Federal Judge Denies Government Motion to Dismiss

Denney v. DEA Heading for Trial

The government claims it wasn't investigating when, in fact, agents didn't find anything incriminating.

By O'Shaughnessy's News Service

U.S. District Judge Lawrence K. Karlton has denied the Drug Enforcement Administration's motion to dismiss a civil suit brought by Philip A. Denney, MD. The case will be tried in October, 2008, in Sacramento. Denney, who succeeded Tod Mikuriya as president of the Society of Cannabis Clinicians, is seeking to enjoin government agents from snooping on doctors.

In the Fall of 2005, as part of an investigation run by the DEA, an informant controlled by the Redding Police Department and an agent from the Alcohol, Tobacco and Firearms Bureau named Steven Decker visited Denney's Redding office feigning ailments and seeking approval to medicate with marijuana. Their sole motive, the DEA contends, was to gain admittance to Dixon Herbs, a nearby dispensary that was under investigation.

The visits to Denney were described in great detail in two "Investigative Narratives" that a concerned citizen sent to the doctor, leading to his suit.

Denney contends that the agents' visits have inhibited his ability to discuss marijuana use with patients in violation of the Conant *injunction.*

Whether or not he was the focus of their investigation, Denney contends, the agents' visits have inhibited his ability to discuss marijuana use with patients. The First Amendment right of doctors to do so was upheld in a case called *Conant v. Walter* by two federal judges and ultimately by the 9th Circuit Court of Appeal. Denney's suit charges that the DEA violated the *Conant* injunction.

Denney's attorney Zenia Gilg must show that the investigators were motivated by "retaliatory animus" in choosing to visit Denney's office.

The facts of the case are set forth in a 36-page order that Karlton issued Aug. 14. Here are excerpts:

"Plaintiff Philip Denney is a physician who has been licensed to practice medicine in the state of California since 1977. Since graduating from medical school at the University of Southern California, he has practiced Family, Emergency, and Occupational Medicine. He has never been disciplined by the state medical board, nor has he had his hospital privileges revoked, suspended, or restricted...

"Dr. Denney is an outspoken proponent of medical marijuana. He has been qualified to testify as an expert witness regarding the use of cannabis in at least 17 counties... has testified before the California Medical Board regarding medicinal cannabis, and is a founding member of the Society of Cannabis Clinicians."

Karlton recounts that Dixon Herbs had twice turned away undercover operatives who lacked doctors' recommendations. On Sept. 21, 2005 a "Confidential Source" (CS) was sent to Denney's office. "The receptionist asked for his/her medical records, which the CS reported were unavailable because he/she had recently moved from Mississippi and that the records had been destroyed in Hurricane Katrina. The receptionist went out of the office and, it is claimed, looked at the CS's vehicle to confirm that it had Mississippi license plates, which it did.

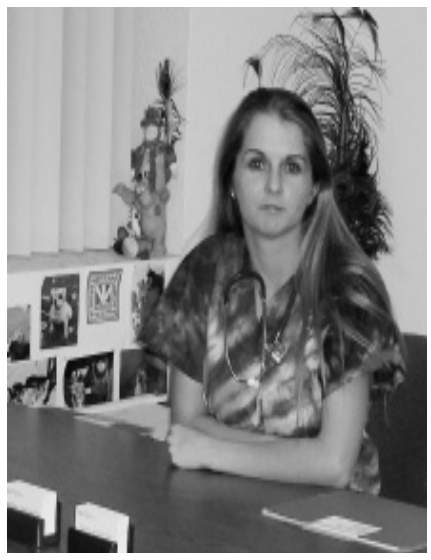
"Thereafter, Dr. Denney examined the CS, whose chief complaint was a pinched sciatic nerve that caused chronic pain. Dr. Denney asked if he/she attempted other mainstream prescription medications, and was told that he/she did, but that these medications caused stomach problems. Plaintiff then indicated that the CS was a candidate for the medical use of marijuana and explained that it was to be used only as recommended, not as a recreational drug. He then gave the CS a written recommendation.

"While the CS was inside, an investigator surveilled the office from the street. Although fitting the CS with a covert transmitter or monitoring device had apparently been considered, the investigators decided against it because the transaction was to take place within a doctor's office. Before the CS entered the office, the investigators checked him for contraband and money and established a prearranged meeting point where they were to meet after he left plaintiff's office...

"On November 9, 2005, defendants DEA Agent Dennis Hale, ATF Agent Steven Decker, and Redding Police Officers Tracy Miller and Eric Wallace conducted a briefing regarding the procurement of a medical marijuana recommendation from plaintiff. Agent Decker was chosen to procure the marijuana recommendation and use it at Dixon Herbs because he was the only conveniently available agent with an appropriate undercover identity. The investigators then approached plaintiff's office and surveilled it while Agent Decker was inside.

