

TO: The Honorable Anthony C. Edwards Presiding Judge of the Superior Court

FROM: Howard R. Freeman, Chairman Board of Supervisors

**SUBJECT: Response to Recommendation of the 2004-2005 Grand Jury Judicial
Committee Final Report-Review of Citizens Complaint Against Law Enforcement
Officials Engaged in Reverse Sting Narcotics Investigations.**

DATE: SEPTEMBER 7, 2005

The Grand Jury Judicial Committee has requested a written response to their final report on the "Review of Citizens Complaint Against Law Enforcement Officials Engaged in Reverse Sting Narcotics Investigation". The Board of Supervisors response is as follows:

RECOMMENDATION #1: Will not be implemented. The County does not have the Authority to control or regulate Federal or State officers performing their functions within Trinity County. The passage of an Ordinance making the use of "reverse sting" narcotic investigations illegal in Trinity County would not be enforceable. The remedy to this issue is with the California Department of Justice and the State Legislature. The County's inability to monitor and/or regulate this type of activity should not be interpreted to assume that the Board of Supervisors is not concerned with the public's health and safety.

RECOMMENDATION #2: Will not be implemented. As stated in Recommendation #1, The County does not have the authority to monitor and/or regulate Federal or State Officers performing their functions within Trinity County.

June 17, 2005

The Honorable Anthony Edwards
Judge of the Superior Court
P. O. Box 1258
Weaverville, CA 96093-1258

Re: Response to Grand Jury Report/DOJ Investigative Techniques Your Honor

Response to Finding #1: The quote from a federal court judge does not require a response under Penal Code Sections 933 and 933.05.

Response to Recommendation #1: The adoption of a county ordinance is not a matter under the control of this department (Penal Code Section 933.05.)

Response to Finding #2: The language is not in a form that requires a response under Penal Code Sections 933 and 933.05.

Response to Recommendation #2: The language is not in a form that requires a response under Penal Code Sections 933 and 933.05.

Sincerely,
DAVID L. CROSS
DISTRICT ATTORNEY

TO: The Honorable Anthony C. Edwards, Presiding Judge of the Superior Court

FROM: Jeanette Palla, County Counsel

SUBJECT: Response to Recommendations of 2004-2005
Grand Jury Judicial Committee Review of Citizens Complaint Against
Law Enforcement Officials Engaged in Reverse Sting Narcotics
Investigations Final Report

DATE: July 19, 2005

The Grand Jury Judicial Committee has requested a written response to their final report on the Citizens Complaint Against Law Enforcement Officials Engaged in Reverse Sting Narcotics Investigations. In my capacity as County Counsel, my response is as follows:

Finding #1: *(Quoting from Chief Judge Emeritus, Lawrence K Karlton, United States District Court, in his order on motion to dismiss based on outrageous government conduct, U.S. vs. Spruth, Spruth and Rowley, Order dated May 19, 1998.)*

"It must be emphasized from the outset that this is not a case in which the government's conduct was such as to represent 'no danger of distribution. 'On the contrary, as much as a hundred thousand doses of methamphetamine were distributed Nor is this a case in which law enforcement did not violate any federal statute or rule or commit any crime in infiltrating the defendant's drug enterprise'. On the contrary, here the agents, at a minimum, aided and abetted the manufacture and distribution of methamphetamine, and given the fact that the agents received money rather than drugs, could properly be viewed as having conspired to manufacture and distribute methamphetamine, both being federal crimes. Moreover, it is not without significance that almost every aspect of the BNE's reversal policy designed to protect the public was treated with disdain"

"In this court's view the agents' loss of perspective led to outrageous behavior."

"It seems certain that the denial of the defendants' motion will simply send the wrong message to law enforcement. These law enforcement officers have demonstrated beyond peradventure of a doubt that they are focused exclusively on "the bottom line," and the bottom line in this proceeding is that the irresponsible behavior of these officers will have no consequences. It is the height of naiveté, to believe that the court's expression of concern will affect their conduct in any way."

Response: I have no reason to doubt that Judge Karlton made these statements, so I do not disagree with the finding.

