STATE OF CALIFORNIA

OFFICE OF THE ATTORNEY GENERAL

BILL LOCKYER
ATTORNEY GENERAL

September 29, 2000

I am writing to discuss with you the approach my office is taking on the question of whether or not to promulgate new statewide law enforcement guidelines with regard to marijuana possession. I have concluded that, at least for the time being, it is neither legally necessary nor appropriate to do so. Here is my thinking on the matter.

Since California voters enacted Proposition 215 in November of 1996, a number of controversies continue to complicate the implementation of that measure and the enforcement of marijuana possession and use laws in our state. Immediately upon assuming office, I invited an expert and representative panel to meet in Sacramento to discuss how to effectuate the will of the voters in implementing Proposition 215. The group consisted of representatives from law enforcement, the medical community, lawyers and advocates for the pain management and "death-with-dignity" interests. The task force was co-chaired by Senator John Vasconcellos and Santa Clara County District Attorney George Kennedy. The group met monthly for seven months and produced a legislative proposal that was ultimately introduced by Senator Vasconcellos as Senate Bill 848.

Senate Bill 848 contained many of the ideas agreed upon by the task force, including a statewide voluntary registry system, identification cards for medicinal marijuana patients and limitations on the use of medicinal marijuana by minors, probationers and prisoners. Senate Bill 848 did not include "guidelines" or "standards" addressing the quantity of marijuana a person with a valid recommendation could possess. This issue was discussed and debated many times within the task force before the final legislative recommendations were drafted. However, the strong consensus of the task force was that the amount of marijuana a patient may possess might well depend on the type and severity of illness, and is, in any event, ultimately a medical

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question more appropriately analyzed and decided by medical professionals. Hence, SB 848 included a provision directing the California Department of Health Services to issue emergency regulations setting forth the amount of marijuana a person could possess pursuant to Proposition 215.

As you undoubtedly know, the legislative session ended on August 31, 2000, without passage of a bill to clarify Proposition 215. Senate Bill 2089 (Johannessen), which died in committee, sought to specify the maximum amount of marijuana a physician could recommend for medicinal use. At this point, in my opinion, it is highly unlikely that any legislation setting forth specific maximum amounts will succeed until we have more and better answers to questions about the medical efficacy of marijuana.

The Governor did sign Senate Bill 847 (Vasconcellos) appropriating three million dollars to the University of California to study marijuana's medicinal properties. These funds have recently been allocated to the University of California, San Diego, and it is expected that research will commence in January, 2001.

In the meantime, several counties and communities have informally established their own guidelines for the maximum amount of marijuana an individual may possess with a valid doctor's recommendation. An update, including those local guidelines of which my office has thus far been informed, is included with this letter. As you can see, the amounts adopted vary greatly from community to community. In Oakland, a patient with a valid recommendation can possess up to six pounds of marijuana in particle form if they grew the marijuana themselves. In Simi Valley, a person may grow two plants. The latter standard appears to be based on an Information Bulletin, issued on February 24, 1997, by former Attorney General Dan Lungren, observing "that more than two plants would be cultivation of more than necessary for personal medical use." In truth, however, neither my department nor anyone else has any scientific basis upon which to agree or disagree with this observation. Because the amounts required for personal medical usage cannot be known without the required medical research, and because the amounts which might be presumptive of abusive usage are not scientifically established, I have not issued a bulletin or guideline recommending the quantity or the amount of marijuana a person can possess for medicinal purposes, and have no current plan to do so.

Efforts to implement California's medicinal use law are, of course, further complicated by the position taken by the federal government. The federal government has not been receptive to accommodating the medicinal use initiatives enacted by voters in California and several other western states. In an effort to harmonize the policy enacted by our voters with federal regulations, I have called upon federal officials to consider rescheduling marijuana from its current classification as a Schedule One substance to Schedule Two of the Federal Controlled Substances Act, which would permit a prescription under medical supervision and accountability. As yet, federal officials have declined to reschedule marijuana and state their belief that further research on the medical efficacy of marijuana is needed before reclassification.

