Landmark Cases in the Implementation Of California's Medical Marijuana law

Notwitshstanding the Supreme Court's ruling in *Raich*, the authors expect state and federal courts to follow in the footsteps of *Mower* and *Conant* and generally affirm the voters' belief that marijuana for medical purposes must be treated as a "right" rather than a crime.

By Omar Figueroa and Pebbles Trippet

While we wait for the U.S. Supreme Court to rule in the *Raich-Monson* case, California patients and lawyers are watching the courts closely, working together, sharing case law and insights, and interpreting and assessing Prop 215 rulings and resultant protections for patients, doctors and caregivers under state law.

Listed here are medical marijuana cases in which the courts defined elements of the defense and decided procedures and perspectives intrinsic to the law (Health and Safety Code sections 11362.5 and 11362.7).

In each case, the court ruled on at least one new question concerning how a class of medical marijuana cases will be decided. The appellate court rulings are highlighted and key quotes provided.

Not all these landmark cases represent "wins" for the medical marijuana movement, but the two major cases do: *People v Mower* (on patients' rights) and *Conant v Walters* (on doctors' rights). Both *Mower* in state court in August 2002 and *Conant* in federal court in December 2002 were reasonable rulings, favorable to patients and physicians based on classic constitutional principles: privacy, equality and freedom of speech.

There are still issues that remain to be determined by appellate courts, such as proper jury instructions for Prop 215 caregivers and how to apply the "collective, cooperative cultivation" clause of Senate Bill 420.

• ***People v Myron Mower*** (August 2002) California Supreme Court.

Key ruling: on equality of cannabis patients with prescription drug users.

In April '98, in Tuolomne County Superior Court, Myron Mower —a severe diabetic, legally blind— was tried and convicted of felony cultivation. Sheriff's deputies, after raiding his house and ripping out 28 of 31 plants (Tuolomne having decided on a three-plant limit), had found Mower in a hospital, hooked up to a morphine drip, unable to hold down food. "My health was all in that garden," Mower told them. "You guys don't know what you've done to me." Without a lawyer, Mower "confessed" that the plants were for himself and two other sick people —resulting in his conviction and the imposition of a $1,000 fine, plus five years' probation.

At Mower's trial the prosecution only had to show "by a preponderance of the evidence" that his medical-use claim was false. This standard made California patients accused of marijuana violations less than equal under the law, since all other comparable crimes claiming innocence must be proved beyond a reasonable doubt. One of us (Trippet, joined by Tod Mikuriya, MD), filed an amicus brief on the burden-of-proof issue, and attorney Gerald Uelmen raised it in his appeal.

In August 2002, the state Supreme Court reversed Mower's conviction on the grounds that the trial court had incorrectly instructed the jury on the burden-of-proof question. Although Prop 215 doesn't bar arrests, it now entitles those who claim "medical use" to file a pre-prelim motion to dismiss. The Mower court opened the door for early dismissal of charges for medical users wrongly arrested or prosecuted by allowing an additional motion to dismiss prior to or at prelim, similar to a post prelim 995. If the case goes to trial, the burden of proof beyond a reasonable doubt is on the government.

"The possession and cultivation of marijuana is no more criminal... than the possession and acquisition of any prescription drug with a physician's prescription."

Chief Justice Ronald George wrote, "The possession and cultivation of marijuana is no more criminal —so long as its conditions are satisfied— than the possession and acquisition of any prescription drug with a physician's prescription."

And: "Had the jury properly been instructed that defendant was required merely to raise a reasonable doubt about his purposes instead of proving such purposes by a preponderance of the evidence... the jury might have entertained a reasonable doubt in defendant's favor."

This prosecutorial advantage for conviction, facilitated by trial court judges, prevailed for six years after Prop 215 passed. It was created by CALJIC, an advisory board of judges based in Los Angeles, which issues "standard jury instructions" for criminal trials in California. The preponderance standard was then adopted by judges in a majority of Prop 215 trials. As a result, hundreds of patient-defendants were convicted at trial or accepted plea bargains to avoid trials that would not have occurred if prosecutors had to prove a patient's guilt beyond a reasonable doubt, as with people who use prescription medicines.

The burden of proof issue is important because it goes toward whether or not the conviction is valid.

It took the California Supreme Court to end this unfair process. Moderate Chief Justice Ronald George wrote what amounts to a marijuana equality opinion ("no more criminal than" prescription drug users). The perfect remedy for discrimination is equality.

• ***Conant v Walters*** (December 2002) 9th Circuit US Court of Appeals

Key rulings:

1) First Amendment speech protections apply to doctor-patient relationship without regard to conflicting federal law.

