Prop 36 Syllabus[1]

I *Prospective vs. retroactive application*

Held by the California Supreme Court and Courts of Appeal:

Proposition 36 does not apply to those convicted before the initiative's July 1, 2001, effective date, even if their convictions had not yet become final on appeal as of that date. The prospective application of Prop 36 to only those convicted on or after July 1, 2001, does not violate equal protection of the law. (*People v. Floyd* (2003) 31 Cal.4th 179; see also *In re DeLong* (2001) 93 Cal.App.4th 562 [defendant is "convicted" for Prop 36 purposes at time of sentencing]; *In re Scoggins* (2001) 94 Cal.App.4th 650 [same]; *People v. LeGault* (2002) 95 Cal.App.4th 178, review denied Apr. 10, 2002 [assuming that defendant is convicted when sentenced]; but see *People v. Mendoza* (2003) 106 Cal.App.4th 1030, review denied May 14, 2003 [defendant is "convicted" for Prop 36 purposes at the time of guilt adjudication, not sentencing, so defendant who pled guilty to qualifying drug offense before July 1, 2001, is not entitled to Prop 36 disposition, regardless of when sentencing occurred].)

II *Prop 36 only applies to offenders convicted of qualifying drug offenses in adult court*

Held by the Court of Appeal:

Prop 36 applies only to eligible adult offenders, or to juveniles convicted in adult courts, who commit qualifying drug possession offenses, and not to juveniles adjudicated for such offenses in juvenile court. This differentiation does not violate equal protection of the law. (*In re Jose Z.* (2004) 116 Cal.App.4th 953, review denied Jun. 9, 2004.)

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[1] **Please be advised:** These case summaries have been compiled for informational purposes only in tracking and explaining the various Prop 36-related issues confronted by the appellate courts. While every effort has been made to describe the case holdings concisely ,accurately and in a neutral manner, the summaries do not purport to be definitive, and otherreadings/interpretations of the summarized cases may be possible. To fully appreciate andunderstand the import of the decisions listed in this document, readers are encouraged to consultthe actual texts of the decisions themselves.

III Questions of eligibility

A. Under Penal Code section 1210(a), the definition of a Prop-36qualifying "nonviolent drug possession offense" does not include illegal activities that extend beyond the simple use, possession for personal use, or transportation for personal use of drugs

Held by the Courts of Appeal:

The offense of cultivating marijuana (Health & Saf. Code, § 11358) does not meet the definition of a Prop 36-qualifying "nonviolent drug possession offense" under Penal Code section 1210(a), which expressly excludes from its terms the production or manufacturing of drugs. This is so even where the person is cultivating, or producing, marijuana for his own use. (*People v. Sharp* (2003) 112 Cal.App.4th1336.)

The offense of maintaining a place for the purpose of unlawfully selling, giving away, or using any controlled substance (Health & Saf. Code, § 11366) also fails to qualify as a "nonviolent drug possession offense" under Penal Code section 1210(a)because it is "more like the commercial offenses expressly excluded from" the provisions of Prop 36. (*People v. Ferrando* (2004) 115 Cal.App.4th 917, review denied Apr. 28, 2004.)

The offense of possessing a controlled substance while armed with a loaded, operable firearm (Health & Saf. Code, § 11370.1(a)) is not a "nonviolent drug possession offense" within the meaning of Proposition 36 because the prohibited activity is not limited to the person's own personal use or possession of drugs but the threat that armed controlled substance abusers pose to the public safety. (*In re Ogea* (2004) 121Cal.App.4th 974.)

Forging or presenting a forged prescription to obtain drugs (Health & Saf. Code, §11368) involves unlawful, fraudulent activity beyond the mere simple use, possession for personal use, or transportation for personal use of drugs, and therefore is not a Proposition 36-qualifying "nonviolent drug possession offense." (*People v. Wheeler*(2005) 127 Cal.App.4th 873, review denied Jun. 22, 2005; *People v. Foreman* (2005)126 Cal.App.4th 338.)