"Using a false driver's license, Agent Decker told plaintiff's receptionist that his name was Steven Hoffmaster. When asked for prior medical records, he stated that he had been to a hospital in Santa Clara but could not recall which one. The receptionist called several hospitals in Santa Clara but found no record of a Steven Hoffmaster. Agent Decker was told that the examination could proceed while the receptionist tried to locate his prior medical records.

"During the examination, Agent Decker told Dr. Denney that he had been in a motorcycle accident, which caused him to have daily pain in his neck. Agent Decker then showed plaintiff a scar on his neck, the product of the alleged motorcycle accident. After the examination, Dr. Denney provided a written recommendation to Agent Decker approving the use of medical marijuana....



Receptionist Amanda Peri attempted to confirm government agents' false information, but the lies were constructed craftily enough to be irrefutable. At least they can do *something* well.

photo by Denyse Podva

"The crux of plaintiff's argument that the injunction against investigations of physicians would hamper law enforcement efforts. 'Because a doctor's recommendation does not itself constitute illegal conduct, the portion of the injunction barring investigations solely on that basis does not interfere with the federal government's ability to enforce its laws.' Furthermore, the *Conant* injunction does not bar investigations where the government has a good faith belief that it has substantial evidence of criminal conduct.

"Although *Conant* arose against the backdrop of a federal policy of revoking the drug prescription licenses of doctors who recommend marijuana, its holding, contrary to the federal defendants' portrayal, is not limited to license revocation. Rather, the district court also forbade any investigation of a doctor solely on the basis that he or she recommended medical marijuana. In other words, an investigation motivated by disagreement with the doctor's speech, even if not directly connected to the ultimate objective of license revocation, is nevertheless barred by the *Conant* injunction.

What Denney Needs to Prove

Denney must overcome three hurdles, according to Karlton:

"In order to prove a retaliatory claim, plaintiff must demonstrate that (1) defendants possessed an impermissible motive to interfere with this First Amendment rights, (2) that defendants' conduct would chill a physician of ordinary firmness from future First Amendment activities, and (3) that the defendants would not have engaged in the conduct in question but for the retaliatory motive..."

The second hurdle is very low. Doctors tend to be conservative and a "physician of ordinary firmness" [no jokes, please] would not do anything he or she thinks might displease the DEA.

PARKING AREA outside the Redding office of Denney and Sullivan, from whence the stake-outs were conducted.

The other two hurdles seem not only high but unfair from the victim's perspective. What's motive got to do with it? If a hit man shoots the wrong person by mistake, what does it matter to the victim that he wasn't the intended target? The DEA asserted in its motion to dismiss and will argue at trial that the surreptitious visits to Dr. Denney were incidental to the investigation of Dixon Herbs and that no animus motivated them. But to Denney, the realization that he'd been misled by government agents was extremely upsetting regardless of the agents' motives. After learning of the visits, his complaint states, he became more suspicious of his patients and less open in discussing marijuana use with them.

Certainly in lying to Denney in order to get a desired diagnosis the agents showed disrespect for him personally and as a doctor. That disrespect, Denney argues, reflected their retaliatory animus and disregard for his rights under the First Amendment.

What if the receptionist had not asked for the (fake) patients' records and tried diligently to obtain them?

And what if Denney and his staff had not demonstrated good practice standards? What if the receptionist, Amanda Peri, had not asked for the (fake) patients' records and tried diligently to obtain them? What if she had accepted the agent's cover story with a wink and a nod instead of confirming the out-of-state plates? What if a flyer advertising Dixon Herbs had been observed in Denney's waiting room? What if Dr. Denney had told the agents who were pretending to be in pain, "There's a dispensary in town called Dixon Herbs" and provided the address? Wouldn't the investigation then have included his practice? The DEA claims they weren't investigating when in fact their snoops didn't observe anything incriminating.

One of the arguments attorney Zenia Gilg made on Denney's behalf —and which Karlton did not reject— involves "equal protection under the law." Gilg charged that physicians as a class got better treatment from law enforcement than the class of physicians who openly advocate the use of cannabis.

Perhaps Gilg can call a mathematician to explain that Denney's medical practice and the Dixon Herbs dispensary are, from the DEA's perspective, in the same set —businesses that facilitate access to marijuana for medical use. The DEA has a retaliatory animus towards the whole set, as proven by policy statements defining marijuana as a dangerous drug with no medical use whatsoever.

Karlton's order continues:

"Defendants maintain that the purpose of the undercover visits was not to investigate plaintiff, but merely to obtain written marijuana recommendations so that they could buy marijuana at Dixon Herbs and make a criminal case against Ron Dixon. As support, they note that a Redding Police Department CI who had previously attempted to enter Dixon Herbs without a recommendation was barred from doing so. Furthermore, the DEA CS only went to plaintiff's office

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after being first turned away from Dixon Herbs and then referred to plaintiff's office.