I share your concern that all laws should be applied uniformly throughout our state. It is my hope that we can work with law enforcement and medical experts to come up with a uniform approach to the enforcement of marijuana laws. To work towards that end, I will solicit further advice from California's district attorneys, law enforcement and medical communities in our state on this specific issue and I will report to you the results of my efforts. We need to work together to find a way to implement Proposition 215 in the manner contemplated by the voters of our state, in order to permit compassionate use without compromising effective enforcement of the laws intended to protect Californians from illicit drugs.

Sincerely,

Bill

BILL LOCKYER
Attorney General

Enclosure

City of San Diego
Medical Marijuana Task Force
Legal Memorandum Re: Federal Status; Definition of Caregiver

Juliana B. Humphrey, Chair

Introduction:

As the Task Force tackles the issues surrounding the full implementation of "Prop. 215" (Health & Safety Code §11362.5) in the City of San Diego, the specter of the federal government's position on this law is consistently raised. Residents have reported to Task Force members that law enforcement officers have told them that the law no longer exists because the "feds overruled it." We know from previous reports to PS&NS that some council members are concerned about taking any action that is perceived to be in conflict with federal law. Thus the time appeared ripe for a memorandum on the "federal question."

How "primary caregiver" is defined by law enforcement is an issue that recently became known to the Task Force as we prepared our draft guidelines for possession and cultivation. Police representatives reported that their definition of "primary caregiver" mandates that the person designated literally assumes responsibility for the housing, health, and safety, as well as marijuana cultivation or provision. They further articulated that a sick person could have only one "primary care giver" meeting their needs. It was reported to the Task Force by a resident whose marijuana plants were seized that she was told by one of the police officers that she did not qualify as a "primary caregiver" because she "did not live with the patient." Because the law, as written and as interpreted by the courts, does not support the narrow definitions relied upon by SDPD, it seemed appropriate to include a section on "caregivers" in this memorandum, too.

ISSUES PRESENTED:

1. Do recent federal rulings on medicinal marijuana issues affect the continued legality of Health& Safety Code §11362.5?

   Response:
   There are no court rulings in which California's medical marijuana law has been invalidated because of a conflict with federal law. The only federal and state court cases addressing the application of H&S Code §11362.5 have been limited to the issue of sale and distribution of marijuana.

Many legal experts believe there is no constitutional basis for federal law to supercede state law on the subject of medical marijuana because federal pre-emption cases usually involve an impact on interstate commerce which in turn permits the federal government to override the states. Medical marijuana presents no interstate commerce implications.

2. A "Primary Caregiver" is defined in Health & Safety Code §11362.5(e) as an individual designated by a person [exempted under the statute] who "consistently assume[s] responsibility for the housing, health, or safety of that person."

   May an individual who consistently provides cannabis to a qualified patient, but does not provide for any other need, be considered a "primary caregiver" under Health & Safety Code §11362.5(e)?

   Response:
   The term "primary caregiver" in California's medicinal marijuana law has been interpreted by the courts to mean a person who consistently grows and supplies physician-approved medicinal marijuana for a patient. Under this interpretation, there is no requirement that the person be the patient's sole caregiver or that s/he live with the patient. Moreover, the caregiver is permitted to be reimbursed for his/her services.

I. Federal Law Does Not Prohibit Enforcement of Prop. 215

Supreme Court Justice Clarence Thomas began his majority opinion in *United States v. The Oakland Cannabis Buyers Club* with this paragraph:

> In November 1996, California voters enacted an initiative measure entitled the Compassionate Use Act of 1996. Attempting "to ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes," Cal. Health & Safety Code Ann. § 11362.5 (West Supp. 2001), the statute creates an exception to California laws prohibiting the possession and cultivation of marijuana. (Emphasis added.) (*United States v. The Oakland Cannabis Buyers Club* (2001) 532 U.S. 483, 486.)

