

OFFICE OF OPERATIONS

ORDER NO. 4

March 23, 1997

TO: All Personnel, Office of Operations

FROM: Director, Office of Operations

SUBJECT: SECTION 11362.5 H&S, THE COMPASSIONATE USE ACT OF 1996

EFFECTIVE: IMMEDIATELY

PURPOSE

This Order establishes enforcement guidelines for Section 11362.5 of the Health and Safety (H&S) Code, The Compassionate Use Act of 1996. Section 11362.5 H&S allows individuals, under the care of a doctor, to use marijuana for medicinal purposes.

NOTE: These guidelines shall only apply when the individual in possession of marijuana spontaneously claims to be a patient/primary caregiver in legal possession under Section 11362.5 H&S. Officers shall not solicit this information from individuals not spontaneously claiming legal possession under Section 11362.5 H&S.

INFORMATION

On November 6, 1996 Proposition 215 passed adding Section 11362.5 H&S, The Compassionate Use Act of 1996, to the California Health & Safety Code. This Section permits California residents to use marijuana for medicinal purposes upon the written or oral recommendation or approval of a physician. As a result, Proposition 215 created a medicinal use affirmative defense for suspected violators of 11357 H&S subsections (b) through (e), Possession or Cultivation of Marijuana, 11358 H&S, Unauthorized Cultivation, Harvesting or Processing of Marijuana, and 11360(b) H&S Transportation/Sales of Marijuana.

"Primary caregivers" are also protected under this new law and are permitted to possess and cultivate marijuana for the individual for whom they are the caregiver. "Primary caregiver" is defined as the person who has consistently assumed responsibility for the housing, health or safety of the patient.

NOTE: The burden of proof of the validity of the medicinal use affirmative defense claim made by a patient/caregiver rests with the individual at the time of the investigation.

Proposition 215 does not specify the quantity of marijuana an individual may possess. As such, it is incumbent upon the officer to determine the reasonable amount of marijuana a person should possess, when protected under this law. An example would be a physician prescribing three marijuana cigarettes a day for treatment, totaling 90 marijuana cigarettes for a month. An individual possessing a pound or more of marijuana would exceed the amount for personal use and could possibly be charged with 11360(b) H&S, Transportation/Sales of Marijuana. Proposition 215 does not permit the sale, possession for sales, and/or distribution of marijuana to any person.

Law enforcement officers have the responsibility and legal right to detain and question any and all suspected narcotic violators for the period of time reasonable and necessary to determine whether or not the medicinal use defense applies. The State of California, Office of the Attorney General, has provided the following preliminary guidelines to assist law enforcement officers in determining whether the medicinal use defense applies:

- * The quantity and packaging of the marijuana;
- * The presence of cash, pay/owe documents and the absence of any indication of patient/caregiver status;
- * Observed sales to a person;
- * The presence of weapons, scanners or the use of evasive tactics or other conduct associated with unlawful drug activity;
- * The criminal history of the individual;
- * Activity evidencing consciousness of guilt;
- * The experience and expertise of the officer; and
- * The nature and consistency of the statements made by the individual detained and questioned.

PROCEDURES

These procedures shall only be implemented when the individual spontaneously claims the medicinal use defense.

Officers' Responsibilities

The medicinal use affirmative defense only applies to individuals in violation of Sections 11357 H&S subsections (b) through (e), 11358 H&S and 11360 (b) H&S. When an individual has been detained, but has not yet been placed under arrest, officers do

not need to Mirandize the individual prior to completing the medicinal use investigation. However, when an individual claims the medicinal use defense after being placed under arrest, officers shall Mirandize prior to completing the medicinal use investigation.

Individuals in violation of the applicable Health and Safety Codes in conjunction with another open charge shall not be Mirandized by the arresting officer for the sole purpose of determining the validity of the medicinal use defense. Officers shall indicate the medicinal use defense by the individual under the "ADDITIONAL" heading of the arrest report. All of the marijuana and any paraphernalia shall be confiscated and booked as evidence in accordance with existing Department procedures delineated in the Department Manual (Sections 4/540.70, 4/790.25 and 4/790.27).

