California Department of Justice
Office of the Attorney General

Summary of Medical Marijuana Law

As of August 14, 2012

Please be advised: The following summary has been compiled for informational purposes only. While every effort has been made to describe the statutes and case holdings concisely, accurately, and in a neutral manner, this summary does not purport to be definitive, and other interpretations of the law may be possible. To fully appreciate the principles of medical marijuana law, readers are encouraged to consult the texts of the statutes and decisions themselves.

I California's marijuana statutes

A. General marijuana prohibition

California law proscribes possession, sale, cultivation, transportation, and other activities relating to marijuana. These offenses are generally set forth in the Health and Safety Code, beginning with section 11357.

B. The Compassionate Use Act

In 1996, California voters passed Proposition 215, the Compassionate Use Act ("CUA"), which is codified at Health and Safety Code section 11362.5:

> *Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.*

The court in *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1398, fn. 10, noted that Proposition 215 is a "poorly drafted initiative."

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C. *The Medical Marijuana Program Act*

In 2003, the California Legislature passed Senate Bill 420, the Medical Marijuana Program Act ("MMPA"), which became effective January 1, 2004. The MMPA is codified at Health and Safety Code sections 11362.7 through 11362.83. Among other things, the MMPA:

> *Mandates that counties establish and maintain medical-marijuana identification-card programs. Participation by patients and caregivers in the cardholder program is voluntary, but cardholders are protected from arrest;*
>
> *Extends protection against criminal liability to patients who transport marijuana for personal medical use and to caregivers (and their assistants) who transport, process, administer, etc. marijuana for the personal medical use of the patient;*
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> *Recognizes a qualified right to collective or cooperative cultivation of medical marijuana.*

D. *Assembly Bill 2650*

Effective January 1, 2011, section 11362.768 was added to the Health and Safety Code. The section provides, with some qualifications, that no medical marijuana "establishment" may be located within 600 feet of a school.

E. *Conflict with federal law*

The federal Controlled Substances Act criminalizes marijuana activity and does not provide any medical-use exception, thereby conflicting with California law. Nonetheless, numerous courts have found that California's medical marijuana laws are not unconstitutional under the Supremacy Clause as preempted by the federal Controlled Substances Act. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734; *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798; *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, 380-386.)

> The Second District Court of Appeal has now held, however, that a local ordinance enacted by the City of Long Beach to regulate dispensaries is partially preempted by the federal CSA. This is because the ordinance does not merely decriminalize as a matter of state law what federal law criminalizes, but specifically authorizes activity, through a permit scheme, that frustrates the operation of the CSA. (*Pack v. Superior Court* (2011) 199 Cal.App.4th 1070.) On January 18, 2012, the California Supreme Court granted review in *Pack*. (Case number S197169.)

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The U.S. Supreme Court has said that federal authorities may enforce provisions of the federal Controlled Substances Act that criminalize simple marijuana possession and use against persons whose possession and use of marijuana is legal as a matter of state law under the CUA. (*Gonzales v. Raich* (2005) 545 U.S. 1.)

However, on October 19, 2009, the U.S. Department of Justice issued a memorandum advising federal prosecutors in states with laws authorizing the medical use of marijuana that, as a matter of policy and within the exercise of their discretion, they "should not focus federal resources in [their] States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." (http://blogs.usdoj.gov/blog/archives/192.)

Concomitantly, the California Attorney General has advised state law enforcement agencies that *Gonzales v. Raich* (2005) 545 U.S. 1 does not require state law enforcement officers to enforce federal marijuana law and that state law enforcement officers should avoid effecting arrests in medical-marijuana situations based solely on federal law. (Cf. *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1445 ["state courts do not enforce the federal criminal statutes"].)

