



PROPOSITION 215: UPDATE #7

DATE: August 26, 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 made a tentative ruling favorable to the prosecution. (Copy attached.)

Defendant Martinez was killed in a traffic accident on July 3, 1997. On August 13, 1997, the prosecution dismissed the charges against the remaining defendant.

- ◆ 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.

Defendants took 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.

The trial court is scheduled to rule on a "vicinage" motion on September 4, 1997. No trial date is presently 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. Respondents' brief was filed July 3, 1997. Appellant's closing brief was filed July 21, 1997. Argument has not yet been scheduled.

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 for trial. The People argued the case should be continued pending the appellate court's decision. Defendant opposed the continuance and the matter was assigned for trial. After two days of losing various motions, including a motion to amend the answer, the defense requested a continuance. The case was ordered off calendar. Defendant's motion to amend the answer will be heard on September 11, 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.

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 (including PC995 and PC1538.5 motions) were set in Superior Court for Wednesday, September 3, 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.

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 was scheduled for August 4, 1997. On the date scheduled for preliminary examination, defendant accepted diversion.

- ◆ 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 September 18, 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 October 7, 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.

- ◆ 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 amended the complaint to include Mrs. Webb.

On August 21, 1997, defendants asked to be permitted to proceed "in propria persona," the motion was granted. A pre-hearing conference is scheduled for September 11, 1997. Preliminary Hearing is scheduled for September 12, 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 had a preliminary hearing July 29, 1997. After the evidence had been presented, the magistrate reduced the charge to a misdemeanor. Defendant entered a plea of guilty. He is scheduled to be sentenced on September 30, 1997.

- ◆ People v. Trippet
Contra Costa County conviction
First District Court of Appeals, Division Two
Deputy Attorney General Clifford Thompson (415) 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.

On August 15, 1997, the District Court of Appeals issued its opinion, certified for publication (copy attached). This opinion clarifies a number of issues regarding Health and Safety Code section 11362.5 (added by Proposition 215):

- First - The D.C.A. concluded that the so-called common law defense of medical necessity was not available to Trippet because, on the facts of the case, there was a reasonable, legal alternative to smoking marijuana (see pages 5-7).

An aspect of the court's ruling on the medical necessity issue is whether recognition of the availability of legal alternatives test has any bearing on the validity of a physician's recommendation under section 11362.5. The argument would be that a physician's recommendation permitting marijuana use must be the product of a process which carefully considered use of legal alternative treatments for that particular patient.

- Second - Because Proposition 215 contained no savings clause, the D.C.A. found that new section 11362.5 could be applied retroactively to Trippet's case (see pages 12-13).
- Third - The D.C.A. adopted a narrow view of the impact of new section 11362.5: ". . . neither relaxation much less evisceration of the state's marijuana laws was envisioned (by Proposition 215)" (See pages 13-14) and "we accordingly have no hesitation in declining appellant's rather candid invitation to interpret the statute as a sort of 'open sesame' regarding the possession, transportation and sale of marijuana in this state." (See page 14, including footnote 8.)

The court noted that:

- o the statute merely provides a defense (see page 16);
- o the quantity which may be possessed and the "form and manner" in which it is possessed ". . . should be reasonably related to the patient's *current medical needs* (emphasis added)." These needs are factual matters to be determined by the trier of fact. Such factual matters, the court suggests, may well be focused on the physician who recommends (see page 18).

The court's finding that frequency and dosage are part of the inquiry into what constitutes "current medical need" are factors to be considered in determining whether a recommendation is valid. By way of example, a recommendation that is two months old for stress and simply says "marijuana recommended" may well not pass the "current medical needs" test. This language also

appears to support the argument that the physician needs to have an ongoing, actual physician-patient relationship with the person asserting the affirmative defense.

- o section 11360 (sale, furnishing and transportation) is not included within section 11362.5's reach because the voters did not so intend (see page 19). The possible exception would be a case such as a caregiver walking a few steps down a hallway to take marijuana to a patient (see pages 19-20). Again, the court found the proper test to be a factual test related to the patient's "current medical needs."
- o in footnote 13 (see page 17), the court rejected the idea that approval must precede possession. It held that in "exigent circumstances" approval could be contemporaneous with or after possession, but in all cases *before* use.

Trippet's case was remanded for further proceedings in the trial court.

- ◆ 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. A hearing regarding attorneys' fees is scheduled for September 5, 1997.

◆ Braun v. Superior Court

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

This writ of mandate raised the issue whether Proposition 215 legalized possession and/or cultivation or merely provided an affirmative defense. The petitioner (defendant) asserted that new section 11362.5 placed a duty on law enforcement to demonstrate no defense availability before making an arrest. The court requested opposition. The People filed the requested opposition on July 25, 1997, (copy attached) the D.C.A. (the same division hearing the Trippet case) denied the petition.

◆ 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 September 2, 1997.

◆ 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.

Trial of this case is scheduled for September 23, 1997.

◆ 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. 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 occurred. After considerable negotiation the parties have agreed on language which will fund a fair and objective study to determine what benefits and detriments of marijuana has in a medical context. (A copy of the amended bill is attached together with a copy of the press releases relating to the announcement of the agreement.)

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 one club under emergency ordinance.

The San Jose Police Department developed 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.

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. This issue is still pending resolution. Another issue has arisen with respect to the club's "medical director" who is a podiatrist and, therefore, not a licensed California physician. (See copy of attached news article.)

- ◆ 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.

Doctor Newport has entered into negotiations with the attorney representing the Medical Board.

No hearing date is presently scheduled.

- ◆ United States v. McCormick, Hermes, Zygott, Boje and Evanquelier
Central District of California
A.S.U.A. Fernando Aenlle-Rocha (213) 894-2481

This case was publicized as the "Marijuana Mansion" case. The Los Angeles Sheriff's Office served a search warrant on the home and seized approximately 4,000 plants. McCormick's bail was set at \$500,000, it was arranged by actor Woody Harrelson. The remaining four defendants each have posted their lesser bond amounts.

All five are charged in a complaint alleging as Count 1: Conspiracy to manufacture; and, as Count 2, Conspiracy to possess and distribute an amount in excess of one thousand plants. The time for preliminary hearing was waived by all defendants on July 30, 1997. The last day for hearing is presently August 28, 1997.

◆ People v. Apel
Marin County District Attorney
Deputy District Attorney Teresa Leon (415) 499-6450

This case was a felony cultivation trial. Defendant, a podiatrist, was charged with cultivation of one hundred thirty-seven plants. The case was submitted to a jury which deadlocked ten to two in favor of conviction. Doctor Apel defended on the basis that his cultivation was excused by operation of Proposition 215.

The instructions were given before the decision in People v. Trippet was released. The District Attorney is presently considering whether to re-try the case.

◆ Sacramento Bee News Article

A copy of a September 28, 1997, news article from the Sacramento Bee is attached. Of some interest is the ordinance being drafted. It is also of some interest to note that on September 26, 1997, the Sacramento City Council refused to consider permitting a club to operate. The Council cited the City Attorney's view that clubs are illegal.

◆ New Research

A copy of a recent article from the magazine Science on the possible similarities between marijuana's effect on the brain and the effect of so-called "hard" drugs on the brain.

◆ Old Dog, Old Tricks, New Justification

The final item in the attachments is a press release which speaks for itself.

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

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