Nothing in the Justice's 16-page opinion changed the law as described – California Health& Safety Code §11362.5 is still alive and well.

The limited issue and ruling in the *Oakland* case is simply this:

> The Controlled Substances Act, 84 Stat. 1242, 21 U.S.C. §801 *et seq.*, prohibits the manufacture and distribution of various drugs, including marijuana. In this case, we must decide whether there is a medical necessity exception to these prohibitions. We hold that there is not. (*United States v. The Oakland Cannabis Buyers Club* (2001) 532 U.S. 483, 486.)

Said another way, the Supreme Court ruled that organizations such as collectives, clubs, or other centers of distribution for medical marijuana, whether for profit or not, could not invoke the defense of "medical necessity" to federal charges of distribution of controlled substances. This case did not address any other issue pertaining to H&S §11362.5.

We can look closer to home for additional guidance on this issue. Four years before the *Oakland* case, the California Court of Appeal interpreted our state's own criminal laws which prohibit "selling, furnishing, or giving away" controlled substances in violation of California Health & Safety Code §11360 in basically the same way that the U.S Supreme Court interpreted its federal counterparts. (*People ex rel. Lungren v. Peron* (1997) 59 Cal. App. 4th 1383.)

Peron involved a preliminary injunction obtained by the City of San Francisco against the Cannabis Buyers Club under Health & Safety Code §11570 (nuisance abatement for alleged "drug houses") prior to the passage of Prop. 215. After Prop. 215 was passed, the Club moved to modify the injunction to enable it to serve as "primary caregiver[s]"1 for qualified patients under the new law. (*People ex rel. Lungren v. Peron* (1997) 59 Cal. App. 4th 1383, 1386-87.) The trial court agreed to the modification and the City appealed the ruling.

First, the Appellate Court noted that the plain language of H&S §11362.5 provided for relief to patients and their primary caregivers from prosecution under H&S §11357 (possession of marijuana) and H&S §11358 (cultivation) only. Possession of marijuana for purposes of sales and actual sales of marijuana (H&S §§11359(a) and 11360) continue to be proscribed. (*People ex rel. Lungren v. Peron, supra*, at 1389-1390.) Because "sales" includes "furnishing" or "giving away," the fact that a cooperative or club may be

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1 The *Peron* court's analysis of "primary caregiver" is set forth in Section III below.

"non-profit" or providing marijuana for free is irrelevant to the court's analysis. (*People ex rel. Lungren v. Peron, supra,* at 1391-1392.)

The Court found further support for its ruling within the language of the voter pamphlet in support of Prop. 215. The pamphlet stated that the new statute was intended "to encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to patients in medical need of marijuana." (*People ex rel. Lungren v. Peron, supra,* at 1394.) The court reasoned:

> If the statute authorized the sale or "affordable distribution of marijuana to patients other than by personal cultivation, there would be no need to "encourage" the governments to implement such a plan. (*People ex rel. Lungren v. Peron* (1997) 59 Cal. App. 4th 1383, 1394.)

The *Oakland* and *Peron* cases make clear that Health & Safety Code §11362.5 does not provide an exception to laws prohibiting the sale or distribution of marijuana, but neither case strikes down any other provision of the law. No other published case has done so either.

II. The Federal Courts Are Not Likely To Invalidate H&S §11362.5 In The Future

The "elephant in the living room" that cannot be ignored by the City when formulating its policy is the question of how the federal courts are likely to rule on state medical marijuana laws in the future. The current Supreme Court has shown that it respects the rights of states to enact laws that affect the day-to-day lives of its residents, and favors a "states rights" approach to conflicts between federal and state law. This philosophy is often referred to as "federalism."

