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August 16, 2004

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AUG 24 2004

The Honorable Bruce A. Clark
Presiding Judge of the Superior Court
County of Ventura Hall of Justice
800 S. Victoria Avenue
Ventura, California 93009

VENTURA COUNTY GRAND JURY

Re: **Response to the Ventura County 2003-2004 Grand Jury report entitled *Ventura County Proposition 36 Implementation***

Dear Judge Clark:

As required by California Penal Code section 933.05, this letter is a response to the findings and recommendations of the Ventura County 2003-2004 Grand Jury report entitled, *Ventura County Proposition 36 Implementation* (hereinafter "Grand Jury Report").

I concur with the findings of the Grand Jury, with the following additional comments.

Response to Findings

F-15: If a non-violent drug offender chooses not to participate in Prop 36 treatment, another treatment option is available under the Penal Code. In the pre-plea diversion statute and program ("Diversion"), a defendant may plead guilty to a non-violent drug usage offense and receive a "deferred entry of judgment" in order to obtain drug treatment. According to the statute, "The period during which deferred entry of judgment is granted shall be for no less than 18 months nor longer than three years." The courts closely monitor the defendant's progress, and the criminal charge or charges may be dismissed if the defendant successfully completes treatment.

Diversion does not require a choice to never participate in Prop 36 treatment. Diversion eligible defendants often are still eligible for Prop 36 treatment even after they fail to successfully complete Diversion.

- F-45. Sanctions for drug-related Prop 36 probation violations fall within a three-tiered scheme, depending on whether the violation is the defendant's first, second, or third. The criteria used in making a ruling include the number of previous probation violations, the nature and impact of the current violation, and public safety concerns. When the courts record a probation violation, it is commonly referred to as a "strike" against that grant of probation.

Under the current protocol for administration of Prop 36 in Ventura County, multiple instances of drug use are common prior to any finding of a violation of probation. For example, under the current protocol a treatment provider need not report to the court the fact that a defendant has tested positive on multiple occasions (even every day) for the use of drugs during the first 30 days of treatment. After the first 30 days of treatment, a defendant can use drugs illegally up to another five times before a treatment provider is required to report the drug use to the court. At that time, the court may impose a strike on the defendant's Prop 36 record. This allows the defendant to remain in Prop 36 with no consequence for repeated drug use. The same defendant can then use drugs three more times before again being reported to the court, at which time the court can impose a second strike, again with no consequence for illegal drug use. A defendant can then use drugs three additional times before being reported to the court a third time. The court then may issue a third strike and terminate that particular grant of probation. The defendant may subsequently re-enroll in Prop 36 on a new grant of probation and use drugs illegally dozens of times again, under the same scenario as described above, before the court terminates his/her second grant of probation.

- F-50. "Only after three violations of a drug-related condition of probation does a defendant lose the protection of Penal Code section 1210.1, subdivision (a), which requires participation in a drug treatment program and prohibits incarceration as a condition of probation. Then, however, the court has the full range of options otherwise available in a probation revocation proceeding, including imposing a term of incarceration as a new condition of probation or lifting the stay on a previously imposed term of incarceration."

This finding is an accurate quote from an appellate case; however, it can be misleading to those not familiar with legal terms or when taken out of context. The quote makes reference to a finding by the court that a defendant is in violation of probation. Each judge uses his/her own discretion in deciding whether to make a finding of a violation of probation and in most counties judges are guided by the protocol adopted by the county. Technically, each and every time a defendant uses drugs while on probation, he/she has violated probation since a condition of the

grant of probation is that the defendant not use drugs. However, as explained above, in Ventura County the protocol allows a treatment provider or BHD/ADP to wait until a defendant has been found to have used drugs five times subsequent to the initial 30-day period of treatment before even reporting the drug usage to the court for the first time. The current protocol potentially allows dozens of incidents of drug use, as outlined above, before probation is revoked and a jail consequence can be imposed.