B. Court may require defendant convicted of transportation of drugsto demonstrate that such transportation was "for personal use" inorder to qualify for Prop 36

Held by the Courts of Appeal:

Defendant convicted of transporting a controlled substance has the burden of demonstrating to the trial court that the transportation was "for personal use" within the meaning of Penal Code section 1210(a), so as to qualify for Prop 36. Further, the principles of *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Blakely v.Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531], which require certain sentence enhancement factual allegations to be pled and proven beyond a reasonable doubt if those allegations can raise the maximum penalty for an offense, do not apply to determining a defendant's eligibility for Prop 36. (*People v. Dove* (2004) 124Cal.App.4th 1, review denied Feb. 2, 2005; accord, the pre-*Blakely* cases of *Peoplev. Barasa* (2002) 103 Cal.App.4th 287, review denied Jan. 22, 2003; see also *Peoplev. Glasper* (2003) 113 Cal.App.4th 1104, review denied Feb. 18, 2004.)

C. Trial court lacks discretion to strike a prior conviction that makesa defendant ineligible for Prop 36 under Penal Code section1210.1(b)(1)

Held by the California Supreme Court:

Where an offender is ineligible for Prop 36 under Penal Code section 1210.1(b)(1)for having committed a prior "strike" felony and failing to stay crime-free and out of prison for 5 years, a trial court may ***not*** use its Penal Code section 1385 discretion to strike an action or allegation in furtherance of justice in such a way as to place the ineligible offender into Prop 36. These disqualifying facts are not actions/allegations that are subject to striking under section 1385. (*In re Varnell* (2003) 30 Cal.4th 1132; but see *People v. Orabuena* (2004) 116 Cal.App.4th 84, holding that trial courts ***do*** have section 1385 authority to dismiss an otherwise-disqualifying current companion conviction for a "misdemeanor not related to the use of drugs".)

D. Section 1210.1(b)(1)'s 5-year "washout" period

Held by the Courts of Appeal:

Penal Code section 1210.1(b)(1)'s 5-year "washout" period – that is, the 5-year period a defendant convicted of a prior violent or serious felony must remain free of prison custody and committing new crimes in order to be eligible for Prop 36 – refers to the 5 years ***immediately preceding*** the defendant's commission of his or her

current drug offense. (*People v. Superior Court (Martinez)* (2002) 104 Cal.App.4th 692; *People v. Superior Court (Henkel)* (2002) 98 Cal.App.4th 78; *People v. Superior Court (Turner)* (2002) 97 Cal.App.4th 1222, review denied Jul. 10, 2002; *People v. Superior Court (Jefferson)* (2002) 97 Cal.App.4th 530.)

Where the drug offender with a prior strike conviction ***was never sent to state prison on the prior strike***, the 5-year washout period begins on the date the defendant committed the prior strike felony, i.e., ***not*** the date of conviction. (*Moore v. Superior Court* (2004) 117 Cal.App.4th 401.)

Driving under the influence is "a misdemeanor conviction involving physical injury or the threat of physical injury to another person" within the meaning of section 1210.1(b)(1), and is therefore the type of offense that a prior strike defendant must avoid committing for the five years preceding his current drug crime in order to satisfy the so-called five-year "washout" and gain Prop 36 eligibility. (*People v. Eribarne* (2004) 124 Cal.App.4th 1463, review denied Mar. 30, 2005.)

E. Prior juvenile adjudication does not render adult offender ineligible under section 1210.1(b)(1)

Held by the Court of Appeal:

Because a juvenile adjudication is not a criminal "conviction" for any purpose absent specific statutory language to the contrary, Prop 36's statutory exclusion of certain offenders who have been previously "convicted" of a prior serious or violent felony(Pen. Code, § 1210.1(b)(1)), does ***not*** apply to those with a prior juvenile adjudication – i.e., rather than an adult conviction – for having committed such an offense. (*People v. Westbrook* (2002) 100 Cal.App.4th 378.)