"In response, plaintiff argues that the visits to his office bore all the traditional hallmarks of an investigation. For example, plaintiff notes that when the CI was in the medical office, an agent was outside conducting surveillance. Furthermore, although a covert transmitter and monitoring device was not used, it was at least considered. Additionally, the CI was searched before and after the office visit, the police report described the incident as a 'controlled buy of a marijuana prescription,' and recorded funds were used.

"While there may have been other reasons for the defendants' meticulous care in procuring a marijuana recommendation from plaintiff and preserving an ostensible chain of custody, there is at least a genuine dispute that defendants were investigating plaintiff. This is true in spite of the declaration of Dennis Hale, the federal case agent, which states that there has been no investigation of plaintiff. The intent to inhibit speech, like the existence of a conspiracy, can be demonstrated here through direct or circumstantial evidence, and here, the circumstances at least permit the inference that plaintiff was under investigation for his speech concerning medical marijuana...

"This remains a factual dispute even if, as the federal defendants argue, they had not heard of Dr. Denney until a man at Dixon Herbs referred the CS to plaintiff's office. Although under such circumstances it appears fairly clear that Dr. Denney was not the target of the investigation when it began, this does not foreclose the possibility that the investigation expanded to include him once the CS was referred by Dixon Herbs to plaintiff's office. What matters for purposes of making out a First Amendment violation is that the officials possessed a retaliatory animus at the time the CS and undercover agent visited plaintiff's office...

"Plaintiff has identified the specific defendants allegedly involved, the nature and time of the alleged investigative activities (sending a CS on Sept. 21, 2005 and an undercover agent on Nov. 9, 2005) and the manner in which plaintiff was affected. This is a sufficient factual allegation from which a fact-finder could infer the existence of a conspiracy.

"Second, defendants argue that plaintiff has not proven that a physician of ordinary firmness would be deterred from speaking about medical marijuana in light of two undercover visits. Defendants assert that 'the physician has nothing to fear so long as the physician is... not running a script mill but engaging in the practice of medicine.'

"This turns the holding of *Conant* on its head. Defendants' argument, if carried to its logical conclusion, would mean that the injunction in *Conant* was unnecessary. Because a physician's recommendation of medical marijuana to a patient is not illegal, they should also have nothing to fear from an investigation. The problem, however, is that a physician of ordinary firmness who was only engaging in lawful speech concerning medical marijuana could, in fact, be chilled by a federal investigation.

"As Judge Kozinski noted in his concurrence in *Conant,* 'Physicians are particularly easily deterred by the threat of governmental investigation and/or sanction from engaging in conduct that is entirely lawful and medically appropriate,' in part because an investigation may harm a physician's reputation. Here, the question of whether or not a physician of ordinary firmness would be chilled by two undercover visits is, at the least, an issue on which reasonable minds could disagree.

"Third, defendants argue that the element of causation is lacking. Plaintiff must plead and prove that the challenged investigative activities would not have been undertaken but for the defendants' retaliatory animus... Defendants maintain that they would have sent the undercover visitors to plaintiff's office even without the alleged retaliatory motive... Defendants argue that there is no chain of causation to connect the alleged unconstitutional motive with the undercover visits.

"Plaintiff responds that there were other methods of investigation available that would not have abridged plaintiff's First Amendment rights. For example, plaintiff maintains that defendants could have forged a medical marijuana recommendation, just as law enforcement creates false identity documents for undercover agents. Alternately, plaintiff suggests that law enforcement could have openly enlisted plaintiff's assistance without fraud or deception."

Karlton questioned the efficacy of these options. A forged recommendation, he noted, "could be exposed by a confirmation phone call to Dr. Denney's office," And asking for Denney's help "might have compromised the secrecy of the investigation."

Still, Karlton went on, Denney has a right to "develop an evidentiary basis to support his claim." In other words, he has a right to depose the agents and read their files relevant to their visiting his office.

The "Very Interesting" Depositions

Denney's attorney Zenia Gilg says that sending undercover agents to Denney's office was "never necessary in the first place," given that Dixon Herbs advertised in a local newspaper and online. "The business license, which they got in May 2005, basically says 'We're a medical marijuana dispensary,'" says Gilg.

In October, 2007, Gilg deposed the law enforcement agents who planned and supervised the undercover visits to Denney's office. As Gilg reconstructs the scenario, Shasta County DA Benito had told Deputy DA Ben Hanna that as evidence against Dixon Herbs he wanted four controlled buys from three confidential informants, plus one from a government agent. "But they didn't need any more informants," says Gilg. "Hanna already had a CI with a doctor's recommendation working for him, who made the first buy. Then they send a CI to Dixon Herbs and he's told that he can get a recommendation from a Dr. Rosenthal, who's going to be at the dispensary Oct. 8 Meanwhile the first CI goes back to Dixon Herbs and makes another buy. So they need one more CI to make one more buy, and that's their excuse for going to Dr. Denney's office.

"But what we learned from deposing Officer Hale was that he had a CI working for him who already had a doctor's recommendation! They could have used him to make the buy, but they didn't, they said, because he was in Sacramento."

