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HEADLINE: SACPA's Sophomore Year: The Second Annual Review of Proposition 36 in California's Courts

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BODY:

In November 2000, California voters overwhelmingly approved Proposition 36, the Substance Abuse and Crime Prevention Act of 2000 ("SACPA") (codified at Penal Code § 1210 et seq.; modified by 2001 Stats., ch. 721 (SB 223), § 4, eff. Oct. 11, 2001). Early indicators suggest that this path-breaking initiative is on track to become the most significant piece of sentencing reform anywhere in the country since the end of Prohibition. During the twelve months following the law's implementation on July 1, 2001, 53,697 offenders were found eligible for SACPA probation, and over 30,000 persons entered a SACPA treatment program. The law's deeper impact on the health, well-being, and safety of individuals, their families, and their communities is not yet known, though it is reported that SACPA has afforded thousands of people, including those long-suffering from addiction disorders, their first opportunity to access substance abuse services. The funding provided by the law, moreover, has enabled most counties to greatly expand the number and size of treatment providers. Although SACPA's fiscal impact has not yet been calculated, preliminary estimates indicate that the law already has yielded substantial savings in excess of those predicted by the Legislative Analyst's office. In other words, initial data point to the conclusion that California voters are getting what they voted for: a new and improved way to address the problems of low-level non-violent drug law offenders.

While much information must still be mined about the workings of Proposition 36, we do have data about SACPA's second year in the courts. Between July 2002 and August 2003, the California Supreme Court issued its first two opinions construing the scope of SACPA. In addition, the state's intermediate appellate courts rendered more than eighty SACPA decisions (up from thirty-eight decisions issued during the previous year). Twenty-one of these decisions were published (up from the eleven published opinions published in the preceding twelve months). During this period, the California Supreme Court granted review of six of these appellate decisions.

This article analyzes the appellate courts' work with SACPA in its second year, briefly discussing the significance and in some cases the shortcomings of the rulings in this arena. The article seeks to provide criminal defense practitioners with a succinct overview of recent legal developments, to highlight unresolved issues, and to suggest viable legal arguments for counsel to advance on behalf of clients seeking SACPA relief. This article is not a primer on Proposition 36. It assumes a general working knowledge of the statute, descriptions of which are available elsewhere. Nor is this article a comprehensive practice guide for defense attorneys handling SACPA cases. Lawyers seeking such a resource are encouraged to consult CALIFORNIA CRIMINAL DEFENSE PRACTICE, Vol. 2, Ch. 51, "Deferred Entry of Judgment, Diversion, and Dismissal in Interest of Justice," § § 51.30-51.33, as well as the California Public Defender Association's publication *An Analysis of Proposition 36* (Apr. 30, 2001), and to join the online discussions hosted by CPDA covering all facets of SACPA. These caveats aside, it is time to turn to the High Court's handling of SACPA.

In the first half of 2003, the California Supreme Court issued its first two opinions construing Proposition 36. For its inaugural parsing of the statute, the Court confronted the intersection of SACPA's eligibility provisions with the discretionary powers granted trial courts under Penal Code § 1385 [*In re Varnell* (2003) 30 Cal. 4th 1132]. With its second decision, the Court largely laid to rest a hotly contested issue that received wide-spread attention by the intermediate appellate courts during the early months of SACPA implementation: to what extent can SACPA's provisions be applied retroactively to benefit non-violent drug possession offenders who suffered their drug convictions (or drug-related parole or probation violations) prior to July 1, 2001, the effective date of SACPA's sentencing scheme? [*People v. Floyd* (2003) 31 Cal. 4th 179]. Each case will be addressed in turn.

In *In re Varnell*, the California Supreme Court addressed the trial court's power to dismiss charges and sentencing enhancements "in furtherance of justice" pursuant to Penal Code § 1385 to render an offender eligible for SACPA. Because the law contains provisions which disqualify persons convicted of non-violent drug offenses from receiving SACPA probation if they are also convicted of certain co-occurring crimes and/or previously have been convicted of certain types of offenses (*see* Penal Code § § 1210.1(b), 3063.1(b)), counsel may have had occasion to urge the court to exercise its Penal Code § 1385 powers so the client can get SACPA's benefits. Prior to *Varnell*, the challenge was to persuade the court that the client's non-violent background, history of untreated substance abuse, and eagerness to participate in SACPA justified the dismissal of charges or disqualifying prior convictions pursuant to Penal Code § 1385 in order to honor the intent and spirit of Proposition 36. The *Varnell* decision, however, significantly curtails trial courts' exercise of Penal Code § 1385 powers with respect to sentencing factors (like disqualifying prior offenses), although it preserves courts' dismissal powers in other contexts.

Mr. Varnell was charged with methamphetamine possession, a SACPA-eligible offense. He had, however, been convicted in 1995 of assault with a deadly weapon, an offense for which he was imprisoned until July 1998 and which constituted a "strike prior." Because Mr. Varnell had not remained free of custody during the five years immediately preceding his drug possession offense, he was disqualified from receiving the benefits of SACPA (*see* Penal Code § 1210.1(b)(1)). At his plea and sentencing hearing, Mr. Varnell sought the dismissal of this disqualifying prior conviction and asked to be sentenced to SACPA probation. The trial court found that Mr. Varnell would be a good candidate for drug treatment, but declined to offer SACPA probation, ruling that it lacked the power under Penal Code § 1385 to dismiss his prior conviction and declare him eligible for SACPA, although it did strike his "strike prior" for "Three Strikes" purposes in the interest of justice. Mr. Varnell was sentenced to 16 months in prison. Mr. Varnell then sought (and briefly found) habeas corpus relief from the Second Appellate District. In issuing the writ, that court noted that SACPA neither expressly nor impliedly prohibits trial courts' exercise of discretion pursuant to Penal Code § 1385. The court held that because the text of Proposition 36 failed to clearly and expressly eliminate trial courts' traditional authority under Penal Code § 1385, the trial court could dismiss a disqualifying prior strike and thereby make a defendant eligible for Proposition 36 sentencing.

The California Supreme Court unanimously reversed [*In re Varnell* (2003) 30 Cal. 4th 1132]. The Court determined that Proposition 36 "leaves no room for weighing of the effect of facts," and stated that it would be unprecedented to hold that Penal Code § 1385 "could be used to disregard sentencing factors." Accordingly, the Court ruled that a trial court's power under Penal Code § 1385 to dismiss an "action" does not allow courts to dismiss uncharged sentencing factors of the sort that plagued Mr. Varnell. (The Court discusses at some length why the prosecution is not obligated to allege in an accusatory pleading an offender's ineligibility for SACPA probation or the facts giving rise to the ineligibility). In the Court's view, Mr. Varnell's previous conviction and term of incarceration are, for purposes of SACPA, factors determinative of what sentence he or she is owed: probation under SACPA, or some other disposition. It is the fact of this prior conviction (not the allegation thereof) that prohibits the trial court from conferring SACPA eligibility, and, by its nature, such a fact is not subject to judicial manipulation under Penal Code § 1385.

