City of San Diego
Progress Report to PS&NS Committee
June 19, 2002
Medical Marijuana Task Force

Chair: Juliana B. Humphrey

Progress Summary:

1. Voluntary Verification Card Program

On February 12, 2002, the San Diego City Council voted to adopt the San Diego Medical Cannabis Voluntary Verification Card Program. Since that time the Legislative Subcommittee, particularly its Chair, Dale Kelly-Bankhead, has been working closely with city representatives developing the "Request for Proposal" for implementation of the program. The RFP is now complete and ready to be distributed. Responses will be due by the end of July. Members will next work with the city to present information at a forum for applicants and then assist with selection of a provider. The Task Force's goal remains that the Program be in place this fall.

2. Possession and Cultivation Guidelines
Memo re: Federal Issues, Caregiver Definition

The Task Force is finishing the review and editing process of its proposed guidelines for patients and their caregivers regarding possession and cultivation of medical cannabis. The Task Force is currently contacting patients and doctors to get feedback on the guidelines and enlisting their assistance with our presentation to this Committee. The guidelines will be presented with supporting materials by the end of the summer.

While preparing the guidelines, the Task Force was mindful of recent federal government action against cooperatives in our state. Attached to this memo is a legal memorandum on the potential federal interaction with our implementation of "Prop. 215" in the City of San Diego. While uncertainty about the federal government's actions is unavoidable, the foundation of the City's commitment to full implementation of the law is on solid legal ground.

The memorandum also includes an analysis of the legal definition of "primary caregiver," a definition which will ultimately be incorporated into the Possession and Cultivation Guidelines. There exists a difference of opinion between the Task Force and SDPD on the definition of "primary caregiver," a difference that matters greatly to patients in our community. As you will read, the law supports the view that a "primary caregiver" may be a person who consistently provides medicinal cannabis to a patient.

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

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.