**Testimony of Judge Stephen Manley**
**Superior Court of California**
**County of Santa Clara**

Presented Before the Little Hoover Commission
August 23, 2007

Thank you for the invitation and opportunity to testify before this Commission. My remarks are my own and do not reflect the views or position of the Courts of California, the Administrative Office of the Courts, nor the Judicial Council of California. I base my comments on my experience of many years in directly supervising substance abusing offenders, including those participating in SACPA as well as offenders who are mentally ill.

I have been asked to address the following areas in relationship to the Criminal Justice System:

- The effectiveness of the state's policy responses to drug and alcohol addiction in California, and how the current policies should be reformed to improve outcomes.
- The effectiveness of SACPA, your perspective on the future of SACPA and what changes to SACPA you recommend to achieve its stated goals:
  - Preserve jail and prison capacity for serious and violent offenders;
  - Enhance public safety by reducing drug-related crime; and,
  - Improve public health by reducing drug abuse.
- The adequacy of SACPA for dually-diagnosed offenders and suggestions for reforms that could improve outcomes. Please discuss the prevalence of dually-diagnosed offenders, and the funding streams for treatment of mental health problems and substance abuse problems.
- Models to respond to drug abuse other than SACPA, such as drug courts and intermediate sanctions courts, and whether those models are compatible with SACPA.

A. <u>Existing State Policy Response and the Most Critical Reforms Needed</u>

There is no question in my mind that the Department of Alcohol and Drug Programs that is charged with implementing substance abuse policy in this State has made a concerted effort to do an effective job. The Department has been blessed with strong leadership, vision and, most importantly, an understanding and embracing of collaboration at the local level.

In earlier years, the focus of the Department was primarily on a "public health model" to deliver substance abuse services. However, as became increasingly apparent, beginning in the 1970's, substance abuse overwhelmed the Criminal Justice System, where the response was punitive, with little understanding of the dynamics of addiction. In the 1990's, we saw the first attempt to bring treatment into the Criminal

Justice System with the State directing funding to support Drug Courts as a treatment based response to substance abuse in the Courts, and the formation of a collaborative partnership between the Department of Alcohol and Drug Programs and the Administrative Office of the Courts through the Drug Court Partnership Act and the subsequent Comprehensive Drug Court Implementation Act.

Subsequently, the voters enacted SACPA. However, it is important to note that although this legislation is thought of as "treatment initiative", it is in fact a sentencing statute within the criminal justice system.

Other Legislative initiatives brought substance abuse treatment into our prisons and parole system.

Although this is a brief summary and oversimplification of the policy response of the State in criminal justice, what I have identified as the one major area where reform is critically needed is our failure to create a coherent treatment "system" in Criminal Justice substance abuse treatment that crosses all disciplines and all the separate "jurisdictions." In the field of Mental Health, with the Proposition 63 Initiative, we have seen the development of a concept that there should be "no wrong door." Whether that will prove to be true remains to be seen. However, the concept should apply equally to substance abuse in the criminal justice system. Daily I see offenders who do not receive treatment even though they would benefit from it because they came through the wrong door.

No one seriously argues any longer that punishment alone will stop substance abuse and addiction. However, without one system to deliver that treatment based on an assessment for treatment needs balanced against risk to the community, we end up with our existing multiple funding streams and programs. Moreover, we run the great risk, if policy does not change, that our present concerns relative to prison overcrowding will result in the State determining to buy treatment capacity for substance abusers that is already utilized by offenders on probation, rather than expand the treatment system so that more prisoners, parolees and probationers may enter it.

In sum, if there is one fundamental change that I suggest it is to end the compartmentalizing, and duplication of substance abuse treatment. We have scarce resources and we need to bring them together.

B. <u>The Effectiveness of SACPA, its Future and Recommended Changes</u>

I have worked directly with SACPA offenders on a daily basis and supervise Judges who have sentenced and reviewed the progress of these offenders for the past six years.

The effectiveness I have seen in the program across the State has been the creation of the collaborative effort that is needed to bring together treatment and criminal justice

is nearly every County, and affording treatment to thousands of offenders who had not received treatment in the past.