It is important to note that while foreclosing trial courts' ability to exercise Penal Code § 1385 powers to dismiss disqualifying prior convictions, the Supreme Court emphasized that trial courts retain Penal Code § 1385 authority to dismiss pending criminal charges where the "interest of justice" would be served if SACPA probation were granted. Thus, counsel should still seek Penal Code § 1385 dismissals of concurrent charges that, if proven, would render a client convicted of a non-violent drug possession charge ineligible for SACPA.

Finally, as the "strike prior" had been stricken for "Three Strikes" purposes pursuant to Penal Code § 1385, although it could not be stricken for SACPA purposes, the California Supreme Court held that the trial court could nonetheless grant him probation under Penal Code § 1203(e), and even afford him treatment as part of probation under Health & Safety Code § 11373(a). The lesson for defense counsel is plain: even if the client is ineligible for SACPA,

the "strike prior" may still be stricken for "Three Strikes" purposes and there may be strong grounds to advocate for probation and treatment under other code sections.

In *People v. Floyd* [(2003) 31 Cal.4th 179], the California Supreme Court helped put to rest the appellate court debate over the extent to which SACPA's benefits extend to persons who committed offenses before July 1, 2001, the effective date of SACPA's sentencing provisions. 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)). With respect to its effective date, SACPA provides in Section 8 of the law: "Except as otherwise provided, the provisions of this act shall become effective July 1, 2001 and its provisions shall be applied prospectively." The courts have grappled with SACPA's application to defendants in each of the following situations: (1) defendants who committed the offense before July 1, 2001, but who were found guilty and sentenced after July 1, 2001, (2) defendants whose offense and adjudication of guilt occurred before July 1, 2001, but whose sentencing took place after that date, and (3) defendants whose offense, conviction, and sentencing occurred before July 1, 2001, but whose convictions were not final on appeal before July 1, 2001.

After much spilled ink, the vast majority of appellate courts reached the consensus that SACPA reaches defendants who fit within the first two scenarios. The California Supreme Court's grant of review in two cases, *Floyd and People v. Fryman* [(2002), formerly published at 97 Cal. App. 4th 1315, *rev. gtd.*], squarely focused the retroactivity debate on the third class of defendants. In its *Floyd* decision, the Court, over a strong (and persuasive) dissent by Justice Brown, sided with the majority of appellate courts to have addressed the issue and held that SACPA eligibility does not extend to defendants whose offense, conviction, and sentencing occurred before July 1, 2001, but whose convictions were not final on appeal before that date. As will be explained, the reasoning of *Floyd* leaves much to be desired. Even worse are the devastating, inhumane, and utterly wasteful consequences of the Court's decision for Andre Rene Floyd and a small group of similarly situated persons.

On November 9, 2000, a few days after the passage of Proposition 36, Mr. Floyd was sentenced to 28 years to life imprisonment for possessing one-quarter gram of cocaine. Floyd's lengthy sentence resulted from the finding that he had suffered five prior "strikes" under California's "Three Strikes" law, although he had not engaged in any criminal conduct during the seven years prior to his nonviolent drug possession offense. Floyd's appeal of his sentence was pending when SACPA became effective. He argued that he should get the benefit of SACPA as his judgment of conviction was not "final" as of July 1, 2001, in light of his appeal. A divided court of appeal held that "conviction" for purposes of SACPA does not encompass finality on appeal. The appellate court also rejected defendant's claims that his sentence violated principles of equal protection and the prohibition on cruel and/or unusual punishment.

The California Supreme Court affirmed, rejecting the claim that "convicted" for purposes of Penal Code § 1210.1(a)(1) means adjudication of guilt and final judgment thereon. In reaching this conclusion, the Court undertook a superficial (and arguably flawed) analysis of the statute's language. The Court essentially pointed to the uncodified language of Section 8, which states that the statute "shall be applied prospectively," and declared that this clause resolves the issue: SACPA's benefits cannot be retroactively conferred on the defendant. Moreover, because for the Court this prospectivity clause was clear cut and controlling, the majority had little difficulty rejecting Floyd's claim that he should be granted the benefit of SACPA under the rule of lenity. The Court also found no equal protection violation.

One major shortcoming of the majority's retroactivity analysis is its failure to acknowledge both the fact that the term "conviction" has no fixed meaning in California law, and that there is, in fact, one line of case precedent which expressly equates "conviction" with finality on appeal [*see People v. Treadwell* (1885) 66 Cal. 400]. Had the Court acknowledged these facts, a more appropriate set of statutory construction rules would have come into play; namely, those rules requiring a statute to be construed in a manner that (1) achieves the stated goals of the Proposition (diverting non-violent drug offenders into treatment), and (2) avoids the evils it specifically sought to remedy (the wasteful expenditure of funds and use of prison/jail cells to imprison non-violent drug offenders). The majority's analysis is considerably weakened by these oversights, and its holding should be called into question for thwarting SACPA's core aims. As Justice Brown in the dissent observed, the *Floyd* decision "frustrates rather than promotes the purpose and intent of the initiative."

It can only be hoped that the Court takes to heart the purpose and intent of Proposition 36 when deciding future cases. Meanwhile, Mr. Floyd will be languishing in prison for the next twenty plus years (at taxpayer expense) for possessing a quarter of a gram of white powder. Perhaps the only saving grace of the *Floyd* decision is that as July 1, 2001, recedes into the past, this date will serve as the touchstone for fewer and fewer drug law offenders, and the issue of SACPA's retroactivity eventually will fade into irrelevance.

Whether the *Varnell* and *Floyd* decisions represent the earliest drops of what, over time, will constitute a flood of high Court jurisprudence with respect to SACPA remains to be seen. But as the following sections of this article indicate, the intermediate appellate courts are churning out a steady stream of opinions on a wide variety of SACPA issues that increasingly work their way onto the high Court's docket.

The issue receiving the most attention in the published appellate decisions concerned whether offenders' conduct was "drug-related" under the terms of SACPA. How this question is answered is critical to the defendant, as it will often determine whether that client can become, or remain eligible for, SACPA -- or whether the client faces incarceration (*see, e.g.*, Penal Code § 1210.1 (b)(2) (disqualifying from SACPA eligibility, *inter alia*, "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" [emphasis added]), (e) (permitting court to revoke SACPA probation, *inter alia*, upon a violation of a non-drug-related condition of probation), 3063.1(d)(2) (permitting court to revoke parole and SACPA treatment, *inter alia*, upon a violation of a non-drug-related condition of parole).

