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DEERING'S CALIFORNIA CODES ANNOTATED
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*** THIS DOCUMENT REFLECTS ALL URGENCY LEGISLATION ENACTED ***
THROUGH 2007-2008 THIRD EXTRAORDINARY SESSION CH. 6 AND
CH. 12 OF THE 2008 REGULAR SESSION APPROVED 4/29/08

HEALTH AND SAFETY CODE
Division 10. Uniform Controlled Substances Act
Chapter 6. Offenses and Penalties
Article 2. Marijuana

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Health & Saf Code § 11357 (2008)

§ 11357. Possession

(a) Except as authorized by law, every person who possesses any concentrated cannabis shall be punished by imprisonment in the county jail for a period of not more than one year or by a fine of not more than five hundred dollars (\$500), or by both such fine and imprisonment, or shall be punished by imprisonment in the state prison.

(b) Except as authorized by law, every person who possesses not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars (\$100). Notwithstanding other provisions of law, if such person has been previously convicted three or more times of an offense described in this subdivision during the two-year period immediately preceding the date of commission of the violation to be charged, the previous convictions shall also be charged in the accusatory pleading and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, the provisions of *Sections 1000.1 and 1000.2 of the Penal Code* shall be applicable to him, and the court shall divert and refer him for education, treatment, or rehabilitation, without a court hearing or determination or the concurrence of the district attorney, to an appropriate community program which will accept him. If the person is so diverted and referred he shall not be subject to the fine specified in this subdivision. If no community program will accept him, the person shall be subject to the fine specified in this subdivision. In any case in which a person is arrested for a violation of this subdivision and does not demand to be taken before a magistrate, such person shall be released by the arresting officer upon presentation of satisfactory evidence of identity and giving his written promise to appear in court, as provided in *Section 853.6 of the Penal Code*, and shall not be subjected to booking.

(c) Except as authorized by law, every person who possesses more than 28.5 grams of marijuana, other than concentrated cannabis, shall be punished by imprisonment in the county jail for a period of not more than six months or by a fine of not more than five hundred dollars (\$500), or by both such fine and imprisonment.

(d) Except as authorized by law, every person 18 years of age or over who possesses not more than 28.5 grams of marijuana, other than concentrated cannabis, upon the grounds of, or within, any school providing instruction in kindergarten or any of grades 1 through 12 during hours the school is open for classes or school-related programs is guilty of a misdemeanor and shall be punished by a fine of not more than five hundred dollars (\$500), or by

imprisonment in the county jail for a period of not more than 10 days, or both.

(e) Except as authorized by law, every person under the age of 18 who possesses not more than 28.5 grams of marijuana, other than concentrated cannabis, upon the grounds of, or within, any school providing instruction in kindergarten or any of grades 1 through 12 during hours the school is open for classes or school-related programs is guilty of a misdemeanor and shall be subject to the following dispositions:

(1) A fine of not more than two hundred fifty dollars (\$250), upon a finding that a first offense has been committed.

(2) A fine of not more than five hundred dollars (\$500), or commitment to a juvenile hall, ranch, camp, forestry camp, or secure juvenile home for a period of not more than 10 days, or both, upon a finding that a second or subsequent offense has been committed.

HISTORY:

Added Stats 1972 ch 1407 § 3. Amended Stats 1973 ch 1078 § 8, effective October 1, 1973; Stats 1975 ch 248 § 2; Stats 1976 ch 1139 § 71, operative July 1, 1977; Stats 1982 ch 1287 § 1, operative September 1, 1983; Stats 1983 ch 223 § 2, ch 434 § 1, effective July 28, 1983, operative September 1, 1983, ch 434 § 1.5, effective July 28, 1983, operative January 1, 1984.

NOTES:

Amendments:

1973 Amendment:

Prior to 1973 the section read: "Every person who possesses any marijuana, except as otherwise provided by law, shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison for a period of not less than one year or more than 10 years.

"If such person has been previously convicted once of any felony offense described in this division or of any offense under the laws of any other state or the United States which, if committed in this state, would have been punishable as a felony offense described in this division, the previous conviction shall be charged in the indictment or information and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, he shall be imprisoned in the state prison for a period of not less than two years or more than 20 years and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than two years in the state prison.

"If such person has been previously convicted two or more times of any felony offense described in this division or of any offense under the laws of any other state or the United States which, if committed in this state, would have been punishable as a felony offense described in this division, the previous convictions shall be charged in the indictment or information and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, he shall be imprisoned in the state prison for a period of five years to life and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than five years in the state prison.

"This section shall not become operative if Assembly Bill No. 1778 of the 1972 Regular Session of the Legislature is chaptered whether it is chaptered prior or subsequent to the act enacting this section."

1973 Amendment **(1)** added subdivision designations (a)-(c); **(2)** deleted "felony" before "offense" in subds (b) and (c); **(3)** substituted "subdivision (d)," for "this division or of any offense under the laws of any other state or the United States which, if committed in this state, would have been punishable as a felony offense described in this division" in subds (b) and (c); **(4)** deleted the former fourth paragraph which read: "This section shall not become operative if Assembly Bill No. 1778 of the 1972 Regular Session of the Legislature is chaptered whether it is chaptered prior or subsequent to the act enacting this section."; and **(5)** added subd (d) to read: "(d) Any previous conviction of any of the following offenses, or of an offense under the laws of another state or of the United States which, if committed in this state, would have been punishable as such an offense, shall be charged pursuant to subdivision (b) or (c) of this section:

"(1) Any felony offense described in this division involving a controlled substance specified in subdivision (b) or (c) of Section 11054, specified in paragraph (10), (11), (12), or (17) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055.

