

RIVERSIDE COUNTY DISTRICT ATTORNEY'S OFFICE

WHITE PAPER

MEDICAL MARIJUANA: HISTORY AND CURRENT COMPLICATIONS

September 2006

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In November of 1996, California voters passed the Proposition 215 initiative.¹ The initiative set out to make medical marijuana available to people with certain illnesses. The initiative was later supplemented by the Medical Marijuana Program Act; which was enacted as Senate Bill 420 by the state legislature in 2003 and became effective in January of 2004. Across the state, counties have varied in their responses to medical marijuana. Some counties have allowed businesses to open and provide medical marijuana. Others have disallowed all such establishments within their borders. Several counties once issued business licenses allowing medical marijuana stores to operate, but no longer do so. This paper discusses the legality of both medical marijuana and the businesses that make it available.

History of Medical Marijuana

The world history of marijuana for medicinal use is long and varied. Among other illnesses, the Chinese used it to treat gout, malaria and memory. Hindu sects have used it as a stress reliever. Ancient physicians prescribed marijuana for pain, childbirth and earaches. Early Americans used it to treat skin inflammation, rabies, and tetanus.²

However, evidence that marijuana lessens the symptoms of any medical condition is largely anecdotal.³ Additionally, medical marijuana is normally administered by smoking and not a single Federal Drug Administration approved medication is smoked.⁴

Federal Law

Federal law clearly and unequivocally states that all marijuana related activities are illegal. Consequently, all people engaged in such activities are subject to federal prosecution. The United States Supreme Court recently decided, *Gonzales v. Raich*, (2005) 125 S.Ct. 2195, making the federal position absolutely plain. The court has declared that, despite the attempts of several states to partially legalize marijuana, it

continues to be wholly illegal since it is classified as a Schedule I drug. As such, there are no exceptions to its illegality. The mere categorization of marijuana as “medical” by some states fails to carve out any legally recognized exception regarding the drug. Marijuana, in any form, is neither valid nor legal.

Clearly the United States Supreme Court is the highest court in the land. Its decisions are final and binding upon all lower courts. The court invoked the United States Supremacy Clause and the Commerce Clause in reaching its decision. The Supremacy Clause declares that all laws made in pursuance of the Constitution shall be the “supreme law of the land” and shall be legally superior to any conflicting provision of a state constitution or law.⁵ The Commerce Clause states that “the Congress shall have power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁶

Gonzales v. Raich addressed the concerns of two California individuals growing and using marijuana under our state’s medical marijuana statute. The court explained that under the Controlled Substances Act marijuana is a Schedule I drug and is strictly regulated.⁷ “Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment.”⁸ The court ruled that the Commerce Clause is applicable to California individuals growing and obtaining marijuana for their own personal, medical use. Under the Supremacy Clause, the federal regulation of marijuana, pursuant to the Commerce Clause, supersedes any state’s regulation, including California’s. The court found that the California statutes did not provide any federal defense if a person is brought into federal court for cultivating or possessing marijuana.

Accordingly, there is no federal exception for the growth, cultivation, use or possession of marijuana and all such activity remains illegal.⁹ California’s Compassionate Use Act of 1996 and Medical Marijuana Program Act of 2004 do not create an exception to this federal law. All marijuana activity is absolutely illegal and subject to federal regulation and prosecution.

California Law

On November 5, 1996, California voters adopted Proposition 215, an initiative statute authorizing the medical use of marijuana.¹⁰ The initiative added Health and Safety code section 11362.5 which allows “seriously ill Californians the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician”¹¹ The codified section is known as the Compassionate Use Act of 1996.¹² Additionally, the state legislature passed Senate Bill 420 in 2003; it became the Medical Marijuana Program Act and took effect on January 1, 2004.¹³ This act expanded the definitions of “patient” and “primary caregiver”¹⁴ and created guidelines for identification cards.¹⁵ It defined the amount of marijuana that “patients” and “primary caregivers” can possess.¹⁶ It also created a limited affirmative defense to criminal prosecution for qualifying individuals that collectively gather to cultivate medical marijuana.¹⁷

Despite their illegality, the medical marijuana laws in California are specific. The statutes craft narrow affirmative defenses for particular individuals with respect to enumerated marijuana activity. All conduct, and people engaging in it, that falls outside

of the statutes' parameters remains illegal under California law. Relatively few individuals will be able to assert the affirmative defense in the statute. To use it a person must be a "qualified patient", "primary caregiver", or a member of a "cooperative". Once they are charged with a crime, if a person can prove an applicable legal status, they are entitled to assert this statutory defense.

