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DEERING'S CALIFORNIA CODES ANNOTATED
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*** THIS DOCUMENT REFLECTS ALL URGENCY LEGISLATION ENACTED ***
THROUGH 2007-2008 THIRD EXTRAORDINARY SESSION CH. 6 AND
CH. 12 OF THE 2008 REGULAR SESSION APPROVED 4/29/08

HEALTH AND SAFETY CODE
Division 10. Uniform Controlled Substances Act
Chapter 6. Offenses and Penalties
Article 2. Marijuana

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Health & Saf Code § 11358 (2008)

§ 11358. Planting, harvesting, or processing

Every person who plants, cultivates, harvests, dries, or processes any marijuana or any part thereof, except as otherwise provided by law, shall be punished by imprisonment in the state prison.

HISTORY:

Added Stats 1972 ch 1407 § 3. Amended Stats 1973 ch 1078 § 9, effective October 1, 1973; Stats 1976 ch 1139 § 72, operative July 1, 1977.

NOTES:

Amendments:

1973 Amendment:

(1) Added subdivision designations (a)-(c); (2) substituted "offense described in subdivision (d)" for "felony offense described in this division or of any offense under the laws of any other state or the United States which, if committed in this state, would have been punishable as a felony offense described in this division" in subds (b) and (c); and (3) added subd (d).

1976 Amendment:

Substituted the section for the former section which read: "(a) Every person who plants, cultivates, harvests, dries, or processes any marijuana or any part thereof, except as otherwise provided by law, shall be punished by imprisonment

in the state prison for a period of not less than one year or more than 10 years and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than one year in the state prison.

"(b) If such person has been previously convicted once of any offense described in subdivision (d), the previous conviction shall be charged in the indictment or information and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, he shall be imprisoned in the state prison for a period of not less than two years or more than 20 years and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than two years in the state prison.

"(c) If such person has been previously convicted two or more times of any offense described in subdivision (d), the previous convictions shall be charged in the indictment or information and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, he shall be imprisoned in the state prison for a period of five years to life and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than five years in the state prison."

"(d) Any previous conviction of any of the following offenses, or of an offense under the laws of another state or of the United States which, if committed in this state, would have been punishable as such an offense, shall be charged pursuant to subdivision (b) or (c) of this section:

"(1) Any felony offense described in Section 11378, 11379, or 11380.

"(2) Any felony offense described in this division involving a controlled substance specified in subdivision (b) or (c) of Section 11054, specified in paragraph (10), (11), (12), or (17) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055.

"(3) Any felony offense described in this division involving a narcotic drug classified in Schedule III, IV, or V."

Historical Derivation:

Former H & S C § 11530.1, as added Stats 1968 ch 1465 § 2, amended Stats 1970 ch 1098 § 7.

Cross References:

"Marijuana": *H & S C §§ 11018, 11032.*

Use of marijuana for medical purposes: *H & S C § 11362.5.*

Payment of criminal laboratory fee after conviction under this section: *H & S C § 11372.5.*

Notice of seizure of personal property used in offense under this section: *H & S C § 11485.*

Registration of controlled substance offenders: *H & S C § 11590.*

Drug Dealer Liability Act: *H & S C §§ 11700 et seq.*

Unspecified felony punishment: *Pen C § 18.*

Diversion of criminal proceedings: *Pen C §§ 1000 et seq.*

Collateral References:

Cal Forms Pl & Practice (Matthew Bender) ch 214 "Drugs and Pharmacists".

Bender's Forms of Discovery (Matthew Bender) vol 4A "Drugs and Druggists".

Cal Criminal Defense Practice (Matthew Bender) ch 145 "Narcotics and Alcohol Offenses".

Defense of Narcotics Cases (Matthew Bender) ch 1 "Narcotic Crimes".

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2370, Planting, etc., Marijuana

Forms:

Suggested form is set out below, following Notes of Decisions.

