2024 PROPOSITION 36: HOMELESSNESS, DRUG ADDICTION, AND THEFT REDUCTION ACT AND RELATED LEGISLATION

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I. Introduction

Proposition 36

Proposition 36,[1] "The Homelessness, Drug Addiction, and Theft Reduction Act," was enacted by the voters on November 5, 2024. The initiative addresses three broad areas of concern:

- Reducing homelessness through the establishment of a new class of crimes called a "treatment-mandated felony" for designated drug offenses. Under this approach prosecutors have the discretion to charge a felony drug possession offense after two prior drug convictions, with the defendant having the option of participating in drug treatment. Successful completion of the treatment program results in the dismissal of the drug charges.

- Increasing the penal consequences of drug trafficking, particularly for fentanyl, and under circumstances where the user of a drug suffers serious physical injury, or the defendant is armed with a firearm.

- Increasing the accountability for repeat commercial thefts, such as "smash and grab" offenses. The Act permits felony prosecution after two prior theft convictions and allows the aggregation of the value of property taken to reach the $950 level for felony prosecution. Enhancements may be imposed because of excessive loss of or damage to property.

Legislation

In an attempt to obviate the need for the changes made by Proposition 36, the Legislature enacted a number of bills to address some of the concerns raised in the context of Proposition 47, which had reduced the penal consequences for most drug and theft offenses. These bills must now be analyzed in the context of Proposition 36. If there is conflict between Proposition 36 and an enactment by the Legislature, the initiative will prevail unless it is properly amended. Here it cannot be said that the legislation amended Proposition 36 since the legislation was

[1] "Proposition 36" has been used on two prior occasions for the numerical designation of initiatives making significant changes to the criminal justice system. It was first used for the "Substance Abuse and Crime Prevention Act of 2000," and again in the enactment of the "Three Strikes Reform Act of 2012." Unless otherwise indicated, all further references to Proposition 36 in these materials are to "The Homelessness, Drug Addiction, and Theft Reduction Act."

passed by the Legislature and signed by the governor prior to the enactment of Proposition 36 on November 5th. "The Legislature may not amend an initiative statute without *subsequent voter approval* unless the initiative permits such amendment, 'and then only upon whatever conditions the voters attached to the Legislature's amendatory powers.' [Citation.]" (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568, italics added.)

II. Effective date of changes

A. Proposition 36

Since Proposition 36 does not designate a specific effective date, the general rule is that it becomes effective five days after the certification of the election results by the Secretary of State. "An initiative statute or referendum approved by a majority of votes cast thereon takes effect on the fifth day after the Secretary of State files the statement of the vote for the election at which the measure is voted on, but the measure may provide that it becomes operative after its effective date." (Calif. Const., Art 2, § 10, subdivision (a).) Elections Code, section 15501, subdivision (b), provides that the Secretary of State "shall prepare, certify, and file a statement of the vote from the compiled results no later than the 38th day after the election." Accordingly, assuming the Secretary of State complies with the statutory deadlines for certification, the certification must be completed by December 13, 2024, making the provisions of Proposition 36 effective no later than five days thereafter on December 18, 2024. Except for one provision, Proposition 36 will apply to all crimes committed on or after December 18, 2024, or earlier depending on the date of certification by the Secretary of State. Section 15501, subdivision (b), requires the certification be posted on the Secretary of State's website. Certainly any of the provisions of Proposition 36 that increase the punishment for a crime cannot be applied to crimes committed prior to that date because of the *ex post facto* clause.

The provisions of Health & Safety Code, section 11369, added by Proposition 36 to require the court to warn designated offenders of the risks of drug manufacturing and distribution, likely applies to crimes committed prior to the effective date of the proposition but the defendant has not been sentenced as of the effective date. *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 297-302 (*Tapia*), observes that in determining whether a particular provision of an initiative applies to crimes committed prior to its effective date depends on the character of the provision: "The provisions fall into four categories: (A) provisions which change the legal consequences of criminal behavior to the detriment of defendants; (B) provisions which address the conduct of trials; (C) provisions which clearly benefit defendants; and (D) a single provision which codifies existing law." (*Tapia*, *supra*, 53 Cal.3d at p. 297.) Provisions falling in category (A) may not be applied to crimes committed prior to the initiative's effective date because of *ex post facto* concerns. The other three categories, however, may be applied to crimes committed prior to the initiative's effective date. (*Tapia*, *supra*, 53 Cal.3d at pp. 299-302.)

The admonition required by section 11369 best aligns with the second category, a procedural requirement governing the conduct of criminal trials which should be applied to cases where the defendant has not been sentenced as of the effective date of Proposition 36. Completely apart from any legal obligation of the court to admonish the defendant is the strong public policy favoring the advisement. Providing the defendant with a written admonishment is an insignificant burden on the court and hopefully will benefit the defendant by deterring criminal conduct and preventing harm to others.

B. Legislative enactments

The bills enacted by the Legislature will become effective January 1, 2025. Nothing in any of the bills specifies an alternative effective date.

III. Relationship of Proposition 36 to other criminal laws

Proposition 36, the "Substance Abuse and Crime Prevention Act of 2000," enacted by the voters on November 7, 2000, provides that its provisions apply "[n]otwithstanding any other provision of law." (Pen. Code, § 1210.1, subd. (a).) Proposition 184, the Three Strikes Law, enacted by the voters on November 8, 1994, provides its provisions apply "[n]otwithstanding any other provision of law." (Pen. Code, § 1170.12, subd. (a).) Proposition 36, the "Homelessness, Drug Addiction, and Theft Reduction Act," enacted by the voters on November 5, 2024, provides that the provisions of Health & Safety Code, section 11395, subdivision (b)(1), and Penal Code, section 666.1, subdivision (a)(1), apply "[n]otwithstanding any other law." However, section 11395, subdivision (g), and section 666.1, subdivision (d), provide that "[t]his section shall not be construed to preclude prosecution or punishment pursuant to any other law." The plain meaning of "notwithstanding any other law" and the provisions permitting prosecution or punishment under any other law appears to be in conflict: is Proposition 36 to be applied to the exclusion of other sentencing schemes such as the Three Strikes law, or may the prosecution put into play other sentencing schemes such that Proposition 36 really is not being applied "notwithstanding any other law."

The court has an obligation to apply and give effect to all portions of a statute whenever possible. As observed by our Supreme Court in *State Department of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955: "We have recently emphasized the importance of harmonizing potentially inconsistent statutes. ' "A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions. [Citations.] This rule applies although one of the statutes involved deals generally with a subject and another relates specifically to particular aspects of the subject." [Citation.] Thus, when " 'two codes are to be construed, they "must be regarded as blending into each other and forming a single statute." [Citation.] Accordingly, they "must be read together and so construed as to give effect, when possible, to all the provisions thereof." [Citation.]' [Citation.]"

Giving all portions of Health & Safety Code, section 11395, and Penal Code, section 666.1, full effect, the enactors of Proposition 36 likely intend that the prosecution will retain full discretion to charge a defendant under the statutes deemed most appropriate for the defendant's circumstances. The provisions of Proposition 36 requiring its application "notwithstanding any other law" are likely intended to permit the prosecution to charge a felony drug or theft offense which without Proposition 36 would have been limited to a misdemeanor. For example, without the provisions of Penal Code, section 666.1, in most situations multiple petty thefts remain misdemeanors regardless of the number of convictions. With the addition of section 666.1 by Proposition 36, however, the third petty theft may be charged as a felony. Similarly, the provisions of Health & Safety Code, section 11395, are designed to apply "notwithstanding" the provisions of Health & Safety Code 11350 and 11377 limiting simple possession of designated drugs to misdemeanor prosecution.

By providing in Penal Code, section 666.1, subdivision (d), and Health & Safety Code, section 11395, subdivision (g), that "[t]his section shall not be construed to preclude prosecution or punishment pursuant to any other law," the enactors expressly preserve the ability to prosecute or punish under any other applicable law based on the charging discretion of the prosecution. For example, a defendant convicted of a treatment-mandated felony under Health & Safety Code, section 11395, who has a prior strike could be charged under both the Three Strikes law and section 11395. The defendant could choose the treatment option and avoid the mandatory prison term under the Three Strikes law. But if the defendant fails treatment, they could then be punished under the Three Strikes law for the new violation. Section 11395, although not actually an exception to the Three Strikes law, offers a way around its harsh provisions and a dismissal of the drug charges upon successful completion. (See discussion, *infra*, on sentencing after failure to complete treatment.)

IV. Property offenses

Proposition 36 makes the following changes to the Penal Code concerning theft and property related offenses.

A. Aggregation of property value

Section 490.3 is added to the Penal Code. Section 490.3 provides that "notwithstanding any other law, in any case involving one or more acts of theft or shoplifting, including but not limited to, violations of Sections 459.5 [shoplifting], 484 [theft defined], 488 [petty theft], and 490.2 [petty theft, repeat offenders], the value of property or merchandise stolen may be aggregated into a single count or charge, with the sum of the value of all property or merchandise being the values considered in determining the degree of theft."

The plain meaning of the statute suggests that aggregation can occur in a single case with the consolidation of several acts into a single count. There is no requirement in section 490.3 that the victims be the same, that the offenses occur on the same date and time, or that the multiple thefts be a part of a common scheme or plan. Several of the legislative enactments

authorizing aggregation of loss require the theft acts to be part of a common scheme or plan. (See, *e.g*., Pen. Code, § 12022.10, enhancement for sale of stolen property; Pen. Code, § 487, grand theft, *infra*.[2]) Likely the "common scheme or plan" restriction in the legislative acts has been abrogated by section 490.3 because it applies to all multiple acts of theft. Although the statute lists several specific crimes when aggregation of value can occur, aggregation can occur in *any* case of theft or shoplifting, "including but not limited to," the designated theft offenses.

Section 490.3 applies to "any acts of theft or shoplifting." For the purposes of determining eligibility for aggregation of value under section 490.3, the current crime must be either "petty theft or shoplifting." Potential liability for theft is broader than simply the crimes referenced in Penal Code, sections 484-488. Penal Code, section 490a provides "[w]henever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefore." Accordingly, the current charges could include such offenses as appropriation of lost property (Pen. Code, § 485), and misdemeanor embezzlement (Pen. Code, §§ 503-515).

B. Repeat theft offenders

Section 666.1 is added to the Penal Code. Proposition 36 provides for a felony disposition of petty theft or shoplifting if the person has two or more prior convictions of designated theft offenses. No minimum level of value is required for the new offense to become a felony. The first such conviction is punishable by up to one year in county jail or 16 months, two, or three years under Penal Code, section 1170, subdivision (h). The second or subsequent theft conviction with two or more priors is punishable by up to one year in county jail or 16 months, two, or three years in state prison. (Pen. Code, § 666.1, subd. (a)(1).)

For the purposes of determining eligibility for prosecution under section 666.1, the current crime must be either "petty theft or shoplifting." Potential liability for "petty theft" is broader than simply the crimes referenced in Penal Code, sections 484-488. Penal Code, section 490a provides "[w]henever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefore." Accordingly, the current charges could include such offenses as appropriation of lost property (Pen. Code, § 485), and misdemeanor embezzlement (Pen. Code, §§ 503-515).

Prior offenses

The priors include the following offenses, including convictions occurring before November 6, 2024. (Pen. Code, § 666.1, subd. (a)(2).) The list does not distinguish between felony and misdemeanor convictions.

[2] Proposition 36 in adding Penal Code, section 12022.6, also requires for aggregation of value that the crimes be committed as part of a common scheme or plan. (See discussion, *infra*.)