The effectiveness of SACPA in my own county, Santa Clara, where we were able to reach a 50% completion rate last year has been the result in my view of a very strong collaboration, and the utilization of the Drug Court model that places all SACPA offenders with a group of Judges on dedicated calendars, with ongoing reviews of progress and face-to-face interaction between defendants and Judges, as well as utilization of a system approach that includes our Drug Court, very active involvement of treatment, assessments and reassessments, changes in treatment plans based on drug testing and behavior in the community, case management, probation supervision, and extended time and opportunity for offenders to complete treatment. However, none of this would have been possible without the substantial commitment and expenditure of County General Fund dollars to supplement the SACPA allocation and the dedication of substantial resources, including those of the Courts, without reimbursement for those additional resources. Many counties and courts in this State are unable to make this additional county and court resource commitment.

I do not believe that there is presently convincing evidence on a statewide basis that SACPA has in fact met its goals to preserve jail and prison capacity for serious and violent offenders, enhance public safety by reducing drug-related crime, and improve public health by reducing drug abuse to the extent that demonstrates major progress.

The basis of my conclusion is as follows:

> We are all familiar with the research findings of UCLA that approximately 50,000 offenders are eligible for the program each year. Approximately 70% of eligible defendants make it to treatment each year, and that of the number who make it to treatment, approximately 32% complete treatment, or about one-quarter of all offenders eligible for this sentencing alternative. Many argue that we are working with substance abusers who suffer from a relapsing condition, not unlike similar re-occurring diseases, and that this completion rate is within the range of completion rates or compliance rates in any substance abuse treatment program, and similar diseases and medical conditions that lead to repeated relapse.
>
> However, I do not believe that policy makers will or should ever be satisfied with the argument that we must accept these outcomes as “the best that we can ever do”. This is certainly not true in the medical field where some of the most common re-occurring and relapsing medical conditions are the subject of ongoing research and the development of better interventions and treatments.
>
> Moreover, policy makers faced with funding a sentencing alternative that is premised on reducing prison and jail use, reducing drug related crime and reducing drug use, should be expected to ask for better results.

**Where are the shortfalls?**

One specific area that needs improvement is criminal justice data.

The main source of UCLA data on the criminal justice side is the Department of Justice. What is lacking is data at the trial court level. For example, we know that approximately 30% of all eligible SAPA offenders do not ever get to treatment. What we do not know is what happens to them? It appears to many that these individuals simply "slip through the cracks." Based on my experience, I do not believe that this is true. However, we should be able to answer this question, and to do so, evaluators need to drill down to the Court disposition level. Only then, can we begin to approach the issue of whether or not we can in fact improve outcomes as to this group of offenders.

We also need to know the disposition and ultimate sentencing of offenders who are disqualified from SACPA, and we do not have this data. How can we answer policy questions about reducing jail and prison populations so that beds may be utilized for serious and violent offenders unless we have data on those who do not complete treatment and probation or are found in violation of probation for a third drug related violation, or a non drug related violation, and probation is terminated?

UCLA makes the interesting finding that of those "comparison" offenders sentenced before SACPA went into effect, only 6.7% were sent to prison for felony drug offenses, 9.3% were sent to jail for felony drug offenses and 5.4% were sent to jail for misdemeanor drug offenses.[1]

It would be important to know what percentage of SACPA participants are in fact disqualified and what percentage of these SACPA "failures" are in fact sent to prison or jail each year, if we want to gauge the effect of this new policy on jail and prison capacity. We also need to know the average sentence received.

UCLA reports that the comparison group of "pre-SACPA" offenders was less likely to suffer a new drug arrest than SACPA participants 30 months after the conviction. However, the researchers felt that because the pre-SADCPA drug offenders were more likely to be sent to jail or prison they had less exposure time to be rearrested during the 30 month follow-up period because some were in custody for part of that period.[2] Again, the data that policy makers

[1] *Evaluation of the Substance Abuse and Crime Prevention Act, 2005*, 59 Longshore, et al. (2005)
[2] *Evaluation of the Substance Abuse and Crime Prevention Act, 2005*, 63-65 Longshore, et al. (2005)

need is a specific comparison of the number of new arrests during the period, as well as the actual time in custody for the two groups.