A strict construction of California law

The California Attorney General, Bill Lockyer, has also spoken on medical marijuana. His office issued a bulletin to California law enforcement agencies on June 9, 2005. The office expressed the opinion that *Gonzales v. Raich* did not address the validity of the California statutes and, therefore, had no effect on California law. The office advised law enforcement to not change their operating procedures. The Attorney General made the recommendation that law enforcement neither arrest nor prosecute "individuals within the legal scope of California's Compassionate Use Act."

When California's medical marijuana laws are strictly construed our two offices come to a point of agreement. We believe that *Gonzales v. Raich* does affect California law. However, we also acknowledge that the California statutes offer some legal protection to "individuals within the legal scope of" the acts. The medical marijuana laws speak to patients, primary caregivers, and true collectives. These people are expressly mentioned in the statutes and, if their conduct comports to the law, may have some state legal protection for specified marijuana activity. Conversely, all medical marijuana establishments that fall outside the letter and spirit of the statutes are not legal; including dispensaries and store-front facilities. These establishments have no legal protection. The Attorney General's opinion does not present a contrary view.

1. Conduct

Health and safety code sections 11362.765 and 11362.775 describe the conduct for which the affirmative defense is available. If a person qualifies as a "patient", "primary caregiver", or is a member of a legally recognized "cooperative" they have an affirmative defense to possessing a defined amount of marijuana. Under the statute no more than eight ounces of dried marijuana can be possessed. Additionally, either six mature or twelve immature plants may be possessed.¹⁸ Note that if someone claims patient or primary caregiver status, and possesses more than this amount of marijuana, he can be prosecuted for drug possession. The qualifying individuals may also cultivate, plant, harvest, dry, and/or process marijuana; but while still strictly observing the permitted amount of the drug. The statute may also provide a limited affirmative defense for possessing marijuana for sale, transporting it, giving it away, maintaining a marijuana house, knowingly providing a space where marijuana can be accessed, and creating a narcotic nuisance.¹⁹

However, for anyone who cannot lay claim to the appropriate status under the statutes: all instances of marijuana possession, cultivation, planting, harvesting, drying, processing, possession for the purposes of sales, completed sales, giving away, administration, transportation, maintaining of marijuana houses, knowingly providing a

space for marijuana activity, and creating a narcotic nuisance continue to be illegal under California law.

2. Patient

Under section 11362.5(b)(1)(A), a patient is anyone a physician has determined will benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or *any other illness for which marijuana provides relief*.²⁰ A physician's recommendation that indicates medical marijuana will benefit the treatment of an illness is required before a person can claim to be a medical marijuana patient. Accordingly, such proof is also necessary before a medical marijuana affirmative defense can be claimed.

3. Primary Caregiver

A primary caregiver is an individual who has "consistently assumed responsibility for the housing, health, or safety of a patient".²¹ The statutory definition includes some clinics, health care facilities, residential care facilities, and hospices. If more than one patient designates the same person as the primary caregiver, all individuals must reside in the same city or county. In most circumstances the primary caregiver must be at least 18 years of age.

