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PROPOSITION 215: UPDATE #6

DATE: July 21, 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. The superior court appellate department has provided a tentative ruling favorable to the prosecution. 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.

Defendant Martinez was killed in a traffic accident on July 3, 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 July 21, 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. On July 2, 1997, the Court of Appeals denied the writ and the requested stay.

- ◆ 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. Respondents' brief was filed July 3, 1997. Appellant's closing brief was filed July 21, 1997 (copy attached).

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

- ◆ 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.

Preliminary hearing occurred on June 23, 1997. Defendant called a physician witness who attempted to offer an opinion about the need to use marijuana as medicine. The court refused to permit

the testimony because the crime had occurred before any doctor's recommendation. Defendant was bound over for trial. Arraignment occurred July 17, 1997. Motions were set in Superior Court for Wednesday, September 3, 1997; including PC995 and PC1538.5 motions.

◆ 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.

A request for writ of mandamus was filed. The Court of Appeals, Sixth Appellate District, summarily denied the writ on March 18, 1997. Preliminary hearing is scheduled for August 4, 1997.

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

Defendants were charged with cultivation (H&S 11358) and possession for sale (H&S 11359) of 38 marijuana plants and 2 pounds of processed buds. Charges were dismissed before preliminary hearing against Mulcare because she suffers from Crohn's disease and she met all necessary criteria under H&S 11362.5 as a "patient." Berkowitz's "primary caregiver" defense was deemed insufficient by the district attorney's office because he did not actively care for Mulcare and admitted to using marijuana himself.

At the preliminary hearing on June 23, 1997, the magistrate did not hold Berkowitz to answer on the charge of possession for sale (H&S 11359), and although the magistrate found Berkowitz to be a "primary caregiver" for Mulcare, Berkowitz was held to answer for the cultivation charge due to his own use of the marijuana he possessed with Mulcare. The magistrate held that H&S 11362.5 did not apply to Berkowitz's case, and Berkowitz will accept a 3 year deferred judgment diversion (PC 1000) on July 14, 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.

The defense has stated its intention to have Dr. Eugene Schoenfeld testify. Dr. Schoenfeld who is the former author of "Dr. Hip" newsletters provided his resume to the district attorney (copy attached).

◆ 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. Status Conference set for August 21, 1997.

◆ People v. Poltorak
 Santa Clara County
 Deputy District Attorney Steve Fein (408) 792-2789

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 July 29, 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 were filed by both parties June 19, 1997. A copy of the respondent's supplemental brief is attached.

- ◆ 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. At the June 29th status conference the court provided a schedule for discovery and proceedings by way of summary judgement. The schedule runs from August 1, 1997, through May 15, 1998.

- ◆ Braun v. Superior Court

District Court of Appeals, First Appellate District
Sr. Assistant Attorney General John Gordnier (916) 324-5169

This writ of mandate raises the issue whether Proposition 215 legalized possession and/or cultivation or merely provided an affirmative defense. The court requested opposition. This is due on August 1, 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 came on for hearing on probation revocation on June 27, 1997. Doctor Bannister testified on behalf of the defendant. The judge concluded that defendant had met all of the requirements of Proposition 215 and, therefore, refused to revoke probation.

- ◆ 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.

As to the indicted defendants, a briefing schedule that closes September 5, 1997, has been established. If an evidentiary hearing is necessary, it will occur on September 23, 1997. Navarro's preliminary hearing is presently scheduled for August 8, 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 Vasconcellos (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 sent a letter to Senator Vasconcellos which stated the view that the changes were positive and suggested some additional amendments. Senator Vasconcellos has sent a reply to the Attorney General which was essentially positive. Negotiations regarding language will be occurring. The bill was sent out of its first Assembly policy committee (Committee On Higher Education) on July 15, 1997.

SB 54, the bill into which many of the objectionable provisions which appeared in the original version of this bill, did not pass out of the house of origin by the deadline. This means that it becomes a "two-year" bill that cannot be enacted in 1997.

◆ 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.

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.

Some difficulties for this operation have arisen. The ordinance under which the "club" operates requires that the "club" cultivate its supply and the club has not been able to comply with this requirement.

◆ 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.

◆ 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.

◆ City of Palo Alto - No "Club" Ordinance

The City of Palo Alto has enacted an emergency ordinance which makes operation of a "club" or "dispensary" for marijuana contrary to existing zoning laws. A copy of the relevant documents is attached.

◆ Sonoma County Matters

District Attorney J. Michael Mullins (707) 527-2311

As the attached news article reflects, the District Attorney has established guidelines for the cultivation and personal possession of marijuana in Sonoma County. Also attached is a copy of a letter sent by District Attorney Mullins dealing with the issue of interpreting the word "approve" as it is used in Health and Safety Code section 11362.5.

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

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