- Petty theft (§§ 488 or 490.2)
- Grand theft (§§ 487, 487h, and as described in Chapter 5, Title 13, Part 1, commencing with § 484)
- Theft from elder or dependent adult (§ 368)
- Theft or unauthorized use of a motor vehicle (Veh. Code, § 10851)
- Burglary (§ 459)
- Carjacking (§ 215)
- Robbery (§ 211)
- Receiving stolen property (§ 496)
- Shoplifting (§ 459.5)
- Identity theft and mail theft (§ 530.5)

Although not specifically listed in section 666.1, prior convictions incurred in other jurisdictions may also qualify as a prior conviction for the purposes of this section. Penal Code, section 668 provides that felony convictions obtained in other jurisdictions, if they would qualify for a state prison commitment or commitment under section 1170, subdivision (h), in this state, can be considered a prior conviction for the purposes of a subsequent conviction in this state. A felony conviction under Penal Code, section 666.1 is punishable in state prison or under Penal Code, section 1170, subdivision (h). Likely out-of-jurisdiction misdemeanor priors cannot be considered for the purposes of a conviction under Penal Code, section 666.1 because they are crimes punishable only in county jail. (See *People v. Eckard* (2011) 195 Cal.App.4th 1241, 1246.)

The current version of Penal Code, section 666, subdivision (a), specifies limited circumstances under which a person convicted of petty theft may receive a felony disposition to state prison. One of the requirements is that the defendant has a prior theft conviction for which they served a period of imprisonment either as a straight sentence or as a term of probation. Section 666.1 has no such requirement; a prior theft conviction will qualify even if the defendant served no custody term for the violation.

Unless admitted by the defendant, the two prior theft convictions must be proved at the preliminary hearing and trial. The existence of the prior convictions is a required sentencing factor, without proof of which will leave the crime a simple misdemeanor petty theft or shoplifting.

Diversion

The prosecuting attorney or probation officer may refer a person charged under Penal Code, section 666.1, to "a theft diversion or deferred entry of judgment program pursuant to section 1001.81. If appropriate, a person admitted to such a program may also be referred to a substance abuse treatment program." (Pen. Code, § 666.1, sub. (b).) The referral of the defendant under this section is at the discretion of the prosecution, not the court.

Pretrial release of defendant

Penal Code, section 666.1, subdivision (c), provides: "Upon an arrest for a violation of this section, the court shall require judicial review prior to release to make an individualized determination of risk to public safety and likelihood to return to court." It seems clear that the intent of this section is to require a judicial officer to determine whether a person charged under section 666.1 would be suitable for pretrial release. To the extent that the statute references an individualized consideration of public safety and the probability of future court appearances by the defendant, the statute mirrors the requirements of *In re Humphrey* (2021) 11 Cal.5th 135.

The statute appears to override local county pretrial release programs where the initial release decision is made administratively without a judicial officer. It is doubtful, however, that this provision will have a significant impact on existing pretrial services. The statute is more a "disposition/punishment" statute than a discrete crime. In most cases the defendant will be arrested for an underlying theft offense, but the charging of Penal Code, section 666.1, will come later after the district attorney has a chance to review the defendant's record to determine eligibility. By the time the defendant is arraigned on section 666.1, they will have long been out and under supervision of pretrial services, making these provisions moot.

Prosecution or punishment under other laws

Penal Code, section 666.1, subdivision (d), specifically authorizes prosecution or punishment pursuant to any other law. The decision to prosecute or punish under any other law initially will be a matter of prosecutorial discretion. If the defendant is charged with a felony theft offense under section 666.1, they also may be charged under other statutes such as the Three Strikes law. Nothing in section 666.1, however, precludes the court from exercising its traditional discretion to dismiss prior strikes under Penal Code, section 1385, subdivision (b), or specifying the offense as a misdemeanor thus completely avoiding the application of the Three Strikes law. If the defendant has a current or prior conviction of a strike, however, they are ineligible for disposition under Penal Code, section 1170, subdivision (h), even if the court dismisses the strike, and must be sent to state prison if probation is denied. (Pen. Code, § 1170, subd. (h)(3).)

C. Excessive taking or damage

Section 12022.6 is added to the Penal Code. Section 12022.6, subdivision (a), provides for an enhancement "[w]hen any person takes, damages, or destroys any property in the commission or attempted commission of a felony, or commits a felony violation of Section 496. . . ." The enhancement is to be imposed based on the loss or value of the property in the underlying crime.

- An additional term of one year for loss or property value exceeding $50,000. (§ 12022.6, subd. (a)(1).)

- An additional term of two years for loss or property value exceeding $200,000. (§ 12022.6, subd. (a)(2).)

- An additional term of three years if the loss or property value exceeds $1 million. (§ 12022.6, subd. (a)(3).)

- An additional term of four years if the loss or property value exceeds $3 million. (§ 12022.6, subd. (a)(4).)

- An additional term of one year for every increment of loss or value of $3 million thereafter. (§ 12022.6, subd. (a)(5).)

Because Penal Code, section 12022.6, does not specify where the term is to be served, the service of the enhancement will be where the defendant serves the time on the underlying crime. (Pen. Code, § 1170, subd. (h)(9).)

If the accusatory pleading charges multiple offenses of taking, damage, or destruction, or multiple violations of Penal Code, section 496, and the crimes "arise from a common scheme or plan," the term of the enhancement can be calculated based on the aggregate loss to the victims or the aggregate property values. (Pen. Code, § 12022.6, subd. (b).) There may be a conflict between this provision and Penal Code section 490.3 also added by Proposition 36. Section 490.3 permits aggregation of theft offenses without the requirement of there being a common scheme or plan. (See discussion of section 490.3, *supra*.) Because both provisions are part of Proposition 36, the requirement of a common scheme or plan specified in section 12022.6, subdivision (b), should be viewed as an exception to the provisions of section 490.3.

The facts justifying the imposition of the enhancement must be pled and proved or admitted by the defendant. (Pen. Code, § 12022.6, subd. (c).) Presumably such a requirement will include the proof of a common scheme or plan if the prosecution seeks to aggregate the loss or value of the property.

Subdivision (d) provides that "[n]otwithstanding any other law, the court may impose an enhancement pursuant to this section and another section on a single count, including an enhancement pursuant to Section 12022.65." The reference to section 12022.65 is to a new enhancement added by Proposition 36 when the defendant acts in concert with two or more persons to take, damage or destroy property. (See discussion of section 12022.65, *infra*.) Although the language is a little ambiguous, it seems to permit the court to impose an enhancement under section 12022.6 and at least one other enhancement on a single count; it is not clear that the court can impose three or more enhancements on a single count. To the extent section 12022.6, subdivision (d), specifically permits multiple enhancements on a single count, it overrides the provisions of Penal Code, section 1385, subdivision (c)(2)(B), which justifies the dismissal of all but one enhancement in a single case. It seems likely, however, that

section 12022.6 would have no effect on the application of the other factors listed in subdivision (c)(2). In other words, in sentencing a defendant under Penal Code, section 12022.6, the court should consider whether any of the mitigating factors listed in Penal Code, section 1385, subdivisions (c)(2)(A) and (C)-(I), are present and whether the court should dismiss the enhancement in the interests of justice.

Legislative version of § 12022.6

AB 1960, enacted by the Legislature, also adds section 12022.6 to the Penal Code. With one exception, the provisions of the initiative and AB 1960 are functionally identical. The Legislature's version of section 12022.6 contains a sunset clause in paragraph (e); there is no sunset provision in Proposition 36. Since the initiative supersedes the legislative action, section 12022.6 will not be subject to a sunset provision.

Many of the provisions of Penal Code, section 12022.6, are included in Penal Code, section 12022.10, added by the Legislature. (See discussion, *infra*.) Section 12022.6 is the broader measure because it applies to all felonies. Likely prosecutions will proceed under the former, not the latter statute.

D. Acting in concert

Section 12022.65 is added to the Penal Code. Section 12022.65, subdivision (a), provides: "Any person who acts in concert with two or more persons to take, attempt to take, damage, or destroy any property, in the commission or attempted commission of a felony shall be punished by an additional and consecutive term of imprisonment of one, two, or three years." Because Penal Code, section 12022.65, does not specify where the term is to be served, the service of the enhancement will be where the defendant serves the time on the underlying crime. (Pen. Code, § 1170, subd. (h)(9).)

The enhancement may not be imposed unless the underlying facts justifying its application are pled and proved, or admitted by the defendant. (Pen. Code, § 12022.65, subd. (b).)

Subdivision (c) provides that "[n]otwithstanding any other law, the court may impose an enhancement pursuant to this section and another section on a single count, including an enhancement pursuant to Section 12022.6." The reference to Penal Code, section 12022.6, is to a new enhancement added by Proposition 36 when the defendant commits acts involving excessive loss or damage to property. (See discussion of Pen. Code, section 12022.6, *supra*.) Although the language is a little ambiguous, it seems to permit the court to impose an enhancement under Penal Code, section 12022.65, and at least one other enhancement on a single count; it is not clear that the court can impose three or more enhancements on a single count. To the extent Penal Code, section 12022.65, subdivision (c), specifically permits multiple enhancements on a single count, it overrides the provisions of Penal Code, section 1385, subdivision (c)(2)(B), which justifies the dismissal of all but one enhancement in a single case. It seems likely, however, that section 12022.65 would have no effect on the application of the

other factors listed in subdivision (c)(2). In other words, in sentencing a defendant under Penal Code, section 12022.65, the court should consider whether any of the mitigating factors listed in Penal Code, section 1385, subdivisions (c)(2)(A) and (C)-(I), are present and whether the court should dismiss the enhancement in the interests of justice.

Legislative enactments

The Legislature enacted the following theft related statures.

1. Forcible entry into vehicle to commit theft (Pen. Code, § 465) [SB 905]

SB 905 adds section 465 to the Penal Code. Section 465, subdivision (a), provides that any "person who forcibly enters a vehicle as defined in section 670 of the Vehicle Code, with the intent to commit a theft or any felony therein is guilty of unlawful entry of a vehicle." The crime is punishable as a wobbler by up to one year in the county jail, or 16 months, two, or three years under Penal Code, section 1170, subdivision (h).

"Forcible entry" means: "the entry of a vehicle accomplished through any of the following means: the use of a tool or device that manipulates the locking mechanism, including, without limitation, a slim jim or other lockout tool, a shaved key, jiggler key, or lock pick, or an electronic device such as a signal extender, or force that damages the exterior of the vehicle, including, but not limited to, breaking a window, cutting a convertible top, punching a lock, or prying open a door." (Pen. Code, § 465, subd. (c).)

A person may not be convicted both pursuant to this section and Penal Code, section 459. (Pen. Code, § 465, subd. (d).)

2. Possession of property acquired through theft from a vehicle (Pen. Code, § 496.5) [SB 905]

SB 905 adds section 496.5 to the Penal Code. Section 496.5 makes it a crime to possess property acquired from a vehicle by an act of theft, whether or not the person committed the theft, if the following two conditions apply: "(1) The property is not possessed for personal use and the person has the intent to sell or exchange the property for value, or the intent to act in concert with one or more persons to sell or exchange the property for value. (2) The value of the possessed property exceeds nine hundred fifty dollars ($950). For purposes of determining the value of the property, the property described in paragraph (1) can be considered in the aggregate with any of the following: (A) Any other such property possessed by the person with such intent within the last two years. (B) Any property possessed by another person acting in concert with the first person to sell or exchange the property for value, when that property was acquired through one or more acts of theft from a vehicle, unlawful entry of a vehicle, burglary of a locked vehicle, or vehicle tampering as defined in Section 10852 of the

Vehicle Code, regardless of the identity of the person committing the acts of theft, burglary, or vehicle tampering." (Pen. Code, § 496.5, subd. (a).)