"(2) Any felony offense described in this division involving a narcotic drug classified in Schedule III, IV, or V."

1975 Amendment:

Amended the section to read: "(a) Except as authorized by law, every person who possess any concentrated cannabis shall be punished by imprisonment in the county jail for a period of not more than one year or by a fine of not more than five hundred dollars (\$500), or by both such fine and imprisonment, or shall be punished by imprisonment in the state prison for a period of not less than one year or more than five years.

"(b) Except as authorized by law, every person who possesses not more than one avoirdupois ounce of marijuana, other than concentrated cannabis, is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars (\$100). Notwithstanding other provisions of law, if such person has been previously convicted three or more times of an offense described in this subdivision during the two-year period immediately preceding the date of commission of the violation to be charged, the previous convictions shall also be charged in the accusatory pleading and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, the provisions of *Sections 1000.1 and 1000.2 of the Penal Code* shall be applicable to him, and the court shall divert and refer him for education, treatment, or rehabilitation, without a court hearing or determination or the concurrence of the district attorney, to an appropriate community program which will accept him. If the person is do diverted and referred he shall not be subject to the fine specified in this subdivision. If no community program will accept him, the person shall be subject to the fine specified in this subdivision. In any case in which a person is arrested for a violation of this subdivision and does not demand to be taken before a magistrate, such person shall be released by the arresting officer upon presentation of satisfactory evidence of identity and giving his written promise to appear in court, as provided in *Section 853.6 of the Penal Code*, and shall not be subjected to booking.

"(c) Except as authorized by law, every person who possesses more than one avoirdupois ounce of marijuana, other than concentrated cannabis, shall be punished by imprisonment in the county jail for a period of not more than six months or by a fine of not more than five hundred dollars (\$500), or by both such fine and imprisonment."

1976 Amendment:

Deleted "for a period of not less than one year or more than five years" after "state prison" at the end of subd (a).

1982 Amendment:

Added subd (d).

1983 Amendment (§ 1):

(1) Substituted subd (d) for former subd (d) which read: "(d) Except as authorized by law, every person who possesses marijuana upon the grounds of, or within, any school providing instruction in kindergarten or, any of grades 1 through 12 inclusive, during hours in which the school is open for classes or school-related programs is guilty of a misdemeanor to be punished by a fine not to exceed five hundred dollars (\$500), or by imprisonment in the county jail for a period of not more than 10 days, or both; provided, that except as authorized by law, every minor who possesses marijuana upon the grounds of, or within, any school providing instruction in kindergarten or, any of grades 1 through 12 inclusive, during hours in which the school is open for classes or school-related programs is guilty of a misdemeanor to be punished by a fine not to exceed two hundred fifty dollars (\$250) for a first offense; and provided further, that except as authorized by law, every minor who possesses marijuana upon the grounds of, or within, any school providing instruction in kindergarten or, any of grades 1 through 12 inclusive, during hours in which the school is open for classes or school-related programs is guilty of a misdemeanor to be punished by a fine not to exceed five hundred dollars (\$500), or by imprisonment in the county jail for a period of not more than 10 days, or both, for the second and each subsequent conviction of a violation of this subdivision."; and (2) added subd (e). (As amended Stats 1983 ch 434, compared to the section as it read prior to 1983. This section was also amended by an earlier chapter, ch 223. See *Gov C § 9605*.)

1983 Amendment (§ 1.5):

Substituted "28.5 grams" for "one avoirdupois ounce" wherever it appears.

Historical Derivation:

(a) Former H & S C § 11530, as enacted Stats 1939 ch 60, amended Stats 1st Ex Sess 1940 ch 9 § 27, Stats 1945 ch 955 § 29, Stats 1949 ch 1475 § 19, Stats 1953 ch 1770 § 3, Stats 1959 ch 1112 § 7, Stats 1961 ch 274 § 7, Stats 1968 ch 1465 § 1, Stats 1970 ch 1098 § 6.

(b) Stats 1929 ch 216 § 1.4, as added Stats 1937 ch 385 § 1.

Cross References:

"Marijuana": *H & S C §§ 11018, 11032*.

Use of marijuana for medical purposes: *H & S C § 11362.5*.

When probation or suspended sentence prohibited: *H & S C § 11370*.

Imposition of fine in addition to term of imprisonment for violating this section: *H & S C § 11372*.

Payment of criminal laboratory fee after conviction under this section: *H & S C § 11372.5*.

Registration of controlled substance offenders: *H & S C § 11590*.

Limitations on employers and penalties for conviction: *Lab C § 432.8*.

Offenses punishable in alternative as either felony or misdemeanor: *Pen C § 17*.

Unspecified felony punishment: *Pen C § 18*.

Diversion of criminal proceedings: *Pen C §§ 1000 et seq.*

Plea to charge of previous conviction: *Pen C § 1025*.

Finding by jury on charge of previous conviction: *Pen C § 1158*.

County jail: *Pen C §§ 4000 et seq.*

Prisons: *Pen C §§ 6081, 6082*.

Suspension or revocation of the privilege of any person to operate a motor vehicle on conviction of a violation of this section: *Veh C § 13202*.