We do know that no county jails are reporting a decrease in the drug offender population, and prison admission data for new offenses is not presented in the UCLA reports.

We need to have solid data as to the number of misdemeanor and number of felons participating in SACPA by county. To date the only estimate of these numbers and percentages has primarily been through stakeholder surveys. However, we do know that there may be vast variations across the State and policy makers need to know whether resources are being shared equally, or felons are more likely than misdemeanants to receive the benefits of SACPA.

We also need to know what percentage of eligible defendants are "refusing" to participate in SACPA Statewide and by county because this may give us some information as to what happens to defendants who are eligible but never participate in the program.

There is another missing area that I believe needs to be included in any data about SACPA. Whether we review the UCLA evaluations, or simply observe what happens in the courtroom, we know that the "Pipeline Analysis" developed by UCLA in its evaluations[3] has a very important missing component. Drug offenders often go in and out of treatment and fail to appear in court. When they fail to appear in court, abscond for long periods of time, leave treatment, fail to report to their probation officers, etc., bench warrants are often issued for their arrest. The net result is that the offender is at some point in custody again, and in a not insubstantial number of cases in my experience has been rearrested on a new drug or other offense and is placed in custody for that reason as well. It would be very helpful to know the number of jail bed days that these defendants remain in custody. Of equal importance would be to have data as to the number of times that these defendants go in and out of SACPA treatment, and the length of time that they are actually in the treatment system and on probation. For example, we may find that SACPA offenders as a group spend far more time in treatment than we assume because there are many intervals of noncompliance followed by numerous readmissions. Knowing the amount of time that they actually spend in treatment will help us understand what the cost of treatment really is rather than rely on the present UCLA analysis that measures how many offenders received at least 90 days of treatment that they find is typical of criminal justice offenders who enter treatment.[4]

---

[3] *Evaluation of the Substance Abuse and Crime Prevention Act, 2005*, 6-9 Longshore, et al. (2005)
[4] *Evaluation of the Substance Abuse and Crime Prevention Act, 2004*, 10 Longshore, et al. (2004)

One size does not fit all.

SACPA was enacted with a flawed assumption that eligible offenders would be "non violent" offenders. This has not been the case. SACPA eligibility criteria have allowed serious and violent offenders to participate in a treatment program that lacks accountability and ties the hands of Judges to deny treatment to offenders who pose a risk to society. Some of these offenders might well benefit from treatment; however, they will never benefit from this program that lacks the level of accountability that is needed for this group of offenders. As to offenders who would not benefit from treatment and pose an ongoing risk to the public, Judges should be given the discretion to remove them from the program, and save the very limited resources for this program to treat other defendants.

Adversarial proceedings do not produce collaboration.

The SACPA program needs complete collaboration at the local level. However, as written, the statute creates a very "adversarial" court setting. This setting is ineffective with substance abusers and those addicted to drugs. Courts and Counties that are most effective in working with these offenders have relied on a non-adversarial approach that places emphasis on the offender to accept responsibility for his or her substance abuse and addiction and follow direction, that is supported by the entire team in and outside the courtroom, to modify behavior. These Courts and Counties have adopted as many elements as possible from the effective Drug Court model.

I believe that the "adversarial" nature of SACPA leads to poor outcomes because it once again assumes that "one size fits all" and fails to take into account that offenders who abuse drugs are not all the same in their use or level of addiction. For example, SACPA allows only three (3) drug-related violations of Probation (or "chances"). The experience of working with those addicted to drugs has taught me and is well supported by research and best practices that a high needs offender who is heavily addicted, and perhaps a daily user, will be expected to relapse and falter. He or she will need very close monitoring, drug testing and a high level of treatment intervention. This offender may well succeed if allowed to continue to receive SACPA treatment beyond a third drug related violation if Judges were given the discretion to continue the defendant in treatment based on an assessment and finding that the defendant would be amenable to treatment and not pose a risk to the public.

Funding for Proposition 36 does not relate to treatment and supervision needs.