Law Review Articles:

Civil commitment of narcotic addicts in California. *19 Hast LJ 602.*

Psychedelics and religious freedom. *19 Hast LJ 667.*

California Marijuana Possession Statute: An infringement on the right of privacy or other peripheral constitutional rights. *19 Hast LJ 758.*

Medical and delinquent addicts or drug abusers: A medical distinction of legal significance. *19 Hast LJ 783.*

Effects of the Single Convention on narcotic drugs upon the regulation of marijuana. *19 Hast LJ 848.*

Selected bibliography of narcotics and hallucinogens. *19 Hast LJ 862.*

Proposition 36 Eligibility: Are Courts and Prosecutors Following or Frustrating the Will of Voters? *36 McGeorge LR 627.*

The single convention on narcotic drugs vs. Decriminalization of marijuana. *49 St BJ 524.*

California's New Marijuana Law: A Sailing Guide for Uncharted Waters. *51 St BJ 27.*

Diversion of drug offenders in California; operation of the diversion statute. *26 Stan LR 923.*

Constitutional objections to California's Marijuana Possession Statute. *14 UCLA LR 773.*

Marijuana possession and the California Constitutional prohibition of cruel or unusual punishment. *21 UCLA LR 1136.*

The Official Report of the National Commission Studying Marijuana: More misunderstanding. *8 USF LR 1.*

Attorney General's Opinions:

If parcel of land with residence is used to cultivate marijuana for sale, but there is no evidence concerning where marijuana is sold, property would not be subject to forfeiture without proof of additional evidence. *74 Ops. Cal. Atty. Gen. 70.*

Annotations:

Sufficiency of prosecution proof that substance defendant is charged with possessing or selling, or otherwise unlawfully dealing in, is marijuana. *75 ALR3d 717.*

Competency of drug addict or user to identify suspect material as narcotic or controlled substance. *95 ALR3d 978.*

Hierarchy Notes:

Div. 10 Note

Div. 10, Ch. 6 Note

Div. 10, Ch. 6, Art. 2 Note

NOTES OF DECISIONS 1.5. Relationship With Federal Law 4. Search and Seizure

Decisions under Former H & S C § 11530.1 and Present Section

1. In General 2. Particular Applications 3. Compassionate Use Act

1.5. Relationship With Federal Law

By pleading guilty to felony cultivation of marijuana under *H & S C § 11358*, defendant admitted that he was guilty of activities that were clearly within the ambit of the federal felony of manufacturing marijuana under *21 USCS § 841* despite the fact that *H & S C § 11358* criminalized drying while the Controlled Substances Act did not use the term drying because, pursuant to *21 USCS § 802(15)*, the term manufacture means the production or processing of a drug, and the ordinary meaning of the terms production and processing of a drug includes the act of drying. Accordingly, defendant's conviction fell within the generic definition of a drug trafficking crime under *18 USCS § 924(c)(2)*, and thus constituted an aggravated felony as defined by *8 USCS § 1101(a)(43)* such that defendant was ineligible for cancellation of removal under *8 USCS § 1229b(a)(3)*. *United States v. Reveles-Espinoza (2008, CA9 Cal) 2008 US App LEXIS 8023.*

California's aiding and abetting liability under *Pen C § 971* is not sufficiently broader than that under *18 USCS § 2(a)* such that it places a conviction under *H & S C § 11358* outside the ambit of felonies punishable under the Controlled Substances Act. Even if a defendant convicted under *H & S C § 11358* is convicted under an aiding and abetting theory, he is liable under federal as well as state law; thus, defendant's conviction under § 11358 clearly fell within the ambit of the federal felony of manufacturing marijuana set forth in *21 USCS § 841* even though the court could not determine whether the state conviction was obtained under an aiding and abetting theory of liability. *United States v. Reveles-Espinoza (2008, CA9 Cal) 2008 US App LEXIS 8023.*

4. Search and Seizure

Police observation of people smoking marijuana in defendant's apartment could not support a warrantless entry based on exigent circumstances because of the minor nature of the crime; because the entry was illegal, defendant's

motion to dismiss under *Pen C § 1538.5* should have been granted, and the court reversed defendant's conviction for cultivation of marijuana under *H & S C § 11358*. *People v. Hua (2008, 1st Dist) 2008 Cal App LEXIS 35*.