In determining whether the property was held for resale, the trier of fact may consider any competent evidence, including: "(1) Whether the defendant has in the past two years sold or exchanged for value any property acquired through theft from a vehicle, burglary of a locked vehicle, or vehicle tampering as defined in Section 10852 of the Vehicle Code, or through any related offenses, including any conduct that occurred in other jurisdictions, if relevant to demonstrate a fact other than the defendant's disposition to commit the act, as provided by subdivision (b) of Section 1101 of the Evidence Code. (2) Whether the property involved in the offense is of a type or quantity that would not normally be purchased for personal use or consumption, including use or consumption by one's immediate family." (Pen. Code, § 496.5, subd. (b).)

The crime is punishable as a wobbler by up to one year in the county jail, or 16 months, two, or three years under Penal Code, section 1170, subdivision (h). (Pen. Code, § 496.5, subd. (c).)

3. Organized retail theft, removal of sunset provisions (Pen. Code, § 490.4) [SB 982, AB 1802]

Section 490.4 of the Penal Code is amended to remove the sunset provisions. Section 490.4 previously contained a sunset provision to become effective on January 1, 2026. (Pen. Code, § 490.4, subd. (f).) That provision has now been repealed.

4. Arson to facilitate retail theft (Pen. Code, § 452) [SB 1242]

Section 452 is amended to make arson for the purpose of committing retail theft an aggravating factor. Penal Code, section 452, subdivision (f), provides: "For purposes of sentencing for a violation of this section, the fact that the offense was carried out within a merchant's premises in order to facilitate organized retail theft, as defined in Section 490.4, shall be a factor in aggravation."

Under the provisions of Penal Code, section 1170, subdivision (b)(1), the trial court will determine whether this aggravating factor exists and whether to impose the lower or middle term of imprisonment when it is considered with all other sentencing factors. If the court intends to impose an aggravated term of imprisonment based on this aggravating factor, its existence must be found true beyond a reasonable doubt by the trier of fact or admitted by the defendant. (Pen. Code, § 1170, subd. (b)(2).)

5. Enhancement for sale of stolen property (Pen. Code, § 12022.10) [SB 1416]

Section 12022.10 is added to the Penal Code as an enhancement when the defendant sells, exchanges, or returns for value, or attempts such acts, property that has been acquired from a retail business by shoplifting, theft, or burglary. Section 12022.10, subdivision (a), provides for an enhancement based on the value of the property with the following stepped increases:

- If the value exceeds $50,000, an additional one year. (§ 12022.10, subd. (a)(1).)
- If the value exceeds $200,000, an additional two years. (§ 12022.10, subd. (a)(2).)
- If the value exceeds $1 million, an additional three years. (§ 12022.10, subd. (a)(3).)
- If the value exceeds $3 million, an additional four years. (§ 12022.10, subd. (a)(4).)
- For each additional increment of $3 million, an additional one year. (§ 12022.10, subd. (a)(5).)

Because Penal Code, section 12022.10, does not specify where the term is to be served, the service of the enhancement will be where the defendant serves the time on the underlying crime. (Pen. Code, § 1170, subd. (h)(9).)

The enhancement is to be imposed whether or not the defendant committed the theft or if the defendant was acting in concert with others to commit the theft. (Pen. Code, § 12022.10, subd. (a) and (b).)

Subject to the rules of joinder in Penal Code, section 954, the loss may be aggregated among victims to establish the level of the enhancement if the crimes arise out of a common scheme or plan. (Pen. Code, § 12022.10, subd. (c).) It is likely the requirement that the multiple crimes arise out of a common scheme or plan will be superseded by the provisions of Penal Code section 490.3, enacted by Proposition 36, which permits aggregation without such a requirement. (See discussion of section 490.3, *supra*.)

The facts warranting the imposition of the enhancement must be pled and proved or admitted by the defendant. (Pen. Code, § 12022.10, subd. (d).)

Section 12022.10, subdivision (e), provides that "[n]otwithstanding any other law, the court may impose an enhancement pursuant to this section and another section on a single count." Although the language is a little ambiguous, it seems to permit the court to impose an enhancement under section 12022.10 and at least one other enhancement on a single count; it is not clear that the court can impose three or more enhancements on a single count. To the extent section 12022.10, subdivision (e), specifically permits multiple enhancements on a single count notwithstanding any other law, it overrides the provisions of Penal Code, section 1385, subdivision (c)(2)(B), which justifies the dismissal of all but one enhancement in a single case. It seems likely, however, that Penal Code, section 12022.10 would have no effect on the application of the other factors listed in subdivision (c)(2). In other words, in sentencing a defendant under Penal Code, section 12022.10, the court should consider whether any of the mitigating factors listed in Penal Code, section 1385, subdivisions (c)(2)(A) and (C)-(I), are present and whether the court should dismiss the enhancement in the interests of justice.

Section 12022.10 sunsets on January 1, 2030, unless otherwise extended. (Pen. Code, § 12022.10, subd. (f).)

Penal Code, section 12022.6, added by Proposition 36, is substantially similar to section 12022.10, but is the broader measure because it applies to all felonies. Likely prosecutions will proceed under the former rather than the latter code section.

6. Jurisdiction of consolidated theft offenses (Pen. Code, § 786.5) [AB 1779]

Section 786.5 is amended to specify the jurisdiction for the prosecution of consolidated theft offenses. Penal Code, section 786.5, subdivision (b), specifies: "The jurisdiction of a criminal action for theft, as defined in subdivision (a) of Section 484, or a violation of Section 490.4 or 496, shall also include the county where an offense involving the theft or receipt of the stolen merchandise occurred, the county in which the merchandise was recovered, or the county where any act was done by the defendant in instigating, procuring, promoting, or aiding in the commission of a theft offense or a violation of Section 490.4 or 496 or in abetting the parties concerned therein. If multiple offenses of theft or violations of Section 490.4 or 496, either all involving the same defendant or defendants and the same merchandise, or all involving the same defendant or defendants and the same scheme or substantially similar activity, occur in multiple jurisdictions, then any of those jurisdictions are a proper jurisdiction for all of the offenses, subject to a hearing pursuant to Section 954 in the jurisdiction of the proposed trial. At the hearing pursuant to Section 954, the prosecution shall present written evidence that all district attorneys in counties with jurisdiction over the offenses agree to the venue. Charged offenses from jurisdictions where there is not a written agreement from the district attorney shall be returned to that jurisdiction. Jurisdiction also extends to all associated offenses connected together

in their commission to the underlying theft offenses or violations of Section 490.4 or 496."

7. Grand theft, aggregation of value (Pen. Code, § 487) [AB 2943]

AB 2943 amends Penal Code, section 487, by adding subdivision (e). Grand theft now includes the taking of property when the aggregate value exceeds $950, if the property was obtained under the following circumstances:

- The property was taken "over the course of distinct but related acts, including acts committed against multiple victims or in counties other than the county of the current offense."

- "[T]he acts are motivated by one intention, one general impulse, and one plan. Evidence that distinct acts are motivated by one intention, one general impulse, and one plan may include, but is not limited to, evidence that the acts involve the same defendant or defendants, are substantially similar in nature, or occur within a 90-day period."

It is likely the foregoing requirements for aggregation required by section 487, subdivision (e), will be superseded by section 490.3 added by Proposition 36. Section 490.3 permits aggregation of value for any act of theft without such a showing. (See discussion of Pen. Code, section 490.3, *supra*.)

8. Deprivation of a retail business opportunity (Pen. Code, § 496.6) [AB 2943]

AB 2943 adds Penal Code, section 496.6, the crime of "deprivation of a retail business opportunity." The crime has the following elements:

- The defendant possesses property acquired from a retail business by shoplifting, theft or burglary. (§ 496.6, subd. (a).)

- The property is not possessed for personal use, but is possessed with the intent to sell, exchange or return the property for value, including the commission of such acts in concert. (§ 496.6, subd. (a)(1).)

- The value of the property exceeds $950. In determining whether the value exceeds $950, the value may be considered in the aggregate with: "(A) Any other such property possessed by the person with such intent within the prior two years. (B) Any property possessed by another person acting in concert with the first person to sell, exchange, or return the merchandise for value, when such property was acquired through one or more acts of shoplifting, theft, or burglary

from a retail business, regardless of the identity of the person committing the act of shoplifting, theft, or burglary." (§ 496.6, subd. (a)(2).)

In determining whether the property is being held with the intent to sell, exchange, or return for value, the trier of fact may consider all competent evidence, including "(1) Whether the defendant has in the prior two years sold, exchanged, or returned for value merchandise acquired through shoplifting, theft, or burglary from a retail business, or through any related offense, including any conduct that occurred in other jurisdictions, if relevant to demonstrate a fact other than the defendant's disposition to commit the act, as provided by subdivision (b) of Section 1101 of the Evidence Code. (2) The property involved in the offense is of a type or quantity that would not normally be purchased for personal use or consumption, including use or consumption by one's immediate family." (Pen. Code, § 496.6, subd. (b).)

The crime is punishable as a wobbler by up to one year in the county jail, or by 16 months, two or three years under Penal Code, section 1170, subdivision (h). (Pen. Code, § 496.6, subd. (c).)

9. Arrest without a warrant for shoplifting (Pen. Code, § 836) [AB 2943]

AB 2943 amends Penal Code, section 836, by adding subdivision (f) to permit the arrest of persons for shoplifting not committed in the officer's presence. Penal Code, section 836, subdivision (f), permits a law enforcement officer to arrest a person without a warrant for a violation of section 459.5 if all the following conditions are met:

- The officer has probable cause to believe the person committed the violation. (§ 836, subd. (f)(1).)

- The arrest is made "without undue delay" after the violation. (§ 836, subd. (f)(2).) "Undue delay" is not further defined.

- Any of the following occur: (§ 836, subd. (f)(3).)

    - The officer obtains a sworn statement from a person who witnessed the theft.
    - The officer observes a video showing the person committing the theft.
    - The person "possesses a quantity of goods inconsistent with personal use and the goods bear security devices affixed by a retailer that would customarily be removed upon purchase."
    - The person confesses to the crime to the officer.

10. Probation for shoplifting (Pen. Code, § 1203g) [AB 2943]

AB 2943 adds section 1203g to the Penal Code, permitting a two-year term of probation for shoplifting as defined in section 459.5, and petty theft as defined in sections 488 or 490.2.

Penal Code, section 1203g, subdivision (a), provides: "Notwithstanding Section 1203a, for a violation of shoplifting, as defined in Section 459.5, or petty theft, as described in Section 488 or 490.2, the court may suspend the imposition or execution of the sentence and make and enforce the terms of probation for a period not to exceed two years."

Penal Code, section 1203g, subdivision (b), provides: "If a court imposes a term of probation that exceeds the maximum period of time specified in subdivision (a) of Section 1203a, the court, as a condition of probation, shall consider referring the defendant to a collaborative court or rehabilitation program that is relevant to the underlying factor or factors that led to the commission of the offense. If the defendant who is referred to a rehabilitative program is under 25 years of age, the court shall, to the extent such a program is available, refer the defendant to a program modeled on healing-centered, restorative, trauma-informed, and positive youth development approaches and that is provided in collaboration with community-based organizations. If the court finds that referral to a collaborative court or rehabilitation program is not an appropriate condition of probation, it must state the reasons for its finding on the record." The rehabilitative or collaborative court program is not to exceed two years without the consent of the defendant. (Pen. Code, § 1203g, subd. (d).)

The court is to discharge the defendant from probation if the defendant successfully completes the rehabilitation program. The rehabilitation program is charged with determining whether the defendant has successfully completed the program. (Pen. Code, § 1203g, subd. (c).)

11. Retail crime restraining orders (Pen. Code, § 490.8) [AB 3209]

Section 490.8, added to the Penal Code, permits the court at the time of sentencing a defendant for specified retail offenses to issue a restraining order prohibiting the defendant from entering the premises of a retail establishment for up to two years. (§ 490.8, subd. (a).)

The restraining order may be issued whenever the defendant is convicted of any of the following offenses: (Pen. Code, § 490.8, subd. (b).)

- Shoplifting in violation of Section 459.5.

