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PROPOSITION 215: UPDATE #3

DATE: April, 1997

- ◆ People v. Martinez and Miller  
Sonoma County  
Chief Deputy District Attorney Kathy DeLoe (707) 527-2311

This case presented the issue whether Health and Safety Code section 11362.5 provided an affirmative defense or was a bar to criminal prosecution. It also raised certain issues regarding whether the recommending physician's identity had to be revealed. The trial court ruled that the section does provide an affirmative defense and that the physician's identity must be revealed.

Defendants unsuccessfully sought appellate review of the trial court's rulings. Preliminary hearing was held on March 17, 1997. Neither defendant presented an affirmative defense, both were held to answer. Arraignment in superior court occurred on April 16, 1997. The case is scheduled for further proceedings on May 22, 1997.

- ◆ People v. Dennis Peron, Beth Moore, et al.  
Alameda County  
Senior Assistant Attorney General Ron Bass (415) 356-6185

In this case the management of the Cannabis Buyers' Club are being prosecuted for sale related offenses. This case arose before passage of Proposition 215.

Hearings on the indictment (a 995 and discriminatory prosecution motion) occurred on April 14, 1997. The trial judge took the matters under submission, he will issue a written ruling on May 12, 1997. A venue motion is scheduled for hearing on June 17, 1997. No trial date has been scheduled.

- ◆ People v. Dennis Peron and Beth Moore  
San Francisco City and County  
Senior Assistant Attorney General John Gordnier (916) 324-5169  
Deputy Attorney General Jane Zack Simon (415) 356-6286  
Deputy Attorney General Larry Mercer (415) 356-6259

The People had successfully enjoined the operation of a buyers' club prior to the passage of Proposition 215. In January, 1997, the trial judge modified the injunction to permit the club to operate provided it made no net profit.

The People filed a request for writ of mandamus from the superior court ruling modifying the injunction against operation of a buyers' club. This writ was filed February 14, 1997.

On March 3, 1997, the Court of Appeals denied the writ, but invited an appeal from the court's order of modification. Notice of appeal was filed March 7, 1997. Appellant's opening brief (copy attached) was filed on April 8, 1997.

- ◆ People v. Gibson, et al.  
Mariposa County  
Deputy District Attorney Quinn Baranski (209) 966-3626

This case involves charges of possession and possession for sale. A motion to remand for further proceedings in the municipal court was made and granted. The theory of the motion was that because the preliminary hearing had occurred before Proposition 215 the defendants had been deprived of their right to present the affirmative defense at that hearing. The motion was granted. When the parties appeared a dispute over the nature of the hearing arose between the court and defense counsel. The result was a motion to disqualify under C.C.P. 170.5. The matter was on calendar for further proceedings March 10, 1997.

On March 10th the trial court declared that an appropriate motion for disqualification had been filed. The case is pending until the Judicial Council appoints a new judge.

◆ People v. Elm  
Santa Cruz County  
Assistant District Attorney Paul Marigonda (408) 454-2568

Defendant was charged with violation of Health and Safety Code sections 11358 and 11359. She moved for dismissal of the cultivation charge on the basis of Health and Safety Code section 11362.5. In support of the motion, defendant offered a letter from her psychiatrist which asserted: (1) that defendant suffered from Dysthymia (depressive neurosis); (2) that defendant was using marijuana as treatment; and (3) that defendant had medical reasons for her use of marijuana. On the strength of these three assertions, defendant argued that she was not subject to any criminal prosecution or sanction.

The preliminary hearing judge denied the motion to dismiss. He found that section 11362.5 applied only to "seriously ill" California residents and that the court may determine: (1) whether a person is seriously ill; and (2) whether marijuana use is an appropriate medical use for that person. With those two determinations in mind, the court held that the psychiatrist's letter was insufficient evidence on both the illness and appropriateness issues. In his ruling the judge did suggest that if adequate evidence was presented a pretrial motion to dismiss could be granted.

Preliminary hearing is scheduled for April 21, 1997. A request for writ of mandamus was filed. The Court of Appeals, Sixth Appellate District, summarily denied the writ on March 18, 1997.

◆ People v. Bill and Tina Costa  
Santa Cruz County  
Assistant District Attorney Paul Marigonda (408) 454-2568

In this pre-Proposition 215 investigation, defendants, a husband and wife, were charged with violations of Health and Safety Code section 11358 for cultivation. Tina claimed that she was allowed to grow marijuana for a medical condition, and that the Santa Cruz Cannabis Buyers Club had authorized her to grow marijuana. Tina's attorney submitted a June 1996 letter from her doctor, in which the doctor stated that Tina "reports using marijuana to treat muscle spasms and joint pain" to the Santa Cruz County District Attorney for pre-filing review.