SACPA was funded in a fixed amount for each of the first five years. The assumption was that offenders should not be kept in primary treatment for more than one year, and that the available modalities of treatment, with a

heavy emphasis on outpatient treatment which is the least costly, and "routine" probation supervision would meet what were assumed to be the limited treatment and supervision needs of these offenders.

In my experience and that of many other Judges and treatment providers whom I talk to across the State, this is not reality.

The offenders entering SACPA have far more treatment and supervision needs than were ever anticipated. First, many are at a high level of substance abuse, and that means that they often need the higher (and more expensive) levels of care including Residential Treatment, and Structured Sober Living Homes tied to intensive outpatient programs.

Added to this dynamic, is the fact that SACPA offenders go in and out of treatment, abscond, or are terminated by programs, and this leads to a large percentage of these offenders being in treatment and needing more intensive supervision long after the first year they entered treatment.

UCLA concentrates in their evaluations on the number of offenders "entering" treatment each year. What I have noted is that each year not only do we have a number of offenders closely equal to the same number who entered last year; we also have a substantial number of offenders who remain in primary treatment the next year who entered treatment in preceding years. Therefore, the number of "new" offenders each year is misleading as a basis for funding decisions.

When you combine these two factors, the lack of a "complete" treatment/supervision system with all modalities, including adequate residential, sober living with intensive outpatient treatment, as well as adequate probation supervision and testing, and a treatment population that grows larger each year as the local stakeholders attempt to improve outcomes, the net result may ultimately be poorer outcomes because of the lack of residential treatment and offenders being placed on banked probation caseloads with no supervision at all.

SACPA Lacks Accountability

One of the most important factors that drives up the cost of treatment and supervision in my view and observations is the lack of accountability in the SACPA program. An understanding of addiction leads to the conclusion that "denial" and "manipulation" are expectations in the disease of addiction and in the behavior of many substance abusers and addicts eligible under SACPA. Failure to follow through is also a "given" for many of them. We have also learned that early intervention and immediate response to behaviors by substance abusing offenders, whether they be positive or negative are essential

to successful outcomes, and that treatment providers are as interested in accountability as the Courts are.

SACPA ties the hands of Judges and does not permit them to intervene "at the earliest possible time". No action may be taken on first and second drug related violations of probation other than to modify treatment. Denial, manipulation and absconding from treatment and the court are encouraged when defendants know that there is no accountability.

It should not surprise anyone, that under these restrictions, SACPA offenders can be expected to fail to appear in court, fail to appear at treatment, fail to remain in treatment and fail to follow directions to enter a higher level of treatment when directed to do so.

The net result is that offenders go in and out of treatment, in and out of jail, and may remain on probation and in treatment far longer than should be necessary, with no increase in positive outcomes.

Most importantly, the effect is to drive up the cost of the program, both as to treatment and probation supervision, as well as court monitoring.

In this regard, it is interesting to note that a recent alternative to incarceration program implemented in Hawaii, and known as the Hawaii Opportunity Probation with Enforcement program relied on an approach that economized on scarce treatment resources by utilizing sanctions of a few days in jail to motivate compliance and accomplish a major goal that has been set out in Proposition 36 –reduce drug use.

According to the research of Angela Hawken of UCLA and Peperdine University this well-run testing-and-sanctions program resulted in a reduction in the rate of missed and "dirty" drug tests by more than 80%, and reduced the costs of treatment and probation supervision.

"The disease model of addiction is somehow supposed to imply that sanctions won't work, although the research on contingency management shows it to be an unusually effective treatment approach. And the people who treat drug abusers don't agree with the Prop. 36 purists: Over half of the treatment providers in a survey responded that sanctions would be a useful tool to aid treatment compliance."[5]

The essential point is that drug addiction is all about behavior modification and Judges can play an important role in facilitating this process. However, they cannot do so if they lack the essential treatment tools to hold defendants accountable to their treatment plans.

[5] *Hope from Hawaii*, Hawken and Kleiman (2006)

Parole

Parolees perform the poorest of all groups under SACPA. From a public policy standpoint this should be of great concern, because these offenders are the one group that if successful would allow SACPA to begin to live up to its promise of preserving prison capacity for serious and violent offenders.