It is important to note that it is almost impossible for a store-front medical marijuana business to gain true primary caregiver status. Businesses that call themselves "cooperatives", but function like store-front dispensaries, suffer this same fate. In *People v. Mower*, the court was very clear that the defendant had to prove he was a primary caregiver in order to raise the medical marijuana affirmative defense. Mr. Mower was prosecuted for supplying two people with marijuana.²² He claimed he was their primary caregiver under the medical marijuana statutes. This claim required him to prove he "**consistently had assumed responsibility for either one's housing, health, or safety**" before he could assert the defense.²³

The key to being a primary caregiver is not simply that medical marijuana is provided for a patient's health: the responsibility for the health must be consistent. Any relationship a store-front medical marijuana business has with a patient is more likely to be transitory than consistent. A patient can go to any dispensary he chooses. He can even visit different ones on a single day or any subsequent day. Courts have found that a patient's act of signing a piece of paper declaring that someone is a primary caregiver does not necessarily make them one. The relationship between patient and primary caregiver must be consistent over time. Any business that cannot prove its relationship with the patient meets these requirements is not a primary caregiver. Functionally, the business is a drug dealer and is subject to prosecution as such.

4. Store-front medical marijuana cooperatives and dispensaries

Since the passage of the Compassionate Use Act of 1996, many store-front medical marijuana businesses have opened in the state.²⁴ Some are referred to as

dispensaries, some as cooperatives; but it is how they operate that removes them from any umbrella of legal protection. These facilities operate as if they are pharmacies. Most offer different types and grades of marijuana. Some offer baked goods that contain marijuana.²⁵ Monetary donations are collected from the patient or primary caregiver when marijuana or food items are received. The items are not technically sold since that would be a criminal violation of the statutes.²⁶ These facilities are able to operate because they apply for and receive business licenses from cities.

Federally, all existing store-front medical marijuana businesses are subject to search and closure since they violate federal law.²⁷ Their mere existence violates federal law. Consequently, they have no right to exist or operate, and arguably counties in California have no authority to sanction them.

Similarly, in California there is no apparent authority for the existence of these store-front medical marijuana businesses. The Medical Marijuana Program Act of 2004 allows *patients* and *primary caregivers* to grow and cultivate marijuana, no one else.²⁸ Although Health and Safety Code section 11362.775 offers some state legal protection for true collectives and cooperatives, no parallel protection exists in the statute for any store-front business providing any narcotic.

The common dictionary definition of collectives is that they are organizations jointly managed by those using its facilities or services. Legally recognized cooperatives generally possess “the following features: control and ownership of each member is substantially equal; members are limited to those who will avail themselves of the services furnished by the association; transfer of ownership interests is prohibited or limited; *capital investment receives either no return or a limited return*; economic benefits pass to the members on a substantially equal basis or on the basis of their patronage of the association; members are not personally liable for obligations of the association in the absence of a direct undertaking or authorization by them; death, bankruptcy or withdrawal of one or more members does not terminate the association; and [the] services of the association are furnished primarily for the use of the members.”²⁹ Medical marijuana businesses, of any kind, do not meet this legal definition.

Actual medical dispensaries are commonly defined as offices in hospitals, schools, or other institutions from which medical supplies, preparations, and treatments are dispensed. Hospitals, hospices, home health care agencies, and the like, are specifically included in the code as primary caregivers as long as they have “consistently assumed responsibility for the housing, health, or safety” of a patient.³⁰ Clearly, it is doubtful that any of the store-front medical marijuana businesses currently existing in California can claim that status. Consequently, they are not primary caregivers and are subject to prosecution under both California and federal laws.

Riverside County

There appear to be four dispensaries currently operating in the County of Riverside: the Healing Nations Collective in Corona, Compassionate Caregivers in Palm Springs, C.A.P.S. in Palm Springs and CannaHelp³¹ in Palm Dessert.

The County of Riverside is currently considering ordinance number 348.4403 which provides for the zoning and licensing of medical marijuana cooperatives in the

county. As discussed above, all such store-front medical marijuana businesses are illegal. Consequently, all are subject to criminal prosecution.

