

RESOLUTION 02-08-2013

DIGEST

Criminal Law: Proposition 36 Diversion even if Convicted of Concurrent Non-Violent Offense
Amends Penal Code section 1210.1 to expand the availability of diversion under Proposition 36 to persons concurrently convicted of non-violent, non-drug related offenses in the same case.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

Similar to 03-02-2004 which was approved in principle.

Reasons:

This resolution amends Penal Code section 1210.1 to expand the availability of diversion under Proposition 36 to persons concurrently convicted of non-violent, non-drug related offenses in the same case. This resolution should be disapproved because it does not confirm that the alleged concurrent crimes would not render the defendant unavailable to the rehabilitation process.

Existing section 1210.1 provides that a defendant who would otherwise be eligible for diversion for a drug related offense is ineligible for the program if the defendant is concurrently charged with a non-drug related offense. This resolution would permit such a defendant to obtain the diversion as to the drug offense, while still suffering the consequences of conviction of the concurrent offense.

The purpose of the Substance Abuse and Crime Prevention Act is to divert from incarceration into community-based substance abuse treatment programs non-violent defendants, probationers and parolees charged with simple drug possession or drug use offenses. (*People v. Muldrow* (2006) 144 Cal.App.4th 1038, 1042, citing *People v. Esparza* (2003) 107 Cal.App.4th 691, 698.) However, *Muldrow* further cited *Esparza*, at page 1044, for the proposition that when a defendant is sent to prison with no access to drug programs administering Proposition 36 drug treatment, the trial court was not required to engage in the superfluous act of placing the defendant on probation when he could not participate in the treatment program required as a condition of that probation.

The resolution does not represent, or even suggest, that the offenses it seeks to address would always be such that a defendant would always be available for participation in the treatment program. Absent the preservation of availability of the defendant for treatment, for example a requirement that the other offenses involve a sentence of probation, the resolution is not well founded.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1210.1 as follows:

1 § 1210.1

2 (a) Notwithstanding any other provision of law, and except as provided in subdivision
3 (b), any person convicted of a nonviolent drug possession offense shall receive probation. As a
4 condition of probation the court shall require participation in and completion of an appropriate
5 drug treatment program. The court shall impose appropriate drug testing as a condition of
6 probation. The court may also impose, as a condition of probation, participation in vocational
7 training, family counseling, literacy training and/or community service. A court may not impose
8 incarceration as an additional condition of probation. Aside from the limitations imposed in this
9 subdivision, the trial court is not otherwise limited in the type of probation conditions it may
10 impose. Probation shall be imposed by suspending the imposition of sentence. No person shall be
11 denied the opportunity to benefit from the provisions of the Substance Abuse and Crime
12 Prevention Act of 2000 based solely upon evidence of a co-occurring psychiatric or
13 developmental disorder. To the greatest extent possible, any person who is convicted of, and
14 placed on probation pursuant to this section for a nonviolent drug possession offense shall be
15 monitored by the court through the use of a dedicated court calendar and the incorporation of a
16 collaborative court model of oversight that includes close collaboration with treatment providers
17 and probation, drug testing commensurate with treatment needs, and supervision of progress
18 through review hearings.

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

22 (b) Subdivision (a) shall not apply to any of the following:

23 (1) Any defendant who previously has been convicted of one or more violent or serious
24 felonies as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7,
25 respectively, unless the nonviolent drug possession offense occurred after a period of five years
26 in which the defendant remained free of both prison custody and the commission of an offense
27 that results in a felony conviction other than a nonviolent drug possession offense, or a
28 misdemeanor conviction involving physical injury or the threat of physical injury to another
29 person.

30 (2) Any defendant who, in addition to one or more nonviolent drug possession offenses,
31 has been convicted in the same proceeding of a misdemeanor ~~not related to the use of drugs~~
32 involving physical injury or the threat of physical injury to another person or any felony.

33 (3) Any defendant who, while armed with a deadly weapon, with the intent to use the
34 same as a deadly weapon, unlawfully possesses or is under the influence of any controlled
35 substance identified in Section 11054, 11055, 11056, 11057, or 11058 of the Health and Safety
36 Code.

37 (4) Any defendant who refuses drug treatment as a condition of probation.

38 (5) Any defendant who has two separate convictions for nonviolent drug possession
39 offenses, has participated in two separate courses of drug treatment pursuant to subdivision (a),
40 and is found by the court, by clear and convincing evidence, to be unamenable to any and all
41 forms of available drug treatment, as defined in subdivision (b) of Section 1210.
42 Notwithstanding any other provision of law, the trial court shall sentence that defendant to 30
43 days in jail.