Instead of sending Hale's CI from Sacramento to Dixon Herbs —a two hour drive that would cost $25 in gas— the investigators deployed another CI to go into Denney's office and lie to get a recommendation, while they conducted a stake-out in the parking lot. Perhaps the government can argue — *truthfully!*— that they weren't investigating Denney, their agents were simply running up their billable hours. Bear in mind Gilg's observation that the whole exercise was unnecessary because Dixon Herbs advertised itself as a medical marijuana dispensary.

PHILIP A. DENNEY, MD

Gilg: "They could have gone to Ron Dixon and said 'We notice you have a business license that says you're a medical marijuana dispensary and you advertise on the internet as a medical marijuana dispensary and we don't think that's legal.' How simple would that have been?

"It's common sense —give them a warning. Ask them to stop. Especially when they're doing it openly."

Gilg also learned, she says, that the investigation of Dixon Herbs was launched as "a Redding Police-Shasta County operation —not DEA— but with a twist I found very interesting. Ordinarily such investigations are handled by a task force called SINTF [pronounced sin-teff] that includes the Shasta County District Attorney, the Sheriff, Redding Police, Anderson Police, the state Bureau of Narcotics, CHP, and some other agencies. But to go after Dixon Herbs they created a different organization, because the state attorney general mandates that anytime a task force investigates a medical dispensary, they have to get the okay [from the AG's office]. SINTF didn't want to do that, so they created another group that included many of the same agencies, including the Shasta County DA, the sheriff, the DA —and they didn't need the attorney general's okay."

How did Gilg find out about SINTF's end-run around the attorney general's office? "Tracy Miller admitted it at the deposition. Flat out."

Gilg believes that the impetus for the move against Dixon Herbs may have come from MacGregor Scott, a former DA of Shasta County whom George Bush had appointed U.S. Attorney for the Eastern District of Califonia. Scott had issued a memo August 1, 2005 — "just after the U.S. Supreme Court ruled in the Raich case," observes Gilg, "and just before this investigation began"— inviting all law enforcement agencies in the Eastern District to forward medical marijuana cases to his office.

Gilg says, "Scott's memo told every DA in the state, 'Hand us your medical marijuana cases, because there's no defense under federal law.' And a lot of DAs who had cases they weren't sure they could win in Superior Court went 'Right on. How cool is that?'"

The reason the case against Dixon wasn't turned over to the feds, Gilg learned through depositions, was that after searching Ron Dixon's home the investigators "determined that they hadn't found enough to spark the interest of the feds."

Astonishing ignorance

"Most interesting of all," says Gilg of the depositions, " was their astonishing level of ignorance. When I asked Hanna if he knew the case of *People vs. Urziceanu,* he said 'No.'

"People vs. Wright?

"'No.'

"People vs. Mower?

"'I've heard of it, but I can't tell you what it says.'

"That's crazy. *People vs. Spark?*

"'Never heard of it.'

"People vs. Jones?

"'Never heard of it.'

"Conant vs.McCaffrey?

"'Never heard of it.'

"Then I asked Benito the same questions. He had never even heard of *Mower!* The district attorney of Shasta County doesn't know the law."

Looking towards the trial

The government —both the federal and state defendants— have filed motions for "summary judgment" which will be argued before Judge Karlton March 24. These are essentially claims that, based on evidence presented in the depositions, no harm was done to Denney and no reasonable jury could find for him.

Gilg says, "A lot of things came out in the depositions that are going to strengthen our position at trial, and nothing came out that's going to weaken it. Of course the government denied that they were investigating Dr. Denney, but as Judge Karlton said, 'You can deny that all you want but the facts are the facts.' And the big one is that they had another informant who had a recommendation."

If and when the case comes to trial, in order to get an injunction preventing the government from sending undercover agents into his practice in the future, Denney must prove what Judge Karlton summarized as "1) injury in fact, 2) causation, and 3) redressability."

Denney alleges that the undercover visit harmed him in two ways, and Karlton, in denying the motion to dismiss, agreed that it "made him fearful of discussing the medical benefits of marijuana with his patients [and] made him suspicious of his patients, some of whom he has turned away for fear that they were using false identification provided by law enforcement.

Karlton paraphrased the government's line thus: "whereas criminal prosecution can threaten liberty, mere

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investigations cannot" and "suspicion and anxiety do not constitute cognizable injury." He rejected it thus: "The court disagrees. If harm to a doctor's ability to 'speak frankly and openly to patients,' was not a cognizable injury, the *Conant* injunction would never have issued in the first instance."

As for causation, "Dr. Denney's suspicions were roused only upon the defendants' undercover visits and his discovery of the same. These visits were the but-for cause of his self-censorship, and an injunction would clearly restore Dr. Denney's confidence in his relationships with his patients.

"Defendants argue that emotional distress caused by an investigation is not irreparable harm... but the harms of an investigation were sufficiently irreparable to justify the injunction upheld in *Conant*. Damages would be an inadequate remedy because they could not reassure Dr. Denney that similar investigative tactics will not be used in the future."