Practical Issues in California

A. How existing dispensaries operate

Despite their clear illegality, some cities do have existing and operational dispensaries. Assuming *arguendo*, that they may operate, it may be helpful to review the mechanics of the business. The former Green Cross dispensary in San Francisco illustrates how a typical medical marijuana dispensary works.³²

A guard or employee may check for medical marijuana cards or physician recommendations at the entrance. Many types and grades of marijuana are usually available. Sales clerks will probably make recommendations about what type of marijuana will best relieve a given medical symptom; although employees are neither pharmacists nor doctors. Baked goods containing marijuana may be available and sold; although there is usually no health permit to sell baked goods. The dispensary will give the patient a form to sign declaring that the dispensary is their “primary caregiver” (a process fraught with legal difficulties). The patient then selects the marijuana they want and is told what the “contribution” will be for the product. The code specifically prohibits the sale of marijuana to a patient so “contributions” are made to reimburse the dispensary for its time and care in making “product” available. However, if a calculation is made based on the figures in the article, it is clear that these “contributions” can easily add up to millions of dollars per year. That is a very large cash flow for a “non-profit” organization denying any participation in the retail sale of narcotics. Before its application to renew its business license was denied by the City of San Francisco, there were single days that Green Cross sold \$45,000.00 worth of marijuana. On Saturdays, Green Cross could sell marijuana to forty-three patients an hour. The marijuana sold at the dispensary was obtained from growers who brought it to the store in backpacks. A medium-sized backpack would hold approximately \$16,000.00 worth of marijuana. Green Cross used many different marijuana growers.

It is clear that dispensaries are running as if they are businesses, not legally valid cooperatives. Additionally, they claim to be the “primary caregivers” of patients. This is a spurious claim. As discussed above, the term “primary caregiver” has a very specific meaning and defined legal qualifications. A primary caregiver is an individual who has “consistently assumed responsibility for the housing, health, or safety of a patient.”³³ The statutory definition includes some clinics, health care facilities, residential care facilities, and hospices. If more than one patient designates the same person as the primary caregiver, all individuals must reside in the same city or county. In most circumstances the primary caregiver must be at least 18 years of age.

It is almost impossible for a store-front medical marijuana business to gain true primary caregiver status. A business would have to prove that it “**consistently** had assumed responsibility for [a patient’s] **housing, health, or safety**.”³⁴ The key to being a primary caregiver is not simply that medical marijuana is provided for a patient’s health: the responsibility for the patient’s health must be consistent.

As seen in the Green Cross example, a store-front medical marijuana business' relationship with a patient is most likely transitory. In order to provide a qualified patient with marijuana, a store-front medical marijuana business must create an instant "primary caregiver" relationship with him. The very fact that the relationship is instant belies any consistency in their relationship and the requirement that housing, health, or safety is consistently provided. Courts have found that a patient's act of signing a piece of paper declaring that someone is a primary caregiver does not necessarily make them one. The consistent relationship demanded by the statute is mere fiction if it can be achieved between an individual and a business that functions like a narcotic retail store.

B. Secondary effects of dispensaries and similarly operating cooperatives

Of equal concern are the secondary effects of these dispensaries and store-front cooperatives. Throughout the state, many violent crimes have been committed that can be traced to their proliferation. On February 25, 2004, two men in Mendocino County committed a home invasion robbery to steal medical marijuana. They held a knife to a 65-year-old man's throat, and though he fought back, managed to get away with large amounts of marijuana. They were soon caught and one of the men received a sentence of six years in the state prison.³⁵

At least two murders can be traced to the existence of medical marijuana dispensaries. On August 19, 2005, 18-year-old Demarco Lowery was shot when he and his friends attempted a takeover robbery of a store-front medical marijuana business in the City of San Leandro. The owner fought back and a gun battle ensued. Demarco Lowery was hit by gunfire and "dumped outside the emergency entrance of Children's Hospital Oakland" after the shootout.³⁶ He did not survive. The second known murder occurred on November 19, 2005. Approximately six men broke into Les Crane's home in Laytonville while yelling "this is a raid". Les Crane, who owned a store-front medical marijuana business, was at home and shot to death. Another man present at the time was beaten with a baseball bat. The murderers left the home after taking currency and processed marijuana.³⁷

