

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT

**ERIC NELSON BRAUN,**

Petitioner and Defendant,

A078991

v.

**SUPERIOR COURT, COUNTY OF SAN MATEO**

Respondent,

**PEOPLE OF THE STATE OF CALIFORNIA,**

Real Party in Interest.

San Mateo County Superior Court No. SC40579  
The Honorable Dale A. Hahn, Judge

**OPPOSITION TO PETITION FOR WRIT  
OF MANDATE AND/OR PROHIBITION**

DANIEL E. LUNGREN  
Attorney General

GEORGE WILLIAMSON  
Chief Assistant Attorney General

JOHN A. GORDNIER  
Senior Assistant Attorney General  
State Bar No. 45250

1300 I St., Suite 125  
P.O. Box 944255  
Sacramento, CA 94244-2550  
Telephone: 916 324-5169  
Fax: 916 324-2960

Attorneys for Real Party in Interest and  
Plaintiff

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Real Party in Interest.

**STATEMENT OF THE CASE**

Petitioner Braun was charged by complaint with a single count of cultivation of marijuana in violation of Health and Safety Code section 11358. Preliminary hearing was conducted on the dates of April 9, 1997, and April 25, 1997. (See Reporter's Transcript of Preliminary Hearing (hereinafter RT/PH), page 1.)

Petitioner was held to answer (RT/PH, 79-80).

Subsequently, Petitioner challenged the information by making a motion pursuant to Penal Code section 995 (see Petitioner's Motion To Dismiss, page 1). The motion to dismiss was heard on June 17, 1997 (Reporter's Transcript On Appeal (hereinafter RTA) page 1). The trial court denied the motion (RTA, page 13).

Petitioner timely filed his Petition For Writ Of Mandate July 1, 1997 (see Penal Code section 999a).

## STATEMENT OF FACTS

On February 2, 1997, Pacifica Police Department officers were dispatched to cover a residential burglar alarm call (RT/PH 5). After the officers arrived, but before they entered, the dispatcher telephoned the residence to make sure the alarm had not been accidentally activated (RT/PH 42-43). There was no answer to the dispatcher's telephone calls. (RT/PH 43.)

The front door of the residence was ajar. (RT/PH 31, 36-37, 58.) Officers entered the residence. Officer Noyes entered the garage and observed an enclosed area accessed through the garage (RT/PH 58-59.) The officer opened the unlocked door and observed several marijuana plants which were under cultivation. (RT/PH 60-61.)

During the time the officers were attempting to determine whether there were suspects in the residence or whether a burglary had occurred (RT/PH 78), Petitioner arrived. (RT/PH 22.) Petitioner identified himself as the owner. (RT/PH 22.)

Petitioner was subsequently arrested and charged with cultivation.

**REAL PARTY IN INTEREST'S CONTENTIONS**

1. Continuance of the preliminary hearing was consented to by Petitioner.

2. Proposition 215 did not legalize marijuana it merely enacted an affirmative defense to two Health and Safety Code sections.

## ARGUMENT

### I.

#### **CONTINUANCE OF THE PRELIMINARY HEARING WAS CONSENTED TO BY PETITIONER**

Insofar as this contention is concerned, the pertinent facts are that during the preliminary hearing Petitioner's counsel made a motion to suppress. (RT/PH 25.) After taking some testimony, the preliminary hearing judge stated that she wished to have the parties submit briefs on certain issues. (RT/PH 45-46.) After some further consideration the magistrate concluded that certain hearsay evidence could not be used in connection with the motion to suppress. (RT/PH 51-52.) She gave the prosecution the opportunity to produce a witness who could testify directly as to the matters concerning the magistrate. (RT/PH 52,53.)

After unsuccessful efforts were made to bring the necessary witness into court that day (see RT/Ph 52-54), the matter was continued until April 25, 1997. (RT/PH 54-55.)

Of particular importance to the issue Petitioner raises is the following:

"Mr. Giorgi [the prosecutor]: I called his [the witness'] home left a message on his machine; but it's his day off, and we don't know where he is today.

