

APPELLANT'S PETITION FOR REVIEW

TO: THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE,
AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE STATE OF CALIFORNIA:

Appellant Ruben Erebia, pursuant to rule 28 of the California Rules of Court, respectfully petitions for review of the opinion in the above-captioned matter, filed on July 8, 2003, which is attached hereto as Appendix A. Appellant requests this court grant this petition, or, in the alternative, that it grant this petition and suspend briefing pending its disposition of *People v. Canty* (2002) 100 Cal.App.4th 903, rev. granted 10/16/02 (S109537/C039187.)

Questions for Review

1. Was appellant entitled to have the disposition of his conviction for transportation of a controlled substance set in accordance with the provisions of the Substance Abuse and Crime Prevention Act of 2000 (Prop. 36, General Elec. (11/7/00)), or was that enactment inapplicable because defendant was also convicted of misdemeanor driving under the influence of a controlled substance? (See Pen. Code, sec. 1210.1, subd. (b)(2).) The sub-issues to be addressed in resolving this question include:
 - (A) Should appellant, who is otherwise eligible for sentencing under Proposition 36, be found ineligible because he suffered a misdemeanor conviction for driving under the influence of drugs (Veh. Code, 23152, subd. (a)) in the same proceeding in which he sustained a conviction for nonviolent drug possession?
 - (B) Should a misdemeanor conviction for driving under the

influence of drugs remove appellant from eligibility for sentencing under Proposition 36, merely because it may involve the threat of physical injury to another?

- (C) Where it is undisputed that the misdemeanor was drug related and did not involve alcohol, should the misdemeanor offense for driving under the influence of drugs be classified as a non-violent drug possession offense for determining appellant's eligibility for sentencing under Proposition 36?
- (D) Where it is undisputed that the misdemeanor was drug related and did not involve alcohol, should the misdemeanor offense of driving under the influence of a drug be deemed to be a misdemeanor involving the use of drugs, or should it be treated as similar to offenses involving the use of drugs, for purposes of determining a defendant's eligibility for sentencing under Proposition 36?

(These issues are currently before this court in *People v. Canty* (2002) 100 Cal.App.4th 903, rev. granted 10/16/02 (S109537/C039187). Review has also been granted in *People v. Ayele* (2002) 102 Cal.App.4th 1276, rev. granted 1/15/03 (S111522/D038700); *People v. Walters* (2002) 103 Cal.App.4th 936, rev. granted 1/22/03 (S112291/B158090); *Trumble v. Superior Court* (2002) 103 Cal.App.4th 1011, rev. granted 1/29/03 (S112339/D039990); *Whatley v. Superior Court*, unpublished opinion, rev. granted 1/29/03 (S112361/D039989); *People v. Garcia* (2002) 103 Cal.App.4th 1228, rev. granted 2/11/03 (S112688/F039327); and *People v. Campbell* (2003) 106 Cal.App.4th 808, rev. granted 5/21/03 (S115020/H023299). Briefing in these cases has been deferred pending this court's decision in *Canty*.

Combined Statements of the Case and Facts

The opinion of the Court of Appeal sets forth the relevant facts.

(Slip Op. pp. 1-6.) Appellant was detained when the officer observed

the car appellant was driving traveling at a “slow rate of speed,” weaving within the lane, and at fluctuating speeds. (2/28/2002 R.T. p. 7.) On March 6, 2002, a jury convicted appellant of simple possession and transportation of methamphetamine, in violation of Health and Safety Code sections 11377, subdivision (a), and 11379, subdivision (a), respectively. (C.T. pp. 84, 160-161.) The jury also convicted appellant of being under the influence of methamphetamine in violation of Health and Safety Code section 11550, subdivision (a), and driving under the influence of methamphetamine, in violation of Vehicle Code section 23152, subdivision (a). (C.T. pp. 84, 162-163.) The trial court denied appellant’s request for treatment pursuant to Proposition 36.

Necessity for Review

Proposition 36

On November 7, 2000, the voters approved Proposition 36, the Drugs, Probation and Treatment Program Initiative. According to the Legislative Analysts overview:

This measure changes state law so that certain adult offenders who use or possess illegal drugs would receive drug treatment and supervision in the community, rather than being sent to prison or jail or supervised in the community, generally without drug treatment.

(Analysis of Legislative Analyst, http://vote2000.ss.ca.gov/VoterGuide/text/text_analysis_36.htm.)

The Legislative Analyst noted that the major change in the sentencing law affected by the initiative would be that a person convicted of a nonviolent drug possession offense would generally be put on probation. The Analysis continued:

The measure defines a nonviolent drug possession offense as a felony or misdemeanor criminal charge for being under the influence of illegal drugs or for possessing, using, or transporting illegal drugs for personal use. The definition excludes cases involving possessing for sale, producing or manufacturing illegal drugs.

(Ibid.)