F. Misdemeanors not "related to" the use of drugs, which render a defendant ineligible under section 1210.1(b)(2)

Held by the California Supreme Court:

Affirming an earlier decision of the Third District Court of Appeal, the Supreme Court held that driving under the influence of drugs is ***not*** a misdemeanor "related to the use of drugs" within the meaning of Penal Code section 1210(d). This means a defendant convicted of this offense along with an otherwise qualifying drug crime is ***ineligible*** for Prop 36 under the exclusion set forth in Penal Code section 1210.1(b)(2). (*People v. Canty* (2004) 32 Cal.4th 1266; accord, *People v. Goldberg* (2003) 105 Cal.App.4th 1202.)

Held by the Court of Appeal:

In a decision that predated the Supreme Court's decision in *Canty* by a few months, and which acknowledged that the definition of a Prop 36-disqualifying "misdemeanor not related to the use of drugs" would be addressed by *Canty*, the Sixth District Court of Appeal held that the misdemeanor offense of driving on a suspended or revoked license is plainly not related to the use of drugs, and therefore would disqualify the defendant from Prop 36 eligibility. (*People v.Orabuena* (2004) 116 Cal.App.4th 84.)

The Third Appellate District held concealment or destruction of evidence (Pen. Code, § 135) is not a misdemeanor related to the use of drugs and therefore would disqualify the defendant from Prop 36 eligibility. The Court of Appeal reached this conclusion because a defendant can possess drugs without violating Penal Code section 135, the focus of the statute is the destruction of evidence, not possession of drugs, and its purpose is to prevent the obstruction of justice. (*People v. Moniz* (2006) 140 Cal.App.4th 86, discussing *Canty* at length.)

G. Trial courts have discretion to strike a current conviction that would render the defendant ineligible for Prop 36 under Penal Code section 1210.1(b)(2)

Held by the Court of Appeal:

As mentioned above, in *In re Varnell* (2003) 30 Cal.4th 1132, the California Supreme Court found that trial courts lack Penal Code section 1385 discretion to dismiss a prior conviction that renders a defendant ineligible for Prop 36 under section 1210.1(b)(1) because such disqualifying convictions are merely uncharged sentencing facts, as opposed to a charge or allegation that may be subject to striking. The Sixth District Court of Appeal has now held that a current accompanying conviction for a "misdemeanor not related to the use of drugs" that would disqualify an otherwise eligible drug offender from Prop 36 under section 1210.1(b)(2) is, by definition, a charge that is subject to striking under section 1385. Therefore, the *Varnell* rationale does not apply in this context, and trial courts do have section 1385 authority to strike an otherwise-disqualifying current "misdemeanor not related to the use of drugs." (*People v. Orabuena* (2004) 116 Cal.App.4th 84.)

H. Refusing drug treatment renders a defendant ineligible for Prop 36 under section 1210.1(b)(4)

Held by the Courts of Appeal:

Drug offender who never reports to drug treatment program has, in effect, "refused" drug treatment as a condition of probation within the meaning of section 1210.1(b)(4) and therefore rendered himself ineligible for a disposition of drug treatment and probation under Prop 36. (*People v. Johnson* (2003) 114 Cal.App.4th 284, review denied Mar. 17, 2004; *People v. Guzman* (2003) 109 Cal.App.4th 341.)

In a decision now superseded by the California Supreme Court's grant of review, the Fifth District Court of Appeal held that a defendant may plead guilty to an other wise qualifying drug possession offense in exchange for a *non*-Prop 36 disposition because section 1210.1(b)(4) allows an otherwise-eligible drug- possession defendant to refuse drug treatment and thereby opt out of the Proposition 36 program. Such a defendant, the Court of Appeal reasoned, may not then attack the judgment on appeal unless he or she obtains a certificate of probable cause to pursue such an appeal. Subsequently, the Supreme Court dismissed review. (*People v. Kendrick*, review granted Jan. 19, 2005, formerly published at 122 Cal.App.4th 1305, review dismissed Feb. 22, 2006.)