Decisions under Former H & S C § 11530.1 and Present Section 1. In General

The offense of cultivation of marijuana in violation of *Health & Saf. Code, § 11530.1* (now § 11538), a felony, does not involve moral turpitude as a matter of law, although it may do so as a question of fact. Ed. Code, § 12911, which provides that the record of a conviction of a narcotics offense defined in Ed. Code, § 12912.5, shall be sufficient proof of conviction of a crime involving moral turpitude for the purposes of dismissal of permanent employees, does not define nor mention *Health & Saf. Code, § 11358*, or its predecessor, § 11530.1, which is a clear indication that the Legislature did not intend cultivation of marijuana to be classed as an offense which involved moral turpitude as a matter of law. *Board of Trustees v. Judge (1975, Cal App 2d Dist) 50 Cal App 3d 920, 123 Cal Rptr 830, 1975 Cal App LEXIS 1827*.

The validity of surveillance turns upon the reasonable expectation of privacy rather than upon the means used to view or hear it; so long as the object which is viewed is perceptible to the naked eye, the person has no reasonable expectation of privacy and as a consequence, the government may use technological aid of whatever type without infringing upon the person's constitutional rights. Thus, where law enforcement officers observed, from an airplane, a marijuana garden in which defendants had no reasonable expectation of privacy, the use of high-power binoculars during the flight did not render the search illegal. *People v. St. Amour (1980, Cal App 1st Dist) 104 Cal App 3d 886, 163 Cal Rptr 187, 1980 Cal App LEXIS 1733*.

Considering the plain dictionary definition of the verb "to process," the construction given that term by courts of sister states, and the well-known principles of statutory construction that if the words of a statute, when given their ordinary and popular meaning, are reasonably free of uncertainty, courts will look no further to ascertain the statute's meaning, and that, in construing a statute, a word should not be given a forced and strained meaning contrary to its common understanding, one who removes the leaves from marijuana plants in order to render the leaves usable for smoking is engaged in processing the drug in violation of *Health & Saf. Code, § 11358*, proscribing the cultivation of marijuana. *People v. Tierce (1985, Cal App 5th Dist) 165 Cal App 3d 256, 211 Cal Rptr 325, 1985 Cal App LEXIS 1715*.

Cultivation of marijuana (*H & S C § 11358*) means planting, or cultivating, or harvesting, or drying, or processing marijuana. Only one of the enumerated acts need be proven to uphold a conviction, but the jury must all agree upon the same act. *People v. Tierce (1985, Cal App 5th Dist) 165 Cal App 3d 256, 211 Cal Rptr 325, 1985 Cal App LEXIS 1715*.

In deciding if a defendant accused of violating *Health & Saf. Code, § 11358* (planting, cultivating, harvesting, or processing marijuana), is eligible for diversion (*Pen C §§ 1000 et seq.*), determining the operative fact of "personal use" predicates the resolution of conflicting inferences of intended use, which is a judicial function. *H & S C § 11358*, itself does not distinguish between personal versus nonpersonal use. Thus, the question is whether the marijuana was for personal or nonpersonal use, and the task of making that determination is inherently a judicial one. Claimed authority by the district attorney to determine a commercial use under *Pen. Code, § 1000*, subd. (a)(3), conflicts with the judicial authority to resolve conflicting inferences of intended use under *Pen. Code, § 1000.2*, since it precedes and therefore preempts the judicial function. The judicial function must be preserved and, a fortiori, prevail. Pretrial review of a finding of ineligibility for diversion applies only when the question is whether the defendant is before any court upon an accusatory pleading for the commission of specified offenses (*Pen. Code, § 1000*, subd. (a)). That question, which is not assigned to the prosecutor, requires a judicial resolution, and hence a pretrial hearing. *People v. Brackett (1994, Cal App 3d Dist) 25 Cal App 4th 488, 30 Cal Rptr 2d 557, 1994 Cal App LEXIS 528*.