"So we're asking to put the case over. *Counsel stated that April 25, that morning, would be okay with him.*" (RT/PH 54; emphasis added.)

Subsequent to this exchange between the prosecutor and the magistrate, Petitioner's counsel asked if the court wanted additional briefing and agreed that the evidence could be returned to the police during the time the preliminary hearing was continued. (RT/PH 55.)



A close reading of the record shows that Petitioner never objected to continuing the preliminary hearing, the objection was to permitting the prosecution to reopen its case. (RT/PH 52.) The magistrate found that the objection to reopening was not made on grounds consistent with the truth seeking purpose of the preliminary examination. (RT/PH 52-53.)

The general rule is that when there is a continuance or delay at a preliminary hearing that continuance or delay is:

"... presumed to have been [granted] with appellant's consent in the absence of proof to the contrary." (*People v. Collins* (1953) 117 Cal.App.2nd 175, 181.)

Here the presumption would operate to support the ruling of the trial court; however, this Court need not utilize the presumption because the record shows no objection by Petitioner.

When, as in this case, the magistrate concludes that the preliminary hearing must be continued for good cause an objection by an accused not in custody is insufficient unless there is some prejudice to the accused. (*People v. Castagnola* (1972) 28 Cal.App.3d 882, 887-888; see discussion in *People v. Guevara* (1982) 132 Cal.App.3d 193, 200-201.)

## II.

### HEALTH AND SAFETY CODE SECTION 11362.5 PROVIDES AN AFFIRMATIVE DEFENSE TO CHARGES OF SIMPLE POSSESSION AND CULTIVATION

Petitioner has argued that the prosecution must prove that the cultivation was unlawful to justify either his arrest and charging or the order holding him to answer for the crime. The pertinent facts are that petitioner offered no evidence at the preliminary hearing (RT/PH 46.) Consequently, the only evidence in the record was that he was growing marijuana in a concealed location (RT/PH 32-34.)

Health and Safety Code section 11358 provides, in pertinent part:

"Every person who . . . cultivates . . . any marijuana . . . except as otherwise provided by law, shall be punished by imprisonment in the state prison."<sup>1/</sup>

The rule for determining whether statutory language is or is not an affirmative defense is stated in *People v. George* (1994) 30 Cal.App.4th 262, 275:

" . . . the only inquiry arises, whether the matter excepted or that which is contained in the provision, is so incorporated as to become . . . a part of the enacting clause. If it is so incorporated, it shall be negated, otherwise it is a matter of defense.' Thus, where exceptions or provisos are not descriptive of the offense, or define it, but rather afford a matter of excuse, 'they are to be relied on in [the] defense.'" (emphasis added; see also *People v. Cardenas* (1997) 53 Cal.App.4th 240, 244-245; *People v. Palma* (1995) 40 Cal.App.4th 1559, 1568.)

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1. Appropos of the "except" clause, note that Health and Safety Code section 11213 permitting use for research was enacted by the same legislation which enacted Health and Safety Code section 11358 (Statutes 1972, chapter 1407).

More specifically, the *Cardenas, supra*, court noted that *George* used the situation adjudicated in *People v. Martinez* (1953) 117 Cal.App.2d 701 to demonstrate the distinction at issue. *Martinez*, stated, in pertinent part:

"Appellant's claim that it was incumbent upon the prosecution [or an officer] to negative the exception in the statute . . . that the accused did not have the written prescription of a physician . . . licensed to practice in the state of California is without merit. As far back as [1898] . . . it has been the law that when a license or prescription would be a complete defense, the burden is upon the accused to prove that fact so clearly within his knowledge." (*Id.* at p. 708; see also *People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1044; *People v. Montalvo* (1971) 4 Cal.3d 328, 333, fn3.)

Newly added Health and Safety Code section 11362.5(d) provides, as relevant to this case:

"Section 11358, relating to cultivation of marijuana, shall not apply to a patient . . . who . . . cultivates marijuana for . . . personal medical purposes . . . upon the . . . recommendation or approval of a physician."