Evidence of violation of this section, when found during examination in proceeding for involuntary commitment of person for treatment as narcotic addict, as inadmissible in criminal proceedings against that person: *W & I C § 3100.6*.

Collateral References:

Cal Forms Pl & Practice (Matthew Bender) ch 214 "Drugs and Pharmacists".

Cal Criminal Defense Practice (Matthew Bender) ch 145 "Narcotics and Alcohol Offenses".

Witkin & Epstein, Criminal Law (3d ed), Crimes Against Public Peace and Welfare §§ 77, 78, 79, 343.

Witkin & Epstein, Criminal Law (3d ed), Criminal Judgment §§ 81, 82.

Witkin & Epstein, Criminal Law (3d ed), Introduction To Crimes §§ 35, 36, 70.

Witkin & Epstein, Criminal Law (3d ed), Introduction To Criminal Procedure § 2.

Witkin & Epstein, Criminal Law (3d ed), Pretrial Proceedings §§ 342, 343, 344, 346, 351, 345.

Witkin & Epstein, Criminal Law (3d ed), Punishment §§ 512, 606.

10 Witkin Summary (10th ed) Parent and Child § 479.

Cal Jur 3d (Rev) Criminal Law §§ 1553, 1554, 1589, 2371, 2496, 3262.

Bailey & Rothblatt, Handling Narcotic and Drug Cases, §§ 34 et seq.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2350, Sale, Furnishing, etc., of Marijuana

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2351, Offering to Sell, Furnish, etc., Marijuana

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2352,

Possession for Sale of Marijuana

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2370, Planting, etc., Marijuana

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2375, Simple Possession of Marijuana: Misdemeanor

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2376, Simple Possession of Marijuana on School Grounds: Misdemeanor

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2377, Simple Possession of Concentrated Cannabis

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2390, Sale, Furnishing, etc., of Marijuana to Minor

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2391, Offering to Sell, Furnish, etc., Marijuana to Minor

Exclusion of aliens convicted of violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession, sale, or traffic in narcotic drugs or marihuana: *8 USCS § 1182*.

Deportation of aliens convicted of violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession, sale, or traffic in narcotic drugs or marihuana: *8 USCS § 1227*.

Prescriptions, requirement not dispensed with by statute exempting certain drugs from labeling requirements: *21 USCS § 353*.

"Marihuana": *21 USCS § 802(16)*.

Forms:

Suggested form is set out below, following Notes of Decisions.

Law Review Articles:

Constitutionality of punishment for acts incidental to narcotics addiction. *54 ABAJ 1081*.

Use of expert and documentary evidence in constitutional attack on state criminal statute proscribing use and sale of marijuana. *56 CLR 29*.

Psychedelics and religious experience. *56 Cal LR 75*.

Religious aspects of psychedelic drugs. *56 Cal LR 86*.

Civil commitment of narcotic addicts in California. *19 Hast LJ 602*.

Psychedelics and religious freedom. *19 Hast LJ 667*.

California marijuana possession statute as infringement on right of privacy or other peripheral constitutional rights. *19 Hast LJ 758.*

Medical and delinquent addicts or drug abusers: A medical distinction of legal significance. *19 Hast LJ 783.*

Effects of Single Convention on Narcotic Drugs on regulation of marijuana. *19 Hast LJ 848.*

Constitution and the narcotics addict. *11 Santa Clara Law 140.*

Coercion to virtue, and penal sanctions against use of marijuana. *41 SCLR 601.*

The single convention on narcotic drugs vs. Decriminalization of marijuana. *49 St BJ 524.*

California's New Marijuana Law: A Sailing Guide for Uncharted Waters. *51 St BJ 27.*

Possession of marijuana in San Mateo County; social costs of criminalization. *22 Stan LR 101.*

Diversion of drug offenders in California; operation of the diversion statute. *26 Stan LR 923.*

A primer on heroin. *27 Stan LR 80.*

Marijuana and the law. *1 U San Fernando v. LR 139.*

Constitutional objections to California's marijuana possession statute. *14 UCLA LR 773.*

Empirical study of enforcement and administration of marijuana laws in Los Angeles County. *15 UCLA LR 1507.*

Marijuana possession and the California Constitutional prohibition of cruel or unusual punishment. *21 UCLA LR 1136.*

The misguiding hand of counsel--Reflections on "criminal malpractice". *21 UCLA LR 1191.*

The Official Report of the National Commission Studying Marijuana: More misunderstanding. *8 USF LR 1.*

The term "usable quantity" as an element in violations of California narcotic and drug statutes. *4 UWLA LR 57.*

Barristers Tips: Deferred Entry of Judgment for Criminal Defendants. *29 LA Law 10 (November, 2006).*

Attorney General's Opinions:

Single Convention on Narcotic Drugs and Federal Controlled Substances Act as prohibiting state's legalization of marijuana. *54 Ops. Cal. Atty. Gen. 57.*

Annotations:

What constitutes "possession" of narcotic drug as proscribed by § 2 of the Uniform Narcotic Drug Act. *91 ALR2d 810.*

Testamentary capacity as affected by use of intoxicating liquor or drugs. *9 ALR3d 15.*

Free exercise of religion as defense to prosecution for narcotic or psychedelic drug offense. *35 ALR3d 939.*

Use of illegal drugs as a ground for dismissal of teacher, or denial or cancellation of teacher's certificate. 47 ALR3d 754.

Offense of aiding and abetting illegal possession of drugs or narcotics. 47 ALR3d 1239.