Drug offender who admittedly failed to comply with any of the terms of his deferred entry of judgment program was properly deemed to have refused drug treatment within the meaning of section 1210.1(b)(4) because deferred entry of judgment is the equivalent of probation. Thus, the trial "court did not have discretion to admit him to Prop 36." (*People v. Strong* (2006) 138 Cal.App.4th Supp. 1, 41 Cal.Rptr.3d 867.)

Although agreeing that a court's erroneous denial of drug treatment probation could be affirmed on an alternate ground where the record supports it, the First District Court of Appeal held that the record did not support affirmance on the basis of an implied finding that the defendant refused treatment. Rather, the trial court found that the defendant had "good intentions" despite repeated failures in drug treatment. The record did "not establish with certainty that defendant's acts and omissions evinced a complete refusal to undergo drug treatment" as in *Guzman* and *Johnson*. (*People v. Castagne* (2008) 166 Cal.App.4th 727.)

I. Defendant who pleads guilty in exchange for a non-Proposition 36 plea bargain is estopped from later claiming he was entitled to a Proposition 36 disposition

A defendant who pled guilty to a nonviolent drug possession offense in exchange for dismissal of a charge of resisting a police officer and received a non-Proposition 36

disposition of probation that included a term in county jail was estopped from later claiming that he had been entitled to a Proposition 36 disposition in the first instance. (*People v. Chatmon* (2005) 129 Cal.App.4th 771, petition for review denied Aug. 31, 2005.)

J. For provisions of Prop 36 to apply, the underlying crime resulting in probation grant must be a "nonviolent drug possession offense." This restriction does not amount to an equal protection violation.

Held by the California Supreme Court and Courts of Appeal:

A person on probation for inflicting corporal injury on a cohabitant and committing battery upon a peace officer is not entitled to have his drug-related probation violations governed by Prop 36's three-tiered scheme for handling such violations (see Pen. Code, § 1210.1(e)(3)). These crimes do not qualify as qualifying "nonviolent drug possession offenses" within the meaning of Penal Code section 1210(a), and Prop 36 does ***not*** apply to a probationer unless probation was granted for a qualifying offense. (*People v. Guzman* (2005) 35 Cal.4th 577; see also *People v. Esparza* (2003) 107 Cal.App.4th 691, review denied June 25, 2003 [underlying crime of vandalism]; *People v. Goldberg* (2003) 105 Cal.App.4th 1202 [underlying crimes included such non-covered offenses as driving under the influence].)

Held by the California Supreme Court:

The Sixth District Court of Appeal had held that not granting Prop 36 protections to those on probation for most non-drug crimes violates equal protection since "similarly situated" parolees who served prison terms for committing such non-drug crimes would qualify for Prop 36. The California Supreme Court reversed, holding that the non-drug parolee has ended his period of Prop 36 ineligibility by serving the prison time imposed for his non-drug criminal conduct, but the non-drug probationer remains ineligible because he has not completed the probationary sanction imposed for his non-drug criminal conduct. Thus, the two groups are not similarly situated with respect to Prop 36's purposes, thereby defeating any claimed equal protection violation. (*People v. Guzman* (2005) 35 Cal.4th 577.)

Held by the Court of Appeal:

In a writ proceeding brought by the district attorney's office, the Fourth District Court of Appeal held that a defendant who is found to have committed a nonviolent drug possession offense is eligible for Prop 36 treatment even if, at the time of the commission of the qualifying offense, he was on probation for other, non-qualifying offenses. The Court of Appeal distinguished the California Supreme Court's decision

in *Guzman* (upon which the People had relied), explaining that *Guzman* had held "an offender who is on probation for non-qualifying offenses is not eligible for Proposition 36 treatment *as to those offenses*. (*Guzman, supra*, 35 Cal.4th at p. 585.)" The Court of Appeal also found that the defendant was not otherwise unable to comply with the requirements of his Prop 36 probation, unlike the defendants in *Wandick* and *Esparza*. (*People v. Superior Court (Edwards)* (2007) 146 Cal.App.4th 518.)

