



A Fresh Look at Data Related to the Prop. 36 Debate

Testimony of Dave Fratello
to the Little Hoover Commission

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Every once in a while it is useful to take a step back and ask: *What if we didn't know what we think we know?*

In this testimony I want to address just a few common misperceptions of the evidence surrounding issues related to drug treatment generally, and Prop. 36 specifically. I'll cover these questions with reference to the actual data:

- *Is it really true that Prop. 36 has a big "no-show" problem?*
- *Is the Prop. 36 treatment completion rate just 25%?*
- *Isn't Prop. 36 underperforming, compared with other treatment systems?*
- *Are "high-cost offenders" ruining Prop. 36, and how should we reform it?*
- *Aren't jail sanctions a well-proven way to increase treatment success rates?*

I was a co-author of Prop. 36 and a big supporter of the measure's provision for objective research by a public university. Like many others, I believed that long-term studies of Prop. 36 would lead naturally to continued and even expanded funding for the program. Time and experience have shown how easily data can be skewed, politicized and ignored, as it seems to me has happened rather dramatically in the case of Prop. 36.

The 'No-Show' Phenomenon – Data Questions

UCLA has published data indicating that 68-75% of the people who initially tell the court they want to try Prop. 36 actually wind up starting treatment at some later point. UCLA has also noted that this "show rate" is impressive for a program like Prop. 36, given other

research suggesting that 50 to 60 percent is an average conversion rate for similar systems¹.

But there has also been much criticism of Prop. 36 for “losing” many potential clients. In fact, the “no-show rate” has been cited as a marker of failure. In litigation related to Prop. 36 last year, the Attorney General wrote:

[T]he noncustodial treatment programs authorized by Proposition 36 are failing. Approximately 30 percent of those offenders referred to treatment under Proposition 36 did not enter treatment programs and only 34 percent of those offenders who entered treatment programs actually completed treatment.²

The commissioners should be aware of two facts regarding Prop. 36 no-shows:

- the no-show rate is now 25%, not 30%, according to the most recent UCLA report, and
- there are major questions as to how many “no-shows” are actually absconding from the program.

Interestingly, *the question of who is “not showing up,” and why not, has barely yet been examined.* In the absence of data, politically motivated assumptions have driven the discussion. Mainly, we hear that people are blowing off Prop. 36 in droves because it lacks teeth.

But what if the data were to show that most “no-shows” are turning away from Prop. 36 to take traditional criminal sentencing? That is, at some point after registering their acceptance of Prop. 36’s terms, defendants learn more about the demands of the program and reverse themselves, rejecting treatment to take the jail time. How would that change perceptions of the problem, and possible solutions?

¹ University Of California Los Angeles, Integrated Substance Abuse Programs, *Evaluation of the Substance Abuse and Crime Prevention Act, Final Report*, April 13, 2007; pg. 15

² Bill Lockyer, CA Attorney General, “Opposition to Plaintiffs’ Motion for Preliminary Injunction” (*Gardner v. Schwarzenegger*, Case RG06 278911), Aug. 17, 2006; pg. 1

That's the norm in Los Angeles County, according to data published by the county. (See the next page.) These figures show that, in the first four years of Prop. 36, half or more of the dropoff between initial sentencing and treatment assessment was accounted for by clients who "declined participation." A few hundred more "declined participation" after assessment each year, too.

These figures suggest that much of what is commonly assumed about "no-shows" in Prop. 36 is wrong. L.A. County data, in fact, suggest that the true "no show" rate for Prop. 36 – meaning the number of people who flee while hoping to use Prop. 36 as a shield – may be half or less than the rate that UCLA has reported to date.

Of course, this challenge to the statewide Prop. 36 no-show figures would be less serious if the L.A. County data do not mean what they appear to mean – if "declined participation" were a catch-all coding for absconders, for instance. I have peppered the data specialists in the county with questions focused on that possibility, and they stand firmly behind the data as reported. They feel that the data systems' users are well-trained, and the terms are clear. Hence, to challenge the L.A. County data requires the impeachment of the people who designed the county's data system, trained its users and analyze its results. I can't say they've got it wrong.

