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August 4, 2016

DISTRICT ATTORNEY'S RESPONSE TO MENDOCINO COUNTY GRAND JURY
RE: *THE DISTRICT ATTORNEY'S MARIJUANA RESTITUTION PROGRAM*,
REPORT DATED MAY 13, 2016

Mendocino County's elected District Attorney, David Eyster, respectfully submits the following timely response to the 2015-2016 Mendocino County Grand Jury report entitled, *The District Attorney's Marijuana Restitution Program,* dated May 13, 2016. As required by law, the response has been prepared by the District Attorney and his staff. Taken as a whole, **this Grand Jury report is an informative and good report**, with certain caveats that will be specifically identified and addressed below.

While utilizing illegal marijuana as its primary focus, this Grand Jury report shines a light on one topical area of plea and sentencing bargains. "Plea negotiation, with bargains duly honored, is a device necessary to administration [of justice] if a steady flow of guilty pleas is to be maintained." (*People v. Cardoza* (1984) 161 Cal.App.3d 40, 42, internal citations omitted.) As the California Supreme Court observed, "The benefit to the defendant from a lessened punishment does not need elaboration; the benefit to the state lies in the savings in cost of trial, the increased efficiency of the procedure, and the further flexibility of the criminal process." (*Hoines v. Barney's Club, Inc.* (1980) 28 Cal.3d 603, 613; *People v. West* (1970) 3 Cal.3d 594, 613; *People v. Cardoza*, *supra*, 161 Cal.App.3d at p. 42 ["the state has an interest in settling criminal cases by means more economical than litigation"].) "The process of plea bargaining … contemplates an agreement negotiated by the People and the defendant and approved by the court." (*People v. Alvarez* (1982) 127 Cal.App.3d 629, 633, internal citations omitted.) "The nature of a plea bargain … places the interpretation of the agreement generally within the purview of contract principles, including the principles of public policy. (*Ibid.*) "As a general proposition, `courts will not compel parties to perform contracts which have for their object the performance of acts against sound public policy." (*Moran v. Harris* (1982) 131 Cal.App.3de 913, 918.)

As discussed by one court, "`Public policy' is a vague, somewhat troublesome and malleable expression. Frequently it has been defined in conclusory or visceral terms. For example, `public policy means the public good.' But it is exactly because of this subjective, amorphous definition and the variations of human response to the same facts, depending upon philosophical or psychological perceptions of those involved, that courts have been cautious to blithely applying public policy reasons to nullify otherwise enforceable contracts." (*Moran, supra,* 131 Cal.App.3d

at pp. 919.) "[P]ublic policy … encourages the making of contracts … and courts so recognizing have allowed parties the *widest latitude* in this regard. (*Ibid.)* It bears significant emphasis that the California Supreme Court, long ago, determined that local prosecutors enjoy a wide latitude in the administration of plea agreements, and a prosecutor's motivation in securing a plea bargain is, itself, "consistent with public policy." (*Hoines v. Barney's Club, Inc., supra,* 28 Cal.3d at 610, 613.)

With the above opening comments and citations, we next move on to the errata found in the report:

GJ Section: SUMMARY
Page: 1
Sentence: "As of March 2016, the total amount of marijuana-related restitution funds received by Mendocino County since program inception is approximately $7.5 million."

Correction: Restitution monies received from program inception through April 2016 by the Mendocino County Sheriff ("the county") is just under $7.1 million, not the $7.5 million the Grand Jury reported. However, the mistake is probably due to an addition error of including the $462,035 received during the same time period by other local non-county law enforcement agencies (i.e., local police departments, etc.)

GJ Section: FACTS AND DISCUSSION
Page: 3
Sentence: "In other California counties, the County Counsel prosecutes defendants to recover restitution."