Marijuana, psilocybin, peyote or similar drugs of vegetable origin as narcotics for purposes of drug prosecution. 50 ALR3d 1164.

LSC, STP, MDA, or other chemically synthesized hallucinogenic or psychedelic substances as narcotics for purposes of drug prosecution. 50 ALR3d 1284.

Sale or use of narcotics or dangerous drugs on licensed premises as ground for revocation or suspension of liquor license. 51 ALR3d 1130.

Review for excessiveness of sentence in narcotics case. 55 ALR3d 812.

Modern status of the law concerning entrapment to commit narcotics offense--state cases. 62 ALR3d 110.

Sufficiency of prosecution proof that substance defendant is charged with possessing or selling, or otherwise unlawfully dealing in, is marijuana. 75 ALR3d 717.

Validity of state statute imposing mandatory sentence or prohibiting granting of probation or suspension of sentence for narcotics offenses. 81 ALR3d 1192.

Prosecutions based upon alleged illegal possession of instruments to be used in violation of narcotics laws. 92 ALR3d 47.

Competency of drug addict or user to identify suspect material as narcotic or controlled substance. 95 ALR3d 978.

Constitutionality of state legislation imposing criminal penalties for personal possession or use of marijuana. 96 ALR3d 225.

Criminality of act of directing to, or recommending, source from which illicit drugs may be purchased. 34 ALR5th 125.

Propriety of lesser-included-offense charge in state prosecution of narcotics defendant--Marijuana cases. 1 ALR6th 549.

Modern status of the law concerning entrapment to commit narcotics offense--Federal Cases. 22 ALR Fed 731.

Federal criminal liability of licensed physician for unlawfully prescribing or dispensing "controlled substance" or drug in violation of Controlled Substances Act (21 USCS §§ 801 et seq.). 33 ALR Fed 220.

What constitutes conviction under § 304(a)(2) of the Controlled Substances Act (21 USCS § 824(a)(2)) which provides for revocation of registration to manufacture, distribute, or dispense controlled substances upon finding that registrant has been "convicted." 56 ALR Fed 909.

Hierarchy Notes:

Div. 10 Note

Div. 10, Ch. 6 Note

Div. 10, Ch. 6, Art. 2 Note

NOTES OF DECISIONS 5. In General

Decisions under Former H & S C § 11530 and Present Section

A. GENERAL CONSIDERATIONS 1. In General 2. Constitutionality 3. Construction 4. Defenses 4.5. Destruction of Seized Marijuana B. EVIDENCE 5. In General 6. Possession 7. Knowledge 8. Intent 9. Identity of Substance 10. Usable Quantity 11. Proof by Circumstantial Evidence C. JUDGMENT AND SENTENCE 12. In General 13. Sentence after Prior Conviction D. APPEAL AND ERROR 14. Jurisdiction 15. Suppression of evidence

5. In General

Police observation of people smoking marijuana in defendant's apartment could not support a warrantless entry based on exigent circumstances because the nature of the crime was minor; under *H & S C § 11357(b)*, possession of less than 28.5 grams of marijuana was a misdemeanor punishable by a fine of no more than \$100, and while there was a reasonable possibility that there was more marijuana in the apartment than two blunts observed by the officers, it was mere conjecture to conclude that there was enough to constitute a jailable offense. *People v. Hua (2008, 1st Dist) 2008 Cal App LEXIS 35*.

Decisions under Former H & S C § 11530 and Present Section A. GENERAL CONSIDERATIONS

1. In General

Though information in narcotics case erroneously charged violation of former § 11500, general narcotics statute, instead of this section, illegal possession of marijuana, defendants were not misled as to charge against them where charging language of information charged them with feloniously having marijuana in their possession. *People v. Jackson (1961, Cal App 2d Dist) 191 Cal App 2d 296, 12 Cal Rptr 748, 1961 Cal App LEXIS 2051, cert den (1961) 368 US 864, 7 L Ed 2d 60, 82 S Ct 109, 1961 US LEXIS 749*.

The Legislature is empowered to enact a statute making the possession of marijuana a public offense. *People v. Oatis (1968, Cal App 2d Dist) 264 Cal App 2d 324, 70 Cal Rptr 524, 1968 Cal App LEXIS 2089, cert den (1969) 393 US 1108, 21 L Ed 2d 805, 89 S Ct 920, 1969 US LEXIS 2677*.

The 1968 amendment to Health & Saf Code, former § 11530, providing for alternate sentences of imprisonment in the county jail for not more than one year or in the State Prison for one to ten years where no prior narcotic offenses are shown, for illegal possession of marijuana (*Stats 1968 Ch 1465, § 1*), applied to a marijuana prosecution where the judgment had not become final before the effective date of the amendment. *People v. Francis (1969) 71 Cal 2d 66, 75 Cal Rptr 199, 450 P2d 591, 1969 Cal LEXIS 234*.

2. Constitutionality

Section, in prohibiting, inter alia, possession of marijuana except as otherwise provided by law, is not unconstitutional on ground that it is vague, uncertain, ambiguous and unintelligible, for not defining word "possession," since statute has been judicially construed to forbid "conscious and voluntary possession." *People v. Widener (1963, Cal App 2d Dist) 220 Cal App 2d 826, 34 Cal Rptr 130, 1963 Cal App LEXIS 2318*.