If the L.A. County experience is paralleled around the state, we may find that many more people are voluntarily refusing treatment, or failing to connect for reasons of transportation, child care and confusing bureaucracy, than are brazenly walking away. And that suggests a completely different range of policy responses. We might need to find ways to smooth the transition into Prop. 36, make the program more attractive and provide better links to support services than many counties offer now.

This is truly the other side of the coin. For three years or more, the main policy response that has been proffered to deal with "no-shows" has been increased punishment – jail sanctions and other "teeth" to force people to follow through on their commitment to Prop. 36. (As it happens, I would not oppose the use of greater coercion for true absconders – people who break their word and walk away from Prop. 36 seem to deserve little sympathy.)

Only recently has the UCLA research team begun to explain the limitations of no-show data and to call for more research. As UCLA says in the April 2007 "final" report on Prop. 36:

CHAPTER FOUR

TAKING A LOOK BACK – FISCAL YEAR 2001-02 THROUGH FISCAL YEAR 2004-05

I. A FOUR-YEAR COMPARISON

| | <u>FY 2001-02</u> | <u>FY 2002-03</u> | <u>FY 2003-04</u> | <u>FY 2004-05</u> |
|--|---------------------|----------------------|----------------------|----------------------|
| Sentenced by Superior Court | 8,889 | 8,925 | 7,641 | 8,015 |
| Referrals Directly from Parole | 46 | 527 | 558 | 488 |
| Referrals from Out-of-County | 320 | 384 | 439 | 523 |
| Total Sentenced | 9,255 | 9,836 | 8,638 | 9,026 |
| Declined Participation | 1,737 | 1,271 | 1,270 | 1,647 |
| No Show/Bench Warrant Issued | 229 | 453 | 331 | 45 |
| Dismissals | 19 | 5 | 13 | 9 |
| Deferred Entry of Judgment | 40 | 13 | 7 | 9 |
| Admitted to Drug Court | 29 | 10 | 4 | 2 |
| Pending Court Action | 1,098 | 811 | 568 | 632 |
| Subtotal: | 3,152 | 2,563 | 2,193 | 2,344 |
| Sentenced Participants from Previous Fiscal Year | 0 | 775 | 943 | 1,005 |
| Appeared for Assessment | 6,103 | 8,048 | 7,388 | 7,687 |
| No Show/Bench Warrant Issued | 81 | 232 | 126 | 35 |
| Pending Arrival to Treatment Facility | 32 | 348 | 53 | 58 |
| Rejected and Re-referred to CASC | 277 | 296 | 260 | 280 |
| Referred Out-of-County | 67 | 204 | 381 | 410 |
| Referred to Veterans Administration | 8 | 43 | 78 | 68 |
| Referred to Mental Health | 1 | 12 | 22 | 24 |
| Referred to Private Paid Facility | 10 | 111 | 108 | 102 |
| Specialty Services Required | 0 | 10 | 0 | 0 |
| Not Amenable to Treatment – Referred Back to Court | 14 | 46 | 62 | 62 |
| Declined Participation – Program Terminated by Court | 501 | 367 | 268 | 314 |
| Subtotal: | 991 | 1,669 | 1,358 | 1,353 |
| Treatment Placement | 5,112 | 6,379 | 6,030 | 6,334 |
| Participants Who Received Treatment During Fiscal Year (includes active participants at start of fiscal year) | <u>5,112</u> | <u>10,979</u> | <u>15,013</u> | <u>16,427</u> |

Note that no-show offenders may have failed to complete assessment or enter treatment for any reason. For example, these offenders may have decided to decline SACPA participation after initial acceptance, or they may have absconded, died, or committed crimes or probation/parole violations that precluded further participation. Currently available statewide data do not specify the reason for the no-show. Future research should collect data to identify reasons for no-shows and examine the prevalence of each reason.