K. Being in custody, or getting deported, makes a person unavailable for drug treatment under Prop 36

Held by the Courts of Appeal:

Penal Code section 1210(b) states that drug treatment under Prop 36 does ***not*** include drug treatment programs offered in a prison or jail facility. So, someone who is incarcerated is unavailable for drug treatment within the meaning of Prop 36. (*People v. Esparza* (2003) 107 Cal.App.4th 691, review denied June 25, 2003; *People v. Wandick* (2004) 115 Cal.App.4th 131.)

Where an illegal alien is deported for a drug possession conviction, the trial court may properly deny probation under Prop 36. Once the offender is deported to a foreign jurisdiction, the "premises, requirements, and objectives" of Prop 36 can no longer be satisfied. (*People v. Espinoza* (2003) 107 Cal.App.4th 1069.)

However, having a parole hold does not necessarily render the defendant unavailable for treatment. The parolee in *Muldrow* argued that "the trial court's determination that he would be unavailable for drug treatment was based on speculation." The Court of Appeal for the Fifth Appellate District held that the "substantial likelihood" test set forth in *Espinoza,* which was used to determine whether a defendant with an immigration hold was unavailable for treatment, was inapplicable to a defendant with a parole hold because the "defendant is not similarly situated to an undocumented alien facing a substantial likelihood of imminent deportation . . . ." Because "the defendant here had not yet been committed to prison on a different offense," "placing him on probation would not have been superfluous at the time of sentencing." The Court of Appeal remanded the case for "resentencing based on a reassessment of defendant's amenability for drug treatment." (*People v. Muldrow* (2006) 144 Cal.App.4th 1038.)

IV Probation under Prop 36

A. Drug-related and non-drug-related violations of probation

Held by the Courts of Appeal:

Penal Code section 1210.1(e)(2) states that a trial court may modify or revoke probation whenever a Prop 36 participant is found to have violated a ***"non-drugrelated"*** condition of his or her probation, but Penal Code section 1210.1(e)(3), sets up a progressive 3-tiered violation/revocation scheme to be employed when a Prop 36 participant violates a ***"drug-related"*** condition of probation. Penal Code section 1210.1(f) provides that the "term 'drug-related condition of probation' shall include a probationer's specific drug treatment regimen, employment, vocational training, educational programs, psychological counseling, and family counseling." The appellate courts have addressed some specific probation violations:

Failure to appear in "drug court": The Third District Court of Appeal has held that failing to appear in drug court constitutes a drug-related violation of probation to which subdivision (e)(3)'s 3-tiered scheme would apply. (*People v. Davis* (2003) 104 Cal.App.4th 1443, review denied Apr. 9, 2003.)

Failure to report to probation officer: The First District Court of Appeal observed that, although the probationer in that case was not entitled to Prop 36, a Prop 36 probationer's failure to report to a probation officer would be a non-drug-related violation of probation for Prop 36 purposes. (*People v. Goldberg* (2003) 105 Cal.App.4th 1202.)

The Second District then expressed the somewhat more specific view that a probationer's failure to report to a probation officer would be non-drug-related where the appointment concerns a non-drug-related purpose, such as the probationer's obligation to maintain a residence or employment, complete other types of counseling, or comply with probation generally, but that failing to report ***is*** drug related if the missed appointment was for a drug-related purpose such as taking a drug test. (*In re Taylor* (2003) 105 Cal.App.4th 1394 & fn. 7, review denied May 21, 2003.) The Fourth District adopted this view in holding that a failure to report to probation for what the record revealed were non-drug-related reasons was a nondrug-related violation of probation. (*People v. Johnson* (2003) 114 Cal.App.4th 284, review denied Mar. 17, 2004.)

The Third District has held that where a particular violation, such as failing to meet with a probation officer, could be deemed either drug-related or non-drug-related, the prosecution has the burden of demonstrating the non-drug-related nature of the violation where it is seeking to have probation revoked on that basis. (*People v.*

Atwood (2003) 110 Cal.App.4th 805.)

