DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE

1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550
(916) 445-9555
FACSIMILE: (916) 324-2960
(916) 324-5169

PROPOSITION 215: UPDATE #9 DATE: October 28, 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.

Defendants took various issues to the appellate court through the Penal Code section 999a procedure. The court 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.

Although the trial court had denied both the change of venue and "vicinage" motions, on October 16, 1997, the new trial judge ordered the matter transferred to San Francisco. The prosecution will be seeking to reverse this decision.

♦ *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. Argument occurred for September 29, 1997. The panel hearing the case was Presiding Justice Peterson, Justice Haning and, a last minute substitute, Justice Kline. The matter is submitted for decision.

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 was heard on September 11, 1997, and denied. The People filed a motion to modify the January modification in light of *Trippet*. This matter was heard on October 2, 1997. Judge Garcia had announced a tentative ruling denying the motion. After considerable argument he took the motion under submission, no ruling has yet been made.

♦ *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. 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 [Doctor Schoenfeld ("Dr. Hipp")] who attempted to offer an opinion about the need to use marijuana as medicine. Defendant was bound over for trial. Arraignment occurred July 17, 1997. Various motions were scheduled for hearing in early October, however Mr. Gibson was shot while trying to steal marijuana from a Madera County grower. Because Mr. Gibson is recuperating from his leg wound, the matter has been rescheduled to November 13, 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 December 4, 1997. Defendant is dying of cancer.

- *People v. Norris and Gamble*
  Madera County
  Deputy District Attorney Paul Avent (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 November 18, 1997.

The defense has stated its intention to have Dr. Eugene Schoenfeld testify. Dr. Schoenfeld who is the former author of "Dr. Hipp" 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. Preliminary Hearing was held September 12, 1997. Mr. Webb was bound over to Superior Court. Mr. Webb's trial is presently scheduled for November 18, 1997. Mrs. Webb waived preliminary hearing on October 23, 1997. The superior court arraignment is scheduled for November 10, 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 was given thirty days in jail 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

The official citation to this case is: *People* v. *Trippet* (1997) 56 Cal.App.4th 1532. On September 5, 1997, the District Court of Appeals issued a modification of its opinion. This modification made it very clear that Health and Safety Code section 11362.5 "provides a limited affirmative defense" and nothing more. The court also denied each party's request for re-hearing. Trippet has requested hearing in the state supreme court, which has not yet acted on her request.

- *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 was held September 5, 1997. The Judge issued an order awarding 50% ($95,568.48) attorneys' fees and all costs ($17,961.64). The total received from EAJA is $113,530.12. Plaintiff previously received a grant from the Drug Policy Foundation in the amount of $135,000. Parties are exchanging discovery at this time and will meet and confer.

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

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

All of the defendants have been charged with conspiracy to manufacture (cultivate) and 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. The grand jury indicted all defendants except Navarro on May 8, 1997.

As to the indicted defendants, a briefing schedule that closed September 5, 1997, was established. At an evidentiary hearing on September 23, 1997, the motions to dismiss and to suppress were denied. Further motions are scheduled for January 21, 1998. Navarro's case was dismissed on August 25, 1997, because of his very serious medical condition.

♦ 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.

Arbitration did not take place on September 23, 1997, and has not been rescheduled at this time.

♦ Legislation Introduced by State Senator John Vascancellos (S.B. 535)

After agreement was reached with the University of California over certain language and "mechanical" issues, the bill went to the Assembly floor. Unfortunately it became the victim of partisan politics and was not approved by the Assembly.

This does not "kill" the legislation, instead it becomes a "two year" bill which may be considered when the Legislature reconvenes in January, 1998.

♦ 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.

♦ 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.

Stipulation has been reached but has not yet been adopted.

No hearing date is presently scheduled.

♦ *United States v. McCormick, Hermes, Zygott, Boje and Evanguelier*
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. At present there is nothing new to report.

♦ *People v. Ager*
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 Ager defended on the basis that his cultivation was excused by operation of Proposition 215.

A copy of the instruction given to the jury regarding the affirmative defense is attached. The District Attorney has decided to re-try the case. Trial is set for January 15, 1998.

♦ *People v. Enos*
Nevada County District Attorney
Deputy District Attorney Kathryn Kull (916) 265-7225

The defendant's home was the location to which the local fire department responded. It seems that the electrical meter by pass used to support his ninety-one plant indoor grow had ignited. After law enforcement arrived, the defendant informed them that he was a caregiver who also used and sold. He was unable to

recall his physician's name. He asserted he had a contract with the Cannabis Cultivator's Club to grow and furnish for them. His contract was verbal and the most specificity he was able to provide was that it was with "someone at CBC."