F. Attorney General guidelines

The MMPA required the California Attorney General to develop and adopt appropriate guidelines to ensure the security and nondiversion of medical marijuana. (Health & Saf. Code, § 11362.81, subd. (d).) On August 25, 2008, the Attorney General issued those guidelines, which may be found at http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf. The guidelines are not binding, but are entitled to "considerable weight." (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734; *People v. Hochanadel* (2009) 176 Cal.App.4th 997.)

II To invoke the protection of California's medical marijuana laws, one must be a "patient," a "primary caregiver," or a recommending physician

A. A physician's recommendation renders a person a medical marijuana "patient"

A "patient" is a person who is entitled to the protections of the CUA (Health & Saf. Code, § 11362.7, subd. (f)), meaning a person who has a written or oral recommendation or approval from a physician to use marijuana (Health & Saf. Code, § 11362.5, subd. (d)).

Note: There are no valid medical-marijuana "prescriptions" in California. FDA regulations prevent physicians from prescribing marijuana, but a written or oral "recommendation" is permissible. (*Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 632.)

The physician's recommendation should be based on a patient's serious illness, such as "cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." (Health & Saf. Code, § 11362.5, subd. (a); see also Health & Saf. Code, §§ 11362.7, subd. (a), 11362.7, subd. (h).) However, all that required for purposes of CUA protection is a recommendation or approval; neither a court nor a jury looks behind the recommendation or approval to evaluate the reasons for it. (*People v. Spark* (2004) 121 Cal.App.4th 259.)

"Approval" connotes a less formal act than "recommendation." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1548.) "Recommendation" suggests that the physician has raised the issue of marijuana use and presented it to the patient as a beneficial treatment; "approval" suggests that the patient has raised the issue and the physician has expressed a favorable opinion of it. (*People v. Jones* (2003) 112 Cal.App.4th 341, 347.)

The recommendation or approval must precede arrest. (*People v. Rigo* (1999) 69 Cal.App.4th 409, distinguishing *People v. Trippet* (1997) 56 Cal.App.4th 1548, fn. 13, which had stated that "approval" does not necessarily have to be antecedent to possession.)

The recommendation need not be renewed, nor must the recommendation specify a particular quantity. (*People v. Windus* (2008) 165 Cal.App.4th 634.)

B. ***Being designated by a patient and attending to that patient's "core survival needs" renders a person a "primary caregiver"***

A primary caregiver is defined under the CUA as a person designated by a patient who has "consistently assumed responsibility for the housing, health, or safety" of the patient. (Health & Saf. Code, § 11362.5, subd. (e).) The MMPA definition of "primary caregiver" mirrors the CUA definition and specifically cites as permissible caregivers healthcare clinics, hospices, and similar entitites. The MMPA also requires, with few exceptions, that a primary caregiver be over the age of 18. (Health & Saf. Code, § 11362.7, subd. (e).)

The California Supreme Court has interpreted these definitions to mean that a caregiver is someone who tends to "the core survival needs of a seriously ill patient, not just one single pharmaceutical need." (*People v. Mentch* (2008) 45 Cal.4th 274.) Thus, merely supplying marijuana is insufficient to render one a primary caregiver. A defendant asserting a primary caregiver defense must prove at a minimum that he or she was designated a primary caregiver, and that she or

she (1) consistently provided caregiving (2) independent of assisting with marijuana (3) at or before the time he or she began assisting with marijuana. (*Ibid.*; accord, *People v. Windus* (2008) 165 Cal.App.4th 634; *People v. Frazier* (2005) 128 Cal.App.4th 807; *People v. Mower* (2002) 28 Cal.4th 457, 475-476.)

A primary caregiver is not limited to a single patient. (*People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1398-1399; see also Health & Saf. Code, § 11362.7, subd. (e)(2).)

C. *Physicians are expressly protected for the act of recommending marijuana*

A physician may not be punished simply for recommending marijuana use. (Health & Saf. Code, § 11362.5, subd. (c).) However, the California Medical Board may take disciplinary action against physicians who do not follow accepted medical standards in relation to medical marijuana. (See May 13, 2004, Cal. Med. Bd. Statement; http://www.mbc.ca.gov; see also Health & Saf. Code, § 11362.7, subd. (a).)