F-166: BHD/ADP officials reported to the Jury that the office of the District Attorney has no statistics to prove that any rise in crime can be attributed to Prop 36 clients; however, the office of the District Attorney continues to state these beliefs along with the assertion that the substantiating statistics will eventually be collected when BHD/ADP releases the Prop 36 funds required to hire a statistician.

Property crimes rose 9.3 percent in Ventura County in 2003. An 11-week study conducted by the District Attorney in 2004 counted how many defendants appearing in Prop 36 court during that time period had suffered one or more prior convictions for theft. This study revealed that at least 46.7 percent of defendants appearing in Prop 36 court during this period had previously been convicted of at least one theft offense. This tells us that nearly one-half of the Prop 36 defendants are convicted thieves, a significant statistic when one considers that most property theft crimes go unsolved. We know that most of these individuals are unemployed, still using drugs while on Prop 36 probation, and paying for their drug use by selling drugs or stealing and then selling property. Succinctly, unemployed drug users either deal or steal to support their habit.

Statistical information provided by ADP in July 2004 indicates that 58 percent of defendants enrolled in Prop 36 were unemployed and another 11 percent were employed just part-time. Most defendants enrolled in Prop 36 use illegal drugs in violation of probation while on the program. The protocol implemented by ADP recognizes and accepts this. In fact, the protocol does not mandate a treatment provider report a defendant for illegal drug use even if the defendant uses drugs every day for the first 30 days of treatment. Thereafter, a defendant can get caught using drugs up to 11 additional times before the protocol calls for the defendant to be terminated from the program. The terminated defendant can then re-enroll in the program upon the next arrest for a Prop 36 eligible offense.

It is important to note that each use and/or possession of drugs by a defendant while on Prop 36 probation is actually an independent crime in addition to being a violation of the terms of probation; however, the program has made no attempt to keep a numerical count of these crimes.

The following statistics have been collected by the District Attorney with regard to non-drug related offenses by defendants while on Prop 36 probation. In a period of just three months and four days (April 5 to July 9, 2004), 40 defendants were terminated from the Prop 36 program due

to their commission of non-Prop 36 criminal acts while under Prop 36 supervision. The new offenses included commercial burglary, possession of weapons, petty theft with priors, battery against an elder or dependant adult, spousal battery with injury, breaking/removing vehicle parts, interfering with police, forgery, vandalism, false identification to police, driving under the influence causing injury, vehicle theft, contempt of court, disorderly conduct and making criminal threats.

As explained above, defendants on Prop 36 probation often use drugs dozens of times before even one grant of Prop 36 probation is terminated. Many of those individuals subsequently begin a new grant of Prop 36 probation after a prior grant is terminated. The District Attorney is allocated none of the more than \$2.7 million received annually by ADP to run the Prop 36 program, despite the fact that the District Attorney devotes a deputy district attorney full-time to Prop 36 court. Prop 36 is not saving resources of the District Attorney. Defendants who are placed on Prop 36 probation often tax the resources of the criminal justice system in the traditional manner, contesting their cases in preliminary hearings and jury trials before eventually seeking placement in the Prop 36 program, even after contesting their guilt to a jury and being found guilty. Thus, the Office of the District Attorney is without the resources to adequately compile the statistics the program should have been compiling since July 2001.

BHD/ADP has accumulated a tremendous surplus (over \$1 million) of funds in managing the program. Part of this money should be used to compile useful statistics for county policy makers. For example, BHD/ADP reports that 35 persons completed treatment in 2001/2002 and 245 persons completed treatment in 2002/2003. One of a number of studies that should be conducted to evaluate the success of the program would be to determine how many of those persons have been re-arrested since completion of treatment and for what charges. A study should be done to determine how many and what types of crimes were committed by all defendants while on Prop 36 probation. It should be reported how many defendants have received two, three, four or more grants of Prop 36 probation and how many "completed treatment" and how many "successfully completed treatment."

F-183: A senior BHD/ADP official was asked to comment on the fact that, with the exception of BHD/ADP, everyone the Jury has asked about Prop 36 expresses disappointment in the lack of success. It was stated that, "You have to be careful who you ask." This was followed by, the "District Attorney and Probation are mostly interested in public safety," and they have concerns even though those concerns are not backed up by data.