- Any theft, including a violation of Section 487 or 488, from a retail establishment.

- Organized retail theft in violation of Section 490.4.

- Any vandalism of a retail establishment in violation of Section 594.
- Any assault or battery of an employee of a retail establishment while that person is working at the retail establishment, including a violation of Section 240, 242, or 245.

The restraining order is to prohibit the defendant from entering the establishment or being present on the grounds or adjacent parking lot used by the establishment. If the retail establishment is part of a chain or franchise, the court may also include other establishments in the chain or franchise but must specify the geographic range of the exclusion. (Pen. Code, § 490.8, subd. (c).)

"In determining whether to impose a retail crime restraining order . . . , the court shall consider whether the retail establishment is the only place that sells food, pharmaceuticals, or other basic life necessities within one mile of where the individual resides, or otherwise creates undue hardship for the individual." (Pen. Code, § 490.8, subd. (d).)

Apart from the authority of the court to issue a restraining order at the time of sentencing, the prosecuting attorney, city attorney, county counsel, or an attorney representing a retail establishment, may petition for the court for a retail crime restraining order under the following circumstances: (Pen. Code, § 490.8, subd. (e).)

- The person has been arrested or cited two or more times for any of the retail offenses listed in subdivision (b), *supra*, committed within the same retail establishment.

- The court holds a hearing after notice to the respondent, and with entitlement to court-appointed counsel.

- The petitioner has the burden of proof by a preponderance of the evidence to establish the requisite violations.

- The court may enter the restraining order for up to two years with a finding based on a preponderance of the evidence that the respondent committed the requisite number of violations at the retail establishment and there is a "substantial likelihood that the individual will return to the retail establishment." (§ 490.8, subd. (e)(5)(B).) The restraining order can apply to the retail

establishment or any chain or franchise within a specific geographic range, including any adjacent parking lot used by the establishment.

Violation of the restraining order is a misdemeanor. (Pen. Code, § 490.8, subd. (f).) The court may offer the defendant diversion if they are eligible. (Pen. Code, § 490.8, subd. (h).)
"Notwithstanding Section 853.6, an officer arresting a person for a violation of this section is not required to release the person pursuant to a written notice to appear." (Pen. Code, § 490.8, subd. (g).)

If the respondent is not present in court at the time the court issues a retail crime restraining order, the respondent is to be personally served by law enforcement or another authorized person. (Pen. Code, § 490.8, subd. (i).)

V. Drug offenses

Proposition 36 enacted the following provisions with respect to drug offenses.

A. Drug advisory statement (H&S Code, § 11369)

Section 11369 is added to the Health & Safety Code to require the admonishment of a person convicted of designated drug offenses. Upon conviction of designated "hard drug" offenses, the defendant is to be advised by the court as follows:

"You are hereby advised that it is extremely dangerous and deadly to human life to illicitly manufacture, distribute, sell, furnish, administer, or give away any drugs in any form, including real or counterfeit drugs or pills. You can kill someone by engaging in such conduct. All drugs and counterfeit pills are dangerous to human life. These substances alone, or mixed, kill human beings in ve1y small doses. If you illicitly manufacture, distribute, sell, furnish administer, or give away any real or counterfeit drugs or pills, and that conduct results in the death of a human being, you could be charged with homicide, up to and including the crime of murder, within the meaning of Section 187 of the Penal Code. " (H&S Code, § 11369, subd. (b).)

The advisement is required for all convictions involving a "hard drug" in the following crimes: Health & Safety Code, sections 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, or 11379.6. (H&S Code, § 11369, subd. (b).) "Hard drug" is specifically defined in subdivision (d): " 'hard drug' means a substance listed in Sections 11054 or 11055, including a substance containing fentanyl; heroin, cocaine, cocaine base, methamphetamine, or phencyclidine, and the analogs of any of these substances as defined in Sections 11400 and 11401. [ ] '[H]ard drug'' does not include cannabis, cannabis products, peyote, lysergic acid diethylamide (LSD) or other psychedelic drugs such as mescaline and psilocybin (mushrooms), or any other substance listed in subdivisions (d) and (e) of Section 11054, or, with the exception of methamphetamine, any other substance listed in subdivision (d) of Section 11055." (H&S Code, § 11369, subd. (d).)

"The advisory statement shall be provided to the defendant in writing, either on a plea form if used, as an addendum to a plea form, or at sentencing, and the fact that the advisory was given shall be specified on the record and recorded in the abstract of the conviction." (H&S Code, § 11369, subd. (c).)

The advisement should be given in any case where the defendant has not been sentenced as of the effective date of Proposition 36, even though the crime was committed prior to the effective date. (See discussion of the effective date of Proposition 36, *supra.*)

B. Possession of fentanyl while armed with a firearm (H&S Code, § 11370.1)

Health & Safety Code, section 11370.1 is amended to add fentanyl as a drug subject to punishment under that section. Health & Safety Code, section 11370.1, subdivision (a), specifies a sentence of two, three, or four years in state prison for any person convicted of a designated drug offense while armed with a loaded and operable firearm. Proposition 36 adds "a substance containing fentanyl" to the list of offenses subject to the enhanced punishment.

C. Service of term for designated drug enhancements (H&S Code, § 11370.4)

Health & Safety Code, section 11370.4, is amended to designate state prison as the place where the sentence for specified drug crimes is to be served.

Place of service of enhancement

Health & Safety Code, section 11370.4, specifies the term to be served for certain enhancements to designated drug offenses. Prior to the enactment of Proposition 36, section 11370.4 did not specify *where* the enhancement was to be served. Under such circumstances the service of the enhancement followed the service of the underlying crime to either state prison or under Penal Code, section 1170, subdivision (h). (Pen. Code, § 1170, subd. (h)(9).)

Proposition 36 amends section 11370.4 to specify that service of the designated enhancements shall be in state prison. (See H&S Code, § 11370.4, subd. (a), (b), and (c).) Proposition 36 also makes it clear that the provisions of Penal Code, section 1170, subdivision (h)(9), do not apply: "Notwithstanding paragraph (9) of subdivision (h) of Section 1170 of the Penal Code, a defendant convicted of an underlying violation specified in this section who admits an enhancement pursuant to this section or for whom an enhancement pursuant to this section is found true, is punishable by imprisonment in the state prison and not pursuant to subdivision (h) of Section 1170 of the Penal Code."[3] (H&S Code, § 11370.4, subd. (e).) Accordingly, if the defendant is convicted of an underlying drug offense with an enhancement specified in section 11370.4, the service of the underlying offense and the enhancement will be in state prison,

[3] Pen. Code, section 1170, subdivision (h)(9), provides: "*Notwithstanding the separate punishment for any enhancement*, any enhancement shall be punishable in county jail or state prison as required by the underlying offense and *not as would be required by the enhancemen*t." (Italics added.)

even though the underlying offense specifies service in county jail under Penal Code, section 1170, subdivision (h). Furthermore, if the defendant is being sentenced under section 11370.4 and any other crime either consecutively or concurrently, *all terms must be served in state prison*. (Pen. Code, §§ 669, subd. (d), 1170.1, subd. (a).)

Violation with substance containing fentanyl

Proposition 36 adds an enhancement if the defendant is convicted of a violation of Health & Safety Code, sections 11351 or 11352, with respect to a substance containing fentanyl; the specific term is based on the weight of the substance. (H&S Code, § 11370.4, subd. (c).) Proposition 36 does not change the specified punishments for heroin, cocaine, or cocaine base, but adds specified terms if the substance contains fentanyl:

Over 28.35 grams (1 oz.)	3 Years
Over 100 grams	5 Years
Over 500 grams	7 Years
Over 1 Kilogram	10 Years
Over 4 Kilograms	13 Years
Over 10 Kilograms	16 Years
Over 20 Kilograms	19 Years
Over 40 Kilograms	22 Years
Over 80 Kilograms	25 Years

If the defendant is being charged with conspiracy to commit the offense with fentanyl, the trier of fact must find "the defendant conspirator was substantially involved in the planning, direction, execution, or financing of the underlying offense." (H&S Code, § 11370.4, subd. (c)(2).) "Substantially involved" is not further defined in the statute.

D. Treatment-Mandated Felony (H&S Code, § 11395)

Proposition 36 adds section 11395 to the Health & Safety Code, establishing the "Treatment-Mandated Felony."

Change in punishment of drug offenses

Health & Safety Code, section 11395, subdivision (b)(1), provides that notwithstanding any other law, and except for persons who qualify for drug treatment as specified, the first conviction of unlawful possession of a "hard drug" with two or more prior specified drug convictions is a wobbler, punishable by up to one year in the county jail or by 16 months, two, or three years in the *county jail* pursuant to Penal Code, section 1170, subdivision (h). A second or subsequent conviction of possession with two or more priors is punishable by up to one year in the county jail or by 16 month, two, or three years in *state prison*.

What is and is not a "hard drug" is specified in subdivision (e): " 'hard drug' means a substance listed in Sections 11054 or 11055, including a substance containing fentanyl, heroin, cocaine, cocaine base, methamphetamine, or phencyclidine, and the analogs of any of these substances as defined in Sections 11400 and 11401. [It] does not include cannabis, cannabis products, peyote, lysergic acid diethylamide (LSD) or other psychedelic drugs such as mescaline and psilocybin (mushrooms), or any other substance listed in subdivisions (d) and (e) of Section 11054, or, with the exception of methamphetamine, any other substance listed in subdivision (d) of Section 11055."

Section 11395, subdivision (c), specifies that subdivision (b) "applies to a person who has two or more prior convictions for a felony or misdemeanor violation of sections 11350 [possession of controlled substances], 11351 [possession for sale of controlled substances], 11351.5 [possession of cocaine base for sale], 11352 [transportation or sale of controlled substances], 11353 [adult inducing minor to commit drug offense], 11353.5 [distribution of controlled substances to a minor], 11353. 7 [adult preparing a controlled substance to a minor], 11370.1 [possession of controlled substances while armed with firearm], 11377 [possession of controlled substances], 11378 [possession of controlled substances for sale], 11378.5 [possession for sale of designated controlled substances], 11379 [transportation of controlled substances], 11379.5 [transportation of designated controlled substances], 11379.6 [manufacturing of controlled substances], 11380 [adult inducing a minor to commit drug offense], or 11395 [possession of hard drugs with priors], including a conviction that occurred before the effective date of this section."

The requirement that the person must have two or more prior convictions may be confusing. It is the intent of Health & Safety Code, section 11395, subdivision (b), to create a discrete crime of "possession of a hard drug with two or more drug prior convictions." The first such conviction is punishable as a wobbler either in county jail or under Penal Code, section 1170, subdivision (h); the second or subsequent such conviction is punishable as a wobbler either in county jail or in state prison. The specification of the punishment is illustrated in the following chart:

Number of convictions	**Source of Sentence**	**Specified Sentence**
1st "hard drug" conviction	The specified drug crime	As required for the specified drug offense
2nd "hard drug" conviction	The specified drug crime	As required for the specified drug offense
3rd "hard drug" conviction	H&S, § 11395, [first conviction] if charged under H&S § 11395(b) with two or more priors	Up to one year in county jail or 16 months, 2 years, or 3 years under Pen. Code § 1170(h)

4th or subsequent "hard drug" conviction	H&S, § 11395, [second or subsequent conviction] if charged under H&S § 11395(b) with two or more priors	Up to one year in county jail or 16 months, 2 years, or 3 years in state prison

The prior convictions must be pled and proved or admitted by the defendant. (H&S Code, § 11395, subd. (c).) There is no "washout" specified for the charging of the prior convictions.

