

THE DISTRICT ATTORNEY'S MARIJUANA RESTITUTION PROGRAM

SUMMARY

In 2011, the Mendocino County District Attorney (DA) instituted a program that, under certain circumstances, permits alleged felony offenders of State and County marijuana laws to accept a misdemeanor charge after first paying restitution as allowed by Health and Safety Code §11470.2¹. As of March 2016, the total amount of marijuana-related restitution funds received by Mendocino County since program inception is approximately \$7.5 million. Known as the DA's *11470.2 Program*, supporters of the program cite its effectiveness in clearing prosecutorial and judicial case backlogs, freeing space in the County Jail, and easing resources in the Probation Department. Critics deem it “pay for play” and claim that it gives undue preferential treatment to those having the money to pay the fees, thus discriminating against those who cannot pay.

BACKGROUND

An investigation was internally generated by the Grand Jury, not in response to a complaint by the public although a complaint was later received on this topic. The intent was to determine the validity of concerns expressed by members of the public and certain public officials of the propriety of the marijuana program.

METHODOLOGY

The Jury interviewed members of the offices of the DA, Sheriff, Probation, Public Defender, County Executive, and Mendocino County Court Collections; a private criminal defense attorney; a member

¹ See Appendix A – HSC 11470.2

² Note that there are other forms of restitution used in criminal justice, including but not limited to restitution to

of the public who submitted a related complaint. The County Public Defender failed to attend a scheduled meeting with the Grand Jury and did not return phone calls to reschedule. The Jury also reviewed documents from the Office of the DA and pertinent State statutes. Two members of the Jury were recused from any participation in this investigation.

FACTS AND DISCUSSION

Upon first taking office in 2011, the now incumbent DA was faced with a reported 500 (approximately) open felony cases for violations regarding marijuana. The DA has stated that the average time to resolve a marijuana related case was 15 months at that point. That situation placed a heavy burden on the resources of the DA as well as the courts, the County Jail, and the County Probation Department—resources needed to deal with more serious felonies such as murder, rape, and other violent crimes.

The DA determined to approach marijuana prosecutions from a different legal perspective. Rather than prosecuting most such cases in the courts as felonies, the DA would exercise prosecutorial discretion to offer plea reductions to certain defendants down to misdemeanors in exchange for “restitution” of law enforcement costs associated with their pre-arrest conduct, investigation expenditures, and expenses of seizure, storage and/or contraband destruction.² The legal basis for the program is Health and Safety Code (HSC) §11470.2, which allows for the restitution of costs incurred in the enforcement of laws regarding controlled substances. The DA has broad discretion to prosecute criminal misconduct at any level of prosecution (infraction, misdemeanor, or felony) using any California state statute that the DA deems fits the circumstances.

² Note that there are other forms of restitution used in criminal justice, including but not limited to restitution to the victims of crime. This report addresses ONLY restitution in marijuana cases and conducted under HSC §11470.2.

The goals of the marijuana restitution program are to address criminal conduct in Mendocino County relation to non-medical marijuana, in a way that reduces:

- DA and Superior Court case loads (which in turn likely also mitigates some part of public defense attorney caseloads),
- jail population,
- probation workload, and
- marijuana-related recidivism.

After some research and analysis, and in consultation with the County Sheriff, County Counsel, and the County Major Crimes Task Force, the DA set the standard amounts for restitution as follows:³

- \$50 per marijuana plant
- \$500 per pound of processed marijuana
- \$100 per pound for shake (marijuana leaves rather than buds)

It should be noted that despite opposition from some sources, the Mendocino County Superior Court has allowed this marijuana restitution program to proceed, and that there has been no contrary ruling on it by appellate courts. The program is unique to Mendocino County—no other California county has a similar program. In other California counties, the County Counsel prosecutes defendants to recover restitution.

³ There has been criticism of these amounts either as being insufficient or, conversely, being excessive. However, every disposition under the restitution program is accompanied by a written stipulation executed by the defendant and/or his/her attorney waiving an itemized accounting of law enforcement expenses, and agreeing the amount of restitution sought and paid is reasonable for all purposes.

The DA personally evaluates and negotiates, where appropriate, all marijuana cases and determines which alleged offenders may be eligible for and offered the program according to a number of criteria. With a few exceptions, only first-time adult offenders are eligible to participate in the marijuana restitution program. Moreover, the DA takes into account past criminal history, Department of Motor Vehicle records, and whether firearms were involved and indicators of remorse and/or a willingness to comply with the law in the future. More specifically, the DA normally does not offer the restitution option if any of the following factors apply:

- Children are involved.
- The crime took place on public lands.
- The crime involved trespass.
- The crime included the theft of resources such as water or electricity.
- Degradation of environmental resources occurred during the course of the crime.
- The violation involved “**pure profiteering.**”⁴

After reviewing a report and deciding the arrestee may be eligible for the restitution program, the DA offers to meet with the arrestee and/or his or her attorney to exchange information, which serves as an opportunity for the arrestee and/or his or her attorney to provide exculpatory information that may be used in the DA’s final charging decision. If the arrestee’s conduct, (though not considered to have been legal), is deemed eligible for restitution program participation, the program conditions are discussed and explained. The defendant is then given ten days to consider the offer and respond. Note that alleged offenders are not eligible at this point to have a public defender appointed to represent them because the DA has yet to actually charge them with a crime.