Health & Saf Code, former § 11530, is not unconstitutional as imposing cruel and unusual punishment. *People v. Quilon (1966, Cal App 1st Dist) 245 Cal App 2d 624, 54 Cal Rptr 294, 1966 Cal App LEXIS 1499*.

The validity of legislation which would be necessary or proper under a given state of facts does not depend on the actual existence of the supposed facts, but it is enough if the law-making body may rationally believe such facts to be established; and Health & Saf Code, former § 11530 prohibiting the possession of marijuana is constitutional if reasonable men may entertain the belief that the use of the drug, once begun, almost inevitably leads to excess, such belief affording a sufficient justification for applying restrictions thereto. *People v. Aguiar* (1968, Cal App 1st Dist) 257 Cal App 2d 597, 65 Cal Rptr 171, 1968 Cal App LEXIS 2484, cert den (1968) 393 US 970, 89 S Ct 411, 21 L Ed 2d 383, 1968 US LEXIS 261.

In a prosecution for possession of marijuana, the defendant made no showing that any wrongful legislative discrimination or other impure motive existed for an alleged disparity between the treatment of alcohol and marijuana so as to render a statute prohibiting possession of the latter unconstitutional as a denial of equal protection of the laws, where the court could judicially notice that it might be reasonably said the legislature was warranted in concluding that the use of alcohol is not as antisocial as the use of marijuana and that the differences inherent in these euphorics reasonably justify differentiation in treatment, and where it could not be said in the light of present medical attitudes toward marijuana that the proscription against possession thereof is palpably arbitrary and erroneous beyond rational doubt. *People v. Aguiar* (1968, Cal App 1st Dist) 257 Cal App 2d 597, 65 Cal Rptr 171, 1968 Cal App LEXIS 2484, cert den (1968) 393 US 970, 89 S Ct 411, 21 L Ed 2d 383, 1968 US LEXIS 261.

In the light of conflicting opinion as to the addictive effect of marijuana, it is for the legislature to weigh fact-finding studies, and a court must uphold Health & Saf Code, former § 11530, prohibiting the possession of marijuana, provided the statute does not invidiously discriminate against any group and it does not intrude on specially protected areas enumerated in the Bill of Rights, for example, the freedom to hold and express ideas or the right to associate freely with persons of one's own choice. *People v. Aguiar* (1968, Cal App 1st Dist) 257 Cal App 2d 597, 65 Cal Rptr 171, 1968 Cal App LEXIS 2484, cert den (1968) 393 US 970, 89 S Ct 411, 21 L Ed 2d 383, 1968 US LEXIS 261.

The constitutionality (*U.S. Const, 8th Amend; Cal Const, art I, § 6*) of the statute on possession of marijuana (Health & Saf Code, former § 11530), and the statute on the sale of marijuana (Health & Saf Code, former § 11531) could not be properly presented on appeal, where the matter was not raised in the trial court, and the appellate court only had before it an expression of defense counsel's personal belief that the offenses did not endanger society to the extent that the sentences were justified, and no authority was cited that demonstrated the harmfulness or harmlessness of marijuana use or addiction or the social consequences of the use of the drug. *People v. Cuellar* (1968, Cal App 5th Dist) 262 Cal App 2d 766, 68 Cal Rptr 846, 1968 Cal App LEXIS 2367.

The prohibition of possession of marijuana is not unconstitutional. *People v. Irvin* (1968, Cal App 1st Dist) 264 Cal App 2d 747, 70 Cal Rptr 892, 1968 Cal App LEXIS 2142.

California's general nondiscriminatory prohibitions against marijuana express a compelling state interest as discerned by the Legislature and, in a prosecution for possession of marijuana, there was no violation of the constitutional ban against interference with religion, where the record showed that defendant did not worship or sanctify marijuana, but employed its hallucinogenic biochemical properties as an auxiliary to a desired capacity for communication with the Supreme Being; thus the law did not bar defendant from practices indispensable to the pursuit of his faith; it merely compelled him to abandon reliance upon an artificial aid and to utilize other, perhaps self-induced, means to attain the desired intensification of apperception. *People v. Collins* (1969, Cal App 3d Dist) 273 Cal App 2d 486, 78 Cal Rptr 151, 1969 Cal App LEXIS 2191.

The state's prohibitions against the use of marijuana express sufficiently compelling and lawful state interest to be upheld against a claim of interference with the exercise of religion in the absence of evidence that marijuana itself constituted for the particular defendant an object of worship essential to an exclusively religious ritual. *People v. Werber* (1971, Cal App 1st Dist) 19 Cal App 3d 598, 97 Cal Rptr 150, 1971 Cal App LEXIS 1306.

The provision in *Health & Saf. Code, § 11357*, providing that a person convicted of possession of marijuana who has previously been convicted twice of narcotics violations shall not be eligible for parole for a period of five years, is unconstitutional as constituting cruel and unusual punishment, and is invalid under *Cal. Const., Art. I, § 6*. Thus, a defendant sentenced pursuant to that provision was entitled to parole consideration at such time as was otherwise appropriate under the laws of the state. However, defendant's sentence under the statute of from five years to life was not unconstitutional. *People v. Ruiz (1975, Cal App 1st Dist) 49 Cal App 3d 739, 122 Cal Rptr 841, 1975 Cal App LEXIS 1248*.