Chief Justice William Rehnquist wrote the following succinct description of the principles of federalism:

> The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." (Citation omitted) "Just as the separation and

> independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny. (*United States v. Lopez* (1995) 514 U.S. 549, 552.)

Although federal constitutional provisions are the "supreme law of the land" (*U.S. Const.* Art. IV, §2) acts of Congress such as the Controlled Substances Act governing federal jurisdiction over drug offenses are scrutinized by the courts to determine whether Congress had the power to act, that is, whether federal or state law should govern in a particular circumstance. One of the constitutionally delegated powers of congress is the regulation of commerce, better known as the "commerce clause." (*United States v. Lopez, supra,* at 552.)

When considering whether a congressional act is lawful under the commerce clause courts must analyze "whether the regulated activity 'substantially affects' interstate commerce." (*United States v. Lopez, supra,* at 559.)

In the recent landmark case of *United States v. Lopez*, the U.S. Supreme Court struck down the Gun Free School Zones Act, an act of Congress that sought to grant jurisdiction to federal prosecutors over weapons violations occurring on school property. A 12th grade student brought a gun to school and was prosecuted by federal authorities. (*United States v. Lopez, supra,* at 551-552.)

The Supreme Court held that Section 922(q) is a criminal statute:

> that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms....Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce. (*United States v. Lopez, supra,* at 561.)

The Court noted that states maintain the primary authority for defining and enforcing criminal law. (*United States v. Lopez, supra,* at 561, fn 3.):

> "Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated

> powers, has created offenses against the United States" (citation omitted). "When Congress criminalizes conduct already denounced as criminal by the States, it effects a "'change in the sensitive relation between federal and state criminal jurisdiction.'" (citations omitted.) (*Id.*)

The Court also found §922(q) unconstitutional because it contained no jurisdictional element that could be used to differentiate, on a case-by-case inquiry, between firearm possessions which affected interstate commerce and those which did not. (*Id.*) Nor did Congress make specific "Congressional findings" regarding the alleged effects on interstate commerce of gun possession in a school zone, where the court found "no such substantial effect was visible to the naked eye." (*Id.* at 563.)

The principles and holdings articulated by the Supreme Court in *Lopez* are instructive on how the federal courts might ultimately interpret of H&S §11362.5. Like §922, California's medical marijuana law, by its terms, has nothing to do with commerce or any sort of economic enterprise. Thus, it cannot be said to substantially affect interstate commerce. And like §922 there is no "savings clause" which would allow federal authorities to do a case-by– case analysis of medical marijuana cases in order to cull out of the system those which could be seen to affect interstate commerce. Federal interference with the will of the California electorate in enacting Prop. 215 is precisely the evil sought to be avoided by the framers of the U.S. Constitution, Art. I, section 8.

While no case has addressed this question yet, many legal commentators assert that the federal government should not be allowed to thwart the will of voters in individual states regarding medicinal marijuana because it is a local issue with local impact which does not "substantially affect" interstate commerce. [*See:* Massey, Calvin, *Federalism and the Rehnquist Court*, 53 Hastings L.J. 431 (Jan. 2002); Cohen, Marsha N., *Breaking the Federal/State Impasse Over Medical Marijuana: A Proposal*, 11 Hastings Women's L.J. 59, (Winter 2000); Comment, *The Growing Debate on Medical Marijuana: Federal Power vs. States Rights*, 37 Cal. W. L. Rev. 369 (Spring 2001); Comment, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use After United States v. Lopez*, 88 Calif. L. Rev. 1575 (Oct. 2000).]

Even then-Governor of Texas, George W. Bush, while campaigning for president, stated his support for "state self-determination" on the issue of medical marijuana laws. He said that while such laws were not likely to be enacted in Texas, and that he personally opposed the use of medical marijuana, he nonetheless supported the right of other states' voters to enact medical marijuana laws. (*Dallas Morning News*, p. 6A, Oct. 20, 1999.)

