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TO: Law Enforcement Agencies, 19th Judicial Circuit
FROM: Bruce H. Colton *BHC*
RE: Marijuana Prosecutions
DATE: July 11, 2019

Memorandum

The July 1, 2019, amendment to the definition of cannabis in Florida Statute 893.02(3) will require law enforcement agencies to develop new strategies for the arrest and prosecution of offenses involving cannabis. The statute provides that hemp is not a controlled substance. Florida Statute 581.217 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.” The exemption of hemp from the definition of a controlled substance will impact probable cause determinations and the ability of the State Attorney’s Office to prove beyond a reasonable doubt that suspected cannabis is a controlled substance.

I. Probable Cause Determinations

Since there is no way to visually distinguish hemp from cannabis, the mere presence of suspected cannabis or its odor will no longer suffice to establish probable cause to believe that the substance is cannabis. Law enforcement officers should therefore look for other evidence of illegality before taking any action that requires probable cause. A number of agencies have issued memoranda providing examples of indicia of illegality, and those memoranda provide a non-exhaustive list of factors to consider in determining whether probable cause exists.

The use of a field test kit that can differentiate between cannabis and hemp may also provide additional evidence of probable cause. Agencies should carefully consider, however, whether such field test kits have been scientifically validated as accurate, have a sufficient shelf life, and are economically feasible to use. Questions regarding specific test kits should be directed to the Indian River Crime Laboratory.

II. Prosecution of Cannabis Offenses

In any criminal trial involving a cannabis offense, the state is required to prove beyond a reasonable doubt that the suspected substance is, in fact, cannabis. Since cannabis and hemp are visually and microscopically identical, the state will need to prove that the substance at issue has a THC concentration of greater than 0.3% on a dry weight basis. Neither the Indian River Crime Laboratory nor any other DEA-licensed facility in Florida currently has the ability to quantitate the concentration level of THC in suspected cannabis. Although there may be private labs in Florida that offer this testing in non-forensic settings, these facilities are not licensed by the DEA to possess controlled substances and should not be used for forensic testing. IRCL Director Lesley Perrone has identified NMS Labs in Willow Grove, Pennsylvania as a DEA-licensed facility that offers THC quantitation testing. This laboratory is currently licensed by the DEA, FDA, the Florida Agency for Health Care Administration, and the Florida Department of Law Enforcement's Alcohol Testing Program. See www.nmslabs.com

In order to successfully prosecute a cannabis offense, it will be incumbent upon the law enforcement agency to submit suspected cannabis to a DEA-licensed facility for quantitation testing. The State Attorney's Office will need a laboratory test result *before* filing formal charges in a case. Due to speedy trial considerations, officers should not make a probable cause arrest for a cannabis-related offense until obtaining a laboratory result. Agencies should also consider that the cost of testing may be prohibitive. Likewise, the cost of obtaining witnesses from an out of state laboratory may be prohibitive. Cases should be evaluated on an individual basis.

III. Future Developments

The DEA has developed a procedure for cannabis testing that compares the ratio of THC to CBD using a combination of chemical and instrumental testing. This method would not require the Indian River Crime Laboratory to purchase any additional testing equipment, but would require the lab to conduct validation and proficiency testing. The lab estimates this process would take 3-6 months. Agencies may want to consult with the crime laboratory regarding the costs associated with the validation and proficiency testing process. The DEA's testing methodology appears to offer the best long-term solution to this problem. At this time, agencies should not be submitting, to the Indian River Crime Laboratory, suspected cannabis exhibits seized by law enforcement on or after July 1, 2019.