"This case is about the First Amendment," Gilg emphasizes.

That's fine with Denney. His goals are political, not financial. He's into defending the Bill of Rights.

"This case is about the First Amendment," Gilg emphasizes. "The feds argued that the *Conant* injunction was aimed at the DEA, therefore the other defendants are immune from prosecution even if they violated it. Judge Karlton recognized the absurdity of that. You can't get around *Conant* by having other agencies do your dirty work for you. All state actors —county and city, state and federal—must respect the right of doctors and patients to discuss medical marijuana under the First Amendment."

Is This Proper Work for Grown Men?

The Shasta Interagency Narcotics Task Force (SINTF) initiated the investigation that Philip A. Denney is protesting in his civil lawsuit —so his attorney, Zenia Gilg, learned via depositions.

SINTF was formed in the 1980s, along with thousands of other such task forces in jurisdictions throughout the United States. The Reagan-Bush Administration —having failed to reduce the supply of illicit drugs by taking down major importers and dealers— had declared war on "demand," i.e., users. As SINTF's commander would explain in a 2004 report to the grand jury, "SINTF targets investigations toward the apprehension of street level distributors."

SINTF receives funding from forfeited assets and a grant from the state.

SINTF is made up of two deputies and a secretary from the Shasta County sher-iff's office; an assistant district attorney; two Redding Police investigators; an Anderson PD officer; a special agent supervisor from the Bureau of Narcotics En-forcement; a CHP officer; a county probation officer; and a state parole officer.

According to the 2004 report to the grand jury (filed in response to a citizen's complaint), "SINTF receives funding from forfeited assets and a grant from the state... Assets seized by SINTF are liquidated and placed into an interest bearing account. The City of Anderson Finance Department manages the account."

The SINTF report stated, "It takes a year to 18 months for an agent to be fully trained." What additional training does a Redding cop or a Shasta County deputy sheriff require in order to bust a street-level drug dealer under SINTF auspices? What does that special SINTF training consist of? How to appraise property for foreiture? Learning the other agencies' secret handshakes?

The Mindset of the Police

No sooner had Dr. Denney learned that SINTF was funded by assets seized from civilians than Kimberly Olson, a patient from Siskiyou County, sent him a document revealing the mindset of the police who make such seizures.

Olson is a 41-year-old woman who walks with a cane. Dr. Denney describes her as "chronically disabled since age 18 because of severe injuries sustained in a motor vehicle accident. She suffers from chronic, intractable low back pain and has undergone multiple surgical procedures culminating in a multi-level spinal fusion."

Olson's residence was raided on August 4, 2007, and her plants were taken. She sued for return of property. In late October, Assistant DA Christine Winte filed a single felony charge of illegal cultivation against Olson. The material Olson received from the DA on discovery included an "Incident Report" by Siskiyou Sheriff's Deputy Dennis Ford describing the raid on her house; and a transcripton of an audio tape made during the raid that included a very revealing exchange between the arresting officers, one of whom, Det. Daryl Lemos, apparently referring to the environs of Hornbrook, CA, —and assuming that Ford's tape recorder was paused— said: "You could seize every property there, support your MET team [Marijuana Education Team] and buy new cars for the whole department."

photo by Peter Harrell

Kimberly Olson

"You could seize every property there, support your MET team and buy new cars for the whole department."
—Det. Daryl Lemos

Olson's Account of the Raid

Olson sent Dr. Denney the transcript. He put her in touch with *O'Shaughnessy's* and she told us about the Aug. 4 raid on her house. Her friend Peter Harrell had been present. She had been ripped off earlier in the summer and had replanted in hopes of having some buds by harvest time. She says the raiders were "six or seven men in their full flak gear with automatic weapons, goggles. I was just 'Oh, my God!'

"They had me sit on the couch. One stood by the door and one in the hallway, one in the kitchen, one in another room with Peter, and they had people outside searching everywhere. They were supposedly making a probation search. It was part of a sweep. They were hitting all the medical-marijuana patients in the area."

Hornbrook is in the Siskiyou Mountains, 15 miles north of Yreka, seven miles south of the Oregon border.

"Without a warrant," says Olson, "they took one female that was starting to flower. Five others that were not flowering yet. I had a male, which they said was illegal to have. And there were some seedlings in four-inch pots. Detective Lemos said it was '76 starter plants."

Olson said she plants several seeds per 4-inch pot, then keeps the most vigorous one when they sprout.

The Incident Report

Officer Ford describes the encounter in his Incident Report. "On 10/04/07 the Sheriff's Department, along with other law enforcement agencies, were conduct-

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Note to the Shasta County D.A. *re:* Controlling Precedents

To: District Attorney Gerald Benito

The stated purpose of the Shasta Interagency Narcotics Task Force is "to endeavor to effectively enforce the controlled substance laws of the State of California as expressed in the Health and Safety Code and applicable federal laws relating to the trafficking of controlled substances."

