August 31, 1999

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

LEGAL USE OF MARIJUANA

QUESTION PRESENTED

You asked that our office address state and federal laws concerning the use of "medical" marijuana, and to reconcile the two statutory schemes.

BRIEF ANSWER

Marijuana is illegal to possess, cultivate, transport, or sell in the State of California. State law provides an affirmative defense to the criminal charges of possession of marijuana and cultivation of marijuana for a patient, or the patient's primary care giver (an individual), who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

Federal law prohibits the possession, cultivation, transportation, and sale of marijuana for any purpose. There is no "medical use of marijuana" defense to federal criminal charges.

State law does not make legal any conduct prohibited by federal law. The possession or cultivation of marijuana by any person remains a federal crime in the State of California. State law, however, exempts certain conduct by certain persons from the state's marijuana laws. Thus state and federal law cannot be reconciled or harmonized without changing the existing statutory schemes.

DISCUSSION

Federal Law

In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act [the Act] codified at 21 U.S.C. 801, et seq. The Act established a comprehensive regulatory scheme placing controlled substances in one of five "schedules." The schedule designation is

based on the controlled substance's potential for abuse, the extent to which it may lead to physical or psychological dependence, and whether it has an accepted medical use in the United States. 21 U.S.C. 812(b); *United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1092 (N.D. Cal. 1998).

Congress determined that "Schedule I" substances have a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and a "lack of accepted safety for use of the drug or substance under medical supervision." 21 U.S.C. 812(b)(1). Congress placed marijuana in Schedule I at the time it passed the Act and that placement has not changed. 21 U.S.C. 812(c)(10).

Schedule I substances are strictly regulated. No physician may dispense any Schedule I substance to anyone with the exception of strictly controlled research projects registered with the Drug Enforcement Administration, and approved by the Secretary of Health and Human Services acting through the Food and Drug Administration. 21 U.S.C. 823(b)(f).

The Act makes it unlawful for any person knowingly or intentionally "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. 841(a)(1). Under the definition of the terms "distribute" and "deliver," to constitute "distribution," it is not necessary that the substance in question be sold. 21 U.S.C. 802(8), 841(a); *United States v Workopich*, 479 F.2d 1142, 1147 (5th Cir. 1973). For example, a physician may be convicted of "distributing" if the physician steps outside the course of professional practice and research to dispense or deliver a controlled substance, or delivers a controlled substance pursuant to an unlawful prescription. *United States v. Badia*, 490 F.2d 296, 298; (1st Cir. 1973)*; United States v. Black,* 512 F.2d 864, 866-867 (9th Cir. 1975). Thus physicians who recommend marijuana to a patient may be subject to federal prosecution. The offense of dispensing is complete when the patient receives the prescription; the physician need not dispense the actual drug. *See United States v. Tighe*, 551 F.2d 18, 20-21 (3d Cir. 1977).

Despite the enactment of California Health and Safety Code section 11362.5, federal law is applicable to all Californians. Health and Safety Code section 11362.5 cannot exempt Californians from federal law. In fact, a federal court upheld the closure of six Northern California medical marijuana clubs by the Department of Justice in 1998, essentially saying that Health and Safety Code section 11362.5 is irrelevant to the application and enforcement of the Act. *United States v. Cannabis Cultivators Club*, 5 F. Supp 1086, 1092-93 (N.D. Cal. 1998).

State Law

California's statutory scheme relating to marijuana is largely parallel to the federal model, classifying marijuana as a Schedule I controlled substance. Cal. Health and Safety Code 11054.

The "Compassionate Use Act of 1996" [Use Act] codified in Health and Safety Code section 11362.5 (attached) was enacted to allow seriously ill Californians to obtain and use marijuana. It provides an affirmative defense to a patient or primary care giver, who is charged with illegally possessing or cultivating marijuana, when the marijuana is possessed or cultivated

for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician. It also provides immunity to a physician for recommending marijuana to a patient for medical purposes. Because it is an affirmative defense, the burden is on the defendant to raise the defense and prove its elements. *People v. Trippet*, 56 Cal. App. 4th, 1532, 1551 (1997).

The Use Act clearly states that it shall not be construed *to supersede a prohibition on persons engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes*. Ballot arguments in support of the legislation, and subsequent case law, emphasize the narrow circumstances to which the Use Act applies. "Police officers can still arrest anyone who grows too much, or tries to sell it" (Ballot Pamp., Proposed Amendments to Cal. Const. with arguments to voters, Gen. Elc.) (Nov. 5, 1996, p. 61). ". . . (the Act) [d]oes not change other legal prohibitions on marijuana." *Id.* at 59. "[A] state initiative cannot overrule those (federal) laws." *Id.* at 60. "[T]his defense is limited to the narrow circumstances approved by the voters . . . ." *People ex rel. Lungren v. Peron*, 59 Cal. App. 4th 1383, 1400 (1997). "The purpose of the proposition was to provide a narrow medical exception . . . . The focus of the ballot arguments was that the statute would apply only in very limited situations." *People v. Rigo*, 69 Cal. App. 4th 409, 415 (1999). "[B]oth the statute's drafters and the proponents took pains to emphasize that . . . neither relaxation much less evisceration of the state's marijuana laws was envisioned." *People v. Trippet*, at 1546.

State law prohibits the sale and "giving away" of marijuana. Health & Safety Code 11359, 11360. Operators of commercial enterprises to distribute marijuana are not "primary care givers," even if the patient designates them as such. *People v. Peron*, 59 Cal. 4th at 1396-97. A "primary care giver" is defined as an individual designated by the patient who has consistently assumed responsibility for the housing, health, and safety of the patient. Health and Safety Code 11362.5(e). Additionally, such commercial enterprises, including those commonly referred to as "cannabis clubs," do not become legal by maintaining a non-profit status. *Id.* at 1391-92. Health and Safety Code section 11362.5 does not affect state law making buildings or places a nuisance when used for illegally selling, storing, serving, keeping, manufacturing or giving away marijuana. *Id.* at 1390.

There may be an implied defense to a charge of illegally transporting marijuana if the person charged can show that the quantity transported and the method, timing, and the distance of the transportation are reasonably related to the patient's current medical needs. *People v. Trippet*, at 1550-51. However, the Fifth Division of the same court disagrees and held Health and Safety Code section 11356.2 does not provide a defense to prosecution under Sections 11359 (possession for sale) and 11360 (transportation/sale) under any circumstances.
People v. Peron, 59 Cal. 4th at 1392-95.

There is no age limit contained in the law. Therefore, it appears that juveniles may avail themselves of the "medical use of marijuana" defense.

The California Supreme Court has yet to decide any case involving the Use Act. The Use Act leaves many unresolved questions in its implementation, as well as the inherent problem with federal law. Such questions include: How much is too much for personal medical use? What

is the nature of the physician's "approval"? What qualifies as a "serious illness"? How does one legally obtain the marijuana in the first instance? If the police seize marijuana and the defendant successfully asserts the medical use of marijuana defense, how do the police return the marijuana without violating federal law?

CONCLUSION

There is no way to legally harmonize state and federal laws concerning marijuana. Attorney General Bill Lockyer created a Medical Marijuana Task Force to address implementation problems within the state, and address the conflict with federal law.

We have reviewed the San Diego Police Department's current procedures for handling "medical" marijuana issues and find they comport with the statute, current case law, and the guidelines set forth by the Office of the Attorney General. The ambiguous, uncertain nature of law leaves our law enforcement officials in a difficult position. We will continue to work with them on these issues.

Respectfully submitted,

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Attachment
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