In an action for declaratory and injunctive relief by individuals and an organization against law enforcement officials, attacking sections of the H & S C that prohibit the private possession and use of marijuana by adults, the trial court properly granted summary judgment for defendants as to a cause of action alleging that the statutes violated plaintiffs' rights of privacy under *Cal Const, art I, § 1*. The right of privacy does not guarantee adult Californians the privilege of smoking a possibly harmful drug, even in the privacy of their homes. *National Organization for Reform of Marijunan Laws v. Gain (1979, Cal App 1st Dist) 100 Cal App 3d 586, 161 Cal Rptr 181, 1979 Cal App LEXIS 2472*.

In an action for declaratory and injunctive relief by individuals and an organization against law enforcement officers, attacking sections of the H & S C that prohibit the private possession and use of marijuana by adults, the trial court properly granted summary judgment for defendants as to a cause of action alleging that the laws violated plaintiffs' rights to equal protection because other substances such as alcohol and tobacco are not illegal, where the existence of a legitimate scientific debate regarding whether marijuana is harmful was established by the affidavits and other evidence filed in proper form by both sides. The Legislature could reasonably conclude that the use of alcohol is not as antisocial as the use of marijuana and that the differences inherent in those euphorics reasonably justify differentiation in treatment. *National Organization for Reform of Marijunan Laws v. Gain (1979, Cal App 1st Dist) 100 Cal App 3d 586, 161 Cal Rptr 181, 1979 Cal App LEXIS 2472*.

In an action for declaratory and injunctive relief by individuals and an organization against law enforcement officers, attacking sections of the H & S C that prohibit the private possession and use of marijuana by adults, the trial court properly granted summary judgment for defendants as to a cause of action alleging that enforcement of the marijuana laws subjected plaintiffs to cruel and unusual punishment in violation of *U S Const, 8th Amend*, and *Cal Const., art I, § 17*. The guidelines for determining whether a punishment is cruel and unusual are to be used only in a situation in which a punishment has been imposed. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears. *National Organization for Reform of Marijunan Laws v. Gain (1979, Cal App 1st Dist) 100 Cal App 3d 586, 161 Cal Rptr 181, 1979 Cal App LEXIS 2472*.

In an action for declaratory and injunctive relief by individuals and an organization against law enforcement officials, attacking sections of the H & S C that prohibit the private possession and use of marijuana by adults, the trial court properly granted summary judgment for defendants as to a cause of action alleging that the statutes prohibited plaintiffs their rights to liberty and pursuit of happiness in violation of *Cal Const, art I, § 1*. Those guarantees are not absolute and do not operate as a curtailment on the basic power of the Legislature to enact reasonable police regulations. *National Organization for Reform of Marijunan Laws v. Gain (1979, Cal App 1st Dist) 100 Cal App 3d 586, 161 Cal Rptr 181, 1979 Cal App LEXIS 2472*.

3. Construction

Possession of marijuana by purchasers is not the same identical possession as that of the seller; the two possessions, as well as the two offenses, are separate and distinct. *People v. Mimms (1952, Cal App) 110 Cal App 2d 310, 242 P2d 331, 1952 Cal App LEXIS 1528, cert den (1952) 344 US 846, 73 S Ct 64, 97 L Ed 658, 1952 US LEXIS 1932*.

Possession and transportation of marijuana may constitute separate acts, transportation not being necessarily incident to possession. *People v. Holliday (1953, Cal App) 120 Cal App 2d 562, 261 P2d 301, 1953 Cal App LEXIS 1975*.

In prosecution for illegal possession of marijuana, it is not sufficient to instruct a jury that person is in possession of narcotic when it is under his dominion and control and, to his knowledge, either is carried on his person or is in his presence and custody, or, if not on his person or in his presence, possession thereof is immediate, accessible and exclusive to him, since such instruction does not include essential element of knowledge of narcotic character of object possessed. *People v. Winston* (1956) 46 Cal 2d 151, 293 P2d 40, 1956 Cal LEXIS 163.

Possession of narcotics is an offense distinct from transportation thereof, but there can be only one conviction when single act of transportation is proved and only act of possession is that incident to transportation. *People v. Roland* (1960, Cal App 1st Dist) 183 Cal App 2d 780, 6 Cal Rptr 895, 1960 Cal App LEXIS 1828.

Order finding defendant guilty of violation of this section and committing him to Youth Authority constituted "conviction" warranting deportation under Federal statute. *Zabanazad v. Rosenberg* (1962, 9th Cir Cal) 306 F2d 861, 1962 US App LEXIS 4293.

Where alien was found guilty of violating this section and placed on probation, he was deemed "convicted" of crime which subjected him to deportation under federal statute providing for deportation of alien convicted of violation of law relating to "illicit possession of or traffic in narcotic drugs or marijuana." *Gutierrez v. Immigration & Naturalization Service* (1963, 9th Cir) 323 F2d 593, 1963 US App LEXIS 4016, cert den (1964) 377 US 910, 12 L Ed 2d 179, 84 S Ct 1171, 1964 US LEXIS 1462.

The rule prohibiting multiple punishment of the same act under different provisions of the Penal Code (*Pen Code*, § 654) has no relevancy to punishment for simultaneous possession of different kinds of narcotics. Although possession of marijuana and possession of hypnotic drugs are parallel and closely-related crimes, they remain separate offenses, and neither crime contains any element which is essential to the composition of the other; for the two crimes separate punishment may be imposed. *People v. Lopez* (1967, Cal App 2d Dist) 251 Cal App 2d 918, 60 Cal Rptr 72, 1967 Cal App LEXIS 2056, cert den (1968) 390 US 1006, 88 S Ct 1251, 20 L Ed 2d 106, 1968 US LEXIS 2096.

