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MEMORANDUM

TO: Law Enforcement Agencies in King County

FROM: King County Prosecutor's Office

SUBJECT: Medical Marijuana Case Review Standards

In 1998, the people of the state of Washington approved citizens' initiative I-692 establishing an affirmative defense to prosecution for the possession or manufacture of marijuana for medicinal use. While key portions of the law were vague, such as the definition of a medicinal "sixty-day supply" of marijuana, the law established an official policy in Washington that permits qualified patients and their providers to legally possess marijuana.

In 2007, the Legislature added their own policy statement to the law: "*The legislature intends to clarify the law on medical marijuana so that the lawful use of this substance is not impaired and medical practitioners are able to exercise their best professional judgment in the delivery of medical treatment, qualifying patients may fully participate in the medical use of marijuana, and designated providers may assist patients in the manner provided by this act without fear of state criminal prosecution. This act is also intended to provide clarification to law enforcement and to all participants in the judicial system.*" [2007 c 371 § 1.]

Furthermore, the Legislature included the following directive to law enforcement:
If a law enforcement officer determines that marijuana is being possessed lawfully under the medical marijuana law, the officer may document the amount of marijuana, take a representative sample that is large enough to test, but not seize the marijuana. A law enforcement officer or agency shall not be held civilly liable for failure to seize marijuana in this circumstance. RCW 69.51A.040 (1).

The Legislature also added language that requires the Washington State Department of Health, by July 1, 2008, to define a *presumptive* quantity that could reasonably be considered a patient's 60 day supply of medical marijuana. Patients who possess no more than this amount are presumed to be in compliance with the law; patients who require more than this amount still maintain the right to present evidence of their personal, actual medical need in court if necessary.

On October 2, 2008 the Department of Health officially defined a presumptive 60 day supply of marijuana for a patient's personal use. The "presumptive quantity" is now set at 24 ounces of useable marijuana and 15 plants, regardless of the plant's stage of growth.

The official State policy on marijuana in Washington is that qualifying patients or providers to patients may legally grow and possess a reasonable amount of marijuana for medical purposes. Again, the personal use amount set by the Department of Health is a *presumptive* standard that should be taken into account when determining the legality of possessing marijuana, but is not the sole determining factor. Careful investigation by law enforcement is the only way to distinguish between those persons authorized to possess and distribute marijuana for medicinal purposes, and those persons who are non-patients or selling the drug in illicit markets for the purpose of profit.

The PAO will decline to prosecute legitimate patients who qualify under the law if they reasonably adhere to the dictates of the statute. We will also make ourselves available to consult with law enforcement during any ongoing discovery or investigation to help in the complicated process of distinguishing between legitimate patients/providers and those who are merely exploiting the law to hide their commercial or recreational and criminal purposes.

In order to fairly and judiciously review and prosecute cases involving the possession or sale of marijuana, our office has established the following internal policies:

OFFICE POLICY ON RCW 69.51A:

1. The PAO does not intend to prosecute those individuals who are truly ill. While some of these individuals will have the paperwork to show they are in compliance with the affirmative defense of RCW 69.51A, some will not. Our office will look with a very lenient eye towards those medically ill people who have reasonably tried but failed to have their medical marijuana paperwork in order.

2. We will accept the forthcoming guidance from the Department of Health as to the quantity of marijuana that is permissible under the law. The Department of Health has now set that amount as 24 ounces of useable marijuana and 15 plants, in any stage of growth. There has been substantial debate and disagreement over this proposal within state government, law enforcement and the larger medical marijuana community. The amount set is now one of several factors in deciding whether or not a person legally possesses marijuana for medical purposes. The PAO will not reflexively prosecute an ill person possessing an amount over the presumptive standard set by the Department of Health who is otherwise compliant with RCW 69.51A. However, we will litigate this issue if there is clear and convincing evidence that the person possessing the marijuana is not ill, or the individual is selling marijuana to non-ill individuals.

3. In our experience, there are cases where groups of individuals share, distribute, and cooperate in the growing and distribution of marijuana to those medically in need. While ideally all involved would have proper medical documentation, we do not wish to prosecute these operations so long as it is clear that qualifying patients/providers are distributing to other qualifying patients/providers, and that someone in the operation has the proper documentation

in compliance with RCW 69.51A. If, however, it is clear that the operation is a mere front for growing and distributing marijuana to those who are not ill, we will prosecute.

4. Because there is no way to simply know, without investigation, if a person (or group of persons) is in compliance with the affirmative defense, we support law enforcement's reasonable efforts to carefully and sensitively investigate these cases. Failure to do so would be contrary to the law as currently written, and unfair to those who are in compliance with the law. As these investigations proceed, we must remember that the affirmative defense remains largely undefined, making successful prosecutions challenging at best.

In addition to the internal policies noted above, our office will diligently follow our Filing and Disposition Standards in the review of all medical marijuana cases. Those standards are as follows:

FILING AND DISPOSITION STANDARDS (FADS):

Medical Marijuana

In cases where a suspect in a criminal investigation, or defendant in a charged case, claims that he or she possessed marijuana exclusively for "medical" purposes, either as a patient or provider, pursuant to RCW 69.51A, charging and disposition decisions shall be reviewed for all plausible defenses, by the Chair of Special Drug Unit in consultation with the Chief Criminal Deputy and/or the Prosecuting Attorney.

When determining whether to file charges, or otherwise resolve a filed case, factors that shall be considered include, but are not limited to, the following:

a. Whether the suspect or defendant had been diagnosed by a physician as having a terminal or debilitating medical condition, as defined by RCW 69.51A.010(4);
b. Whether the suspect or defendant possessed, prior to arrest, valid documentation from a licensed physician that states in part that, in the physician's professional opinion, the potential benefits of medical marijuana would likely outweigh the health risks for the patient, and made that documentation available to law enforcement officials;
c. Where the suspect or defendant is under 18 years of age, whether the parent or legal guardian controlled the possession, production, acquisition, dosage, and frequency of use by the suspect or defendant, as required by RCW 69.51A.040(4);
d. Where the suspect or defendant is a designated provider, whether that person is 18 years of age or older, has been designated in

writing by a patient to serve as a designated provider, is the designated provider to only one patient at a time, and has not consumed marijuana obtained for the personal medical use of the patient, as required by RCW 69.51A.010(1);

e. Whether the suspect or defendant (whether a patient or provider) possessed an amount of marijuana exceeding the amount defined as a reasonable amount for a sixty-day supply as defined by the Washington State Department of Health, pursuant to RCW 69.51A.080;

f. Whether there are any indicia that the suspect or defendant (whether a patient or provider) was engaged in the for profit delivery of marijuana to others who were not qualified patients or providers, such as possessing items consistent with sales of marijuana, (scales, packaging materials, records of sales, possession of currency in a quantity and denominations associated with sales);

g. Whether the suspect or defendant used or displayed the medical marijuana in a manner or place that was open to the view of the general public, as proscribed in RCW 69.51A.060(1);

h. Whether the suspect or defendant engaged in the medical use of marijuana in a way that endangered the health or well-being of any person through the use of a motorized vehicle on a street, road, or highway, as proscribed in RCW 69.51A.060(6).