

"War on Pot" Overrides "Support Our Troops"

Sgt. Northcutt's Post-Iraq Nightmare: Getting Arrested for Marijuana Cultivation

By Fred Gardner

Phil Northcutt saw the map of Iraq on the wall and started recalling his time there. He'd been stationed in Ramadi, Al Anbar Province, in 2004.

NORTHCUTT: There was this main street, 'Route Michigan,' like a 4-lane highway going through town with a 12-inch tall median painted yellow and black. When we first got there you could see big holes in the median. By the time we left, there was no median. It had been blown up along six or seven miles of roadway...

There were two different kinds of fighters we engaged. When we first got there it was like local fighters. You could tell. They were wearing the man dresses and flip-flops and they had old rusty AKs. They were like beat-up, ragged-out goat herders but with weapons. They didn't use squad maneuvers, they didn't use military tactics, it was a shoot and run kind of thing. And pretty much we killed all those guys or they went away.

And then the second wave came in. These dudes were wearing brand new Adidas, American jeans, they were wearing tactical rigs like American contractors, baseball hats, sunglasses—they looked like American contractors.

O'Shaughnessy's: When did that second wave appear?

NORTHCUTT: Let's see... I got there in late August or September... That first wave lasted for three months and then it died down and then we heard, "Guys are coming from Syria." Next thing you know there were these new guys, and they operated in squads, it was obvious they'd been trained. But they didn't have the logistical support that we did—supplies and weapons. So they didn't really last long, either.

I think they decided "This coming out in the open stuff is not working, let's hang back and let's do more IEDs and suicide bombs." That's when things got really scary. More scary than guys shootin' at you, now you've got people hiding and trying to blow you up.

We lost our commanding officer to a suicide car bomber like 1500 meters from the gate. Captain Patrick Rapicault, 34. Fucking solid guy. One of the best officers I ever worked with in the Marine Corps. He got killed when a VBIED [vehicle-borne improvised explosive device] rammed vehicle Whiskey Six. Marc Ryan, 25, and Lance Thompson, 21, were also killed. Ben Nelson was seriously wounded but survived.

The psychs came out to see us. They said "We're going to do a screening of you guys. We want you guys to get help... They sent us to the Battalion aid station, which was Udei Hussein's old guest house. They had turned his main house into a helipad. They leveled it with Cruise missiles and landed helicopters there. The took the guest house and turned it into the Battalion CP [Com-



PHIL NORTHCUTT with artwork found in Ramadi. "I happened to know the proprietors of the American Beauty tattoo parlor in Sunset Beach, quite well," Northcutt says.

mand Post]. At the far end of it was the armory and the medical building. So we went over there and got interviewed by a Navy captain. That'd be a colonel in the Marine Corps—a full-bird captain. He said, "what you have is called chronic post-traumatic stress disorder. It's a natural result of you being in combat and seeing the things you've seen, blah blah blah."

And the diagnosis was written down in your file but it wasn't grounds for taking a leave or anything?

NORTHCUTT: Not at all. They would have had to send half of everybody home. And if everyone had told the truth, they would have had to send ev-

erybody home. "Take these anti-depressants and get some sleep. You'll be fine. Here's your M-16. Back to work!" And then we're out on the front lines.

They gave anti-depressants to everybody in the company?

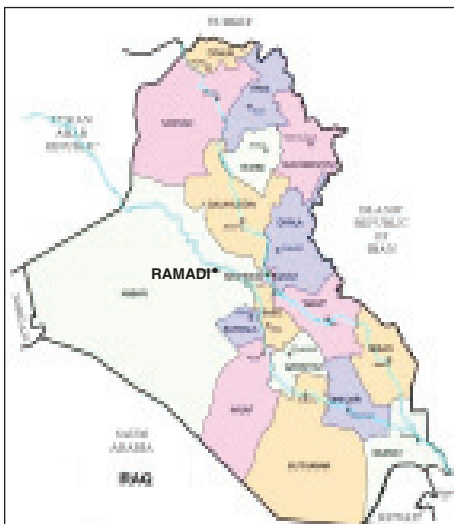
NORTHCUTT: All the guys who didn't lie. The questions were, "Are you having nightmares?" Fuck yes. Are you kidding me? Do you know what I saw yesterday? "Are you having intrusive thoughts?" Yes. Fucking of course. They went through this whole series of questions that obviously, if you're in combat and you're being honest, the answer is "yes" to all of them.

But a lot of guys say, "Well you just gotta suck it up. You're in the Marine Corps." That's bullshit. Some of these guys are fucking yelling in their sleep. And naturally everybody's so hyper-fucking-vigilant that everybody wakes up. (*softly*) Oh, okay, it's only Sergeant Tolson yelling in his sleep, okay, cool... Sometimes we'd get woken up because fucking mortars would be hitting next to the hooch and rocks would be crackling down on the roof. And you'd just be laying there like "fuck, I think I'm still here," with nothing but a tin roof over your head

Basically our job was like, they would say, "Hey, there's an ambush set up at

checkpoint 295, you guys go check it out." Okay. We'll check it out. We go there and see if they shoot at us. If they shoot at us—this is really the tactic! You've got bullets hitting around you, concrete flying in your face... What can you do?