Nearly half of all published appellate decisions since July 1, 2002, addressed the "drug relatedness" of a conviction or probation violation. The courts addressed this issue in the following factual contexts: driving under the influence, resisting arrest, and violating the terms of probation or parole in a variety of ways. Already in 2003, the California Supreme Court has granted review of five appellate decisions, all of which hold that driving under the influence is not a "drug-related" offense. In addition, the California Supreme Court has granted review of one appellate decision holding that a conviction for resisting arrest is non-"drug-related" and so disqualifies the offender from SACPA.

Each of California's six appellate districts has held that driving under the influence involves more than the simple possession or use of drugs and therefore the commission of this offense cannot be considered "related to the use of drugs" or "drug-related" for purposes of SACPA. Accordingly, a person convicted both of a DUI and of simple drug possession is not eligible for SACPA under Penal Code § 1210.1(b). At the time of writing, the California Supreme Court has granted review of, and thereby vacated, every one of these decisions, with the exception of the First Appellate District, Division Five's decision, *People v. Goldberg* [(2003) 105 Cal. App. 4th 1202].

The Sixth Appellate District's opinion in *People v. Campbell* [(2003), formerly published at 106 Cal. App. 4th 808, rev. *gtd.*] is illustrative of the reasoning of these appellate decisions. Prior to SACPA's enactment, Mr. Campbell was placed on probation after being convicted of drug possession. On July 9, 2001, Campbell faced a probation hearing in which he was charged with various violations of probation including failing to comply with his drug treatment regimen, and suffering a conviction for driving under the influence (DUI). The trial court found the violations true, rejected Campbell's claim that he should receive SACPA probation because his violations were "drug-related" (*see* Penal Code § 1210.1(e)(3)(D), (E), (F) (extending SACPA's coverage to "pre-Act" probationers)), revoked probation, and sentenced him to a 16-month prison term.

In affirming the probation revocation decision, the Sixth Appellate District held that Campbell's DUI conviction placed him outside the framework of Penal Code § 1210.1 (e)(3)(D) because a DUI conviction is not a "non-violent drug possession offense;" nor is it a "misdemeanor for simple possession or use," or a "violation of drug related condition of probation." Notwithstanding the fact that driving under the influence is indisputably "drug-related" conduct in lay terms, the court found that the overall purpose and intent of SACPA excluded DUIs from its coverage.

First, the court read SACPA as strictly limiting "nonviolent drug possession offenses" to the unlawful possession, use, or transportation for personal use of any controlled substance. The court observed that driving while impaired by alcohol and or other drugs "is conduct that goes beyond" these statutorily listed activities and so is not a nonviolent drug possession offense. Similarly, the court reasoned that driving under the influence is not a "misdemeanor for simple possession or use." While impaired driving can give rise to a misdemeanor offense, the offense is for driving, not the SACPA-eligible conduct listed in the Act. Furthermore, the court noted, the danger to public safety posed by driving under the influence is "fundamentally different from, not similar to, the conduct" to which SACPA expressly extends its protections. Finally, the court held that a DUI conviction is not a violation of a "drug-related condition of probation." The court, looking to Penal Code § 1210.1(f), stated that such conditions are "those that focus directly on a probationer's substance abuse and its prevention and treatment." The DUI conviction did not violate any of these conditions of Campbell's probation, and so the trial court was free to revoke Campbell's probation without adhering to SACPA's provisions that confer additional rights on probationers and cabin courts' revocation powers. Again, the case is now pending before the California Supreme Court on a grant of review.

As an abstract question of policy, it remains open to debate whether the refusal to afford DUI offenders access to SACPA treatment promotes or undermines public health and safety. But odds are that the California Supreme Court will

not depart markedly from the appellate districts, which are unanimous in their withholding of SACPA from impaired drivers.

In another appellate decision granted California Supreme Court review between July 2002 and August 2003, the Fourth Appellate District, Division One, in *People v. Ayele* [(2002), formerly published at 102 Cal. App. 4th 1276, *rev. gtd.*], held that resisting arrest, even while under the influence of drugs, could be a disqualifying concurrent misdemeanor not related to the use of drugs (*see* Penal Code § 1210.1(b)(2)). Although the opinion has been vacated by the grant of review and cannot be cited by counsel, the flavor and depth of the court's analysis may serve as a good indicator of how other appellate courts will adjudge similar fact patterns.

In the *Ayele* case, the resisting arrest charge stemmed from the defendant's walking away from uniformed officers, ignoring their orders to stop, and being preemptively tackled by the officers upon suspicion that he would try to evade them after being cornered. A brief struggle ensued, the officers employed pepper spray, and Ayele coughed up a plastic bag containing rock cocaine (giving rise to the drug possession conviction). The trial court denied Ayele's motion to strike the resisting arrest misdemeanor conviction, denied his motion for treatment under SACPA, and sentenced Ayele to a five-year prison term. On appeal, Mr. Ayele argued that his conviction for resisting arrest does not render him ineligible for probation and treatment under SACPA. Specifically, Ayele pointed to the causal nexus between his possessing drugs and his flight from the police, and urged the court to find, therefore, that his resisting arrest conviction was in fact a misdemeanor offense "related to" his possession and use of drugs.

The Fourth Appellate District, Division One found this argument unconvincing, characterizing Ayele's conduct in "willfully" resisting arrest as lacking a "close similarity" to possessing or using drugs, even if the possession and/or use of drugs "motivated" Ayele to resist arrest. Whatever the merits of the result, the court's reasoning in reaching this result is both overly broad and superficial. In dismissing out of hand a nexus between drug use and resisting arrest, the court fails to acknowledge that for some defendants, particularly deeply addicted ones whose functioning is seriously impaired at the time of arrest, this nexus can be real and powerful, and to ignore this nexus may undermine rather than honor the letter and the spirit of Proposition 36. Unfortunately, this acknowledgment is not forthcoming. On the other hand, the court does observe that even though Ayele's resisting arrest conviction was not "related to" his drug possession or use, the trial court could nonetheless exercise its authority under Penal Code § 1385 and dismiss this concurrent misdemeanor conviction "in the furtherance of justice" for purposes of sentencing an offender under Proposition 36. Again, the case is pending before the California Supreme Court on a grant of review.

Whether a concurrent misdemeanor conviction (or probation violation) is sufficiently "related to" the offender's drug possession to confer SACPA eligibility promises to be a fertile battleground for prosecutors and defense attorneys. The challenge for defense attorneys representing clients who potentially qualify for SACPA is to guard against overcharging of their clients by calling into question the propriety of concurrent non-drug charges, and to paint a compelling picture of their clients as persons who not only would greatly benefit from SACPA, but who would not have committed the charged offenses but for their untreated substance abuse problems.