This was the first time UCLA had acknowledged a range of possible reasons for “no-shows.” UCLA is quite right that no statewide data now offer any explanation of why, exactly, people fail to show for assessment or treatment. That’s too bad, but in light of L.A. County data suggesting that most “no-shows” are actually refusing treatment formally, it should no longer be assumed that the problem is one of insufficient coercion.

Completion Rates: Now, Just One Bottom Line

The problems with show-rate data also raise new questions about how to present and interpret Prop. 36 completion rates. In the quote above from the Attorney General, the completion rate is properly given as 34 percent – the number *completing* treatment divided by the number who *began* treatment. This is the most common-sense calculation.

However, in the first few reports on Prop. 36, UCLA published *two* completion rates: one using the total number of nonviolent drug offenders who had accepted Prop. 36 as the denominator, and one using only those who *began* treatment as the denominator. This led to widespread confusion: *Was the Prop. 36 completion rate 25 percent, or 34 percent?* Both were in the UCLA reports, so both appeared to be right.

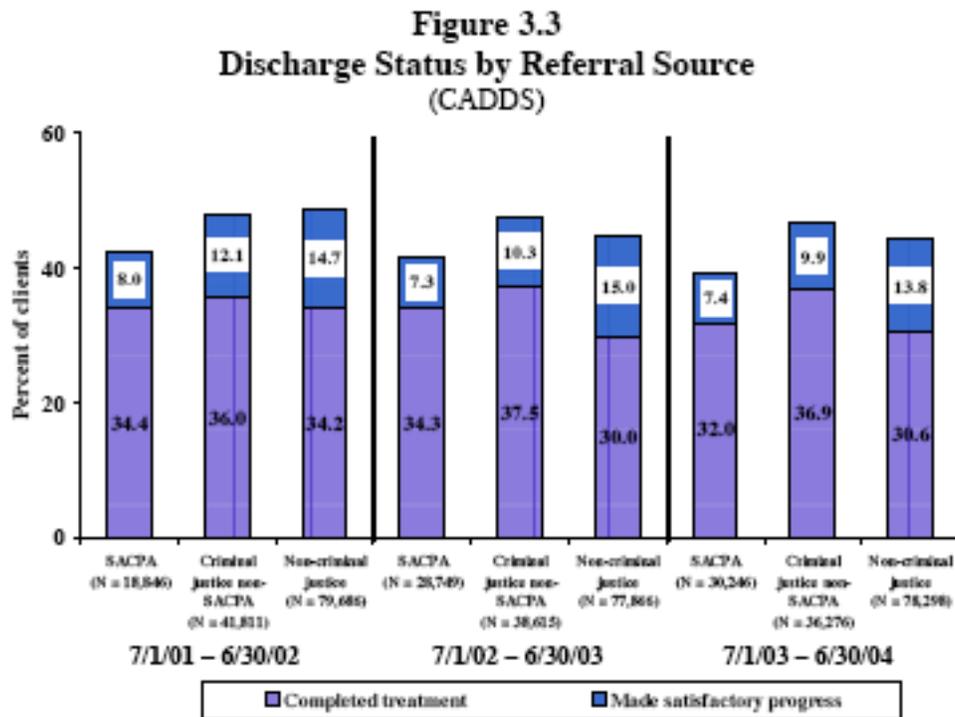
In the most recent (2007) report, no doubt recognizing the data-quality problems apparent in the show rate data, UCLA for the first time *did not publish* a lower “completion rate” using all drug offenders sentenced to Prop. 36 as the denominator. Only one figure, 32 percent, is given – the number who completed treatment, divided by the number who began treatment.