The identity between this language and the language of *Martinez* is clear.

The heart of Petitioner's argument is that because the purpose stated in section 11362.5(b)(1)(B) is expressed in terms that cultivators are "not subject to criminal prosecution" the so-called "codified purpose" redefines cultivation.

Unfortunately for Petitioner the entirety of section 11362.5 (b)(1)(B) is not so broad, it states:

"To ensure that patients and their primary caregivers who obtain and use marijuana *for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanctions.*"

Obviously the "not subject to" language is limited by the need for the accused to show: (1) a personal medical purpose, and (2) a physician's recommendation. In light of *Martinez* and the other authorities cited by Respondent, it is clear that neither subsection 11362.5(b)(1)(B) nor 11362.5(d) redefined the crime of cultivation.

At pages 10 and 11 of the brief submitted to the trial court, Petitioner made two arguments that fail.

The first is that the language isn't that used to express an affirmative defense (page 10, line 15 through page 11, line 3). As *George, supra*, noted the words used to express an affirmative defense may vary (see page 275).

The second is that any ambiguity must be resolved in favor of the so-called "codified purpose." If there is any ambiguity the proper source to examine for resolution is the ballot pamphlet materials (copies attached as Appendix 1) submitted to the voters. (*N.C.A.A. v. Hill* (1994) 7 Cal.4th 1, 16.) What those materials confirm is that only an affirmative defense was contemplated by the electorate.

**CONCLUSION**

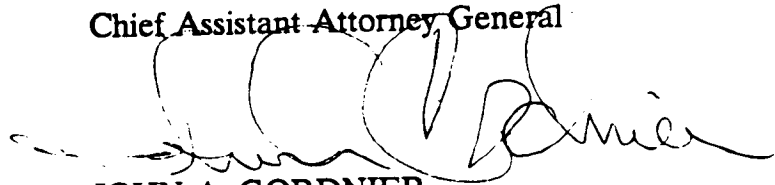
This writ should be denied.

Dated: July 24, 1997.

Respectfully submitted,

DANIEL E. LUNGREN  
Attorney General

GEORGE WILLIAMSON  
Chief Assistant Attorney General

A handwritten signature in black ink, appearing to read "John A. Gordnier", written over a faint circular stamp or watermark.

