

SAN DIEGO POLICE DEPARTMENT PROCEDURE

DATE: June 24, 2015

NUMBER: 3.28 – INVESTIGATIONS

SUBJECT: MEDICAL USE OF MARIJUANA
ENFORCEMENT PROCEDURES

RELATED POLICY: 3.13

ORIGINATING DIVISION: INVESTIGATIONS I

NEW PROCEDURE:

PROCEDURAL CHANGE:

SUPERSEDES: DP 3.28 – 07/15/2011

I. PURPOSE

This Department procedure establishes guidelines on the enforcement of narcotic violations related to medical use of marijuana.

II. SCOPE

This procedure applies to all sworn members of the Department.

III. BACKGROUND

In 1996, California voters passed *The Compassionate Use of Marijuana Act (CUA)*, codified as Health and Safety Code section 11362.5. This statute provides an *affirmative defense* for patients and their caregivers who possess or cultivate marijuana to alleviate the symptoms of certain medical conditions under the recommendation of a physician.

In 2003, the California Legislature established state enforcement guidelines for the *CUA* referred to as the *Medical Marijuana Program (MMP)*, codified as Health and Safety Code section 11362.7 et. seq. The *MMP* requires the State Department of Health to create a statewide identification card program. Locally, the San Diego County Health and Human Services Agency is responsible for issuing the cards.

The MMP also established quantity limits on the amount of marijuana a *Qualified Patient* or *Primary Caregiver* could possess (H&S Code § 11362.77(a)). This section of the statute was challenged and ruled unconstitutional by the California Supreme Court in *People v. Kelly*, 47 Cal. 4th 1008 (2010), as it applied to those who are *Qualified Patients* or *Primary Caregivers* and who do not voluntarily obtain an Identification Card. The Court ruled that this section of the *MMP* was in conflict with the *CUA* which allows individuals to possess and cultivate any quantity of marijuana reasonably necessary for their current medical needs.

Pursuant to *Kelly* the quantity limitations in Health and Safety Code section 11362.77 cannot be enforced against *Qualified Patients* and *Primary Caregivers* entitled to protection under the *CUA*. However, *Kelly* did not completely invalidate the provisions in Health and Safety Code section 11362.77. This section of the *MMP* continues to allow cities and counties to enact their own medical marijuana guidelines and quantity limits for those that voluntarily obtain a state issued Identification Card (H&S Code § 11362.77(c)). The City Council enacted Medical Marijuana Regulations, codified in sections 42.1301 – 42.1304 of the San Diego Municipal Code (SDMC). The regulations specify quantity limits for those that possess state issued Identification Cards (SDMC § 42.1303). Although these quantity limits cannot be applied to *Qualified Patients* and *Primary Caregivers* asserting an *affirmative defense* under the *CUA*, the limits can be applied to those persons who voluntarily obtain an Identification Card and are not subject to arrest pursuant to Health and Safety Code section 11362.71(e).

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IV. DEFINITIONS

- A. *Affirmative Defense* – is an assertion of protection from state criminal liability if one is entitled to that protection pursuant to the *CUA*, which provides that violations of Penal Code section 11357, relating to the possession of marijuana, and Penal Code section 11358, relating to the cultivation of marijuana, shall not apply to a *Qualified Patient*, or to a *Primary Caregiver*, who possesses or cultivates marijuana for the personal medical purposes of the *Qualified Patient* upon the written or oral recommendation or approval of a physician. H&S Code § 11362.5 (d).
- B. *Compassionate Use of Marijuana Act (CUA)* – is a statute which provides an *affirmative defense* for patients and their caregivers who possess or cultivate marijuana to alleviate the symptoms of certain medical conditions under the recommendation of a physician. This law does not supersede the federal laws governing marijuana. H&S Code § 11362.5.
- C. *Cooperatives, Collectives or Dispensaries* – are common words used to identify groups of individuals who associate to collectively and cooperatively cultivate

marijuana for medical purposes. These groups do not qualify as a *Primary Caregiver*.

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- D. *Medical Marijuana Program (MMP)* – is a series of statutes which provide a statewide voluntary Identification Card program for patients and their caregivers who possess or cultivate marijuana to alleviate the symptoms of certain medical conditions under the recommendation of a physician and provide a qualified exemption from arrest for those patients and caregivers who obtain Identification Cards or who collectively or cooperatively cultivate medical marijuana. H&S Code § 11362.7 et seq.
- E. *Person with a Patient Identification Card* – pursuant to the *MMP*, is an individual who is a *Qualified Patient* who has applied for and received a valid patient Identification Card issued by the San Diego County Health and Human Services Agency.
- F. *Person with a Primary Caregiver Identification Card* – pursuant to the *MMP*, is an individual who is a *Primary Caregiver* and who has applied for and received a valid primary caregiver Identification Card issued by the San Diego County Health and Human Services Agency.
- G. *Primary Caregiver* – pursuant to the *CUA* is an individual designated by the *Qualified Patient* and who has consistently assumed responsibility for the housing, health, or safety of that person. (A *Primary Caregiver* can also be a *Qualified Patient*.)
- H. *Qualified Patient* – pursuant to the *CUA* is a person who is a California resident who has a serious illness including, but not limited to, cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. The patient must have a written or oral recommendation from a physician who has examined him or her and determined that his or her health would benefit from the use of marijuana. (This definition includes minors.)
- I. *Recommending Physician* – is a person who possesses a license in good standing to practice medicine in California and has taken responsibility for some aspect of the medical care, treatment, diagnosis, counseling, or referral of the *Qualified Patient*.