⁴ The DA stated “the restitution program is more geared for people higher in the structure and hierarchy of an illegal marijuana grow, such as a foreman, labor recruiter, middle and upper management, and owner principals.”

If the defendant accepts the offer to pay restitution then additional time is allowed (usually 45 days) for the restitution to be paid to the initiating law enforcement agency. The DA prepares two documents: 1) a proposed probation order and 2) a stipulation and order supporting the payment of restitution. The Superior Court Judge hearing the case must approve both. If the defendant declines to participate in the restitution program, then the DA proceeds with traditional prosecution.

The average amount of restitution per case is \$14,435. A case may have multiple defendants who each pay varying amounts of the total restitution amount for the case. A trimmer may pay no restitution; whereas principles in the marijuana grow operation may pay the entire restitution amount for the case. The other probation requirements recommended to the Superior Court judge before whom the parties appear typically include:

- Two-years court probation also known as summary or informal probation (as opposed to Adult Probation Department supervision),
- 100 hours or more of community service, monitored by Mendo-Lake Alternative Services, Inc.,
- A Fourth Amendment waiver (no search warrant required) of a defendant's residence, his car, and of property under his or her control, which is applicable to all locations and property normally requiring a search warrant, and
- Court costs and fees.

In addition, assets associated with the offense, including weapons, are forfeited. Those who successfully participate in the program may be able to receive automatic expungement of their case records after two years pursuant to HSC §11361.5. The combined plea and sentence bargain may not prohibit the offender from continuing to grow or possess medical marijuana for their personal use as

may otherwise be authorized by HSC §11366.5 (the State medical marijuana law) and Mendocino County Ordinance 931.

Restitution payment must be made in full before arraignment. Payment plans are no longer offered to defendants although they were permitted in the past. The Superior Court does allow installment payments for court fees – at an additional \$45 cost. Inability to pay restitution may result in ineligibility to participate in the program. Despite an assertion otherwise, the DA declined to provide records documenting any provisions for the truly indigent. The DA also states that most low-level offenders, e.g., “trimmers,” are typically charged only with misdemeanor violations under HSC §11366.5 as a matter of course.

Payments are normally received, receipted and deposited by the arresting agency (Sheriff, city police departments) and a copy of the receipt is forwarded to the DA for recording in a spreadsheet that is shared by the DA and that agency. Any large amounts of cash received in payment to a law enforcement agency are immediately deposited in the bank. The DA monitors the receipt of restitution payments. Although the DA provided documentation of the legal basis for the program and charging/sentencing recommendations⁵, the Jury was unable to obtain any other written procedures or policies concerning operation of the program from the Office of the DA.

Marijuana restitution payments are an attempt to recover costs of law enforcement and all marijuana restitution funds go to the law enforcement agencies involved in the enforcement action. The DA’s Office does **not** receive restitution funds. Currently, payments to the Sheriff’s Office from the program are in excess of \$100,000 per month for a total of approximately \$7 million. During County budget

⁵ See Appendix B – Marijuana Restitution Sentencing Recommendations (Jan 2015).

development, the Sheriff's budget is decreased by some or the entire amount of the restitution funds estimated for the next year. Thus, although the program is intended to be revenue neutral for law enforcement agencies, the County as a whole benefits financially. This year's projection for receipts is \$1.5 million, but typically the amount actually received has been above the amount projected.

Since its inception, more than 500 defendants have participated in the program. The DA's office reports that the recidivism rate for those participating in the program is 10% as opposed to the overall recidivism rate of 40% for all convicted defendants in the County. Moreover, the average time for a marijuana case from arraignment to disposition is now 120 days, including those that go to court. Furthermore, the program has resulted in reducing jail crowding, workload for Probation, and court backlog.

The marijuana restitution program has had both supporters and critics. County law enforcement officials, as well as some County supervisors tend to support it. So do some academics specializing in criminal justice. For example, University of California Hastings law professor David Levine has called it reasonable, noting that "It's very expensive to make people our guests in these state prisons," and stating that "it seems like a smart thing to do."⁶ However, others are critical, deeming it to be "pay for play." This includes a Mendocino County Superior Court Judge who during a restitution hearing for a man with an 800-plant grow criticized it as "extortion of defendants."⁷ Nevertheless, as stated earlier, other County Judges have approved the terms of over 500 restitution settlements and, as of yet, no State appellate court has ruled against the program.

⁶ "Get Out of Jail for a Fee," *North Coast Journal*, January 28, 2016.

⁷ "Mendocino County D.A. takes a new approach to marijuana cases," *Los Angeles Times*, May 25, 2014.

FINDINGS

- F1. The marijuana restitution program has proven effective in meeting its intended goals.
- F2. 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.
- F3. The program does not provide **additional** funds for law enforcement but instead reimburses law enforcement for costs associated with apprehension of offenders or abatement of illegal grows. However, County government as a whole benefits from an additional source of revenue.