Preliminary hearing is scheduled for December 11, 1997.

- *People v. Richard Hearth*
  Sacramento County
  Deputy District Attorney Michael Blazina (916) 552-8848

This case involved a person arrested for cultivation who went to Doctor Schoenfeld and obtained a "recommendation" some eleven months *after* his arrest. After an Evidence Code section 402 hearing the trial court refused to permit Mr. Hearth to offer the affirmative defense.

Hearth subsequently pled guilty with an understanding that any jail time would not exceed 210 days. Deputy District Attorney Blazina has a good bit of transcript and other information about Dr. Schoenfeld as well as Mr. Ed Rosenthal.

Copies of the district attorney's In Limine Motion (Appendix 1) and the trial court's ruling (Appendix 2) are attached.

- If your jurisdiction has received recommendations signed by either Dr. Eugene Schoenfeld or Dr. Tod Mikurya, please notify John Gordnier at (916) 324-5169

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

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

JAN SCULLY
District Attorney
Sacramento County
901 G Street
Sacramento, CA 95814-1858
Phone (916) 440-6637

SUPERIOR COURT STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. RICHARD SCOTT HEARTH, Defendant.	NO. 96F07629 DEPT. 8 MOTION IN LIMINE TO EXCLUDE PROPOSITION 215 DEFENSE Hearing: 09/23/97 Time: 8:30 a.m.

The People of the State of California submit the following memorandum of points and authorities in support of their motion to exclude the Defendant from presenting any evidence or making any argument that Defendant cultivated or possessed marijuana for medicinal purposes or at the direction or recommendation of a counselor, therapist, psychologist, physician, or other medical personnel.

FACTUAL AND PROCEDURAL BACKGROUND

On September 20, 1996, shortly after midnight, Sacramento Sheriff's Department Deputies Gonzalez and Buchanan responded to Defendant's home regarding a burglary call. (Reporter's Transcript of Preliminary Hearing ("RT") 7-8.) While investigating the burglary call, Deputy Buchanan found four marijuana plants in Defendant's backyard. (RT 8.) These plants ranged in

approximate height from four and a half to six and a half feet tall. (RT 8, 12.) There had been seven plants in the backyard; however, the burglar apparently stole three of the plants that night. (RT 162, 170-171.) The three additional plants were approximately the same height as the four which were recovered. (RT 170-171.)

In the Defendant's bathroom, Deputy Gonzalez found marijuana drying under a fan in the sink. (RT 15.) Deputy Gonzalez also found in the bathroom approximately twenty sandwich bags containing marijuana, six match boxes containing marijuana, approximately thirty empty sandwich bags, pipes, bongs, and three scales. (RT 16-22.) Deputy Buchanan found a zip-lock bag containing marijuana in Defendant's vehicle. (RT 9.) The marijuana found in the Defendant's house and car, not including the four marijuana plants, totaled 314.1 grams. (RT 6.)

On September 26, 1996, Defendant was charged by complaint with cultivating marijuana in violation of Health and Safety Code section 11358 and with possessing marijuana for sale in violation of Health and Safety Code section 11359. On January 8, 1997, the preliminary hearing was commenced before the Honorable Jeffrey L. Gunther. On March 7, 1997, the hearing was concluded and Judge Gunther held the Defendant to answer on both charges.

According to defense counsel, Defendant saw a counselor in 1994 and 1995 regarding stress arising from his autistic son and his adulterous wife. Defendant had discussed smoking marijuana with this counselor. The prosecution was provided with the name of Keith Henriques, a licensed counselor, who is presumably the Defendant's treating counselor.

On August 21, 1997, Dr. Eugene Schoenfeld, a physician who practices in Sausalito, California, wrote a letter stating the following:

> I have evaluated Mr. Richard Hearth and find that he has been using marijuana for medicinal purposes for at least 5 years. I recommend that he continue using marijuana as needed for anxiety. This recommendation is valid until November 30, 1997.

From this letter and prior discussions with counsel, it appears that Dr. Schoenfeld evaluated the Defendant in August of 1997. This is the only discovery that has been provided to the prosecution regarding Dr. Schoenfeld or any other physicians.