> The Medical Board is entitled to absolute immunity, and its investigators may be entitled to qualified immunity, from civil rights liability based on investigation of potential transgressions of medical ethics related to a marijuana recommendation. (*Bearman v. California Medical Bd.* (2009) 176 Cal.App.4th 1588 [dismissing civil rights suit based on unsuccessful investigation of recommendation of marijuana to treat attention deficit disorder, noting that "there is room for abuse in this emerging area of the law" and the Board and its agents are not exposed to tort liability for simply trying to investigate such abuse].)

III *Arrest protection and search and seizure issues*

A. *A holder of an official MMP ID card is entitled to immunity from arrest if the amount of marijuana is within statutory limits*

Under the MMPA, medical marijuana patients or caregivers may voluntarily obtain county-issued identification cards. (Health & Saf. Code, §§ 11362.71-11362.755.) A holder of an official, county-issued identification card under the MMPA is protected from arrest for possession, transportation, delivery, or cultivation of marijuana *in an amount that is within the MMP limits*. (Health & Saf. Code, § 11362.71, subd. (e).) A police officer may not refuse to accept an identification card unless fraud is suspected. (Health & Saf. Code, § 11362.78.)

> The MMPA requires that the quantity of marijuana possessed be no more than eight ounces of dried marijuana and no more than six mature or twelve immature plants. (Health & Saf. Code, § 11362.77, subd. (a).) A

physician may recommend more if those quantities are insufficient to meet the patient's medical needs. (Health & Saf. Code, § 11362.77, subd. (b).) In addition, local jurisdictions may enact guidelines increasing the limits. (Health & Saf. Code, § 11362.77, subd. (c).)

The MMPA limits themselves apply to only the "dried mature processed flowers of female cannabis plant or the plant conversion." (Health & Saf. Code, § 11362.77, subd. (d).)

"Marijuana" is defined by statute as all parts and derivatives of the plant Cannabis sativa L., except for mature stalks and derivatives of mature stalks. (Health & Saf. Code, § 11018.)

Concentrated cannabis (hashish) is included in the definition of "marijuana" for purposes of the CUA. (86 Ops.Cal.Atty.Gen. 180 (2003); see also Health & Saf. Code, § 11006.5.)

It is not necessary for a person to obtain an identification card in order to claim the protection of the CUA's in-court defense (see below). (Health & Saf. Code, § 11362.71, subd. (f).)

The identification card program of the MMPA does not unconstitutionally amend the CUA. (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798.)

B. ***Those without official ID cards are subject to the ordinary probable cause standard***

Although the CUA does not provide immunity against arrest, evidence of medical use is one of the totality of the circumstances taken into account by law enforcement officers in confronting search and seizure questions. Absent an MMP ID card, officers must still have probable cause to arrest based on all the circumstances, including evidence of lawfulness under the CUA. (*People v. Mower* (2002) 28 Cal.4th 457, 468-469.)

Presentation of a doctor's note recommending marijuana use does not preclude reasonable investigation based on all the other circumstances. (*People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1059-1060 ["defendant was not sitting at home nursing an illness with the medicinal effects of marijuana. He was smoking in a parked car in a public place, a gas station parking lot, with another person."].)

Posting a copy of the physician's authorization next to a marijuana patch may or may not be enough to dispel probable cause. (*People v. Russell* (2006) 138 Cal. App. 4th 723 [posted authorization vitiated probable cause], ordered not published.)

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Once a warrant is issued, the search must proceed, even if officers are presented with evidence of medical authorization upon arrival to execute the search. (*People v. Fisher* (2002) 96 Cal. App. 4th 1147.)