Finally, the Third District held that a probationer's failure to comply with the condition that he report to probation by mail once per month is a general, non-drug related violation of probation. No further hearing on the matter was necessary (as it was in *Atwood*, *supra*) because the failure to report by mail was not a violation that could have been deemed either drug-related or non-drug-related. Rather, the failure to report by mail had to be non-drug-related because it "could not have involved a drug test nor was there anything else about reporting by mail that was peculiar to [the probationer's] drug problems or drug treatment." (*People v. Dixon* (2003) 113 Cal.App.4th 146.)

Failing to report to mental health "gatekeeper": The Fifth District Court of Appeal held that a probationer's failure to meet with a mental health gatekeeper, who was to have evaluated him for purposes of placing him in an "appropriate treatment program pursuant to the provisions of Proposition 36," was a violation of a drug related condition of probation. (*People v. Dagostino* (2004) 117 CalApp.4th 974 [distinguishing this gatekeeper violation from the more general, non-drug-related conditions of probations at issue in the above-cited *Dixon*, *Goldberg*, and *Johnson* cases].)

Driving under the influence: On May 21, 2003, the California Supreme Court granted review in *People v. Campbell*, formerly published at 106 Cal.App.4th 808. In *Campbell*, the Sixth District Court of Appeal had held that driving under the influence of drugs is a misdemeanor not related to the use of drugs under sections 1210(d)/1210.1(b)(2), pertaining to Prop 36 eligibility in the first instance, *and a non-drug-related violation of probation* within the meaning of section 1210.1(e)(2). Disposition in *Campbell* was deferred pending the Supreme Court's decision in the *Canty* DUI/drugs/Prop 36-eligibility case mentioned above. The Supreme Court later dismissed review in *Campbell*, but the Court of Appeal's opinion remains superseded and may not be cited. Nonetheless, the decision in *Canty* would appear to support the proposition that the offense of driving under the influence -- which fails to meet the definition of a "misdemeanor related to the use of drugs" -- also fails to qualify as a "drug-related" violation of probation.

Forging a check: The offense of forging a check is a non-drug related violation of probation, even if the defendant had planned to buy drugs with the check proceeds. (*People v. Martinez* (2005) 127 Cal.App.4th 1156, review denied June 29, 2005; see also Pen. Code, § 1210.1, subd. (f) [defining drug-related conditions of probation as those involving the probationer's "specific drug treatment regimen, employment, vocational training, educational programs, psychological counseling, and family counseling."].)

B. Trial court discretion to revoke probation under Prop 36

Held by the Courts of Appeal:

First drug-related violation of probation: A trial court cannot revoke a person's probation for a first drug-related violation unless the prosecution also shows "by a preponderance of the evidence that the defendant poses a danger to the safety of others" within the meaning of Penal Code sections 1210.1(e)(3)(A) and/or (e)(3)(D). (*In re Taylor* (2003) 105 Cal.App.4th 1394, review denied May 21, 2003; *In re Mehdizadeh* (2003) 105 Cal.App.4th 995, review denied May 21, 2003; *People v. Davis* (2003) 104 Cal.App.4th 1443, review denied Apr. 9, 2003; see also *People v. Murillo* (2002) 102 Cal.App.4th 1414, review denied Jan. 15, 2003.)

Second drug-related violation of probation: A trial court cannot revoke a person's probation for a second drug-related violation unless the prosecution also shows "by a preponderance of the evidence that the defendant poses a danger to the safety of others or is unamenable to treatment" within the meaning of Penal Code sections 1210.1(e)(3)(B) and/or (e)(3)(E). (*People v. Dagostino* (2004) 117 Cal.App.4th 974.)