Claims of success should be viewed with caution unless supported by verifiable data that indicates a defendant has met minimum objective standards. The law dictates that successful completion of treatment has not been attained unless "... there is reasonable cause to believe that the defendant will not abuse controlled substances in the future." (Penal Code section 1210(c))

To date, administrators of the program have largely ignored this statutory guideline, blurring the line between mere completion of a treatment program and successful completion. Failure to implement minimum mandatory requirements for random drug testing and impose a requirement that a defendant be proven drug free for a significant period prior to completion of treatment is evidence that there has been no serious attempt to be guided by the law in awarding a designation of "successful completion." Policy makers should demand a clear definition from program administrators of what gives administrators "reasonable cause to believe that the defendant will not abuse controlled substances in the future" before accepting a claim of success.

The failure to collect meaningful data and yet claim success is unacceptable. At the outset of the implementation of Prop 36, BHD/ADP committed to collecting statistical data. In its second year report, submitted to the Board of Supervisors on October 16, 2003, BHD/ADP stated that it has been working with a computer consultant regarding the collection of data since September 2001. To date, no data collection system exists for tracking the criminality of Prop 36 defendants while enrolled in the program or after a participant's "successful completion." BHD/ADP has had sole control of the budget for the program and has accumulated a huge surplus of funds (over \$1 million at the end of year 2), but has failed to devote any resources to collecting data that meaningfully reflects the impact Prop 36 has had on public safety. The District Attorney has made repeated requests that BHD/ADP spend a portion of the Prop 36 funding to track data so that policy makers can make informed evaluations and decisions.

Response to Recommendations:

In reference to the Grand Jury Report's recommendation:

R-01: The Board of Supervisors undertakes the reorganization of Prop 36 implementation within Ventura County in order to better accomplish the statutory mandates and scheme intended under Prop 36.

I concur that a reorganization of Prop 36 implementation is necessary. State funding of this program will terminate on June 30, 2006, and it is likely that the Board of Supervisors will be asked to fund the program thereafter. In making funding determinations, the Board must have useful and accurate information. Only a short period of time remains to gather that information and to determine if the program can be administered in an effective and fiscally prudent manner.

R-02: The Board of Supervisors withdraws the Lead Agency Designation from BHD/ADP and designates the County Executive Officer (CEO) as the Lead Agency for Prop 36 management and oversight functions.

The Board of Supervisors will have significant funding decisions to make in less than two years and should assign management and oversight to the agency it feels is best suited to provide an objective and comprehensive evaluation of the program.

- R-03: Having assumed responsibility for leading Prop 36 treatment programs in the past, BHD/ADP may function as the county's expert in recommending treatment methods and the standards of successful treatment program completion.

BHD/ADP has not moved toward establishing meaningful standards for the successful completion of treatment. Penal Code section 1210(c) instructs that the term "successful completion of treatment" means that a defendant who has had drug treatment imposed as a condition of probation has completed the prescribed course of drug treatment and, as a result, **there is reasonable cause to believe that the defendant will not abuse controlled substances in the future.**" This legal standard has been openly ignored and mere completion of treatment has been equated with "successful completion of treatment." Until random testing is incorporated into the treatment program and a condition that a defendant be drug free for a meaningful period of time (e.g. 120 days) before he/she can be deemed to have successfully completed a course of drug treatment, there is no foundation upon which one could base reasonable cause to believe that the defendant will not abuse controlled substances in the future. This is especially true of defendants who have been using drugs for years.

Other jurisdictions have incorporated "random testing" in their programs in recognition of the fact that synthetic drugs are available to mask the use of illegal drugs by defendants. The Board of Supervisors should establish clear guidelines for how to define "successful completion of treatment" and require compilation and submission of meaningful statistics upon which the success of the program can be measured. Without clear definitions and accurate statistical reporting on drug use and other criminal activity by defendants in the program, the bare assertion that a certain number of defendants successfully completed the program is meaningless to anyone who is evaluating the effectiveness of the program.