JOHN A. GORDNIER  
Senior Assistant Attorney General

Attorneys for Real Party in Interest and  
Plaintiff

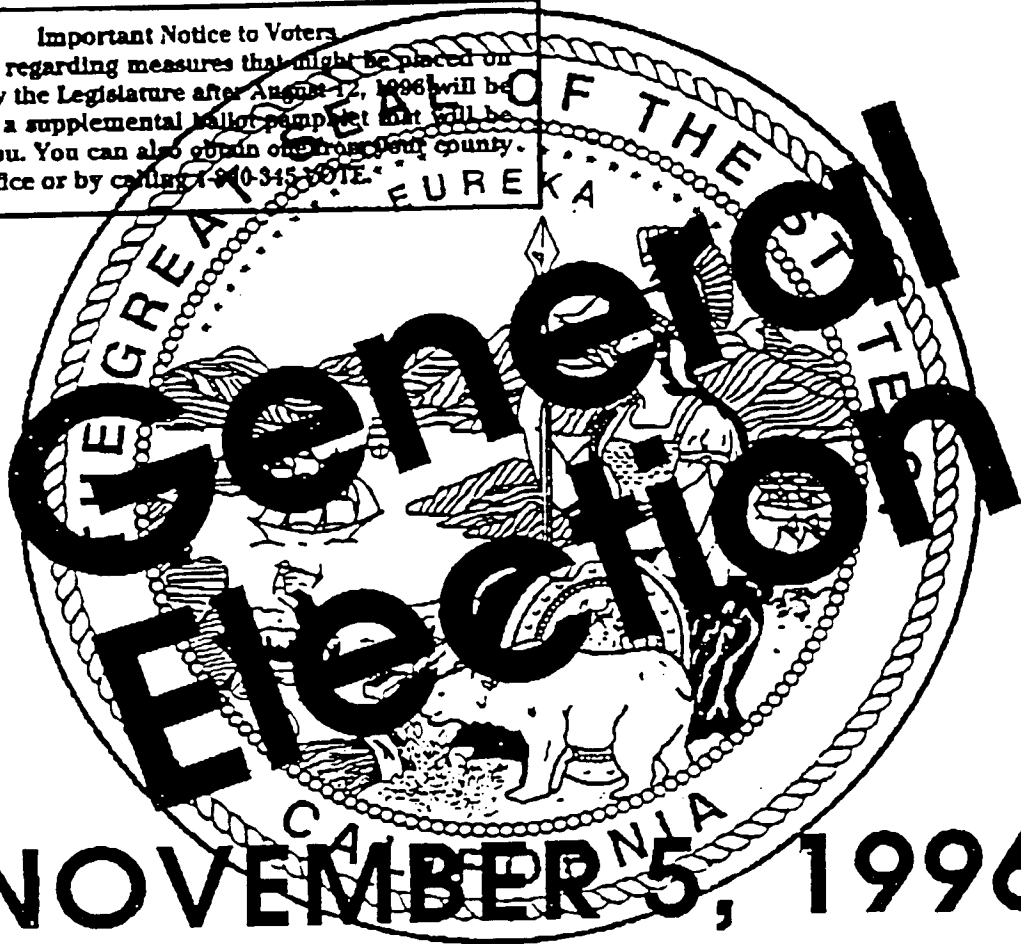
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# ***APPENDIX I***

# California

## BALLOT PAMPHLET

**Important Notice to Voters**  
 Information regarding measures that might be placed on the ballot by the Legislature after August 12, 1996 will be included in a supplemental ballot pamphlet that will be mailed to you. You can also obtain one from your county elections office or by calling 1-800-345-3311.



# GENERAL ELECTION

## NOVEMBER 5, 1996

### CERTIFICATE OF CORRECTNESS

I, Bill Jones, Secretary of State of the State of California, do hereby certify that the measures included herein will be submitted to the electors of the State of California at the GENERAL ELECTION to be held throughout the State on November 5, 1996, and that this pamphlet has been correctly prepared in accordance with law.

Witness my hand and the Great Seal of the State in Sacramento, California, this 12th day of August, 1996.



*Bill Jones*  
 BILL JONES  
 Secretary of State

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## Analysis by the Legislative Analyst

### BACKGROUND

Under current state law, it is a crime to grow or possess marijuana, regardless of whether the marijuana is used to ease pain or other symptoms associated with illness. Criminal penalties vary, depending on the amount of marijuana involved. It is also a crime to transport, import into the state, sell, or give away marijuana.

Licensed physicians and certain other health care providers routinely prescribe drugs for medical purposes, including relieving pain and easing symptoms accompanying illness. These drugs are dispensed by pharmacists. Both the physician and pharmacist are required to keep written records of the prescriptions.

### PROPOSAL

This measure amends state law to allow persons to grow or possess marijuana for medical use when recommended by a physician. The measure provides for the use of marijuana when a physician has determined that the person's health would benefit from its use in the

treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or "any other illness for which marijuana provides relief." The physician's recommendation may be oral or written. No prescriptions or other record-keeping is required by the measure.

The measure also allows caregivers to grow and possess marijuana for a person for whom the marijuana is recommended.

The measure states that no physician shall be punished for having recommended marijuana for medical purposes. Furthermore, the measure specifies that it is not intended to overrule any law that prohibits the use of marijuana for nonmedical purposes.

### FISCAL EFFECT

Because the measure specifies that growing and possessing marijuana is restricted to medical uses when recommended by a physician, and does not change other legal prohibitions on marijuana, this measure would probably have no significant state or local fiscal effect.

