

## WHAT TO LOOK FOR IN CASES WHERE A DEFENDANT IS SENT TO PRISON AFTER A PROPOSITION 36 PROBATION VIOLATION

**\*\*\*IMPORTANT PRELIMINARY NOTE:** The precise procedures for Proposition 36, as provided in section 1210.1, are currently in flux because the Alameda County Superior Court, in case number RG06278911, has issued a preliminary injunction restraining actions implementing Senate Bill 1137 (signed into law in 2006), which amended section 1210.1. The injunction was issued as part of a lawsuit challenging the Senate Bill's amendments that permit jail sanctions for Proposition 36 violations. A copy of the injunction and other documents, as well as information regarding the status of the lawsuit, can be found on the Alameda County Superior Court's website, <http://apps.alameda.courts.ca.gov/fortecgi/fortecgi.exe?ServiceName=DomainWebService&TemplateName=index.html>, by searching for case number RG06278911.

Because Senate Bill 1137 includes amendments to the lettering of subdivisions in section 1210.1, current Penal Code publications refer to the Senate Bill's new delineations. However, this handout refers to the original subdivisions because they are currently the law. For clarity, this handout labels the original subdivisions "former" subdivisions, as have various Courts of Appeal (e.g., *People v. Hazle* (2007) 157 Cal.App.4th 567).

Before raising a Proposition 36 argument, the impact of this injunction should be considered; it may foreclose arguments based on statutory amendments in Senate Bill 1137. Also, counsel handling Proposition 36 cases should check the status of the injunction. Please note that in two places – in italics and in brackets – the handout references a new provision under Senate Bill 1137 because it is favorable to our clients, thereby making it important for counsel to consider in determining whether it may still help a given client despite the injunction.

## IS THE VIOLATION DRUG-RELATED OR NOT DRUG-RELATED?

- According to section 1210.1, former subdivision (e)(3)(A), the following are **drug-related violations**:
  - non-violent drug possession, drug paraphernalia possession, or drug use offenses, or something similar (not possession for sale or violations of section 4573.6 or 4573.8 (§ 1210, subd. (a))
  - being present where drugs are being used or something similar
  - failing to register as a drug offender or something similar
  - violating a drug-related condition of probation, which explicitly includes the defendant's specific drug treatment regimen, employment, vocational training, educational programs, psychological counseling, and family counseling (§ 1210.1, former subd. (f))
  
- **IF VIOLATION IS NOT DRUG-RELATED** (§ 1210.1, former subd. (e)(2)):
  - The state must “move” to revoke probation, which requires notice to the defendant, and the court must hold a hearing regarding the motion
  - Upon the finding of a violation, the court has discretion to terminate or to reinstate probation.
  - **If Third [Or Subsequent] Drug-Related or Non-Drug-Related Violation is Found True<sup>1</sup>** (§ 1210.1, former subd. (e)(3)(C)), the court shall revoke probation, *[unless it finds:*
    - 1) *Defendant is not a danger to society; and*
    - 2) *Defendant would benefit from further treatment]*
  
- **IF VIOLATION IS DRUG-RELATED** (§ 1210.1, former subd. (e)(3)):
  - The state must “move” to revoke probation, which requires notice to the defendant, and the court must hold a hearing regarding the motion
  - **If First Violation is Found True** (§ 1210.1, former subd. (e)(3)(A)), the court “*shall*” revoke probation only if the defendant poses a danger to the safety of others by a preponderance of the evidence
  - **If Second Violation is Found True** (§ 1210.1, former subd. (e)(3)(B)), the court “*shall*” revoke probation if it finds:
    - 1) The defendant poses a danger to the safety of others by a preponderance of the evidence; or
    - 2) The defendant is unamenable to treatment by a preponderance of the evidence
  - **If Third [or Subsequent] Drug-Related or Non-Drug-Related Violation Found True<sup>2</sup>** (§ 1210.1, former subd. (e)(3)(C)), the court shall revoke probation *[, unless it finds:*
    - 1) *Defendant is not a danger to society; and*
    - 2) *Defendant would benefit from further treatment]*

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<sup>1</sup>The most notable change under Senate Bill 1137, other than for jail sanctions, is that courts would have discretion not to terminate probation upon a third probation violation. In any case involving the situation of a defendant terminated from probation because of a third [or subsequent] violation, counsel should consider whether there may be an argument for appeal because of the new provision or whether the injunction forecloses any argument.

<sup>2</sup>See footnote 1, *ante*.

## **DOES A DRUG-RELATED VIOLATION COUNT AS A FIRST, SECOND, THIRD, OR LATER VIOLATION FOR STATUTORY PROCEDURAL PURPOSES?**

- The key to answering the question is the premise that **defendants are entitled to three separate periods of probation** before termination from Proposition 36. (*People v. Hazle* (2007) 157 Cal.App.4th 567, 572; *People v. Tanner* (2005) 129 Cal.App.4th 223, 236.)
  - The rationale is that relapse is part of the recovery process. (*People v. Hazle* (2007) 157 Cal.App.4th 567, 572; *People v. Atwood* (2003) 110 Cal.App.4th 805, 809.)
- A recent case holds that **a violation does not count as a third violation if the defendant did not receive notice of the second violation prior to the act underlying the second violation** (the same rule should apply to second violations). The rationale behind the holding is that the defendant was not informed of a second violation in time to change behavior to avoid a third violation, which contradicts the Legislature's intention that defendants receive three separate periods of probation. (*People v. Hazle* (2007) 157 Cal.App.4th 567, 576-577.)
- A similar rationale supports the argument for appeal that **defendants must not only receive notice of alleged violations in chronological order, but also must be revoked and reinstated on probation because of a violation before a subsequent violation is counted for purposes of the statutory procedure.**
  - However, be aware that the Third Appellate District has concluded otherwise that multiple hearings for multiple violations can take place at one time without violating due process. (*People v. Budweiser* (2006) 140 Cal.App.4th 105, 109; *People v. Hazle* (2007) 157 Cal.App.4th 567, 573.) However, no other court, including the Supreme Court, has spoken on the issue.
  - Therefore, an argument for appeal exists that allowing a single hearing to lead to both the first and second or both the second and third violations for purposes of the statutory procedures violates the Legislative intent that defendants receive three distinct periods of probation. Notice of an alleged violation does not create a separate period of probation. Rather, a new period of probation only begins after a court finds an allegation true and reinstates the person on probation, which usually will include modified conditions to improve the defendant's prospect for recovery.