Similar issues arise in another hotly contested area of SACPA: whether a probationer's or parolee's failure to report to probation or parole, appear in court, and/or attend the SACPA treatment program are violations of "drug-related" conditions of probation and parole, or are "non-drug-related" violations. How these questions are answered determines the process that is due the probationer and parolee. If these failures are deemed non-drug-related violations, then the court may simply modify or revoke probation or parole if the violation is found (*see, e.g.*, Penal Code §§ 1210.1(e)(2), 3063.1(d)(2)). On the other hand, if these violations are deemed "drug-related," then SACPA provides additional safeguards for the offender to be maintained on probation or parole and kept in treatment (*see, e.g.*, Penal Code §§ 1210.1(e)(3)(A)-(B), 3063.1(d)(3)(A)).

These issues are far from speculative. The path from addiction to recovery is rarely straight or smooth (as many avid cigarette smokers who try to quit can attest), and probationers and parolees who struggle with substance abuse often stumble, sometimes repeatedly. As a result, it is important to provide addicted individuals multiple opportunities to succeed in treatment. Temporary set-backs may manifest themselves in various ways, including missed appointments, court dates, and the failure to meet other obligations and expectations. The appellate courts have varied in their willingness to acknowledge and accommodate many of the foreseeable consequences of substance abuse. In representing a SACPA-eligible offender, a core responsibility of counsel is to help educate the court (and the probation officer and the prosecutor) about the daily realities of your client's fight to overcome addiction. Only then, will it be understood that the client's setbacks are not evidence that the client is "unamenable" to treatment (*see, e.g.*, Penal Code § 1210.1(e)(3)(E)), nor are they proof that he or she is "gaming" the system. Rather, the courts (and probation officers

and prosecutors) must learn to recognize these setbacks as the symptoms of and corollaries to a debilitating medical condition. Under SACPA, the appropriate response must be continued (and perhaps modified) treatment, not incarceration.

There are optimistic signs that the courts will listen. For example, the Second Appellate District, Division Eight in *In re Taylor* [(2003) 105 Cal. App. 4th 1394] held that a defendant's failure to report to a probation officer for drug testing was a violation of a "drug-related" condition of probation, thereby qualifying the defendant to continued probation and treatment under SACPA (*see* Penal Code § 1210.1(e)(3)). In reaching this conclusion, the court found that the purpose, intent, and structure of SACPA required the court to broadly construe the phrase "drug-related conditions of probation" (Penal Code § 1210.1(e)(3)(A), (B)), so as to confer SACPA's enhanced procedural protections on probationers. The court declared that "[b]y replacing incarceration with community-based treatment, Proposition 36 works a sea change in California's response to nonviolent drug possession offenses." It then noted that because "drug abusers often initially falter in their recovery, Proposition 36 gives offenders several chances at probation before permitting a court to impose jail time." In finding that a failure to report for a drug test was squarely a violation of a drug-related condition of probation, the court made clear that "Proposition 36 overrides a sentencing court's traditional discretion" to impose jail time. To rule otherwise would "undermine[]" "the purpose of Proposition 36, and the will of the voters... ." Consequently, the court issued a writ of habeas corpus and directed that Mr. Taylor be freed from jail, where he was serving a 180-day sentence imposed by the lower court.

Similarly, the Third Appellate District in *People v. Davis* [(2003) 104 Cal. App. 4th 1443] held that it was "it is beyond question that defendant's acceptance into and ordered participation in the court's substance abuse program of drug testing and reporting to drug court was part of defendant's drug treatment regimen and a drug-related condition of his probation." Accordingly, the court set aside the two-year prison sentence imposed by the trial court, and ordered the defendant to receive probation and continued treatment under SACPA.

In *People v. Atwood* [(2003) 110 Cal. App. 4th 805], the Third Appellate District also found that the probationer's premature discharge from a drug treatment program was "drug-related," and reversed the lower court's order revoking probation and imposing a four-year prison term. The appellate court, however, stated that it lacked sufficient facts to determine whether the probationer's failure to keep an appointment with her probation officer was also "drug-related." Noteworthy is the fact that the court went on to hold that "the burden of producing evidence and the burden of persuasion [is] on the People to show that the appointment missed by defendant was not a part of a 'specific drug treatment regimen' (such as testing), as defined by [Penal Code § 1210.1(f)]." The court remanded the case, and ordered that the probation revocation hearing be re-opened to take additional evidence on whether the missed appointment violated a drug-related condition of probation.

In a case whose facts will hopefully limit its application, the Second Appellate District, Division One, in *People v. Guzman* [(2003) 109 Cal. App. 4th 341], refused to apply SACPA's procedural safeguards to a probationer who failed to report to drug treatment. But as distinguished from the *Atwood* or *Davis* cases which found treatment failures to be "drug-related," Mr. Guzman "never took the first step [towards treatment] other than being sentenced and released from custody." Instead, he left the country, "absconding from the jurisdiction of the trial court," and failed to report to court until involuntarily brought in on a bench warrant upon his return to the United States. In the court's words, "this is not a case in which a defendant commences drug treatment and falters. This is not a case in which a defendant responded to a family emergency and then voluntarily reported to his probation officer for supervision or the drug treatment center for treatment. This is a case in which defendant, by his acts and omissions, evinced a complete and unequivocal refusal to undergo drug treatment." Against this backdrop, the court did not analyze Mr. Guzman's conduct under the rubric of Penal Code § 1210.1(e), which concerns drug-related and non-drug-related probation violations; rather, the court deemed him to have constructively "refuse[d] drug treatment" -- a refusal of drug treatment being grounds under the statute for disqualification from SACPA (*see* Penal Code § 1210.1(b)(4)).

Does SACPA extend to probationers who committed non-violent drug possession offenses while serving probation for nondrug-related felony offenses that were neither "serious" nor "violent"? The Act is silent on this point, and this silence has given rise to widely divergent analyses and conflicting appellate precedent.

It is useful to start this discussion by observing that the statute, generally speaking, is divided into two parts. One part of the statute describes how SACPA's protections and procedures apply to persons on probation; the other part describes how they apply, somewhat differently, to persons on parole (*compare* Penal Code § 1210.1 with Penal Code § 3063.1). By its terms, the probation provisions of SACPA apply, with certain exceptions (*see* Penal Code § 1210.1(b)(1)), to persons convicted of non-violent drug possession offenses. These provisions also apply (with certain

exceptions (*see* Penal Code § 1210.1(e)(3)(D), (E), (F))) to persons who, at the effective date of the Act, were on probation and who subsequently violate the terms of that probation by engaging in nonviolent drug-related conduct. Similarly, the parole provisions of the statute apply (with certain exceptions) to persons who, on the effective date of the Act, are on parole, and who violate parole by committing nonviolent drug possession offenses or violating drug-related conditions of parole.