2) Physicians may discuss marijuana use with their patients, and authorize its use.

3) Government is enjoined from investigating doctors without "good cause."

Marcus Conant, MD

On December 30, 1996, Drug Czar Barry McCaffrey (John Walters' predecessor) and other federal officials held a press conference at which they threatened to prosecute and punish doctors who approve marijuana use by their patients by revoking their prescription-writing privileges.

On behalf of AIDS specialist Dr. Marcus Conant and other San Francisco Bay Area doctors and patients, the American Civil Liberties Union in January, 1997, brought a civil suit against Drug Czar McCaffrey et al to prevent the threats from being carried out. The suit charged that the federal government had "intruded into the physician-patient relationship, an area traditionally protected from government interference."

In April 1997, federal Judge Fern Smith granted a preliminary injunction "limiting the government's ability to prosecute physicians, revoke their prescription licenses, or bar their participation in Medicare and Medicaid because they recommend medical use of marijuana."

"The First Amendment allows physicians to discuss and advocate medical marijuana..."

In a 43-page opinion Smith wrote, "The First Amendment allows physicians to discuss and advocate medical marijuana, even though use of marijuana itself is illegal... The government's fear that frank dialog between physicians and patients about medical marijuana might foster use does not justify infringing First Amendment freedoms."

A permanent injunction was issued in September, 2000, by federal district Judge William Alsup. It was challenged by the Bush Administration and upheld by the 9th Circuit US Court of Appeal in December 2002. The U.S. Supreme Court chose not to review the 9th Circuit ruling, so the *Conant* injunction will remain the law of the land.

Under the First Amendment, MDs have the right to discuss marijuana with a patient and to recommend its use. Judge Alsup wrote: "The government is permanently enjoined from 1) revoking a... physician's DEA registration merely because the doctor recommends medical marijuana to a patient based on a sincere medical judgment and from 2) initiating any investigation solely on that ground."

• ***People v Baez/Santa Clara*** (April 2000). California Court of Appeal, 6th Appellate District.

Key ruling: Discovery of discriminatory prosecution was granted.

In March '98 San Jose police seized patients' records from the Santa Clara County Cannabis Center (one day after a sympathetic police chief was replaced by a drug warrior). Police contacted doctors listed in the files to discuss their patients' cases. Co-founder Peter Baez was indicted by a grand jury on five felony sales charges (failing to verify some doctors' recommendations) and two grand-theft charges. Baez claimed he was targeted for his involvement in a cannabis dispensary, amounting to a discriminatory prosecution. His attorneys requested internal district attorney memos about the decision to file charges against him. The DA refused to provide.

In May 2000 the DA offered Baez a lenient deal ($100 fine for maintaining a place for marijuana sales) after an appeals court ruled that 1) he had made a credible showing of discriminatory prosecution and 2) the trial court did not abuse its discretion in granting defendant's motion to discover the "district attorney's unconstitutionally discriminatory prosecution."

• ***People v Bianco*** (October 2001). California Court of Appeal, 3d Appellate District.

Key ruling: Probation condition was properly imposed after guilty plea for cultivation.

Defendant Stephen Richard Bianco was a longtime marijuana user convicted of cultivation in Shasta County. He did not possess a valid doctor's approval and pled guilty. The trial court prohibited him from using marijuana while on probation.

An appeals court held that the trial court had discretion to impose conditions of probation based on conviction, prohibiting defendant from using or possessing marijuana without providing an exception for medical use "in the absence of specific language prohibiting the imposition of the type of probation condition at issue here."

• **People v Fisher** (March 2002) California Court of Appeal, 3d Appellate District.

Key ruling: Police cannot call off a warranted search upon showing of

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medical documentation.

After marijuana plants were spotted during a flyover of Stephen Ray Fisher's Siskiyou County property in July 1999, the Sheriff obtained a warrant to search Fisher's house. Fisher showed them his doctor's approval to cultivate. The officers continued the search and found more marijuana plus a cane sword and ammunition, which Fisher, previously convicted of a felony, was not allowed to own. At trial he moved to suppress the evidence on grounds that the search should have been called off (for lack of "probable cause") once he showed his documentation. The court denied the motion and a jury found Fisher guilty of unlawful possession of the sword and ammo (while acquitting him on the marijuana charges).

Fisher's argument on appeal: "Officers, when confronted with defendant's claim that his possession of marijuana was legally justified, should have secured the house, investigated defendant's claim and returned to the court for further instruction... Once officers were shown the certificate, probable cause for the search no longer existed."

The appeals court disagreed, ruling that once deputies have a warrant in hand, there is no discretion to abandon it if the situation is found to be a protected 215 garden. A search warrant is a court order, "not an invitation that officers can choose to accept or reject or ignore; it is an order of the court based on probable cause."

