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The Substance Abuse and Crime Prevention Act of 2000: The Parameters and Promise of Proposition 36

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Introduction

On November 7, 2000, 61 percent of the California electorate enacted what may be the most sweeping criminal justice reform measure of the last twenty years — the Substance Abuse and Crime Prevention Act of 2000 ("SACPA"), or Proposition 36 (codified at Penal Code § 1210 et seq.).¹

SACPA allows certain adult offenders who use or possess illegal drugs to avoid county jail or state prison and instead serve terms of probation involving drug treatment and supervision in the community. While the class of offenders affected by SACPA is narrowly defined, the human and fiscal impact of the new law will likely be substantial. It is estimated that SACPA will divert as many as 37,000 non-violent drug possession offenders from California's jails and prisons into community-based drug treatment and educational and vocational training programs each year. In addition, SACPA will invest significant resources — \$660 million through 2006 — to expand and improve drug treatment and related social services across the state.² What is more (and

what offers a ray of hope for future reform efforts), SACPA successfully repealed a portion of California's "Three Strikes" law — that "third rail" of criminal codes that state lawmakers fear will bring instant political death to those who tamper with it.³

This article describes several key components of the Substance Abuse and Crime Prevention Act, identifies complex interpretive issues that have emerged in the first six months of SACPA, and offers some guiding principles and important resources for defense team members who are involved in the representation of non-violent drug possession offenders in California courts. This article is not an exhaustive review of the law's many provisions and cannot substitute for a careful study of its text.

The Genesis of SACPA: The Failed War on Drugs.

Last year California incarcerated over 35,000 non-violent drug possession offenders. The cost of this incarceration was staggering, not simply in fiscal terms,⁴ but also in terms of untreated addiction and the senseless and brutal warehousing

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¹ The full text of the Substance Abuse and Crime Prevention Act of 2000 can be found at <http://www.prop36.org/fulltext.tpl>.

² California Legislative Analyst's Office, Fiscal Effect of "The California Safety and Crime Prevention Act of 2000" [sic] (1999) <http://www.drugreform.org/laoreport.tpl>

³ See Penal Code § 1210.1(b)(1) (exempting "strikers" who meet SACPA's five year washout provision for prior offenses to be given probation and treatment instead of sentence enhancements under "Three Strikes" upon conviction for a nonviolent drug possession offense).

⁴ According to the California Department of Corrections, the average yearly cost of incarcerating an offender is \$25,607. California Department of Corrections, CDC Facts, Third Quarter 2001 <http://www.cdc.state.ca.us/factsht.htm>

of persons behind bars. While the state's prison population ballooned with low level drug offenders,⁵ rates of illicit drug use have remained stable, black market drug prices plummeted, and drug-related disease, suffering, and death have skyrocketed.⁶

To be sure, small steps were taken to ameliorate California's drug war. Most notably, in the mid 1990's, California established drug courts that sought to divert low level drug offenders from incarceration into drug treatment. By November 2000 these specialized courts operated in 47 of the state's 58 counties at a cost of over \$48,000,000. Nevertheless, drug courts barely made a dent in the substance-abusing population, diverting less than five percent of eligible drug offenders into treatment.⁷ Moreover, drug courts tend to

"cherry pick" offenders who are deemed most likely to succeed in treatment, an exercise of discretion that results in a disproportionately large percentage of white defendants being offered treatment, while defendants of color are disproportionately incarcerated.⁸ Lastly, many drug courts provide sub-par treatment opportunities and few or no treatment options from which to choose.⁹

Against this backdrop, SACPA sought to expand the drug treatment diversion opportunities for non-violent drug possession offenders, reduce the arbitrariness by which defendants are deemed eligible for treatment, and improve the quality of drug treatment and related services "through proven and effective drug treatment strategies" and increased funding.¹⁰ Apparently, these goals were anathema to California