The offense of possession of marijuana (Health & Saf Code, former § 11530) is included within the charge of sale; hence, on appeal from a judgment convicting defendant of three counts of sale of marijuana, it was proper for the appellate court to modify the judgment by reducing one count to a conviction of possession of marijuana, where it was conceded that on that count the trial judge, before whom trial was had without a jury, actually found defendant guilty of possession, and where the abstract of judgment reflected a clerical error in reciting that under that count there was a conviction of a sale. *People v. Evanson* (1968, Cal App 1st Dist) 265 Cal App 2d 698, 71 Cal Rptr 503, 1968 Cal App LEXIS 1667.

In a prosecution for possessing marijuana, the issue is not whether defendant possessed each narcotic item found in an area, but whether he possessed a usable amount of marijuana at the time and place charged; and it was not necessary that the court instruct the jury that its members must all agree which specific items of narcotics defendant possessed, so long as they all agreed at the time and place he possessed, separately, jointly or constructively, a usable amount of marijuana as to which they were correctly instructed, where the act of possession was not fragmented as to time or space, and the evidence showed all of the marijuana came from a car of which defendant was one of the occupants, some of the marijuana having remained there and some having been thrown over a cliff. *People v. Wright* (1968, Cal App 4th Dist) 268 Cal App 2d 196, 73 Cal Rptr 692, 1968 Cal App LEXIS 1292.

The offense of knowingly being present in any room or place where any narcotics are being unlawfully smoked or used (Health & Saf Code, former § 11556) is not an included offense under Health & Saf Code, former § 11530, which forbids possession of marijuana. *People v. Wilson* (1969, Cal App 2d Dist) 271 Cal App 2d 60, 76 Cal Rptr 195, 1969 Cal App LEXIS 2357.

In a narcotics prosecution, it was reversible error to convict defendant of possessing marijuana (Health & Saf Code, former § 11530), where he was also convicted of possessing marijuana for sale (Health & Saf Code, former § 11530.5),

where, further, although he might have been convicted of simple possession of the smaller quantities of marijuana found by the arresting officers and of possession for sale as to the larger quantities, no attempt at such distinction was made at trial, and where it was a case involving, not multiple acts of possession separated by time or space, but the same set of circumstances, namely, defendant's presence in a marijuana-smoke-filled room in defendant's leased premises in which various quantities of marijuana and narcotics paraphernalia had been found and in which a narcotics sale had been negotiated with a federal agent two hours before the raid on the house. *People v. Clay* (1969, Cal App 4th Dist) 273 Cal App 2d 279, 78 Cal Rptr 56, 1969 Cal App LEXIS 2166.

Possessing marijuana (Health & Saf Code, former § 11530) is an offense necessarily included in the crime of possessing marijuana for sale (Health & Saf Code, former § 11530.5). *People v. Clay* (1969, Cal App 4th Dist) 273 Cal App 2d 279, 78 Cal Rptr 56, 1969 Cal App LEXIS 2166.

The mere possession of water pipes supposedly used for smoking marijuana, standing by itself, does not provide sufficient grounds for an arrest for possession of marijuana. *People v. Ortiz* (1969, Cal App 4th Dist) 276 Cal App 2d 1, 80 Cal Rptr 469, 1969 Cal App LEXIS 1764.

One can possess marijuana in violation of Health & Saf Code, former § 11530, without opening or maintaining a place in which narcotics are sold or used in violation of Health & Saf Code, former § 11557, requiring proof of opening or maintaining such a place, and such a violation is not an offense necessarily included in a violation of former § 11530. *People v. West* (1970) 3 Cal 3d 595, 91 Cal Rptr 385, 477 P2d 409, 1970 Cal LEXIS 233.

A municipal court misdemeanor conviction of possession of marijuana was not a "felony offense" or an offense "punishable as a felony" so as to be chargeable as a prior conviction for the purpose of enhancement of penalties on conviction of subsequent felony charges of possession of marijuana under Health & Saf Code, former § 11530, and possession of a restricted dangerous drug under Health & Saf Code, former § 11910, where the offense giving rise to the municipal court conviction was initially charged by the prosecutor as a misdemeanor as permitted by *Pen Code*, § 17, subd (a). Under Health & Saf Code, former §§ 11533, 11914, a "felony offense" or a "offense punishable as a felony" is an offense for which the law prescribes imprisonment in the state prison as either an alternative or the sole penalty, regardless of the sentence received, but the prosecutor's action in charging the offense as a misdemeanor removed the alternative of a prison sentence; it was a misdemeanor from the moment the complaint was filed. *People v. Garnett* (1973, Cal App 1st Dist) 31 Cal App 3d 255, 107 Cal Rptr 197, 1973 Cal App LEXIS 1067.

When a conviction for possession of marijuana, although the misdemeanor alternate sentence is imposed, serves to trigger the enhanced penalty provisions of *Health & Saf. Code*, § 11357, and other sections of the code in the event of subsequent narcotic or controlled substances, the existence of such penalties shields *Pen. Code*, § 1203.45, providing for the sealing of the records of a minor's misdemeanor convictions but excluding narcotics offenses, from an equal protection challenge when they are applicable. The enforcement of sanctions prescribed in criminal statutes is a compelling state interest of great importance. *People v. Ryser* (1974, Cal App 3d Dist) 40 Cal App 3d 1, 114 Cal Rptr 668, 1974 Cal App LEXIS 843.

