



1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550
(916) 445-9555

FACSIMILE: (916) 324-2960
(916) 324-5169

PROPOSITION 215: UPDATE #4

DATE: May 12, 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. Defense counsel was, however, able to have the appellate department of the superior court consider certain questions; that department has not yet ruled. 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. On May 12, 1997, Judge Goodman in a twenty-five page written opinion (copy attached) denied both the 995 and discriminatory prosecution motions. 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 was filed on April 18, 1997.

On April 18, 1997, the superior court heard defendant's Motion to advance the trial date on the permanent injunction. A date of August 8, 1997, was set subject to the People's right to move to re-set because of lack of discovery and/or unresolved appellate issues.

A hearing on defendant's protective order occurred on May 2, 1997. The commissioner hearing the cause granted the order on the twin theories that the appeal of the order modifying the injunction stayed the entire proceeding and that the Attorney General had no standing to seek discovery for the purpose of ascertaining whether the terms of the modified injunction were being followed by defendants.

- ◆ 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. A judge has been appointed. Preliminary hearing is scheduled for May 19, 1997.

◆ 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 June 2, 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.

Preliminary hearing had been scheduled for May 12, 1997. On that date Tina entered a plea under a deferred judgement agreement and was placed on diversion for the three year period, she also agreed to a search condition. Bill entered a misdemeanor plea to section 11357. (c), was fined and placed on probation also subject to a search condition.

◆ 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 June 6, 1997. Defendant claims he is dying from cancer.

◆ 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). Preliminary hearing occurred on April 18, 1997. Both defendants were held to answer, no affirmative defense was offered. Superior Court trial date is presently set for July 29, 1997.

- ◆ People v. Webb
Yuba County
District Attorney Charles O'Rourke (916) 741-6201

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.

- ◆ People v. Poltorak
Santa Clara County
Assistant District Attorney Karyn Sinunu (408) 299-7504

The defendant presented a forged prescription (the prescription pad had been stolen from an ophthalmologist's office) which stated he should receive "cannabis for glaucoma." The club at which the prescription was presented was suspicious and contacted the police.

Poltorak has been charged with violation of Business and Professions Code section 4324(a). He turned himself in, was arraigned and has a preliminary hearing setting scheduled for May 22, 1997.

- ◆ People v. Trippet
Contra Costa County conviction
First District Court of Appeals, Division Two
Deputy Attorney General Clifford Thompson (916) 356-6241

This appeal arises from a March, 1996, conviction for transportation and possession of marijuana. Defendant had just over two pounds of marijuana in her possession at the time her vehicle was stopped. At the trial court level, defendant sought to offer the defense of "medical necessity."

At an Evidence Code section 402 hearing in December, 1995, defendant presented testimony by Doctor Tod Mikuriya, a Berkeley psychiatrist. The essence of this testimony was that he did not recommend marijuana for defendant's migraines but would prescribe it if permitted to do so by law. The offer of proof was rejected and the court refused to permit the medical necessity defense.

When the case was argued on April 20th, the court asked for counsels' respective views of the applicability of Proposition 215. Subsequently, on April 22nd, the court issued an order requesting supplemental briefing (see attached copy of the order). These briefs are due on May 22nd.

- ◆ 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 advanced a first amendment theory seeking to prevent the federal agencies from acting to discipline them for recommending use of marijuana. An amended complaint was 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 parties were directed to attempt to negotiate a resolution of the litigation. The attempt failed.

On April 30th, Judge Smith issued an order granting the preliminary injunction sought by the plaintiffs. A copy of the court's order is attached. Of specific interest are: (1) the court's delineation of the class (see page 21); and (2) the court's various statements regarding the limits of physician activities and enforcement's response (see pages 26-27, 34-35, 38 footnote 7, and 4-42 including footnote 8).

- ◆ 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.

- ◆ United States v. Maughs, Harrell, Pearce, Marshall, Aurelio and Navarro
United States District Court, Eastern District
Nancy Simpson, Assistant U. S. Attorney (916) 554-2729

This case involves Navarro, as the president of the Redding Cannabis Cultivator's Club, contracting with the other defendants to grow marijuana. The Siskiyou County Sheriff's Office served search warrants on the "grow" which was posted as the Club's property, and seized twelve hundred fifty plants in various stages of growth.

All of the defendants have been charged with conspiracy to manufacture (cultivate) and all, except Navarro have been charged with a second count of manufacturing (cultivation).

Four of the defendants (Maughs, Harrell, Pearce and Marshall) were at the grow location. A fifth, Aurelio, was arrested at a home she and Maughs shared, another two hundred fifty plants were found at that location.

Two defendants, Maughs and Aurelio, are at large, the others have surrendered. Arraignments are scheduled for May 14th and May 21st.

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

Mr. Dunaway 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. As amended the proposal provides funding only for research supporting the use of marijuana rather than a comprehensive study carefully examining the negative and positive impact of marijuana use. Note further that the bill as amended appears to contemplate that one form of distribution that could be approved would be existing "clubs." The task force is mandated to "analyze . . . the attributes of existing means of distribution."

The Attorney General has opposed the proposal on the broad ground that California Constitution, Article II, section 10(c) does not permit amendment of the statute. CDAA has also voted to oppose the proposal.

The bill was heard most recently in Senate Appropriations. In addition to the various law enforcement and citizen anti-drug opponents, the bill was also opposed by the Governor's Office of Finance. The bill has been placed in the "suspense" file.

◆ Legislation Introduced by Assemblyman Marquette

This legislation 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.

◆ San Jose City Ordinance

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

San Jose continues to permit the operation of clubs under emergency ordinance. The City Planning Commission will be considering the permanent ordinance at a meeting in late May. One of the persons who was involved in the operation of a club is now a defendant in an injunctive action based on violation of zoning laws because of operating his club from a residence (City of San Jose v. Nishwonger, hearing is scheduled for May 13, 1997).

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.

◆ 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.

◆ Custodial Facilities

The attached May 1, 1997, news article discusses the fact that some counties are beginning to adopt policies regarding medicinal marijuana in custodial facilities.

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

John Gordnier
Senior Assistant Attorney General
Department of Justice
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5169
Facsimile: (916) 324-5169