⁵ According to the Justice Policy Institute, California leads the United States in incarcerating drug offenders. Since 1980, there has been a 25 fold increase in Californians incarcerated. Over 27 percent of California's prisoners more than 44,000 persons — are incarcerated for drug offenses; almost half of these offenders are incarcerated for simple possession. Beatty, Phillip, et al. (2000) *Poor Prescription: The Costs of Imprisoning Drug Offenders in the United States*, Washington, DC: The Justice Policy Institute (2000), <http://www.cjcj.org/drug/pp.html>; see also <http://www.cdc.state.ca.us/factsht.htm>

⁶ By June 2000, 36 percent of U.S. AIDS cases reported to the centers for Disease Control and Prevention had occurred among injection drug users, their sexual partners, and offspring. Centers for Disease Control and Prevention. U.S. HIV and AIDS cases reported through June 2000. *HIV/AIDS Surveillance Report*. 2000; Midyear Edition Vol. 12(1): 12-13. In California, rates of overdose fatalities have risen exponentially over the last twenty years: 1434 overdose deaths were reported in 1998 as compared to 426 in 1981 (The Lindesmith Center-Drug Policy Foundation, *California Illegal Drug Overdose Fatalities, 1981-1998*, <http://www.drugpolicy.org/caoverdose>).

⁷ For more information about the location and number of California's drug courts, see the Judicial Council of California's website on California drug court information (visited October 4, 2001) <http://www.courtinfo.ca.gov/programs/drugcourts/cdcinfo.htm>

⁸ Although rates of drug use are spread evenly across racial, ethnic, and socio-economic lines, in California persons of color — particularly poor persons of color — are more likely to be arrested for drug crimes, more likely to be charged for violating drug laws, and, when convicted, more likely to receive lengthier sentences (see, e.g., *Law Enforcement/Drug Court Partnerships: Possibilities and Limitations: A Case Study of Partnerships in Four California Counties*, National Association of Drug Court Professionals, June 2000, pp. 35-36 (finding that "the ethnic breakdown of drug arrests for each county . . . demonstrates that blacks and Hispanics are arrested for drug offenses in each county in proportions greater than their representation in the drug court program . . . the majority of the participants in the programs visited was Caucasian").

⁹ Many drug courts ordered drug addicts to participate exclusively in Alcoholics Anonymous or Narcotics Anonymous group meetings that are not actually drug "treatment" but rather an adjunct to treatment. In addition, most drug courts in California prohibit offenders from engaging in methadone maintenance treatment the gold standard therapy for chronic and severe heroin dependence. Drug courts' refusal to refer heroin addicts to methadone treatment contravenes the recommendations of all leading state and federal advisory bodies on issues of substance abuse treatment. For more information about methadone treatment, see The Lindesmith Center, *Research Brief: Methadone Maintenance Treatment* (October, 1997), http://www.drugpolicy.org/cites_sources/brief4.html

¹⁰ See Substance Abuse and Crime Prevention Act of 2000, Purpose and Intent, <http://www.prop36.org/fulltext.tpl>

law enforcement. SACPA was opposed by 57 of the state's 58 Sheriffs and District Attorneys, the California Police Chiefs Association, the California State Sheriff's Association, the California Narcotic Officer's Association, the California Probation, Parole and Correctional Association, the Chief Probation Officers of California, many of the state's judges, including the California Association of Drug Court Professionals, the Governor, the Attorney General, and the state's most powerful union, the California Corrections Officers Association.

In rejecting the pleas of law enforcement, Californians sent a powerful message that the War on Drugs has failed, that incarceration is not the solution to drug use and abuse, and that the time has come to address drug abuse as first and foremost an issue of public health.

The Basic Workings of SACPA.