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For text of Proposition 215 see page 104

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**Medical Use of Marijuana. Initiative Statute.**

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Official Title and Summary Prepared by the Attorney General

**MEDICAL USE OF MARIJUANA. INITIATIVE STATUTE.**

- Exempts patients and defined caregivers who possess or cultivate marijuana for medical treatment recommended by a physician from criminal laws which otherwise prohibit possession or cultivation of marijuana.
- Provides physicians who recommend use of marijuana for medical treatment shall not be punished or denied any right or privilege.
- Declares that measure not be construed to supersede prohibitions of conduct endangering others or to condone diversion of marijuana for non-medical purposes.
- Contains severability clause.

**Summary of Legislative Analyst's  
Estimate of Net State and Local Government Fiscal Impact:**

- Adoption of this measure would probably have no significant fiscal impact on state and local governments.
-

## Argument in Favor of Proposition 215

PROPOSITION 215 HELPS TERMINALLY  
ILL PATIENTS

Proposition 215 will allow seriously and terminally ill patients to legally use marijuana, if, and only if, they have the approval of a licensed physician.

We are physicians and nurses who have witnessed firsthand the medical benefits of marijuana. *Yet today in California, medical use of marijuana is illegal.* Doctors cannot prescribe marijuana, and terminally ill patients must break the law to use it.

Marijuana is not a cure, but it can help cancer patients. Most have severe reactions to the disease and chemotherapy—commonly, severe nausea and vomiting. One in three patients discontinues treatment despite a 50% chance of improvement. When standard anti-nausea drugs fail, marijuana often eases patients' nausea and permits continued treatment. It can be either smoked or baked into foods.

MARIJUANA DOESN'T JUST HELP  
CANCER PATIENTS

University doctors and researchers have found that marijuana is also effective in: lowering internal eye pressure associated with glaucoma, slowing the onset of blindness; reducing the pain of AIDS patients, and stimulating the appetites of those suffering malnutrition because of AIDS 'wasting syndrome'; and alleviating muscle spasticity and chronic pain due to multiple sclerosis, epilepsy, and spinal cord injuries.

When one in five Americans will have cancer, and 20 million may develop glaucoma, shouldn't our government let physicians prescribe any medicine capable of relieving suffering?

The federal government stopped supplying marijuana to patients in 1991. Now it tells patients to take Marinol, a synthetic substitute for marijuana that can cost \$30,000 a year and is often less reliable and less effective.

Marijuana is not magic. But often it is the only way to get relief. A Harvard University survey found that almost one-half of cancer doctors surveyed would prescribe marijuana to some of their patients if it were legal.

IF DOCTORS CAN PRESCRIBE MORPHINE,  
WHY NOT MARIJUANA?

Today, physicians are allowed to prescribe powerful drugs like morphine and codeine. It doesn't make sense that they cannot prescribe marijuana, too.

Proposition 215 allows physicians to recommend marijuana in writing or verbally, but if the recommendation is verbal, the doctor can be required to verify it under oath. Proposition 215 would also protect patients from criminal penalties for marijuana, but ONLY if they have a doctor's recommendation for its use.

MARIJUANA WILL STILL BE ILLEGAL  
FOR NON-MEDICAL USE

Proposition 215 DOES NOT permit non-medical use of marijuana. Recreational use would still be against the law. Proposition 215 does not permit anyone to drive under the influence of marijuana.

Proposition 215 allows patients to cultivate their own marijuana simply because federal laws prevent the sale of marijuana, and a state initiative cannot overrule those laws.

Proposition 215 is based on legislation passed twice by both houses of the California Legislature with support from Democrats and Republicans. Each time, the legislation was vetoed by Governor Wilson.

Polls show that a majority of Californians support Proposition 215. Please join us to relieve suffering and protect your rights. VOTE YES ON PROPOSITION 215.

**RICHARD J. COHEN, M.D.**  
*Consulting Medical Oncologist (Cancer Specialist),  
California-Pacific Medical Center, San Francisco*

**IVAN SILVERBERG, M.D.**  
*Medical Oncologist (Cancer Specialist), San Francisco*

**ANNA T. BOYCE**  
*Registered Nurse, Orange County*

## Rebuttal to Argument in Favor of Proposition 215

**AMERICAN CANCER SOCIETY SAYS:** ". . . Marijuana is not a substitute for appropriate anti-nausea drugs for cancer chemotherapy and vomiting. [We] see no reason to support the legalization of marijuana for medical use."