44 (c) (1) Any defendant who has previously been convicted of at least three non-drug-
45 related felonies for which the defendant has served three separate prison terms within the

46 meaning of subdivision (b) of Section 667.5 shall be presumed eligible for treatment under
47 subdivision (a). The court may exclude the defendant from treatment under subdivision (a) where
48 the court, pursuant to the motion of the prosecutor or its own motion, finds that the defendant
49 poses a present danger to the safety of others and would not benefit from a drug treatment
50 program. The court shall, on the record, state its findings, the reasons for those findings.

51 (2) Any defendant who has previously been convicted of a misdemeanor or felony at least
52 five times within the prior 30 months shall be presumed to be eligible for treatment under
53 subdivision (a). The court may exclude the defendant from treatment under subdivision (a) if the
54 court, pursuant to the motion of the prosecutor, or on its own motion, finds that the defendant
55 poses a present danger to the safety of others or would not benefit from a drug treatment
56 program. The court shall, on the record, state its findings and the reasons for those findings.

57 (d) Within seven days of an order imposing probation under subdivision (a), the
58 probation department shall notify the drug treatment provider designated to provide drug
59 treatment under subdivision (a). Within 30 days of receiving that notice, the treatment provider
60 shall prepare a treatment plan and forward it to the probation department for distribution to the
61 court and counsel. The treatment provider shall provide to the probation department standardized
62 treatment progress reports, with minimum data elements as determined by the department,
63 including all drug testing results. At a minimum, the reports shall be provided to the court every
64 90 days, or more frequently, as the court directs.

65 (1) If at any point during the course of drug treatment the treatment provider notifies the
66 probation department and the court that the defendant is unamenable to the drug treatment being
67 provided, but may be amenable to other drug treatments or related programs, the probation
68 department may move the court to modify the terms of probation, or on its own motion, the court
69 may modify the terms of probation after a hearing to ensure that the defendant receives the
70 alternative drug treatment or program.

71 (2) If at any point during the course of drug treatment the treatment provider notifies the
72 probation department and the court that the defendant is unamenable to the drug treatment
73 provided and all other forms of drug treatment programs pursuant to subdivision (b) of Section
74 1210, the probation department may move to revoke probation. At the revocation hearing, if it is
75 proved that the defendant is unamenable to all drug treatment programs pursuant to subdivision
76 (b) of Section 1210, the court may revoke probation.

77 (3) Drug treatment services provided by subdivision (a) as a required condition of
78 probation may not exceed 12 months, unless the court makes a finding supported by the record,
79 that the continuation of treatment services beyond 12 months is necessary for drug treatment to
80 be successful. If that finding is made, the court may order up to two six-month extensions of
81 treatment services. The provision of treatment services under the Substance Abuse and Crime
82 Prevention Act of 2000 shall not exceed 24 months.

83 (e) (1) At any time after completion of drug treatment and the terms of probation, the
84 court shall conduct a hearing, and if the court finds that the defendant successfully completed
85 drug treatment, and substantially complied with the conditions of probation, including refraining
86 from the use of drugs after the completion of treatment, the conviction on which the probation
87 was based shall be set aside and the court shall dismiss the indictment, complaint, or information
88 against the defendant. In addition, except as provided in paragraphs (2) and (3), both the arrest
89 and the conviction shall be deemed never to have occurred. The defendant may additionally
90 petition the court for a dismissal of charges at any time after completion of the prescribed course
91 of drug treatment. Except as provided in paragraph (2) or (3), the defendant shall thereafter be

92 released from all penalties and disabilities resulting from the offense of which he or she has been
93 convicted.

94 (2) Dismissal of an indictment, complaint, or information pursuant to paragraph (1) does
95 not permit a person to own, possess, or have in his or her custody or control any firearm capable
96 of being concealed upon the person or prevent his or her conviction under Chapter 2
97 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.

98 (3) Except as provided below, after an indictment, complaint, or information is dismissed
99 pursuant to paragraph (1), the defendant may indicate in response to any question concerning his
100 or her prior criminal record that he or she was not arrested or convicted for the offense. Except as
101 provided below, a record pertaining to an arrest or conviction resulting in successful completion
102 of a drug treatment program under this section may not, without the defendant's consent, be used
103 in any way that could result in the denial of any employment, benefit, license, or certificate.
104 Regardless of his or her successful completion of drug treatment, the arrest and conviction on
105 which the probation was based may be recorded by the Department of Justice and disclosed in
106 response to any peace officer application request or any law enforcement inquiry. Dismissal of
107 an information, complaint, or indictment under this section does not relieve a defendant of the
108 obligation to disclose the arrest and conviction in response to any direct question contained in
109 any questionnaire or application for public office, for a position as a peace officer as defined in
110 Section 830, for licensure by any state or local agency, for contracting with the California State
111 Lottery, or for purposes of serving on a jury.

