

Proposition 36: Discretion for Effective Prosecution

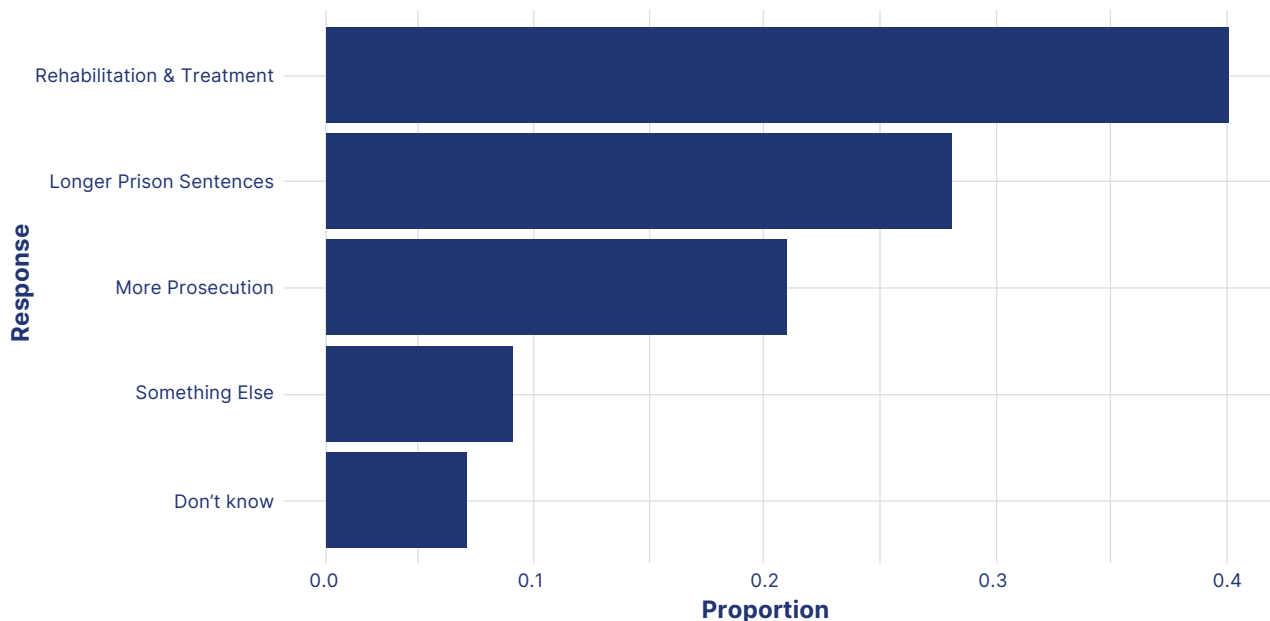
This brief explains how prosecutors, judges, and administrative agencies can use discretion in implementing Proposition 36 (“The Homelessness, Drug Addiction, And Theft Reduction Act”) to ensure it achieves its purpose of reducing homelessness and addiction through effective rehabilitation.

1. Public Support

Proposition 36 aims to prioritize effective rehabilitation over both harm reduction and incarceration. In a survey conducted before voting on Proposition 36, California voters indicated that the most important aspect to improve in the criminal legal system is “to expand efforts to provide first-time offenders with rehabilitation and treatment.”

Which of the following best describes your opinion of the most important aspect of the criminal justice system that needs improving? (Likely Voters)

Berkeley IGS Poll, conducted by the Institute of Governmental Studies (IGS) at UC Berkeley Administered online in English and Spanish from September 25 - October 1, 2024
Sample: 3,045 likely voters in California



The proposition process allows voters to express their preferences on policy. It is direct democracy in action. Proposition 36 allows prosecutors and judges to fulfill the proposition goals by using discretion. Judges and prosecutors can ensure a balance between rehabilitation and punishment in light of the best way to achieve the Proposition's goals.

2. Implementation Obstacles - Treatment Mandated Felonies

The Proposition creates an alternative to jail time for certain drug possession offenses through court-approved treatment programs. Eligible defendants must plead guilty, and agree to treatment.

Program Component	Details
Initial Assessment	Court-ordered evaluation by drug addiction expert for substance abuse and mental health
Program Features	<ul style="list-style-type: none"> • Flexible length and customized treatment plan • May include drug treatment, mental health services, job training • Regular court monitoring • Supervision based on available resources

Key Implementation Challenges:

Challenge	Impact
Expert Qualification	No clear definition of “drug addiction expert” could cause inconsistent implementation.
Resource Constraints	Existing treatment capacity may not meet increased demand, leading to waitlists.
Program Consistency	Flexible guidelines create disparities in treatment decisions across counties.

3. Discretion in Implementing Proposition 36

While the law creates new tools and options, it preserves discretion at multiple levels rather than creating mandatory requirements.

Type of Discretion	Area	Details
Prosecutorial	Charging Decisions	Prosecutors have discretion in charging someone under the new “treatment-mandated felony” provision after two prior drug convictions. The law creates this option but does not mandate its use.
	Diversion Programs	Prosecutors and probation officers have the discretion to refer defendants charged under Section 666.1 to theft diversion or deferred entry of judgment programs, where such programs exist.

3. Discretion in implementing Proposition 36 (Continued)

While the law creates new tools and options, it preserves discretion at multiple levels rather than creating mandatory requirements.

Type of Discretion	Area	Details
Judicial	Treatment Program Design	Judges have broad discretion in supervising treatment, which “may include, but is not limited to, drug treatment, mental health treatment, job training, and any other conditions related to treatment or a successful outcome.”
	Suitability Determinations	Judges have discretion to determine whether someone is “suitable” for treatment. The law does not define suitability criteria, leaving this to judicial interpretation.
	Enhancement Decisions	Judges retain discretion to strike various new enhancements “in the interests of justice.”
	Re-referral to Treatment	After treatment failure (except for new convictions), judges have the discretion to re-refer defendants to treatment “in the interest of justice.”
	Sentencing Options	When treatment fails, judges have multiple sentencing options, including: granting probation with or without jail, imposing county jail time, sentencing to state prison, or using other available disposition alternatives.
	Restraining Orders	Judges have discretion in issuing retail crime restraining orders and their geographic scope.
	System-Level	Program Implementation
Resource Allocation		Local agencies have discretion in how they allocate resources to support these new programs.

Conclusion

Proposition 36 can only fulfill its promise of reducing homelessness and addiction if prosecutors, judges, and administrative agencies use their discretion wisely and collaboratively. By aligning tailored treatment options with thoughtful charging, sentencing, and program design, these actors can ensure that Proposition 36’s goals of rehabilitation, accountability, and community well-being are not just aspirational but realized in practice.