

California Department of Justice  
DIVISION OF LAW ENFORCEMENT  
Gregory G. Cowart, Director



# INFORMATION BULLETIN

**Subject:** Peace Officer Guide  
Compassionate Use Act of 1996

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To: All Chiefs of Police, Sheriffs and District Attorneys

**PEACE OFFICER GUIDE  
COMPASSIONATE USE ACT of 1996  
Section 11362.5 Health and Safety Code  
Prepared by the  
California Attorney General's Office**

California state and local law enforcement authorities should continue to enforce all laws against marijuana in the same manner as prior to the passage of Proposition 215 (Compassionate Use Act of 1996), subject to the following guidelines:

- I. It is not incumbent on a police officer to inquire whether the individual cultivating, possessing, or using marijuana is doing so for medicinal purposes. It is the responsibility of an individual to claim that he/she has an affirmative defense under Proposition 215 as either a "patient" or "caregiver." If an officer does choose to inquire, he/she should use the questions set out under II(B) or II(D). Some prosecutors may favor the approach that an officer always make these inquiries in situations where the circumstances suggest the defense might be used. The officer should check to determine the local prosecutor's policy.
- II. Should the suspect make the claim that he/she has an affirmative defense to criminal sanctions as a patient or caregiver, the officer should detain the person for the purpose of making those inquiries necessary to determine whether there is a legitimate affirmative defense. If the individual refuses to provide information, the officer should note that refusal and should proceed with the arrest (or, if the quantity is less than 28.5 grams, citation and confiscation). If the individual agrees to provide information, some suggested questions to be asked are discussed in subparts B and D. In cases where an individual has been taken into custody and the officer wishes to interrogate, *Miranda* warnings should be given to ensure that any statements produced by interrogation can be used in the prosecution's case-in-chief.

**A. Patient Qualifications**

1. Patients must be California residents. Out-of-state residents, temporary visitors or foreign nationals without legal residence in the United States are not covered by this Act. [Section 11362.5 H&S reads, "Seriously ill Californians" (emphasis added).]
2. Patients must be seriously ill. Minor injuries, colds, common flu, most skin cancer, stress, etc., are not covered. [Section 11362.5 reads "Seriously ill" (emphasis added). The diseases highlighted are cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, and migraines. The act does contain the catchall phrase "any other illness for which marijuana provides relief."]
3. The patient must have had an examination by a physician, and the physician must have determined that the specific patient's health would benefit from marijuana as a treatment for the specific illness. [Section 11362.5 H&S reads, ". . . where the medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana. . ." (emphasis added).]
4. The patient must not be engaged in behavior that endangers others such as driving a vehicle, working with dangerous equipment, or being under the influence in public. [Section 11362.5 reads, "Nothing in this act shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others . . ." (emphasis added).]
5. The patient cannot be involved in any diversion of marijuana for nonmedical purposes such as furnishing to a friend or using strictly for recreational or commercial purposes. [Section 11362.5 H&S reads, "Nothing in this act shall be construed . . . to condone the diversion of marijuana for non-medical purposes" (emphasis added).]
6. Patients cannot cultivate or possess amounts greater than necessary for their personal medical needs. This precludes commercial and most cooperative style operations. Questioning by an officer should help determine whether the amount is consistent with what was recommended by the doctor for what length of time and for what illness. By way of example, if the patient is undergoing chemotherapy treatment for thirty days and the basis for the recommendation is to combat nausea caused by the therapy, then a supply greater than thirty days is more than necessary for medicinal use.

**NOTE: One marijuana plant produces approximately one pound of bulk marijuana. One pound will make approximately 1,000 cigarettes.**

Therefore, one can argue that more than two plants would be cultivation of more than necessary for personal medical use.<sup>1</sup>

Health & Safety Code Section 11357 provides that any amount less than 28.5 grams should be deemed to be for personal use. Generally, one gram will make two marijuana cigarettes. The 28.5 gram standard, then, translates into approximately sixty marijuana cigarettes; quantities over this amount may be more than necessary for personal medical purposes.

7. Although there are no age limitations in H&S Section 11362.5, numerous studies confirm that smoking marijuana is a danger to youth. Therefore, it will be difficult in most cases for a doctor acting in good faith to recommend that a youth smoke marijuana. Officers should continue to handle youth by utilizing Section 601 or 602 of the Welfare and Institutions Code. Failure to act on the part of the officer could place both the officer and his/her department in jeopardy of liability.
8. Patients cannot assert the affirmative defense based on a general recommendation of a physician through such means as a written article, speech, radio show, television appearance, etc. [Section 11362.5 states, "a physician who has determined that the person's health would benefit" (emphasis added).]

