a pursuing peace officer."[268] Under *Canty*, these misdemeanors would probably disqualify a defendant from Proposition 36.[269]

6. *Other Vehicle Offenses: Misdemeanors and Infractions*

In *People v. Orabuena*, the Sixth District Court of Appeal reviewed the case of a defendant who was excluded from Proposition 36 after pleading guilty to possession of methamphetamine, being under the influence of the same, and misdemeanor driving on a suspended license.[270] The court decided that, even though the driving on a suspended license charge was a misdemeanor not related to the use of drugs,[271] the trial court should have decided whether to exercise its

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261. People v. Canty, 32 Cal. 4th 1266, 1275 (2004).

262. *Id.* at 10-11.

263. *Id.* at 9-10 (reasoning that driving under the influence of a drug is not "similar" to being under the influence of a drug because the emphasis is on impaired driving and "the driver's activity as it actually or potentially affects or 'transacts' with other persons" and because the purpose of outlawing impaired driving is to protect other people on the roadway, rather than the drug user).

264. CAL. VEHICLE CODE § 23103 (West 2000).

265. *Id.* at § 2800 (referring to the failure "to comply with any lawful order... of any peace officer").

266. *Id.* at § 23109.

267. *See, e.g.*, CALJIC 16.840 Reckless Driving (containing the elements of driving a vehicle on a street or highway "with an intentional or conscious disregard for the safety of [others]").

268. *Id.* 16.890 Flight From Pursuing Police Officer (requiring that the pursuing peace officer wear a distinctive uniform, in a marked police car, while "exhibiting at least one lighted red lamp" and "sounding the siren as may be reasonably necessary").

269. *See* People v. Canty, 32 Cal. 4th 1266, 1275 (2004) (reasoning that section 23152 of the Vehicle Code is intended to protect other drivers and people on the roadways, an interest that goes beyond the interest served by Health and Safety Code section 11550, which is meant to protect the drug user from harming himself).

270. People v. Orabuena, 116 Cal. App. 4th 84 (2004).

271. *Id.* Orabuena had four prior convictions for driving on a suspended license. *Id.*

discretion to dismiss it.[272] As prosecutors had pled the vehicle violation in *Orabuena* as a separate count in the complaint, it was within the court's discretion to strike it "in the interests of justice."[273] Typically, individual prosecutors themselves have discretion to drop charges in order to make defendants Proposition 36 eligible.[274]

In an unpublished opinion, the Fifth District Court of Appeal considered the case of a defendant who was disqualified from Proposition 36 by a concurrent misdemeanor conviction for driving without a valid driver's license.[275] At sentencing, the defendant moved in the trial court to reduce the misdemeanor to an infraction.[276] The judge denied the defendant's motion, reasoning that it was too late in the proceedings for the court to reduce the charge.[277] On appeal, the Fifth District refused to reverse this determination or remand for sentencing, since the defendant had put himself outside of the "spirit" of Proposition 36 by testifying that he did not use methamphetamine.[278]

7. *Other Misdemeanors*

In one California appellate court case, a defendant was denied diversion under Proposition 36 after being convicted of nonviolent drug possession and delaying or resisting an officer.[279] The Fourth District Court of Appeal found that

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272. *Id.* at 2429-30 (discussing the trial court's discretion to dismiss the vehicle code violation pursuant to Penal Code section 1385).

273. *Id.* The court distinguished *In re* Varnell, where the defendant's prior conviction disqualified him from Proposition 36 under Penal Code section 1210.1(b)(1), because that was a "sentencing factor" not an "action" within the meaning of Section 1385. *Id.*

274. *E.g.*, Wilson, *supra* note 171, at 2 ("Our Deputy DAs are given the discretion on a case-by-case basis to dismiss concurrent charges in order to render a defendant eligible for Prop. 36 probation.").

275. People v. Macias, No. F041150, 2003 WL 22346640, at *1 (Cal. Ct. App. Oct. 15, 2003). A jury acquitted the defendant of possession of methamphetamine for sale (Health and Safety Code section 11378), but found the defendant guilty of both possession of methamphetamine (Health and Safety Code section 11377) and transportation of methamphetamine (Health and Safety Code section 11379) and two misdemeanors; driving without a valid driver's license (Vehicle Code section 12500) and possession of marijuana (Health and Safety Code section 11357, subd. (b)). *Id.*

276. *Id.* The defendant argued that the court had the discretion to reduce the charge under Penal Code section 17, subd. (d), which states "that a violation of certain enumerated statutes, including, Vehicle Code section 12500, 'is an infraction when: . . . (2) The court, with the consent of the defendant, determines that the offense is an infraction in which event the case shall proceed as if the defendant had been arraigned on an infraction complaint.'" *Id.* at *2 n.2.