This change by UCLA is a tacit acknowledgement that the lower completion rates given in earlier reports were unreliable. It’s simple – the larger denominator, consisting of everyone who initially accepted Prop. 36, includes many people who opted out. They

don't belong in the data. Including them when calculating a completion rate will artificially and unduly lower the completion rate that is reported.

UCLA made the right call to stop reporting the lower figure. Certainly, in judging the program's success, policymakers don't need to be distracted by suspect data or multiple figures purporting to answer the same question: How many people complete Prop. 36?

Law enforcement groups that have long opposed Prop. 36 have always cited the 25% completion rate figure. Some major media, including the Sacramento Bee, have done so as well. But now that UCLA has backed away from publishing these lower rates, it is clearly inappropriate for anyone else to cite them.



It is also important to note that Prop. 36's completion rate of about one-third compares well, using very large data sets, with all other drug treatment systems in California. As in the chart above, UCLA's reports have always placed the completion figures for Prop. 36 clients alongside those for people entering treatment voluntarily (i.e., no legal coercion)

and for people entering through other forms of criminal justice referral. Prop. 36 consistently outperforms “voluntary” treatment and falls just a few percentage points short of the success rate for all other criminal justice referrals. (A fact that is easily understood, as treatment is offered with much more discretion and pre-screening to non-Prop.-36 criminal justice clients.)

So, when we hear that Prop. 36 is “failing,” to use the former Attorney General’s word, with a completion rate of (then) 34 percent, we might ask: *Where is the outcry over the 30% completion rate for “voluntary” clients? Is the state wasting money there? Or, who is responsible for the “failure” when just 37% of criminal justice referrals complete treatment?* The fact that such questions are rarely raised hints how badly politicized the debate over Prop. 36 has become.

“High-cost offenders” in Prop. 36

UCLA’s cost analysis of Prop. 36³ used an economic model to gauge the program’s impacts – particularly costs and savings. One finding that surprised researchers, and has drawn continued attention, was that a tiny fraction of all the people eligible for Prop. 36 impose costs on state and county governments at ten times the level imposed by average Prop. 36-era offenders.

These “high-cost offenders,” which UCLA tallied as 1.6% of all Prop.-36-eligible drug offenders, were distinguishable because they all had five or more drug convictions within the 30 months prior to their newest, Prop.-36-eligible, charge. They proved to be costly because they were arrested, rearrested and incarcerated at very high rates compared to the rest of the Prop.-36-era drug offender population.

To this day, UCLA researchers frequently spend a great deal of time in public presentations talking about “high-cost offenders,” suggesting that they represent a special problem that requires a policy response.

What is poorly understood about the “high-cost offenders” is that UCLA has never claimed that any of these people actually chose to *enter* Prop. 36. The data produced to

³ University of California Los Angeles, Integrated Substance Abuse Programs, *SACPA Cost Analysis Report (First and Second Years)*, March 13, 2006

date tell us only that they were drug offenders *eligible for* Prop. 36 in the *first year* after the ballot measure took effect. Some, perhaps many, never even opted to try Prop. 36. That means that one reason they were “high-cost offenders” was that they rejected less-expensive treatment alternatives.

The *n* under study in UCLA’s analysis of nonviolent drug offenders (in 2001-02) totaled 61,609; but less than half that many – 30,469 people – entered Prop. 36 treatment that year. Also, that 1.6% who were “high-cost offenders” represented just 985 people in total. It is conceivable that all 985 “high-cost offenders” were part of the 31,140 who did not choose to try Prop. 36. Without data from UCLA, we simply don’t know.

It is important, also, to note that *the profile established by UCLA for “high-cost offenders” may not carry forward at all to the present day*. It would be surprising to find a person convicted of drug possession five times since 2004-05 (30 months ago) who hasn’t already done some time in Prop. 36. The 5-convictions-within-30-months-prior profile was met by less than 2% of drug possession offenders in 2001; it could be a vanishingly small number today, making it that much more difficult to craft policies now to cope with this population.

