

## Criminal laws created or amended by Prop 36

Prepared February 2025 by the staff of the Committee on Revision of the Penal Code  
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### Key takeaways

Proposition 36 was approved by California voters in November 2024. The initiative's changes can be grouped into three general categories:

1. Creating a new “treatment-mandated” felony offense for repeat drug possession.
2. Increasing penalties and expanding sentencing enhancements for drug sale offenses, particularly those involving fentanyl.
3. Increasing punishment for certain thefts, including expanding California’s “petty theft with priors” offense.

Details on these changes are below.

#### 1. Drug possession: “treatment-mandated felony”

- **Eligibility and sentencing range.**

Prop 36 established a “treatment-mandated felony” for drug possession that can be charged when the person has two or more prior convictions for possession or sale of drugs such as heroin, cocaine, or cocaine base.<sup>1</sup>

This offense is a wobbler, meaning the prosecutor can choose to charge it as either a misdemeanor or felony.<sup>2</sup> If charged as a felony, the defendant can be sentenced to up to 3 years in county jail for a first offense and 3 years in state prison for any subsequent offense.<sup>3</sup> The misdemeanor punishment is 1 year in county jail.<sup>4</sup>

People charged with this offense can elect to plead guilty or no contest to the offense and agree to participate in a treatment program approved by the court after a required evaluation.<sup>5</sup> If the person successfully completes treatment, the court must dismiss the charge.<sup>6</sup>

Courts cannot sentence a person to incarceration unless the court first determines that the person is either “not eligible or suitable for treatment.”<sup>7</sup> Prop 36 does not directly address what should occur if treatment is unavailable.

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<sup>1</sup> Health & Safety Code § 11395(c).

<sup>2</sup> Health & Safety Code § 11395(b)(1).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Health & Safety Code § 11395(d)(1).

<sup>6</sup> Health & Safety Code § 11395(d)(3).

<sup>7</sup> Health & Safety Code § 11395(b)(2).

- **Treatment requirements.**

The treatment program has no statutorily prescribed length or conditions and can include 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.”<sup>8</sup>

Courts are required to make referrals to programs that provide services at no cost to participants.<sup>9</sup> The programs must be deemed “credible and effective” by the court, the drug addiction expert, and the parties, including the prosecutor and defense counsel.<sup>10</sup>

- **Termination of treatment.**

Courts must hold regular hearings and courts, prosecutors, and the probation department can move to terminate treatment at any time by alleging the person is performing unsatisfactorily in the program, is not benefitting from treatment, is not amenable to treatment, has refused treatment, or has been convicted of a new crime.<sup>11</sup>

If a person is terminated from treatment, the court must proceed with entry of judgment and sentencing.<sup>12</sup>

## 2. Drug sales

- **Specified that the drug weight enhancement requires a prison sentence and lowered the weight requirements in fentanyl cases.**

Prop 36 specified that a sentencing enhancement based on the weight of drugs in drug sales cases requires a prison sentence and cannot be served in county jail.<sup>13</sup>

Prop 36 also lowered the weight at which the enhancement applies for fentanyl. The enhancement now begins with an additional 3 years of punishment for 1 ounce of any substance containing fentanyl — down from 1 kilogram — and can extend to 25 years.<sup>14</sup>

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<sup>8</sup> Health & Safety Code § 11395(d)(2).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Health & Safety Code § 11395(d)(4).

<sup>12</sup> *Id.*

<sup>13</sup> Health & Safety Code § 11370.4(e).

<sup>14</sup> Health & Safety Code § 11370.4(c)(1)(A)-(I).

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- **Specified that the sentence for being armed with a gun during drug sales offenses is served in prison.**  
Before Prop 36, California law specified that an enhancement for being armed with a firearm in the commission of drug sales offenses (which can add up to 5 years to a sentence) was to be served in county jail. Prop 36 specified that these enhancements must be served in state prison.<sup>15</sup>
- **Expanded felony offense of possessing drugs with a gun to include fentanyl.**  
Preexisting law made it a felony offense, punishable by up to 4 years in prison, to possess certain drugs while also armed with a loaded and operable firearm. Prop 36 added fentanyl to the list of drugs covered by this section.<sup>16</sup>
- **Expanded great bodily injury enhancement to injuries caused by drugs.**  
Prop 36 established a 4 year enhancement for great bodily injury caused by selling, furnishing, or administering drugs to another.<sup>17</sup> This provision abrogates a California Supreme Court court decision that limited the application of this enhancement for furnishing drugs to another.<sup>18</sup>
- **Court must advise about dangers of selling drugs.**  
Courts are now required to advise people convicted of certain drug sales offenses that manufacturing, selling, or giving away drugs is “extremely dangerous and deadly to human life,” and that if such conduct results in someone dying, they can be charged with murder.<sup>19</sup> The giving of this advisement could be used as evidence that the person was aware of the risks of their actions in a later prosecution, including for murder.<sup>20</sup>

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<sup>15</sup> Penal Code § 12022(c)(1).

<sup>16</sup> Health & Safety Code § 11370.1

<sup>17</sup> Penal Code § 12022.7(f)(2).

<sup>18</sup> See *People v. Ollo*, 11 Cal.5th 682 (2012).

<sup>19</sup> Health & Safety Code § 11369

<sup>20</sup> See generally *People v. Watson*, 46 Cal.2d 818 (1956). See also *People v. Wolfe*, 20 Cal.App.5th 673, 683 (2018).

### 3. Theft

- **Expanded “petty theft with priors.”**

Prop 36 allows people who commit misdemeanor petty theft to be charged with a felony when they have previously been convicted of two or more theft offenses including petty and grand theft, burglary, and robbery.<sup>21</sup> There is no limit on how old the prior convictions can be.

The offense is a wobbler, and when charged as a felony is punishable by up to 3 years in county jail for a first offense, and by 3 years in state prison for a subsequent offense.

This new offense is similar to existing law that allows any theft to be charged as a felony in narrower circumstances based on the defendant’s criminal history.<sup>22</sup>

- **Expanded aggregation rule.**

Prop 36 expanded the state’s aggregation rule, which allows the value of items stolen during different acts of theft to be added together to reach the \$950 threshold required to charge felony grand theft.<sup>23</sup>

In a departure from prior law, there is no requirement that the thefts occur close in time to one another or be part of a common scheme.<sup>24</sup>

- **Created enhancement for acting in concert.**

Prop 36 created an enhancement adding 3 additional years of incarceration for acting in concert with two or more people to take or damage property during a felony.<sup>25</sup>

- **Reenacted an expired enhancement for taking or damaging property over \$50,000.**

Prop 36 created a 1 year enhancement for taking or damaging property over \$50,000.<sup>26</sup> The enhancement increases to up to 4 years for property value exceeding \$3 million.<sup>27</sup> A previous version of this enhancement was allowed to sunset in 2018.<sup>28</sup>

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<sup>21</sup> Penal Code § 666.1.

<sup>22</sup> Penal Code § 666. The offense in § 666 was last updated by Proposition 47 in 2014, which narrowed the circumstances where it could apply. See Section 10 of Proposition 47.

<sup>23</sup> Penal Code § 490.3.

<sup>24</sup> Compare Penal Code § 490.3 with Penal Code § 487(e). The Legislature clarified the scope of § 487(e) in 2024. See AB 2943 (Zbur 2024).

<sup>25</sup> Penal Code § 12022.65(a).

<sup>26</sup> Penal Code § 12022.6(a)(1).

<sup>27</sup> Penal Code § 12022.6(a)(4).

<sup>28</sup> See Assembly Committee on Public Safety Analysis of AB 484 (Gabriel 2023), 3.