Thousands of scientific studies document the harmful physical and psychological effects of smoking marijuana. It is not compassionate to give sick people a drug that will make them sicker.

SMOKING MARIJUANA IS NOT APPROVED  
BY THE FDA FOR ANY ILLNESS

Morphine and codeine are FDA approved drugs. The FDA has not approved smoking marijuana as a treatment for any illness.

Prescriptions for easily abused drugs such as morphine and codeine must be in writing, and in triplicate, with a copy sent to the Department of Justice so these dangerous drugs can be tracked and kept off the streets. Proposition 215 requires absolutely no written documentation of any kind to grow or smoke marijuana. It will create legal loopholes that would protect drug dealers and growers from prosecution.

PROPOSITION 215 IS MARIJUANA  
LEGALIZATION—NOT MEDICINE

- Federal laws prohibit the possession and cultivation of marijuana. Proposition 215 would encourage people to break federal law.
- Proposition 215 will make it legal for people to smoke marijuana in the workplace . . . or in public places . . . next to your children.

**NOT ONE MAJOR DOCTOR'S ORGANIZATION,  
LAW ENFORCEMENT ASSOCIATION OR  
DRUG EDUCATION GROUP SUPPORTS  
PROPOSITION 215—IT'S A SCAM CONCOCTED AND  
FINANCED BY DRUG LEGALIZATION ADVOCATES!  
PLEASE VOTE NO.**

**SHERIFF BRAD GATES**  
*Past President, California  
State Sheriffs' Association*

**ERIC A. VOTH, M.D., F.A.C.P.**  
*Chairman, The International Drug Strategy Institute*

**GLENN LEVANT**  
*Executive Director, D.A.R.E. America*

# Medical Use of Marijuana. Initiative Statute.

# 215

## Argument Against Proposition 215

### READ PROPOSITION 215 CAREFULLY • IT IS A CRUEL HOAX

The proponents of this deceptive and poorly written initiative want to exploit public compassion for the sick in order to legalize and legitimize the widespread use of marijuana in California.

Proposition 215 DOES NOT restrict the use of marijuana to AIDS, cancer, glaucoma and other serious illnesses.

READ THE FINE PRINT. Proposition 215 legalizes marijuana use for "any other illness for which marijuana provides relief." This could include stress, headaches, upset stomach, insomnia, a stiff neck . . . or just about anything.

### NO WRITTEN PRESCRIPTION REQUIRED EVEN CHILDREN COULD SMOKE POT LEGALLY!

Proposition 215 does not require a written prescription. Anyone with the "oral recommendation or approval by a physician" can grow, possess or smoke marijuana. No medical examination is required.

THERE IS NO AGE RESTRICTION. Even children can be legally permitted to grow, possess and use marijuana . . . without parental consent.

### NO FDA APPROVAL • NO CONSUMER PROTECTION

Consumers are protected from unsafe and impure drugs by the Food and Drug Administration (FDA). This initiative makes marijuana available to the public without FDA approval or regulation. Quality, purity and strength of the drug would be unregulated. There are no rules restricting the amount a person can smoke or how often they can smoke it.

THC, the active ingredient in marijuana, is already available by prescription as the FDA approved drug Marinol.

Responsible medical doctors wishing to treat AIDS patients, cancer patients and other sick people can prescribe Marinol right now. They don't need this initiative.

### NATIONAL INSTITUTE OF HEALTH, MAJOR MEDICAL GROUPS SAY NO TO SMOKING MARIJUANA FOR MEDICINAL PURPOSES

The National Institute of Health conducted an extensive study on the medical use of marijuana in 1992 and concluded that smoking marijuana is *not* a safe or more effective treatment than Marinol or other FDA approved drugs for people with AIDS, cancer or glaucoma.

