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PLEASE REPLY TO:

MEMORANDUM

July 31, 2019

To: All Law Enforcement Agencies
8th Judicial Circuit

From: Bill Cervone
State Attorney

Subject: Cannabis - Probable Cause And Prosecution

As I am sure everyone knows by now, FS 893.02(3) was amended effective July 1st to legalize hemp in Florida by excluding it from the definition of cannabis. In essence, hemp and related hemp products having less than .3% THC are now legal. Because hemp and cannabis cannot be distinguished by mere sight or smell, this causes a host of problems for law enforcement. Because approved laboratory testing to quantify THC levels to prove that the .3% threshold has been exceeded do not currently exist, even more problems exist for prosecutors. As a result and after conferring with many of the other State Attorneys and various agencies around Florida the following are my recommendations to you.

PROBABLE CAUSE. Because hemp and cannabis are indistinguishable by sight or smell that alone is no longer sufficient probable cause to go forward. Existing presumptive field tests are also no longer valid in that they cannot address the required percentage of THC. While there are reports of newer field test kits that might do so, those kits have not been certified for use and will not likely meet with court approval. A canine alert is not likely to be sufficient. What this means is that an officer must have more than experience and observation, or what many bulletins are referring to as an "odor plus" standard, to proceed. This will require that an officer be able to articulate additional facts such as related criminal activity, an admission, signs of deception such as nervousness or furtive movements, or any of the other myriad of circumstances that could suggest guilt. This is in some ways analogous to the requirements for a pat down when weapon possession is suspected. If those kinds of facts can be articulated then my position is that sufficient probable cause to go forward with a search or charge exists, although I cannot assure anyone at this time as to how the courts will rule on that.

CHARGING. Because of the uncertainty of all of the above and the problems noted below my recommendation is that if an officer can meet the odor plus standard and wishes

to charge that be done by sworn complaint and not arrest. I would also suggest that the arrest option be limited to significant quantities of suspected cannabis or known drug traffickers.

PROSECUTION. Because the State must prove beyond a reasonable doubt that any substance alleged to be cannabis is in fact illegal, which now means proof of the percentage of THC, because mere experience with the sight and smell of cannabis is no longer sufficient, because FDLE cannot currently test for the now required percentages of THC, and because no approved private testing facility for that exists it is highly unlikely that any cannabis charge forwarded to my office can go forward at this time or for the foreseeable future. I am unwilling to categorically say that no such cases will be prosecuted as circumstances may arise that would justify the extraordinary effort and expense that will likely be required to do so, but everyone should know that my office being able to proceed is unlikely, certainly for low level offenses. Our ethical burden requires a good faith belief that we can produce admissible evidence sufficient to sustain a conviction, and that is something that we cannot do at the moment. Of course, any agency that is willing and somehow able to obtain the required lab proof before bringing a case to my office is welcome to do so, and that would change the equation.

To be clear, this change in the law was largely un-vetted by any criminal justice committee in Tallahassee during the legislative session as it was run through agricultural committees. Few if any of us in the criminal justice field knew that it had passed much less that it was even being considered. Those who did were apparently met with deaf ears when they raised concerns about the impact of hemp legalization. That changes nothing. Until and unless the legislature provides some assistance such as adequate funding for the required testing to quantify THC levels our hands are largely if not totally tied. Court decisions going forward will provide some clarification, and with adequate articulation to meet and allow us to argue the existence of probable cause under an odor plus analysis I fully intend to litigate the legality of any related seizures that might result, such as of different narcotics, illegal weapons, or evidence of other crimes. Everyone should remember that recreational cannabis still remains illegal in Florida. What has changed has been our ability to meet our burden of proof.

This problem is not unique to Florida as Texas and several other states currently find themselves in the same situation. As this issue continues to develop I will circulate additional information. Agencies are, of course, always welcome to call my office about this at any time, either for general discussions or specific questions, especially if relevant information impacting what we can do might be discovered from some other source.