277. *Id.* at *2.

278. *Id.* at *3. The defendant was pulled over by Atwater Police after the officer noticed that the car had expired registration tags. After learning that the defendant was not licensed to drive, the officer placed the defendant under arrest and searched the inside of the car where he found a thermos containing four baggies of methamphetamine totaling over fifty grams. At trial, the defendant testified that he found the thermos by the side of the road and thought it might belong to a coworker. He did not know it contained methamphetamine; he had never knowingly driven with methamphetamine in his car; he had never purchased methamphetamine with his earnings; and he was not a user of methamphetamine. The judge suspended imposition of sentence and placed defendant on probation for 60 months, with a condition that he serve ten months in county jail. *Id.* at *1.

279. People v. Ayele, 126 Cal. Rptr. 2d 262 (2002), *superceded by grant of review.*

the resisting arrest misdemeanor was not "drug related" because it contained the additional element of willfully resisting an officer.[280] Misdemeanor battery on a police officer has likewise been held to disqualify a defendant from Proposition 36.[281]

Serious misdemeanors, such as misdemeanors that involve harm to discrete victims, will disqualify defendants from Proposition 36 diversion in practically all cases.[282] Examples include contributing to the delinquency of a minor and endangering a child in one's care.[283] While literally any misdemeanor other than the relatively few "drug related" misdemeanors listed in 1210(d) will disqualify a defendant from Proposition 36 if convicted in the same proceeding as a nonviolent drug offense,[284] prosecutors are relatively likely to omit minor misdemeanor offenses from the complaint,[285] or drop such charges in order to make defendants eligible.[286]

C. *Secondary Disqualifiers*

A defendant who has committed a "serious or violent felony" (as defined in Penal Code sections 667.5 and 1192.7) will be ineligible for Proposition 36 unless he or she can satisfy a five-year washout provision.[287] A person who has committed such a felony must have been out of prison for at least five years, during which time he or she did not commit another felony (other than a nonviolent drug offense) or violent misdemeanor, in order to receive Proposition 36 diversion.[288] This five-year period refers to the five years that immediately precede the current drug offense.[289]

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280. *Id.* (reasoning that resisting arrest is not among the limited class of offenses described in Penal Code section 1210(d) merely because the defendant's flight was motivated by his desire to dispose of the drug).

281. People v. Montano, No. H023030, 2003 WL 21766517, (Cal. Ct. App. July 31, 2003).

282. *See supra*, Part III.D (discussing the intent of voters to exclude defendants who commit "other crimes" besides nonviolent drug possession).

283. People v. Hubbard, No. F039113, 2003 WL 21040583 (Cal. Ct. App. May 9, 2003).

284. *See, e.g.*, People v. Superior Court (Jefferson), 97 Cal. App. 4th 530 (2002) (holding that solicitation of prostitution will disqualify a defendant from Proposition 36).

285. *E.g.*, Telephone Interview with Mike Lomazo, Deputy District Attorney, Riverside County (Feb. 3, 2004) (notes on file with *McGeorge Law Review*) (stating that virtually any misdemeanor offense would disqualify a defendant if charged, and discussing prosecutor's discretion to not charge certain offenses in order to qualify the defendant for Proposition 36 diversion).

286. *E.g.*, Rubin, *supra* note 51 (stating that minor misdemeanors such as Vehicle Code section 14601, when charged concurrently with nonviolent drug offenses, are typically dropped during plea negotiations).

287. CAL. PENAL CODE § 1210.1 (b)(1) (West Supp. 2004).

288. *See id.* (defining the washout period as "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 nonviolent drug possession offense, or (B) a misdemeanor conviction involving physical injury of the threat of physical injury to another person").

289. *See* Nolan, *supra* note 260, at 9 (citing People v. Superior Court (Martinez), 104 Cal. App. 4th 692 (2002), for the interpretation of the five year washout provision in Penal Code section 1210.1(b)(1)).