It is important to note at the outset that there are several excellent sources of information that defense practitioners with SACPA clients should consult. The California Public Defenders Association has published a comprehensive legal analysis of the Act and provides its members with legal briefs, cutting-edge practice tips, the latest court rulings, and information about local practices in this new and burgeoning field.¹¹ In addition, counsel should develop a working knowledge of the science of addiction and evidence-based addiction therapy,¹² as well as the types of treatment programs and related services available in the community. Finally, it is imperative for the practitioner to learn about his or her SACPA clients — their social and drug use histories, their needs and goals — in order to effectively

advocate for appropriate resources and meaningful interventions.

Eligible Defendants: Non Violent Drug Offenders.

SACPA requires that probation be given to qualifying defendants. To qualify, a defendant must be convicted of a felony or misdemeanor for "unlawful possession, use, or transportation for personal use of any controlled substances" (Penal Code § 1210(a)). Conviction for sale, possession for sale, production or manufacturing of drugs render a defendant ineligible for SACPA (Penal Code § 1210(a)). Unlike most drug courts, which condition treatment upon a plea, SACPA allows defendants to exercise their constitutional right to a jury trial and remain eligible for treatment if convicted (Penal Code § 1210.1). The court must order the SACPA probationer to participate in and complete a community-based drug rehabilitation program.

The law also enumerates several conditions which, if applicable, exclude defendants from probation under SACPA (Penal Code § 1210.1(b)). For example, a defendant is rendered ineligible under SACPA if in the same proceeding he or she is also convicted of nonqualifying felonies or misdemeanors not related to the use of drugs (Penal Code § 1210.1(b)(2)), or if he or she has previously been convicted of a "serious" or "violent" felony and within the past five years has committed or been in custody for "a felony conviction other than a non-violent drug possession offense or . . . a misdemeanor conviction involving physical injury or the threat of physical injury to another person" (Penal Code § 1210.1(b)(1)).¹³ Defendants are also excluded from SACPA for "using" a firearm in connection with the unlawful possession or being under the influence of certain drugs (Penal Code § 1210.1(b)(3)). Of course, a defendant can

¹¹ Gary Windom, et al., California Public Defenders Association's Proposition Committee, An Analysis of Proposition 36 (April 30, 2001), <http://www.cpda.org/publicarea/CPDAProp36Analysis.pdf>. SACPA defense practitioners are strongly encouraged to become a member of CPDA and consult CLARANET, an invaluable on-line resource that provides practitioners with a brief bank, chat room and breaking legal developments regarding SACPA and other areas of criminal law. For instructions on how to subscribe to CLARANET, visit: <http://www.cpda.org/PublicArea/CLARAInfo/claranet.pdf>

¹² The following sources contain excellent overviews of addiction science and therapy: JOYCE H. LOWINSON ET AL., EDS, *SUBSTANCE ABUSE: A COMPREHENSIVE TEXTBOOK* (Williams and Wilkins 1992); NIDA, *Principles of Addiction Treatment A Research Based Guide*, (site visited October 4, 2001) <http://www.drugabuse.gov/PODAT/PODATIndex.html>; American Methadone Treatment Association, (site visited October 4, 2001) <http://www.americanmethadone.org>

¹³ Practitioners need to be on notice that where a client has previously pled guilty to what appears to be a serious or violent felony, it may be necessary to look behind the plea to the facts of the case to determine whether the client was actually convicted of conduct that bars the client from SACPA treatment under Penal Code § 1210.1(b)(1) or Penal Code § 3063.1(b)(1).

at any point refuse to participate in treatment and thereby be excluded from SACPA's terms of probation (Penal Code § 1210.1(4)).