According to the Fourth District Court of Appeal, an officer was qualified to author a marijuana search warrant where he was familiar with marijuana laws and experienced in marijuana investigations; an erroneous legal observation by the officer in the warrant application did not invalidate his expertise, given the unsettled nature of medical marijuana law. (*People v. Hochanadel* (2009) 176 Cal.App.4th 997, distinguishing *Chakos*.)

In the same case, the Court of Appeal also held that the trial court had erroneously quashed the search warrant served on a medical marijuana dispensary on the ground that the dispensary qualified as a primary caregiver; although the dispensary may have been lawful as a collective or cooperative, there were sufficient indicia that it was operating outside the scope of section 11362.775—that it was profit-driven and dealing with non-members—to support probable cause for the warrant. (*People v. Hochanadel* (2009) 176 Cal.App.4th 997.)

A medical marijuana patient may bring a civil suit against law enforcement alleging seizure of lawfully cultivated marijuana without a warrant or probable cause, even if the patient is not arrested. That is, the patient's recourse is not limited solely to raising a defense in criminal proceedings. (*County of Butte v. Superior Court* (2009) 175 Cal.App.4th 729.)

> Note: The Fourth Appellate District has decided that the lawful seizure of marijuana pursuant to a search warrant, and its later destruction by police, did not come within the "theft" provision of a homeowner's insurance policy, even in light of the insured's retrospective attempt to show that he was lawfully cultivating the marijuana pursuant to California's medical-use laws. (*Barnett v. State Farm General Ins. Co.* (2011) 200 Cal.App.4th 536.)

C. ***Return of seized marijuana***

Where a valid CUA defense is established, a defendant may be entitled to the return of marijuana seized by state authorities, even though possession of marijuana is still illegal under federal law. (*City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355.)

However, where a CUA defense is not established, the marijuana need not be returned, even if the case is dismissed. If the defense fails on the ground that the amount of marijuana possessed was in excess of permissible amounts, authorities are not required to apportion the marijuana and return a permissible amount. (*Chavez v. Superior Court* (2004) 123 Cal.App.4th 104.)

IV *The in-court medical marijuana defense*

A. *The medical marijuana defense is a limited one which may be raised in court, either at the preliminary hearing or at trial*

Marijuana remains a controlled substance under California law (*People v. Harris* (2006) 145 Cal.App.4th 1456, 1464), and the CUA did not create a constitutional right to use marijuana (*People v. Urzuceanu* (2005) 132 Cal.App.4th 747, 773-774).

Rather, the CUA provides only "limited immunity" by establishing an in-court affirmative defense against prosecution. (*People v. Mower* (2002) 28 Cal.4th 457; see also *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [CUA was not a marijuana-law "open sesame"].) The defense may be raised at the preliminary hearing and at trial. (*People v. Mower* (2002) 28 Cal.4th 457.)

B. *California's medical marijuana laws provide protection only against certain crimes*

By its express terms, the CUA provides immunity against prosecution only for possession and cultivation of marijuana. (Health & Saf. Code, § 11362.5, subd. (d); *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550.)

The MMPA extends protection against criminal liability to patients who transport marijuana for personal medical use and to caregivers (and their assistants) who transport, process, administer, etc. marijuana for the personal medical use of the patient. (Health & Saf. Code, § 11362.765.)

Other crimes may be implicitly covered by the CUA or the MMPA:

> An early question was whether transportation was implicitly covered by the CUA. A split of authority developed (see *People v. Trippet* (1997) 56 Cal.App.4th 1532 [yes]; *People v. Young* (2001) 92 Cal.App.4th 229 [no]), but before the California Supreme Court could resolve it, the MMPA was enacted, which extended protection against prosecution for transportation to patients and caregivers. (See *People v. Wright* (2006) 40 Cal.4th 81, 90-92.)
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> One court has found that misdeameanor possession of less than an ounce of marijuana in a motor vehicle (Veh. Code, § 23222, subd. (b)) is implicitly covered by the CUA and the MMPA. (*City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, 375-376.)