On July 17, 2006, the El Cerrito City Council voted to ban all such medical marijuana facilities. It did so after reviewing a nineteen-page report that detailed a rise in crime near these store-front dispensaries in other cities. The crimes included robberies, assaults, burglaries, murders and attempted murders.³⁸ As recently as August 10, 2006, an armed robbery took place at a Santa Barbara dispensary. A small amount of currency and fifteen medical marijuana baggies were stolen. The owner says it is the fourth time he has been robbed. He failed to report the first three because "medical marijuana is such a controversial issue".³⁹ Even though medical marijuana store-front businesses do not currently exist in the City of Monterey Park, it issued a moratorium on them after studying the issue in August 2006.⁴⁰ After allowing these establishments to operate within its borders, the City of West Hollywood recently passed a similar moratorium. The moratorium was "prompted by incidents of armed burglary at some of the city's eight existing pot stores and complaints from neighbors about increased pedestrian and vehicle traffic and noise"⁴¹

Medical marijuana store-front businesses have allowed criminals to flourish in California. This past summer the City of San Diego cooperated with federal authorities

and served search warrants on several medical marijuana locations. In addition to marijuana many weapons were recovered, including a stolen handgun and an M-16 assault rifle.⁴² The National Drug Intelligence Center reports that marijuana growers are employing armed guards, using explosive booby traps and murdering people to shield their crops. Street gangs of all national origins are involved in transporting and distributing marijuana to meet the ever increasing demand for the drug.⁴³ Store-front medical marijuana businesses are very dangerous enterprises.

C. Liability Issues

With respect to issuing business licenses to medical marijuana store-front facilities a very real issue has arisen: counties and cities are arguably aiding and abetting criminal violations of federal law. Such actions clearly put the counties permitting these establishments in very precarious legal positions. Aiding and abetting a crime occurs when someone commits a crime, the person aiding that crime knew the criminal offender intended to commit the crime, and the person aiding the crime intended to assist the criminal offender in the commission of the crime.

The legal definition of aiding and abetting is easily applied to counties and cities allowing medical marijuana facilities to open. A county that has been informed about the *Gonzales v. Raich* decision knows that all marijuana activity is federally illegal. Furthermore, such counties know that individuals involved in the medical marijuana business are subject to federal prosecution. When an individual in California cultivates, possesses, transports, or uses marijuana he is committing a federal crime.

A county issuing a business license to a medical marijuana facility knows that the people there are committing federal crimes. The county also knows that those involved in providing and obtaining medical marijuana are intentionally violating federal law.

This very problem is why some counties are re-thinking the presence of medical marijuana facilities in their communities. There is a valid fear of being prosecuted for aiding and abetting federal drug crimes. Presently, two counties have expressed concern that California's medical marijuana statutes have placed them in such a precarious legal position. Because of the serious criminal ramifications involved in issuing business permits and allowing store-front medical marijuana businesses to operate within their borders, San Diego and San Bernardino Counties have filed a lawsuit against the state. They seek to prevent California from enforcing the medical marijuana statutes which subject them to criminal liability.

Conclusion

In light of the United States Supreme Court's decision and reasoning in *Gonzales v. Raich*, the United States Supremacy Clause renders California's Compassionate Use Act of 1996 and Medical Marijuana Program Act of 2004 illegal. No state has the power to grant its citizens the right to violate federal law. People have been, and continue to be, federally prosecuted for marijuana crimes. We conclude that medical marijuana is not legal under federal law, despite the current California scheme.

Furthermore, store-front medical marijuana businesses are prey for criminals and create easily identifiable victims. The people growing the marijuana are looking to and

employing illegal means to protect their valuable cash crops. Many distributing marijuana are hardened criminals.⁴⁴ The others distributing marijuana to the businesses are perfect targets for thieves and robbers. They are being assaulted, robbed and murdered. Those buying and using medical marijuana are also being victimized.

Additionally, illegal medical marijuana facilities have the potential for creating liability issues for counties and cities.

The Riverside County District Attorney's Office believes that the cooperatives being considered are illegal and should not be permitted to exist within the County's borders. They are a clear violation of federal and state law, they invite more crime, and they compromise the health and welfare of the citizens of this County.

¹ Ten other states have enacted medical marijuana laws in some fashion: Alaska, Arizona, Colorado, Hawaii, Maine, Montana, Nevada, Oregon, Vermont, and Washington.

² Stack, *Inhaling to cure ailments is a lot older than you might believe* (October 27, 2002) Time Magazine.