Defendants are also prevented from receiving the benefits of SACPA if they have twice previously been found eligible for SACPA, have participated in two separate courses of treatment under SACPA, and upon a third conviction for a qualifying offense are found to be "unamenable to any and all forms of available drug treatment" (Penal Code § 1210.1(b)(5)). But in a radical departure from prior law, SACPA imposes a *maximum* 30-day jail sentence upon defendants who fall within this category.¹⁴

Importantly, defendants with lengthy histories of non-violent drug convictions that predate July 1, 2001 (the effective date of SACPA's sentencing provisions) are not thereby disqualified from SACPA (Penal Code 1210.1(b)). SACPA's allowance for past drug offenses stands in stark contrast to deferred entry of judgment programs which disqualify defendants who have prior drug convictions [*see People v. Paz* (1990) 217 Cal. App. 3d 1209].¹⁵

Probation Violations

If a defendant sentenced under SACPA fails to complete the court ordered treatment program or violates the conditions of probation the court may revoke probation and impose a jail or prison sentence (Penal Code § 1210.1(e)). SACPA, though, erects several obstacles to the revocation of probation. It does so out of the recognition that drug addiction, by definition, is a chronic illness characterized by relapse. Indeed, addicted offenders are *expected* to suffer false starts and experience various setbacks on their road to recovery.¹⁶

SACPA distinguishes between two types of probation violations: non-drug-related and drug-related. If a SACPA probationer violates probation by being arrested for an offense *not* involving drugs, or involving a non-qualifying drug offense such as selling drugs, the court may (but need

not) revoke probation (Penal Code § 1210.1(e)(2)). If, however, the probationer violates probation either by being arrested for a qualifying drug offense or by violating a drug-related condition of probation, the court must return the probationer to a treatment program upon the first such violation unless the state can prove that the probationer poses a danger to the safety of others (Penal Code § 1210.1(e)(3)(A)). Upon the second such violation, the court must return the probationer to treatment unless the state can prove either that the probationer poses a danger to the safety of others, or that the probationer is unamenable to drug treatment (Penal Code § 1210.1(e)(3)(b)). A third drug-related violation of probation renders a defendant ineligible for continued probation under SACPA (Penal Code § 1210.1(e)(3)(c)).

This process makes clear that counsel's responsibilities do not end with the sentencing of the client under SACPA. With some foresight and planning, defense counsel can take effective steps to significantly reduce the chances that the court will revoke their client's probation and impose a term of incarceration. Many, perhaps most, probation violations will first come to the attention of the drug treatment providers in whose programs the clients are enrolled and/or the probation officers to whom the clients are assigned. In practice, both the treatment provider and the probation officer exercise substantial discretion as to whether to report, when to report, to whom to report, and how to report potential probation violations. Because SACPA probationers who violate a drug-related condition of probation can get two bites at the treatment apple, whereas those who violate non-drug-related conditions are subject to immediate revocation of probation, defense counsel should take steps to: (1) prevent a client's conduct from being reported as possible violations of probation, and (2) characterize as "drug-related" those incidents that are reported.

To this end, it is strongly recommended that defense counsel:

- Introduce himself or herself to the treatment

¹⁴ The theory behind the 30-day maximum jail sentence set forth in Penal Code § 1210.1(b)(5) is that the state should not waste jail space and taxpayer dollars incarcerating recidivist low level drug offenders who do not pose a danger to public safety and who are not committing other crimes.

¹⁵ SACPA does not displace deferred entry of judgment programs that operate in many counties and which may be a preferred option for defendants who lack a prior record [*see Atty. Gen. Opn. No. 01-207* (June 14, 2001), summarized in the Reporter, Aug. 2001, p. 364].

¹⁶ "Individuals with substance abuse disorders face the possibility of relapse once they have initiated cessation of alcohol or other drug use." DALEY, DENNIS AND MARLATT, G. ALAN, RELAPSE PREVENTION, in SUBSTANCE ABUSE, A COMPREHENSIVE TEXTBOOK, *see supra* note 12 (*see also* California Society of Addiction Medicine website (visited October 4, 2001), <http://www.csam-asam.org>).

providers and probation officer to whom the client is assigned;

- Document for the treatment provider and probation officer any special difficulties the client faces so that treatment can be better tailored to the client's needs, including, but not limited to educational, vocational, mental health, and family counseling services;
- Make clear to the treatment provider and probation officer that defense counsel is concerned about the client's well-being and wants to see the client succeed in treatment;
- Ask the treatment provider and probation officer to contact defense counsel *first* should any problems arise; and,
- Offer to intervene with the client on behalf of the treatment provider or probation officer before matters escalate to the point that either the treatment provider or the probation officer feels compelled to report the client's behavior to the court as a possible probation violation.