What, then, do “high-cost offenders” say about Prop. 36? Almost nothing.

By definition, these are people with established addictions and a high propensity for arrest. They may disproportionately decline Prop. 36 or abscond from it, but this does not suggest that Prop. 36 is somehow ineffective. What’s more, the difficulties of dealing with this sub-population do not argue for any broad reforms of Prop. 36’s treatment structure. Indeed, incorrigible addicts were cycling through the system before Prop. 36, and they will continue to do so for years to come.

UCLA has made only limited policy recommendations regarding “high-cost offenders.” Their initial advice was to place offenders fitting this profile into “more controlled” settings. However, the issue of “high-cost offenders” quickly became a political football. Lobbyists for law enforcement groups called for “high-cost offenders” to be excluded from Prop. 36 completely. (The Legislature took that suggestion, in an eleventh-hour addition to Senate Bill 1137 inserted by Republican Assembly members. That exclusion is stalled in court along with all other provisions of SB 1137.)

So what should be done about “high-cost offenders?” The responses seem relatively simple.

- First, we must recognize that this is a group that will always be resistant to treatment. We won’t reach many of them.
- Second, how to deal with this population is largely separate from any question about how to improve or reform Prop. 36.
- Third, when someone does present him or herself with the 5-prior-convictions-in-30-months profile to Prop. 36, there should be special attention paid to guiding and monitoring those clients.

Where possible, “high-cost offenders” should be placed in drug courts or otherwise put in the care of judges and treatment providers with the patience and experience to manage a tough case. These suggestions do not require new legislation, just common sense and resources at the local level.

Jail Sanctions in Prop. 36

By far the most contentious issue in the Prop. 36 debate to date – beginning during the campaign in 2000 and continuing ever since – has been whether or not judges should be permitted to jail clients during treatment to enhance their “motivation” to succeed.

As Judge Winifred Smith recognized in issuing an injunction against legislation purporting to allow jail sanctions in Prop. 36, the voter-approved law was written both conceptually and specifically to prohibit the use of incarceration during treatment. Jail or prison are reserved as punishments for those who fail out of treatment, and only after severe disruptions or multiple probation violations.

So why are Prop. 36 proponents so firmly opposed to jail sanctions during treatment?

First, there was, and is, no scientific evidence to support the idea that jail sanctions increase treatment success rates. It is truly that simple.

I've been making the same point in presentations and op-ed columns for several years. No one has tried seriously to contradict the claim. In May 2005, the state Department of Alcohol and Drug Programs staged a panel discussion of the issue with me, a leading judge and several academics. There was clear consensus in that discussion that the research does not exist now to support jail sanctions. To attempt to draw support from the existing literature, one must draw inferences about how coercion and consequences can shape behavior. Those inferences may be interesting, but they're not evidence.

UCLA has weighed in ever so lightly on the subject in footnotes to their reports on Prop. 36. In 2006, the researchers said:

The benefits of flash incarceration are not yet consistently confirmed in the research literature.⁴

More recently, the same footnote evolved to say this:

The benefits of flash incarceration are not well established.⁵

Note the direction of this evolution – from a hopeful-sounding statement that “confirmation” might come soon, to a clear, factual statement that jail sanctions have not been proven.

When one does evaluate the literature, there are contradictory hints of the value of jail sanctions. In one study, Bronx, NY, drug court clients were asked to rate the importance of various aspects of the program.⁶ They ranked jail sanctions third-to-last out of several elements, with a mean rating of 1.9 on a scale of 5. Alas, in a separate study, another group of clients ranked jail sanctions better.

A 2001 study looking at drug courts in Portland, Oregon, and Las Vegas, Nevada, provided separate completion rates for those clients who were subjected to jail sanctions,

⁴ University of California Los Angeles, Integrated Substance Abuse Programs, *SACPA Cost Analysis Report (First and Second Years)*, March 13, 2006 (initial online version), Footnote 44.