Not only do they fail in treatment; more disturbing is the fact that approximately 60% were returned to prison.[6]

I believe that the basic cause of the failure of parolees in SACPA is that this is the one area that is a "bifurcated" treatment and supervision system within SACPA, with Corrections and the Board of Parole Hearings maintaining full and complete jurisdiction, while, at the same time, treatment must be provided by the county stakeholders. I suggest that the solution to this failure in SACPA is contained in my first recommendation, that we develop "one" system for treatment and supervision rather than disparate, duplicate and separate jurisdictions.

## Changes and the Future of SACPA

SACPA will remain a sentencing mandate regardless of whether or not outcomes improve, absent a change in the law. However, I believe that the continued funding for the program as well as funding at an appropriate level depends on a number of major changes taking place, and I have detailed a number of changes that I feel are necessary in my earlier testimony.

In addition, a group of stakeholders developed a detailed list of changes to the SACPA program that became law when the Legislature passed and the Governor signed Senate Bill 803. However, those changes are presently enjoined.

Separate from Senate Bill 803, the Legislature passed the Offender Treatment Program to improve outcomes under SACPA. I believe that this program provides a number of positive changes that could if properly funded and implemented take one step towards improving outcomes under SACPA. Those changes include:

(1) The establishment and maintenance of dedicated court calendars with regularly scheduled reviews of treatment progress for persons ordered to drug treatment.

(2) The existence or establishment of a drug court, and

[6] *Evaluation of the Substance Abuse and Crime Prevention Act, 2004*, 53 Longshore, et al. (2005)

Willingness to accept defendants who are likely to be committed to state prison.

(3) The establishment and maintenance of protocols for the use of drug testing to monitor offenders' progress in treatment.

(4) The establishment and maintenance of protocols for assessing offenders' treatment needs and the placement of offenders at the appropriate level of treatment.

(5) Enhancing treatment services for offenders assessed to need them, including residential treatment and narcotic replacement therapy.

(6) Increasing the proportion of sentenced offenders who enter, remain in, and complete treatment, through activities and approaches such as colocation of services, enhanced supervision of offenders, and enhanced services determined necessary through the use of drug test results.

(7) Reducing delays in the availability of appropriate treatment services.

(8) Developing treatment services that are needed but not Available.

All of these changes are needed to begin to improve outcomes in SACPA. However, they are meaningless unless properly funded.

<u>The Adequacy of SACPA for dually-diagnosed Offenders and Suggestions for Reforms</u>

If I have learned anything during these past years, it is the following: First, those defendants who suffer from co-occurring disorders can and do get better in appropriate community treatment; and second, by focusing "solely" on mental illness, or, in the alternative, "solely" on substance abuse, we only perpetuate the existing problems, we do not meet the needs of the individual, and defendants do not get better.

SACPA prohibits the expenditure of any funding under the SACPA trust fund to treat the mental illness of an eligible offender.

To assume that substance abuse is to be treated through SACPA, and mental illness through the mental health department does not reflect reality.

Mental Health uses a rigid diagnostic system based on serious mental illness and a "medical necessity test" that excludes individuals, while SACPA must accept all eligible offenders.

I suggest to you that what I see every day in the courtroom and in the courtrooms of my colleagues is this reality: A very substantial percentage of all defendants who are mentally ill and who are in our jails and prisons in California are substance abusers. National statistics bear this observation out. In a recent report that examined our prison and jail populations across the Country by the Bureau of Justice Statistics, 49% of State inmates who were mentally ill had a high rate of substance abuse.[7]

Research tells us that the only way to effectively work with individuals who have co-occurring disorders is to treat both conditions at the same time.

However, that is not what we do under SACPA nor under the Mental Health Services Act (MHSA) created by Proposition 63. To this very day in most counties we continue to have a separation between substance abuse and mental health treatment. We do not have a single assessment tool for co-occurring disorders, colocation of substance abuse and mental health treatment for this group of individuals, nor treatment plans that address each disorder together.

We should not allow the concepts of "turf", "special expertise", or "stigma" to stand as barricades to the correct diagnosis of the defendant with co-occurring disorders, nor set up barriers to appropriate treatment.

With the enactment of MHSA, there is no reason why that funding cannot be used to treat SACPA offenders with co-occurring disorders. This is a common sense systems approach.