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A PHYSICIAN'S RECOMMENDATION PURSUANT TO PROPOSITION 215 MUST OCCUR PRIOR TO DEFENDANT'S CULTIVATION AND POSSESSION

At the November 5, 1996, general election, the voters of the State of California approved Proposition 215, which created a new section 11362.5 of the Health and Safety Code. This section became effective the day after the election. (Cal. Const., art. II sec. 10, subd. (a).) The section provides as follows:

> (a) This section shall be known and may be cited as the Compassionate Use Act of 1996.
>
> (b)(1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:
>
> > (A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.
> >
> > (B) 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 sanction.
> >
> > (C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.
>
> (2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.
>
> (c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.
>
> (d) Section 11357, relating to possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.
>
> (e) For the purposes of this section, "primary caregiver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.

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To date, there is only one published appellate court decision interpreting this section, People v. Trippet 97 Daily Journal D.A.R. 10639.

In Trippet, the defendant was stopped driving a motor vehicle containing approximately two pounds of marijuana. She also had hand-rolled cigarettes containing marijuana. The defendant knew that the marijuana was in her car. She was charged with transportation of marijuana in violation of Health and Safety Code section 11360 and possession of more than 28.5 grams of marijuana in violation of Health and Safety Code section 11357(c). A jury found her guilty on both counts. (Id.)

On appeal, the defendant argued that the trial court denied her right to present a defense of medical necessity, that her conviction violated her right to freely exercise her religion, and that Proposition 215 provided her with a defense to the prosecution. (Id.) The First Appellate District of the California Court of Appeal rejected her necessity and free exercise arguments. (Id.) The court held that Proposition 215 could be retroactively applied to her case because her appeal was pending when Proposition 215 was enacted. (Id. at 10642.) However, the record was unclear whether a doctor had approved of her use of marijuana for medical purposes and remanded the case back to the trial court with direction for that determination. (Id. at 10643.)

On the other hand, the Trippet court noted that any recommendation or approval of marijuana for medical purposes must occur prior to actual usage. (Id. at 10643 n. 13.) Section 11362.5(d) states that sections 11357 and 11358 "shall not apply to a patient . . . who possesses or cultivates marijuana . . . upon the written or oral recommendation or approval of a physician." Webster's New World Dictionary defines the word "upon" as "on." The word "on" is defined as "at the time of," "connected with," or "as a result of." Therefore, under the language of section 11362.5, the possession or cultivation must have occurred at the time of, connected with, or as a result of the physician's recommendation or approval. Moreover, logic dictates that any recommendation or approval must have occurred prior to Defendant's possession and cultivation.

Dr. Schoenfeld's recommendation is dated August 21, 1997, and appears to have occurred almost one year after Defendant's possession and cultivation. Defendant did not possess or

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cultivate marijuana at the time of, in connection with, or as a result of Dr. Schoenfeld's recommendation. Therefore, the recommendation should be excluded.

DEFENDANT'S ANXIETY IS NOT A SUFFICIENT ILLNESS TO QUALIFY FOR PROPOSITION 215 PROTECTION

Section 11362.5 protects "seriously ill" patients. (Health and Safety Code section 11362.5(b)(1)(A).) Moreover, as noted by the Trippet court, "by the language of its proponents' arguments in the ballot pamphlet, it was plainly presented to California's voters as an act of compassion to those in severe pain" and to "'allow seriously and terminally ill patients to legally use marijuana.'" (97 Daily Journal D.A.R. at 10642, emphasis added.) Dr. Schoenfeld recommended marijuana for Defendant "as needed for anxiety." Anxiety does not constitute severe pain or a serious or terminal illness. Therefore, the recommendation should be excluded.

A COUNSELOR'S RECOMMENDATION IS NOT SUFFICIENT UNDER PROPOSITION 215

Section 11362.5 applies only to recommendations or approvals made by physicians. It does not apply to any recommendations made by counselors, psychologists, or psychotherapists. Keith Henriques, Defendant's counselor, is not a licensed physician. He therefore cannot testify regarding ever approving or recommending that Defendant use marijuana. His testimony has no other relevance to this proceeding. Therefore, Keith Henriques should not be allowed to testify.

CONCLUSION

Because Dr. Schoenfeld's recommendation occurred almost one year after Defendant cultivated and possessed marijuana and is not for a serious illness and because Defendant's counselor does not have the authority to recommend the use of marijuana, the Court should exclude the Defendant from presenting any evidence or making any argument that Defendant cultivated or possessed marijuana for medicinal purposes or at the direction or recommendation of a counselor, therapist, psychologist, physician, or other medical personnel.

Respectfully submitted,

DATED: 9/23/97

MICHAEL M. BLAZINA
Deputy District Attorney

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

PEOPLE OF THE STATE OF CALIFORNIA,

vs.