Northcutt is now 36. He joined the Marine Corps in 1998, after not finding fulfillment as a music promoter (ska and punk bands) and screen printer. He went through boot camp in San Diego, excelled, and was made platoon guide (first in his unit). After School of Infantry at Camp Pendleton he trained in "Military Operations, Urban Terrain"



at an off-the-map base in Virginia. He was stationed in idyllic Iceland and the Hellish Mojave Desert, didn't see combat, and finished his four-year tour without a scratch well before the US invaded Iraq.

In the spring of '04 he was about to start attending Santa Rosa Junior College when he

got a call: the Marine Corps was looking for NCOs with his training to participate in the "combat casualty replacement program."

Northcutt told them, "If you guys are looking for gate guards at Camp Pendleton, forget it. But if a Marine can come home because I take his place, then I'll do it." He says, "I was seeing Marines get killed all the time on TV. And being a Marine I started to feel guilty about it and take it personal."

He signed a one-year contract, supposedly non-renewable, and got assigned to Two Five—Second Battalion, Seventh Marines, the most decorated unit in the USMC.

NORTHCUTT: They put me in a regular weapons company, infantry unit. We were replacing Two Four in Ramadi. They had seen more combat than any unit since the Vietnam War. We got there and they're like "Thank God you guys are here, we're going home!" A couple of them stayed behind to show us around.

The first day out, all of a sudden—wapping ping pong—"Ambush! Ambush!" I start to dismount because that's what you're trained to do when there's an ambush, dismount, spread out, and find the bad guys and get 'em. "Negative! Negative! Don't dismount!" I'm just a corporal. There's the vehicle commander and the patrol commander, a lieutenant over me. "Stay in the vehicles. Button up." So we just sat there taking hits. Ping ting toong ting. I'm like, this is fucking crazy.

Next thing you know a fucking football goes across the hood of the Humvee but it's not a football, it's a fucking RPG! [Rocket-propelled grenade]. I'm thinking "That could have hit this vehicle and we would have gone up like a box of fireworks." So I'm like "why if we're not dismounting don't we get out of the fucking kill zone?"

We sat there for what must have been a whole minute—it seemed like a whole hour—just taking bullets. Nobody was shooting back because the gunners were all down inside the fucking thing because they said "button up." The sergeant sitting next to me and another sergeant in the vehicle up in front are going "Get the fuck out of here. Get the fuck out of here." Trying to get the point across on the radio to the platoon commander.

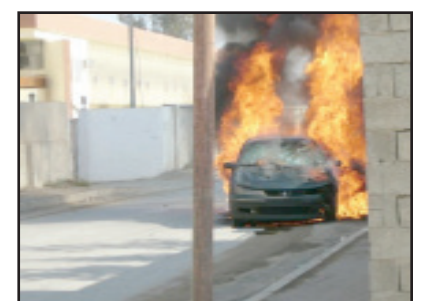
Some lance corporal is driving but he's not doing shit until he gets the word from the lieutenant up front who doesn't know what he's doing, it's his first ambush. Finally he's like "Okay, let's go, let's go" and we boned out.

We get back to the rear and I'm like "I am not going to die like that. If I get killed, so be it. But I didn't come out here to do some stupid shit and get killed." So I got together with the other corporals and sergeants and I said, "We've got to talk to the lieutenant, because if that shit happens tomorrow, some of us aren't coming back."

So we got him and sat him down and said "look sir, I've made up a little play-book. We should maybe come up with some basic maneuvers for the different kinds of engagements me might be in. So we can close with and destroy the enemy. That's how you win." He said, "You gents are getting ahead of yourselves. We have to take baby steps here."

Baby steps? Well, he's the 'sir,' we do what he says, even if his decisions are going to get people hurt. To the dude's credit, he got his shit together later. But when he first got there, that first day, what a clusterfuck. Looking back, I realize what a fucked-up job [the lieutenant had]. I wouldn't want that job. Because you can't predict what's going to happen, but you have to make decisions anyways. And if you're making decisions in a combat zone, with combat troops, undoubtedly some of your decisions are going to lead to people dying. I think the dude was planning to pursue a Marine

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Sgt. Northcutt *from previous page*

Corps career, but I heard that he got out two years later.

Northcutt’s unit lost 12 men and sent more than 150 home wounded. Up close he saw men, women and children maimed and dead. He tried to lift a dying friend whose shoulder “felt like raw hamburger.” He was wounded but stuck it out to the end of his tour.