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The CUA does not protect against liability for selling marijuana. (*People v. Wright* (2006) 40 Cal.4th 81, 99; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1395.)

> Sale is prohibited under the CUA regardless of whether profit is involved. (*People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1392-1393.) Caregivers, however, may receive "bona fide reimbursement for their actual expense of cultivating and furnishing marijuana for the patient's authorized medical treatment." (*Id.* at p. 1399; see also Health & Saf. Code, § 11362.765, subd. (c) [permitting "reasonable compensation" to caregivers].)

C. ***The amount of marijuana at issue must be reasonably related to the patient's current medical needs***

Under the CUA, the quantity of marijuana possessed or transported, and the form and manner thereof, should be "reasonably related to the patient's current medical needs." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1549; see also *People v. Kelly* (2010) 47 Cal.4th 1008.)

> Although the MMPA set forth bright-line quantity limits that on their face would have applied to the in-court defense, those limits cannot extend to the CUA's in-court defense because such an application would amount to an impermissible legislative amendment of an initiative measure under California Constitution, Article II, section 10, subdivision (c). Other applications of the MMPA's quantity limits, such as in the context of the identification card program, remain unaffected. (*People v. Kelly* (2010) 47 Cal.4th 1008.)

Even after the MMPA, the quantity and method of transportation must still be reasonably related to the patient's medical needs. Qualified patients do not have an unfettered right "to take their marijuana with them wherever they go." (*People v. Wayman* (2010) 189 Cal.App.4th 215.)

D. ***The collective or cooperative cultivation defense***

Notwithstanding the foregoing limitations, the MMPA added a significant new protection against a range of offenses, including sale, for those patients and primary caregivers "who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes." (Health & Saf. Code, § 11362.775; *People v. Urzuceanu* (2005) 132 Cal.App.4th 747.) The MMPA, however, does not define the critical term "collectively or cooperatively cultivate."

> Note: The CUA does not allow for collective or cooperative cultivation of medical marijuana. (*People v. Urzuceanu* (2005) 132 Cal.App.4th 747,

766-773; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1167-1169.) Selling or furnishing marijuana to others, even if not for profit, remains prohibited under the CUA. (*People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1392-1393.)

However, section 11362.775 is not an unconstitutional amendment of the CUA. (*People v. Hachanadel* (2009) 176 Cal.App.4th 997, 1013; *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734.)

The Attorney General Guidelines state that a collective or cooperative cultivation operation should be formally organized, should not operate for profit, should maintain business licenses and permits, and should pay tax. Further, a collective or cooperative should verify each member's status as a patient, execute an agreement with each member regarding use and distribution of marijuana, and keep records regarding members and regarding distribution of marijuana. Collectives or cooperatives should also refrain from acquiring marijuana from, or distributing marijuana to, non-members. (A.G. Guidelines at pp. 8-10; *People v. Hochanadel* (2009) 176 Cal.App.4th 997.)

Note: After *Mentch*, which narrowly defined the term "primary caregiver" in the context of California's medical-marijuana laws, the collective-or-cooperative cultivation defense under section 11362.775 appears to be the only potentially viable protection for storefront medical-marijuana "dispensaries." See below (Section VII) for a more detailed outline of that subject.

E. Burden of proof and evidentiary issues

At trial, the defendant bears the burden to raise a reasonable doubt regarding the unlawfulness of his or her actions in light of the CUA. (*People v. Mower* (2002) 28 Cal.4th 457; see also *People v. Frazier* (2005) 128 Cal.App.4th 807.)

One of the issues on which the California Supreme Court granted review in *People v. Mentch* was whether the burden described in *Mower* is a burden of production or a burden of proof. Although the court ultimately did not reach the issue, Justice Chin noted in his concurrence his agreement with the Attorney General's position that "the defendant's burden is only to produce evidence under Evidence Code section 110" and stated that "trial courts might well be advised to be cautions before instructing on any defense burden." (*People v. Mentch* (2008) 45 Cal.4th 274 (conc. opn. of Chin, J.).)