112 (f) (1) If probation is revoked pursuant to the provisions of this subdivision, the defendant
113 may be incarcerated pursuant to otherwise applicable law without regard to the provisions of this
114 section. The court may modify or revoke probation if the alleged violation is proved.

115 (2) If a defendant receives probation under subdivision (a), and violates that probation
116 either by committing an offense that is not a nonviolent drug possession offense, or by violating
117 a non-drug-related condition of probation, and the state moves to revoke probation, the court
118 may remand the defendant for a period not exceeding 30 days during which time the court may
119 receive input from treatment, probation, the state, and the defendant, and the court may conduct
120 further hearings as it deems appropriate to determine whether or not probation should be
121 reinstated under this section. If the court reinstates the defendant on probation, the court may
122 modify the treatment plan and any other terms of probation, and continue the defendant in a
123 treatment program under the Substance Abuse and Crime Prevention Act of 2000. If the court
124 reinstates the defendant on probation, the court may, after receiving input from the treatment
125 provider and probation, if available, intensify or alter the treatment plan under subdivision (a),
126 and impose sanctions, including jail sanctions not exceeding 30 days, a tool to enhance treatment
127 compliance.

128 (3) (A) If a defendant receives probation under subdivision (a), and violates that
129 probation either by committing a nonviolent drug possession offense, or a misdemeanor for
130 simple possession or use of drugs or drug paraphernalia, being present where drugs are used, or
131 failure to register as a drug offender, or any activity similar to those listed in subdivision (d) of
132 Section 1210, or by violating a drug-related condition of probation, and the state moves to
133 revoke probation, the court shall conduct a hearing to determine whether probation shall be
134 revoked. The trial court shall revoke probation if the alleged probation violation is proved and
135 the state proves by a preponderance of the evidence that the defendant poses a danger to the
136 safety of others. If the court does not revoke probation, it may intensify or alter the drug
137 treatment plan and in addition, if the violation does not involve the recent use of drugs as a

138 circumstance of the violation, including, but not limited to, violations relating to failure to appear
139 at treatment or court, noncompliance with treatment, and failure to report for drug testing, the
140 court may impose sanctions including jail sanctions that may not exceed 48 hours of continuous
141 custody as a tool to enhance treatment compliance and impose other changes in the terms and
142 conditions of probation. The court shall consider, among other factors, the seriousness of the
143 violation, previous treatment compliance, employment, education, vocational training, medical
144 conditions, medical treatment, including narcotics replacement treatment, and including the
145 opinion of the defendant's licensed and treating physician if immediately available and presented
146 at the hearing, child support obligations, and family responsibilities. The court shall consider
147 additional conditions of probation, which may include, but are not limited to, community service
148 and supervised work programs. If one of the circumstances of the violation involves recent drug
149 use, as well as other circumstances of violation, and the circumstance of recent drug use is
150 demonstrated to the court by satisfactory evidence and a finding made on the record, the court
151 may, after receiving input from treatment and probation, if available, direct the defendant to
152 enter a licensed detoxification or residential treatment facility, and if there is no bed immediately
153 available in that type of facility, the court may order that the defendant be confined in a county
154 jail for detoxification purposes only, if the jail offers detoxification services, for a period not to
155 exceed 10 days. The detoxification services must provide narcotic replacement therapy for those
156 defendants presently actually receiving narcotic replacement therapy.