RECOMMENDATIONS

The Grand Jury recommends that:

- R1. The DA continue the marijuana restitution program as long as it is pertinent to State statute and County ordinance. (F1, F3)
- R2. The DA institute and demonstrate a publicly visible program to assist those who truly cannot afford to pay restitution. (F2)

RESPONSES

Pursuant to Penal Code §933.05, responses are *required* from the following individuals:

- The District Attorney (All Findings and Recommendations)
- The Sheriff (F3)
- The Chief Executive Officer (F3)

Reports issued by the Civil Grand Jury do not identify individuals interviewed. Penal Code §929 requires that reports of the Grand Jury not contain the name of any person or facts leading to the identity of any person who provides information to the Civil Grand Jury.

It may be noted that the District Attorney's report of August 22, 2011, entitled *Marijuana/Cannabis & H&S 11470.2 Dispositions*, may be found as a link on the Grand Jury's 2015-16 Report Webpage.

APPENDIX A
Health and Safety Code §11470.2

- (a) In lieu of a civil action for the recovery of expenses as provided in Section 11470.1, the prosecuting attorney in a criminal proceeding may, upon conviction of the underlying offense, seek the recovery of all expenses recoverable under Section 11470.1 from:
- (1) Any person who manufactures or cultivates a controlled substance or its precursors in violation of this division.
 - (2) Any person who aids and abets or who knowingly profits in any manner from the manufacture or cultivation of a controlled substance or its precursors on property owned, leased, or possessed by the defendant, in violation of this division. The trier of fact shall make an award of expenses, if proven, which shall be enforceable as any civil judgment. If probation is granted, the court may order payment of the expenses as a condition of probation. All expenses recovered pursuant to this section shall be remitted to the law enforcement agency which incurred them.
- (b) The prosecuting attorney may, in conjunction with the criminal proceeding, file a petition for recovery of expenses with the superior court of the county in which the defendant has been charged with the underlying offense. The petition shall allege that the defendant had manufactured or cultivated a controlled substance in violation of Division 10 (commencing with Section 11000) of the Health and Safety Code and that expenses were incurred in seizing, eradicating, or destroying the controlled substance or its precursors. The petition shall also state the amount to be assessed. The prosecuting attorney shall make service of process of a notice of that petition to the defendant.
- (c) The defendant may admit to or deny the petition for recovery of expenses. If the defendant admits the allegations of the petition, the court shall rule for the prosecuting attorney and enter a judgment for recovery of the expenses incurred.
- (d) If the defendant denies the petition or declines to admit to it, the petition shall be heard in the superior court in which the underlying criminal offense will be tried and shall be promptly heard following the defendant's conviction on the underlying offense. The hearing shall be held either before the same jury or before a new jury in the discretion of the court, unless waived by the consent of all parties.
- (e) At the hearing, the burden of proof as to the amount of expenses recoverable shall be on the prosecuting attorney and shall be by a preponderance of the evidence.
- (f) For the purpose of discharge in bankruptcy, a judgment for recovery of expenses under this section shall be deemed to be a debt for willful and malicious injury by the defendant to another entity or to the property of another entity.

APPENDIX B

District Attorney 11470.2 Misdemeanor Dispositions:
Standardized Sentencing Recommendations (January 2015)

H&S § 11357(c) – Possession of more than one ounce of marijuana

Two (2) years summary probation:

- Community Service, as stated on the record;
- Search and Seizure (4th Amendment waiver);
- H&S 11470.2 restitution, as stated on the record;
(addressed as a condition precedent and by written stipulation);
- No possession or cultivation of marijuana without a valid and written physician's 215 recommendation and then only in compliance with same;
- No cultivation in Mendocino County without mandatory compliance with the 9.31 ordinance and Sheriff's zip tie program (meaning a zip tie is required for one plant or more);
- Marijuana and other contraband forfeited;
- Obey all laws;
- Aggregate court fines and fees = \$245.00

\$150 Victim Restitution Fine
\$40 Security Fee
\$30 Conviction Fee
\$25 Booking Fee

H&S § 11366.5 – Maintaining a place where controlled substances manufactured, stored and/or cultivated.

Three (3) years summary probation:

- Community Service, as stated on the record;
- Search and Seizure (4th Amendment waiver);
- H&S 11470.2 restitution, as stated on the record;
(addressed as a condition precedent and by written stipulation);
- No possession or cultivation of marijuana without a valid physician's 215 recommendation and then only in compliance with same;
- No cultivation in Mendocino County without mandatory compliance with 9.31 ordinance and Sheriff's zip tie program (meaning a zip tie is required for one plant or more);
- Marijuana and other contraband forfeited;
- H&S 11590 registration required;
- Obey all laws;
- Aggregate court fines and fees = \$1,005.00

\$570 Drug Program Fee
\$190 Criminal Lab Fee
\$150 Victim Restitution Fine
\$40 Security Fee
\$30 Conviction Fee
\$25 Booking Fee