The Fourth District Court of Appeal has said that for a prosecution witness to testify as an expert at a marijuana trial where a medical defense is raised, the expert must have particular expertise in medical marijuana. (*People v. Chakos* (2007) 158 Cal.App.4th 357.) The Third District Court of Appeal disagrees,

saying that such a requirement would improperly shift the burden of proving a medical-marijuana defense. (*People v. Dowl* (2010) 183 Cal.App.4th 702.) The Supreme Court has now granted review in *Dowl* to resolve this disagreement. (*People v. Dowl* (2010) 112 Cal.Rptr.3d 291.)

F. Interaction with other defenses

The existence of the CUA precludes the possibility of a "medical necessity" defense to the use of marijuana. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1160-1162; see also *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1538-1540.)

The use of marijuana for "spiritual and meditative needs" does not support a religious freedom defense. (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1541-1543.) Neither RFRA, nor the First Amendment, nor a mistake of law defense, nor the state free-exercise clause protects sales of marijuana by an establishment with nebulous religious principles. Sale of marijuana from such an establishment is not the same as the sacramental use of a controlled substance as an integral part of religious experience. (*People v. Rubin* (2008) 168 Cal.App.4th 1144.)

V Other limits to medical marijuana protection

Because marijuana is a controlled substance, irrespective of any claim under the CUA, it remains subject to other restrictions on controlled substances, such as the prohibition against taking it into a correctional facility. (*People v. Harris* (2006) 145 Cal.App.4th 1456; see also Health & Saf. Code, § 11362.785, subd. (a).)

Marijuana may not be smoked for medical purposes where smoking is prohibited by law, within 1000 feet of a school (unless inside a residence), on a schoolbus, or in an operating vehicle or boat. (Health & Saf. Code, § 11362.79.)

An employer may prohibit employees from using marijuana, even for medical purposes. (*Ross v. RagingWire Telecommunications* (2008) 42 Cal. 4th 920; see also Health & Saf. Code, § 11362.785, subd. (a).)

As of January 1, 2011, no medical marijuana "establishment" may be located within 600 feet of a school. (Health & Saf. Code, § 11362.768.)

VI Probation and parole

A defendant with a medical marijuana recommendation "may request" that the trial court "confirm" his or her eligibility to use marijuana while on probation or released on bail. (Health & Saf. Code, § 11362.795.) A defendant who obtains a recommendation while on probation or parole "may request" modification of the terms of probation or parole to allow the use of medical marijuana. (*Ibid.*)

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A probation condition prohibiting marijuana use may be valid under usual standards for setting probation conditions notwithstanding a doctor's recommendation that the defendant use marijuana for medical purposes. (*People v. Bianco* (2001) 93 Cal.App.4th 748.)

However, a probation condition that simply requires a probationer to "obey all laws" does not prohibit medical marijuana use simply because federal law does not recognize a medical-use exception, since California courts do not enforce federal law. (*People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1437, 1445-1447 [expressly limiting holding to cases in which there is "no claim the conditions of probation which defendant violated concerned the rehabilitative purposes of the probation law or that defendant's marijuana use and possession endangered others or was diverted for nonmedical purposes."].)

Addressing *Bianco* and *Tilehkooh*, the Second District Court of Appeal found that a probation condition prohibiting the use of marijuana even with a physician's recommendation is not invalid as a matter of law. Where there is evidence that marijuana has been diverted for a nonmedical purpose a trial court my restrict even medical use of marijuana authorized by a physician. Nor does such a probation condition amount to cruel and unusual punishment. (*People v. Brooks* (2010) 182 Cal.App.4th 1348.) The Fourth District Court of Appeal has likewise found that a no-medical-use probation condition is not invalid as a matter of law and is reviewed for abuse of discretion under traditional standards governing probation conditions. (*People v. Hughes* (2012) 202 Cal.App.4th 1473.)