V. **GENERAL ENFORCEMENT PROCEDURES**

- A. When an officer encounters an individual possessing or cultivating marijuana, it is the detainee/arrestee's obligation to show an Identification Card or to assert the *affirmative defense*. It is **not the officer's duty to inquire**.

- B. If an individual does not possess a valid state Identification Card and does not assert the *affirmative defense*, officer(s) should proceed with enforcement action in accordance with Department Procedure 3.13, Narcotic Enforcement Procedures.
- C. If an arrest is made, evidence should be impounded in accordance with Department Procedure 3.15, Narcotics Impounds/Release of Evidence.
- D. If the person has a valid Identification Card, the person is not subject to arrest for possession, transportation, delivery, or cultivation of marijuana or detention by the SDPD **longer than necessary** to verify his or her status as a card holder and determine whether the amount of marijuana possessed is within the legal limits set forth in the SDMC. H&S Code § 11362.71(e); SDMC § 42.1303.
- E. If it appears to the officer that the person is eligible to use the *affirmative defense*, the officer should return any marijuana and release the person. Officers will complete a Detention Only report, detailing the circumstances of the initial encounter, the amount of marijuana found, the facts that led to the conclusion that the person was eligible to assert the *affirmative defense*, and that all marijuana seized was returned to the person at the time of their release. Officers should use H&S Code § 11362.5 in the “Charges” section of the report. This will allow for retrieval of the reports for statistical purposes.

VI. ENFORCEMENT PROCEDURES INVOLVING THE AFFIRMATIVE DEFENSE UNDER THE CUA

If the person contacted is not an Identification Card holder under the *MMP* and an *affirmative defense* is asserted, the officer should determine if the individual meets the requirements to be a *Qualified Patient* or *Primary Caregiver* under the *CUA*. If it is determined by the totality of the circumstances that the person qualifies as a *Qualified Patient* or *Primary Caregiver*, and the amount possessed is for “personal medical purposes” (H&S Code § 11362.5(d), the officer should release the person and not confiscate the marijuana.

See section VI. C. and Attachment A, *Qualified Patient* Questionnaire for guidance on evaluating whether a person is a *Qualified Patient*.

A. Additional Guidelines Regarding *Primary Caregivers*:

- 1. To show that he or she “has consistently assumed responsibility for the housing, health, or safety” of the *Qualified Patient*, the *Primary Caregiver* must prove at a minimum that he or she consistently provided caregiving, independent of any assistance in taking medical marijuana, at or before the time he or she assumed responsibility for assisting with medical marijuana. *People v. Mentch*, 45 Cal.4th 274, 283 (2008).

2. The growth and supply of marijuana by itself is not sufficient to establish that an individual is a *Primary Caregiver*. *Id.* at 284-285.

3. An entity such as a *cooperative, collective or dispensary* which grows and supplies marijuana to its members does not qualify as a *Primary Caregiver* on that basis alone. *People v. Hochanadel*, 176 Cal.App.4th 997, 1016 (2009).

a. However, Health and Safety Code section 11362.775 provides a defense to charges of Health and Safety Code section 11357, 11358, 11359, 11360, 11366, 11366.5, and 11570 for *Qualified Patients, Persons with a Patient Identification Card, and their Primary Caregivers* who associate to collectively or cooperatively cultivate marijuana for medical purposes.

4. A person delivering marijuana from a *cooperative, collective, or dispensary* to a *Qualified Patient* does not qualify as a *Primary Caregiver* on that basis alone.

5. A person may serve as a *Primary Caregiver* to more than one *Qualified Patient*, provided that the *Primary Caregiver* and the *Qualified Patients* all reside in the same city or county. If the *Primary Caregiver* does not reside in same city or county as all the *Qualified Patients*, then the *Primary Caregiver* may only have one *Qualified Patient*. H&S Code § 11362.7(d) (2) and (3).

