BILL LOCKYER
Attorney General

State of California
DEPARTMENT OF JUSTICE

1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Public: (916) 445-9555
Telephone: (916) 324-5293
Facsimile: (916) 324-4293
E-Mail: Robert.Anderson@doj.ca.gov

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BULLETIN TO ALL CALIFORNIA LAW ENFORCEMENT AGENCIES

This supplements a previous bulletin issued on June 9, 2005, regarding the recent United States Supreme Court decision in *Gonzales v. Raich*, in which the Court held that *federal* authorities may enforce provisions of the federal Controlled Substances Act that criminalize simple marijuana possession and use (see 21 U.S.C. § 844(a)(1)) against persons whose possession and use of marijuana is legal *as a matter of state law* under California's Compassionate Use Act (Cal. Health & Saf. Code, § 11362.5). After careful review, legal staff in our office reached the opinion that California's Compassionate Use Act is not preempted by the federal Controlled Substances Act as a result of the decision in *Raich*, and that therefore the use of medicinal marijuana under state law is unaffected by that decision. Accordingly, California state and local peace officers may not refuse to abide by the provisions of California's Compassionate Use Act on the basis that this Act conflicts with federal law.

It is also our considered view that *Raich* imposes no mandatory duty on California peace officers to enforce the federal Controlled Substances Act against individuals whose possession, use or cultivation of marijuana is lawful under California law. *Raich* did not purport to change state or federal law regarding peace officer arrest authority. California Penal Code section 836(a) states that a "peace officer *may* arrest a person" whenever "the officer has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence." While the definition of a "public offense" is not limited to offenses that violate California law, the statute's use of the term "may" and the cases construing this provision make clear that the officer's arrest power is discretionary rather than mandatory. (See *Michenfelder v. City of Torrance* (1972) 28 Cal.App.3d 202, 206-207 ["The officer's decision whether to use this authority is an exercise of discretion."]; *Tomlinson v. Pierce* (1960) 178 Cal.App.2d 112, 116 ["If he 'may' arrest, he may 'not' arrest."].) Nor does the federal Controlled Substances Act impose some separate, mandatory obligation on state or local officers to arrest those believed to be violating its terms. With reference to the powers of law enforcement personnel, including those state or local officers working in conjunction with the federal Drug Enforcement Agency, 21 U.S.C. § 878(a)(3) provides that officers *may* make an arrest for any federal offense committed in their presence. And the United States Supreme Court has observed as a general matter that "'[t]he Federal Government may not compel the States to enact or administer a federal regulatory program'" such as the Brady Act's now-invalidated requirement that state law enforcement officials perform background checks on prospective handgun purchasers. (*Printz v. United States* (1997) 521 U.S. 898, 932, quoting *New York v. United States* (1992) 505 U.S. 144, 188.)

In exercising discretion to make a marijuana-related arrest, state and local officers should recognize that under the Compassionate Use Act, the unlawful – i.e., non-medically authorized – use or possession of marijuana remains illegal under California law, as does the sale of marijuana and various

other marijuana-related offenses. So if there is reason for the officer to suspect an invalid authorization, possession of an amount inconsistent with personal medical use, diversion of the marijuana for non-medical reasons, or other activity not rendered lawful under the Compassionate Use Act, then an arrest and seizure of evidence is clearly authorized under state law. (*People v. Mower* (2002) 28 Cal.4th 457, 468-469.) On the other hand, in situations where a state or local officer can only conclude that the person encountered was legitimately using a medically-authorized, reasonable amount of marijuana within the meaning of the Compassionate Use Act, the only possible charge would be for violating the federal Controlled Substances Act.

Although California peace officers have the discretion to make arrests for violations of federal law, such as the federal immigration statutes (see *Gates v. Superior Court* (1987) 193 Cal.App.3d 205, 215; see also *People v. Barajas* (1978) 81 Cal.App.3d 999, 1004-1006), we believe that they should avoid effecting arrests (and seizures of marijuana) on the sole basis of a federal law violation of the Controlled Substances Act in situations where it appears that the person encountered was legitimately using a medically-authorized, reasonable amount of marijuana within the meaning of California's Compassionate Use Act. First, effecting an arrest and seizure on the basis of only a violation of federal law will leave the local prosecutor's office with no charges to file because the "state courts do not enforce the federal criminal statutes," including the simple marijuana possession provision of the Controlled Substances Act. (See *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1445-1446.) Second, arrests and seizures under such circumstances should be avoided because, unlike the situations involving federal immigration laws, California has an express policy decriminalizing the medically approved use of marijuana. (See Health & Saf. Code, § 11362.5, (b)(1)(B) [purposes of Compassionate Use Act include ensuring that qualified patients and caregivers not be "subject to criminal prosecution"].) In our view, this express policy of decriminalization must necessarily govern the exercise of discretionary arrest powers by California peace officers and counsels against effecting arrests and seizures under federal law when the use, possession, or cultivation of the marijuana appears legal within the meaning of California's Compassionate Use Act.

If you have any questions about this subject, please contact Special Assistant Attorney General Scott Thorpe at (916) 324-5294.

Sincerely,

ROBERT ANDERSON
Chief Assistant Attorney General

For BILL LOCKYER
Attorney General