For a defendant to be able to avoid criminal prosecution or sanction pursuant to *H & S C § 11362.5(b)(1)(B)*, when charged with possession or cultivation of marijuana in violation of *H & S C §§ 11357, 11358*, he or she must be able to defend on the ground that these provisions do not apply because he or she is a qualified patient or primary caregiver, *H*

& S C § 11362.5(d). *People v. Mower* (2002) 28 Cal 4th 457, 122 Cal Rptr 2d 326, 49 P3d 1067, 2002 Cal LEXIS 4520.

Diabetic criminally accused of possession and cultivation of marijuana at advice of his physician was allowed to raise his status as qualified patient under Compassionate Use Act of 1996 to move for dismissal of indictment; *H & S C § 11362.5(d)* provided that *H & S C § 11357*, criminalizing the possession of marijuana, and *H & S C § 11358*, criminalizing the cultivation of marijuana, did not apply to a patient, or to a patient's primary caregiver, who possessed or cultivated marijuana for medical purposes. *People v. Mower* (2002) 28 Cal 4th 457, 122 Cal Rptr 2d 326, 49 P3d 1067, 2002 Cal LEXIS 4520.

After the magistrate denied defendant's motion to suppress evidence pursuant to *Pen C § 1538.5*, defendant pled guilty to one count of cultivating marijuana in violation of *H & S C § 11358*, but he argued that his trial counsel was constitutionally ineffective for failing to preserve the legality of the search as an issue to be considered on appeal; however, the appellate court found that counsel was not given an opportunity to explain why the motion was not renewed, and a satisfactory explanation could exist, and it rejected defendant's ineffective assistance of counsel claim on appeal and left him to the remedy in a habeas corpus proceeding. *People v. Hinds* (2003, Cal App 3d Dist) 108 Cal App 4th 897, 134 Cal Rptr 2d 196, 2003 Cal App LEXIS 729, review denied (2003, Cal) 2003 Cal LEXIS 5469.

Physician gives his or her "approval" of a patient's marijuana use within the meaning of the Compassionate Use Act if the physician expresses to the patient a favorable opinion of marijuana use for treatment of the patient's illness. When a Compassionate Use Act defense is the subject of a pretrial hearing under *Evi C § 402*, the defendant need only produce evidence sufficient to raise a reasonable doubt on that element of the defense. *People v. Jones* (2003, Cal App 3d Dist) 112 Cal App 4th 341, 4 Cal Rptr 3d 916, 2003 Cal App LEXIS 1491.

Defendant who pleaded no contest to cultivation of 37 marijuana plants for personal use in violation of *H & S C § 11358* was not eligible to be sentenced to a drug treatment program pursuant to *Pen C §§ 1210 et seq.* because that sentencing scheme specifically excluded cultivation crimes and because cultivation of marijuana, even for personal use, was not possession, use, or transportation for personal use or being under the influence of a controlled substance and, therefore, did not meet the statutory definition of a "nonviolent drug possession offense" as contemplated in *Pen C § 1210(a)*. *People v. Sharp* (2003, Cal App 3d Dist) 112 Cal App 4th 1336, 5 Cal Rptr 3d 771, 2003 Cal App LEXIS 1621.

Conviction for cultivating marijuana was reversed because the jury was erroneously instructed that for a compassionate use defense, defendant had to prove that he was "seriously ill." The question of whether the medical use of marijuana was appropriate was a determination that was to be made by a physician and that was not to be second-guessed by jurors. *People v. Spark* (2004, Cal App 5th Dist) 121 Cal App 4th 259, 16 Cal Rptr 3d 840, 2004 Cal App LEXIS 1261.

2. Particular Applications

Evidence consisting of marijuana plants, on which charges against homeowners of cultivating marijuana were based, was illegally obtained, and the taint of such illegality extended to an incriminating statement made by one of the defendants after his arrest, where the evidence came to light as a result of entry of defendants' enclosed backyard by an agriculture department inspector who was looking for citrus pests, where the inspector had neither a warrant as required by *Code Civ Proc, §§ 1822.50- 1822.56*, nor defendants' consent to enter, and where police officers who also entered the premises without a warrant and without consent, were led to a position from which they could see some marijuana plants in the backyard by information related to them by the inspector and resulting from his illegal conduct; moreover, a person who surrounds his backyard with a fence, and limits entry with a gate, locked or unlocked, has shown a reasonable expectation of privacy for that area, and it is protected from unreasonable government intrusion or search without a warrant, unless the circumstances excuse the warrant. *Vidaurri v. Superior Court* (1970, Cal App 4th Dist) 13 Cal App 3d 550, 91 Cal Rptr 704, 1970 Cal App LEXIS 1267.