NORTHCUTT: I was on the 50-cal until I hurt my back. They mount these things on a Humvee. Normally they have a traversing mechanism for spinning the turret. But the turret is just a steel ring on top there with a post for the 50 cal. Because of these IEDs [improvised explosive devices] and snipers, they started bolting armor on the top, on the sides, but it’s not designed for that. The thing gets turned into a Frankenstein. It’s nothing like what it was designed to be. They look ridiculous driving down the road.

With all that weight added, my 50 cal didn’t have a traversing mechanism on it. I had put one on there and was ordered to take it off because I had stripped it off a damaged vehicle that had been blown up and I wasn’t authorized to do it. So I was ordered to remove the part and put it back on the vehicle I had got it from. And I’m like “that’s bullshit, we’re going out on patrols.” And the staff sergeant is like “just take it off.”

A couple of weeks later I blew my back out and got Medi-vacced to Baghdad. They’re like, “You’re going to Germany for an MRI because we don’t have that equipment here.” I said, “I’m not going to Germany, I’ve got a squad in Ramadi.”

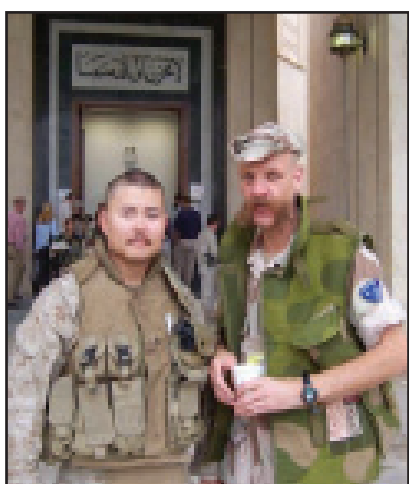
I knew that I could live with a physical injury and physical pain, but I couldn’t live with the guilt of thinking “Maybe I should have gone back.” What if your friends die and you’re not there and you think, “Well maybe I could have done something? I couldn’t live with that doubt. Of course I did nothing but complicate my injuries. My guys helped me hide my injuries. They would carry the heavy equipment to the Humvee.

Are you in pain now?

NORTHCUTT: I’m okay. Some days it hurts. It depends on how I sleep. Sleeping on the floor is better than sleeping in a bed. Cannabis helps. And it helps even more with anxiety.

Northcutt came back to Camp Pendleton April 1, 2005, and was put on “medical hold” while the Marine Corps evaluated whether his back injury qualified him for medical retirement.

NORTHCUTT: The MRI showed that my L-4 and L-5 disks were bulging. They were pinching my sciatic nerve and causing me severe pain down to



NORTHCUTT with a Norwegian officer outside the U.S. Embassy annex in Baghdad. “And people thought my mustache was long,” says Northcutt.



CPL NORTHCUTT IN THE TURRET OF HIS HUMVEE before going out on patrol. The mechanism to swivel the M2 .50 calibre machine gun was broken, so Northcutt had to aim the weapon by hand –sometimes as the vehicle was making a fast turn in the middle of a firefight. All the armor was added on, Northcutt says –steel plates bolted to the sides and underneath, and the shields protecting the gunner– although the Humvee was not designed for the weight.

the back of my knees. They showed no interest in my PTSD, there was never a word about TBI. Three years later a VA doctor in Martinez diagnosed me with traumatic brain injury.

O’S: How long were you on medical hold?

NORTHCUTT: For a year. This is when they super-medicate me. I would be given a grocery bag full of really heavy shit. Hydrocodones and anti-depressants, Neurontin, Seroquel, anti-nightmare pills, half of it you get really fucking high on. I’m not much of a pillbilly but I’ve taken them all. And that is true of just about anyone I know who went to Iraq and has come back. They’re all pill experts. How the fuck does that happen? You get back and they just like push 10 pills on you right away.

Were you dealing with Marine Corps doctors or the VA?

The Marine Corps. But I was also trying to deal with the VA because they sent me home awaiting orders. I go to live at my grandma’s in Long Beach and I’m chilling in the guest house while I’m waiting to get out of the Marine Corps. The VA Hospital is like a mile from my house and Camp Pendleton is two hours away in traffic. I’m drugged out all day long and they’re like, “You’ve got appointments on this day at Camp Pendleton.” I would just lie in bed all day, loaded. Totally fucked up. But it was cool because a doctor prescribed it.

The VA tells me, “you’re active duty, we can’t treat you.” So I’d go to the appointments at Camp Pendleton –sometimes– and I’m telling these people, “you don’t understand. I have waking nightmares. I sleep with a gun under my pillow.”

When I first got home I’d sleep for one or two hours a night. I’d be like I’m here with you and we’d be talking and *(as if dozing off)*. And an hour later *(as if startled awake)* “Where am I? Where are my Marines? Where is my weapon?” First thing that comes to my head. And then it would be like: “This is not a dream. This is not Iraq.” It’s weird because your brain goes *[sound of a car accelerating]* and then it comes back. A lot of people haven’t been exposed to severe stress and don’t understand that severe stress makes your brain do weird shit. I knew something was wrong with my head but I couldn’t get help.