Although not specifically listed in Health & Safety Code, section 11395, prior convictions incurred in other jurisdictions may also qualify as a prior conviction for the purposes of this section. Penal Code, section 668, provides that felony convictions obtained in other jurisdictions, if they would qualify for a state prison commitment or commitment under Penal Code, section 1170, subdivision (h), in this state, can be considered a prior conviction for the purposes of a subsequent conviction in this state. A felony conviction under Health & Safety Code, section 11395, is punishable in state prison or under Penal Code, section 1170, subdivision (h). Likely out-of-jurisdiction misdemeanor priors cannot be considered for the purposes of a conviction under Penal Code, section 666.1, because they are crimes punishable only in county jail. (See *People v. Eckard* (2011) 195 Cal.App.4th 1241, 1246.)

Health & Safety Code, section 11395, subdivision (b)(2), prohibits the court from sentencing a person to jail or prison unless the court first determines that the person is either not eligible or not suitable for treatment, or that the person should not be continued in treatment because of unsatisfactory performance as specified in subdivision (d)(4) (discussed, *infra*). "Suitability" for treatment is not further defined. Presumably the court will have traditional discretion to determine suitability based on the nature of the current offense, whether there are other substantial pending non-drug criminal offenses, the defendant's criminal record, and prior involvement in treatment programs. For example, if a defendant clearly is headed to state prison or a lengthy custody term under Penal Code, section 1170, subdivision (h), for non-drug offenses, such a commitment may be considered incompatible with the treatment program envisioned by Health & Safety Code, section 11395.

Treatment program

Health & Safety Code, section 11395, subdivision (d)(1)(i), provides for an alternative treatment program at the person's election: "In lieu of a jail or prison sentence, or a grant of probation with jail as a condition of probation, a defendant charged with a violation of this section may elect treatment by pleading guilty or no contest to a violation of this section and admitting the alleged prior convictions, waiving time for sentencing and the pronouncement of judgment, and agreeing to participate in, and complete, a detailed treatment program developed by a drug addiction expert and approved by the court. A defendant's plea of guilty or no contest shall not constitute a conviction for any purpose unless judgment is entered pursuant to paragraph (4) for a violation of this section." Accordingly, placement of a person into a

treatment program in lieu of a sentence to jail, prison, or grant of probation with jail, requires the following:

- Treatment must be at the request of the defendant.

- The defendant must plead guilty or no contest to a violation of section 11395, subdivision (b)(1), and admit the charged prior convictions. Nothing in section 11395 requires the defendant to admit any other non-drug offenses.

- The defendant must waive time for sentencing and pronouncement of judgment.

- The defendant must agree to participate in and complete a drug treatment program developed by a drug addiction expert and approved by the court.

Development of the treatment program

Health & Safety Code, section 11395, subdivision (d)(1)(ii), specifies the procedure to be followed in the establishment of the treatment program: "Upon or subsequent to arraignment for a violation of this section, and at the request or with the consent of the defendant or their attorney, the court shall order a drug addiction expert to conduct a substance abuse and mental health evaluation of the defendant. The expert shall submit a report of the evaluation to the court and parties. The evaluation may be based on an interview of the defendant and/or other individuals with relevant knowledge and review of records the expert deems appropriate, such as medical records, criminal history, prior treatment history, and records pertaining to the current offense. If the defendant participates in the interview, neither the defendant's interview nor evidence derived from the interview may be used against the defendant at any subsequent trial for the instant offense except for the purposes of impeachment should the defendant testify inconsistently. The evaluation shall detail the defendants drug abuse and/or mental health issues, if any, so the court and parties may better determine appropriate handling of the defendant's case." Health & Safety Code, section 11395, subdivision (d)(1)(iii), requires a concurrent evaluation by a qualified individual to determine if the defendant is eligible to receive "Medi-Cal, Medicare, or any other relevant benefits for any programs or evaluations under this section."

The components of the treatment program are specified in Health & Safety Code, section 11395, subdivision (d)(2): "A treatment program 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 for the defendant that the court finds appropriate. The court must hold regular hearings to review the progress of the defendant. The court shall make referrals to programs that provide services at no cost to the participant and have been deemed by the court, the drug addiction expert, and the parties to be credible and effective. A defendant may also choose to pay for a program that is approved by the court." Accordingly, the establishment and maintenance of a drug treatment program has the following key components:

- Evaluation of the defendant for treatment may start at any time, including at arraignment on the underlying charges. The evaluation must be at the request of the defendant.

- The court must order two evaluations: (1) a substance abuse and mental health evaluation by a drug addiction expert; and (2) an evaluation by a qualified person to determine the defendant's eligibility for Medi-Cal, Medicare, or other financial benefits that could be used to provide treatment. The statute does not identify the agency or person responsible for the costs of the evaluations. Presumably that will be a matter of negotiation between the court, the county, probation and the drug experts.

- The drug addiction expert may interview the defendant. Any statements made by the defendant have a qualified privilege, except for the purpose of impeachment at trial.

- The court must hold regular hearings on the defendant's progress in treatment. No specific interval is specified.

- The court is to make referrals to programs that provide services at no cost to the defendant. While the referral may be to a program that will not pose a cost to the defendant, Proposition 36 stops short of specifically requiring the county to provide treatment without cost or to create programs where they do not already exist.

- The court should not impose a jail or prison sentence and suspend its execution pending satisfactory completion of the treatment program. To impose a suspended custody term is to impose judgment, a final step in the process which only may be taken if the defendant fails to complete treatment. (Pen. Code, § 11395, subd. (d)(4), discussed, *infra*.)

Health & Safety Code, section 11395, is vague on many of the details of the treatment program. The sponsors of the initiative intentionally left many of the operational details to be decided by the local jurisdiction. For example:

- The treatment program has no statutorily prescribed length. Presumably the court will establish the length based on the initial recommendation of the drug expert and make adjustments as dictated by the defendant's performance in the program. If the defendant accomplishes their treatment goals early, the program may be terminated without needless further participation. If the defendant needs additional time in treatment, the program may be extended without concern for some artificial statutory deadline. The length of the program is not statutorily tied to the maximum period of incarceration – presumably the length of the treatment program may be longer or shorter than a potential custody term, at the discretion of the court and with the agreement of the defendant.

- The components of the program are totally flexible to meet the treatment needs of the defendant. "A treatment program *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 for the defendant that the court finds appropriate*." (Italics added.)

- Although Health & Safety Code, section 11395, subdivision (d)(2), specifies the court is to hold regular hearings to assess the defendant's progress in treatment, no interval is specified. Presumably the intervals will be adjusted to meet the needs of the defendant.

- The statute does not specify who is responsible for submitting reports to the court, nor does it specify the level of supervision or the agency to provide the supervision. These will be matters of negotiation between the court, the county, the drug programs, and the probation department.[4] The designation of the responsible agency will depend on available funding, and agency and program resources.

- The statute does not require the court or counties to provide a designated level of treatment. Presumably the court must rely on existing resources to provide treatment services. Likely many courts will adapt their existing drug court calendars to meet the new demands posed by Proposition 36.

Successful completion of the treatment program

Health & Safety Code, section 11395, subdivision (d)(3), addresses the successful completion of the treatment program: "Upon the defendant's successful completion of the treatment program as specified in paragraph (2), the positive recommendation of the treatment program, and the motion of the defendant, prosecuting attorney, the court, or the probation department, the court shall dismiss this charge against the defendant and the provisions of Section 1000. 4 of the Penal Code, as it read on the effective date of this section, shall apply, including the provision that the arrest upon which the defendant was deferred shall be deemed to have never occurred. A dismissal based on the successful completion of treatment shall not count as a conviction for any purpose, including for determining punishment pursuant to subdivision (b)."

Aside from the prospect of the defendant facing custody time if they fail the treatment program, subdivision (d)(3) makes it clear that successful completion of the program will result in the complete dismissal of the drug charge, including for the purposes of determining whether the defendant has a prior conviction under subdivision (b).

[4] The probation department would not normally be involved in a pre-conviction program as contemplated by H&S Code, section 11395. Subdivisions (b)(3) and (4), however, make specific reference to the potential involvement of probation in the treatment program in requesting dismissal of the drug charge on successful completion of the program, and requesting sentencing if the defendant fails treatment. Requiring probation to provide reports and other supervision services will be determined in each county.

It is clearly the intent of the enactors that if the defendant successfully completes the treatment program, the drug charges are to be dismissed and for most purposes are to be considered as having never occurred. Proposition 36 makes no reference to the disposition of other criminal charges filed against the defendant. Presumably existing law will govern the disposition of non-drug offenses.

Unsatisfactory performance in treatment

Health & Safety Code, section 11395, subdivision (d)(4), provides for the defendant's unsatisfactory performance in treatment: "If at any time it appears that the defendant is performing unsatisfactorily in the program, is not benefiting from treatment, is not amenable to treatment, has refused treatment, or has been convicted of a crime that was committed since starting treatment, the prosecuting attorney, the court on its own, or the probation department may make a motion for entry of judgment and sentencing. After notice to the defendant, the court shall hold a hearing to determine whether judgment should be entered and the defendant sentenced. Judgment shall be imposed and the defendant sentenced if the court finds true one or more of the foregoing circumstances. However, except when the defendant has been found to have been convicted of a crime that was committed since starting treatment, the court may re-refer the defendant to treatment if the court finds that it is in the interest of justice to do so, that the defendant is currently amenable to treatment, and if the defendant agrees to participate in, and complete, a treatment program as described in this section."

Action taken by the court for unsatisfactory performance in treatment includes the following important points:

- Whether a defendant is performing satisfactorily can be assessed by several factors: performance in the program, whether the defendant is benefitting from treatment, whether the defendant is amenable to treatment, whether the defendant has refused treatment, and whether the defendant has committed any new crime since starting treatment.

- The defendant may be removed from the program for any new crime, drug or non-drug, felony, misdemeanor, or infraction.

- The defendant can be removed from the program only after a hearing, with counsel. Presumably the hearing may be conducted informally with offers of proof and argument of counsel. The court would have the discretion to allow live testimony.

- With respect to new criminal activity, the defendant may be excluded only if they have been *convicted* of a new offense *committed after* starting treatment.

- There is no specified burden of proof to establish that the defendant is performing unsatisfactorily. Accordingly, the court must be satisfied by a preponderance of the evidence that the defendant is performing unsatisfactorily.

- Except when the defendant has committed a new crime, the court may re-refer the defendant for treatment if to do so would be in the interests of justice, the defendant is amenable to treatment, and the defendant agrees to complete treatment.

If the defendant is terminated from the treatment program, the court is to proceed to "entry of judgment and sentencing," unless the court agrees to an extension of treatment. (H&S, § 11395, subd. (d)(4).) The defendant is entitled to request the court to refer their case to the probation department for a report prior to sentencing. (Pen. Code, § 1203, subd. (b)(1); Calif. Rules of Court, Rule 4.411, subd. (a).)

The court will have full discretion in sentencing the defendant:[5]

- The court may grant probation, with or without suspended execution of a custody term in prison or county jail. There may be circumstances where the court determines the defendant will benefit from a period of traditional probation supervision. The term of probation would be limited to two years. (Pen. Code, § 1203.1, subd. (a).)

- The defendant may be eligible for disposition under Proposition 36, the "Substance Abuse and Crime Prevention Act of 2000," if the defendant and their drug offense are qualified under that initiative. (See Pen. Code, §§ 1210, 1210.1 and 3063.1.) The availability of this alternative will depend on whether the county continues to support and fund drug services under this statutory scheme.

- The defendant may be sentenced to a straight term of to up to one year in county jail. Such a sentence will make the crime a misdemeanor as a matter of law. (Pen. Code, § 17, subd. (b)(1).)

- The defendant may be sentenced to 16 months, two, or three years under Penal Code, section 1170, subdivision (h), if the current conviction under section 11395 is their first such conviction. If the defendant has been convicted of a strike either in the current or a prior proceedings, however, they must be sent to state prison if probation is denied. (Pen. Code, § 1170, subd. (h)(3).)