The analysis also noted that some offenders would be excluded from treatment under the initiative:

This measure also excludes offenders convicted in the same court proceeding of a misdemeanor unrelated to drug use or any felony other than a nonviolent drug possession offense.

(Ibid.)

The initiatives proponents argued:

Proposition 36 is strictly limited. It only affects those guilty of simple drug possession. If previously convicted of violent or serious felonies, they will not be eligible for the treatment program unless they've served their time and have committed no felony crimes for five years. If convicted of a non-drug crime along with drug possession, they're not eligible. If they're convicted of selling drugs, they're not eligible.

(Argument in Favor of Proposition 36 http://vote200.ss.ca.gov/VoterGuide/text/text_yesarg_36.htm.)

Of course, the Voter Guide included the text of the proposed law

and the following:

SEC. 2 Findings and Declarations. The People of the State of California hereby find and declare all of the following:

(a) Substance abuse treatment is a proven public safety and health measure. Nonviolent, drug-dependent criminal offenders who receive drug treatment are much less likely to abuse drugs and commit future crimes, and are likelier to live healthier, more stable and more productive lives.

(b) Community safety and health are promoted, and taxpayer dollars are saved, when nonviolent persons convicted of drug possession or drug use are provided appropriate community based treatment instead of incarceration.

(c) In 1996, Arizona voters by a 2-1 margin passed the Drug Medicalization, Prevention, and Control Act, which diverted nonviolent drug offenders into drug treatment and education services rather than incarceration. According to a Report Card prepared by the Arizona Supreme Court, the Arizona law: is resulting in safer communities and more substance abusing probationers in recovery, has already saved state taxpayers millions of dollars, and is helping more than 75 percent of program participants to remain drug free.

SEC. 3 Purpose and Intent. The People of the State of California hereby declare their purpose and intent in enacting this act to be as follows:

(a) To divert from incarceration into community-based substance abuse treatment programs non-violent defendants, probationers and parolees charged with simple drug possession and drug use offenses;

(b) To halt the wasteful expenditure of hundreds of millions of dollars each year on the incarceration--and reincarceration--of non-violent drug users who would be

better served by community based treatment; and

(c) To enhance public safety by reducing drug-related crime and preserving jails and prisons cells for serious and violent offenders, and to improve public health by reducing drug abuse and drug dependence through proven and effective drug treatment strategies.

(http://vote2000.ss.ca.gov/VoterGuide/text/text_proposed_law_36.htm.)

The initiative passed, with the approval of 60.9 of the voting public. (<http://vote200.ss.ca.gov>Returns/prop/00.htm>)

The initiative added two sections, the interpretation of which is at the heart of this case. Penal Code section 1210.1 provides in relevant part:

(b) Subdivision (a) [making probation mandatory for specified offenders] does not apply to either of the following:

.....

(2) Any defendant who, in addition to one or more nonviolent drug possession offenses, has been convicted in the same proceedings of a misdemeanor not related to the use of drugs or any felony.

These terms of exclusion are defined in Penal Code, section 1210:

(a) The term nonviolent drug possession offense means the unlawful possession, use, or transportation for personal use of any controlled substance identified in Section 11054, 11055, 11056, 11057, or 11058[3] of the Health and Safety Code, or the offense of being under the influence of a controlled substance in violation of Section 11550 of the Health and Safety Code. The term nonviolent drug possession offense does not include the possession

for sale, production, or manufacturing of any controlled substance and does not include violations of Section 4573.6 and 4573.8

.....

(d) The term misdemeanor not related to the use of drugs means a misdemeanor that does not involve (1) the simple possession or use of drugs or drug paraphernalia, being present where drugs are used, or failure to register as a drug offender, or (2) any activity similar to those listed in paragraph (1).

Both the plain meaning of Penal Code section 1210 and the intent of the electorate in enacting Proposition 36 support the conclusion that driving under the influence is a misdemeanor related to and involving the use of drugs because of its similarity to such offenses. Accordingly, this court should grant review to establish that one who is convicted of such an offense should be deemed to be eligible for probation and drug treatment.

CONCLUSION

Based on the foregoing, appellant requests that this Court grant review and suspend briefing on the Proposition 36 issue, pending disposition in *People v. Canty, supra*.

DATED:

Respectfully submitted,

Word Count Certificate

Pursuant to rule 8.360(b)(1) of the California Rules of Court, I, [ATTORNEY NAME], appointed counsel for [APPELLANT'S NAME], hereby certify that I prepared the foregoing [NAME OF BRIEF] on behalf of my client, and that the word count for this brief is [####], excluding tables. This brief therefore complies with the rule which limits a computer-generated brief to 25,500 words. I certify that I prepared this document in [NAME OF COMPUTER WORD PROCESSING PROGRAM USED], and that this is the word count [NAME OF COMPUTER WORD PROCESSING PROGRAM USED] generated for this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[ATTORNEY NAME]