

c. Supplemental Compassionate Use Act of 1996 (Marijuana) Procedure.

(1) General.

(a) On November 5, 1996, California voters approved Proposition 215 (the Compassionate Use Act of 1996). With its passage, Proposition 215 added Section 11362.5 H&S.

(b) In part, Section 11362.5 H&S states it was enacted "to ensure seriously ill Californians" the right to "obtain and use marijuana for medical purposes" where "deemed appropriate" and "recommended by a physician" and "to ensure [those] patients and their primary caregivers who obtain and use marijuana . . . are not subject to criminal prosecution . . ."

Section 11362.5 H&S further states that Sections 11357 H&S (possession) and 11358 H&S (cultivation) "shall not apply to a patient" or the "patient's primary caregiver" who so possesses or cultivates the marijuana. Thus, the intent of the proposition was to authorize physician recommended medical use of marijuana to seriously ill persons.

(c) Due to ambiguous language and possible conflicts with federal statutes, however, the impact of this new law is uncertain. Currently, law enforcement officials are conferring with federal authorities to resolve these conflicts and develop implementation policies. Ultimately, definitive interpretation will only be available through judicial review. Due to the uncertainty of judicial interpretation, it is imperative that all marijuana related violations be thoroughly investigated and well documented.

(2) Definitions:

(a) Marijuana: Pursuant to Section 11018 H&S, marijuana is defined to include "every . . . mixture or preparation of the plant . . ." which would therefore include hashish, concentrated cannabis, and any such marijuana plant derivative. Section 11362.5 H&S makes no distinction regarding the above mentioned forms of marijuana. Therefore, the Section 11362.5 H&S defense may be applicable to the more concentrated forms of marijuana.

(b) Physician: A medical doctor (holding the title of MD) licensed to practice by the State of California who examines a patient and thereafter recommends marijuana for medical use, either orally or in writing.

(c) Patient: A California patient who has been diagnosed with "cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief."

(d) Primary Caregiver: An individual "designated" by the patient who has "consistently assumed responsibility for the housing, health, or safety of that person." This implies a direct, "one-on-one" relationship with the patient. Thus, the primary caregiver cannot be a commercial entity, organization, or club.

(3) Policy:

(a) Continuous efforts shall be directed toward the enforcement of marijuana-related laws.

(b) When a Section 11362.5 H&S exemption is claimed officers shall:

1 Process all marijuana seizures using existing evidence handling procedures as outlined in HPM 70.1, Evidence Manual.

2 Consider the totality of the circumstances in determining the type of enforcement action to be taken. If any question arises regarding validity of exemption, the officer should strongly consider use of the "complaint to be filed" process through the district attorney's office.

3 Thoroughly investigate and document the incident.

(c) Commanders shall coordinate with the courts and district attorney's office to ensure that:

1 Local policy on Section 11362.5 H&S is established.

2 The district attorney's office is apprised when there is potential for a court "Order of Return" being sought.

(4) Discussion:

(a) In theory, Proposition 215 created limited exceptions to some marijuana laws. Section 11362.5 H&S affects only certain classes of persons under a narrow set of circumstances. In general, this section protects:

1 The patient who uses marijuana for medicinal purposes upon recommendation from a physician.

2 The primary and designated caregiver who provides the marijuana to the patient.

3 The physician who provides either written or oral recommendation for the use of medicinal marijuana.

(b) It is important to note that Section 11362.5 H&S only protects a physician from punishment/deprivation of rights for recommending marijuana use to a patient. The section does not extend any additional rights or exemptions. Thus, a physician who does any of the following acts could be charged for possession, possession for sale, etc., under existing statutes:

1 Is in personal possession of marijuana.

2 Provides (sales or without charge) marijuana to patients.

3 Self-prescribes marijuana use.

(c) Further narrowing applicability, this defense applies only to **possession and the cultivation** of marijuana. Thus, most marijuana violations remain unaffected. Given the extreme limitations of Section 11362.5 H&S applicability, officers should actively enforce all marijuana related violations.

(d) Due to the complexities of Section 11362.5 H&S, officers should thoroughly investigate and document alleged defense claims. In all cases, officers should exercise sound judgment and, where appropriate, strongly consider the "complaint to be filed" process for violations which may fall under the purview of Section 11362.5 H&S. The "complaint to be filed" process will allow for a prosecutor's review and assistance in determining Section 11362.5 H&S applicability.

(e) Even if a Section 11362.5 H&S claim is alleged, all marijuana should be confiscated and booked as evidence according to HPM 70.1. Those claiming a need for the marijuana should be advised to file a motion with the appropriate court seeking an "Order of Return." Area commanders

should apprise the district attorney's office of the seizure and potential for such an order being sought.