After an investigation by the district attorney's office, Tina's doctor wrote her a letter in February 1997 terminating her as his patient, indicating that he felt it was inappropriate for Tina to use the June 1996 letter as a defense to illegally growing and using marijuana. The doctor also stated that he did not feel that Tina's condition required the use of marijuana.

Defense counsel have indicated that they will assert Proposition 215 as a defense to the charges, and that they will subpoena Tina's doctor if necessary to show that he did in fact approve of Tina's use of marijuana for her condition. Preliminary hearing is set for April 28, 1997.

◆ People v. Stockdale  
Nevada County  
Deputy District Attorney Kathryn Kull (916) 265-1301

In this case a defendant on probation for violation of Health and Safety Code section 11359 seeks to modify a term of probation that prohibits consumption of or possession of marijuana. His reason, of course, is that his physician has recommended use of marijuana.

The matter came on calendar for hearing on March 31, 1997. The trial judge dismissed the request for modification without prejudice to renewal of the motion at a future time.

◆ People v. King  
Tulare County  
Deputy District Attorney Douglas Squires (209) 733-6411

Cultivation of a significant (thirty mature plants) controlled grow case. A search warrant was served, the defendant was observed involved in acts consistent with cultivation. Defendant has cancer. This case arose before the passage of Proposition 215.

Attorney Logan has stated his intention to raise Health and Safety Code section 11362.5 as a bar to the prosecution. In the alternative he has stated that he will assert the affirmative defense.

The case is scheduled for preliminary hearing setting on May 5, 1997. Defendant claims he is dying from cancer.

A copy of a release form prepared by the district attorney for use by law enforcement is attached.

◆ People v. Norris and Gamble  
Madera County  
Deputy District Attorney Mike Keitz (209) 675-7940

These two defendants are charged with violation of Health and Safety Code section 11359 (as well as weapons counts and resisting arrest). The case is presently scheduled for preliminary hearing on April 18, 1997.

Defense counsel has stated his intention to present an affirmative defense predicated on Proposition 215 at the preliminary hearing. Counsel has identified Doctor Eugene Schoenfeld, a Santa Cruz County physician, as the recommending doctor whose testimony will be offered.

- ◆ People v. Webb  
Yuba County  
District Attorney Charles O'Rourke

In this case, a traffic stop revealed that both the driver (defendant Jeffery Webb) and the other adult in the car (Mrs. Webb) were in Vehicle Code section 14601 status so the car was to be towed. Defendant volunteered to the officer that there was marijuana in the vehicle. The quantity was approximately two ounces. Both Webbs were carrying cards issued by the Cannabis Buyers' Club on April 4, 1997. They claimed to be caregivers making a delivery.

Mr. Webb was arrested, subsequently charged with transportation and possession for sale. The district attorney will be amending the complaint to include Mrs. Webb. Preliminary hearing is scheduled for May 23, 1997.

- ◆ Conant, et al. v. McCaffrey, et al.  
United States District Court, Northern District  
Assistant United States Attorney Derrick Watson (415) 436-7073

In this class action seeking declaratory and injunctive relief several physicians have advanced a first amendment theory seeking to prevent the federal agencies from acting to discipline them for recommending use of marijuana. An amended complaint has been filed alleging lack of statutory authority. A hearing on the issues of preliminary injunction and the certification of the class occurred on April 11, 1997.

At the hearing, Judge Fern Smith granted a temporary restraining order precluding the federal government from taking action against any doctors. The order is to remain in effect until the parties either agree on clear guidelines or fail to reach an agreement. A copy of the Sacramento Bee's article is attached.

Both the California Medical Association and the American Medical Association sent letters to the court and the parties encouraging an end to the litigation and criticizing the plaintiffs' case. Settlement discussions are ongoing. The California Medical Association had previously declined a request to join the suit on the side of plaintiffs by filing an amicus brief.

- ◆ Pearson, Shaw, et al. v. McCaffrey, Shalala and Reno  
United States District Court (D.C. District)  
Civil Action No. 97 CV 462 (filed March 6, 1997)

This declaratory relief action has been brought by physicians and associations to prevent actions against physicians who recommend or prescribe marijuana for patients. No further information is presently available.

