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### CLIENT ALERT MEMORANDUM

To: All Police Chiefs and Sheriffs

From: Martin J. Mayer, Esq.

#### U. S. SUPREME COURT REJECTS CHALLENGE TO PROP 215

The United States Supreme Court refused to hear the constitutional challenge, lodged by the counties of San Diego and San Bernardino, to Proposition 215. Both counties, in a unified action, sued the state of California claiming that, among other things, the requirement in SB 420 (which codified Prop 215) that counties issue ID cards to persons who had recommendations from doctors to use marijuana as medicine, violated federal law.

After losing in all of the California courts, the counties petitioned the U.S. Supreme Court to accept the cases for review but the Supreme Court said "no." Last July, in San Diego County vs. San Diego NORML and San Bernardino County vs. California, the Fourth District Court of Appeal held that "*the purpose of the (federal law) is to combat recreational drug use, not to regulate a state's medical practices.*" The Court of Appeal also said California is free to decide whether to punish drug users under its own laws.

Proposition 215 does *not* legalize marijuana in California - not even for medical users. What it does is establish a defense against criminal prosecution of those who have met the state requirements to be classified as "qualified patients" who have a doctor's recommendation to use marijuana for medical purposes. The Court of Appeal had said that states are not obligated to enforce federal law and, therefore, they do not have to prosecute cultivation, possession, use, or transportation of marijuana, if they choose to not do so.

In their appeal, San Diego County's lawyers had argued that California's marijuana law was "preempted under the Supremacy Clause" of the Constitution by the federal drug control laws. By refusing to accept the case, without any comment, it would appear that the U.S. Supreme Court does not believe California's law is barred by the supremacy clause.

## **Second Significant Loss**

This is now the second major loss for those challenging the state's medical marijuana law (there are 12 other states which have also adopted laws similar to California's Proposition 215). Last year, after unsuccessfully challenging, in California courts, orders by state court judges for law enforcement officers to return marijuana after cases were dismissed pursuant to Prop 215, the City of Garden Grove petitioned the U.S. Supreme Court for review in the case of *City of Garden Grove v. Superior Court (Kha)*. The Supreme Court rejected that request, as well.

It has always been our position that such a judicial order *did* violate federal law. In such a case, a judge was requiring a peace officer to transfer marijuana to a person who was prohibited, under the federal Controlled Substances Act (CSA), from possessing the drug. That required an affirmative act on the part of the officer, in direct violation of the federal prohibition. Proposition 215, however, merely created a defense to prosecution under California law but one could still be prosecuted under federal law.

For more details on the current case, and on the Garden Grove case, please go to our website [[www.jones-mayer.com](http://www.jones-mayer.com)], click on Client Alerts and scroll down to Vol. 23, No. 17, Oct. 22, 2008 and Vol. 23, No. 23, Dec. 4, 2008, respectively.

## **HOW THIS AFFECTS YOUR AGENCY**

Although the firm of Jones & Mayer has been actively representing the interests of law enforcement in addressing the concerns created by California's medical marijuana law, it now appears that at least two of the key issues have been resolved - albeit, not as we had thought. As such, if a judge issues an order to return marijuana, it must be returned and counties must issue ID cards to those

who prove they are "qualified patients."

However, the conflicts between state and federal laws regarding marijuana are still present. To add to the confusion, U.S. Attorney General, Eric Holder, recently stated that the federal government would not commit resources to prosecute medical marijuana dispensaries, in states which have decriminalized such use, ***as long as the dispensaries are in compliance with their state laws***. It is important to note that the U.S. Attorney General has also stated that the federal Department of Justice ***will continue*** to pursue and prosecute marijuana use and distribution where it is in violation of the state's laws.

A recent example of that position occurred in Morro Bay where the owner of a dispensary was prosecuted and convicted in federal court for sale of a controlled substance. Because of the statement by Holder, the federal judge delayed sentencing until the Attorney General's position could be clarified. As a result, the Director of the Executive Office for United States Attorneys stated, in a letter dated April 17, 2009, that the case of *United States v. Charles Lynch* was an example of an "investigation, prosecution, and conviction ... entirely consistent with Department policies as well as public statements made by the Attorney General." Ironically, the federal judge has still not sentenced Lynch.

It is also important to note that California law does not permit profit making dispensaries to operate under the protections of Proposition 215 or SB 420. The Guidelines issued by the California Office of the Attorney General makes a very clear distinction between dispensaries and "cooperatives" or "collectives." Cooperatives or collectives ***are*** permitted under California law, but not under federal law.

However, cities may not authorize the operation of dispensaries, or even cooperatives or collectives, for the purpose of cultivating or distributing marijuana for medical purposes. Government Code 37100 states that a city's " ... legislative body may pass ordinances not in conflict with the Constitution and laws of the State or the United States." Since distribution of marijuana violates federal law, whether in a dispensary, cooperative or collective, passing a zoning ordinance which, for example, only allows such operations to be conducted in the industrial or commercial zone of a city, would still be in violation of the laws of the United States and, therefore, prohibited under G.C. 37100.

It is imperative that all of these types of issues be dealt with only after receiving advice and guidance from your agency's legal counsel. As always, if you wish to discuss this matter in greater detail, please don't hesitate to contact me at (714) 446 - 1400 or via e-mail at [mjm@jones-mayer.com](mailto:mjm@jones-mayer.com)