**B. Patient Questions**

1. What is the nature of your serious illness? How long ago was it diagnosed and by whom?
2. Do you use marijuana to provide relief from this illness? Have you tried other drugs? If so, what drugs? Have you tried Marinol?
3. How many marijuana cigarettes do you smoke per day because of your condition?
4. Do you have written recommendation from a licensed California physician in your possession? May I see it? Do I have your permission to contact the physician to verify this recommendation?

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<sup>1</sup>Obviously, the number of plants will depend on the circumstances. Typically, a controlled, indoor grow will result in fewer plants lost as well as better, more uniform quality plants. The other extreme would be an infrequently tended outdoor grow.

5. Have you received an oral recommendation from a physician? Who? When did you obtain permission and what exactly did the doctor say? What is his/her address and telephone number? Do I have your permission to contact him/her to verify this recommendation?
6. Did the physician conduct an examination and make a determination that marijuana would be beneficial?
7. How long have you been seeing the doctor? Has he/she done any follow-up examinations to monitor your condition? How often are you examined by the physician?
8. Are you willing to sign an authorization allowing an examination of your medical records? Will you give permission to examine your medical records?

**C. Caregiver Qualifications**

1. The primary caregiver must be an individual specifically designated by the patient. [Section 11362.5 H & S reads, ". . . primary caregiver means the individual designated by the person exempt under this act . . ." (emphasis added).]
2. The primary caregiver's role must have been established prior to the designation to be valid. [Section 11362.5 H & S reads, ". . . primary caregiver . . . who has consistently assumed responsibility. . ." (emphasis added).]
3. The primary caregiver must have prior and consistent responsibility for the patient's housing, health, or safety. Since the act uses the words "primary" and "consistently," it assumes that the patient is unable to be responsible for or has not been responsible for his/her own housing, health, or safety and that no other person, institution, or government agency is the primary provider for these needs.
4. The primary caregiver is the only individual who can qualify for the specific patient. Secondary or general caregivers may not assert the affirmative defense. [Section 11362.5 is very specific in using the term "primary".]
5. The primary caregiver must have personal knowledge of the doctor's recommendation. [Section 11362.5 reads, ". . . patient and their primary caregiver who obtain and use marijuana for medical purposes upon the recommendation of a physician . . ." The act continues, ". . . a patient or a patient's primary caregiver who possesses or cultivates marijuana for personal

medical purposes of the patient upon a written or oral recommendation or approval of physician (emphasis added).]

6. The primary caregiver cannot engage in any conduct that endangers others. The primary caregiver cannot use marijuana unless he/she is also a patient.
7. The primary caregiver cannot be involved in diversion of marijuana for non-medical purposes.
8. The primary caregiver cannot possess marijuana for sale or sell marijuana and can only assert an affirmative defense to charges of cultivation or possession for medical use of a specific patient.

**D. Caregiver Questions**

1. The name, address, and telephone number of the person for whom the individual is a caregiver and how the so-called patient can be contacted.
2. What is the caregiver's relationship to the patient? How long has this relationship existed? What has been the frequency of contact between the caregiver and the patient?
3. What specific conditions qualify the individual as a caregiver? When did the patient request that the caregiver act as caregiver?
4. How long has the individual assumed the caregiver role?
5. What is the patient's serious illness?
6. What is the name of the doctor who made the recommendation? What is his/her address and telephone number? Does the caregiver have personal knowledge of the specific recommendation from the physician?
7. How much marijuana does the patient use and under what conditions?
8. Is the caregiver receiving any remuneration for the service? If so, how much?
9. Who designated the individual as a caregiver, how was designation given, and is the specific physician aware of the individual's status as caregiver?
10. Describe the conditions that exist with the patient that make him or her unable to assume primary responsibility for his/her own housing, health, or safety.

### **III. Peace Officers' Response**

- A. If, considering the guidelines and questions set out in section II, the officer still thinks, based on the amount, packaging, circumstances, and the answers to the questions, that he/she has probable cause to believe that the individual has cultivated, possessed, or used marijuana for other than medical purposes, the officer may arrest and book the suspect (or, if appropriate, cite and confiscate).
- B. If, considering the guidelines and answers to the questions as articulated in section II, the officer thinks, based on the amount, packaging, circumstances, and answers to the questions, that the individual may have an affirmative defense to certain marijuana charges, he/she should:
1. Complete the identification of the suspect and cease the detention.
  2. If an arrest was made, release the individual from custody under Section 849b of the Penal Code.
  3. The officer should seize a sample of the marijuana under either of the circumstances (1 or 2) above and hold it as potential evidence until notified of the result of the district attorney's review. The officer should photograph and/or weigh the quantity if he/she has the equipment available.<sup>2</sup>
  4. Complete a detailed report outlining the circumstances of the encounter (which report documents the quantity or estimate of quantity of marijuana) and submit it to the district attorney's office to accept or reject as a charge.

### **IV. Other Issues and Questions**

Question: Under Section 11362.5 of the Health and Safety Code, are cannabis clubs or growers' co-ops legal?

