

Subject: Leaked memorandum from the USAO re federal prosecution guidelines

Dear Clients:

Following is text from a memorandum obtained that ***ALLEGEDLY*** sets forth the United States Attorneys' Office's (USAO) guidelines to local law enforcement in California as to whether or not the USAO or the Department of Justice (DOJ) will be interested in prosecuting a case that is referred to them by local law enforcement. As the memorandum states, do not think that merely by avoiding the matters listed you will not be violating federal law if you are possessing, growing, distributing, or transporting medical marijuana.

To: DEA, HIDTA, Federal task force partners in California for internal law enforcement use only.
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From: California United States Attorneys

This memorandum outlines factors that all four California U.S. Attorneys Offices (the USAOs) agree may render a particular marijuana case suitable for federal prosecution. Identification of these factors is intended to assist federal, state and local law enforcement agencies in determining whether a particular marijuana case has significant potential for federal prosecution and conducting investigations in a manner that develops the best evidence to support federal prosecution (Footnote 1). The USAOs will consider for federal prosecution cases investigated by federal, state or local law enforcement agencies that implicate federal interests as reflected in the factors. Cases investigated by federal agencies will generally be given priority over cases adopted from state or local investigations. The factors listed below are relevant to the USAOs consideration of whether a marijuana case should be prosecuted federally but the presence or absence of one or more of the factors will not guarantee or preclude federal prosecution in any case. In general the federal interest will be greater in prosecuting leaders and organizers of the criminal activity as opposed to lower level workers.

The memorandum is intended as prospective guidance only, is not intended to have the force of law and is not intended to, does not, and may not be relied on to create any right, privilege or benefit, substantive or procedural, enforceable by any person or entity against any type of the USAOs, DOJ or the United States.

1) Domestic distribution cases.

Federal prosecution of a case of domestic distribution of marijuana should generally involve at least 200 or more kilograms of marijuana and also include additional factors that reflect a clear federal interest in prosecution (Footnote 2—This guidance for domestic distribution cases does not apply to cases involving distribution within or smuggling into a federal prison. 18 USC 1791). Typically the more marijuana above 200 kilograms the better the potential for federal prosecution. Domestic distribution cases involving quantities of marijuana below 200 kilograms should demonstrate an especially strong federal interest or should not be prosecuted with marijuana distribution as the sole federal charge. Set forth below is a non-exhaustive list of factors that USAOs believe indicate a federal interest in a domestic distribution case.

*Distribution by an individual or organization with provable ties to an international drug cartel or a poly-drug trafficking organization.

*Distribution of significant quantities to persons or organizations outside California.

*Distribution by individuals with significant prior criminal histories.

*Distribution by individuals with provable ties to a street gang that engages in drug trafficking involving violent conduct.

*Distribution for the purpose of funding other criminal activities.

*Distribution near protected locations or involving underage or vulnerable people (e.g. in violation of 21 USC 859 persons under 21, 860 near schools, playground and colleges, 861 employment of persons under 18).

*Distribution involving the use or presence of firearms or other dangerous weapons including cases that would support charges under 18 USC 924c.

*Distribution generating significant profits that are used or concealed in ways that would support charges of federal financial crimes such as tax evasion, money laundering or structuring. Note: Generation of significant profits alone generally will not be viewed as a factor weighing in favor of federal prosecution.

*Distribution in conjunction with other federal crimes involving violence or intimidation.

2. Cultivation cases.

Federal prosecution of a marijuana case involving cultivation on non-federal or non-tribal land, indoor or outdoor, should generally involve at least 1,000 marijuana plants so that the quantity necessary to trigger the ten-year mandatory minimum sentence can be clearly proven and also include additional factors that reflect a clear federal interest in prosecution. Typically, the more marijuana above 1,000 plants, the better the potential for federal prosecution. Non-federal or non-tribal land cases involving quantities below 1,000 plants should demonstrate an especially strong federal interest or should not be prosecuted with marijuana cultivation as the sole federal charge. Federal prosecution of a marijuana case involving cultivation on federal or tribal land should generally involve at least 500 marijuana plants and also include additional factors that reflect a clear federal interest in prosecution. Cases on federal or tribal land involving quantities below 500 plants will be considered if they demonstrate a strong federal interest, if the cultivation has caused significant damage to federal or tribal lands or has occurred in an area of exclusive federal jurisdiction (Footnote 3-- The USAOs will consider the totality of circumstances with respect to all marijuana plant quantities in these guidelines. For example, the presence of especially mature, large or robust plants will generally weigh in favor of prosecution while the presence of seedlings or immature plants will generally weigh against prosecution). Set forth below is a non-exhaustive list of factors that the USAOs believe indicate a federal interest that may justify federal prosecution of a marijuana case involving cultivation whether on federal, tribal or other lands.