According to the First District Court of Appeal, a probation condition requiring the defendant to forfeit his medical marijuana card was valid where: (1) the trial court had concerns about the defendant's ongoing criminal behavior and related marijuana use; (2) the trial court had reason to doubt the legitimacy of the defendant's medical need for marijuana; and (3) the defendant could have simply rejected the probation condition and accepted a prison sentence, or a Marinol alternative offered by the court, if he thought the condition too onerous. (*People v. Moret* (2009) 180 Cal.App.4th 839 [reaffirming that courts may restrict medical marijuana use as condition of probation and distinguishing *Tilehkooh* on basis that *Tilehkooh* predated enactment of Health and Safety Code section 11362.795.)

Lawfully using medical marijuana pursuant to Proposition 215 does not necessarily, or as a matter of law, make a probationer unamenable to Prop 36 drug treatment. Rather, there must be a showing based on the particular circumstances of the case that the defendant's medical marijuana use makes him unamenable to treatment. (*People v. Beaty* (2010) 181 Cal.App.4th 644.) According to the Fifth District Court of Appeal, the fact that a treatment program requires abstinence from all mind-altering substances as a blanket rule is an insufficiently specific showing of unamenability for Prop 36 drug treatment. (*Id.*)

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VII Medical marijuana "dispensaries"

A. Ambiguous status

California's medical marijuana laws do not expressly sanction storefront "dispensaries." However, as one court has noted, "[n]othing in section 11362.775, or any other law, prohibits cooperatives and collectives from maintaining places of business"; it therefore may be possible for a dispensary to operate lawfully within the ambit of the laws governing collective and cooperative cultivation. (*People v. Hochanadel* (2009) 176 Cal.App.4th 997]; accord, A.G. Guidelines at p. 11.) The A.G. Guidelines suggest that, if collective or cooperative cultivators operate through a storefront, the operation should, among other things, be formally organized, should buy and sell marijuana only among members, and should be non-profit. (*Id.*; accord, A.G. Guidelines at p. 11.)

> Note: Before passage of the MMPA, dispensaries commonly operated on a "primary caregiver" model. That model has now effectively been foreclosed. (See *People v. Mentch* (2008) 45 Cal.4th 274 [explaining that a primary caregiver must attend to "the core survival needs of a seriously ill patient, not just one single pharmaceutical need."]; see also *People v. Hochanadel* (2009) 176 Cal.App.4th 997 [storefront dispensary that merely requires patients to summarily designate the dispensary as primary caregiver and then offers marijuana in exchange for cash does not operate lawfully as a "primary caregiver"]; accord, A.G. Guidelines at p. 11; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1396 [patients cannot designate, "seriatim, and on an ad hoc basis," various providers of marijuana as primary caregivers; there must be consistency in caring for the patient."].)

> Note: Health and Safety Code section 11362.768, which became effective January 1, 2011, now acknowledges "cooperatives," "collectives," and "dispensaries," in the context of restricting *where* they may operate. The section does not, however, shed any light on *how* they may operate (within the parameters of section 11362.775).

In *People v. Colvin* (Feb. 23, 2011) 203 Cal.App.4th 1029, the Second District Court of Appeal rejected the Attorney General's contention that, while marijuana dispensaries are not necessarily unlawful, to "collectively or cooperatively cultivate" requires something more than a retail-like relationship where thousands of patients simply exchange money for marijuana grown by a few cultivators unknown to most of the patients. The *Colvin* court found, instead, that a storefront distributing marijuana to patients and caregivers, akin to a grocery cooperative, which was in compliance with all local municipal regulations regarding marijuana dispensaries, was entitled to the protection of 11362.775. (Pet. for Review denied May 23, 2012.)