In *In re Varnell*, the California Supreme Court reversed an appellate decision that held it to be within the trial court's discretion to disregard prior offenses for purposes of Proposition 36 eligibility.[290] The Court ruled that the discretion afforded trial courts by Penal Code section 1385 does not cover a defendant's prior offense because that does not need to be plead and proven as a specific charge or allegation but is merely a fact for the court to consider at sentencing.[291] The Second District Court of Appeal later decided that the washout provision of the law does not apply to offenses committed as a juvenile, since juveniles are not "convicted" within the meaning of Penal Code section 1210.1(b).[292]

Another way for an individual to lose eligibility for Proposition 36 diversion is through Penal Code section 1210.1(b)(3). This subsection renders ineligible those persons who unlawfully possess certain specified substances (cocaine base, cocaine, heroin, methamphetamine, or PCP) while "using a firearm," or who are under the influence of one of the same substances while using a firearm.[293]

D. Voluntary Disqualifiers

The fourth category of defendants who are ineligible for Proposition 36 diversion are those who refuse treatment as a condition of their probation.[294] Under this provision, someone who is convicted of a qualifying nonviolent drug possession offense and wishes to accept a brief jail sentence may do so, despite having the option to undergo treatment in the community.[295] This fourth basis for disqualification is also triggered in cases where the defendant is unable to complete a drug treatment program because he or she is deported.[296]

E. Unamenability

Finally, an addict who has failed to give up drugs after numerous attempts at treatment may be declared "unamenable" to treatment.[297] Specifically, the defendant must have two separate convictions for nonviolent drug offenses, where he or she participated in two different courses of Proposition 36 diversion,

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290. 70 P.3d 1037, 1041 (2003). The defendant's assault conviction three years prior to the nonviolent drug possession offense made him ineligible for treatment. *Id.*

291. *Id.*

292. *See* Nolan, *supra* note 260, at 10 (citing People v. Westbrook, 100 Cal. App. 4th 378 (2002)). A prior juvenile adjudication is not a "conviction" for purposes of Proposition 36 eligibility. *Id.*

293. CAL. PENAL CODE § 1210.1(b)(3) (West Supp. 2004).

294. *Id.* at § 1210.1(b)(4).

295. *See* McGrath, *supra* note 123, (reporting the high percentage of defendants in his county who opt out of treatment because they do not want to stop using drugs).

296. *See* Nolan, *supra* note 260, at 11 (citing People v. Espinosa, 107 Cal. App. 4th 1069 (2003)); *see also* Telephone Interview with Joan Stein, Deputy District Attorney, San Diego County (Feb. 12, 2004) (notes on file with *McGeorge Law Review*).

297. CAL. PENAL CODE § 1210.1(b)(5) (West Supp. 2004).

and he or she must be found unamenable to "any and all forms of treatment" before he or she may be excluded under this provision.[298] Only if these three requirements are met may a defendant be sentenced to jail, for a maximum of thirty days.[299]

VI. CONCLUSION

Anecdotal evidence indicates that there has not been any systematic effort by prosecutors to undermine Proposition 36 except (perhaps) in a handful of small rural counties.[300] However, the relatively small number of eligible drug offenses, coupled with the large number of disqualifying misdemeanors, gives a prosecutor who wishes to avoid Proposition 36 in a given case the ability to do so with greater ease than initiative drafters anticipated.[301] That is why it is crucial for trial courts to have the discretion to bifurcate proceedings or dismiss misdemeanor charges when justice demands.[302] Fortunately, appellate courts have repeatedly reaffirmed this power.[303]

Proposition 36 puts faith in the efficacy of drug treatment, and simultaneously rejects incarceration of drug addicts as a waste of resources.[304] Proposition 36 seeks to conserve jail and prison beds for more deserving offenders by getting nonviolent drug addicts out of jail and into treatment.[305] But it employs an overbroad and complex system of qualifiers and disqualifiers that sometimes hinder the screening of only violent and dangerous individuals.[306] As California's experience with this new drug treatment option matures, the sweeping change that voters demanded in 2000 may be eroded by judges' incremental adoption of the strict interpretation demanded by Proposition 36 opponents.[307]

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298. *Id.*; CDAA, *supra* note 9, at 13.

299. *See* CPDA, *supra* note 35, at 24-27 (arguing that the 30-day provision is a maximum, which furthers the goal of Proposition 36 to "preserv[e] prison and jail cells for... violent offenders" by maintaining a short jail term only for "incorrigible drug addict[s]").

300. *See supra* Part IV (discussing the research conducted by the author and UCLA).

301. *See supra* Part V (providing examples of misdemeanor offenses that disqualify defendants from Proposition 36 when charged in the same proceeding as a nonviolent drug possession offense).

302. *See id.* (analyzing the discretion of trial courts to dismiss charges under Penal Code section 1385).

303. *See id.* (discussing the Supreme Court opinion in *In re* Varnell, and the opinion of the Sixth District Court of Appeals in People v. Orabuena).

304. *See supra* Part III (discussing the policy behind Proposition 36).

305. *Id.*

306. *Compare id.* (containing statements of purpose and intent of Proposition 36) *with supra* Part V (providing examples of cases where defendants were found ineligible for Proposition 36).

307. *See supra* Part III (contrasting the arguments for and against Proposition 36 with the purposes of the initiative).