By taking these steps, counsel can significantly reduce the likelihood that a client's foreseeable setbacks in treatment will prematurely deprive the client of a full and fair opportunity to obtain and complete an appropriate treatment program.

Community-Based Drug Treatment as Condition of Probation

Defendants sentenced to probation under SACPA must participate in an "appropriate" community-based drug treatment program (Penal Code § 1210.1(a)-(b)).¹⁷ The determination of what constitutes appropriate treatment begins with an assessment of the client by a trained professional who administers a standardized assessment instrument to identify the level of severity of the client's addiction, if any, and other relevant health information and background data. The assessor will then recommend an appropriate treatment program or combination of programs to the court that will

address the needs identified by the assessment. After the court refers the defendant to an appropriate treatment program (or programs), the program(s) must craft (and provide to the court) a treatment plan for the defendant (Penal Code § 1210.1(c)). The treatment plan should directly address the primary needs identified by the assessment. It is then the duty of the treatment provider(s) to offer the services identified by the assessment and set forth in the treatment plan in a timely and effective manner. Defense counsel should ensure that each of these steps is taken in full.

The practitioner should keep in mind the following points with respect to treatment. First, SACPA defines treatment broadly, to include various levels of intensity — from low level drug education or drug use prevention courses, to outpatient, to "limited" residential treatment (Penal Code § 1210(b)). It will generally be the client's desire, and in the client's interest, for defense counsel to advocate for the least restrictive (but medically appropriate) placement. Second, SACPA expressly provides that "[t]he court may also impose as a condition of probation participation in vocational training, family counseling, literacy training and/or community service" (Penal Code § 1210.1(a)). The importance of such "ancillary services" for many defendants cannot be overstated. Very often, an offender's drug "problem" stems as much or more from a lack of meaningful opportunities to fully participate in society than from a physiological need to alter the brain's chemistry. Counsel therefore should make best efforts to determine and document the client's need for vocational training, literacy courses, family counseling, mental health services, etc., and forcefully advocate for the inclusion of such services in the treatment plan.¹⁸ Counsel should then make best efforts to ensure that those ancillary services are in fact provided. Third, SACPA expressly provides for the placement of heroin-addicted defendants to receive opioid replacement therapy (Penal Code § 1210(b)). Methadone maintenance is the most common opioid replacement therapy. It is also the most effective treatment for heroin dependence.¹⁹ Unfortunately, methadone is poorly understood and wrongly maligned by the general public, many judges, and even some treatment providers. Accordingly, it is critical that practitioners who

¹⁷ SACPA requires that drug treatment programs that accept SACPA clients be "licensed" or "certified" (Penal Code § 1210(b)). Regulations promulgated by the Department of Alcohol and Drug Programs define the licensing and certification requirements for drug treatment programs.

¹⁸ Counsel, of course, should balance the client's needs for ancillary services against the fact that if those services are made part of the conditions of probation there is increased risk that the client may not successfully complete the additional terms of probation.

¹⁹ See The Lindesmith Center, Research Brief: Methadone Maintenance Treatment (October, 1997), http://www.drugpolicy.org/cites_sources/brief4.html

represent clients with a history of heroin dependence educate themselves about methadone, insist upon an assessment by a professional experienced with referring persons to methadone maintenance, and demand placement of the client in a methadone program when medically indicated.²⁰

Dismissal of Charges¹

Convicted felony drug offenders labor under considerable social stigma and legal repercussions that can hamper their efforts at rehabilitation. To enable drug possession offenders to become fully productive citizens, SACPA provides for the setting aside of the drug possession conviction and the dismissal of the indictment or information upon a finding that the offender successfully completed drug treatment and substantially complied with the conditions of probation (Penal Code § 1201.1(d)). To reap the benefits of this provision, defense counsel should petition the court for a dismissal order as soon as practical after the client's completion of treatment.