Correction: It is difficult to tell whether this statement is one of fact or of what is possible. The individuals appointed to serve as the County Counsel in the 58 California counties have statutory authority – as do the elected District Attorneys in the same 58 counties -- to exercise his or her discretion to file civil actions to recover drug-related and other restitution. In the drug-related context, a County Counsel, if asked by a county law enforcement agency to so act, may opt to proceed with civil litigation to pursue restitution pursuant to Health and Safety Code § 11470.1. Likewise, a District Attorney may, in his or her separate discretion, also opt to proceed under the same statute (civil litigation) but is not required to do so. The District Attorney, however, has an additional arrow in his or her quiver that County Counsel does not have. The District Attorney may opt to pursue restitution in the drug context under Health and Safety Code § 11470.2 (criminal petition or stipulation).

While statutory authority exists for a County Counsel to pursue civil litigation as the Grand Jury report mentions, the Mendocino County DA is not aware that such litigation is a workload priority that the various County Counsel regularly (or irregularly) initiate and pursue, if at all. The reason for this may be the expense, inherent inefficiencies, and lengthy delays that are often part and parcel of civil litigation.

GJ Section: FACTS AND DISCUSSION
Page: 6
Sentence: "Payment plans are no longer offered to defendants although they were permitted in the past."

Correction: This is incorrect. As a matter of policy and planning, payment plans have never been a planned part of the process. One defendant was allowed to make payments when a deputy prosecutor handling a case inadvertently authorized it. This aberration thereafter presented as a fine example of why payment plans are not offered as they are not cost and resource-effective. The legal resources (time and money) subsequently expended to enforce the court's restitution order in that one case were significant.

Grand Jury Findings:

GJF #1. The marijuana restitution program has proven effective in meeting its intended goals.

District Attorney's Response:

The District Attorney agrees with this finding. Though extremely demanding on the District Attorney's time, the program has exceeded original hopes and expectations in many regards.

The District Attorney also appreciates the positive evaluations and legal observations made regarding the restitution program by those in academic circles, including the comments by University of California – Hastings College of Law Professor David Levine[1], and Ohio State University – Moritz College of Law Professor Douglas A. Berman.[2]

[1] http://www.uchastings.edu/faculty/levine/index.php: **Professor Levine**: "University of California Hastings law professor David Levine says the program is a "reasonable" way to clear court dockets in counties like Mendocino, where marijuana isn't a high priority. Keeping people out of prison — whether they serve time in county jails or receive probation — is a way to save state taxpayers huge amounts of money, he says. "It's very expensive to make people our guests in these state prisons," Levine says. With marijuana crimes a "low danger to society," he says, "it seems like a smart thing to do."
http://www.northcoastjournal.com/humboldt/get-out-of-jail-for-a-fee/Content?oid=3538233

[2] http://moritzlaw.osu.edu/faculty/professor/douglas-a-berman/: **Professor Berman**: "Regular readers should not be at all surprised that I am inclined to praise Mendocino County DA for engineering a seemingly more efficient and perhaps more effective way to

GJF #2. **Because the DA did not provide evidence to the Grand Jury of the existence of a program to assist indigent offenders, the Grand Jury was unable to reach a finding regarding such a program.**

District Attorney's Response:

The District Attorney disagrees with this finding because "evidence," as that word is commonly used in courts and all administrative evidentiary hearings, was presented to the Grand Jury. The evidence heard by the Grand Jury was testimony offered by the DA. In statements to the Grand Jury, the DA was forthright that he had in several cases considered financial declarations submitted by offenders or their attorneys so he (the DA) could assess the viability of receiving restitution from a particular marijuana offender who was claiming poverty. This Grand Jury finding (GJF #2) would have made more sense if it had written that the Grand Jury was interested in having access to documentary evidence (as will be discussed below) that the DA did not have the resources and time to go mining for.