Observation of marijuana plants growing in a backyard gave a deputy sheriff reasonable grounds to believe that

articles and property used as a means of committing the offense of possession and cultivation of marijuana would be stored within the house on the premises and, consequently, a search of the entire house, pursuant to a search warrant, was proper. *Hart v. Superior Court (1971, Cal App 1st Dist) 21 Cal App 3d 496, 98 Cal Rptr 565, 1971 Cal App LEXIS 1091.*

In a prosecution for planting and cultivating marijuana, the trial court did not err in ruling that as a matter of law defendant's offer of proof was insufficient to establish that he used marijuana in good faith in the pursuit of his religious faith, where, though the offer proffered evidence that defendant worshiped and sanctified marijuana and that he used it in his religious practices, it did not proffer any evidence that the use of marijuana was an indispensable part of the religious professed by the Universal Life Church of Christ Light of which he was a pastor, and where the proffered evidence did not indicate that the prohibition of the use of marijuana resulted in a virtual inhibition of the practice of defendant's religion, or that it barred him from practices indispensable to the pursuit of his religious faith. *People v. Mullins (1975, Cal App 1st Dist) 50 Cal App 3d 61, 123 Cal Rptr 201, 1975 Cal App LEXIS 1280.*

The evidence established that a deputy sheriff had the status of a private citizen, rather than that of a law enforcement officer, at the time he entered premises and discovered the presence of growing marijuana where the deputy was off duty fishing with a neighbor when he discovered the growing marijuana, his neighbor attempting to pay a social call on defendant and his wife and finding them not at home, where the discovery was made after simple curiosity led the deputy from a garden down a slope along the course of a garden hose, disclosing a cultivated plot on which marijuana was growing, and where the deputy then communicated the information acquired as a private citizen to the proper law enforcement officials. *People v. Wachter (1976, Cal App 5th Dist) 58 Cal App 3d 911, 130 Cal Rptr 279, 1976 Cal App LEXIS 1600.*

In a prosecution for unlawful cultivation of marijuana and unlawful possession of marijuana for sale in which the grounds asserted in defendants' motion for dismissal of the information included an assertion the warrant was not issued for probable cause, lack of probable cause for issuance of the warrant could not validly be predicated on a claim the affidavit in support of the warrant failed to state explicitly that plants that had been observed were marijuana or that marijuana would still be present when the warrant was obtained and executed. The affidavit disclosed that a marijuana garden of one-third to one-half acre in size was being tended in a remote area of the property in question. Also, area overflights indicated the plants appeared to be marijuana, and a highly experienced and well-trained narcotic agent so testified. Under all the circumstances there were reasonable grounds to believe the plants were marijuana and the affidavit was sufficient to support the issuance of a search warrant. *Tuttle v. Superior Court (1981, Cal App 5th Dist) 120 Cal App 3d 320, 174 Cal Rptr 576, 1981 Cal App LEXIS 1870, cert den California v. Tuttle (1981) 454 US 1033, 70 L Ed 2d 477, 102 S Ct 571, 1981 US LEXIS 4412.*

In a prosecution for cultivation of marijuana and possession of a sawed-off shotgun, the trial court properly denied defendants' motion to dismiss the charge of marijuana cultivation, where the judge who issued the warrant pursuant to which the marijuana plants were seized testified at the preliminary hearing that, before the search warrant was issued, he was invited to enter the backyard adjacent to defendants' residence and from that vantage point he looked through the open fence and saw on the property where defendants lived what appeared to be about 15 marijuana plants, and where he explained that in his years as a judge he had seen marijuana plants about 50 times. Thus, apart from the evidence seized pursuant to the warrant (invalid because of the judge's lack of neutrality), there was sufficient evidence presented to hold defendants to answer on the charge of cultivating marijuana. The judge's investigative activities did not constitute an illegal search, since he never entered defendants' yard but saw the plants in plain view from a place he had a right to be. *Grimes v. Superior Court of Madera County (1981, Cal App 5th Dist) 120 Cal App 3d 582, 174 Cal Rptr 623, 1981 Cal App LEXIS 1848.*