RICHARD SCOTT HEARTH,

Defendant.

Case No. 96F07629 Dept. 37

RULING AND ORDER ON THE PEOPLE'S "MOTION IN LIMINE TO EXCLUDE PROPOSITION 215 DEFENSE"

The defendant herein is charged in two counts, one alleging possession of marijuana for sale in violation of Health and Safety Code §11359 and the other alleging cultivation of marijuana in violation of Health and Safety Code §11358.

The events giving rise to these charges occurred on and before September 20, 1996, on which date the defendant was found to be growing marijuana plants in the back yard of his home and to be in possession of a quantity of marijuana, in individually wrapped baggies, found in his home and his automobile. The complaint setting forth these charges was filed on September 26, 1997.

The defense to these charges is in two parts. First, the defendant will contend that his possession was not for sale but for personal use. The second portion of his defense is that the possession for personal use and the cultivation is legally excused because he is protected by the provisions of Health and Safety Code §11362.5 The latter is the statutory citation for that law which was approved by the electorate in 1996 entitled "The Compassionate Use Act of 1996," known otherwise and generally as Proposition 215.

In the defendant's view, he comes within the provisions of Health and Safety Code §11362.5(d) by virtue of his having obtained the approval for his use of marijuana by Dr. Eugene Schoenfeld, which approval was granted on August 21, 1997. Dr. Schoenfeld wrote:

> "I have evaluated Mr. Richard Hearth and find that he has been using marijuana for medicinal purposes for at least five years. I recommend that he continue using marijuana as needed for anxiety. This recommendation is valid until November 30, 1997."

The People have challenged the availability of this defense under the facts and circumstances of this case by way of a motion in limine asking the Court to exclude any evidence offered in support of the Proposition 215 defense.

The Court conducted a hearing under Evidence Code §402 on October 8, 1997 at which time Dr. Schoenfeld responded in detail to questions put to him by the defendant and the People and the Court. I will refer to certain portions and aspects of his testimony momentarily. In essence, Dr. Schoenfeld confirmed that which his written recommendation implied; that is, that the defendant was, on September 20, 1997 and had been since 1992, suffering from chronic and situational anxiety and situational depression; that these conditions have been known in the medical community to lead to serious health problems such as heart attack, stroke, high blood pressure and other serious disease; that anxiety and depression is relieved by the use of marijuana and; that he therefore believed that marijuana was medicinally indicated for the defendant within the meaning and provisions of Health and Safety Code §11362.5.

First of all, I find that the provisions of Health and Safety Code §11362.5 are in the nature of an affirmative defense and note that it is entirely within the Court's authority and discretion to consider and decide as a preliminary matter if the evidence proffered by the defendant will not support the defense as a matter of law. See *People v. Honig*, (1996) 48 Cal.App.4th 289, 346-47.

Second, resolution of the People's motion requires application of the general rules of statutory construction. Paraphrasing from *People v. Jones* (1993) 5 Cal.4th 1142, 1146, the primary task is to determine the lawmakers' intent, whether the lawmakers are the Legislature or, in the case of an initiative adopted by the voters, the voters themselves. To determine intent, a court must turn first to the words of the law and if the language is clear and unambiguous, there is no need for construction nor is their a need to resort to indicia of intent. The plain meaning of the words must prevail. If there is ambiguity, familiar rules of statutory construction must then be employed in determining the underlying intent of the lawmakers.

The Court notes that "California decisions have long recognized the propriety of resorting to . . . election brochure arguments as an aid in construing legislative measures . . . adopted pursuant to a vote of the People." *People v. Trippett* (1997) 97 DAR 10639, 10642, fn. 7, citing and quoting *White v. Davis* (1975) 13 Cal.3d 757, 775 fn. 11.

The law is entitled the "Compassionate Use Act of 1996." Election materials in favor of the measure note that it is a law which "helps terminally ill patients" and say that the law "will allow seriously and terminally ill patients to legally use marijuana if, and only if, they have the approval of a licensed physician." By way of example, the proponents noted that marijuana lowers internal eye pressure associated with glaucoma slowing the onset of blindness, reduces the pain of AIDS patients, stimulating the appetites of those suffering from malnutrition because of AIDS "wasting syndrome" and alleviating muscle spasticity and chronic pain due to multiple sclerosis, epilepsy, and spinal cord injuries.

The proponents of the measure also stated that the intent of the statute was not to "permit non-medical use of marijuana" and that "recreational use would still be against the law." The proponents asked the voters to "please join us to relieve suffering."