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<sup>2</sup>It is the case that marijuana remains contraband under federal law. There is authority for the proposition that a California peace officer may enforce federal criminal laws. However, D.E.A. has stated that it would not consider "adopting" a seizure unless there was an arrest and a refusal by the local prosecutor to take the case.

Before exercising the authority to enforce federal law, an officer should consult with the local prosecutor's office and D.E.A. as well as with his own departmental policy. There may be policy and liability issues connected with local peace officers enforcing, seizing and destroying marijuana under federal law.

**Answer:** Generally not, because neither cannabis clubs nor most growers co-ops can qualify as a primary caregiver<sup>3</sup>. Although they may be supplying marijuana for medical purposes, they would not qualify as being primarily and consistently responsible for the housing, health, or safety of the patient. Cannabis clubs and co-ops also are not "the individual" as specified under Section 11362.5(e). Also, Proposition 215 did not amend Health and Safety Code Section 11366 (making it a crime to maintain a place for selling, giving away or using marijuana) or Health and Safety Code Section 11366.5 (making it a crime to use a premises to store or distribute marijuana), either or both of which sections would apply to clubs.

The intent of the Act is to provide a primary caregiver for those individuals who are incapable of providing for themselves because of the seriousness of their illness. The primary caregiver must also have specific knowledge of the physician's recommendation. The simple word of a person that he/she is a patient who has a physician's recommendation is insufficient. When investigating a cannabis club or co-op, in addition to laws against possession, possession for sale and sale of marijuana, officers should consider:

1. Section 11364.5 of the Health and Safety Code (requirements for sale of drug paraphernalia).
2. Section 11364.7 H&S (unlawfully providing drug paraphernalia)
3. Section 11366 H&S (maintaining a place for sale)

Under certain circumstances, a true cooperative cultivation of a very small number of plants by properly qualified patients and/or caregivers might qualify for the affirmative defense.

**Question:** Is concentrated marijuana or hashish included in the definition of marijuana under Section 11362.5?

**Answer:** Yes, it would appear to be. This Act does not differentiate between marijuana and concentrated cannabis as is the case throughout the Health and Safety Code. Based on the definition of marijuana in Section 11018, hashish is included.

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<sup>3</sup>A superior court judge in a civil proceeding has ruled that, under certain carefully controlled circumstances, a club may be a primary caregiver. This ruling is being challenged in the appellate court. It is still the position of the authors that most clubs and/or growers' co-ops cannot qualify as primary caregivers. Call John Gordnier, (916) 324-5169, if you have questions about this case.

**Question:** To what sections of the Health and Safety Code does the affirmative defense as outlined in Section 11362.5 specifically apply?

**Answer:** The only two sections in the Health and Safety Code that are specifically affected by the Compassionate Use Act are Sections 11357 (unauthorized possession of marijuana) and Section 11358 (unauthorized planting, cultivating, or processing). There is an assumption that, in order for the patient to obtain marijuana, transporting and furnishing as described in Section 11360 H&S may be affected in a very limited way. Neither a caregiver nor a patient may possess marijuana for sale, sell marijuana (11360 H&S), or employ or sell to minors (11361 H&S).

**Question:** Are applicable drug paraphernalia laws affected by Section 11362.5 of the H&S code?

**Answer:** No. Those drug paraphernalia laws which apply to marijuana, such as Section 11364.5, or 11364.7 related to displaying, sale or furnishing, are still applicable.

**Question:** If an officer has information that the possession or cultivation of marijuana might be for medicinal use, should this be included in affidavits and search warrants?

**Answer:** Yes. The magistrate should be provided all pertinent facts to help make a determination whether probable cause exists for issuance of a search warrant. An omission of material facts could be grounds for overturning the warrant.

**Question:** Does Section 11362.5 affect searching a vehicle for marijuana?

**Answer:** Generally not. As long as a peace officer has probable cause based on the arrest or other circumstances, he or she may search a vehicle for marijuana.

## **V. General Statement**

California officers should use common sense when applying the Compassionate Use Act of 1996 and abide by the spirit of the voters' narrow intention regarding Proposition 215. Officers should be familiar with both department policy and the policy of his/her district attorney's office as it applies to Section 11362.5 of the Health and Safety Code. This new law should be dealt with professionally, with special care not to violate anyone's rights or develop bad-case law. Guidelines for dealing with physicians who recommend marijuana will be covered in a separate document.



IF YOU BECOME AWARE OF UNUSUAL CASE CIRCUMSTANCES, COURT DECISIONS, OR ATTEMPTS BY CITIZENS TO MISUSE SECTION 11362.5 OF THE H&S CODE, PLEASE CONTACT AND REPORT THESE TO THE CALIFORNIA DISTRICT ATTORNEYS' ASSOCIATION AT (916) 443-2017, FAX (916) 443-0540, SO THEY CAN BE SHARED WITH LAW ENFORCEMENT STATEWIDE.