In a prosecution for harvesting marijuana (*H & S C § 11358*), the trial court properly instructed the jury that "harvesting" is defined as the gathering of crops of any kind. The court properly refused the more comprehensive dictionary definition offered by defendants, which, with its catalog of different crops, could have led to jury confusion over whether marijuana is a crop and whether an entire season's yield must be gathered to fulfill the requirement of a

harvest. The court's instruction properly focused on the act of gathering, which could apply to an entire crop or to a portion of the crop, however small. *People v. Villa* (1983, Cal App 2d Dist) 144 Cal App 3d 386, 192 Cal Rptr 674, 1983 Cal App LEXIS 1913.

Motion to return a portion of seized marijuana was properly denied, even though the State conceded that the petitioner was a qualified patient and even though the State had dismissed charges against him in the interests of justice, because the amount of marijuana seized (4.5 pounds dried, 10 pounds drying, and 46 plants) confirmed that the petitioner was not in lawful possession. *Chavez v. Superior Court* (2004, Cal App 4th Dist) 123 Cal App 4th 104, 20 Cal Rptr 3d 21, 2004 Cal App LEXIS 1739, review denied (2004, Cal) 2004 Cal LEXIS 12587.

Board of Immigration Appeals (BIA) erred in determining that 8 C.F.R. § 1003.2(d) barred an alien's 8 U.S.C.S. § 1229 motion to reopen a removal order that was issued pursuant to 8 U.S.C.S. § 1182(a)(2)(A)(i)(II), (a)(6)(A)(i); the alien was entitled to reopen the deportation proceeding because his cultivation conviction under H & S C § 11358, which was a "key part" of the deportation proceeding, had been vacated; a remand to the BIA was necessary because the issue of whether the alien's conviction was vacated on the merits or because of immigration consequences had to be determined in the first instance by the BIA. *Cardoso-Tlaseca v. Gonzales* (2006, 9th Cir) 460 F3d 1102, 2006 US App LEXIS 21310.

3. Compassionate Use Act

Where the evidence showed that defendant, who was charged with cultivating marijuana, had the requisite medical authorization and several back injuries that caused him severe pain, which was impervious to traditional pain medications, and defendant credibly denied cultivating marijuana to sell and his prior efforts at growing marijuana only yielded two to three ounces of marijuana per plant, this history, in light of the difficulty of predicting and calculating the yield of useable marijuana, and the vagaries of back pain, constituted substantial evidence that defendant was cultivating marijuana for personal medical use rather than to sell it. *People v. Arbacauskas* (2004, Cal App 3d Dist) 123 Cal App 4th 502, 19 Cal Rptr 3d 853, 2004 Cal App LEXIS 1789, modified (2004, Cal App 3rd Dist) 2004 Cal App LEXIS 1942, op withdrawn by order of the ct, (2005, Cal) 2005 Cal LEXIS 560.

Because defendant presented evidence that he sold medical marijuana to qualified patients and counseled them on its use, there was enough evidence to present a medical marijuana defense under Cal. Health & Safety Code § 11362.5 to the charge of cultivation of marijuana in violation of Cal. Health & Safety Code § 11358; thus, the trial court infringed on defendant's constitutional right to present a defense when it refused to give a primary caregiver instruction. *People v. Mentch* (2006, Cal App 6th Dist) 143 Cal App 4th 1461, 50 Cal Rptr 3d 91, 2006 Cal App LEXIS 1623, review gr, depublished (2007, Cal) 55 Cal Rptr 3d 862, 153 P3d 953, 2007 Cal LEXIS 1113.

SUGGESTED FORMS

Allegation Charging Unlawful Planting, Cultivating, Harvesting, Drying or Processing of Marijuana