*Cultivation causing significant environmental damage, risk to human health or interference with particularly sensitive land or significant recreational interests, ie damage to wilderness area or wildlife, danger to innocent families using a recreation area or use of toxic or dangerous chemicals.

*Cultivation by an individual or organization with provable ties to an international drug cartel or poly-drug trafficking organization.

*Cultivation of significant quantities on behalf of persons or organizations outside California.

*Cultivation by individuals with significant prior criminal histories.

*Cultivation by individuals with provable ties to a street gang that engages in drug trafficking involving violent conduct.

*Cultivation for the purpose of funding other criminal activities.

*Cultivation near protected locations or involving under-age or vulnerable people (eg, in violation...

*Cultivation involving the use or presence of fire-arms, booby traps or other dangerous weapons including cases that would support charges under 18 USC 924c.

*Cultivation generating significant profits that are used or concealed in ways that would support charges for federal financial crimes such as tax evasion, money laundering or structuring.. Note—generation of significant profits alone will not be viewed as a factor weighing in favor of federal prosecution.

*Cultivation in conjunction with other federal crimes involving violence or intimidation

3. Dispensary cases.

Given California state law, prosecution of marijuana stores or “dispensaries” purporting to comply with state law face additional challenges. Federal prosecution of a case involving a marijuana store should generally involve a) provable sales through seizures or records of over 200 kilograms or 1000 plants per year. b) sales clearly in violation of state law, eg sales to persons without legitimate doctors’ recommendations, side-sales occurring outside of the store or shipping to persons outside of California (Note—selling for profit, though a violation of state law, typically alone will not alone satisfy this requirement), and c) additional factors that reflect a federal interest in prosecution. Set forth below is a non-exhaustive list of such additional factors. Nothing herein should be taken as a limitation on investigation by federal law enforcement to determine the existence of these factors. However, search warrants or other more intrusive investigative techniques directed at marijuana stores should be closely coordinated with the USAOs.

*Marijuana “inventory” obtained from cultivation on federal or tribal land.

*Targets involved in cultivation or distribution outside of the dispensary that merits federal prosecution based on consideration of factors set forth in sections 1 and 2 above.

*Targets using profits from the dispensary to support other criminal activity.

*Store linked to physician providing marijuana recommendations without plausible legitimate justification, eg doctor on site providing recommendation with no on-site examinations or legitimate medical procedures. *Targets have significant prior criminal histories.

*Targets have provable ties to a street gang that engages in drug trafficking involving violent conduct.

*Store operations involve the use or presence of firearms or other dangerous weapons including cases that would support charges under 18 USC 924.

*Store generates significant profits that are used/concealed in ways that would support charges for federal financial crimes such as tax evasion, money laundering or structuring. Note--generation of significant profits alone generally will not be viewed as a factor weighing in favor of federal prosecution

*Store operations in conjunction with other federal crimes involving violence or intimidation.

*Store employs minors under 18 and/or sells a significant portion of marijuana to minors under the age

of 21 especially where evidence that minors aren't using for medical purposes

4. Civil forfeiture.

The USAOs general preference is to pursue forfeiture through criminal forfeiture or civil forfeiture filed in parallel with a criminal case. Nevertheless circumstances may arise in which civil forfeiture alone is the best option. Those cases will generally involve one or more of the following:

*Significant forfeitable assets clearly traceable to marijuana trafficking in violation of federal criminal law that would merit federal prosecution based on consideration of factors set forth in sections 1-3 above.

*Significant forfeitable assets clearly traceable to non-marijuana related violations of federal law such as structuring or money-laundering. Large scale "medical marijuana" cultivation operations that 1) are operating in violation of state law 2) involve real property that has been the subject of a warning letter or similar prior notice or 3) involve real property that has been the subject of a prior forfeiture proceeding arising from marijuana cultivation or a property owner who has been a claimant in such proceedings or individual targets not subject to criminal prosecution eg fugitives or persons whose involvement in marijuana trafficking is too marginal to justify criminal prosecution including off-site land lords and non-resident owners falsely claiming ignorance of tenant's marijuana trafficking.