The District Attorney also believes this finding by the Grand Jury to be inartful, at the very least, and contrary to long-standing legal precedent. To that end, the following additional commentary is provided:

Long-standing California appellate decisions on indigent dispensation almost always involve reducing or waiving a poor person's court fees, not reducing or waiving his adversary's costs and expenses (restitution). (*Isrin v. Superior Court* (1965) 63 Cal.2d 153; *Majors v. Superior Court* (1919) 181 Cal. 270; *Martin v. Superior Court* (1917) 176 Cal. 289; *Emerson v. Superior Court* (1938) 29 Cal.App.2d 539; *Alexander v. Superior Court* (1938) 29 Cal.App.2d 538; Gomez v. Superior Court (1933) 134 Cal. App. 19 (disapproved in *Isrin v. Superior Court*, *supra*.); *Willis v. Superior Court* (1933) 130 Cal. App. 766; *Rucker v. Superior Court* (1930) 104 Cal. App. 683; *Jenkins v. Superior Court* (1929) 98 Cal. App. 729; *Hammond v. Justice's Court* (1918) 37 Cal. App. 506; *Wait v. Superior Court* (1917) 35 Cal. App. 330.)

Based on many years of criminal law experience, it is asserted that the vast majority of individuals involved in illegal marijuana activity in Mendocino County are committing marijuana-related crimes of such a size that investigating law enforcement officers have no choice but to engage in eradication and then submit documenting crime reports to the DA for charging review. These individuals are generally not indigent, as that word is commonly defined

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wage the modern drug war. Indeed, given the muddled mess that is both California's medical marijuana laws and the opaque federal enforcement of prohibition in that state, this "Mendocino model" for modern marijuana enforcement for lower-level marijuana cases strikes me as a very wise way to use prosecutorial discretion and triage prosecutorial resources."
http://sentencing.typepad.com/sentencing_law_and_policy/2014/05/california-da-tries-to-make-sure-marijuana-crime-does-not-pay-by-making-the-criminals-pay-for-reduce.html

in any English dictionary, and as used in courts of law across the United States. The evidence seen in most illegal marijuana-related crime reports that have been submitted to the DA generally reveals, for example, the expenditure of significant financial resources to acquire land, machinery, vehicles, high intensity lights, greenhouses, drip irrigation systems, timers, electrical panels, soil, amendments, fertilizer, and/or payroll for laborers. Often large sums of unexplained money may be found in the course of these law enforcement investigations. Additionally, the individuals having discussions with the DA about charging options – either personally or through an attorney -- are normally not the field laborers (trimmers, aka "trimmigrants"); rather, the people participating in plea and sentence negotiations are property owners, site managers, labor recruiters, the mid and upper level entrepreneurs, and other principals who become entangled with marijuana for many of the wrong reasons.

While it is not disputed that some arrestees have claimed poverty as an attempted shield against having to pay restitution, very few of these arrestees have been willing to fill out financial declarations under penalty of perjury that would expose their finances and financial well-being to confirmatory investigation. In that context, approximately six individuals who sought participation in the 11470.2 program have submitted financial information seeking reduction in the formulaic calculation and assessment of restitution. While the current DA has attempted to compile all manner of information and statistics that never before have been kept, a listing of marijuana-related arrestees who have claimed directly or through their counsel to be poor with no financial resources is not a category of information for which statistics have been maintained. The reality is that everybody claims to one degree or another to lack financial resources; we often never know with absolute certainty who is telling the truth in this regard. The District Attorney relies on his judgment, honed by 31 years experience as a prosecutor, civil litigator, and criminal defense attorney – complimented by invited input from the arrestee's attorney during confidential and private settlement negotiations -- to exercise his constitutionally-authorized discretion in deciding what financial claims should be considered true or not.

More to the point, after hearing from the DA, the Grand Jury then wanted to see the list of offenders who at some point had claimed to be indigent, along with copies of all financial declarations or other documents submitted during the last five years by such claimants. To satisfy this request, the DA and his staff would have been required to pull files from archives and go through over 500 individual case files and crime reports to confirm the DA's approximation (6), a number that equates to approximately 0.012% of all offenders who have engaged in the 11470.2 program to any degree. Given the office staffing levels, as well as the time and resources that would have been needed to find the six proverbial needles in the haystack, the DA made a business decision that it was not a wise use of taxpayer dollars to attempt such a large scale search for so little a benefit.