At depositions in the *Denney v. DEA et al* law suit, Deputy DA Ben Hanna, who was acting in an advisory capacity to law enforcement in connection with the Dixon Herbs investigation, did not know the propositions for which the following cases stood:*Urziceanu, Wright, Mower and Conant*. You yourself acknowledged unfamiliarity with those four cases, as well as *Spark* and *Jones*.

To help your office and SINTF perform their missions lawfully, a summary of these cases by patients'-union organizer Pebbles Trippet follows.

People v Mower (Aug 2002) California Supreme Court

Issue: Are medical-marijuana users and people who use prescription medicines equal under the law?

Facts: Myron Mower, a legally blind diabetic, confessed from his hospital bed (while hooked up to a morphine IV drip) and was convicted of cultivating 31 plants. He was sentenced to five years probation. The 5th District Appeals Court denied his appeal.

Ruling: The Supreme Court reversed Mower's conviction based on incorrect instructions to the jury regarding the burden of proof. Patient-defendants need only raise a reasonable doubt (a doctor's authorization); the prosecution must disprove beyond a reasonable doubt, not by "preponderance of the evidence." Doctor-approved marijuana users are "no more criminal than" those who use prescription meds. The Court created a new motion to dismiss, prior to preliminary hearing, i.e., a doctor's authorization is the equivalent of a prescription and grounds for immediate dismissal.

Conant v Walters (Dec 2002) US Court of Appeals, 9th Circuit

Conant protects physicians' First Amendment right to discuss and recommend medical cannabis under state law regardless of conflicting federal law. It was originally filed as *Conant v McCaffrey*) to stop the federal government from interfering with the right of California doctors to make medical decisions based on discussions with their patients. Dr. Conant was granted a permanent injunction preventing the Drug Czar, the DEA and other federal officials from even investigating doctors for authorizing medical cannabis under state law without probable cause.

***People v Jones* (Sept 2003) 112 CalApp4th 341 • 3d Appellate District • Sacramento County**

Issue: What qualifies as a physician's approval to use marijuana for migraine headaches?

Facts: William Ira Jones was found guilty of cultivation of 31 marijuana plants for migraines after a no-contest plea. He testified at a pre-trial hearing that his doctor had stated, "It might help. Go ahead." The court determined that the jury could find that such a "favorable opinion" qualifies as a physician's approval, even though the doctor admitted that he was afraid to issue a written approval. Thus the trial court erred in precluding defendant from presenting his defense to the jury, and the order granting four years probation was reversed.

Ruling: A defendant need only raise a reasonable doubt as to whether s/he had a doctor's approval to permit a jury to decide the question.

***People v Spark* (Aug 2004) 121 CalApp4th259 • 5th Appellate District • Kern County**

Issue: Must a patient be considered "seriously ill" to qualify for protection under Prop 215?

Facts: Noel Spark, a patient being treated for chronic back pain, was arrested for growing three plants. Spark was found guilty of cultivation at two jury trials. Both verdicts were reversed on appeal, based on the jury having been erroneously instructed. At the first trial the jury was instructed to decide based on the "preponderance of evidence" not "beyond a reaonable doubt." At the second trial the jury was allowed to interpret the meaning of "seriously ill," which is not a jury issue.

Ruling: A physician's determination that the use of marijuana is appropriate is not to be second-guessed by jurors.

***People v Urziceanu* (Sept 2005) 132 Cal App 4th 747 • 3d Appellate District • Sacramento County**

Issue: Is collective or cooperative cultivation and distribution lawful under Prop 215 and SB420.

Facts: Michael Urziceanu and his partner Susan Rodger created FloraCare, a cooperatively run dispensary near Sacramento. Some members contributed medicine and got "suggested donations." Floracare was first raided 9/18/01. After reorganizing as a co-op, they were raided again. A jury acquitted Urziceanu of cultivation and sales but convicted for conspiracy to sell (a

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Work for Grown Men? *from previous page*

ing warrant sweeps, probation and parole searches in and around Hornbrook CA. At approx. 1015 hours I conducted a probation search on Kimberly Olson.

"Law enforcement officers present during the search were Sgt. Gilley, Sgt. Houtman, Det. Lemos, Deputy Randall, Deputy Grossman, and I. I went up to the front door and knocked. I announced Sheriff's Department and advised we were conducting a probation search. Olson answered the door carrying a cane. I advised her we were there to conduct a probation search. She showed us inside the residence.

"From prior calls to this residence, prior to Olson residing there, I knew the residence was not well taken care of. Olson stated she had some of her friends remodel the inside of the residence."

Ford suspects that drug money has been used to buy sheetrock. Olson has said she receives disability and has no other income. He will come back to her finances.

"I didn't find any illegal or controlled substances inside the residence, or processed marijuana," Ford's report continues. "Olson told me she was out of her processed medical marijuana.