Counting drug-related violations of probation:

Under the Proposition 36's three-tiered scheme for counting drug-related violations of probation (see Pen. Code, § 1210.1(e)(3)(A)-(F)), a drug-related violation only occurs after the prosecution moves to revoke probation, and the trial court finds the defendant to have violated one or more drug-related conditions of probation. In other words, a probationer is entitled to three separate noticed probation revocation hearings before his Proposition 36 probation may be revoked under Penal Code section 1210.1(e)(3)(C) or (e)(3)(F); multiple drug-related violations alleged and found true in one probation revocation proceeding count as only a single "strike" in Proposition 36's three-tiered scheme. (*People v. Tanner* (2005) 129 Cal.App.4th 223.)

More recently, however, the Third Appellate District has concluded that a trial court does not violate a Prop 36 probationer's due process rights by conducting only one hearing on two revocation petitions. The Court of Appeal found that the "event triggering revocation for [subdivisions (e)(3)(A) and (B)] is the separate motion to revoke probation filed by the People. Although each subdivision requires 'a hearing to determine whether probation shall be revoked,' nothing in the statute requires that the hearings be separate." (*People v. Budwiser* (2006) 140 Cal.App.4th 105.)

However, while reaffirming its decision in *Budwiser* that "three *temporally distinct* hearings are [not] required," the Third Appellate District has now found in a case where "the facts supporting the *third* revocation petition took place before the *second*

petition was filed" that the spirit of Prop 36 was violated. The court held, "But where, as in this case, no notice of one petition is given *before the conduct underlying the next petition occurs*, although a consolidated hearing may be proper, it would be improper to treat the result as if the People had made separate noticed motions." The court found that to do so would deprive appellant of "a third period in which to reform his errant behavior." (*People v. Hazle* (2007) 157 Cal.App.4th 567.)

The Third Appellate District extended its holding in *Hazle* to a situation where the facts supporting the second revocation petition took place one day after the filing of the first petition, and the record did not show that the defendant was given notice of the first petition before the second petition was filed one day later. The court stated, "Under Proposition 36, defendant was entitled to three distinct periods of probation before he lost his eligibility," and found "[h]e did not get that" based on the timing of the filing of the three petitions, the lack of evidence that he had received proper notice of the second petition and the conduct involved in the third petition. (*People v. Enriquez* (2008) 160 Cal.App.4th 230.)

Under Penal Code section 1210.1(e)(3)(F), a person on probation under the provisions of Prop 36 who is found to have committed three drug-related violations of that probation is no longer eligible for Prop 36, even if one or more of the violations occurred before Prop 36's July 1, 2001, effective date. (*People v. Williams* (2003) 106 Cal.App.4th 694, review denied May 14, 2003; accord, *People v. Bowen* (2004) 125 Cal.App.4th 101, review denied Mar. 23, 2005.)

Effect of violating non-drug-related condition of probation: When a Prop 36 probationer violates a non-drug-related condition of probation, he "loses the 'grace' granted to probationers otherwise subject to the provisions of Prop[] 36" and therefore "stands in the same shoes as any other probationer and he is subject to whatever sentencing statutes bear on his sentencing." So, where a Prop 36 probationer with three prior felony convictions violates a non-drug-related condition of probation, the trial court properly applied the presumption against probation set forth in Penal Code section 1203(e)(4) for those with two or more prior felonies (*People v. Dixon* (2003) 113 Cal.App.4th 146.)

C. Trial court discretion to remand into custody pending a formalprobation revocation hearing

Held by the Court of Appeal:

If a probationer under Prop 36 is alleged to have committed a first drug-related violation of his probation – meaning that revocation will not be allowed unless the prosecution demonstrates that he poses a danger to the safety of others under Penal Code section 1210.1(e)(3)(A) – then a trial court may not summarily revoke

probation and remand the violator into custody pending the formal violation hearing unless there is evidence that the violator is a danger to the safety of others and/or a flight risk. (*In re Mehdizadeh* (2003) 105 Cal.App.4th 995, review denied May 21, 2003.)