(f) The standard search and seizure liability rules remain applicable to the enforcement of marijuana related violations. Reasonable suspicion is required for detention and probable cause is required for search and seizure. Officers should be particularly alert for (and document) indications of non-medical use of marijuana such as pay/owe sheets, large quantities of marijuana, packaging for sale, and large amounts of cash.

(5) Criminal Violations Unaffected by Section 11362.5 H&S.

(a) Section 11360(a) H&S - Sale (only). - Although Proposition 215 made reference to the cultivation of marijuana, there was no defense created for the sale of marijuana. Thus, even if for eventual medical use, there is no Section 11362.5 H&S application to an observed sale of marijuana.

(b) Section 11359 H&S - Possession for Sale. - Section 11362.5 H&S defenses are not applicable to "possession for sale" of marijuana. Although Section 11362.5 H&S failed to define quantitative limits, possession of large amounts of marijuana is indicative of such prohibited use. Where large quantities of marijuana are observed, officers should further investigate for other indicia of sale, such as pay/owe sheets and packaging for sale.

(6) Criminal Violations Potentially Affected by Section 11362.5 H&S.

(a) Section 11357 H&S - Possession of Marijuana. - Section 11362.5 H&S applies only to the medical use of marijuana. Non-medical use receives no protection. All marijuana possession should be thoroughly investigated for possible non-medical use.

(b) Section 11358 H&S - Cultivation of Marijuana. - Pursuant to Section 11362.5 H&S, patients and primary caregivers may cultivate marijuana for "personal" medical use by the patient. Commercial cultivation of marijuana, however, is not protected. Caregivers, as previously defined, must have a direct relationship with the individual patient. Thus, their ability to cultivate is narrow. Likewise, "clubs" that show a profit or that can be shown to produce more than necessary for medical use are not protected.

(c) Section 11360(a) H&S - Transportation, Furnishing or Giving Away. - Patients and primary caregivers may assert a Section 11362.5 H&S

defense for transporting, furnishing, or giving away, etc., of marijuana. Officers should be alert for indications of mass production such as excessive quantities and special packaging. Utilizing Section 11362.5 H&S as a defense applies only to "personal" use. The "caregiver" defense is limited by the necessity of having a direct relationship with a patient. As such, the patient must have obtained a recommendation from a physician that marijuana is needed for treatment of a medical condition. Thus, large quantities indicative of something other than medical use are outside the applicability of Section 11362.5 H&S. The defense is also not applicable to the Section 11360(a) H&S prohibition regarding the sale of marijuana.

(d) Section 23222(b) VC - Possession of Marijuana While Driving. - Since Section 11362.5 H&S pertains to the transportation of marijuana, Section 23222(b) VC may also be impacted by a defense assertion. However, just as there is a distinction between mere possession and possession/use of an alcoholic beverage while driving, there is a distinction between mere possession and possession coupled with the use of marijuana while driving. For those instances where the driver merely possesses (but has not used) the marijuana, officers are strongly encouraged to use the "complaint to be filed" process. On the other hand, as conduct that "endangers others" is specifically exempted from the Section 11362.5 H&S defense, those drivers who are under the influence of marijuana are subject to arrest. Passengers who are under the influence of marijuana and who are so intoxicated as to be a danger to themselves or others should be arrested for violation of Section 647(f) PC - (Public intoxication).

(7) Annex 1-D contains several scenarios which may be helpful in understanding how to apply the provisions of Section 11362.5 H&S.

d. Supplemental Marijuana Procedure.

(1) Depending upon the offense, persons involved with marijuana may be arrested and charged as follows:

(a) A felony, Sections 11357(a), possession of concentrated cannabis, and/or 11360(a) H&S, transport, import, sell, furnish, administer, or give away marijuana, or offer to do any of the above.

(b) A misdemeanor with mandatory cite and release provisions, Sections 11357(b) and/or 11360(b) H&S, possessing, transporting, or

giving away not more than 28.5 grams (one ounce) of marijuana (other than concentrated cannabis).

(c) A misdemeanor with optional cite and release provisions, Section 11357(c) H&S, possessing more than 28.5 grams of marijuana where neither the amount nor the circumstances indicate an intent to sell.

(d) A misdemeanor with mandatory cite and release provisions, Section 23222(b) VC, driving a motor vehicle while possessing not more than one ounce of marijuana.

NOTE: The optional "Booking Required" box on the CHP 215 shall not be used for violations under (b) and (d) above. These are not "recordable" offenses as defined in GO 100.28, Criminal Fingerprinting and the JUS 8715, Disposition of Arrest and Court Action.