In response to the argument of the opponents of the measure that the law would allow a legal loophole that would protect drug dealers and growers from prosecution, proponents argued that the law only allows marijuana to be grown for a patient's personal

use and noted that the defense provided by the statute applied only where a defendant "can prove they used marijuana with a doctor's approval."

Turning to the language of the statute, it states, at paragraph 11362.5(b)(1)(A), as one of its purposes, the intent "to insure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana" in the treatment of medical conditions that are then set forth "or any other illness for which marijuana provides relief."

In addition, the statute states at paragraph 11362.5(b)(2) that "(n)othing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, to condone the diversion of marijuana for nonmedical purposes."

Without question, it will take the courts of this state some time to establish the factual boundaries of this law. A full description of those boundaries is not a task that this Court is now required to undertake. I decide these matters only on the facts before me and on no others.

I find that the defendant in this matter cannot employ this statutory defense consistently with the intent of the law for a number of reasons.

First, I construe the statute to require that the recommendation or approval of a physician for the use of marijuana which triggers the offense must occur before cultivation, use, or possession of marijuana. To do otherwise would emasculate the criminal prohibitions against such activities in other contexts. It would allow, as the defendant here hopes it would allow, a full defense to criminal proceedings based upon after the fact approvals given not only after the cultivation, possession or use, but after the institution of criminal proceedings for such activities, the end result of which would be the negation of legitimate prosecutions by those sympathetic to the legalization of marijuana. Such an interpretation is contrary to the statute's stated intent; is supported by the plain meaning of the phrase "upon the . . . recommendation or approval of a physician," and also

is supported by the proponents stated arguments which the Court properly assumes were accepted by the voters in adopting the measure. More importantly, I find that such a requirement comports with common sense. I find that anything to the contrary set forth in the decision of the Court of Appeal in *People v. Trippett*, supra, at footnote 13 is *dicta* which I am not required to and choose not to follow.

Even if *Trippett* is correct and there are circumstances where the approval of a physician can post date the possession or cultivation of marijuana, but not its use, I find that an after-the-fact approval based on exigent circumstances does not apply to the facts of the instant case. In this matter, an approval coming 11 months after the event of the arrest and the institution of criminal charges and after five years of continuous use, an approval given primarily to create, after the fact, a defense to a criminal prosecution, cannot be consistent with the intent of the voters in passing this measure.

Further, I find that the "illness" for which Dr. Schoenfeld prescribed the past and future use of marijuana was not one within the contemplation of the voters at the time they approved this law. While the final phrase of Health and Safety Code §11362.5(b)(1)(A) is very general in its statement of the predicate medical conditions, that phrase is circumscribed by the types of medical conditions which precede it, at least in their seriousness.

Dr. Schoenfeld prescribed marijuana in this case as a preventive measure to avoid the possibility of serious illness in the future, not to relieve the pain or other symptoms of an illness presently existing. His diagnosis of anxiety in the defendant's case is not one that Dr. Schoenfeld can place into any of the anxiety disorders set forth in the Diagnostic and Statistical Manual of Mental Disorders, (4th Edition). That notwithstanding, according to Dr. Schoenfeld such approval is medically appropriate to the same degree and for the same reasons as the use of alcohol to relax after a long day at work, that is for the prevention of serious health problems that can arise from long standing and unrelieved stress and anxiety. This use is much closer to recreational than medicinal use and is consistent with a relaxing jog around the neighborhood for its "medicinal" effect. In fact,

the doctor testified that he would prescribe such use for the Court to relieve this judge's stress and anxiety brought about by the normal demands of his work and the normal stresses of raising a teenage son.

Whatever else the voters had in mind in passing this law, a fair construction of the statute cannot include such recommendation or approval for if such had been the intent of the electorate the initiative would, as a practical matter, have to have been styled the "Legalization of Personal Use of Marijuana Act of 1996." Such a construction would eviscerate the law relating to the use, possession and cultivation of marijuana in the State of California, which evisceration is directly contrary to the statute's stated intent. Like the *Trippett* court, I decline to interpret the statute as an "open Sesame" regarding the use, possession, or cultivation of marijuana in the State of California.

In summary, I find that if these facts were presented to a reasonable jury, that jury could not find, consistent with the law, that they give rise to a defense to the pending charges and therefore, the People's motion *in limine* is granted; evidence in support of the defense will be excluded in this trial.

DATED: October 14, 1997

HARRY E. HULL, JR.

HARRY E. HULL, JR.
JUDGE OF THE SUPERIOR COURT

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