Did you ask to be tested for brain injury?

NORTHCUTT: No. I was not even thinking about it. And nobody asked me how many times I’d been near things blowing up, or how close, or anything like that. The help I needed was not pills but fucking counseling. I needed

people who knew what the fuck PTSD was and could tell me: “Your life’s going to change in this way.” Nobody there knew. We were like the first bunch of guys to really come back from heavy combat in Iraq. They may have known about Gulf War Syndrome and another set of deal-ios...

Northcutt punctuated his knocked-out days with adrenaline-junkie jags, racking up speeding tickets. He relied on high-doses of Hydrocodone to suppress his back pain.

NORTHCUTT: They just left me to my own devices with PTSD and a steady paycheck. So I bought a fast motorcycle and went to Utah. Went to Vegas. My back was so fucked up I could hardly walk, but I could drive real fast. I liked staying in hotels because I was drinking heavily and in a hotel I could go first thing in the morning to the hotel bar and start drinking.

I kind of avoided everybody I knew. I didn’t want anybody to ask me “How are you?” Because what do you tell them? “I’m all fucked up?” You don’t even know how to answer. And every time you start telling them it takes you back. And you’re trying to escape in your mind from Iraq.

What about your grandma?

I would be there like two days a week. I would barely talk to her. I would give her a hug and go out to the guest house and by that night I was gone. Or I would stop in to do laundry and visit with her for a minute.

What did you drink?

Tequila, Newcastle, Guinness. I like really good tequila.

Do you still drink?

No. Almost never.

Did you quit through a program?

No. I don’t need alcohol. As I’m getting older I really do feel it the next day. And my days are hard enough. And that’s one of the reasons I love medical marijuana.

How did you find medical marijuana?

I knew about marijuana because I was a recreational smoker. And I started medicating with marijuana before I became a patient.

I started realizing, “Of all the crap they’re giving me, I feel the best when I’m smoking herb. Hmmm... That’s weird. When I just smoke herb I feel kind of relaxed, I don’t feel so stressed out, I don’t feel the depression, I don’t feel the guilt...” Eventually I realized: “this is real medicine.”

Did it help you sleep?

For sure. It helped me relax so I could sleep. That’s a big difference. The pills

just knock you the fuck out. You’re just gone. Even if you don’t want to go to sleep you’re still sleeping. Which can be pretty dangerous. Once I decided to become a medical marijuana patient, that’s when everything changed.

When was that?

I want to say October 2005. When I went to see Dr. [William] Eidelman.

How did you decide on Dr. Eidelman?

I Googled “medical marijuana” and started reading different websites. I read stuff on his website about healing and medicine and I thought he had a legitimate angle. People should take him more seriously. A lot of what he says is just common sense, like giving healing a chance to happen.

So I went to him and said I was interested in medical marijuana and he said, “I’m going to give you a recommendation, but I want you to quit smoking cigarettes and I want you to quit drinking.” He also warned about the side effects of all the prescription pills I was on.

At the time he got his letter of approval, Northcutt was becoming enraptured with marijuana –its beauty, its fragrance, its usefulness. “I became a connoisseur,” he says. His transition from consumer to provider came in response to requests from friends –a very common pattern.

NORTHCUTT: I discovered that organic herb made me feel the best. So next thing you know, I’m on this mission to get the best organic herb. I started going up to Mendo and Humboldt and meeting with farmers. *(As if smelling a bag full of cannabis flowers)* “Ah this is good.” And it would be that kushy wet hay... There’s no smell like it. But I would have to pay up the yin-yang.

Other patients knew that I was getting good organic herb and they were like, “Can you get me some?” So I started coming back with a couple of pounds. That’s how I could afford to have good herb for myself.

So the next logical step is, “Why am I traveling all the time and spending all this money when I can just be growing it myself and all these people can learn to grow it, too?” So we got together and decided to grow for ourselves.

How many people were involved?

Four or five of us did the growing. There were more than a dozen patients, including my girlfriend. We called ourselves a co-op. I had the space. I had a warehouse from when I was in the screen printing business. I had one screen printing machine there, a gift from my dad, who was moving to Tennessee. He’d gotten into the screenprinting business after I did. He said, “If you can make money at it, I can for sure.” When he gave me the machine –which is really like giving somebody millions of dollars, because you can make a living with it, he said, “Don’t say I never gave you nothin’.”

O’S: Were you planning to go back into screenprinting?