- ◆ People v. Perkins  
Los Angeles City  
Senior Assistant City Attorney Maureen Siegel (213) 485-4481

In this case the defendant was in possession of about 1.6 grams of marijuana. Defendant was charged with (misdemeanor) violation of Health and Safety Code section 11357. The prosecutor received a written document (copy attached) from defendant. The document indicated defendant was suffering from H.I.V. and wasting syndrome and that under the circumstances the physician did not object to the use of marijuana. After verification of the diagnosis and of the identity of the physician, the prosecution has dismissed. One factor was the small amount possessed.

The issue whether "no objection" as stated in the Los Angeles Cannabis Club's sample is sufficient to constitute a recommendation was not litigated.

- ◆ Matter of Dunaway  
Orange County  
Deputy County Counsel Wanda Florence (714) 834-3943

Mr. Dunnaway was a county employee who was discharged from his job after he tested positive for marijuana. The matter is currently the subject of arbitration and, therefore, cannot be discussed in detail by County Counsel.

Dunaway has filed a claim asserting that he ingested marijuana as a result of discussion with a physician in an effort to ameliorate glaucoma. According to the claim, Dunaway, a heavy equipment operator, had sought and been denied accommodation.

- ◆ Legislation Introduced by State Senator John Vascancellos

This legislation is designed to see that Proposition 215: ". . . be implemented expediently and in a manner that is consistent with the understanding of the voters . . . of the purpose and intent of the measure". The bill contains an "urgency" clause which, if it were enacted and signed by the Governor, would make the law effective immediately.

The legislation came before its first committee on April 2, 1997. Prior to the hearing the bill had been amended (see copy of amended version attached). As amended the proposal appears to provide funding only for research supporting the use of marijuana rather than a comprehensive study carefully examining the negative and positive impact of marijuana use (see page 7, lines 21-22 which have been amended out as well as lines 23-33 [relating to protection for children and adolescents] also amended out; see also page 4 Comments, item 2 of the committee analysis).

Note further that the bill as amended appears to contemplate that one form of distribution that could be approved would be existing "clubs" (see page 9, lines 25-27). The task force is mandated to "analyze . . . the attributes of existing means of distribution."

The Attorney General opposed the proposal on the broad ground that California Constitution, Article II, section 10(c) does not permit amendment of the statute (see copy of opposition letter attached). The bill passed out of committee on a 5-2 favorable vote. CDAA has also voted to oppose the proposal.

The bill came before the Criminal Justice Committee (chaired by Vasconcellos) on April 15th. It had been further amended (see copy attached). The bill passed out of committee by a vote of 5-2. Of some interest is the fact that State Senator Kopp was one of the "no" votes. His public statement was that he believed Proposition 215 to be the first step in a legalization effort.

◆ Legislation Introduced by Assemblyman Margette

This legislation (copy attached) also seeks to amend Health and Safety Code section 11362.5. As in the case of the Vasconcellos legislation the Attorney General has sent an opposition letter based on the constitutional limitation of amendment. (See copy of opposition letter attached.)

◆ San Jose City Ordinance

Senior Deputy City Manager Carl Mitchell (408) 277-2419.

A copy of the emergency ordinance passed by the City of San Jose is attached.

The draft of the permanent ordinance is identical to the attached urgency ordinance. The ordinance requires medical marijuana dispensaries to be located only in commercial zones. The ordinance prohibits dispensaries in residential zones and requires a special use permit in order to operate. The draft ordinance will be reviewed by the Planning Commission before being submitted to the City Council for approval.

The San Jose Police Department is developing regulations governing such issues as record keeping, proper identification of patients, on-site storage of marijuana, on-site cultivation and the maximum amount that can be dispensed in any single transaction. These regulations are not yet available in draft form.

◆ California Medical Association

Two recent C.M.A. documents are enclosed for your benefit. The first is the most recent legal counsel bulletin. The second, resolutions passed at the most recent C.M.A. conference.

◆ Accusation Against Doctor Newport

Deputy Attorney General Jane Zack Simon (415) 356-6286

This disciplinary action is presently pending before the Board of Medical Examiners. Insofar as relevant to Proposition 215, the accusation is in three parts: (1) a departure from standards of practice to prescribe marijuana for a patient with the specific mental illness involved in this instance; (2) a departure from standards for failure to conduct a good faith examination prior to making the prescription; and (3) a departure from standards for failure to formulate a treatment plan or schedule follow-up visits.

No hearing date is presently scheduled.

◆ "Contract"

The closing item for this month's update is a copy of Mr. Peron's "Cultivation Contract" which has turned up in the north coastal counties.

If you have any items of general interest, please notify:

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