The issue raised here illuminates a critical difference between these two sections of the statute. Specifically, the parolee part of the Act expressly denies SACPA eligibility to those parolees who, *inter alia*, have been convicted of one or more serious or violent felonies (*see* Penal Code § § 667.5(c), 1192.7). The probation part of the Act, however, is silent as to what, if any, underlying offenses for which a person may be on probation disqualify that probationer from SACPA's benefits if the probationer commits a non-violent drug possession offense or violates a drug-related condition of probation.

Two of California's appellate districts confronted cases of probationers who committed non-violent drug possession offenses while serving probation for nondrug-related felony offenses that were neither "serious" nor "violent," as defined by the Act (by reference to Penal Code § § 667.5 and 1192.7) (*see* Penal Code § 3063.1(b)). The issue raised by the cases is whether probationers in these circumstances are eligible for SACPA. The Third and Sixth Appellate Districts undertake divergent analyses and reach conflicting conclusions.

In *People v. Esparza* [(2003) 107 Cal. App. 4th 691 (Third Appellate District)], the defendant was serving four years' probation for a felony vandalism conviction when he was convicted of a non-violent drug possession offense. Rather than imposing SACPA probation, however, the trial court used the drug offense as grounds for reinstating Esparza's suspended felony sentence for vandalism. Esparza appealed, arguing that he was SACPA-eligible. The Third Appellate District rejected this claim, relying on "the plain language of the statute." It reviewed each of the Act's provisions governing SACPA eligibility for probationers, and found that "[t]he statute does not include any language applicable to defendants on probation for nondrug crimes." The court further noted that "[a]ll of the provisions barring incarceration for probation violators refer solely and explicitly to defendants on probation for drug crimes." In a footnote, the court contrasted the Act's provisions concerning parolees, remarking that it is "significant[]" that "the plain language of [SACPA] does not require that parolees be on parole for a drug offense." Against this backdrop, the court found clear evidence that the statute was not intended to apply to probationers in Mr. Esparza's situation, and therefore declined "to expand the statutory umbrella to include drug-related probation violations for nondrug offenses." In support of this holding, the court stated that to "[g]rant[] Proposition 36 treatment to a probationer, ... who was convicted of a crime unrelated to drug possession as well as a drug possession offense, would be directly contrary to the purpose of the statute."

In *People v. Guzman* [(Aug. 8, 2003) -- Cal. App. 4th --], the Sixth Appellate District considered the case of a defendant who was serving three years' probation for a nonviolent, nonserious felony offense and a misdemeanor offense when he committed two potentially SACPA-eligible offenses (drug possession and being under the influence). For these offenses, the trial court summarily revoked the defendant's probation and sentenced him to two years imprisonment. Thus, the Sixth Appellate District in *Guzman* faced a similar set of facts as the Third Appellate District addressed in *Esparza*.

Like the court in *Esparza*, a unanimous panel of the Sixth District found that the Act's probation provisions "simply does not cover the situation where a defendant is on probation for a nonviolent, nonserious felony and then commits a [nonviolent drug possession offense]." But in stark contrast to the *Esparza* court, the court in the *Guzman* case was deeply troubled by the fact that the parole provisions of SACPA apply to similarly situated parolees. Instead of finding this divergence between the Act's two parts to be evidence that probationers should be denied the protections conferred upon parolees, the Sixth Appellate District found this divergence to be a legally compelling reason to extend SACPA to these probationers, holding that the failure to do so violates principles of equal protection, as guaranteed by the Fourteenth Amendment and Cal. Const., art. I, § 7.

In so holding, the *Guzman* court looked to the purpose and intent of SACPA and concluded that "defendants who commit a nonviolent drug possession offense ["NVDPO"] while on probation for a nonviolent, nonserious offense and defendants who commit an NVDPO while on parole for a nonviolent and nonserious offense are sufficiently similar to justify judicial scrutiny of the Act's distinction between them." The court offered several reasons for this conclusion:

"First, both the parolee and probationer have committed the same type of offense--an NVDPO. Second, both the parolee and probationer are on probation or parole for the same type of offense--a nonviolent and nonserious felony. Third, diverting to drug treatment a defendant who commits an NVDPO while on probation for a nonviolent and

nonserious felony would save as much money and enhance public health and safety just as much as diverting a defendant who commits an NVDPO while on parole for a nonviolent and nonserious felony. The public health, safety, and pocketbook would benefit if drug treatment were provided to probationers like defendant."

The *Guzman* court then applied strict scrutiny review to SACPA's differential treatment of similarly situated probationers and parolees, observing that such review is warranted by the "fundamental liberty interests" at play. The court found that the Act's distinction between probationers and parolees "is not justified by a compelling interest or necessary to further any compelling interest." Indeed, the court observed that "[t]he Act is designed to have a 'wide reach' and a 'far-ranging application.'" The court therefore held that "the Act's distinction between probationers and parolees violates equal protection." Faced with this constitutional infirmity the court may "declare [the statute] a nullity and order that its benefits not extend to" the statute's intended beneficiaries, or it may "extend the coverage of the statute to include those who are aggrieved by the exclusion" The court chose the latter option, and thus construed SACPA to include probationers who commit an NVDPO while on probation for a nonserious, nonviolent offense.

Guzman, at the time of press, was not yet final.

The *Esparza* and *Guzman* decisions thus present counsel with conflicting precedent. How, as a practical matter, does this conflict affect counsel's defense strategy? In the absence of additional appellate court rulings on this issue, it should be noted that while *Esparza* and *Guzman* reached different conclusions, the "conflict" with respect to interpretation of SACPA was limited. The *Esparza* court's opinion appears inconsistent as to the bases of its decision. In the first part of the court's analysis, the court found that the defendant was not SACPA eligible because he was on probation for a nondrug felony conviction at the time he committed his drug possession offense. In the second part of the court's analysis, the court appears to ground defendant's SACPA-ineligibility on the fact that he was incarcerated for the vandalism offense (when his probation was revoked for the drug offense), and that SACPA treatment does not extend to incarcerated persons (*see* Penal Code § 1210(b) (prohibiting drug treatment under SACPA to take place in prison or jail), (c) (setting forth timeline by which SACPA treatment is to be provided)). Specifically, in the second part of its analysis, the court declared that the "trial court could [] have exercised its discretion to reinstate defendant's probation on the vandalism case in order to permit defendant to take advantage of the Proposition 36 programs in the felony drug case. The important point [] is that the trial court was not required to do so."