I was. But as I became more health-conscious, I realized the health hazards involved. The chemicals are terrible for the environment... I’d been using the warehouse for storage and to park my vehicles. For growing cannabis I turned it into like an operating room. I made

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Sgt. Northcutt *from previous page*

special doors so that no dust or dirt could get in under the cracks. Air coming into the entire building was hepa-filtered. The air going out was charcoal filtered. Every room was plastic-wrapped and could be individually sterilized. I had four 10-by-10 tables, a separate nursery for my clones, a separate mama room, a drying room, a sleeping area because I'm there all the time. I slept under the lights. When the lights came on, I'd get up.

One of the really wild things that happened was: I became a gardener for the first time in my life. I was developing a love of plants and an appreciation of nature. And I was developing a relationship with God. Instead of killing and maiming I was making things grow.

"He's military and he's got a gun!"

Northcutt was busted by Long Beach police on the evening of March 28, 2006, while driving away from his warehouse. He had two mason jars, each with about 1/2 ounce of marijuana (New York City Diesel and Skunk Number 1). He tried to smooth-talk his way out of trouble, mentioning that he had a doctor's approval to use marijuana and was an active duty sergeant in the Marine Corps. He suspected a set-up when the officers said it seemed like "a lot of marijuana" and that it was "packaged for sale." When Northcutt informed them that he had a weapon, the officers vanished before he could hand it over.

In the rearview mirror Northcutt could see them crouched behind their vehicle, calling for back-up. "He's military and he's got a gun!" one yelled into her radio. She would repeat the urgent warning as reinforcements arrived.

Sgt. Northcutt was taken to L.A. County Jail for booking. A warrant was issued to search his grandma's house. The search yielded 20 grams of marijuana, a scale, five tablets of MDMA (ecstasy), and an unloaded shotgun.

NORTHCUTT: My neighbors came to me later and said, "The way they cordoned off the whole fucking neighborhood, we thought you shot a cop." Of course there was nothing to find. My cousin hears one of the cops say, "Hey, look for some warehouse keys."

Next thing you know, they're issuing a warrant for my business, based on my electric bill of \$600. Which is not high in an industrial zone. The diesel shop next door uses three times as much. It was unreal on a professional level. It blew me away. But it didn't really surprise me. I've seen that happen to other people. Now it was happening to me.

The media had been notified in advance of the raid on Northcutt's warehouse, and it made the news that night. Long Beach police seized 339 plants that he and his friends were growing by the "sea-of-green" method (small plants packed together). They also confiscated 18 mason jars containing 1.2 pounds of dried flowers, bags full of leaf and stalk, and a loaded shotgun.

NORTHCUTT: They took me down-

Overreaction is the mark of many police officers and deputy sheriffs in LA and Orange County, and there does often seem to be an anti-Marine Corps bias almost built into the law enforcement community there. I speak from the experience with many run-ins with police as a young Marine in Southern California in the 1980's.

-Tim King, OregonNews

town to LA County Jail for booking and the whole time they're talking shit to me: "Who do you think you are? You think you're bad. You think you're Rambo."

O'S: *Tim King says that law enforcement in Orange County has always had it in for the grunts.*

NORTHCUTT: I have some buddies who are good cops because they're good human beings. But these cops who are badge-heavy, who think they're badass, they're the ones who fuck things up. They told the judge that I had an unregistered weapon, but one of them ran it and saw that it was registered to me. They wouldn't call Dr. Eidelman.

O'S: *Did you ask them to?*

NORTHCUTT: Of course. And when they didn't, I asked them to call someone from Narcotics who might know the proper procedure.

Northcutt was charged on counts of marijuana cultivation (with a firearm), marijuana possession for sale, and MDMA possession (with a firearm). He spent 18 days in jail before getting bailed out by his uncle Bob Northcutt, who would loyally attend court appearances throughout Phil's legal ordeal.

O'S: *How did the Marine Corps respond to your getting busted?*

NORTHCUTT: They came to me in LA County because on TV they'd said I was a reservist. They wanted to get me out before it became known that I was on active duty medical hold and had PTSD. A staff sergeant came in and said, "Sgt. Northcutt, if you sign right here we won't prosecute you, you'll be out of the Marine Corps in 20 days."

With what kind of discharge?

NORTHCUTT: General under other than honorable conditions.

Northcutt's discharge cost him all his military benefits. He had enough money to pay defense attorney Bruce Margolin \$20,000. Unfortunately, the Margolin associate handling his case failed to appear at a hearing and Northcutt was sent directly into custody by Judge James Pierce in December 2006. Northcutt heard that his lawyer eventually showed up and had been scolded by the judge. He figured he would be released - but he was still in jail six months later when his trial finally got underway.

Northcutt describes LA County jail as "a gulag that should be investigated by the United Nations."

He was represented by a veteran public defender, Ken MacDonald, whom he describes as competent in court but not knowledgeable regarding medical marijuana law, and terminally pessimistic about Northcutt's chances.

The trial was held June 12-18 - just when Northcutt's girlfriend Jennifer, a key defense witness, was due to give birth. Northcutt wondered if the date had been chosen to guarantee her absence. (Jen delivered a healthy baby boy, Kai, June 16, 2007).