• ***People v Galambos*** (Dec 2002). California Court of Appeal, 3d Appellate District.

1st key ruling: Patients and caregivers' Prop 215 protections are not extended to suppliers.

"You can't in essence legalize milk and outlaw the cow."
—Tony Serra

In July, 1997, Robert Galambos, 32, was arrested in Calaveras County and charged by the DA with cultivation of 382 marijuana plants and possession for sale. Galambos used marijuana to treat headaches caused by a fractured skull, but had not gotten a doctor's approval until after his arrest. At trial in March '99, Tony Serra argued that Galambos was growing for the Oakland Cannabis Buyers Co-op, which he believed was lawful under Prop 215. ("You can't in essence legalize milk and outlaw the cow," said Serra.) The jury found Galambos guilty on the cultivation charge and deadlocked on possession-for-sale. In exchange for the DA not retrying him on the sales charge, Galambos pled guilty to possession of more than an ounce. In June '99 he was sentenced to nine months in jail, five years probation.

The 3d Appellate District court upheld Galambos's conviction. Prop 215's limited immunity protecting a patient or caregiver from prosecution "was not extended to cover cultivation of marijuana for a cooperative" (supplier).

In a strict interpretation of 215's "primary caregiver" clause, there is no category called "provider" to a cannabis club or dispensary. The question is: Can a provider for a club be considered a caregiver under law? A piece of paper authorizing one to be a caregiver/provider for a club does not, in and of itself, make it so.

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Under SB 420, cooperatives and collectives are not considered the same as clubs and dispensaries. Since *Galambos* occurred pre-SB420, it lacks the SB420 perspective, which encourages "collective cooperative cultivation projects" as viable patient/caregiver models.

It can be argued that a co-op or collective binds each patient to the caregiver, based on actual caregiving, not buying and selling. Providers to clubs with hundreds, even thousands of patients unknown to the provider, show a different level of caregiving involvement than a caregiver, one on one, with a patient.

This distinction between clubs/dispensaries (Peron model) and co-ops/collectives (SB420 and WAMM models) is significant since collectives are codified as legal in the text of SB420 (and serve as the example in *Santa Cruz v Ashcroft*) but clubs were ruled illegal by the US Supreme Court in *US v Oakland Cannabis Buyers Cooperative* (2001). The OCBC court unanimously ruled that clubs have no third party medical necessity exemption to the Controlled Substances Act, but did not rule on California's Prop 215, since clubs' interests, not patients' rights, was at issue.

Second key ruling: Medical necessity defense was denied as having requirements inconsistent with Prop 215.

A necessity defense requires an emergency situation (such as dying or going blind without cannabis) and proof of illness based on multiple criteria, whereas Prop 215 merely requires a doctor's authorization without further proof of illness and without it having to rise to the level of emergency.

Third key ruling: Hearing to determine defenses is procedurally appropriate.

"The trial court did not abuse its discretion when it held a preliminary (402) hearing to determine the admissibility of defendant's proposed defenses."

• ***People v Fishbain/White*** (April 2003), California Court of Appeal, 1st Appellate District.

Key rulings:

1)CHP officer "unreasonably and unlawfully" stopped and searched defendant's vehicle, violating his 4th and 14th Amendment rights.

2) A single license plate and hanging air-freshener are not traffic violations and not the basis for a stop.

3)The appeals court ruled the trial court erred in denying defendants' motion to suppress and reversed.

4)Pretext stops are unconstitutional (ending hippie profiling, as with racial profiling).

On January 31, 1999, Jason Fishbain, Chris White and Veronica Quatse were traveling on Highway 101 in Humboldt County, taking medicinal marijuana to a patient in the Bay Area, when they were stopped on the basis of having a single Arizona license plate (which is legal in Arizona) and a hanging air-freshener. The officer who made the stop cruised behind, in front of and alongside Fishbain and company for about five miles. His investigation following the stop discovered five pounds of marijuana and thousands of dollars in cash. Defendants were detained and arrested and their medicine confiscated.

Fishbain's trial resulted in a hung jury, but White was convicted of transportation and sentenced to four years prison. The DA refiled against Fishbain. The jury hung again, and the DA refiled again. Fishbain then pled to a lesser charge ("maintaining a vehicle"), preserving his Prop 215 rights and appeal rights.

Fishbain's appeal claimed he had been stopped on a pretext —that the plate and air-freshener were not traffic violations. The actual reason was the stereotypically hippie appearance of his dreadlocked passengers (also known as "DWH, " "driving while hip," or "driving with hair").

Hippie profiling, like racial profiling, was found to be unconstitutional.