(2) The mandatory cite and release provisions of the marijuana law apply to juveniles as well as adults.

(3) Where a district attorney has established specific direction or procedures for marijuana offenses within the county or jurisdiction, such directions or procedures should be followed.

(4) To provide reasonable flexibility in any county where the district attorney has not provided specific direction, marijuana offenses should be handled in accordance with the following guidelines:

(a) All felons shall be physically arrested as prescribed by law (see paragraph 2.a.[1] of this chapter).

(b) A person charged with possessing, transporting, giving away, or driving a motor vehicle while in possession of marijuana in an amount of 28.5 grams or less must be cited and released after being satisfactorily identified and signing a CHP 215. (Section 11375[b] H&S.)

1 If the amount in these cases does not exceed 28.5 grams, cite and release is mandatory.

2 If subsequent weighing establishes the amount to be in excess of 28.5 grams, the complaint may be amended to the appropriate section.

4. **Situation:** An officer effects an enforcement stop on a driver from Arizona for a mechanical violation. The officer observes a one-ounce bag of marijuana on the right front seat. During questioning, the subject states he traveled to California to obtain marijuana upon the recommendation of his hometown doctor, who has prescribed marijuana for a medical condition.

Response: The driver is subject to citation or arrest based on existing California law. The statute as written specifies that Section 11362.5 H&S only applies to "seriously ill Californians" and not persons from other states who have merely entered the state to obtain marijuana. In addition, the physician recommending the use of marijuana must be licensed in California to prescribe under this statute.

5. **Situation:** An officer effects an enforcement stop on a subject for excessive speed. The officer observes a small quantity of marijuana on the right front seat. The driver exhibits signs of marijuana use, but is not under the influence. During the enforcement contact, the driver indicates he is a practicing physician from Los Angeles and prescribed himself the marijuana for a cancer-related illness.

Response: The officer should cite the physician, since the statute prohibits self-prescribed use. The evidence is seized and processed under existing evidence handling procedures.

6. **Situation:** An officer makes a traffic stop in Los Angeles. During the enforcement contact, a small amount of marijuana is observed. The officer obtains consent to search the vehicle and observes 150 pounds of marijuana located in the trunk of the vehicle. The subject indicates he is a primary patient caregiver and is transporting the marijuana to his residence in Redding for the care of his chronically ill brother, who has received a physician's recommendation to use marijuana for a medical condition.

Response: The officer should arrest the subject for possession for sale and transportation since the quantity being transported is excessive for personal use. The evidence is seized and processed using existing evidence handling procedures. Since the Section 11362.5 H&S defense was asserted, the Area commander should apprise the district attorney's office of the sizable marijuana seizure and any potential for a court "Order of Return" being sought.

7. **Situation:** Same circumstances as above, except that the patient's caregiver has a small quantity of marijuana which would be consistent with personal use.

Response: In this case, the "complaint to be filed" process should be utilized and the evidence should be confiscated and processed using existing procedures.

8. **Situation:** After either an arrest or use of the "complaint to be filed" process, a subject contacts the Area office to seek return of his/her marijuana.

Response: Irrespective of the amount of marijuana confiscated, the subject is advised to file a motion in the appropriate court to seek return of the marijuana. The local district attorney's office should be advised of the request and the circumstances surrounding the incident.

9. **Situation:** The officer responds to a residence for hit and run follow-up. While at the residence, the officer observes 50 fully developed marijuana plants on the side of the house. When questioned, the tenant states he is cultivating the marijuana as a result of a medical condition. He shows the officer a note from his physician which recommends the use of marijuana for glaucoma.

Response: The officer should arrest the subject and confiscate the marijuana. The statute specifies the patient may only cultivate the amount necessary to meet the single patient's needs. Special consideration should be made in those instances where the party indicates they are a caregiver as well. Based on the number of relationships a caregiver may have, "the amount necessary" with respect to the number of plants may vary. It should be noted that the definition of a primary caregiver is a person who has "consistently assumed responsibility for the housing, health or safety" of the patient. Thus, a person who states they are the caregiver for several people, and possesses a large quantity of marijuana, will likely not fall under the standards of the statute.

10. **Situation:** A 17 year-old driver is stopped for a traffic violation. During the enforcement contact, an officer observes a one-ounce bag of marijuana in plain view. The driver has not used any marijuana and presents a note from his physician recommending the medical use of marijuana.

Response: The evidence should be seized and processed using existing procedures. A "complaint to be filed" should be utilized through the appropriate juvenile court or district attorney's office. In this case, even though the physician's duty to prescribe in the case of minors is more stringent, there is no distinction between adults and minors in the language of Section 11362.5 H&S.