Northcutt says he was sleep-deprived during the trial, transported by bus to different facilities, stashed for a few hours in overcrowded cells, then driven back to LA County to hit the rack for a few hours.

It was stipulated that the amount of plant matter taken from the warehouse was just under 17 pounds. A Long Beach detective testified that 339 plants were growing at the warehouse and would yield three to five ounces each. Cultivation expert Chris Conrad testified for the defense that the "sea of green" plus the immature plants in Northcutt's warehouse would yield



about 4.25 pounds total.

Northcutt and Jennifer had letters of approval from Dr. Eidelman that exempted them from the SB-420 limits on allowable quantity. Two participants in the grow offered to testify about their involvement and submit their letters of recommendation as evidence. The others wanted to have their names kept out of the proceedings, and Northcutt says, "I understood and protected them." More co-op members would have come forth, he adds, if his lawyer had thought it would help.

The jury was not instructed by Judge James Pierce that collective cultivation is legal in California. The jury was instructed that California's medical marijuana laws include limits on allowable quantity. Northcutt was found guilty of cultivation - but acquitted on possession for sale. Apparently the jurors thought the marijuana was being grown for medical use, but the paperwork was insufficient to justify the amount on hand.

Northcutt was acquitted on the MDMA charges because the five pills were found in an area accessible to many people and there was no evidence that they belonged to Northcutt.

After his trial Northcutt was transferred to state prison in Chino. He was sentenced on Nov. 8 to three years' felony probation with one year in jail (time served), and to pay \$470 in fines.

At the time of his release, Phil Northcutt had lost his Marine Corps benefits, his chosen livelihood, and almost a year of his life.

He requested a court-appointed lawyer to appeal his conviction. At the time of his release, Phil Northcutt had lost his Marine Corps benefits, his chosen livelihood, and almost a year of his life.

NORTHCUTT: I lost my business, I lost my car, I lost my respect in the community, I lost all my money trying to defend myself. I literally had nothing to my name. Jennifer had moved back to Oklahoma to stay with her mom while I was in jail. When I got out, she came back, but we didn't have a place to live. Not the best strategic decision but we'd been apart so long, we just wanted our family to be together. So there we were together but homeless.

Luckily, friends came to my rescue. A buddy whose girlfriend owned a hotel let us stay there sometimes. Other people let us stay on their couch. It wasn't till I got to the Pathway Home that I started connecting with resources. That was really critical, that turned my life around.

Pathway Home...

In Yountville. Run by Fred Gusman, funded by the the Tides Foundation. It

was there that I saw other people going through what I was going through. I realized I wasn't the only one with legal issues. There are other people who are going through this and it's really having an effect on their lives.

I spent a lot of time on the internet figuring out who's available to help veterans. I feel for guys who don't even know these organization exist. It's ironic - You've got organizations that have outreach programs but don't know where to find the guys who need help. And you've got guys who need help who don't know how to reach the organizations. Or don't know they need help.

When *O'Shaughnessy's* took down his story May 14, 2009, Northcutt was heading from Calistoga, where he lives, to go to "veterans' homeless court" in L.A. to try to deal with \$2,700 worth of tickets that could cost him his driver's license. He was also planning to attend the hearing of his appeal by a three-judge panel from the Second Division Appellate Court on May 19.

Northcutt said admiringly that his state-provided appeals lawyer, Benjamin Owens of El Cerrito, had spent more time discussing his case with him than any of the lawyers who worked on the defense.

We felt bad for him driving off into the night. Rosie had heard on TV that the hills above Santa Barbara were burning out of control. Northcutt said something about going through danger and finding success on the other side. I worried that he would not be able to get out of paying for the tickets, they'd yank his license, then he'd really be up the creek without a paddle.

A few days later he called to describe the scene at oral arguments in *People v. Northcutt*.

NORTHCUTT: My attorney had spent a lot of time preparing what he was going to say. I was looking forward to hearing him argue and the judges asking questions. I heard a judge say, "You're not going to speak." And he sat down. I'm like, "What's going on?"

Then the judge said, "The attorney general can say something if he'd like..." And the attorney general talked about cooperatives' membership requirements and limits and gray areas of the law. Then my attorney said, "I'm available if you have any questions." But the judges said "You're probably better off if we don't ask any questions."

I'm sitting in back there going, "What is that supposed to mean?" Then my lawyer comes back and says, "Okay, let's go." And I'm like, "What just happened?" He said, "The judges had already decided the case. I didn't have to say anything because we'd already won before we got there. They said you're getting a full reversal."

(See story on next page...)