With the Fishbain decision the court ruled that there was no legal justification for the stop. Hippie profiling, like racial profiling, was found to be unconstitutional.

Fishbain has filed a civil rights lawsuit against the CHP officer who made the bad stop. It came out in the answer from the defense that the same CHP officer had made 90 similar stops for air-fresheners over the course of his career and had never been challenged. Fishbain has created a website:

Stophippieprofiling.org.

• ***People v Jones*** (Sept 2003). California Court of Appeals, 3d Appellate District.

Key rulings:

A physician's approval is different than a recommendation, though both are legal.

A patient's testimony regarding the approval need not be verified by the doctor.

William Jones was charged with cultivation in Sacramento County. At a pretrial hearing he testified that he'd asked his physician about treating migraine headaches with marijuana and been told, "It might help, go ahead." The doctor, Walter Morgan, testified that he didn't recall giving verbal approval, but didn't deny it unequivocally. Dr. Morgan also admitted being afraid of legal repercussions had he issued an approval.

The trial court would not allow a Prop 215 defense because there was "nothing to indicate that the doctor approved..."

The appeals court, citing *Mower,* concluded that Jones' testimony at the pretrial hearing was sufficient to raise a reasonable doubt that he had a doctor's approval and reversed his conviction. "A physician could approve of a patient's suggested use of marijuana without ever recommending its use."

• ***People v Tilehkooh*** (Dec 2003), California Court of Appeal, 3d Appellate District.

1st key ruling: Probation of a bona fide Prop 215 patient cannot be revoked.

Darius Tilehkooh informed his Mono County probation officer in February 2000 that he would test positive for marijuana but that he had a written recommendation from Marian Fry, MD. He did test positive, the P.O. moved to revoke him and conducted an apartment search that turned up less than an ounce of marijuana. Another search in March reaped another small quantity. At a consolidated trial, the same evidence supported the possession charge and the probation violation.

Tilehkooh was found guilty of misdemeanor marijuana possession and his probation was revoked. He appealed his conviction and probation revocation. The DA argued that Prop 215 (H&S 11362.5) is not a defense to a revocation.

The appeals court ruled that the probationary status of a qualified patient cannot be revoked, based on clear language in the statute that those qualified to use marijuana for medical purposes "shall not be subject to prosecution or sanction."

"A rehabilitative purpose is not served when the probation condition proscribes the lawful use of marijuana for medical purposes any more than it is served by (proscribing) the lawful use of a prescription drug."

2d key ruling: Medical-use defense cannot be denied.

The trial court ruled that Prop 215 (H&S 11362.5) did not apply because Tilehkooh could not qualify for a medical necessity defense. The appeals court disagreed "because that defense is not the measure of the right to obtain and use marijuana for medical purposes."

Tilehkooh's underlying possession conviction was reversed by the appeals court, which determined that in probation revocation hearings, based on Tilehkooh's legal possession, his due process rights were violated by the trial court's refusal to allow him to present a medical-use defense.

3d key ruling : Serious illness does not have to be proven to the jury.

In denying Tilehkooh a medical-use defense the trial court deemed that he was not "seriously ill" as required by Section 11362.5. The appeals court ruled, "Section 11362.5 applies to any illness for which marijuana provides relief." To meet the requirements, a defendant need only show that she or he is a patient or caregiver, that the marijuana cultivated or possessed was "for the personal medical purposes of a patient" on the "recommendation or approval of a physician."

Senate Bill 420 (January 2004) Codified as H&S 11362.7. (ID card program funding and implementation delayed; now set to begin summer 2005.)

Key Provisions:

1) Voluntary state ID card program protects Proposition 215 patients.

2) Grants statutory exemptions to specified marijuana offenses.

3) Defines exemptions based on legal rights to possess/cultivate/obtain/use/transport/deliver marijuana for medical purposes.

4) "Collective, cooperative cultivation" is the legal model to follow.

5) Physician and/or county can approve additional quantity of medicine above current threshold of 6 mature/+12 immature plants/+8 ounces.

6) Attorney General can raise limits allowed above current threshold.

• ***People v Carolyn Konow*** (April 2004). California Supreme Court (from 4th Appellate District).

Key ruling: A judge can dismiss a medical marijuana case "in the interests of justice."

In 1998 Carolyn Ko-now and her son, Steve Rohr, opened a dispensary, the California Alternative Medicinal Center,

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in San Diego. Undercover police were unable to buy marijuana from the CAMC until they hired a former employee, who made three unauthorized purchases (totaling an ounce). Konow, Rohr, and two employees were arrested and charged with unlawful possession and sales.