"During his search, Det. Lemos found 76 starter marijuana plants and 8 larger marijuana plants growing in her backyard. Det. Lemos believed Olson was over her allotted amount of personal usage."

Ford questions Harrell and Olson separately about the plants. He goes outside to confer with the other officers. Then he returns to inform Olson and Harrell that their "84 plants" will be confiscated. Ford's report states: "From my training and experience, marijuana plants being grown and cultivated in Siskiyou County can produce an average of one pound of processed marijuana. If 84 of Olson's marijuana plants would produce one pound of marijuana each, she would receive 84 pounds of processed marijuana..."

The report concludes, "Due to the amount of marijuana plants (84) Olson and Harrell were growing, I believe they were cultivating marijuana for profit."

The Tale of the Tape

Ford's tape of the raid was transcribed by a secretary, then sent to the D.A.'s office "for review and possible prosecution." It reveals that Olson was forthright and open when questioned by Ford (who had just finished interviewing Harrell).

Ford: ...He was telling me he helps water and helps take care when he can.

Olson: When he can because sometimes I'm completely down so—

Ford: How many plants do you think you have out there?

Olson: I know I have five females for sure. I have um a couple of males out there and like I said I got ripped off so I have to start some new seedlings and I don't know, you don't know which ones are going to...

Ford: Um does Peter do, does he take care of your finances? Who pays your bills?

Olson: I pay my own.

Ford: You cook for yourself?

Olson: Sometimes. Like I said, there's been times when I've been in bed for three days...

Ford: He said you had no processed in the house. You are out?

Olson: Yep. I can show you that my (inaudible)... The very last...

Ford: Okay, when you run out what do you do?

Olson: I hurt.

Ford: You hurt. So you just do without?

Olson: Yeah. I got Vicodin too to take so, you know, but I've talked about this with Dr. Swenson [Olson's general practitioner, who does not oppose her medical marijuana use but will not formally approve it] and I really don't want to go above my two Vicodin a day because I've been on the other hand where they have had me on those um the patches.

Ford: Mm-hmmm

Olson: The sentinel [fentanyl] patches and the Oxycontin. We've done all that and I got myself off that with being able to smoke pot and I got to two Vicodin a day. The doctors are happy with that.

Ford: Okay, So you got off of Oxycontin and what else?

Olson: [Fentanyl] patches... I don't want to be there, man. I don't remember a year and a half of my life basically because of all that stuff so that's past.

Ford: So your doctors approve of you, of you using the marijuana?...

[Sgt. Gilley comes in and Ford explains Olson's situation:]

Ford: She has a current copy of the doctor's recommendation from Oakland but he's recently deceased. His case load and everything was transferred up to Dr. Sullivan or Denny [sic].

Gilley: Who's the one that's deceased?

Olson: Dr. Mikuriya.

Ford: Mikuriya.

Gilley: Okay.

Ford: That recommendation is still current.

Olson: I had no idea that he was as sick as he was. I got my recommendation like a month before he died.

Gilley: I'm going to take this outside and read it because I've got to get my glasses...

[Ford then asks "What do you do for a living?..." " How do you pay for bills so on and so forth?..." "Okay, so you've SSDI. Do you get finances from any other way?..." and finally—]

Ford: You don't have excess marijuana by the end of the year?

Olson: No, sir.

Ford: Okay, right now it's 11:10. I'm going to pause this recorder. I'm going to go out and talk to my Sgt. for a second.

Olson: No, you have to stay here.

Ford: It's a good dog.

Ford leaves room.

Ford: Okay.

Lemos: You could seize every property there, support your MET team and buy new cars for the whole department.

Gilley: Yeah...

Ford: What she's got going is, there's no caregiver, he lives in Oregon.

Lemos: But she said 'her caregiver' when we walked in the door, her caregiver was here.

Ford: Yeah and she even told me he's her care provider and he comes down four or five times a week.

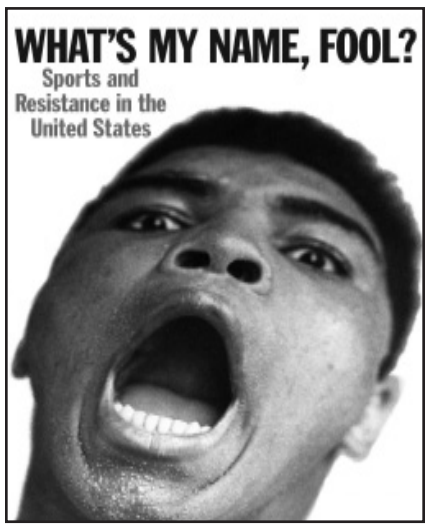
Lemos: He doesn't qualify.

Ford: Yeah, doesn't qualify. He's —basically what they are saying, he's teaching her how to grow her own plants.

Lemos: Same shit as before.

Ford: Yeah. She has a recommendation from Dr. Mikuriya out of the Bay Area.