It Won’t Give Him Back a Year of His Life, But

Northcutt’s Conviction Reversed on Appeal

*“There’s a lone soldier on the cross
smoke pourin’ out of a boxcar door
You didn’t know it, you didn’t think
it could be done
But in the final end he won the war
after losing every battle...”*

—Bob Dylan

California’s Second Appellate Court overturned Philip Northcutt’s conviction for marijuana cultivation in an opinion filed June 5. It was written by Judge Edward Fers; Robert Mallano and Frances Rothschild concurred.

Oral arguments in *People v. Northcutt* were held May 19 in Los Angeles. Benjamin Owens, a young appeals specialist appointed by the court to represent Northcutt, was advised by Judge Rothschild not to address the panel because a decision had already been made to find for his client (presumably on the basis of his written arguments).

Owens filed a brief on Northcutt’s behalf in April 2008. He argued firstly that the conviction should be overturned because of the judge’s “failure... to instruct the jury of the affirmative defense of collective cultivation.”

SB420, enacted by the legislature in 2003 to help implement California’s voter-enacted medical marijuana law, created section 11362.775 of the Health and Safety Code, which states: “Qualified patients... and... designated primary caregivers... who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions.”

An appellate-court ruling in the case of *People v. Urziceanu* established that SB-420 had indeed “created a new affirmative defense to a charge of cultivation of marijuana.” Owens wrote that the court is obligated to instruct on a defense “when it is supported by substantial evidence and the defendant is relying on it or it is not inconsistent with his theory of the case.”

Owens cited cases to define “substantial evidence” as “evidence sufficient to ‘deserve consideration by the jury.’” Northcutt had testified that the grow was providing for at least 12 patients; William Eidelman, MD, testified that he authorized Northcutt and his girlfriend to exceed the quantity limits of SB-420; and Chris Conrad testified that the amount of marijuana found at the warehouse was a reasonable amount for four or five patients to grow for themselves.

It is up to the jury, not the judge, to weigh the credibility and significance of the evidence, Owens argued. “If the jury believed this evidence, it would have to have found that the defense of ‘collective’ applied, and acquitted appellant [Northcutt] of cultivation of marijuana. Therefore, the court erred in not instructing the jury on the defense Health and Safety Code section 11362.775 provides.”

Owens argued that the error was prejudicial as opposed to harmless—meaning it could have influenced the jury’s verdict. He wrote: “A defendant has a due process right to instruction on his theory of the case, violation of which demands application of the federal standard [of what constitutes prejudice].”

Constitutional error is not harmless unless the prosecution can prove beyond a reasonable doubt that the error did not contribute to the verdict... Federal case law suggests that an even stricter test should be applied. Namely, failure to instruct on a defense that is supported by the evidence cannot be a harmless error...

“It is reasonably probable that appellant would have been acquitted had the jury been properly instructed. Indeed, the acquittal on the possession for sale charge indicates the jury likely believed the marijuana cultivation was for medical purposes, but that, under the flawed instructions, he simply had too much... Under the correct instructions, with the evidence adduced at trial, it is likely that this jury would have found the amount of marijuana permissible and acquitted him.”

Owens hoped that if Northcutt’s conviction were reversed because of Judge Pierce’s failure to instruct on “collective cultivation,” the decision would be published and become binding on Superior Courts statewide. “There are no published cases on point there,” Owens observed. However, the appellate court did not take that step.

Another Basis for Reversal

Owens challenged Judge Pierce’s instructions to the jury on a separate basis in a supplemental brief filed in July ’08: “It was prejudicial error for the court to instruct the jury that it could convict appellant of cultivating marijuana solely because he had more than the amounts specified in the constitutionally invalid Health and Safety Code Section 11362.77.”

An appellate court had recently ruled, in a case called *People v. Kelly*, that the section of SB-420 imposing limits on the quantity of marijuana a patient can possess was unconstitutional (because the legislature cannot weaken a law passed by the voters, and Prop 215 did not limit allowable quantity).

Owens wrote, “Through the court’s instructions, the testimony of witnesses, and arguments of counsel, the jury was invited to convict appellant based on the legally incorrect theory that he grew more marijuana than allowed [under SB-420].”

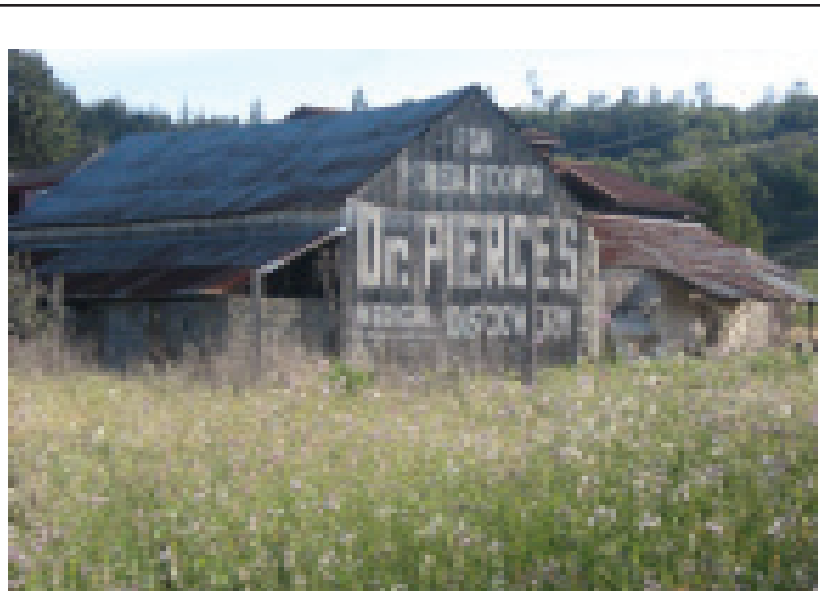
The *Kelly* ruling is up for review by the state Supreme Court, and is no longer binding. If it turns out that the reversal of Phil Northcutt’s conviction was based on the allowable-quantity instruction, the decision will not be published.