Although it declined to extend the scope of SACPA to a situation in which the statute is silent, the *Esparza* court acknowledged that nothing in SACPA barred its application to probationers under these circumstances. The court further suggested that, under the statute, the trial court has the discretion to apply the SACPA provisions to probationers in the same manner as they apply to parolees. "We conclude defendant was eligible for Proposition 36 treatment on the felony drug case under the statutory criteria only if he had not been sent to prison for the vandalism case." Given that defendant's incarceration was triggered solely by the drug offense, the logic underlying the court's ruling seems vulnerable to challenge. The problem is that this part of the *Esparza* opinion is at odds with the court's earlier conclusion that a probationer is statutorily ineligible for SACPA by virtue of the underlying offense he or she committed. If, contrary to *Guzman*, the first part of the *Esparza* ruling is correct, then the probationer is ineligible for SACPA, so that same probationer's eligibility cannot also turn on whether he or she is in fact incarcerated for his or her underlying offense.

Notwithstanding the conceptual inconsistencies that may vex the *Esparza* opinion, the court's conclusion that the defendant would have been SACPA-eligible but for his incarceration gives defense counsel an important opening. Specifically, it enables counsel to urge the trial court to not imprison the client for violating probation on the underlying, nondrug-related offense, and (if the court agrees) to persuade the court to offer the client SACPA probation and treatment for the nonviolent drug possession offense. In this vein, counsel who represent clients on probation for nonserious, nonviolent, nondrug-related offenses should anticipate the *Esparza* problem by filing motions to keep them from being incarcerated for a violation of probation, and by collecting evidence to show that they are in need of, and would be well-served by, placement in an appropriate community-based substance abuse treatment program.

In sum, until new, controlling case law comes down that settles the *Esparza* - *Guzman* split, defense counsel should invoke the holding of *Guzman*, if that decision becomes final. If that fails, counsel should ignore the conceptual inconsistencies of *Esparza*, and urge the court not to incarcerate the client and grant SACPA probation.

The Third Appellate District, in *People v. Esparza* [(2003) 107 Cal. App. 4th 691], rejected the state's contention that the defendant's failure to request sentencing under Proposition 36 waived his right to relief under the Act and to raise the issue on appeal. "When a defendant is eligible for Proposition 36 treatment," the court stated, "it is mandatory unless he is disqualified by other statutory factors, including refusing drug treatment. [citations omitted] Placement of

eligible defendants in Proposition 36 programs is not a discretionary sentencing choice made by the trial judge and is not subject to the waiver doctrine." In so holding, the court cited *People v. Welch* [(1993) 5 Cal. 4th 228, 237].

The Second Appellate District, Division Three ruled in *People v. DeLong* [(2002) 101 Cal. App. 4th 482] that appeals of non-violent drug possession convictions are not rendered moot upon a defendants' completion of drug treatment and the subsequent dismissal of those convictions under Penal Code § 1210.1 (d)(1). The court reasoned that because such drug convictions, even after their dismissal under Penal Code § 1210.1(d)(1), could cause the defendant "to suffer disadvantageous and prejudicial collateral consequences," the conviction "to some extent, still exists," and this fact is sufficient to support an appeal. This holding is particularly important for the many persons who suffer one or more of the several civic consequences that specially attach to felony drug convictions, including (but not limited to) the loss of public assistance, federal student loans for higher education, and access to public housing. For SACPA participants who were wrongfully convicted, *People v. DeLong* offers the chance to fully clear their names and restore their rights and benefits.

The First Appellate District, Division One found in *People v. Espinoza* [(2003) 107 Cal. App. 4th 1069] that a trial court has discretion to deny an illegal immigrant access to SACPA when the immigrant faces "a substantial likelihood of imminent deportation." In the *Espinoza* case, the defendant had a lengthy history of parole violations, had previously been deported twice, and both times illegally re-entered the country. At the time of sentencing for his SACPA-eligible offense, the INS had been notified of Mr. Espinoza's conviction but had yet to place a hold on him. On these facts, the court concluded that "by any measure, the defendant was a prime candidate for deportation." Because "Defendant's immigration status and criminal history make it highly unlikely that he could complete any court-ordered drug treatment before being deported," the court concluded that the trial court retained the discretion to deny Mr. Espinoza SACPA probation.

Notwithstanding the *Espinoza* decision, counsel who represent illegal immigrants convicted of SACPA offenses should continue to challenge the trial court's authority to deny their clients SACPA. First, a "likelihood" that a defendant will fail to complete a treatment program is not grounds, under the statute, for disqualification from SACPA. The commission of certain offenses, the repeated violation of conditions of probation or parole, posing a danger to the safety of others, and being found "unamenable" to "all forms of drug treatment" are grounds for disqualification (*see generally* Penal Code § § 1210.1, 3063.1), but not the likelihood of failure. Second, it is not clear that the *Espinoza* court is correct to recognize that a trial court can exercise its discretion to deny SACPA when federal immigration issues loom in the background. It may be that the "courts have long recognized that the decision whether to grant probation to a deportable alien presents special issues." But Proposition 36 nowhere states that immigration status is a factor to be considered for determining SACPA eligibility. In this respect, the Third Appellate District's observation in *People v. Esparza* [(2003) 107 Cal. App. 4th 691, 699] is instructive: application of the Act "is mandatory unless [the defendant] is disqualified by other statutory factors" Arguably, there are no other statutory factors that give a court discretion to deny SACPA to illegal immigrants, even those who face imminent deportation.

To be sure, "[n]othing in the text of the proposition, or in the ballot arguments and analyses regarding it, suggested that if this measure was enacted California would be compelled to license, certify, and fund drug treatment programs on a worldwide basis," nor can a "California court [] lawfully compel a noncitizen to attend a drug treatment program in his country of origin" [*People v. Espinoza* (2003) 107 Cal. App. 4th 1069, 1075, 1077]. But these facts, relied on by the *Espinoza* court, do not alter the mandatory eligibility requirements of SACPA; rather, they give the trial court grounds to revoke SACPA probation if and when an deportation occurs. The court's ability to revoke probation upon deportation helps counsel in arguing for the mandatory application of SACPA to the deportable client, for it makes clear that the court's hands are not tied if circumstances change. Accordingly, counsel should argue that *Espinoza* was wrongly decided and that trial courts lack discretion to deny SACPA probation based on a client's possible deportation.

At the very least, counsel should urge the trial court to exercise its discretion and grant SACPA probation, consistent with the intent of Proposition 36. To this end, counsel should try to establish that their clients do not face a "substantial likelihood of imminent deportation," and so are good candidates for SACPA treatment. Counsel should argue that the "substantial likelihood of deportation" is a heavy burden for the court or the prosecution to meet, and try to distinguish the client's immigration history from that presented in *Espinoza*. Counsel who pursue this route may wish to point to the Second Appellate District, Division One's analysis in *People v. Guzman* [(2003) 109 Cal. App. 4th 341, 344, 350] where the court sentenced an "undocumented alien" under SACPA (but later revoked his SACPA probation as a result of "a complete and unequivocal refusal to undergo drug treatment").