157 (B) If a defendant receives probation under subdivision (a), and for the second time
158 violates that probation either by committing a nonviolent drug possession offense, or a
159 misdemeanor for simple possession or use of drugs or drug paraphernalia, being present where
160 drugs are used, or failure to register as a drug offender, or any activity similar to those listed in
161 subdivision (d) of Section 1210, or by violating a drug-related condition of probation, and the
162 state moves to revoke probation, the court shall conduct a hearing to determine whether
163 probation shall be revoked. The trial court shall revoke probation if the alleged probation
164 violation is proved and the state proves by a preponderance of the evidence either that the
165 defendant poses a danger to the safety of others or is unamenable to drug treatment. In
166 determining whether a defendant is unamenable to drug treatment, the court may consider, to the
167 extent relevant, whether the defendant (i) has committed a serious violation of rules at the drug
168 treatment program, (ii) has repeatedly committed violations of program rules that inhibit the
169 defendant's ability to function in the program, or (iii) has continually refused to participate in the
170 program or asked to be removed from the program. If the court does not revoke probation, it may
171 intensify or alter the drug treatment plan, and may, in addition, if the violation does not involve
172 the recent use of drugs as a circumstance of the violation, including, but not limited to, violations
173 relating to failure to appear at treatment or court, noncompliance with treatment, and failure to
174 report for drug testing, impose sanctions including jail sanctions that may not exceed 120 hours
175 of continuous custody as a tool to enhance treatment compliance and impose other changes in the
176 terms and conditions of probation. The court shall consider, among other factors, the seriousness
177 of the violation, previous treatment compliance, employment, education, vocational training,
178 medical conditions, medical treatment, including narcotics replacement treatment, and including
179 the opinion of the defendant's licensed and treating physician if immediately available and
180 presented at the hearing, child support obligations, and family responsibilities. The court shall
181 consider additional conditions of probation, which may include, but are not limited to,
182 community service and supervised work programs. If one of the circumstances of the violation
183 involves recent drug use, as well as other circumstances of violation, and the circumstance of

184 recent drug use is demonstrated to the court by satisfactory evidence and a finding made on the
185 record, the court may, after receiving input from treatment and probation, if available, direct the
186 defendant to enter a licensed detoxification or residential treatment facility, and if there is no bed
187 immediately available in the facility, the court may order that the defendant be confined in a
188 county jail for detoxification purposes only, if the jail offers detoxification services, for a period
189 not to exceed 10 days. Detoxification services must provide narcotic replacement therapy for
190 those defendants presently actually receiving narcotic replacement therapy.

191 (C) If a defendant receives probation under subdivision (a), and for the third or
192 subsequent time violates that probation either by committing a nonviolent drug possession
193 offense, or by violating a drug-related condition of probation, and the state moves for a third or
194 subsequent time to revoke probation, the court shall conduct a hearing to determine whether
195 probation shall be revoked. If the alleged probation violation is proved, the defendant is not
196 eligible for continued probation under subdivision (a) unless the court determines that the
197 defendant is not a danger to the community and would benefit from further treatment under
198 subdivision (a). The court may then either intensify or alter the treatment plan under subdivision
199 (a) or transfer the defendant to a highly structured drug court. If the court continues the
200 defendant in treatment under subdivision (a), or drug court, the court may impose appropriate
201 sanctions including jail sanctions as the court deems appropriate.

202 (D) If a defendant on probation at the effective date of this act for a nonviolent drug
203 possession offense violates that probation either by committing a nonviolent drug possession
204 offense, or a misdemeanor for simple possession or use of drugs or drug paraphernalia, being
205 present where drugs are used, or failure to register as a drug offender, or any activity similar to
206 those listed in subdivision (d) of Section 1210, or by violating a drug-related condition of
207 probation, and the state moves to revoke probation, the court shall conduct a hearing to
208 determine whether probation shall be revoked. The trial court shall revoke probation if the
209 alleged probation violation is proved and the state proves by a preponderance of the evidence
210 that the defendant poses a danger to the safety of others. If the court does not revoke probation, it
211 may modify or alter the treatment plan, and in addition, if the violation does not involve the
212 recent use of drugs as a circumstance of the violation, including, but not limited to, violations
213 relating to failure to appear at treatment or court, noncompliance with treatment, and failure to
214 report for drug testing, the court may impose sanctions including jail sanctions that may not
215 exceed 48 hours of continuous custody as a tool to enhance treatment compliance and impose
216 other changes in the terms and conditions of probation. The court shall consider, among other
217 factors, the seriousness of the violation, previous treatment compliance, employment, education,
218 vocational training, medical conditions, medical treatment, including narcotics replacement
219 treatment, and including the opinion of the defendant's licensed and treating physician if
220 immediately available and presented at the hearing, child support obligations, and family
221 responsibilities. The court shall consider additional conditions of probation, which may include,
222 but are not limited to, community service and supervised work programs. If one of the
223 circumstances of the violation involves recent drug use, as well as other circumstances of
224 violation, and the circumstance of recent drug use is demonstrated to the court by satisfactory
225 evidence and a finding made on the record, the court may, after receiving input from treatment
226 and probation, if available, direct the defendant to enter a licensed detoxification or residential
227 treatment facility, and if there is no bed immediately available in that type of facility, the court
228 may order that the defendant be confined in a county jail for detoxification purposes only, if the
229 jail offers detoxification services, for a period not to exceed 10 days. The detoxification services

230 must provide narcotic replacement therapy for those defendants presently actually receiving
231 narcotic replacement therapy.