Parole

Another critical component of SACPA is that it offers diversion to treatment not only for probationers but also for certain parolees. The provisions governing parolees are contained in Penal Code § 3063.1, and resemble but are not identical to those governing probationers. Counsel representing clients on parole should consult both the text of SACPA as well as the guidelines prepared by the Board of Prison Terms that set forth the criteria and time lines the Parole Authority will use to determine whether parolees are eligible for treatment under SACPA.²¹ It is anticipated that several thousand parolees each year will be offered community-based treatment instead of being returned to state prison for violating drug related conditions of parole.

SACPA Amended: Senate Bill 223

Senate Bill 223 has been signed into law as urgent legislation on October 10, 2001, and filed by the secretary of state on October 11, 2001, and became effective immediately (See Stats., Ch. 721 (SB 223)).²² The primary purpose of SB 223 is to allocate funds to be used for the drug testing of SACPA probationers and parolees. But SB 223 also amends SACPA in several important ways that are meant to help retain addicted offenders in SACPA treatment despite drug relapses. Perhaps most significantly, SB 223 adds a new section to SACPA, Penal Code § 1210.5. This new provision states that when drug treatment is a condition of a person's probation or parole, drug testing "shall be used as a treatment tool," and the results of any drug testing "shall be given no greater weight than any other aspects of the probationer's individual treatment program." Counsel can use Penal Code § 1210.5 to argue that a client's positive drug test while on probation is neither sufficient ground for finding a probation violation nor sufficient evidence to find a client "unamenable to treatment." In addition, SB 223 also requires proof that a person is unamenable to "all drug treatment programs" (emphasis supplied) before a court can revoke probation or parole on grounds that the individual is unamenable to treatment.²³

Interpretive Disputes and Shifting Prosecutorial Practices

Several provisions of SACPA are subject to competing interpretations, not least because professionals from diverse disciplines with differing perspectives, assumptions, and knowledge about drug use and drug abuse must all interpret and assess this law. The warring analyses presented by the California Public Defenders Association and the California District Attorneys Association underscore this fact.²⁴ In the first three months of the law's operation, however, no

²⁰ For additional information about Methadone Maintenance Treatment, see The Lindesmith Center-Drug Policy Foundation website <http://www.drugpolicy.org/methadone>, the website of the National Alliance of Methadone Advocates, <http://www.methadone.org>, the Addiction Treatment Forum, <http://www.atforum.com>, and the American Society of Addiction Medicine, <http://www.asam.org>.

²¹ The Board of Prison Terms guidelines are posted on the Board's website, <http://www.bpt.ca.gov/>.

²² The text of SB 223 can be found at http://info.sen.ca.gov/pub/bill/sen/sb_0201-0250/sb_223_bill_20010906_enrolled.html. SB 223 will be summarized in the December issue of the *Reporter*.

²³ See SB 223's modified provision of Penal Code § 1210.1(c)(2). This modified provision also eliminates SACPA's current requirement that the person prove there is a drug treatment program to which he or she is amenable.

²⁴ Compare Gary Windom, et al., California Public Defenders Association's Proposition Committee, *An Analysis of Proposition 36* (April 30, 2001), <http://www.cpda.org/publicarea/CPDAProp36Analysis.pdf> with Proposition 36 Implementation Guidelines, <http://www.cdaa.org/proposition.htm>.

appellate opinions have been published concerning SACPA. Thus, the law is still in its infancy and predictions about its evolution are purely speculative.

