



Judges Are the Gatekeepers Under Prop. 5

The Nonviolent Offender Rehabilitation Act of 2008

Proposition 5 provides for court-supervised treatment for nonviolent drug possession offenders.

On a case-by-case basis, it also **allows judges to decide** whether to place people in treatment for non-drug, nonviolent offenses, if the judge views that person's substance abuse problem to be a contributing factor to the non-drug offense.

Opponents of Prop. 5 have sowed confusion over these provisions, suggesting that a wide range of offenders would automatically qualify for treatment instead of incarceration. They fail to take account of Prop. 5's clear requirements – that any such offenses must be nonviolent, and that the judges have absolute discretion as to whether or not to permit treatment diversion.

Offense Must Be 'Nonviolent'

Offenders diverted to treatment for non-drug offenses would enter Prop. 5's "Track III," the highest level of treatment and supervision. The terms of eligibility are spelled out in Section 18 of the measure, in proposed Penal Code Section 1210.2, paragraph (a)(3). It says that a defendant can be eligible for Track III if her or she has:

"committed **a nonviolent offense** or offenses, and the defendant appears to have a problem with substance abuse or addiction."

Here, the term "nonviolent offense" is not tied to any other statutory definition, such as the lists of serious and violent "strikes" in Penal Code sections 1192.7(c) or 667.5(c). Any offense involving any form of violence, threat of violence, or harm to another would be disqualified from Track III eligibility.

In addition, certain crimes, such as burglary and arson, may not be "violent" in every case, but they are also excluded from Track III if they appear on the list of serious/violent offenses created by the "three strikes" law. Paragraph (d)(1) excludes any person who:

"has ever committed a serious felony, as defined in subdivision (c) of Section 1192.7, or a violent felony, as defined in subdivision (c) of Section 667.5..."

The only exception – an offender can be considered for Track III despite past "strikes" if "the **district attorney seeks** to place the defendant in Track III treatment diversion."

Judges Decide Who Qualifies

Committing a non-drug offense does not entitle any offender to Track III treatment, even if he or she can demonstrate a "problem with substance abuse or addiction." According to Prop. 5:

"The **court must find** that placement of the defendant in Track III treatment diversion pursuant to subdivision (a) is **in the furtherance of justice.**" [*Proposed PC 1210.2(b).*]

The language quoted above gives the court complete discretion to determine whether or not to admit any non-drug offender into treatment diversion.

continued

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Judges Have Broad Powers in Track III

For those offenders that judges do permit to enter Track III treatment, Prop. 5 provides maximum degrees of supervision and sanctions.

Judicial discretion is broad in Track III:

- Judges decide who enters (*PC 1210.2(b)*);
- Judges can require jail time before treatment begins (*PC 1210.2(b)*);
- Judges can impose jail sanctions at any time during treatment (*PC 1210.2(i)*); and
- Judges can terminate people from treatment and sentence them at any time (*PC 1210.2(j)*).

These provisions allow great flexibility for judges to carefully consider whether or not to offer treatment, and to impose swift consequences for those offenders who do not comply.

Other Options for Non-Drug Offenses

Most defendants receiving treatment diversion for non-drug offenses will enter through Prop. 5's Track III. However, it is possible for defendants who are convicted of drug possession plus another offense to enter the measure's Track I or Track II. Again, judges have complete discretion to decide whether to permit diversion or not.

These provisions are intended to prevent prosecutorial "over-charging" from rendering people ineligible for Tracks I or II when they should qualify – a problem that has plagued implementation of Proposition 36 in some counties.

For Track II, for instance, a defendant is disqualified from treatment if convicted of another misdemeanor or felony, except:

“with respect to a **misdemeanor conviction, the court shall have discretion to declare the person eligible** for treatment under subdivision (a) and suspend sentencing during participation in drug treatment.”

Track I, the lowest level of treatment in Prop. 5, also allows judicial discretion to permit diversion if the defendant is charged with “another offense” besides simple drug possession, even if not convicted. Treatment is only allowed “**if the court determines** that it is in the interest of the defendant and in the **furtherance of justice** to permit deferred entry of judgment.”

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