- R-04: The county should address the issue of "unamenability," as described in the statute and case law, with a view toward bringing the concept to bear in county practice.

"Unamenability" is a legal standard which is ultimately the function of a judge to interpret and apply. The judge adjudicating the majority of Prop 36 cases in Ventura County has expressed the opinion that an expert in treatment issues might aid the court in making unamenability determinations. This issue should be explored further with the bench and BHD/ADP should consider hiring an expert who can offer an opinion on these matters if one is not already on staff. While expert witness fees are costly, the savings that may be available to the program from early

determinations of unamenability and consequent earlier terminations may significantly offset expert witness fees.

R-05: In order to organize and provide actionable information to the probationary supervision, top priority should be given to implementing an integrated information system designed for that purpose.

I concur with this recommendation and the noted considerations.

R-06: Probation develops a basic risk management system or protocol to look at key indicators of a client's profile to determine the risk to society.

I concur with this recommendation and the noted considerations. Currently, many defendants who have been convicted of misdemeanor drug offenses and are placed on conditional release have much more serious problems than defendants convicted of a felony and placed on formal probation. Formal probation should be considered for defendants who have long and serious drug histories even if the offense making them eligible for Prop 36 is only a misdemeanor.

R-07: The immediate establishment of a meaningful treatment completion standard in accordance with the spirit and intent of Prop 36.

I concur with this recommendation. There should be a distinction between "successful completion of treatment" and mere "completion of treatment." Those who are found to have used drugs within several months of completion of treatment cannot be viewed as unlikely to abuse drugs in the future and should not be deemed to have "successfully" completed treatment. Random testing is a key component missing from the current treatment model. The Grand Jury's recommendation of a hair follicle test showing complete abstinence from drugs for at least 90 days may not be a long enough time period, given studies that tell us the brain functioning of many users does not return to normal until a period of 180 days of abstinence has passed.

R-08: The Operations and Oversight Committee be reconstituted as the representative body for all stakeholders.

I concur with this recommendation and the noted considerations.

R-09: The drug testing protocol should be tightened immediately.

I concur with this recommendation. In addition to the considerations listed by the Grand Jury, far fewer positive drug tests should be allowed prior to imposition of strikes and it should take fewer positive or missed drug tests to trigger the imposition of each successive strike. All positive and missed tests and absences during the first 30 days of treatment should be reported

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and used to trigger the imposition of strikes. Further discussion is merited as to the consideration raised by the Grand Jury suggesting that the county pay for a drug test when a defendant admits drug use prior to the test. Perhaps no drug test should be administered at that point but another form of positive reinforcement could be awarded for the admission.

R-10: Though, by policy, drug testing is to be used for treatment purposes, public safety concerns require that Probation continue to conduct drug testing.

I concur with this recommendation and the noted considerations, except that further discussion (as noted above) is needed to explore the suggestion that the county pay for a drug test following an admission of use by the defendant prior to the test.

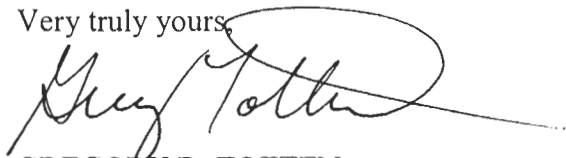
R-11: A goal of early and positive supervision experience should be pursued to initially set the tone for Prop 36 treatment.

I concur with this recommendation.

R-12: The Operations and Oversight Committee should institute thoughtful and allowable sanctions for offenders who fail in treatment, submit positive drug tests, or who miss treatment classes.

I concur with this recommendation and the noted considerations. The exceedingly loose standards for offenders as set forth in the current protocol set the wrong tone for the program.

Very truly yours,



GREGORY D. TOTTON
District Attorney

GDT/cb

pc: Dawn Hall, Foreperson, 2004-2005 Grand Jury
John F. Johnston, County Executive Officer
Pierre Durand, Health Care Agency Director