Penal Code § 1210.1 (b)(1) excludes from SACPA any defendant previously convicted of one or more specified violent or serious felonies unless the nonviolent drug possession offense occurred after a period of five years in which the defendant remained free of both prison custody and the commission of specified offenses. Defense attorneys have vigorously contended that the statute's five year "washout" period is satisfied by any five-year period in which the client is free of both prison custody and any disqualifying convictions, not simply the five years immediately preceding the conviction for the non-violent drug possession offense. In *People v. Superior Court (Martinez)* [(2002) 104 Cal. App. 4th 692], the defense's argument was successful in the trial court. The trial court reasoned that the language of Penal Code § 1210.1 (b)(1), pertaining to the five-year period, is ambiguous and reasonably susceptible of two interpretations. Therefore under principles of statutory interpretation, the court decided that the statute should be construed in defendant's favor to provide a five-year washout period.

The Sixth Appellate District, however, reversed the trial court. Like the trial court, the appellate court found the statutory language ambiguous. But the court went on to examine "the voters' intent in approving Proposition 36." The court reviewed "the ballot summary, analyses, and arguments presented to the electorate in connection with Proposition 36," and found that these documents "make clear that the voters intended the five-year period ... be the five years immediately preceding the commission of the current nonviolent drug possession offense." In so ruling, the court joined the three other appellate courts to have addressed this issue [*People v. Superior Court (Turner)* (2002) 97 Cal. App. 4th 1222 (Second Appellate District, Division Five); *People v. Superior Court (Jefferson)* (2002) 97 Cal. App.4th 530 (Fourth Appellate District, Division Two); *People v. Henkel* (2002) 98 Cal. App. 4th 78 (First Appellate District, Division Two)]. Although not all appellate districts have ruled on the issue, this area of the law appears settled.

One provision of the Act that has essentially become settled law is SACPA's preemption of a trial court's traditional authority to revoke probation pursuant to Penal Code § 1203.2. The leading case on this issue is now *In re Mehdizadeh* [(2003) 105 Cal. App. 4th 995], in which the Second Appellate District, Division Seven held that "probationers subject to Proposition 36 can only have their probation revoked in accordance with the terms of [Penal Code § 1210.1(e)(3)]" [*accord People v. Davis* [(2003) 104 Cal. App. 4th 1443 (Third Appellate District); *People v. Murillo* (2002) 102 Cal. App. 4th 1414 (Fourth Appellate District, Division Two)]. In a comprehensive review of the statute, the court found that "[s]everal provisions of Proposition 36 arguably express the electorate's intent in adopting the initiative to supercede the trial courts' broad powers to revoke the probation of those covered by the initiative." Thus,

"when the evidence before the trial court shows the person is covered by Proposition 36, the alleged probation violations are 'drug-related' and the person has not previously been found in violation of probation, the court cannot summarily revoke probation and subject the probationer to a loss of liberty unless the court has probable cause from the report of the probation officer or otherwise to believe the probationer poses a danger to society."

The *Mehdizadeh* decision was issued at a time when Superior courts in Los Angeles (and elsewhere) were imposing short jail sentences on SACPA probationers, pending their probation revocation hearings, purportedly to send a "wake-up" call to offenders who were "slipping up" that they were in danger of losing their liberty and opportunity for treatment. The short-term jailing of drug offenders -- from a day or two up to a week or two -- is widely practiced by drug courts nationwide, and is often referred to as "shock incarceration," or by the more nefarious term "therapeutic incarceration." The drafters of Proposition 36 intended to prohibit this questionable practice and protect SACPA probationers from its dangerous consequences. The court in *Mehdizadeh* recognizes as much.

The *Mehdizadeh* court also articulated an alternative basis for its decision. The second rationale also underscored the impropriety of incarcerating SACPA-eligible probationers. After concluding that the trial court lacked authority to revoke probation without first holding a hearing and making findings in accordance with SACPA's requirements (*see* Penal Code § 1210.1(e)), the appellate court held, in the alternative, that the trial court abused its discretion in remanding the probationer to custody. Looking to the bail schedule that governs probationers, the court noted that these standards generally require own recognizance release ("O.R. release") for defendants whose criminal histories qualify them for SACPA. "[G]iven the minor nature of [their] crime[s] ... it is an abuse of discretion not to release [them] on [their] own recognizance unless [they] pose[] a danger to society or a risk of flight." Even if a defendant does pose a risk of flight, "incarceration should be avoided if there is a less restrictive alternative."

In what is perhaps the most poorly reasoned and erroneous ruling of the past year, the First Appellate District, Division One, in *People v. Williams* [(2003) 106 Cal. App. 4th 694], held that a defendant's pre-Act violations of probation must be considered in determining whether the defendant is eligible for further probation. In *Williams*, the court was faced with a defendant who, prior to the effective date of SACPA, committed a series of non-violent drug offenses, violated probation three times, and at least twice failed a condition of probation requiring him to enroll in and

complete a drug treatment program. The court found that this history showed that the defendant was "unamenable to treatment" and "no legitimate purpose" would be served by providing him treatment under SACPA. The legal import of the court's decision is that "[f]or purposes of determining amenability to treatment, there is no reason to distinguish between persons who have tried and failed on probation prior to July 1, 2001 and those who have tried and failed on probation only after July 1, 2001."

The court's reasoning suffers several fundamental flaws and oversights, of which only a few will here be addressed. For example, the court misstated the purpose of SACPA in declaring that "no legitimate purpose" would be served by providing Mr. Williams, who had a history of treatment failures, substance abuse services under SACPA. To this end, the court observed that "Proposition 36 was intended to benefit the state's taxpayers," then characterized Mr. Williams as someone for whom incarceration is "inevitable" and concluded that Williams would squander any offer of treatment, thus making him a bad SACPA investment.

Proposition 36 does not grant courts the authority to undertake a cost-benefit analysis of whether a defendant should be SACPA eligible. While it is true that SACPA was intended to save taxpayers' money, it was never the statute's intent to save taxpayer money by denying services to individuals most in need of treatment. Saving taxpayer money is neither the Act's entire purpose, nor its primary purpose. Indeed, any fair reading of the Act must recognize that it was meant to provide non-violent drug possession offenders access to appropriate substance abuse treatment provided by quality-controlled, state-licensed programs (*see, e.g.*, Penal Code § 1210(b) (requiring SACPA treatment programs to be state licensed and/or certified)). Thus, the court was wrong to refuse for financial reasons Mr. Williams access to SACPA probation.