Recommendation #1: *The Trinity County Board of Supervisors should adopt an ordinance making the use of "reverse sting" narcotic investigation illegal in Trinity County unless local law enforcement officials are first informed and also assured that illegal drugs will not be distributed to the public. If Trinity County has no authority to adopt such an ordinance controlling the practice of reverse stings in this county, perhaps an ordinance mandating our local law enforcement be notified prior to a sting and include an assurance the*

methamphetamine will not be distributed to the public.

Response: Implementing the recommendation would require action by the Board of Supervisors. The recommendation invites an opinion from County Counsel on whether Trinity County has authority to adopt the recommended ordinance. Whether or not Trinity County may pass an ordinance, regulating the use of "reverse sting" investigations by state narcotics investigators, requires an analysis of whether a local ordinance governing such agents' conduct would be preempted by state law. Counties may enact ordinances not in conflict with the general laws of the state.

Conflicts between state and local law, constituting a preemption of a local ordinance by state statute, occur when local laws duplicate state law, contradict state law, or cover an area fully occupied by state law. Here it is proposed that an ordinance be passed prohibiting state agencies from conducting reverse sting operations in Trinity County unless (1) local law enforcement officials are first informed of such investigations and (2) assurance is provided that illegal drugs will not be distributed to the public.

In determining whether a subject has been preempted by the state legislature we look at:

1. Whether the subject matter has been so fully and completely covered by state law as to clearly indicate that it has become exclusively a matter of state concern; or
2. Whether the subject matter has been partially covered by state law in terms that clearly indicate that a paramount state concern will not tolerate other local action; or
3. The subject matter has been partially covered by state law, and the subject is of such a nature that the adverse effect of a local ordinance on state citizens outweighs the possible benefit to the County.

The ordinance proposed by the Grand Jury duplicates in part the directive of the State's Policy and Procedure Manual that precursors and chemicals should never be furnished or sold to criminal suspects in a manner in which they may chemically expose the public. The only State Statute that I located on controlled buy investigations is Health and Safety Code section 11454, which authorizes the Attorney General and his agents (the Bureau of Narcotics Enforcement) to expend sums in the purchase of controlled substances, to obtain evidence against criminal suspects.

Section 11500 of the Health and Safety Code allows the Attorney General and his narcotic agents to take "complete charge" of any action to enforce the Uniform Controlled Substances Act, which would ordinarily be conducted by the County's District Attorney. This statement expresses a legislative intent that the state means to preempt local control of narcotics investigations, and would object to a local ordinance placing additional controls on state operations.

A challenge to a local ordinance prohibiting state agents from conducting reverse stings unless local law enforcement is first notified, and assured that illegal drugs will not be distributed to the public, could be mounted on the grounds that follow. It could be asserted that such local ordinance contradicts the above statute granting "complete charge" to the state of those narcotics investigations that it chooses to undertake.

The state could take the position that its narcotics agents would be hampered in the performance

of their duties if they were required to notify local law enforcement agencies in advance of their intentions. The usual practice is to provide courtesy notice to local law enforcement agencies before commencing an operation, and local forces are often enlisted to join the investigation. I suppose there could be situations where state agents would not wish to put local law enforcement on notice. I cannot provide assurances that the State would not challenge such an ordinance as preempting state law.

Finding #2: The testimony within the trial transcripts and evidence presented raised a question whether monetary gain versus recovery of the methamphetamine produced became a priority during reverse sting operations. One financial aspect was not fully addressed and remains an open question: What happened to the approximately \$2.6 million revenue from the street sale of 130,000 + doses of methamphetamine? And what happened to the BNE/SINTF profit gained by the sale or barter of 102 and 1/2 pounds of ephedrine @ \$1000 per pound or its equivalent, and the pseudoephedrine sold to Molko?

Response: The findings are in the form of questions, so I cannot respond by stating whether I agree or disagree with the findings.

Recommendation #2: *This should be investigated. The lab and the "bust" took place in Trinity County. In April of 2000, The US. District Court released seized funds that were generated in this county. Perhaps the Board of Supervisors should have the authority to adopt and ordinance to have some control over "reverse stings" that occur in Trinity County.*

Response: County Counsel has no authority to conduct the recommended investigation. The adoption of an ordinance is addressed in my response to Recommendation No. 1.