The charges were initially dismissed by San Diego Superior court Judge William Mudd, who said Konow and her staff had done everything possible to comply with Prop 215, but ambiguities in the law had put them in an "untenable position. " Mudd suggested that prosecutors should clarify the law in the civil courts.

Supervising Judge Howard Shore then ruled that Mudd had abused his discretion in dismissing charges and ordered him to hold a preliminary hearing to evaluate the evidence. Shore said that marijuana sales are illegal under Prop. 215, and he faulted Konow for not having cleared her plans with the District Attorney. (She had notified the city attorney and Attorney General.)

Mudd deemed the evidence sufficient and ordered a trial, telling Konow's lawyers that he'd been directed by Shore not to dismiss the charges.

In January 2003 another judge, Michael Wellington, ruled that Mudd did indeed have the right to dismiss the case -and dismissed it himself.

The prosecution appealed and Supreme Court Chief Justice Ronald George, in his 2d positive medical marijuana ruling in two years, wrote that Wellington correctly concluded that Konow et al had been denied a legal right.

"The magistrate denied defendants a substantial right by erroneously and prejudicially failing to consider whether to dismiss the complaint in furtherance of justice under PC1385... the superior court judge who ordered reinstatement of the complaint had no authority to preclude the magistrate from ordering dismissal... As the magistrate had clearly indicated a desire to order dismissal of the complaint, his error was prejudicial."

Since a 1385 motion to dismiss may be made only by a judge sua sponte or by a prosecutor, the defense can only "invite" the court to dismiss under 1385.

• ***Bearman v Superior Court of Los Angeles*** (May 2004). California Court of Appeal, 2d District.

Key rulings:

1) Doctors can't be compelled to disclose patients' medical records.

2) Medical Board failed to show "good cause."

3) Subpoena was over-broad.

4) Patient did not voluntarily waive his right of privacy.

David Bearman, MD, 63, was one of very few Southern California doctors willing to approve cannabis use by patients following the passage of Prop 215.

In April 2001 Bearman's patient, N., a 21-year old migraine sufferer (who also had been diagnosed with depression and ADD), showed his letter of approval to Forest Ranger James Just, who sent a copy of it to the medical board with questions about its legality and Bearman's ethics.

The Board —which investigates about 2,000 of the 12,000 complaints it receives annually— decided to determine whether Bearman had been guilty of "gross negligence... incompetence, or... dishonesty or corruption" in his treatment of N.

CAROLYN KONOW AND JEFF JONES were observers at a 1999 meeting of the task force convened by Attorney General Bill Lockyer to draft legislation that would "clarify" Prop 215. Konow introduced herself at the meeting as proprietor of a San Diego cannabis dispensary — leading directly to its investigation and eventual closure by law enforcement.

N. would not authorize the release of the records and Bearman refused to provide them. The Board then subpoenaed the records. Bearman refused to comply. A Superior Court judge in L.A. upheld the subpoena and gave Bearman a month to appeal.

The appeals court from the 2d Appellate District issued an interim ruling to quash the subpoena unless the Medical Board submitted another brief, which it did, followed by oral arguments.

In April '04 the appeals court ordered the trial court to vacate the petition compelling the doctor's compliance and issue a new order denying the petition. The court concluded that the medical board's evidence was insufficient to show 'good cause' to invade the patient's right of privacy in his medical records.

"When the Medical Board seeks judicial enforcement of a subpoena for a physician's medical records, it cannot delve into an area of reasonably expected privacy simply because it wants assurance the law is not violated or a doctor is not negligent in treatment of his or her patient. Instead, the Medical Board must demonstrate through competent evidence that the particular records it seeks are relevant and material to its inquiry... This requirement is founded in the patient's right of privacy guaranteed by Article I of the California constitution, which the physician may, and in some cases must, assert on behalf of the patient...

"By passing this law, the voters intended to facilitate the medical use of marijuana for the seriously ill. This purpose would ...be defeated if, as a condition of exercising the right granted... a person waived his or her right of privacy simply by producing a physician's written recommendation. Interpreting section 11362.5 as necessitating the waiver of a fundamental right in order to enjoy its protection would, we believe, hinder rather than facilitate the voters' intent."

• *People v Spark* (Aug 2004). California Court of Appeal, 5th Appellate District.

1st key ruling: Proof that Prop 215 patients are seriously ill is not a jury issue.

In October 2001 Kern County sheriff's deputies confiscated three marijuana plants from the yard behind Zelma Spark's trailer home. It belonged to her son, Noel Spark, who had an approval from William Eidelman, MD, to use cannabis to treat back pain. San Bernardino police launched an undercover investigation of Eidelman. Two detectives obtained recommendations without even feigning medical problems. Spark sought and got an approval from David Bearman, MD. Both doctors would testify that Spark was a bona fide patient.