⁵ UCLA, *SACPA Cost Analysis Report* (revised online version), Footnote 45.

⁶ Rachel Porter, *Treatment Alternatives in the Criminal Court: A Process Evaluation of the Bronx County Drug Court*, Vera Inst. Of Justice, April 2001; pg. 24

and for those who were not.⁷ In Portland 65% of clients who were never jailed completed treatment, as did 44% in Las Vegas. But among those who *were* jailed as a sanction, completion rates fell precipitously – to 27% in Portland and 12% in Las Vegas.

Now, clearly these data do not say that jail sanctions *cause* lower completion rates. The clients who were jailed were a self-selecting group of people who were having a rocky time in treatment. They were, therefore, more likely to fail.

And yet, *jail sanctions didn't save many of them*. In Portland, 73% of those who were subjected to jail sanctions washed out. In Las Vegas, 88% failed despite the effort to use jail as an intervention. A tool that doesn't work three out of four times, or worse, would not be of much value.

Studies of drug courts across America point to some value for “graduated sanctions,” but inevitably these studies have examined a range of responses that *includes* jail, not jail alone as a separate sanction. (Importantly, most studies of drug courts and other court-supervised treatment systems stress the value of incentives and rewards over negative sanctions, but for some reason “carrots” are overshadowed by “sticks” in the debate over Prop. 36 effectiveness.)

No drug court has allowed the creation of an appropriate double-blind study, in which some clients face jail sanctions while others do not. So it is impossible to generalize from the drug court literature and conclude that jail sanctions are a critical factor. Indeed, it would be difficult in any study to separate out the benefits of the intensive involvement of a judge in a person's treatment, or the multiple supports provided to drug court clients, as opposed to the threat or use of jail sanctions, to explain the successes drug courts have achieved.

In an important review of studies of sanctions noted by UCLA in its 2006 report on Prop. 36, Douglas Marlowe et al note the many risks involved with imposing sanctions of any kind during treatment.⁸ Among them: a *negative* impact on motivation – the client may

⁷ Goldkamp, J.S., White, M.D., & Robinson, J.B. (2001). Do drug courts work? Getting inside the drug court black box. *Journal of Drug Issues*, 31(1), 27-72.

⁸ Douglas Marlowe and Kimberly Kirby, “Effective Use of Sanctions in Drug Courts: Lessons from Behavioral Research,” National Drug Court Institute Review, Vol. II, Issue 1, Summer 1999

feel certain he or she is headed for failure, probably not for the first time. In this way, jail may cause resignation and a feeling of hopelessness, rather than a renewed determination to succeed.

If jail sanctions are supposed to serve as a motivational tool, the possibility of a *completely opposite effect on motivation* must be considered very seriously.

Separately, Marlowe has opined – perhaps counter-intuitively – that the harshest sanctions are of least value with the most experienced addicts, that sanctions of all kinds should be less frequently used, and that judges and others should be required to be trained first in the use of sanctioning tools.⁹

I would readily acknowledge that some people have been steered to complete treatment by the use of jail sanctions. I only wish that those who advocate for jail sanctions would be similarly frank about the lack of evidence for jail and the downside risks of using jail as a “treatment tool.”

Jail sanctions have been promoted as a no-cost, common-sense solution to increase treatment success rates, whereas, in practice, they cost money and jail space, and they might fail or cause harm in more cases than they help.

The major policy problem is that no one can say when jail is appropriate, or when it might cause harms that outweigh its potential to encourage treatment compliance. We might like to think that judicial education would help steer the use of jail sanctions, but if the idea is to add jail sanctions to Prop. 36, someone needs to figure out when we are going to adequately train all 1,500 California judges on the ins and outs of addiction.

⁹ Author’s observation of a Marlowe presentation to the Offender Treatment Advisory Group, Sacramento, CA, Jan. 22, 2007.