D. Improper "bargaining" for a specific form of treatment

Held by the Court of Appeal:

Trial courts are not to bargain with probationers for placement in a specific form of drug treatment, but to make a determination of what form of treatment is best suited to the needs of the particular drug offender. So, the trial court in this case should not have permitted this probationer to receive outpatient treatment merely because he wanted "one last chance" at this less restrictive form of treatment and was willing to stipulate to the upper prison term if he violated probation and probation was revoked. The upper term sentence imposed upon revocation – and based on the inappropriate stipulation – was reversed and the matter remanded to the trial court to resentence without regard to the stipulation. (*People v. Campbell* (2004) 119 Cal.App.4th 1279, review denied Sept. 29, 2004.)

E. Waiver of custody credits

A Proposition 36 probationer's waiver of custody credit for time spent in residential drug treatment is enforceable against him should probation ultimately be revoked and custody time imposed. (*People v. Bowen* (2004) 125 Cal.App.4th 101, review denied Mar. 23, 2005.)

A trial court may require a Proposition 36 participant, as a condition of probation, to waive entitlement to such credits. (*People v. Thurman* (2005) 125 Cal.App.4th 1453, review denied May 11, 2005.)

However, absent a waiver, appellant "is entitled to credit against his post-revocation prison term for the time he spent in a residential drug treatment facility as a condition for probation" and "neither the enactment of Proposition 36 nor the application of [Penal Code] section 2900.5, subdivision (f) supports a contrary finding." (*People v. Davenport* (2007) 148 Cal.App.4th 240.)

F. Dismissal of underlying charges under section 1210.1(d) upon a Prop 36 participant's "successful completion of treatment"

A Prop 36 participant who substantially complies with the terms of probation and demonstrates his "successful completion of treatment" may have the underlying

charges dismissed under section 1210.1(d). "Successful completion of treatment" is defined in section 1210(c). Under that definition, the participant seeking dismissal must show not only that he has "completed the prescribed course of drug treatment" but also that, "as a result, there is reasonable cause to believe that [he] will not abuse controlled substances in the future." Thus, a trial court may deny a probationer's dismissal motion where it finds no reasonable cause to believe the person will not abuse drugs in the future. (*People v. Hinkel* (2005) 125 Cal.App.4th 845, review denied Apr. 13, 2005.)

A probation officer can file on a defendant's behalf a petition for dismissal of the charges pursuant to section 1210.1(d)(1), which allows "any time after completion of drug treatment, a defendant may petition the sentencing court for dismissal of the charges." (*People v. Hartley* (2007) 156 Cal.App.4th 859.)

V Appeal not rendered moot by dismissal of underlying conviction under the terms of Prop 36

Held by the Court of Appeal:

The fact that a Prop 36 defendant/participant successfully completes her probation and has her underlying drug possession conviction dismissed under the terms of Prop 36 (see Pen. Code, § 1210.1(d)(1)) does not moot her appeal from the underlying conviction. (*People v. DeLong* (2002) 101 Cal.App.4th 482, review denied Nov. 13, 2002.)

VI SB 1137

On July 12, 2006, Governor Schwarzenegger signed into law as an emergency measure Senate Bill 1137, which makes certain changes to Proposition 36. Among other things, Senate Bill 1137 authorizes judges to sentence certain types of drug offenders who fall within the scope of Proposition 36 to limited jail time in order to ensure treatment compliance or for detoxification.

Certain groups had stated their intention to file a lawsuit to block the implementation of Senate Bill 1137 if Governor Schwarzenegger signed this bill into law. The Alameda Superior Court issued a preliminary injunction on September 14, 2006, prohibiting enforcement of the amendments. After litigation of the issue, the court issued a writ of mandate and a permanent injunction prohibiting the Governor, the Attorney General, and others "from implementing, enforcing, or giving effect to any of the provisions of SB 1137."

Article 5, Section 13 of the California Constitution provides that "[t]he Attorney

General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, ..." Given this Constitutional provision on the Attorney General's supervision over district attorneys and sheriffs, it appears that all California district attorneys and sheriffs are bound by the court's order.

The State has appealed to the First District Court of Appeal, where the matter is pending. (California Court of Appeal no. A122920.)