The American Medical Association, the American Cancer Society, the National Multiple Sclerosis Society, the American Glaucoma Society, and other top medical groups have *not* accepted smoking marijuana for medical purposes.

### LAW ENFORCEMENT AND DRUG PREVENTION LEADERS SAY NO TO PROPOSITION 215

The California State Sheriffs Association  
The California District Attorneys Association  
The California Police Chiefs Association  
The California Narcotic Officers Association  
The California Peace Officers Association  
Attorney General Dan Lungren

say that Proposition 215 will provide new legal loopholes for drug dealers to avoid arrest and prosecution . . .

Californians for Drug-Free Youth  
The California D.A.R.E. Officers Association  
Drug Use Is Life Abuse  
Community Anti-Drug Coalition of America  
Drug Watch International

say that Proposition 215 will damage their efforts to convince young people to remain drug free. It sends our children the false message that marijuana is safe and healthy.

### HOME GROWN POT • HAND ROLLED "JOINTS" • DOES THIS SOUND LIKE MEDICINE?

This initiative allows unlimited quantities of marijuana to be grown anywhere . . . in backyards or near schoolyards without any regulation or restrictions. This is not responsible medicine. It is marijuana legalization.

### VOTE NO ON PROPOSITION 215

JAMES P. FOX  
President, California District Attorneys Association

MICHAEL J. MEYERS, M.D.  
Medical Director, Drug and Alcohol Treatment  
Program, Brotman Medical Center, CA

SHARON ROSE  
Red Ribbon Coordinator, Californians for Drug-Free  
Youth, Inc.

## Rebuttal to Argument Against Proposition 215

### SAN FRANCISCO DISTRICT ATTORNEY TERENCE HALLINAN SAYS . . .

Opponents aren't telling you that law enforcement officers are on both sides of Proposition 215. I support it because I don't want to send cancer patients to jail for using marijuana.

Proposition 215 does not allow "unlimited quantities of marijuana to be grown anywhere." It only allows marijuana to be grown for a patient's personal use. Police officers can still arrest anyone who grows too much, or tries to sell it.

Proposition 215 doesn't give kids the okay to use marijuana, either. Police officers can still arrest anyone for marijuana offenses. Proposition 215 simply gives those arrested a defense in court, if they can prove they used marijuana with a doctor's approval.

### ASSEMBLYMAN JOHN VASCONCELLOS SAYS . . .

Proposition 215 is based on a bill I sponsored in the California legislature. It passed both houses with support from both parties, but was vetoed by Governor Wilson. If it were the kind of irresponsible legislation that opponents claim it was, it would not have received such

widespread support.

### CANCER SURVIVOR JAMES CANTER SAYS . . .

Doctors and patients should decide what medicines are best. Ten years ago, I nearly died from testicular cancer that spread into my lungs. Chemotherapy made me sick and nauseous. The standard drugs, like Marinol, didn't help.

Marijuana blocked the nausea. As a result, I was able to continue the chemotherapy treatments. Today I've beaten the cancer, and no longer smoke marijuana. I credit marijuana as part of the treatment that saved my life.

TERENCE HALLINAN  
San Francisco District Attorney

JOHN VASCONCELLOS  
Assemblyman, 22nd District  
Author, 1995 Medical Marijuana Bill

JAMES CANTER  
Cancer survivor, Santa Rosa

**DECLARATION OF SERVICE**

Case Name: **Braun v. Superior Court, et al.**

Case No.: **A078991**

I declare:

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550.

On July 25, 1997, I served the attached

**Opposition to Writ of Mandate**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

J. David Nick, Esq.  
294 Page Street  
San Francisco, CA 94102

District Attorney  
San Mateo County  
Hall of Justice  
Redwood City, CA 94063

Honorable Dale A. Hahn, Judge  
Superior Court, San Mateo Co.  
Hall of Justice  
Redwood City, CA 94063

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on July 25, 1997, at Sacramento, California.

  
\_\_\_\_\_  
Signature