NOTE: Guidelines established in O.O. Order No. 4, 1987, Interrogation of Narcotic and Felony Arrestees, remain unchanged.

Individuals Claiming to be Patients

Officers detaining an individual claiming the medicinal use defense, suspected to be in violation of 11357 H&S subsections (b) through (e), 11358 H&S and/or 11360(b) H&S, should ask the following questions:

- * Are you taking medication?
- * If the answer is yes, what medication?
- * For what condition?
- * Prescribing doctor's name, telephone number and address?
and,
- * What is the duration of treatment?

Individuals Claiming to be Primary Caregivers

Officers detaining an individual purporting to be a primary caregiver, suspected to be in violation of 11357 H&S subsections (b) through (e), 11358 H&S and/or 11360(b) H&S, should ask the following questions:

- * For whom are you a primary caregiver?
- * How long have you been a primary caregiver?
- * What type of primary caregiver services do you provide (responsible for housing, health or safety of patient)?

- * What condition is the patient being treated for? and,
- * Who is the doctor treating the patient (name, telephone number, address and any other pertinent information regarding the identification of the doctor)?

Responses to these questions shall be listed in all subsequent documentation that may apply and will play a decisive role in determining whether or not the case is filed.

When the individual (patient/caregiver) claiming the medicinal use defense cannot provide adequate information or, after diligent effort, the officer is unable to verify the information, the individual shall be handled in accordance with Department Manual Section 4/216.25, Marijuana Arrest Procedures. Officers shall complete a Release From Custody (LAPD Form 5.2.8) for 11357(b) H&S if the individual is in possession of one ounce or less of marijuana. If the individual is in possession of more than one ounce, he/she shall be arrested and booked for 11357(c) H&S, Possession of More Than One Ounce of Marijuana. The Release From Custody, Arrest and/or any other applicable report shall contain a summation of the individual's responses to all investigative questions. Each report shall also contain any/all attempts that were made to verify or refute the information used to determine whether or not the medicinal use defense was applicable. The marijuana and any paraphernalia shall be confiscated and booked as evidence.

When the officer concludes that the individual (patient/caregiver) has provided viable information supporting the medicinal use defense, the officer shall immediately notify a supervisor. An appropriate entry shall be made on the officer's Daily Field Activity Report (LAPD Form 15.52) to reflect the detention.

Supervisor's Responsibilities

When officers have determined that the medicinal use defense applies, the responding supervisor shall review the officer's investigation. When the supervisor concurs that the individual has provided viable information to support the medicinal use defense, the supervisor shall cause all confiscated marijuana to be returned to the individual and the detained individual shall be released. When officers are unable to confirm the medicinal use defense, the supervisor approving the arrest report shall ensure that the arresting officer has complied with the preceding guidelines. The concerned supervisor shall make the appropriate entry on the Sergeant's Daily Report (Form 15.48).

Detective's Responsibilities

The medicinal use defense investigation shall be the responsibility of the concerned detective when:

- * An individual in violation of Sections 11357 H&S subsections (b) through (e), 11358 H&S or 11360 (b) H&S, claiming the medicinal use defense, is arrested in conjunction with a separate open charge and is not Mirandized by the arresting officer(s); or
- * Individuals for whom officers were unable to verify information to support the medicinal use defense and consequently were arrested for 11357 H&S subsections (b) through (e), 11358 H&S or 11360 (b) H&S.

These procedures have been formulated to assist officers and detectives during the investigation of 11362.5 H&S. Due to the controversy of this law, officers will be notified of any changes to these procedures in future Department publications.

Any questions regarding the above procedures should be directed to the Office of Operations, Evaluation and Administration Section, (213) 485-4111. All legal questions regarding 11362.5 H&S shall be directed to Legal Affairs Division, Legal Support Unit, (213) 485-9301.

 (For)
BAYAN LEWIS, Assistant Chief
Director
Office of Operations

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