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4 Attorney for Defendant CLARENCE McKEE
5

6 IN THE SUPERIOR COURT
7 TULARE COUNTY, STATE OF CALIFORNIA
8

9 PEOPLE OF THE STATE OF CALIFORNIA,

10 Plaintiff,

11 vs.

12 CLARENCE McKEE,

13 Defendant

Case No.: No. 98-04184

OPPOSITION TO PLAINTIFF'S
MOTION FOR DISCOVERY

DATE: February 27, 1998

TIME: 8:30 a.m.

DEPT: 7

14 COMES NOW THE DEFENDANT CLARENCE McKEE, by and through his
15 Attorney WILLIAM LOGAN, and hereby objects to the Plaintiff's Motion for Discovery of
16 medical records of either of the Defendants.
17

18 This motion is made on the grounds that the medical records are privileged and
19 confidential under State Constitutional and Statutory provisions, and are irrelevant to any issue
20 in the case.

21 The motion is based on this pleading, the attached affidavit of WILLIAM LOGAN, and
22 such other and further evidence, oral and documentary, as may be adduced at the hearing.
23

24 **STATEMENT OF THE CASE**

25 The Defendant has no objection to the statement of the case contained in the moving
papers.

1 The Defendants do intend to introduce evidence at the trial that they were growing and
2 possessing marijuana for medical purposes, pursuant to Health and Safety Code §11362.5. To
3 that end, the Defendants will present evidence of a physician's recommendation or approval of
4 cannabis therapy for their respective conditions.

5 The Defendants will petition the Court for funds to present expert testimony at the trial.
6 Until these experts are able to evaluate the case, they are not able to form or express an
7 opinion, nor generate any reports.

8 9 POINTS AND AUTHORITIES

10 The plain words of Health and Safety Code §11362.5 establish that the sections
11 prohibiting possession and cultivation of marijuana “**shall not apply** to a patient...who
12 possesses or cultivates marijuana for the personal medical purposes of the patient upon the
13 written or oral recommendation or approval of a physician.”

14 This section provides that the physician who has determined that the person's health
15 would benefit from the use of marijuana in the treatment of... *any (other) illness for which*
16 *marijuana provides relief.* Health and Safety Code §11362.5 (A).

17 The statute must be interpreted in a common sense manner. The statute establishes a
18 defense similar to the defense of a charge of unlawful possession of a controlled substance, to
19 wit: that the substance was possessed “upon the written prescription of a physician...”. It has
20 never been an issue at trial whether the physician who prescribed a controlled substance was
21 correct or justified in so prescribing.

22 CALJIC provides that in a prosecution for Health and Safety Code §§11350 or 11377
23 that the various elements involve possession and knowledge as well as usable amount. See
24
25

1 CALJIC 12.00. The defense of a valid prescription is raised as noted in CALJIC 12.30.1 and
2 12.30.2. Nowhere is the issue of the propriety of the prescription addressed. The technical
3 requirements of a prescription are set out, as defined in Health and Safety Code §11164.

4 Evidence Code §994 provides that all communications to a physician by his or her
5 patient are privileged. That privilege may not apply in a criminal proceeding (Evidence Code
6 §998), but the Court cannot order the privilege breached unless the material sought is in
7 someway relevant to any issue in the case. It is submitted that the California Constitution 's
8 guarantee the right to privacy should prevail over the District Attorney's desire to know the
9 medical history of the Defendant.

10
11 Unless and until the names of the witnesses who will appear at trial are known, there is
12 no duty to disclose. If no report exists from a potential testimonial witness, none need be
13 produced or delivered. The plain words of Penal Code § 1054.3 mandate this conclusion.

14 Respectfully submitted,

15 February 26, 1998

16 W
17 WILLIAM LOGAN, Attorney for
18 Defendant CLARENCE McKEE

19 **AFFIDAVIT OF WILLIAM LOGAN**

20 I, WILLIAM LOGAN, do hereby declare and state that:

21 I am the Attorney for the Defendant CLARENCE McKEE,

22 I am informed and believe that Mr. McKEE was cultivating and possessing marijuana
23 for legitimate medical purposes pursuant to Health and Safety Code 11362.5.

24 It is my intention to present this defense at trial. The Defense has not yet decided upon
25 nor retained any particular person to assist as an expert (or otherwise) at the trial. There is a

1 good chance that the Court may be asked to fund the experts necessary. There are several
2 possible experts.

3 If I am required to reveal my strategy and tactics at this time, I believe that it would be
4 a violation of the Defendant's rights to prepare his case free from inspection or interference by
5 the Prosecution. When I have formed any intention to call a witness I will advise the
6 prosecution.
7

8 I declare under penalty of perjury that the foregoing is true and correct of my
9 knowledge, except as to those matters stated on information and belief, and as to those matters,
10 I believe them to be true. Executed this 26th day of February 1998 in Three Rivers, Tulare
11 County California.