Last, the Supreme Court majority specifically left open the question of states rights in the *Oakland* case:

> Finally, we share Justice Stevens' concern for "showing respect for the sovereign States that comprise our Federal Union." *Post*, at 3 (opinion concurring in judgment). However, we are "construing an Act of Congress, not drafting it." (Citation omitted.) Because federal courts interpret, rather than author, the federal criminal code, we are not at liberty to rewrite it. Nor are we passing today on a constitutional question, such as whether the Controlled Substances Act exceeds Congress' power under the Commerce Clause. (Emphasis added.) (*United States v. The Oakland Cannabis Buyers Club* (2001) 532 U.S. 483, 495, fn 8.)

Based on the foregoing case law and legal principles, it is reasonable for the City of San Diego to go forward in implementing the state's medical marijuana law despite some of its contradictions with federal law.

III. Definition of "Primary Caregiver"

California Health & Safety Code §11362.5(e) defines "primary caregiver" as follows:

> For the purposes of this section, "primary caregiver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health or safety of that person. (emphasis added.)

Peron is the only published case to have dealt directly with the definition of "primary caregiver," discussing several aspects of this role in its opinion.

The Appellate Court unequivocally held that collectives, clubs or other centers of distribution cannot serve as "primary caregivers." (*People ex rel. Lungren v. Peron* (1997) 59 Cal. App. 4th 1383, 1397.) Peron argued that as the proprietor of the Cannabis Buyers' Club he was the "primary caregiver" for thousands of people. (*Peron, supra*, at 1397.) The court disagreed stating that to hold otherwise would "entitle any marijuana dealer in California to obtain a primary caregiver designation from a patient before selling marijuana, " thereby evading the laws proscribing the sales or furnishing of marijuana. (*Peron, supra*, at 1397.)

The court focused on the word *"consistently"* in the definition of "primary caregiver" to reach its conclusion. (*Peron, supra*, at 1396.) "A person purchasing marijuana for medicinal purposes cannot simply designate seriatim, and on an ad hoc basis, drug dealers on street corners and sales centers such as the Cannabis Buyers' Club as the patient's 'primary caregiver.'" There must be some consistency in the relationship. (*Id.*) The *Peron* Court found that there was no evidence presented which established the consistent relationship of care between the club and member patients envisioned by the statute. (*Id.*)

However, the court rejected the State's argument that a primary caregiver cannot serve more than one patient. (*Peron, supra*, at 1399.) The court again emphasized the consistency of the care giving, holding that nothing in the statute prohibited a caregiver from caring for more than one patient. (*Id.*)

Moreover, the court also held that primary caregivers could be reimbursed for the service of supplying medical marijuana to a patient. In so holding the court gave its imprimatur of support to the notion that a primary caregiver may be someone who meets the health needs of a patient only by supplying the necessary medicinal cannabis:

> As we have noted, the statute defines a primary caregiver as one 'who has consistently assumed responsibility for the housing, health, or safety or [the patient].' (§11362.5(e), italics added.) Assuming responsibility for Housing, health, or safety does not preclude the caregiver from charging the patient for those services. A primary caregiver who *consistently* grows and supplies physician-approved or prescribed medicinal marijuana for a section 11362.5 patient is serving a health need of the patient, and may seek reimbursement for such services." (Italics in original; underline added.)

To hold otherwise, i.e., that a person's health care provider, or other caretaker, must be the same person who grows or supplies marijuana would be to construe the law so narrowly as to give it no practical effect. For example, it is very unlikely that the patient's daily nurse from a local nursing service would even be permitted by her employer to grow or supply marijuana. It is logical that the patient would seek out a friend or person known to be able to help for assistance with obtaining cannabis. And under *Peron*, if their relationship is consistent, it is lawful.

