



State Attorney

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MEMORANDUM

TO: All Assistant State Attorneys

Date: September 4, 2019

From: State Attorney Andrew Warren

Re: Prosecution of Marijuana Cases following the enactment of the Hemp law.

Summary:

- **Effective immediately, our office will not file charges nor prosecute any cannabis case with an offense date on or after July 1, 2019 without a scientifically reliable, admissible test that proves beyond a reasonable doubt that the substance contains a THC level above the 0.3 % threshold that distinguishes illegal cannabis from legal hemp. Among cannabis-related offenses, our office will continue to prioritize felonies: trafficking, manufacturing, delivery, sale, possession with intent, and felony-amount possession cases, while continuing to deprioritize the prosecution of misdemeanor cannabis cases in favor of established diversion and civil citation programs. Also, we will continue to prioritize the prosecution of cannabis-related felonies in which other felonies are part of the same transaction or occurrence, such as felon in possession of a firearm or offenses involving other controlled substances.**

Florida's new hemp law took effect on July 1, 2019. Since that time, our office has been discussing the prosecutorial impact of the law with elected representatives, other State Attorney's Offices, and our law enforcement partners. Over the past two months, we have provided guidance consistent with this memorandum within our office while waiting to see what, if any, policy changes our law enforcement partners would make with respect to investigating and arresting cannabis offenses. This memorandum formalizes the guidance ASAs have already been given.

New Law

Senate Bill 1020, known as the "Hemp Law," went into effect on July 1, 2019. This law legalizes the possession and use of hemp. The bill defines hemp as "the plant *Cannabis sativa L.* and any part of that plant, including the seeds thereof, and all derivatives, extracts, cannabinoids,

isomers, acids, salts, and salts of isomers thereof, whether growing or not, that has a total delta-9 tetrahydrocannabinol concentration that does not exceed 0.3 percent on a dry-weight basis.” See Florida Statute §581.217(3)(d). The new law changes the definition of cannabis such that the term excludes hemp as defined in section 581.217. Cannabis and hemp both come from the same plant, Cannabis sativa L. Cannabis and hemp look, feel and smell the same, and both can be smoked. The main difference between hemp and cannabis is that hemp has a total delta-9 tetrahydrocannabinol (THC) concentration that does not exceed 0.3%. If the THC concentration of the plant **is less than or equal to 0.3%**, then the plant is hemp, and is legal in Florida. If the THC concentration of the plant **exceeds 0.3%**, then the plant is cannabis and is illegal in Florida (subject to medicinal exceptions).

Impact on Prosecution

The Hemp Law will impact prosecutors and law enforcement. Specifically, the new law affects our ability to prove beyond a reasonable doubt that a substance is illegal cannabis as opposed to legal hemp. Given the inability to distinguish between hemp and cannabis visually or through smell, the only current reliable method is quantitative testing. In order to prove beyond a reasonable doubt that a substance is cannabis, we need quantitative testing to establish that the THC level exceeds 0.3% on a dry weight basis.

Prosecutorial ethics preclude us from charging an offense without a good faith belief that we can prove the offense beyond a reasonable doubt. Accordingly, for any cannabis-related offense occurring on or after July 1, 2019, our office needs a reliable, admissible laboratory test result establishing the suspected substance is illegal cannabis rather than hemp **before filing** charges. Because, pursuant to Florida Rule of Criminal Procedure 3.191, the speedy trial period starts at the time of arrest, probable cause arrests for cannabis offenses made before law enforcement has obtained a reliable, admissible positive ($\geq 0.3\%$ THC) lab test result may jeopardize the successful prosecution of such offenses, absent other circumstances.

Current field tests are insufficient to establish beyond a reasonable doubt that a substance exceeds the 0.3% THC concentration. Law enforcement agencies locally and statewide are working diligently to develop best practices and procedures to meet this challenge. In the meantime, law enforcement is working with private labs to provide reliable and admissible quantitative testing. A law enforcement agency must submit the suspected substance to a DEA-licensed facility for quantitative testing and ensure that proper chain of custody is preserved. To ensure that the results of any such testing are not excluded by the Court, the particular lab testing methodology utilized must be capable of meeting the Daubert standard. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). ACS Laboratory, located in Hillsborough County, is the largest cannabis and hemp testing laboratory in the southeastern United States. ACS Laboratory has advised that it can produce results that will give a quantitative amount of THC in 2-5 business days. More information about ACS Laboratory is available at www.acslabcannabis.com. ASAs should familiarize themselves with the information on the lab practices and procedures necessary to submit evidence of a cannabis offense.