12 LS/
13 WILLIAM LOGAN
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6 ATTORNEY FOR PLAINTIFF
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8
 9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 10 COUNTY OF TULARE

11	THE PEOPLE OF THE STATE OF)	CASE NO. 40184
12	CALIFORNIA,)	
13)	
14	Plaintiff,)	RESPONSE TO DEFENDANT'S
15)	OPPOSITION TO
16	vs.)	PLAINTIFF'S MOTION FOR
17)	DISCOVERY
18	CLARENCE DANIAL MCKEE, and)	
19	PENNY JO MCKEE,)	DATE: 3-6-98
20)	TIME: 8:30 A.M.
21	Defendants.)	DEPT: 7
22)	TIME EST.: 20 Min

23 The People present the following in response to Defendant,
 24 Clarence McKee's, opposition to the People's Motion to Compel
 25 Discovery Compliance:
 26

27 I.

28 THE DEFENDANT'S MEDICAL RECORDS BECAME RELEVANT
ONCE HE NOTICED HIS INTENT TO OFFER A DEFENSE UNDER
HEALTH AND SAFETY CODE SECTION 11362.5

In November 1996, the voters passed Proposition 215 which
 has become codified in Health and Safety Code section 11362.5.
 That statute reads, in pertinent part,

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(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

The defendant noticed his intent to proceed under this defense at his arraignment on January 26, 1998 and has reiterated that desire in his opposition to this motion.

Immense analysis of this statute has taken place since it's passage. As a guideline, the courts have looked to the purposes of the statute which have been laid-out in the statute itself and in the ballot pamphlet containing arguments for and against the passage of Proposition 215. Health and Safety Code section (B) (1) (A) sets forth one of its purposes as being,

To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

In People v. Trippett (1997), 56 Cal.App.4th 1532, the court interpreted this statute to require the existence of a person who is in severe pain. Id. at p.1545. Additionally, there must be approval by a licensed physician. Id. at p.1545-46.

As is clear from the reading of the statute, the defendant must establish that he himself is a seriously patient or a primary caregiver of a seriously ill patient. Additionally,

1 the use of marijuana must be as a result of the recommendation
 2 of a physician who has seen the seriously ill patient and made
 3 a determination that the person's health would benefit from the
 4 use of marijuana in the treatment of an illness for which
 5 marijuana provides relief.

6 The defendant's medical records are relevant to determine
 7 whether the defendant has any medical condition at all; whether
 8 or not the defendant is seriously ill; if he has a medical
 9 condition, whether the medical condition is one where the
 10 symptoms can be alleviated by the use of marijuana; and,
 11 whether the defendant was seen by the person who recommended to
 12 him to use marijuana.

13 If the defendant is proceeding on the theory that he does
 14 not have such a medical condition, but rather is the primary
 15 caregiver for his wife who does have such a medical condition,
 16 then her medical records are relevant to make the same
 17 determinations.

18 The defendant made his medical condition an issue when he
 19 announced his intent to use the defense under Health and Safety
 20 Code section 11362.5 and his wife and co-defendant, Penny
 21 McKee's, medical condition is an issue if he wishes to be
 22 considered her primary caregiver or if she intends to also
 23 proceed under the same defense.

24 II.

25 THE DEFENDANT HAS NO PRIVILEGE AGAINST DISCLOSURE OF HIS
 26 OR ANY OTHER'S MEDICAL RECORDS IN A CRIMINAL CASE

27 The defendant concedes this point in his opposing papers:
 28 "That privilege [under Evidence Code section 994 pertaining to

1 communications between a patient and his physician] may not
 2 apply in criminal proceedings..." Defendant's Opposition, p.3,
 3 line 5. In fact, the Evidence Code states there is absolutely
 4 no physician-patient privilege in criminal proceedings.
 5 Evidence Code section 998. Even in civil cases, there is no
 6 privilege to a physician-patient communication when the
 7 condition of the patient has been made an issue in the case.
 8 Evidence Code section 996.

9 The defendant cannot legally refuse to disclose his or his
 10 wife's medical records.

11 III.
 12 THE PEOPLE ARE ENTITLED TO DISCOVERY RELATED TO THE
 13 RECOMMENDATION TO USE MARIJUANA

14 Health and Safety Code section 11362.5 requires the
 15 recommendation to use marijuana to come from a physician. In
 16 order to run this defense there will have to be testimony from
 17 a physician who made such a recommendation to the defendant or
 18 his wife. "Proposition 215 allows physicians to recommend
 19 marijuana in writing or verbally, but if the recommendation is
 20 verbal, the doctor can be required to verify it under oath."
 21 Ballot Pamp., argument in favor of proposition 215 as presented
 22 to voters, Gen. Elec. (Nov 5, 1996) p.60. The People are
 23 entitled to know the name and address of the physician who
 24 recommended marijuana use to the defendant or his wife and a
 25 copy of the recommendation, should it be in writing. Also
 26 relevant would be the date on which the recommendation was
 27 made. Approval prior to the possession is ordinarily required.
 28 Trippett, Id. at p. 1548, footnote 13. The People are entitled

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to have this information.

CONCLUSION

For the reasons stated above, the People request the court order the defendant, Clarence McKee, to comply with the People's discovery request.

Dated: March 1, 1998

Respectfully submitted,

PHILLIP J. CLINE
DISTRICT ATTORNEY

Michelle K. Margolis
MICHELLE K. MARGOLIS
DEPUTY DISTRICT ATTORNEY