- The defendant may be sentenced to 16 months, two, or three years to state prison if the current conviction under section 11395 is their second or subsequent such conviction.

[5] It does not appear that drug diversion under Penal Code, sections 1000, *et seq*., will be available to the defendant because they have pled to the drug charge as a condition of participating in the treatment program under H&S, § 11395. Diversion under section 1000 is as preconviction program. (See Pen. Code, § 1000.1, subd. (a)(3).)

- The defendant may be sentenced under any other applicable sentencing law. If in addition to the charges and priors under Health & Safety Code, section 11395, the prosecution has charged the defendant under the Three Strikes law and if the defendant has admitted or been convicted of the prior strikes, the defendant may be sentenced under the Three Strikes law. The court will have the discretion to dismiss any of the strikes under Penal Code, section 1385, subdivision (b), in the interests of justice, or the court could impose a straight misdemeanor sentence and thus entirely avoid the Three Strikes law.

Custody credit

Health & Safety Code, section 11395, subdivision (d)(5), specifies the defendant will receive only actual time credit while in residential treatment; there is no conduct credit under Penal Code, section 4019. Participation in non-residential treatment is without any actual or conduct credit.

Proposition 36 does not change any of the law governing the defendant's waiver of past or future custody credits. The court may wish to consider such a waiver if the defendant is re-referred to treatment after a program failure. (See *People v. Johnson* (2002) 28 Cal.4th 1050, 1054-1055; *People v. Ambrose* (1992) 7 Cal.App.4th 1917.)

Prearraignment release

Health & Safety Code, section 11395, subdivision (f), requires that upon arrest for a violation of this section, the court must conduct a judicial review prior to release to make an individualized determination of risk to public safety and likelihood of the defendant returning to court. It seems clear that the intent of this section is to require a judicial officer to determine whether a person charged under Health & Safety Code, section 11395, should be suitable for pretrial release. To the extent that the statute references individualized consideration of public safety and the probability of future court appearances by the defendant, the statute mirrors the requirements of *In re Humphrey* (2021) 11 Cal.5th 135.

The statute also appears to override local county pretrial release programs where the initial release decision is made administratively without a judicial officer. It is doubtful, however, that this provision will have a significant impact on existing pretrial services. The statute is more a "disposition/punishment" statute than a discrete crime. In most cases the defendant will be arrested for an underlying drug offense, but the charging of Health & Safety Code, section 11395, will come later after the district attorney has a chance to review the defendant's record to determine eligibility. By the time the defendant is arraigned on section 11395, they have long been out and under supervision of pretrial services, making these provisions moot.

E. Punishment for being armed with a firearm in commission of drug offense (§ Pen. Code, § 12022)

Penal Code, section 12022, subdivision (c), is amended to specify where a gun enhancement is to be served. If the defendant is convicted of a specified drug offense while being armed with a firearm, the person is to serve an additional term of three, four, or five years in state prison. Previously the term was to be served in county jail under Penal Code, section 1170, subdivision (h).

Proposition 36 also makes it clear that the provisions of Penal Code section 1170, subdivision (h)(9), do not apply: "Notwithstanding paragraph (9) of subdivision (h) of Section 1170 of the Penal Code, a defendant convicted of an underlying violation specified in this section who admits an enhancement pursuant to this section or for whom an enhancement pursuant to this section is found true, is punishable by imprisonment in the state prison and not pursuant to subdivision (h) of Section 1170 of the Penal Code."[6] (Pen. Code, § 12022, subd. (c)(2).) Accordingly, if the defendant is convicted of an underlying drug offense with an enhancement specified in section 12022, the service of the underlying offense and the enhancement will be in state prison, even though the underlying offense specifies service in county jail under Penal Code, section 1170, subdivision (h). Furthermore, if the defendant is being sentenced under section 12022 and any other crime either consecutively or concurrently, *all terms must be served in state prison*. (Pen. Code, §§ 669, subd. (d), 1170.1, subd. (a).)

F. Infliction of great bodily injury in commission of drug offense (Pen. Code, § 12022.7, subd. (f))

Penal Code section 12022.7 is amended to add an enhancement for great bodily injury caused by the commission of a drug offense. Proposition 36 adds subdivision (f)(2) to the definition of "great bodily injury:" "As used in this section, a person who sells, furnishes, administers, or gives away a controlled substance is deemed to have personally inflicted great bodily injury when the person to whom the substance was sold, furnished, administered, or given suffers a significant or substantial physical injury from using the substance." The amendment abrogates *People v. Ollo* (20212) 11 Cal.5th 686, which held that simply furnishing a drug is not sufficient to establish personal infliction of great bodily injury.

[6] See footnote 3, *supra*.

APPENDIX I: Text of Proposition 36

SECTION 1. Title.
This act shall be known as The Homelessness, Drug Addiction, and Theft Reduction Act.

SEC. 2. Purposes and Intent.

This measure will reform laws that have dramatically increased homelessness, drug addiction, and theft throughout California.

This measure will:

(a) Provide drug and mental health treatment for people who are addicted to hard drugs, including fentanyl, cocaine, heroin, and methamphetamine.
(b) Add fentanyl to existing laws that prohibit the possession of hard drugs while armed with a loaded firearm.
(c) Add fentanyl to existing laws that prohibit the trafficking of large quantities of hard drugs.
(d) Permit judges to use their discretion to sentence drug dealers to state prison instead of county jail when they are convicted of trafficking hard drugs in large quantities or are armed with a firearm while engaging in drug trafficking.
(e) Warn convicted hard drug dealers and manufacturers that they can be charged with murder if they continue to traffic in hard drugs and someone dies as a result.
(f) Reinstate penalties for hard drug dealers whose trafficking kills or seriously injures a drug user.
(g) Increase penalties for people who repeatedly engage in theft.
(h) Add new laws to address the increasing problem of "smash and grab" thefts that result in significant losses and damage, or that are committed by multiple thieves working together.

SEC. 3. Findings and Declarations.

The people of the State of California find and declare as follows:

(a) Reducing Homelessness Through Drug and Mental Health Treatment

(1) California has reached a tipping point in its homelessness, drug, mental health, and theft crises. Our state has the highest rate of homelessness per capita of any state in the country. And drug overdoses now kill two to three times the number of people in California as car accidents.
(2) Since the passage of Proposition 47 in 2014, homelessness in California has increased by 51 percent, while during the same time period in the rest of the country, it has declined by 11 percent. Proposition 47 reduced the legal consequences of both possession of hard drugs (fentanyl, cocaine, heroin, methamphetamine, and phencyclidine), and theft. The result has been massive increases in drug addiction, mental illness, and property crimes, including retail theft, committed by addicts to support their addiction. At the same time, California has seen a dramatic

decrease in mental health and drug treatment for homeless people due to reduced incentives to participate in treatment. Our homelessness problem is directly connected to these unintended consequences of Proposition 47, which the voters now desire to correct.

(3) Progressive states, including New Jersey, Maryland, Illinois, and Michigan, have significantly stronger hard drug laws than California, and their homeless rate is 4 to 5 times lower than California's.

(4) This proposal takes a modest step in the direction of these states by enacting a new class of crime called a "treatment-mandated felony." Under this new "treatment-mandated felony," prosecutors would have the discretion to charge a felony for hard drug possession after two previous drug convictions. If charged with this "treatment-mandated felony" for a third or subsequent drug offense, the offender would be given the option of participating in drug and mental health treatment. If the offender successfully completes drug and mental health treatment, the charge would be fully expunged, and the offender would receive no jail time. If the offender refuses drug and mental health treatment, they would serve jail time for hard drug possession. For a second conviction of the treatment-mandated felony (the fourth total conviction for hard drug possession), a judge would have the option of imposing time in jail or state prison. Along with hard drug and mental health treatment, offenders charged with a treatment-mandated felony would be offered shelter, job training, and other services designed to break the cycle of addiction and homelessness.

(b) Cracking Down on Hard Drug Dealers

(1) Fentanyl is the most dangerous drug that our nation has ever seen. Because it is largely produced synthetically, fentanyl is typically cheaper than other hard drugs. As a result, drug dealers now regularly include fentanyl in other drugs, including diet, anxiety, and sleeping pills, cocaine, and heroin. Further, fentanyl is up to 50 times stronger than heroin. Therefore, a very tiny amount of fentanyl can prove deadly. One kilogram (2.2 pounds) of fentanyl provides enough of the drug to manufacture four to ten million doses, or enough to kill 500,000 people. Finally, because such a small amount of fentanyl is necessary to create addiction, it is easier to smuggle across the border in smaller, yet much more deadly quantities.

(2) This act would authorize greater consequences for hard drug dealers whose trafficking kills or seriously injures a person who uses those drugs, and it would provide a mechanism to warn convicted hard drug dealers and manufacturers that they can be charged with murder if they continue to traffic in hard drugs and someone dies as a result.

(3) This act would add nonprescription fentanyl to an existing list of hard drugs, including heroin, cocaine, and methamphetamine, for which it is illegal to possess the drug while armed with a loaded firearm.

(4) This act would also add nonprescription fentanyl to an existing list of hard drugs, including heroin, cocaine, and methamphetamine, that authorizes greater consequences for drug dealers who sell large quantities of hard drugs.

(5) This act also permits judges to sentence drug dealers who traffic in large quantities of hard drugs or who are armed with a firearm while trafficking in hard drugs to state prison instead of local county jails. Only our state prisons are equipped to manage security for hardened drug dealers and to provide them the rehabilitation services they need to safely reenter society.

(c) Accountability for Repeat Theft and Smash and Grab Thefts

(1) Prior to Proposition 47, individuals who repeatedly engaged in theft could be charged with a felony. Prop. 47 eliminated this repeat offender felony and instead provided that any theft up to $950 in value is now a misdemeanor—regardless of how many times the offender has committed theft. In practice, this means that an offender who repeatedly steals up to $950 in value faces virtually no legal consequences.

(2) The result has been an explosion in retail and cargo theft causing stores throughout California to close to protect employees and customers from criminal activity that disrupts the efficient delivery of products directly to consumers and creates billions of dollars in economic losses to our local communities and state. This rapid increase in retail and cargo theft has also contributed to rising inflation, as businesses have been forced to raise prices to account for their economic losses. This retail and cargo theft explosion has collided with the fentanyl epidemic, as hard drug users have engaged in brazen theft to support their drug habits, knowing that there will be no consequences for either their theft or their hard drug use.

(3) Under this act, an offender with two prior convictions for theft can be charged with a felony, regardless of the value of the stolen property. Diversion programs will continue to exist, meaning that judges will retain discretion not to incarcerate an offender even for more than two theft convictions. But prosecutors will have the ability to bring felony charges against hardened, repeat offenders who continue to engage in theft. Judges will have the discretion to sentence a repeat offender to jail in appropriate cases, or to state prison if an offender is convicted four or more times of theft.

(4) This act also authorizes judges to exercise their discretion to impose an enhanced penalty when an offender steals, damages, or destroys property by acting together with two or more offenders or by causing losses of $50,000 or more. By permitting discretion in these scenarios, judges will be able to fashion sentences that are appropriate for the crime committed, including so-called “smash and grabs” committed by mobs or large groups of people working together.

(5) The value of property stolen in multiple thefts will be permitted to be added together so that in appropriate cases an offender may be charged with felony theft instead of petty theft. This provision addresses the problem of offenders who commit a series of thefts in which the property stolen during each theft has a value under the $950 felony theft threshold, in order to insulate themselves from felony charges.

(6) Along with the hard drug provisions in this act, these theft law changes will stop the vicious cycle of hard drug users stealing to support their habits without legal consequences for their actions.

SEC. 4. Section 11369 is added to the Health and Safety Code, to read:

11369. (a) This section shall be known, and may be cited, as Alexandra’s Law.

