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PROPOSITION 215: UPDATE #5

DATE: June 10, 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 trial setting on August 13, 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. On May 12, 1997, Judge Goodman in a twenty-five page written opinion 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.

Defendants have taken various issues to the appellate court through the Penal Code section 999a procedure. The court has asked the prosecution to respond to this motion by June 16, 1997.

- ◆ 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. Respondent's brief must be filed by June 20, 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 June 23, 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 27, 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. 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 August 8, 1997. Defendant is dying of 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 July 11, 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 June 19, 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. The Court of Appeals has relieved former appellate counsel, Mr. Stoner, and given Ms. Trippet to proceed in propria persona. Briefs are due from both parties June 19, 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 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 status conference is scheduled on June 29, 1997.

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

Defendant is on probation. His terms include a use no drugs clause. He claims to need medical marijuana. The case is set for hearing on probation violation June 27, 1997.

- ◆ 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, except Navarro, have been charged with conspiracy to manufacture (cultivate) and with a second count of manufacturing (cultivation). Maughs is also charged with possession of methamphetamine.

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. The grand jury indicted all defendants except Navarro on May 8, 1997.

A status conference is scheduled before Judge Karlton on June 24, 1997. Navarro has waived time, his preliminary hearing is scheduled for July 9, 1997.

- ◆ 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
(S.B. 535)

This bill (S.B. 535) has been dramatically amended since the last update was sent (a copy of the most recent amended version of the bill is attached). It has been approved by the State Senate and will begin the hearing process in the State Assembly.

In its present form the bill creates a vehicle to conduct research regarding whether marijuana has medical benefit and funds the research.

The Attorney General has sent a letter to Senator Vasconcellos (copy attached) which states the view that the changes are positive and suggests some additional amendments.

Many of the provisions in the original version of the bill, to which both the Attorney General and CDAA expressed opposition, have been placed in another bill, S.B. 54. The Attorney General has sent a letter opposing the bill (copy attached).

◆ Legislation Introduced by Assemblyman Margette

This legislation also seeks to amend Health and Safety Code section 11362.5. The Attorney General has sent an opposition letter based on the constitutional limitation of amendment of an initiative statute. This legislation is not moving through the process at this time.

◆ 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. 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*). On May 14, 1997, the superior court issued an injunction against further operation of the club (copy of the order attached).

The San Jose Police Department has developed regulations (copy attached) 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.

- ◆ 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.

- ◆ California Department of Corrections
Deputy Attorney General Ken Baumgarten (916) 327-7858

The C.D.C. has finalized and disseminated its policy regarding Proposition 215. The policy is that marijuana will not be available to inmates (see copy attached).

- ◆ Humboldt County Case
Sergeant Steve Knight (707) 445-7703

Recently, the Humboldt County Sheriff's Department discovered a three hundred sixty-eight plant grow tended by a person missing three of his four limbs, suffering from spinal injuries and confined to an electric wheelchair.

The individual claimed the entire grow was for medical purposes. he produced a letter from his physician (Dr. Bruce McCormack, U.C.S.F. Mount Zion Medical Center) which was unsigned. The letter stated, among other things that the subject had told the physician he would like to purchase marijuana legally for pain control. The physician stated, "I see no medical contraindication to this , and if it offers him good relief, I would encourage his use of marijuana."

The deputies seized three hundred fifty-eight plants, leaving the ten largest; the plants were mostly seedlings, a few were about three and one-half feet tall. The case has been submitted to the district attorney for consideration.

- ◆ Marin Civil Dispute
Assistant District Attorney Paula Kamena (415) 499-6450

Attached is a copy of the small claims case of McKay v. Marin Alliance. It would appear that Proposition 215's passage did not alter the legal truism that oral contracts are not favored by the law.

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

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S.F. Sheriff Will Permit Medical Use Of Marijuana by County-Jail Inmates

By Alex Roth

4/29/97

L.A. Daily Journal Staff Writer P. 3

SAN FRANCISCO — Imagine this scenario: Guards shepherd a county-jail inmate into a private room and hand him a baggie of marijuana, some rolling papers and a match.