I urge this Commission to make the following recommendations to the Legislature and Governor:

(1) Recognize that substance abuse is not only a co-occurring disorder, but an "expectation" in mental illness that MHSA funding is to be used to treat.

(2) Require Counties to demonstrate direct collaboration between the mental health department, and alcohol and drug department to assure that SACPA offenders with co-occurring disorders receive appropriate treatment by requiring county plans to demonstrate that Proposition 63 funding is utilized directly in conjunction with Proposition 36 funding to treat individuals and families with co-occurring disorders.

(3) Require every county plan to have a housing component that includes structured housing for those with co-occurring disorders with a staff trained

[7] *Bureau of Justice Statistics Report of Prison Populations,* 2006.

to work with these individuals and the availability of integrated substance abuse treatment and mental health treatment for each resident.

**Models to Respond to Drug Abuse in Addition to SACPA**

I would like to return to where I started, and that is to urge this Commission to give strong consideration to a "System" approach for substance abuse and addiction.

At this point we should understand that substance abuse to a great extent drives the criminal justice system. I think that we would take a major step forward when we stop viewing substance abuse as separate funding streams and programs.

I believe that the Courts are moving towards recognizing our responsibility to coordinate our own approach to substance abuse and sentencing.
What we need to do is take that coordination beyond the courthouse into Corrections and Parole, at the same time we bring Drugs and Alcohol and Mental Health, SACPA and Drug Courts together.

Next we need to move away from "traditional sentencing" whether it be following the determination of guilt, or on a violation of probation or parole that simply results in new jail or prison terms and/or return to jail or prison, or simply release with no meaningful follow-up to address the needs of the defendant, while we await the commission of a new crime.

I find the answer at the earliest point in which we may engage an offender in the Criminal Justice System, be it at arrest or conviction or revocation. We should start this engagement with an assessment that takes into account both the needs of the offender and his or her risk to the community, regardless of whether or not that offender is under the jurisdiction of the courts or parole.

I am a strong advocate for reentry courts, mental health courts, drug courts, dedicated SACPA courts, and all efforts by the courts, corrections and parole to bring substance abusers together for treatment.

I believe that we can accomplish that goal.

The critical point is to accept the fact that a good needs and risk assessment will result in placing an offender at the level of treatment and supervision that he or she needs, and, in fact will exclude those offenders who have no treatment needs and are primarily a substantial risk to society.

If you think of a "system" that is a continuum with diversion at the low end and drug courts at the high end, you are then in a position to place offenders at the level of treatment and supervision that they need. For example, a defendant, prisoner or parolee who is a low risk for public safety and has very low treatment needs should

be placed in a drug diversion program, while a defendant, probation violator or parole violator who has high needs and presents a higher level of risk should be placed in a Drug Court setting that is very structured and closely monitors participants. Between these two extremes many models can be fashioned, such as the one utilized in Hawaii, to offer specific low cost interventions that are more than diversion, but less than the level of treatment and supervision found in a drug court.

If the assessment instrument is utilized from the time of first arrest and conviction forward, it would follow the individual offender, and be available to be updated if the offender re-enters the system, and that instrument should be available in all parts of the criminal justice system:  courts, probation, jail, prison, parole.

California is an extreme example of what happens when alternative sentencing programs, prison reentry programs and risk/needs assessments are not properly implemented as part of a "system". California does not have a substantially larger population of non-violent prisoners who are incarcerated than other states. Our biggest problem has been the high recidivism rate of existing offenders, not "new offenders".

We are challenged in California because one component of sentencing alternatives that would begin with placement in custody programs to start the process of preparing for reentry are literally unavailable to us because the physical and programmatic infrastructure necessary has been overrun by the need to house prisoners.

It is time for California to intervene with substance abusers are the earliest point in time, utilize a standard needs/risk assessment, and provide alternative sentences for offenders previously simply incarcerated based on a sentencing report that does not adequately address these risks and needs, and does not consider the fact that at some point the offender will once again reenter the community.

I thank you for this opportunity to testify before you.

Respectfully,

Stephen Manley
Judge of the Superior Court