6. A *Primary Caregiver* may receive compensation for actual expenses for services, or out-of-pocket expenses incurred in providing those services, to an eligible *Qualified Patient* or *Person with a Patient Identification Card* to enable that person to use medical marijuana under the *CUA*. H&S § 11362.765(c) and *People ex rel. Lungren v. Peron*, 59 Cal.App.4th 1383, 1399-1400 (1997).

7. See section VI.C and Attachment B, *Primary Caregiver Questionnaire* for guidance on evaluating whether a person is a *Primary Caregiver*.

B. *Qualified Patients and Primary Caregivers may not:*

1. Possess or cultivate marijuana for other than the personal medical purposes of the *Qualified Patient*;
2. Divert marijuana to any other person or sell it;
3. Possess or cultivate an amount greater than that which is reasonably related to the current medical needs of the *Qualified Patient*;

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4. Transport marijuana unless the “quantity transported and the method, timing and distance of the transportation are reasonably related to the patient’s current medical needs.” *People v. Trippet*, 56 Cal.App.4th 1532, 1551(1997);
5. Engage in behavior that would endanger others, such as driving a motor vehicle while under the influence of marijuana, in violation of California Vehicle Code section 23152(a);
6. Smoke marijuana in or within 1,000 feet of the grounds of a school, recreation center, or youth center, unless the medical use occurs within a residence. H&S Code § 11362.79(b);
7. Smoke marijuana on a schoolbus. H&S Code § 11362.79(c);
8. Smoke marijuana in a car that is being driven by another person. H&S Code § 11362.79(d); or,
9. Smoke marijuana in any public place or in any place open to the public. H&S Code § 11362.79(a); SDMC § 42.1304. A violation of Municipal Code section 42.1304 is an infraction.

C. Questionnaire to help determine if a person is a *Qualified Patient* or *Primary Caregiver*

1. Officers must use the attached questionnaires (Attachments A and B) to assist in determining whether the individual qualifies as a *Qualified Patient* or *Primary Caregiver* under the CUA.
2. Do not use the questionnaire when presented with a state issued Identification Card. A *Person with a Patient Identification Card*, or a *Person with a Primary Caregiver Identification Card*, who is within the jurisdictional limits of the City, is not subject to arrest by the SDPD for possession, transportation, delivery, or cultivation of marijuana, or detention by the SDPD *longer than necessary* to verify his or her status as a card holder and determine whether the amount of marijuana possessed is within the limits set forth in the SDMC. H&S Code § 11362.71(e); SDMC § 42.1303.
3. When a person asserting the *affirmative defense* refuses to provide the information on the questionnaire, provides answers which do not substantiate his or her eligibility to use the *affirmative defense*, or, at the end of the investigation, the officer has probable cause to believe that the person possessed or cultivated marijuana for other than medical purposes, the officer should proceed with the citation or arrest as appropriate. If an

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arrest is made, the officer should include the questions and answers from the questionnaire in the arrest report.

4. Officers should consider the totality of the circumstances in arriving at a decision on the person's eligibility to assert the *affirmative defense*. They should consider the time of day and location where the person is detained/arrested, and any other evidence that supports or refutes the person's statements.

D. Uncertain if individual qualifies as a *Qualified Patient* or *Primary Caregiver* under the *CUA*

1. Officers encountering individuals exercising the *affirmative defense* may make a determination to release the individual if the criteria as described in section VI above are met. However, at times determining who qualifies as a legitimate patient and/or caregiver is a process that requires the expertise of personnel assigned to the Narcotics Section.
2. In circumstances where the officer is uncertain whether the individual asserting the affirmative defense is a *Qualified Patient* and/or *Primary Caregiver*, or the amount of medical marijuana possessed appears to be a greater amount than needed for personal use, the San Diego Police Department's Narcotics Section shall be notified.
3. During normal business hours, Monday through Friday, (0600-1800), officers can reach the Narcotics Section at (619) 531-2468. After hours, and on weekends, officers must contact the Watch Commander's Office. The Watch Commander will notify an on-call Narcotics Section sergeant who will evaluate the information and determine the appropriate level of response.

E. Quantity Limits

To help distinguish between the amounts of marijuana allowed under the *CUA* and *SDMC*, the following guidelines for possession of marijuana for medicinal purposes should be followed:

1. Processed Marijuana Under the *SDMC/MMP*:
 - a. A *Person with a Patient Identification Card* may possess the total amount of processed marijuana recommended by his or her physician, not to exceed one pound. *SDMC* § 42.1303(a).
 - b. A *Person with a Primary Caregiver Identification Card* may possess no more than the amount recommended for each *Qualified Patient* for whom the individual serves as a verified *Primary*

Caregiver, not to exceed two pounds for each *Qualified Patient*, whichever is less. SDMC § 42.1303(b).

2. Processed Marijuana Under the *CUA*:

- a. *Qualified Patient* may possess an amount of processed marijuana that is reasonably related to the patient's current medical needs. *People v. Trippet*, 56 Cal App 4th 1532, 1549 (1997).
- b. *Primary Caregiver* may possess an amount of processed marijuana that is reasonably related to the current medical needs of each *Qualified Patient* for which he or she is the caregiver.