The trial judge instructed the jury that a Prop 215 defense is available only to "seriously ill" defendants. The appeals court ruled that legitimate patients do not have to prove to the jury that they are "seriously ill" to qualify as patients deserving of protection. This assures that doctors -not police or jurors- are the gatekeepers of medical cannabis access, as it should be.

2d key ruling: A legitimate patient's probation cannot be revoked merely because federal law does not agree.

The court has no discretion to disregard Prop 215 just because it conflicts with federal law. Federal law has no independent jurisdiction. One cannot prosecute federal crimes in state court.

• ***People v Wright*** (August 2004). California Court of Appeal, 4th Appellate District.

Supreme Court review granted; not citable as precedent. Opening brief: 1/31/05.

Key ruling: Medical-use defense applies to transportation charges when defendant is asserting it as a defense to companion charges (possession or cultivation).

In September, 2001, Shaun Eric Wright was arrested in a Huntington Beach carwash on a tip that there was marijuana in his truck. Police found a total of 19 ounces wrapped in eight baggies, plus a scale. He was charged with possession for sale and illegal transportation. Wright testified he'd used marijuana since 1991 to treat pain, stress, nausea, and lack of appetite; and that he ate rather than smoked it, requiring a pound every two or three months. Dr. William Eidelman, who issued his approval, gave confirmatory testimony. Midway through trial the judge ruled that Wright was not entitled to a medical-use defense to the transportation and possession for sale charges.

The court of appeal reversed Wright's marijuana transportation and possession for sale convictions, saying he did not get a fair trial because the court precluded him from using a medical-use defense, which he was entitled to based on the lesser-included companion charge of possession (H&S11357), an explicit medical exemption.

"Wright contends that reversal is compelled by virtue of the court's exclusion of the compassionate use defense. We agree...In determining that the CUA was, as a matter of law, inapplicable to this case, we believe the trial court prejudicially infringed Wright's constitutional entitlement to present a defense."

Transportation of legal medicine was defined by the court of appeals in *People v Trippet (1997)*, saying defendant must have the "implicit right" to transport or carry with her medicine she can legally possess.

The issue before the court in *People v Young (2001)* was whether or not the Compassionate Use Act could be used as a defense in transportation cases. The *Young* court said a defense to transportation in a vehicle is not allowed by Prop 215, only the exemptions specified in the law, i.e., possession (11357) and cultivation (11358), not transportation (11360).

Transportation thus became a disputed issue between two conflicting courts of appeal. But *Young* is now moot, since the *Trippet* interpretation of transportation as a defense and a right was codified into law in a package of protections in Senate Bill 420, i.e., the right to obtain, use, possess, cultivate, transport and deliver marijuana for medical purposes.

Wright is under review by the same court that gave patients a unanimously favorable decision in *Mower*. They can be expected to not violate their own equality principle, i.e., that people who use marijuana for medical purposes are "no more criminal than" people who use prescription medicines and must be treated the same. If that is the case, the state Supreme Court will clarify the meaning of transportation for medical purposes: that cannabis patients must be allowed to legally possess their medicine while traveling, as is the case with any prescription medicine.

The *Wright* ruling will affect the California Highway Patrol's sweeping public policy to confiscate any and all marijuana they encounter being transported, without regard to a person's legal medicinal status.

In deciding to review this case, the Supreme Court may be motivated in part by the CHP's unconstitutional confiscation contradiction.

The CHP justifies its policy —which contradicts Senate Bill 420— on the grounds that the ID card program created by SB420 has not yet been officially implemented. (See story on page 32.)

In light of the Supreme Court's soon-to-be-issued *Wright* ruling and a civil rights lawsuit on 2/15/05 by Americans for Safe Access and seven cannabis patients against the CHP for violations of constitutional rights, A.G. Bill Lockyer, at a USF Law School seminar in February, all but conceded a settlement of the issue would be "in everybody's best interest." His public persona of "medical marijuana compassionate use advocate" conflicts with representing the CHP, defending its confiscation-of-medicine policy.

Lockyer is likely to change the confiscation policy his office oversees before being ordered to do so by the *Wright* court, so as not to appear to be resisting Prop 215 implementation.

• *People v Chavez* (Sept 2004). California Court of Appeal, 4th Appellate District.

Key ruling: Return of property is not required since there is no clause in the law requiring it.

Marvin Chavez, who suffers from a degenerative spine disorder for which cannabis provides relief, is a martyr of the medical marijuana movement. In 1998 Chavez who had co-founded a cannabis co-op in Garden Grove, was arrested for selling cannabis to an undercover police officer with a faked doctor's letter. Chavez was prohibited from using a Prop 215 defense and convicted. He served 15 months in prison (Susanville), then was released on OR pending an appeal of his conviction.