(b) The court shall advise a person who is convicted of, or who pleads guilty or no contest to, a violation of Section 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, or 11379.6 involving a hard drug, of the following:

“You are hereby advised that it is extremely dangerous and deadly to human life to illicitly manufacture, distribute, sell, furnish, administer, or give away any drugs in any form, including real or counterfeit drugs or pills. You can kill someone by engaging in this conduct. All drugs and counterfeit pills are dangerous to human life. These substances alone, or mixed, kill human beings

in very small doses. If you illicitly manufacture, distribute, sell, furnish, administer, or give away any real or counterfeit drugs or pills, and that conduct results in the death of a human being, you could be charged with homicide, up to and including the crime of murder, within the meaning of Section 187 of the Penal Code."

(c) The advisory statement shall be provided to the defendant in writing, either on a plea form, if used, as an addendum to a plea form, or at sentencing, and the fact that the advisory was given shall be specified on the record and recorded in the abstract of the conviction.

(d) (1) Except as provided in paragraph (2), as used in this section, "hard drug" means a substance listed in Section 11054 or 11055, including a substance containing fentanyl, heroin, cocaine, cocaine base, methamphetamine, or phencyclidine, and the analogs of any of these substances as defined in Sections 11400 and 11401.

(2) As used in this section, "hard drug" does not include cannabis, cannabis products, peyote, lysergic acid diethylamide (LSD), other psychedelic drugs, including mescaline and psilocybin (mushrooms), any other substance listed in subdivisions (d) and (e) of Section 11054, or, with the exception of methamphetamine, any other substance listed in subdivision (d) of Section 11055.

SEC. 5. Section 11370.1 of the Health and Safety Code is amended to read:

11370.1. (a) Notwithstanding Section 11350 or 11377 or any other provision of law, every person who unlawfully possesses any amount of a substance containing cocaine base, a substance containing cocaine, a substance containing heroin, a substance containing methamphetamine, *a substance containing fentanyl,* a crystalline substance containing phencyclidine, a liquid substance containing phencyclidine, plant material containing phencyclidine, or a hand-rolled cigarette treated with phencyclidine while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years.

(b) Subdivision (a) does not apply to any person lawfully possessing fentanyl, including with a valid prescription.

(c) As used in ~~this~~ subdivision *(a)*, "armed with" means having available for immediate offensive or defensive use.

~~(b)~~ *(d)* Any person who is convicted under this section shall be ineligible for diversion or deferred entry of judgment under Chapter 2.5 (commencing with Section 1000) of Title 6 of Part 2 of the Penal Code.

SEC. 6. Section 11370.4 of the Health and Safety Code is amended to read:

11370.4. (a) (1) A person convicted of a violation of, or of a conspiracy to violate, Section 11351, 11351.5, or 11352 with respect to a substance containing heroin, ~~fentanyl,~~ cocaine base as specified in paragraph (1) of subdivision (f) of Section 11054, or cocaine as specified in paragraph (6) of subdivision (b) of Section 11055~~, when the person knew of the substance's nature or character as a controlled substance,~~ shall receive an additional *state prison* term as follows:

(A) If the substance exceeds one kilogram by weight, the person shall receive an additional term of three years.

(B) If the substance exceeds four kilograms by weight, the person shall receive an additional term of five years.

(C) If the substance exceeds 10 kilograms by weight, the person shall receive an additional term of 10 years.

(D) If the substance exceeds 20 kilograms by weight, the person shall receive an additional term of 15 years.

(E) If the substance exceeds 40 kilograms by weight, the person shall receive an additional term of 20 years.

(F) If the substance exceeds 80 kilograms by weight, the person shall receive an additional term of 25 years.

(2) The conspiracy enhancements provided for in this subdivision shall not be imposed unless the trier of fact finds that the defendant conspirator was substantially involved in the planning, direction, execution, or financing of the underlying offense.

(b) (1) A person convicted of a violation of, or of conspiracy to violate, Section 11378, 11378.5, 11379, or 11379.5 with respect to a substance containing methamphetamine, amphetamine, phencyclidine (PCP) and its analogs shall receive an additional *state prison* term as follows:

(A) If the substance exceeds one kilogram by weight, or 30 liters by liquid volume, the person shall receive an additional term of three years.

(B) If the substance exceeds four kilograms by weight, or 100 liters by liquid volume, the person shall receive an additional term of five years.

(C) If the substance exceeds 10 kilograms by weight, or 200 liters by liquid volume, the person shall receive an additional term of 10 years.

(D) If the substance exceeds 20 kilograms by weight, or 400 liters by liquid volume, the person shall receive an additional term of 15 years.

(2) In computing the quantities involved in this subdivision, plant or vegetable material seized shall not be included.

(3) The conspiracy enhancements provided for in this subdivision shall not be imposed unless the trier of fact finds that the defendant conspirator was substantially involved in the planning, direction, execution, or financing of the underlying offense.

(c) (1) A person convicted of a violation of, or of a conspiracy to violate, Section 11351 or 11352 with respect to a substance containing fentanyl shall receive an additional state prison term as follows:

(A) If the substance exceeds 28.35 grams (one ounce) by weight, the person shall receive an additional term of three years.

(B) If the substance exceeds 100 grams by weight, the person shall receive an additional term of five years.

(C) If the substance exceeds 500 grams by weight, the person shall receive an additional term of seven years.

(D) If the substance exceeds one kilogram by weight, the person shall receive an additional term of 10 years.

(E) If the substance exceeds four kilograms by weight, the person shall receive an additional term of 13 years.

(F) If the substance exceeds 10 kilograms by weight, the person shall receive an additional term of 16 years.

(G) If the substance exceeds 20 kilograms by weight, the person shall receive an additional term of 19 years.

(H) If the substance exceeds 40 kilograms by weight, the person shall receive an additional term of 22 years.

(I) If the substance exceeds 80 kilograms by weight, the person shall receive an additional term of 25 years.

(2) The conspiracy enhancements provided for in this subdivision shall not be imposed unless the trier of fact finds that the defendant conspirator was substantially involved in the planning, direction, execution, or financing of the underlying offense.

~~(c)~~ *(d)* The additional terms provided in this section shall not be imposed unless the allegation that the weight of the substance containing heroin, fentanyl, cocaine base as specified in paragraph (1) of subdivision (f) of Section 11054, cocaine as specified in paragraph (6) of subdivision (b) of Section 11055, methamphetamine, amphetamine, or phencyclidine (PCP) and its analogs exceeds the amounts provided in this section is charged in the accusatory pleading and admitted or found to be true by the trier of fact.

(e) Notwithstanding paragraph (9) of subdivision (h) of Section 1170 of the Penal Code, a defendant convicted of an underlying violation specified in this section who admits an enhancement pursuant to this section or for whom an enhancement pursuant to this section is found true, is punishable by imprisonment in the state prison and not pursuant to subdivision (h) of Section 1170 of the Penal Code.

~~(d)~~ *(f)* The additional terms provided in this section shall be in addition to any other punishment provided by law.

~~(e)~~ *(g)* Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section if the court determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment.

SEC. 7. Article 8 (commencing with Section 11395) is added to Chapter 6 of Division 10 of the Health and Safety Code, to read:

Article 8. Treatment-Mandated Felony

11395. (a) This article shall be known and cited as the Treatment-Mandated Felony Act.

(b) (1) Notwithstanding any other law, and except as provided in subdivision (d), a person described in subdivision (c) who possesses a hard drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of

Section 1170 of the Penal Code. A second or subsequent conviction of this section, is punishable by imprisonment in the county jail not exceeding one year or by imprisonment in the state prison.

(2) A person shall not be sentenced to jail or prison pursuant to this section unless a court determines that the person is not eligible or suitable for treatment or that any other circumstance described in paragraph (4) of subdivision (d) applies to that person.

(c) Subdivision (b) applies to a person who has two or more prior convictions for a felony or misdemeanor violation of Section 11350, 11351, 11351.5, 11352, 11353, 11353.5, 11353.7, 11370.1, 11377, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, or 11395, including a conviction that occurred before the effective date of this section. Prior convictions shall be alleged in the accusatory pleading, and either admitted by the defendant in open court or found to be true by the trier of fact.

(d) (1) (A) In lieu of a jail or prison sentence, or a grant of probation with jail as a condition of probation, a defendant charged with a violation of this section may elect treatment by pleading guilty or no contest to a violation of this section and admitting the alleged prior convictions, waiving time for sentencing and the pronouncement of judgment, and agreeing to participate in, and complete, a detailed treatment program developed by a drug addiction expert and approved by the court. A defendant's plea of guilty or no contest shall not constitute a conviction for any purpose unless judgment is entered pursuant to paragraph (4) for a violation of this section.

(B) Upon or subsequent to arraignment for a violation of this section, and at the request or with the consent of the defendant or their attorney, the court shall order a drug addiction expert to conduct a substance abuse and mental health evaluation of the defendant. The expert shall submit a report of the evaluation to the court and parties. The evaluation may be based on an interview of the defendant or other individuals with relevant knowledge and review of records the expert deems appropriate, including medical records, criminal history, prior treatment history, and records pertaining to the current offense. If the defendant participates in the interview, neither the defendant's interview nor evidence derived from the interview may be used against the defendant at any subsequent trial for the instant offense except for the purposes of impeachment should the defendant testify inconsistently. The evaluation shall detail the defendant's drug abuse or mental health issues, if any, so the court and parties may better determine appropriate handling of the defendant's case.

(C) Concurrent with the order for a substance abuse and mental health evaluation of the defendant, and with the defendant's consent, the court shall also order that a case worker or other qualified individual determine whether the defendant is eligible to receive Medi-Cal, Medicare, or any other relevant benefits for any programs or evaluations under this section. If the defendant did not previously consent to an eligibility determination at arraignment, the court shall order the eligibility determination upon and as a condition of the defendant's agreement to participate in and complete a treatment program as described in this subdivision.

(2) A treatment program 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 for the defendant that the court finds appropriate. The court must hold regular hearings to review the progress of the defendant. The court shall make referrals to programs that provide services at no cost to the participant and have been deemed by the court, the drug addiction expert, and the parties to be credible and effective. A defendant may also choose to pay for a program that is approved by the court.

(3) Upon the defendant's successful completion of the treatment program as specified in paragraph (2), the positive recommendation of the treatment program, and the motion of the defendant, prosecuting attorney, the court, or the probation department, the court shall dismiss this charge against the defendant and the provisions of Section 1000.4 of the Penal Code, as it read on the effective date of this section, shall apply, including the provision that the arrest upon which the defendant was deferred shall be deemed to have never occurred. A dismissal based on the successful completion of treatment shall not count as a conviction for any purpose, including for determining punishment pursuant to subdivision (b).

(4) If at any time it appears that the defendant is performing unsatisfactorily in the program, is not benefiting from treatment, is not amenable to treatment, has refused treatment, or has been convicted of a crime that was committed since starting treatment, the prosecuting attorney, the court on its own, or the probation department may make a motion for entry of judgment and sentencing. After notice to the defendant, the court shall hold a hearing to determine whether judgment should be entered and the defendant sentenced. Judgment shall be imposed and the defendant sentenced if the court finds true one or more of the foregoing circumstances. However, except when the defendant has been found to have been convicted of a crime that was committed since starting treatment, the court may rerefer the defendant to treatment if the court finds that it is in the interest of justice to do so, that the defendant is currently amenable to treatment, and if the defendant agrees to participate in, and complete, a treatment program as described in this section.

(5) For time spent in residential treatment, a defendant may earn only actual credits pursuant to Section 2900.5 of the Penal Code and shall not earn conduct credits pursuant to Section 4019 of the Penal Code or any other provision. Time spent in any other type of program or counseling is not eligible for any credits.

(e) (1) Except as provided in paragraph (2), as used in this section, "hard drug" means a substance listed in Section 11054 or 11055, including a substance containing fentanyl, heroin, cocaine, cocaine base, methamphetamine, or phencyclidine, and the analogs of any of these substances as defined in Sections 11400 and 11401.