SACPA's Retroactivity

The question of whether and to what extent SACPA applies retroactively became salient from the outset of implementation.²⁵ Specifically, does SACPA apply to defendants or parolees who fall within one of the following three scenarios: (1) defendants who commit the offense before July 1, 2001, but who are found guilty and sentenced *after* July 1, 2001 (or for whom parole revocation is sought after July 1, 2001), (2) defendants who commit the offense and are found guilty (after trial or by plea) before July 1, 2001, but who are *sentenced after* July 1, 2001, and (3) defendants who commit the offense before July 1, 2001, who are convicted and sentenced *before* July 1, 2001, but whose convictions are not yet final on appeal? Although the shelf-lives for these scenarios rapidly wane as July 1 recedes, a brief discussion is in order.

SACPA unquestionably applies to the first scenario. SACPA provides that "[n]otwithstanding any other provision of law . . . any person *convicted* of a non-violent drug possession offense shall receive probation . . ." (Penal Code § 1210.1(a)). This language, read in combination with Section 8, which provides that the Act's sentencing provisions become effective on July 1, makes clear that defendants

who commit a qualifying offense prior to July 1, 2001, but who are found guilty of and sentenced for the offense after July 1, 2001, must get probation and treatment under Proposition 36.²⁶ SACPA also should apply to defendants who fit the second scenario — those who commit a non-violent drug possession offense and who are found guilty before July 1, 2001, but who are not sentenced until after July 1, 2001. To suggest otherwise would be to construe the phrase "conviction" to require a verdict and judgment but not a sentence. Such a cramped construction, however, would fail to further the statute's purpose as set forth in the "Findings and Declarations" and "Purpose and Intent" and would lead to anomalous results. This conclusion (bolstered by a lengthier legal analysis) was reached by the Administrative Office of the Courts Office of the General Counsel,²⁷ and appears to be the holding of the vast majority of Superior Courts to have addressed this scenario as of early October, 2001.²⁸

Conceivably, there may be some defendants who committed, were found guilty of, and were sentenced for non-violent drug possession offenses before July 1, 2001, and who then appealed their convictions. Can these defendants claim the benefits of SACPA if their appeals were not final as of July 1, 2001? Practitioners faced with this third scenario can advance at least two strong arguments on behalf of their clients. First, counsel can cite the common law "rule of amelioration" [see *Bradley v. United States* (1973) 410 U.S. 605, 607; *Bell v. Maryland* (1964) 378 U.S. 226, 230; *In re Estrada* (1965) 63 Cal. 2d 740, 744-45].

²⁵ Section 8 of SACPA provides: "Effective Date. Except as otherwise provided, the provisions of this Act shall become effective July 1, 2001, and its provisions shall be applied prospectively."

²⁶ See *People v. Superior Court (County of Orange)* (Aug. 15, 2001) 2001 WL 1153451 (Cal. Super.) (unpublished). For similar reasons, Penal Code § 3063.1 of SACPA applies to all otherwise eligible parolees who have committed a non-violent drug possession offense before July 1, 2001, but who have not had their parole suspended or revoked by that date.

²⁷ See Joshua Weinstein, Office of the General Counsel, "Legal Opinion on Selected Proposition 36 Issues" (June 21, 2001), prepared for the Administrative Office of the Courts, Judicial Council of California ("Proposition 36's treatment provisions apply to eligible criminal defendants convicted before but sentenced on or after July 1, 2001"). A copy of the General Counsel's legal opinion can be obtained through the California Public Defenders Association or The Lindesmith Center's Office of Legal Affairs (contact number below).

²⁸ Presentation of the Hon. Darrell Stephens, Chair, Administrative Office of the Courts Working Group on Proposition 36, to the Advisory Committee of the California Department of Alcohol and Drug Programs (October 5, 2001).