³ Zimmerman, *Is Marijuana the Right Medicine for You* (1998) chapter 3.

⁴ "Medical" Marijuana - the Facts United States Drug Enforcement Administration, www.usdoj.gov.

⁵ U.S. Const. art. VI, cl. 2.

⁶ U.S. Const. art. I, section 8, cl. 3.

⁷ *Gonzales v. Raich*, *supra*, 125 S.Ct. at page 2204.

⁸ *Id.*, see also *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 121 S.Ct. 1711, 1718.

⁹ *Id.*

¹⁰ See *People v. Mower* (2002) 28 Cal.4th 457, 463.

¹¹ Health and Safety Code section 11362.5(b) (1) (A). All references hereafter to the Health and Safety Code are by section number only.

¹² 11362.5(a).

¹³ 11362.7 et. seq.

¹⁴ 11362.7.

¹⁵ 11362.71 – 11362.76.

¹⁶ 11362.77.

¹⁷ 11362.765; 11362.775; *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 786.

¹⁸ 11362.77

¹⁹ 11357, 11358, 11359, 11360, 11366, 11366.5, and 11570.

²⁰ HS 11362.7(h) gives a more comprehensive list – AIDS, anorexia, arthritis, cachexia, cancer, chronic pain, glaucoma, migraine, persistent muscle spasms, seizures, severe nausea, and any other chronic or persistent medical symptom that either substantially limits the ability of a person to conduct one or more life activities (as defined in the ADA) or may cause serious harm to the patient's safety or physical or mental health if not alleviated.

²¹ HS 11362.5(e); HS 11362.7(d)(1), (2),(3), and (e); see also *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1395.

²² *People v. Mower*, *supra*, 28 Cal.4th at 476.

²³ *Id.* emphasis added.

²⁴ For a statewide list: <http://canorml.org/prop/cbclist.html>.

²⁵ McClure, *Fuming Over Pot Clubs* (June 2006) California Lawyer Magazine.

²⁶ 11362.765(c); see, e.g. *Urziceanu*, *supra*, 132 Cal.App.4th at page 764.

²⁷ *Gonzales v. Raich*, *supra*, 125 S.Ct. at page 2195.

²⁸ *People v. Urziceanu* (2005) 132 Cal.App.4th 747; see also HS 11362.765.

²⁹ Packel, *Organization and Operation of Cooperatives* (4th ed. 1970) American Law Institute (1970) pp. 4-5; italics added.

³⁰ 11362.7(d)(1).

³¹ As of August 2006, the store CannaHelp leases is undergoing renovations and it is not currently operating out of that facility; it is unknown if it is operating out of another location.

³² See e.g. McClure, *Fuming Over Pot Clubs* (June 2006) California Lawyer Magazine.

³³ HS 11362.5(e); HS 11362.7(d)(1), (2),(3), and (e); see also *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1395.

³⁴ *People v. Mower, supra*, 28 Cal.4th at 476, emphasis added.

³⁵ Scaramella, *No Good Deed Goes Unpunished*, (June 16, 2004) www.theava.com.

³⁶ Graham, *Police Link Suspect to Pot Club Robbery*, (August 9, 2006) www.insidebayarea.com.

³⁷ Clark, *Breaking News: Medical Marijuana Supplier Les Crane Killed*, (November 19, 2005) Ukiah Daily Journal; Clark, *Les Crane Murder Investigation Continues*, (November 27, 2005) Ukiah Daily Journal.

³⁸ Planning Commission Agenda, www.el-cerrito.org; *El Cerrito Bans Dispensaries*, www.420girls.com.

³⁹ Indy Staff, *Medical Marijuana Shop Robbed*, (August 10, 2006) Santa Barbara Independent.

⁴⁰ Ortega, *City bans outlets for medical marijuana*, (August 28, 2006) San Gabriel Valley Tribune.

⁴¹ *Id.*

⁴² Crime statistics, www.sandiego.gov.

⁴³ National Drug Intelligence Center, *Marijuana* (January 2001) www.usdoj.gov.

⁴⁴ *Id.*