The Spectre of Communist Farms

On Feb. 26, 2009, the Attorney General’s brief seeking to uphold Northcutt’s conviction was filed. The AG argued that the collective or cooperative cultivation defense created by SB-420 only protects formally organized groups.

The AG cited California’s Corporations Code and Food and Agriculture Code, which define “cooperative” as a democratically-controlled non-profit corporation that distributes its earnings equally among members or for the members’ general welfare.

And the AG cited Webster’s New International Dictionary to show that “collective” can denote “a farm (as in a communist country) consisting of many small holdings collected into a single unit for joint operation under public supervision.”



“Where did he go to medical school?”

Superior Court Judge James Pierce imposed on Phil Northcutt as a term of probation that he “not use or possess any narcotics, dangerous or restricted drugs or associated paraphernalia, except with a valid prescription.” Northcutt subsequently requested that the court confirm his legal right to use medical marijuana while on probation. He testified that he was using it for back pain and PTSD. He submitted a letter from William Eidelman, MD, noting that his symptoms were combat-related and included chronic back pain, insomnia, nightmares and severe anxiety.

In denying Northcutt’s request, Pierce commented, “he [Eidelman] is a biased individual. This guy, if I had an ingrown toenail, would give me marijuana because under the law he could do that.”

Pierce stated on the record that Northcutt should be “actively pursuing alternatives.” He said he would grant the request to use marijuana if a doctor he considered unbiased reported, “I’ve tried everything else. We’ve tried Vicodin. We’ve tried everything under the sun. Nothing works. And furthermore, he doesn’t have to smoke this. I can give this to him in a tablet, and here’s the tablet.”

Judge Pierce stated that he could respect a doctor who said, “you know, in some cases this will work, but we can do it by a tablet, and we can do it by other means. You don’t need to be in that lifestyle. And but [sic] they said in some cases it really does help.”

Pro-cannabis MDs who stand up for their patients in legal proceedings often encounter judges playing doctor. The late Tod Mikuriya used to say of such judges, “I wonder where he went to medical school?” Judge Pierce’s comments in the Northcutt case reflect several widespread misconceptions:

- Prop 215 only entitles patients with grave or terminal conditions to medicate with marijuana.
- Patients should have tried and failed to treat their medical problem with every conventional drug and procedure before doctors can authorize marijuana use.
- Marijuana is available in pill form. Judge Pierce and his brethren falsely assume that the herb has one active ingredient, THC, and that Marinol, which is synthetic THC, delivers it satisfactorily.
- Medical marijuana users have a “lifestyle” that they should be forced to abandon.

The AG argued that the collective or cooperative cultivation defense created by SB-420 only protects formally organized groups.

Owens filed a reply brief arguing that the words “associate,” “collective,” and “cooperative” are used in SB-420 in accordance with their “common sense, everyday, and non-technical mean-ing(s).” The AG “makes a leap to conclude that because different forms of these words, which are not used in the statute, have technical and legalistic meanings, that must be the sense they convey in the statute.”

Owens pointed out that the AG’s own well-publicized “Guidelines for the Security and Non-diversion of Marijuana Grown for Medical Use,” issued in August 2008, state that “a collective is not a statutory entity.”

Having caught the AG in self-contradiction, the young appeals specialist waxed slightly sarcastic: “These guidelines clearly indicate... that the term ‘collective’ imposes no requirement of a formal business organization. Now, however, because it sometimes means a type of organization used for farms in communist countries, [the AG claims that] the legislature intended that the

collective cultivation defense only be available to those with ‘formalized relationships.’ This is a non sequitur.

“The legislature did not mean that a collective cultivation defense would only be available to communist farms or formally incorporated agricultural non-profits.”

—Benjamin Owens

“It is clear that the legislature did not mean that a collective cultivation defense would only be available to communist farms or formally incorporated agricultural non-profits. If the legislature intended to require a formal legal structure for those engaged in marijuana cultivation, it would have spelled it out in the statute.”