That having been said, it should be clear to all – including the Grand Jury -- that evidence comes in many forms. It was suggested to the Grand Jury by the DA that the Grand Jury could more economically obtain corroborating information on the poverty question by talking to at least two

local criminal defense attorneys who it was believed had presented financial documentation to the DA on behalf of one or more of their marijuana clients. It remains unclear whether the Grand Jury contacted these private attorneys (Keith Faulder and Robert Boyd) to corroborate the existence and availability to offenders and defense attorneys of the discussed financial review by the DA.

Since it will never be known what follow-up the Grand Jury undertook, if any, or whether or not one or both of these attorneys were even contacted, it is relevant to note that a local newspaper reporter did exactly that which was suggested to the Grand Jury. Bruce McEwen, the courthouse reporter for the Anderson Valley Advertiser, asked the question and obtained a written response from at least one of the defense attorneys to the same question the Grand Jury was seeking additional information – that question being whether there is corrobation that the DA has in the past and continues to be willing in the future to considered financial documents and information when presented with a claim of poverty by an illegal marijuana participant engaged with the DA in negotiating a disposition and setting the amount of restitution to be ordered for illegal marijuana activity.

In his article entitled, *The Poor Hippie Myth*[3], dated May 25, 2016, Mr. McEwen wrote,

> [T]he only source for comment we have is the estimable [private criminal attorney and Superior Court-elect Keith] Faulder who sent me the following email on the topic: **"About 20% of my cannabis cases are pro bono, which means the client cannot pay me, let alone thousands of dollars to negotiate a misdemeanor with the DA. Eyster has at times agreed to a misdemeanor disposition for those clients if they do a declaration with documentation [tax records, income and expense records] of their indigence."**

The Grand Jury had the opportunity to seek and obtain the same evidence that Mr. McEwen wrote about, and as quoted in relevant part above. The availability of a process to claim being an indigent and to document same during 11470.2 discussions with the DA has always existed, though the Grand Jury did not have an opportunity to see and pore over the very limited number documents that had been submitted and considered in the last five years.

The Grand Jury recommends that:

GJR #1. The DA continue the marijuana restitution program as long as it is pertinent to State statute and County ordinance. (F1, F3)

[3] http://theava.com/archives/56587

District Attorney's Response:

The District Attorney appreciates this vote of confidence from such an august body. The District Attorney will continue his ongoing evaluation of all criminal and civil programs conducted through his office, including the 11470.2 restitution program, in order to ensure that he and his professional staff are meeting constitutional muster.

GJR#2. The District Attorney institute and demonstrate a publicly visible program to assist those who truly cannot afford to pay restitution. (F2)

District Attorney's Response:

The District Attorney does not agree with this recommendation and will not be fixing that which has already been implemented and is not broken. As further comment, and as also noted in the response to F2 above, the DA has no need to institute and/or demonstrate something that already exists.

Further, settlement negotiations are well-within the legal discretion of the prosecutor and such negotiations are only truly effective when conducted in a private and confidential setting that allows the parties to freely engage in wide-ranging and frank discussions. It is not possible to engage in private and confidential discussions and have those same discussions be "publicly visible."

Third, in pointing out a conflict in the wording of the Grand Jury recommendation, it is noted that it is not the District Attorney's role or obligation in the criminal justice system to "assist" law breakers who have gambled on illegal ventures and, when caught, naturally seek to mitigate punishment and/or financial loss – sometimes through truthful means and other times by subterfuge. While the Mendocino County DA has and will continue to be open to receiving and evaluating all relevant information in the course of plea and sentence negotiations, it should never be overlooked that even the poorest defendant does not have a constitutional or other right to escape or parse the environmental and other costs caused by his or her criminal misconduct.

Finally, it is respectfully asserted that our collective sense of justice is better served when like-situated defendants are treated with consistency from case-to-case, including consistency in the calculation and payment of court-approved restitution. Consistency has from the start been one of the watchwords that characterize the 11470.2 program, a consistency that was not present in the context of marijuana prosecutions prior to 2011.

C. David Eyster
Mendocino County District Attorney

cc: Mendocino Co. 2015-2016 Grand Jury and Presiding Judge, Mendocino Co. Superior Court