During this interlude he cultivated 12 plants for personal medical use, only to have it confiscated by Santa Ana police. Chavez's appeal was denied; he was ordered back to prison (18 months in

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Vacaville, where he was struck by the large numbers of inmates stupefied daily by legal downers). When he got out on parole, Chavez sued Santa Ana for return of his plants. The appeals court ruled that the court has no authority to order return of property (marijuana) if there is no clause in the law specifically authorizing it.

This interpretation flies in the face of the language of the statute: that one "may possess" marijuana for medical purposes, therefore it cannot be considered contraband, cannot be legally confiscated and must be returned as legitimate property if erroneously seized.

The opposite presumption is true for retroactivity, which is generally presumed applicable *(People v Trippet)*, unless there is a clause in the law to the contrary.

The discrepancy between the presumptions for retroactivity (you are entitled to it) and return of property (you are not entitled to it) indicate appellate level courts' continuing resistance to making a principled ruling on confiscations of property, a key to the "drug war." Confiscations keep prosecution wheels turning. Without confiscations, they have no evidence. Without evidence, they have no case. If confiscations of property were not allowed to go on, if illegal searches and seizures of cannabis medicines were stopped with a court injunction, the prosecution side of the story would virtually end.

US v Giacque is a federal case that somewhat offsets the negative *Chavez* ruling. Giacque's wife was found entitled to the return of Giacque's property -confiscated marijuana used for bona fide medical purposes.)

• ***People v Arbacauskas*** (Nov 2004). California Court of Appeal, 4th Appellate District. (Depublished; not citable as precedent.)

Key ruling: Prosecutor may not reinstate complaint after dismissal by court.

In September, 2002, a Sacramento County narcotics officer confiscated from Timothy Arbacauskas' residence 17 backyard and 12 small indoor plants, plus a scale, cell phone and 8 plastic baggies. Arbacauskas was charged with intent to sell. He testified at prelim that he intended the crop for his personal use. He had a documented history of severe back problems, plus a doctor's approval (from Marian Fry). His previous attempt to cultivate had yielded disappointingly small quantities. Expert witness Chris Conrad explained how a novice grower might get an unexpectedly large yield (between 10.6 and 15.9 pounds). The magistrate concluded that there wasn't enough evidence to try Arbacauskas.

The DA made a motion to reinstate the complaint, which was denied, then appealed the denial. The prosecutor contended there was reasonable cause to challenge defendant's personal-use claim, and the magistrate had made no finding of facts contradicting the intent-to-sell charge.

The appeals court denied the motion to reinstate the complaint.

Commentary: Cannabis patients and doctors are winning in state and federal courts more often than not. Two-thirds of the cases cited above got favorable constitutional and/or Prop 215 rulings. A single favorable decision positively influences all subsequent decisions.

The *Raich* decision allowing individual patients to grow for themselves led to the *Santa Cruz WAMM* decision allowing individual patients to grow collectively. Dr. Conant's right to constitutionally protected speech (to discuss and authorize marijuana for medical purposes) was affirmed in federal court, followed by Dr. Bearman's victory in state court based on California's constitutionally protected privacy rights.

Virtually any well-argued challenge to improper implementation of Prop 215 or constitutional challenge to the federal marijuana laws stands a good chance of prevailing in appellate-level courts, both state and federal. Notwithstanding the Supreme Court's ruling in Raich, we expect state and federal courts to follow in the footsteps of *Mower* and *Conant* and generally affirm the voters' belief that marijuana for medical purposes must be treated as a "right" rather than a crime.

Defense attorney Omar Figueroa, cannabis law specialist and frequent speaker on behalf of Prop 215 patients' rights, considers it his job to "keep innocent people out of cages." He can be reached at Pier 5 Law Office, 506 Broadway, San Francisco, 415-215-0469, omar@aya.yale.edu.

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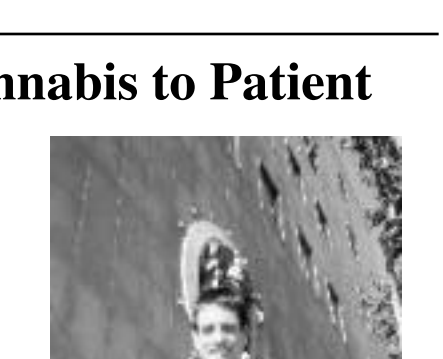

Dispensary limits *from page 1*

Beach imposed a moratorium on medical dispensaries even though there had been no applications. The city attorney said she was awaiting "guidance from the courts."