(2) As used in this section, "hard drug" does not include cannabis, cannabis products, peyote, lysergic acid diethylamide (LSD), other psychedelic drugs, including mescaline and psilocybin (mushrooms), any other substance listed in subdivisions (d) and (e) of Section 11054, or, with the exception of methamphetamine, any other substance listed in subdivision (d) of Section 11055.

(f) Upon an arrest for a violation of this section, the court shall require judicial review prior to release to make an individualized determination of risk to public safety and likelihood to return to court.

(g) This section shall not be construed to preclude prosecution or punishment pursuant to any other law.

SEC. 8. Section 490.3 is added to the Penal Code, to read:

490.3. Notwithstanding any other law, in any case involving one or more acts of theft or shoplifting, including, but not limited to, violations of Sections 459.5, 484, 488, and 490.2, the value of property or merchandise stolen may be aggregated into a single count or charge, with the sum of the value of all property or merchandise being the values considered in determining the degree of theft.

SEC. 9. Section 666.1 is added to the Penal Code, to read:

666.1. (a) (1) Notwithstanding any other law, a person who has two or more prior convictions for any of the offenses listed in paragraph (2), and who is convicted of petty theft or shoplifting, is punishable by imprisonment in the county jail not exceeding one year or pursuant to subdivision (h) of Section 1170. A second or subsequent conviction of this section is punishable by imprisonment in the county jail not exceeding one year or by imprisonment in the state prison.

(2) This section applies to the following offenses, including a conviction that occurred before the effective date of this section:

(A) Petty theft, as described in Section 488 or 490.2.

(B) Grand theft, as described in Sections 487, 487h, and in Chapter 5 (commencing with Section 484) of Title 13 of Part 1.

(C) Theft from an elder or dependent adult, as described in Section 368.

(D) The theft or unauthorized use of a vehicle, as described in Section 10851 of the Vehicle Code.

(E) Burglary, as described in Section 459.

(F) Carjacking, as described in Section 215.

(G) Robbery, as described in Section 211.

(H) Receiving stolen property, as described in Section 496.

(I) Shoplifting, as described in Section 459.5.

(J) Identity theft and mail theft, as described in Section 530.5.

(b) A person subject to charging under this section or actually charged with this section may be referred by a prosecuting attorney's office or by a county probation department to a theft diversion or deferred entry of judgment program pursuant to Section 1001.81. lf appropriate, a person admitted to such a program may also be referred to a substance abuse treatment program.

(c) Upon an arrest for a violation of this section, the court shall require judicial review prior to release to make an individualized determination of risk to public safety and likelihood to return to court.

(d) This section shall not be construed to preclude prosecution or punishment pursuant to any other law.

SEC. 10. Section 12022 of the Penal Code is amended to read:

12022. (a) (1) Except as provided in subdivisions (c) and (d), a person who is armed with a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment pursuant to subdivision (h) of Section 1170 for one year, unless the arming is an element of that offense. This additional term shall apply to a person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm.

(2) Except as provided in subdivision (c), and notwithstanding subdivision (d), if the firearm is an assault weapon, as defined in Section 30510 or 30515, or a machinegun, as defined in Section 16880, or a .50 BMG rifle, as defined in Section 30530, the additional and consecutive term described in this subdivision shall be three years imprisonment pursuant to subdivision (h) of Section 1170 whether or not the arming is an element of the offense of which the person was convicted. The additional term provided in this paragraph shall apply to any person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with an assault weapon, machinegun, or a .50 BMG rifle, whether or not the person is personally armed with an assault weapon, machinegun, or a .50 BMG rifle.

(b) (1) A person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense.

(2) If the person described in paragraph (1) has been convicted of carjacking or attempted carjacking, the additional term shall be in the state prison for one, two, or three years.

(3) When a person is found to have personally used a deadly or dangerous weapon in the commission of a felony or attempted felony as provided in this subdivision and the weapon is owned by that person, the court shall order that the weapon be deemed a nuisance and disposed of in the manner provided in Sections 18000 and 18005.

(c) *(1)* Notwithstanding the enhancement set forth in subdivision (a), a person who is personally armed with a firearm in the commission of a violation or attempted violation of Section 11351, 11351.5, 11352, 11366.5, 11366.6, 11378, 11378.5, 11379, 11379.5, or 11379.6 of the Health and Safety Code shall be punished by an additional and consecutive term of imprisonment *in the state prison* ~~pursuant to subdivision (h) of Section 1170~~ for three, four, or five years.

(2) Notwithstanding paragraph (9) of subdivision (h) of Section 1170 of the Penal Code, a defendant convicted of an underlying violation specified in this subdivision who admits an enhancement pursuant to this subdivision or for whom an enhancement pursuant to this subdivision is found true, is punishable by imprisonment in the state prison and not pursuant to subdivision (h) of Section 1170 of the Penal Code.

(d) Notwithstanding the enhancement set forth in subdivision (a), a person who is not personally armed with a firearm who, knowing that another principal is personally armed with a firearm, is a principal in the commission of an offense or attempted offense specified in subdivision (c), shall be punished by an additional and consecutive term of imprisonment pursuant to subdivision (h) of Section 1170 for one, two, or three years.

(e) For purposes of imposing an enhancement under Section 1170.1, the enhancements under this section shall count as a single enhancement.

(f) Notwithstanding any other provision of law, the court may strike the additional punishment for the enhancements provided in subdivision (c) or (d) in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

SEC. 11. Section 12022.6 is added to the Penal Code, to read:

12022.6. (a) When any person takes, damages, or destroys any property in the commission or attempted commission of a felony, or commits a felony violation of Section 496, the court shall impose a term in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, as follows:

(1) If the loss or property value exceeds fifty thousand dollars ($50,000), the court shall impose an additional term of one year.

(2) If the loss or property value exceeds two hundred thousand dollars ($200,000), the court shall impose an additional term of two years.

(3) If the loss or property value exceeds one million dollars ($1,000,000), the court shall impose an additional term of three years.

(4) If the loss or property value exceeds three million dollars ($3,000,000), the court shall impose an additional term of four years.

(5) For every additional loss or property value of three million dollars ($3,000,000), the court shall impose a term of one year in addition to the term specified in paragraph (4).

(b) In any accusatory pleading involving multiple charges of taking, damage, or destruction, or multiple violations of Section 496, the additional terms provided in this section may be imposed if the aggregate losses to the victims or aggregate property values from all felonies exceed the amounts specified in this section and arise from a common scheme or plan. All pleadings under this section shall remain subject to the rules of joinder and severance stated in Section 954.

(c) The additional terms provided in this section shall not be imposed unless the facts relating to the amounts provided in this section are charged in the accusatory pleading and admitted by the defendant or found to be true by the trier of fact.

(d) Notwithstanding any other law, the court may impose an enhancement pursuant to this section and another section on a single count, including an enhancement pursuant to Section 12022.65.

SEC. 12. Section 12022.65 is added to the Penal Code, to read:

12022.65. (a) Any person who acts in concert with two or more persons to take, attempt to take, damage, or destroy any property, in the commission or attempted commission of a felony shall be punished by an additional and consecutive term of imprisonment of one, two, or three years.

(b) The additional term provided in this section shall not be imposed unless the existence of the facts required in subdivision (a) are charged in the accusatory pleading and admitted by the defendant or found to be true by the trier of fact.

(c) Notwithstanding any other law, the court may impose an enhancement pursuant to this section and another section on a single count, including an enhancement pursuant to Section 12022.6.

SEC. 13. Section 12022.7 of the Penal Code is amended to read:

12022.7. (a) Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years.

(b) Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony which causes the victim to become comatose due to brain injury or to suffer paralysis of a permanent nature shall be punished by an additional and consecutive term of imprisonment in the state prison for five years. As used in this subdivision, "paralysis" means a major or complete loss of motor function resulting from injury to the nervous system or to a muscular mechanism.

(c) Any person who personally inflicts great bodily injury on a person who is 70 years of age or older, other than an accomplice, in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for five years.

(d) Any person who personally inflicts great bodily injury on a child under the age of five years in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for four, five, or six years.

(e) Any person who personally inflicts great bodily injury under circumstances involving domestic violence in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years. As used in this subdivision, "domestic violence" has the meaning provided in subdivision (b) of Section 13700.

(f) *(1)* As used in this section, "great bodily injury" means a significant or substantial physical injury.

(2) As used in this section, a person who sells, furnishes, administers, or gives away a controlled substance is deemed to have personally inflicted great bodily injury when the person to whom the substance was sold, furnished, administered, or given suffers a significant or substantial physical injury from using the substance.

(g) This section shall not apply to murder or manslaughter or a violation of Section 451 or 452. Subdivisions (a), (b), (c), and (d) shall not apply if infliction of great bodily injury is an element of the offense.

(h) The court shall impose the additional terms of imprisonment under ~~either~~ subdivision (a), (b), (c), or (d), but may not impose more than one of those terms for the same offense.

SEC. 14. Chapter 36 (commencing with Section 7599.200) is added to Division 7 of Title 1 of the Government Code, to read:

CHAPTER 36. FUNDING FOR THE HOMELESSNESS, DRUG ADDICTION, AND THEFT REDUCTION ACT

7599.200. (a) This chapter shall be known as the Funding for the Homelessness, Drug Addiction, and Theft Reduction Act.

(b) From moneys disbursed to the Board of State and Community Corrections pursuant to paragraph (3) of subdivision (a) of Section 7599.2 and Section 6046.2 of the Penal Code, the Board of State and Community Corrections may allocate appropriate funds to counties and local governments for programs specified in Section 11395 of the Health and Safety Code. This provision shall not preclude funding for this act from any other source, including, but not limited to, the Local Revenue Fund 2011 established under Section 30025 and other funds designated for substance abuse and mental health treatment.

(c) A defendant charged with a treatment-mandated felony is eligible for any appropriate Medi-Cal or Medicare programs or services, including, but not limited to, those described in clauses (iii) to (v), inclusive, of subparagraph (B) of paragraph (16) of subdivision (f) of Section 30025, for the defendant's programs specified in Section 11395 of the Health and Safety Code. A county or local government may contract directly with the State Department of Health Care Services or any other applicable state agency to provide for the provision or administration of any applicable Medi-Cal or Medicare treatment programs.

SEC. 15. Amendments.

(a) Except as provided in subdivision (b), this act shall not be amended by the Legislature except by a statute that furthers the purposes, intent, findings, and declarations of the act and is passed in each house by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters.

(b) The Legislature may, by majority vote, amend Section 11369 of the Health and Safety Code only to expand the list of drugs that qualify as a "hard drug" and to expand the list of convictions to which it applies, and may, by majority vote, amend Section 11395 of the Health and Safety Code only to expand the list of drugs that qualify as a "hard drug" and to expand the list of applicable prior convictions, and may, by majority vote, amend Section 666.1 of the Penal Code only to expand the list of applicable prior convictions.

SEC. 16. Severability.

If any provision of this act, or any part of any provision, or the application of any provision or part to any person or circumstance is for any reason held to be invalid or unconstitutional, the remaining provisions and applications of provisions shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable.

Sec. 17. Conflicting Initiatives.

(a) This act creates a new drug treatment statute and changes the penalties for career and serial thieves. In the event that this act and another initiative measure or measures relating to the same subject appear on the same statewide ballot, the provisions of the other measure or measures shall be deemed to be in conflict with this measure. In the event this measure receives a greater number of affirmative votes than a measure deemed to be in conflict with it, the provisions of this measure shall prevail in their entirety, and the provisions of the other measure or measures shall be null and void.

(b) If this measure is approved by the voters but superseded by law by any other conflicting

measure approved by the voters at the same election, and the conflicting ballot measure is later held invalid, this measure shall be self-executing and given full force and effect.