The court also erred in characterizing Mr. Williams as a certain "treatment failure" based on his pre-Proposition 36 experiences. Before SACPA took effect, the treatment offered probationers did not have to meet any quality standards, did not have to be based on a treatment plan tailored to the defendant's needs (*see* Penal Code § 1210.1(c)), and could be taken away from probationers by the courts for little or no cause. Ignoring these material differences, the Williams court conflated pre-SACPA treatment with SACPA treatment, and thus erroneously suggested that pre-SACPA treatment failures will accurately predict SACPA treatment outcomes. In characterizing Mr. Williams as a "certain failure", the court revealed a profound cynicism about the efficacy of quality drug treatment and its ignorance of the fact that severely addicted persons often need multiple treatment opportunities before they succeed in recovery -- cynicism and ignorance that SACPA seeks to counter.

Finally, it should be noted that the holding in *Williams* is also vulnerable to attack on the grounds that it conflicts with several opinions of other appellate courts which hold that the state must first prove that a defendant poses a danger to the safety of others before probation is revoked for the first time for a drug-related offense [*see, e.g., People v. Davis* [(2003) 104 Cal. App. 4th 1443 (Third Appellate District); *In re Mehdizadeh* [(2003) 105 Cal. App. 4th 995 (Second Appellate District, Division Seven); *People v. Murillo* (2002) 102 Cal. App. 4th 1414 (Fourth Appellate District, Division Two)]. Despite these and other flaws in the *Williams* decision, the California Supreme Court voted 4-3 to deny review.

In *People v. Barasa* [(2002) 103 Cal. App. 4th 287], the Fourth Appellate District, Division One addressed whether the defendant or the People bears the burden on the question of whether a defendant's drug possession or transportation of drugs is for "personal use." The defendant in *Barasa* argued that the state must prove that the drugs he was charged with transporting were for commercial rather than personal usage. The court rejected this argument, stating that Evid. Code § 500 provides that "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Nevertheless, the court recognized the potential for prosecutorial overcharging as a means to thwart the mandate of Proposition 36. The court cautioned that while the defendant bears the initial burden of proving personal use, "in personal use amount cases, a prosecutor may not avoid the application of Proposition 36 simply by charging the offense as a transportation rather than as a possession."

Even more importantly, the court in *Barasa* held that the court, and not a jury, is to make the determination of whether the possession or transportation is for "personal use." The court found that the jury trial right of *Apprendi v. New Jersey* [(2000) 530 U.S. 466] does not apply to such a determination.

One final issue is one confronting courts and counsel with increasing frequency but which has not yet resulted in a published decision. The issue concerns whether individuals on probation and in treatment under Proposition 36 should be permitted to use medical marijuana in accordance with Proposition 215 (*see* Health & Safety Code § 11352.5). It has been the position of some trial courts, perhaps persuaded by the arguments of some probation officers and/or treatment

providers, that a SACPA client's use of marijuana for medical purposes with the recommendation and under the supervision of a physician -- i.e., in compliance with state law -- is inconsistent with probation and substance abuse treatment under Proposition 36. This position is wrong. It is wrong as a matter of statutory interpretation, and as a matter of state administrative practice.

SACPA's authors were aware of Proposition 215 when drafting Proposition 36 and intended the benefits of SACPA to be available to seriously-ill SACPA defendants who lawfully possess and use medical marijuana in compliance with state law. To this end, the drafters made sure that SACPA's provisions implicitly or expressly exclude from SACPA's full coverage medical marijuana patients. The fact that SACPA does not explicitly reference Proposition 215 is of no legal moment. There is no conflict between the two statutes. Indeed, there is not even a conceptual tension between the statutes, as the central purpose of both laws is to improve the health of ailing Californians, and to reduce criminal penalties and exposure to incarceration for persons in need of medical treatment.

It would flout fundamental principles of substance abuse treatment -- as well as the law -- for a court to deny SACPA probation (or a SACPA treatment program to deny admission) to an offender because the offender uses a pharmaceutical medication prescribed by a physician to treat a serious medical condition. Marijuana can, like many other medications, cause false-positives on standard drug tests. That a prescription medication may make it more difficult for officials to determine whether the offender is improperly using non-prescribed drugs (many prescription medications can cause "false positives" on standard drug tests) is not a valid excuse for requiring the offender to stop taking prescription medication as a condition of receiving drug treatment. Nothing in the text of SACPA -- and nothing about the best scientific protocols and standards of care that guide the delivery of certified substance abuse services -- suggest that courts can or should require SACPA clients to forfeit their medical prescriptions in order to become eligible for drug treatment or to complete that treatment successfully.

For purposes of state law, a physician's recommendation of medical marijuana carries the same weight and effect as a physician's prescription of a traditional pharmaceutical. The State Department of Alcohol and Drug Programs, the agency statutorily designated to oversee the implementation of SACPA statewide, is clear on this point. In a letter dated July 17, 2002, to the Nevada County Council on Alcoholism, the Department declared that it "has determined that under the Compassionate Use Act, a recommendation by a licensed physician must be treated as a prescription. Therefore, medical marijuana shall be treated like any prescribed medication."

For these reasons, counsel should vigorously seek to protect the rights of their SACPA-eligible clients to possess and use medical marijuana if they are qualified patients under the terms of Proposition 215.

SACPA's second year in the courts has seen the appellate courts address an ever-broadening variety of issues. Courts are moving beyond the initial debates concerning SACPA's retroactivity, focusing more often on what factual scenarios render clients eligible or ineligible for drug treatment. It is likely that in the upcoming year the appellate courts will continue to struggle with what conduct is "drug-related" for purposes of SACPA. But as clients work their way through the treatment system and begin graduating in large numbers from their treatment programs, appellate courts will likely begin addressing what constitutes a client's "successful completion of treatment" (*see* Penal Code § 1210(c)), and what rights and procedures surround the dismissal of SACPA offenses upon the completion of treatment. These issues are important and have the potential to affect hundreds, perhaps thousands, of persons.

In concluding, it is worth recalling that over 50,000 people annually will be offered the opportunity for SACPA treatment, and the vast majority of these persons will seize that opportunity. Their personal motivations for choosing SACPA will differ. Their ability to stay the course of treatment and comply with their conditions of probation will vary. But virtually all of them will rely on legal counsel to help avoid the rocky shoals ahead and to navigate the shifting tides of legal precedent. The preliminary data indicates that Proposition 36 is an overwhelming success by almost any measure. This is no doubt due, in significant part, to the skill, dedication and compassion of California's defenders. Congratulations. And keep up the good work.

FOOTNOTES:

(n1) Footnote *. _____

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