If the Supreme Court rules against Raich, more communities are apt to close the door to dispensaries. Some observers foresee a federal crackdown in that event.

Regardless of the court's decision, however, the fact remains that over-the-counter sale of marijuana to Prop 215 patients remains illegal under state law. Under SB420, only legally designated "primary caregivers" may receive money for their services, and then not for profit. Those dispensaries that do operate in California do so purely on tolerance of local authorities.

Apparent Confusion

Many cities and counties remain confused about the law. Some assume incorrectly that they are obliged to accomodate dispensaries, while others feel free to ban them entirely. Others have failed to recognize the distinction between dispensaries, which sell medical cannabis on a retail basis, and cooperatives or collective gardens, in which patients share the crop amongst themselves. While the former are not authorized by state law, the latter are explicitly encouraged under SB 420.

This has become an issue in the city of **Fresno,** which passed an ordinance prohibiting medical marijuana facilities that serve more than two patients. Fresno resident James Mitchell, who grows for two dozen fellow patients, has objected that the ordinance should not apply to his activities, since he is operating a collective garden. The council is working on another ordinance to regulate where medical marijuana can be grown in the city.

The city of **Clovis** also passed a two-patient limit on cannabis providers.

In mid-December **Fresno County** banned dispensaries in unincorporated areas and passed an ordinance limiting sales to two patients.

Ukiah residents have complained about the skunky odor emanating from the city's many marijuana gardens

In cannabis-friendly **Mendocino County,** some residents of **Ukiah** have complained about the skunky odor emanating from the city's many marijuana gardens and police have noted a spate of marijuana-related thefts and robberies. Addressing the issue as a nuisance, the city is considering an ordinance to limit the number of outdoor plants patients can grow to three. Willits is considering a similar ordinance.

SB 420 Implementation

In the absence of state IDs, many law enforcement officials are citing legal patients even when they present valid physician's recommendations. In particular, the California Highway Patrol has an official policy of citing and and confiscating marijuana from everyone with marijuana, no matter how well his or her patient status is documented. Patients must then go to court to recover their medicine and have the citation dismissed.

One of the CHP's victims was Greg Ainsworth, a non-driving paraplegic who was cited while sitting in his wheelchair alongside the road outside a stalled vehicle on I-5 near Los Banos. A patrolman smelled marijuana and cited him for less than one ounce despite his Oakland ID card. Ainsworth had to make a140-mile round trip to court to reclaim his medicine.

The CHP explained that they ignore Prop 215 since there is no SB 420 card program. This policy has been confirmed in official CHP documents posted by Prop 215 defendant Jason Fishbain at www.stophippieprofiling.org

California NORML attorneys charge that the CHP policy is unconstitutional since it subjects patients to citation and seizure without probable cause. A lawsuit to challenge the CHP's policy was filed by Cal NORML and Americans for Safe Access in mid-February.

The CHP has also been citing patients under Vehicle Code 23222 for misdemeanor possession of less than one ounce of marijuana in a vehicle while driving. Due to an apparent oversight in drafting SB420 doesn't include VC 23222 in the list of offenses for which patients are protected from arrest, even though felony transportation of more than one ounce (Health and Safety Code 11360) is included. Ironically, therefore, SB 420 appears to protect patients who drive with more, but not less than one ounce in their vehicle. Attorneys believe that this inconsistency is vulnerable to court challenge. California NORML is looking for test cases to establish that patients should be protected from citation for VC2322.

SFPD Returns Cannabis to Patient

In a 2001 case involving a patient named Babu Lal, the San Francisco Police Department articulated a policy of not returning marijuana to patients, even if it had been confiscated illegally.

"Federal law supercedes state law," explained the head of the narcotics squad, citing the Supreme Court ruling in the Oakland CBC case "I can't order my officers to commit a crime. It would be illegal under federal law for us to physically hand over somebody's marijuana. It doesn't matter if he's a bona fide patient..."

The policy remained in place until Friday, Oct. 29, 2004, when SFPD Lt. Ed Martinez handed over to Joseph Heid, 44, a bona fide patient, four ziplock bags containing a total of about 20 grams of marijuana —a two-weeks' supply Heid had purchased (along with some edibles that were not returned) at a local dispensary on the afternoon of July 7.

Heid's medicine had been confiscated by the Highway Patrol that evening after he was stopped for driving erratically on US 101. Heid doesn't fault the CHP for stopping him. He acknowledges being in a hurry, changing lanes abruptly, and maneuvering his 1999 GMC suburban in a way that could be

Joe Heid with his haul of Justice, 10/29/04. Photo by Omar Figueroa.

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