3. Marijuana Plants Under the SDMC/MMP:

- a. A *Person with a Patient Identification Card* may possess a maximum of twenty-four un-harvested marijuana plants growing in an area of no more than 64 square feet, or an amount consistent with the physician's recommendation, whichever is less. SDMC § 42.1303(c)
- b. A *Person with a Primary Caregiver Identification Card* may possess no more than the amount recommended for each qualified patient for whom the individual serves as a verified primary caregiver, not to exceed a total of ninety-nine plants, whichever is less. SDMC § 42.1303(d).
- c. No unsupervised outdoor marijuana cultivation is permitted by the SDMC. Growing marijuana shall only be permitted in a fully enclosed yard with a minimum six-foot fence perimeter or a greenhouse or structure that must be locked and contained. The amount of marijuana grown outdoors shall not exceed the permissible amounts as outlined above. SDMC § 42.1303(e).

4. Marijuana Plants Under the *CUA*:

- a. A *Qualified Patient* may not possess a number of marijuana plants greater than that which is reasonably related to the patient's current medical needs.
- b. A *Primary Caregiver* may not possess a number of marijuana plants greater than that which is reasonable related to the current medical needs for each of the *Qualified Patients* for which he or she is the caregiver.

F. Determination of Criminal Activity

The *affirmative defense* allowed under H&S § 11362.5 only applies to *Qualified Patients* and *Primary Caregivers* either possessing or cultivating marijuana for their medicinal use. The law does not protect people who possess marijuana for sales (H&S Code § 11359) or sell, furnish or distribute marijuana (H&S Code § 11360). Therefore, if officers discover evidence that a person is selling, furnishing, or possessing marijuana for sales, the person is subject to arrest, regardless of his or her status as a patient, caregiver or card holder. In all such cases, officers must call the Narcotics Section for guidance in handling these cases.

G. Medical Marijuana Enforcement with Federal Authorities

The San Diego Police Department has several investigators assigned to federal law enforcement task forces. These investigators operate under the direction and jurisdiction of the federal agency responsible for the task force. Department personnel including those who are assigned to task forces will not knowingly participate in any federal operation or investigation that is in conflict with our established policies and procedures concerning medicinal marijuana.

QUALIFIED PATIENT QUESTIONNAIRE

1) What illness (es) do you have? _____

2) Approximately when did your illness (es) begin? _____

3) What symptoms do you suffer from this illness? _____

4) Have you been examined by a medical doctor for this illness?
Yes _____ No _____ When _____

5) What are the names, addresses and phone numbers of the doctors who examined you for this illness?
Name: Dr. _____

Address: City: _____ State: _____
Phone Number: (_____) _____

6) Did this doctor recommend that the use of marijuana would be beneficial to your health?
Yes _____ No _____ When _____

7) How much marijuana did the doctor recommend, at what intervals and for what length of time?

8) Do you take any prescription drugs for this illness? (May I see them?)

Name of Drug: _____ Script# _____

Date Issued: _____ Doctor: _____

Name of Drug: _____ Script# _____

Date Issued: _____ Doctor: _____

Name of Drug: _____ Script# _____

Date Issued: _____ Doctor: _____

9) Do you have a primary caregiver?

Yes _____ No _____

10) What is the name, address and phone number of your caregiver?

11) How long has he/she been your caregiver? _____

12) What services do you depend on your caregiver for?

I authorize the release of the medical records in the possession of Dr. _____
which verify that I have been examined for the above listed illness (es) and that there has been a
recommendation for the medical use of marijuana for relief from this illness or illnesses.

Signature: _____ Date: _____

PRIMARY CAREGIVER QUESTIONNAIRE

1) What is the name of the patient for whom you are the primary caregiver?

Name: _____ Address: _____

City: _____ State: _____ Phone: (____) _____

2) What is the illness that this person suffers from? _____

3) Has this patient been examined by a physician for this illness?

Yes _____ No _____

4) What is the name, address and phone number of the doctor who examined this patient?

5) Are you personally aware of the physician's recommendation that this patient use marijuana to benefit his health?

Yes _____ No _____

6) What is your relationship to this patient? _____

7) Has this patient specifically designated you as the primary caregiver?

Yes _____ No _____

8) How long have you been the primary caregiver? _____

9) What services do you provide for this patient? _____

10) What is your frequency of contact with this patient? _____

11) What is your patient's normal daily quantity of use of marijuana? _____

12) For what length of time is the patient recommended to use marijuana?

13) How many patients are you the primary caregiver for? _____

14) Do you also qualify as a patient under the Compassionate Use of Marijuana Act of 1996? Yes _____ No _____