A few weeks later, however, without addressing *Colvin*, a different division of the Second District Court of Appeal flatly stated, in the context of a nuisance-abatement case against a dispensary, "Section 11362.775 protects group activity to cultivate marijuana for medical purposes. It does not cover dispensing or selling marijuana." (*People ex rel. Trutanich v. Joseph*, 204 Cal.App.4th 1512, pet. for review denied June 27, 2012.)

> Note: Given that the Supreme Court denied review in both *Colvin* and *Joseph*, a stark split of authority remains regarding interpretation of the scope of section 11362.775, and it is unclear what the Supreme Court's view on that subject may be.

Yet another division of the Second District Court of Appeal held, a few months later, that California's medical-marijuana laws do contemplate the existence of "dispensaries," as evidenced notably by the use of the term in the later-enacted Health and Safety Code section 11362.768. (*County of Los Angeles v. Alternative Medicinal Cannabis Collective* (2012) 207 Cal.App.4th 601, pet. for review filed Aug. 13, 2012.)

B. ***Zoning and regulation***

California's medical marijuana laws neither expressly authorize dispensaries nor preempt a local government from regulating dispensaries, including by imposing a moratorium on their operation. (*Claremont v. Kruse* (2009) 177 Cal.App.4th 1153; see also *420 Caregivers, LLC v. City of Los Angeles* (2012) 207 Cal.App.4th 703; *County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861.)

> The Fourth District Court of Appeal upheld Riverside's zoning ban against dispensaries, finding that even an outright ban is not preempted by state law. (*City of Riverside v. Inland Empire Patient's Health and Wellness Center, Inc.* (2011) 200 Cal.App.4th 885.)
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> However, the Second District Court of Appeal held that the City of Long Beach's ordinance specifically authorizing dispensaries, through a permit scheme, is preempted by the federal CSA. (*Pack v. Superior Court* (2011) 199 Cal.App.4th 1070.)
>
> On January 18, 2012, the California Supreme Court granted review in both of these cases.
>
> In *County of Los Angeles v. Alternative Medicinal Cannabis Collective* (2012) 207 Cal.App.4th 601, the Second District Court of Appeal held that Los Angeles County's total ban on dispensaries directly conflicted with the Legislature's intent to authorize dispensary operation, and therefore

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was preempted. A petition for review was filed in this case on August 13, 2012.

A dispensary operating without appropriate permitting may be subject to injunction as a nuisance. (See *Claremont v. Kruse* (2009) 177 Cal.App.4th 1153; *Corona v. Naulls* (2008) 106 Cal.App.4th 418.)

A medical marijuana dispensary is not similarly situated to a conventional pharmacy, so that disparate regulation of the two does not give rise to an equal protection violation. (*County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861.)

Marijuana transactions are subject to taxation, and an entity engaged in marijuana sales must hold a seller's permit. (See June 2007 Cal. Bd. of Equalization Special Notice; www.boe.ca.gov.)

An individual member of a marijuana "collective" or "cooperative" does not have standing to challenge a city's zoning ordinance banning dispensaries as preempted by section 11362.775. That section confers only group rights; not individual rights. (*Traudt v. City of Dana Point* (2011) 199 Cal.App.4th 886.)

Upholding summary judgment in favor of the Cities of Los Angeles and Culver City in a nuisance-abatement action against the Organica dispensary, the Second District Court of Appeal stated that neither section 11362.765 nor section 11362.775 provided a defense to the dispensary against section 11570's narcotics abatement law because Organica did not qualify as a primary caregiver as required by section 11362.765, and because "[s]ection 11362.775 protects group activity to cultivate marijuana for medical purposes. It does not cover dispensing or selling marijuana." The court also held that, as a matter of law, Organica's dispensary activities constituted a public nuisance under Civil Code section 3479 and amounted unfair business practices under Business and Professions Code section 17200. (*People ex rel. Trutanich v. Joseph* (2012) 204 Cal.App.4th 1512.)

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