Lemos: Diarrhea, yeah.



one from...

Lemos: From Sullivan.

Ford: From Sullivan, yeah. Sullivan, Denney...

Lemos: Mm-hmm...

Ford: I've got a letter here from Dr. Denney's office to [Probation Officer] Robert Shelton saying approximately five to six grams of cannabis daily and so on and so on.

Lemos: We don't care...

Peter Harrell comments: "The cops knew what Kimberly's doctors said she could have, they knew she was in compliance and that her recommends were current and valid, and they didn't care about that, or what the law said, because the Siskiyou County DA's office told them to take all plants if people had more than the 'limits' in SB420, regardless of circumstances. Note that they didn't just take any overage, they took them ALL."

Dr. Denney comments: "Of course Kimberly Olson's case has its unique aspects, but we hear similar stories from patients all too often."

Precedent Cases *from previous page*

three-year sentence).

Ruling: While Prop 215 may not have protected collective medical marijuana gardens and sales, SB420 (which created Health & Safety Code 11362.7) did. The appeals court unanimously reversed and remanded for a new trial, based on improper jury instructions on conspiracy and mistake of law, as well as search and seizure procedures. The court applied expanded protections to patients and caregivers as long as the medicine-providing processes are collectively or cooperatively organized for the good of the whole, rather than for individual profit.

***People v Wright* (Nov 2006) 40 Cal4th 81 • Supreme Court • Orange County**

Issues: Was the trial court's refusal to instruct the jury about an implicit Prop 215 defense to transportation of personal-use marijuana prejudicial or harmless error? The 4th District appeals court had reversed the conviction, ruling it was prejudicial to the defendant to deny the instruction to the jury. The appeals court had ruled it was prejudicial to the defendant to deny the defense. The California Supreme Court granted review to resolve the conflict between two appellate decisions: Trippet (Prop 215 confers an "implicit right" to transport) and Young (215 doesn't protect transportation). Second issue: is the quantity a patient can possess under SB420 not to exceed eight ounces of dried marijuana?

Facts: Huntington Beach police stopped Shaun Eric Wright as he was leaving a carwash in his pick-up. A search revealed 1lb, 3oz of marijuana, which Wright used with a doctor's approval. A jury convicted him of transportation and possession for sale. The 4th District Appeals Court reversed based on the trial court's refusal to instruct the jury about a 215 defense to the transportation charge.

Ruling: The California Supreme Court reversed the appeals court ruling on grounds that the trial judge's error in not allowing the transportation defense was harmless, not prejudicial, error. While granting the judge should have allowed the defense, "the omission of the instruction did not affect the trial outcome, thus rendering the trial unfair." The Court reinstated the convictions and remanded for further proceedings on defendants' additional claims of instructional error.

On the question of whether Prop 215 implicitly allowed transportation of marijuana for personal use, the Supreme Court determined "that Trippet, not Young, was the better-reasoned decision." On the question of legal quantity, the Supreme Court ruled that SB420 had established six mature plants and eight ounces of processed cannabis as

P.S. To the Movement

All California cases summarized here were reversed on appeal when the trial judge's jury instructions were ruled erroneous and prejudicial to defendants. Only in *Wright* did the state Supreme Court conclude that the trial judge should have allowed a transportation defense (and it was harmless error that he didn't).

Due process procedures are hammered out in the courts on the backs of patient-defendants, who are convicted and later deemed innocent. That is the nature of justice, when it comes at all. Without Appeals, the public would never know most of what goes on in the courtroom.

Why do trial-court judges commit these prejudicial errors in how they instruct juries? Mere ignorance does not explain it. Generally speaking, these due process issues are basic, law-school-level rules of the game. For six years after Prop 215 passed, prosecutors trying medical-marijuana cases had only to establish guilt by a preponderance of the evidence —not beyond a reasonable doubt— resulting in many erroneous convictions and incarcerations.

In 2002 the state Supreme Court in *Mower* finally made the obvious correction and put the burden on the prosecution to prove guilt beyond a reasonable doubt —as in other criminal cases. The *Mower* court also ended the myth that Prop 215 is only a defense at trial, by granting defendants with a medical-cannabis claim a motion to dismiss, based on being "no more criminal than" people who use prescription drugs.

Patient and caregiver defendants who lack a good lawyer in the lower courts are at a disadvantage and usually lose, either by plea to avoid prison or conviction at trial under an illegally instructed jury. A pro-prosecutor atmosphere and drug-war pressure for ever-more convictions prevails. Too many California Superior Court judges see themselves as Junior Attorney Generals in the War on Drugs. We know them by their published list of errors.

There is more objectivity at the appellate-court level, as this list of cases shows. (We can only hope that the Supreme Court's recent ruling in Ross v. RagingWire is a one-time display of obeisance to Property Interests.)

The message is: persistence furthers. Every case that wins on appeal wins for everyone. Every lawsuit won is a model of know-how for others.

—Pebbles Trippet