The Hemp Law does not affect our current prioritization of cannabis cases. Among cannabis-related offenses, our office will continue to prioritize felonies: trafficking, manufacturing, delivery, sale, possession with intent, and felony-amount possession cases. We will likewise continue to deprioritize the prosecution of misdemeanor cannabis cases in favor of established diversion and civil citation programs. Also, we will continue to prioritize the prosecution of cannabis-related felonies in which other felonies are part of the same transaction or occurrence, such as felon in possession of a firearm or offenses involving other controlled substances. Although we anticipate that law enforcement will direct file charges after obtaining a positive lab result in lieu of making an arrest, whether a defendant is arrested or direct filed will not affect the priority of the prosecution.

These changes will increase the cost of prosecuting cannabis related offenses. Law enforcement will pay the increased expenses for the necessary quantitative testing prior to our office filing charges. Our office will pay for expert witness testimony to prosecute cannabis cases, subject to the volume of cases and budgetary constraints.

Impact on Probable Cause Investigations and Admissible Evidence

As in any prosecution, ASAs must evaluate cannabis cases to ensure the admissibility of evidence. Probable cause to search in cannabis investigations has often been based on odor or plain view from a vehicle or person. As noted above, however, hemp and illegal cannabis look and smell the same. As a result, the Hemp Law creates additional Fourth Amendment challenges related to cannabis-based searches.

We continue to work with law enforcement to establish best practices to protect people's Fourth Amendment rights while ensuring successful prosecutions based upon lawful searches and seizures. Under the new Hemp law, the visual observation of suspected cannabis or its odor alone is likely no longer sufficient to establish probable cause to believe a crime is being committed or that evidence of a crime is present. The probable cause standard requires merely a reasonable basis to believe that a crime was committed or that evidence of the crime exists. Accordingly, in most instances, an "odor plus" standard likely demonstrates probable cause to conduct a warrantless cannabis-based search. Many local and statewide law enforcement agencies are adopting this standard.

Below is a non-exhaustive list of "odor plus" factors. This list provides a starting point for ASAs working through these issues in cases involving warrantless cannabis-based searches.

1. Information or intelligence regarding illicit activity prior to the stop
2. Knowledge of the subject's prior recent criminal history for narcotics violations
3. Observation of a hand-to-hand transaction prior to the stop
4. Admission that the substance is illegal cannabis
5. Conflicting or implausible statements
6. Nervousness, such as:
 - a. Sweating when it is not hot
 - b. Shaking or trembling hands
 - c. Avoiding eye contact

7. Furtive movements
8. Discarding, destroying, or trying to hide a substance
9. A large amount of currency
10. Currency in rubber-banded “quick count bundles”
11. Masking agents such as fabric softener, air fresheners, or coffee grinds
12. Firearms or other weapons
13. Drug paraphernalia, such as baggies, pipes, heat sealers, or scales (although legal hemp may be stored in a baggie and smoked in a pipe as well)
14. Signs of impairment on a driver (such as bloodshot, watery eyes or slurred speech)

ASAs must assess the documentation of these “odor plus” factors when making evaluations related to charging determinations and admissible evidence. ASAs must always keep in mind that probable cause is assessed under the totality of the circumstances standard, and thus looking for documentation and evidence of circumstances in addition to the sight or odor of cannabis is fundamental to our evaluation of a case.

Our office will continue to provide guidance as to the latest legal developments related to these Fourth Amendment issues.

Conclusion

As these issues work through our court system, we will continue to monitor new court decisions and law enforcement procedures. We intend for this information to help guide your decision-making as you evaluate your cases rather than dictate specific prosecution decisions. Please consult with your supervisors should you have questions or additional thoughts. The recent legal changes make this an evolving area of law, and it is therefore imperative that we continue to communicate effectively to ensure the appropriate and consistent handling of cannabis offenses to advance our mission of public safety, fairness, and justice.