CONCLUSION:

While it is prudent of the City of San Diego to investigate the potential fallout from enforcement of a state law which conflicts with federal laws, it is neither wise nor fair to the many patients in the community to be paralyzed into inaction. There is no pending federal case that will enlighten us on the issues remaining with §11362.5. The community simply needs to set its standards and fairly enforce the law. Federal questions can be addressed if and when they arise.

A workable definition of "primary caregiver" should be included in the proposed guidelines for possession and cultivation in order to avoid confusion for patients and their caregivers. As it stands, the SDPD definition deprives legitimate caregivers of their ability to assist suffering patients.

California Guidelines by Jurisdiction				
City or County in California	**Processed**	**Plants**	**Agency and ID Program**	**Notes**
City of Arcata	½ pound	10	Police policy based on Humboldt County's policy. No information on ID card program.	
City of Berkeley	1.5 pounds if grown outdoors 2.5 if indoors	10	Guidelines created by City Council Ordinance. Allows for membership in private collectives, which then issue identification to patients.	
City of Oakland	3 pounds	20 outdoors **or** 72 indoors	Guidelines created by City Council Ordinance. Allows for membership in private collectives, which issue identification to patients.	
Butte County	1 pound	6 (3 mature, 3 immature)	No ordinance – just an agreement between Sheriff and DA's office. No ID card program.	
Calaveras County	2 pounds	6	Inter-Agency Protocol adopted by Board of Supervisors. No ID card program.	When adopted by Board of Supervisors, they rejected the suggested distinction between 3 mature and 3 immature plants and increased dried quantity from 1.33 lbs. to 2 lbs.
Colusa County	1.5 pounds	2 outdoors **or** 4 indoors	Unofficial Guidelines set by Taskforce. No ID card program.	Decisions are made on case-by-case basis, using guidelines as point of departure. Assumes need of 3 joints per day.

City or County in California	Processed	Plants	Agency and ID Program	Notes
Del Norte County	1 pound	Canopy of 100 square feet, no more than 99 plants	Official Guidelines adopted by Board of Supervisors. Voluntary verification cards issued to patients by Health and Social Services office. Mandatory registration program for caretakers, with ID cards.	Adopted April 23, 2002.
El Dorado County	1 pound in residence 1 ounce in vehicle	6	Sheriff and DA policy. No ID card program.	Used California Department of Justice Advanced Training Center's "Standardized Criteria For Proposition 215" assuming 5 joints a day.
Humboldt County	2 pounds if consistent with medical need	10 plants if consistent with medical need	DA's unofficial policy. No ID card program	No direct contact made.
Marin County	½ pound	6 mature **or** 12 immature	Unofficial Inter-Agency Protocol. No ID card program.	Cases may be referred to DA for case by case evaluation.
Mendocino County	2 pounds	6 mature **or** 12 immature	DA and Sheriff proposed guidelines with Health Dept. Self identification program.	
Nevada County	2 pounds	10 (if yield not more than 2 pounds)	Inter-Agency Protocol. No ID card program.	
Shasta County	1.33 pounds	2 outdoor **or** 6 indoor (3 flowering + 3 immature)	Inter-Agency Protocol. No ID card program.	Based on California Department of Justice Advanced Training Center's "Standardized Criteria For Proposition 215." Law allows possession of either dried marijuana or plants, but not both.

City or County in California	Processed	Plants	Agency and ID Program	Notes
Sierra County	1 pounds	18 seedlings, 6 flowering, OR 3 mature	Sheriff's policy. No ID card Program.	Based on neighboring County policies and County Council research.
Sonoma County	3 pound	Canopy of 100 square feet, no more than 99 plants	No direct contact made.	No direct contact made.
Tehema County	3 pounds	18 seedlings OR 6 flowering OR 3 mature outdoor OR 6 mature indoor	Sheriff's policy. Suggests voluntary self-identification & monitoring program.	
Yuba County	1.5 pounds	5 plants	Unofficial Inter-Agency Protocol. No ID card Program.	No direct contact made. Case by case review.