232 (E) If a defendant on probation at the effective date of this act for a nonviolent drug
233 possession offense violates that probation a second time either by committing a nonviolent drug
234 possession offense, or a misdemeanor for simple possession or use of drugs or drug
235 paraphernalia, being present where drugs are used, or failure to register as a drug offender, or
236 any activity similar to those listed in subdivision (d) of Section 1210, or by violating a drug-
237 related condition of probation, and the state moves for a second time to revoke probation, the
238 court shall conduct a hearing to determine whether probation shall be revoked. The trial court
239 shall revoke probation if the alleged probation violation is proved and the state proves by a
240 preponderance of the evidence either that the defendant poses a danger to the safety of others or
241 that the defendant is unamenable to drug treatment. If the court does not revoke probation, it may
242 modify or alter the treatment plan, and in addition, if the violation does not involve the recent use
243 of drugs as a circumstance of the violation, including, but not limited to, violations relating to
244 failure to appear at treatment or court, noncompliance with treatment, and failure to report for
245 drug testing, the court may impose sanctions including jail sanctions that may not exceed 120
246 hours of continuous custody as a tool to enhance treatment compliance and impose other changes
247 in the terms and conditions of probation. The court shall consider, among other factors, the
248 seriousness of the violation, previous treatment compliance, employment, education, vocational
249 training, medical conditions, medical treatment including narcotics replacement treatment, and
250 including the opinion of the defendant's licensed and treating physician if immediately available
251 and presented at the hearing, child support obligations, and family responsibilities. The court
252 shall consider additional conditions of probation, which may include, but are not limited to,
253 community service and supervised work programs. If one of the circumstances of the violation
254 involves recent drug use, as well as other circumstances of violation, and the circumstance of
255 recent drug use is demonstrated to the court by satisfactory evidence and a finding made on the
256 record, the court may, after receiving input from treatment and probation, if available, direct the
257 defendant to enter a licensed detoxification or residential treatment facility, and if there is no bed
258 immediately available in that type of facility, the court may order that the defendant be confined
259 in a county jail for detoxification purposes only, if the jail offers detoxification services, for a
260 period not to exceed 10 days. The detoxification services must provide narcotic replacement
261 therapy for those defendants presently actually receiving narcotic replacement therapy.

262 (F) If a defendant on probation at the effective date of this act for a nonviolent drug
263 offense violates that probation a third or subsequent time either by committing a nonviolent drug
264 possession offense, or by violating a drug-related condition of probation, and the state moves for
265 a third or subsequent time to revoke probation, the court shall conduct a hearing to determine
266 whether probation shall be revoked. If the alleged probation violation is proved, the defendant is
267 not eligible for continued probation under subdivision (a), unless the court determines that the
268 defendant is not a danger to the community and would benefit from further treatment under
269 subdivision (a). The court may then either intensify or alter the treatment plan under subdivision
270 (a) or transfer the defendant to a highly structured drug court. If the court continues the
271 defendant in treatment under subdivision (a), or drug court, the court may impose appropriate
272 sanctions including jail sanctions.

273 (g) The term "drug-related condition of probation" shall include a probationer's specific
274 drug treatment regimen, employment, vocational training, educational programs, psychological
275 counseling, and family counseling.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Most persons accused of a simple drug possession offense are eligible for “Prop 36 probation.” This involves mandatory drug treatment instead of incarceration. The voters approved this initiative in 2000.

The statute contains five disqualifiers which prevent a person from benefiting from Proposition 36. One of the disqualifiers is: “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.”

The problem is that this very broad provision disqualifies a person when the other crime is any non-drug related misdemeanor, including such relatively minor, non-violent offenses as being an unlicensed driver, driving on a suspended license, or non-violent theft related offenses. Often, those other misdemeanor crimes, while not technically related to the use of drugs, are a byproduct of the defendant’s drug addiction.

This Solution: In order to maximize the rehabilitative qualities of Proposition 36, the quoted language should be modified to mirror the disqualification language found in the immediately prior subdivision: “a misdemeanor conviction involving physical injury or the threat of physical injury to another person.”

This amendment appropriately prevents violent individuals from the benefits of Proposition 36. In addition, this change does not mean that the person will go unpunished for the non-drug related crime. The defendant would be allowed to reap the benefit of Proposition 36 drug treatment for the drug offense while still being punished for the other, non-drug related crime. This is a win-win situation.

LEGISLATIVE HISTORY

Not known

IMPACT STATEMENT

The proposed resolution does not affect any other law, statute or rule.

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