Under this rule, if an offense is de-criminalized, all defendants whose convictions are not yet final get the benefit of the new rule.²⁹ Counsel can also invoke a line of cases that define the phrase "conviction" broadly to encompass not just the verdict and judgment but equating conviction with finality on appeal [see, e.g., *In re Riccardi* (1920) 182 Cal. 675; *People v. Treadwell* (1885) 66 Cal. 400]. Adopting this broader definition comports with rules of statutory construction, which require courts to consider the statute's purpose and the evils sought to be remedied [see *People v. Aston* (1985) 39 Cal. 3d 481, 489]. Specifically, expanding SACPA eligibility to this third category of defendants would divert non-violent drug offenders into treatment, and avoid the "evils" of taxpayer dollars and prison/jail cells wasted on the incarceration of non-violent drug possession offenders.

"Drug-Related" Violations and Other Issues

Perhaps the most hotly debated issue to date concerns the scope and meaning of the term "drug-related violation." Is the failure to appear for treatment, report to probation, or show up for a court date a "drug-related violation" when the failure is a byproduct of the debilitating use of drugs or alcohol? When, if ever, can a positive drug test constitute a drug-related violation? Does the possession of drug paraphernalia qualify as a "drug-related" violation?³⁰ An accurate understanding of drug addiction, together with the intent and spirit of Proposition 36, strongly suggest that these questions should be answered in the affirmative. But only time will tell how this issue is resolved. Other contentious

issues include the definition of "unamenable to treatment" (relevant for deciding whether to revoke probation or parole) and "successful completion of treatment" (relevant for deciding whether to dismiss charges and set aside the conviction).

Defense counsel also must guard against attempts by prosecutors to circumvent SACPA altogether. Already, there have been scattered reports of prosecutors "piling on" non-drug related misdemeanor charges in order to prevent persons who are arrested for possessing drugs from getting the benefit of SACPA (see Penal Code § 1210.1(b)(2)). There also have been reports that District Attorneys in some jurisdictions are reducing the amount of drugs traditionally required to trigger charges of possession for sale, thereby shrinking the pool of SACPA-eligible defendants (Penal Code § 1210(a)). Undoubtedly prosecutors will devise additional ways to bypass Proposition 36 in favor of punitive drug war policies. In light of this dynamic, it is incumbent upon defense counsel to report suspected abuses of the law to the local public defenders office and/or The Lindesmith Center-Drug Policy Foundation.³¹

Conclusion

California's Substance Abuse and Crime Prevention Act of 2000 dramatically alters the legal and medical landscape for non violent drug possession offenders. However, the promise that SACPA holds for these individuals — avoiding incarceration, obtaining substance abuse services, and being reintegrated into society — depends upon the willingness and ability of defense counsel to advocate for their clients' rights under SACPA. In sum, dedicated defenders will largely determine the shape and success of SACPA.

²⁹ The State might argue that the "plain language" of section 8 of SACPA — that the Act becomes effective on July 1, 2001, and "shall be applied prospectively" — obviates the need to apply the rule of amelioration and excludes this third category of offenders from the Act's scope. In response it would be appropriate to note that the prospectivity language of section 8 was not intended to exclude otherwise qualified defendants merely because their convictions pre-dated July 1, 2001, but rather was designed to ensure that no one would get treatment until July 1, 2001, so as to allow an eight-month period during which the state could certify the drug treatment programs that would provide SACPA treatment. Put differently, the rule of amelioration should apply to this case because the electorate did not express any intent on who would get SACPA treatment on July 1, 2001; it simply expressed its intent as to when SACPA treatment would first be offered.

³⁰ In an unpublished decision [*People v. Superior Court (County of Orange)* (Aug. 15, 2001) 2001 WL 1153451 (Cal.Super.) (unpublished) (Fasel, J.) (conviction of misdemeanor possession of narcotic paraphernalia (Health & Safety Code § 11364) or hypodermic syringe (Health & Safety Code § 4140) do not render defendant ineligible for SACPA)], an Anaheim court deemed the possession of drug paraphernalia to be a drug-related violation of probation (see Stuart Pfeifer, O.C. Judges Boost Reach of Prop. 36, LA TIMES, August 31, 2001, at p. 3).

³¹ The phone number for The Lindesmith Center's Office of Legal Affairs is (510) 208-7711.