The notion might seem highly improbable to some, but in San Francisco it resides squarely within the realm of the possible.

County Sheriff Mike Hennessey confirmed last week that, under certain circumstances, he would allow inmates who fall within the guidelines of the state's new medical-marijuana law to take up inside the county jail. No inmate has made such a request, he said.

"If smoking marijuana were prescribed as a medical necessity, we would accommodate that person," Hennessey said. "We would move them to some other area where there weren't any other inmates and allow that person to receive their prescription."

The law, which voters passed as Proposition 215, allows a patient to smoke marijuana "upon the written or oral recommendation or approval of a physician."

Dr. Joe Goldenson, medical director of the San Francisco County Jail's health services, said he and Hennessey discussed the issue recently. Goldenson said he wouldn't personally recommend medical marijuana to inmates because of uncertainty about the law. But Goldenson said he would, in certain situations, defer to the recommendation of an inmate's private doctor.

"If there's someone who has been using it for medicinal purposes on the outside and the sheriff wants to set up a situation where it could continue in the jail, I have no problem with that," Goldenson said.

Goldenson added he was somewhat surprised no inmates have made the request in the six months since voters passed the initiative. Of the 2,000 inmates in San Francisco's county jails, roughly 70 to 80 at any given time have been identified as HIV-positive.

"I expect that at some point someone is going to walk through the doors who has been receiving medical marijuana and we will have a decision to make," the doctor said. "I think it's going to be mostly the sheriff's decision."

A spokesman for District Attorney Terence Hallinan agreed.

"If the sheriff feels that it doesn't constitute a problem and he can handle that administratively, we're very supportive of that decision," spokesman John Shanley said.

State Department of Corrections officials, meanwhile, are grappling with the law's implications for prison inmates — many of whom happen to be serving time for drug-related convictions. In the next month or so, prison officials expect to announce a formal policy on whether doctors will be allowed to prescribe the drug, according to Dr. Nadim Khoury, the Department of Corrections' assistant deputy director for health-care policy. California Administrative Code Title 15 gives prison medical staff — as opposed to, say, a private doctor — the final say on what is appropriate medical treatment for state prison inmates.

The chances that prison officials will allow inmates to smoke weed is, to be sure, unlikely.

"There's extreme security concerns about controlled substances in any type of state prison, and that's part of the analysis process," said state Deputy Attorney General Kenneth Baumgarten, who works in the correctional law section. "And as long as there's some alternative forms of [adequate] medical care, that's all the Constitution requires."

Even prison-rights advocates seem skeptical.

"How the hell would the prisoner get it?" asked Steve Fama, an attorney at the Prison Law Office in Marin County. "As I understand the law, you can grow it and possess it, but it is still unlawful for you to buy it."

Fama added: "There are a lot more serious issues with regard to health care in state prisons than this."

At the county level, most sheriffs' departments appear unwilling to let inmates smoke pot absent a court order to the contrary. In San Mateo County, Sheriff Lt. Larry Boss noted that the jail has a no-smoking policy. And besides, he added, "Possession of marijuana is still a misdemeanor, and we won't condone crime." In Sacramento, a sheriff's official said security concerns would outweigh any marginal therapeutic benefits the

inmates might receive.

"The whole place would be rockin' and rollin'," said Chief Deputy Philip Murphy. "And that's not what you want in a jail."

The Santa Cruz Sheriff's Department is taking a somewhat more flexible stance. Deputy Kim Allyn, a spokesman for Sheriff Mark Tracy, said Tracy would defer to the recommendations of the county health department, which is responsible for inmates' medical care. While the jail has a no-smoking policy, Allyn noted that inmates could eat marijuana brownies or ingest the pot in a liquid form.

"In the old days, they used to just spark up a fat one [marijuana cigarette]," Allyn said. "Now they make marijuana milk."

Santa Cruz County Health Department officials didn't return a phone call seeking comment.

Even in those counties that are open-minded about the idea of letting sick inmates smoke pot, there's still the question of where the pot would come from. In San Francisco, inmates ordinarily obtain their medical prescriptions through the jail pharmacy at county expense. On rare occasions, health officials might try to recover the cost from the inmate's health insurer.

In the case of medical marijuana, both Hennessey and Goldenson said the inmate probably would have to make arrangements with a caregiver on the outside to deliver the marijuana to the jail. In all likelihood, inmates would have to pay for the marijuana themselves.

As for security concerns, Hennessey noted that health officials inside the jail manage to administer medication ranging from Valium to psychotropic drugs without unleashing chaos.

"We have a full range of medicines in our jail that are far more toxic and powerful than marijuana," Hennessey said.

Indeed, some medical-marijuana advocates argue that letting inmates smoke pot would have the benefit of helping keep the prison population peaceful and mellow. Marijuana would "kill some of the boredom" and "ease racial tensions," said Dennis Peron of the San Francisco Cannabis Cultivators Club.

"It doesn't have to cost any money," Peron added. "They can grow it right on the prison grounds. It will give them something to do."

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Doctors can advise on pot

State physicians may recommend medical marijuana, not help patients get it, judge says

LA 5-1-97
Daily News Staff and Wire Service

SAN FRANCISCO — California doctors can recommend marijuana to their patients without punishment as long as they don't help patients buy or grow the drug, a federal judge ruled Wednesday.

Calling the Clinton administration's policy on medical marijuana vague and contradictory, U.S. District Judge Fern Smith said the federal government has no right to stop doctors from recommending

marijuana to treat certain diseases, even though the treatment may be illegal.

"The government's fear that frank dialogue between physicians and patients about medical marijuana might foster drug use does not justify infringing First Amendment freedoms," Smith wrote.

"The First Amendment allows physicians to discuss and advocate medical marijuana, even though use of marijuana itself is illegal."

Some proponents of medical

marijuana said the ruling falls short and leaves patients with little alternative but to seek their medication from illegal drug pushers.

"It's a hoax on patients," said Scott Imler, director of the Cannabis Buyers' Club in West Hollywood which dispenses smokable and edible marijuana to medical patients.

"We think it's a matter of patient health and safety to know about the Cannabis Buyers' Club, to know there's an alternative to the alley," he said.

But Graham Boyd, a lawyer for the doctors and patients who filed the suit, declared the ruling a victory.

"This means doctors can do what they normally do: talk to their patients and give advice," Boyd said. "It means that a doctor is doing nothing more than exercising free speech."

Smith issued a preliminary injunction in a doctors' lawsuit that was similar to a temporary restraining order she issued April 11 allowing doctors to recommend marijuana without fear of

criminal prosecution.

This time, Smith said she would bar federal action — such as prosecution or withdrawal of prescription licenses — against doctors who discuss or recommend marijuana to their patients, but would "draw the line at criminal conduct," such as helping buy or cultivate marijuana.

The order applies to doctors who recommend marijuana for patients with acquired immune

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Doctors free to back pot, judge rules

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deficiency syndrome or the virus which causes AIDS, cancer, glaucoma, and seizures or muscle spasms associated with a chronic, debilitating condition.

The 10 doctors and five patients who filed the lawsuit say marijuana can relieve pain for all of those conditions, stimulate appetite or combat the debilitating effects of chemotherapy.

The federal government maintains that marijuana has no proven medical benefits.

Unless overturned by a higher court, the injunction will remain in effect until the lawsuit goes to trial.

The suit was filed after a state law was passed in November allowing patients to grow and possess marijuana for medical use at the recommendation of their doctors. Possession and cultivation remain federal crimes, however.

Bob Weiner, spokesman for the Office of National Drug Control Policy, said the administration would not comment until Justice Department lawyers reviewed the ruling.

The government can appeal to the 9th U.S. Circuit Court of Appeals and can ask the court to suspend the injunction during the appeal.

White House drug policy chief Barry McCaffrey said in December that any doctors who prescribed or recommended marijuana would lose their federal authority to prescribe drugs, would be excluded from Medicare and Medicaid and could face criminal charges.

Two months later, the administration issued a clarifying statement saying doctors could discuss marijuana with their patients as long as they did not help patients obtain the drug.