4. Defenses

Defendant's use of marijuana in accordance with his religious beliefs as being constitutionally protected was not a defense to possession and cultivation of marijuana where he offered no evidence that his use of marijuana was a religious practice in any sense of that term and though, in his discourse to the jury, he referred to the Bible and to the practices of some Hindus, in essence his testimony expressed only his own personal philosophy and way of life. *People v. Mitchell* (1966, Cal App 2d Dist) 244 Cal App 2d 176, 52 Cal Rptr 884, 1966 Cal App LEXIS 1558.

Arrestees could not prevent the State from prosecuting them for possession of marijuana for sale, in violation of former H & S C § 11530.5, on the ground that the State refused to disclose the name of certain informants because former CCP § 1881.1 gave the trial court the discretion to permit nondisclosure of the identity of an informer after a

determination that the informer was reliable. *Martin v. Superior Court of Los Angeles County* (1967) 66 Cal 2d 257, 57 Cal Rptr 351, 424 P2d 935, 1967 Cal LEXIS 300.

In a prosecution for transporting marijuana (*Health & Saf. Code*, § 11360, subd. (a)) and possession of more than 28.5 grams of marijuana (*Health & Saf. Code*, § 11357, subd. (c)), the trial court properly excluded defendant's common law medical necessity defense. The defense was unavailable to defendant, since a legal medication was available and known to both her and her doctor for treating her migraine headaches. A reasonable jury, therefore, could not have found that defendant lacked adequate legal alternatives to possessing and transporting marijuana. Further, the trial court properly excluded defendant's psychiatrist from testifying during the trial with respect to that defense. A witness may testify at trial only as to relevant matters. The witness's testimony was relevant only to whether defendant could establish a medical necessity defense. The trial court found defendant's offer of proof insufficient. The defense was excluded because, even accepting all of the witness's testimony as true, defendant failed to establish the required elements of that defense. *People v. Trippet* (1997, Cal App 1st Dist) 56 Cal App 4th 1532, 66 Cal Rptr 2d 559, 1997 Cal App LEXIS 649, rehearing denied (1997, Cal App 1st Dist) 57 Cal App 4th 754, 1997 Cal App LEXIS 706, review denied (1997, Cal) 1997 Cal LEXIS 8225.

In a prosecution for transporting marijuana (*Health & Saf. Code*, § 11360, subd. (a)) and possession of more than 28.5 grams of marijuana (*Health & Saf. Code*, § 11357, subd. (c)), the trial court properly rejected defendant's religious freedom defense on the ground that the statutes prohibiting the possession and transportation of marijuana were constitutional as applied to her. Application of religion-neutral, general criminal drug laws need not be supported by a compelling state interest. Thus, a state may enact and enforce generalized criminal sanctions for marijuana possession and transportation without running afoul of the free exercise clause of *U.S. Const., 1st Amend.* Further, defendant failed to present evidence of her religious beliefs or that her use of marijuana was central to her religious practice to trigger any sort of consideration of the free exercise clause. The only evidence that she presented remotely relevant to this issue consisted of a lengthy policy argument describing the unfairness of prohibiting marijuana use for medical and religious reasons and then the conclusory statement, "I use it for spiritual and meditative needs." At no time did defendant assert, much less establish, that marijuana use was mandated or even substantially motivated by her religion. *People v. Trippet* (1997, Cal App 1st Dist) 56 Cal App 4th 1532, 66 Cal Rptr 2d 559, 1997 Cal App LEXIS 649, rehearing denied (1997, Cal App 1st Dist) 57 Cal App 4th 754, 1997 Cal App LEXIS 706, review denied (1997, Cal) 1997 Cal LEXIS 8225.

The Compassionate Use Act of 1996 (*Health & Saf. Code*, § 11362.5) (marijuana for medical purposes), which was enacted while defendant's appeal from convictions for possessing and transporting marijuana was pending, could be applied retroactively to provide, if its terms and the applicable facts permitted, a defense to defendant. The Legislature is presumed to have extended to defendants whose appeals are pending the benefits of intervening statutory amendments that decriminalize formerly illicit conduct or reduce the punishment for acts that remain unlawful. No different rule applies to an affirmative defense to the crime for which a defendant was convicted, which defense was enacted during the pendency of his or her appeal. Since *Health & Saf. Code*, § 11362.5, contains no savings clause, it may operate retrospectively to defend against criminal liability, in whole or in part, for some who are appealing convictions for possessing, cultivating, and using marijuana. *People v. Trippet* (1997, Cal App 1st Dist) 56 Cal App 4th 1532, 66 Cal Rptr 2d 559, 1997 Cal App LEXIS 649, rehearing denied (1997, Cal App 1st Dist) 57 Cal App 4th 754, 1997 Cal App LEXIS 706, review denied (1997, Cal) 1997 Cal LEXIS 8225.

In a prosecution in which defendant was convicted of transporting marijuana and possession of more than 28.5 grams of marijuana, remand for a limited retrial was required for the trial court to determine whether the Compassionate Use Act of 1996 (*Health & Saf. Code*, § 11362.5) (marijuana for medical purposes), which was enacted while defendant's appeal was pending, and which applied retroactively, provided her with a partial defense to either or both of the charges against her. First, *Health & Saf. Code*, § 11362.5, subd. (d), provides that *Health & Saf. Code*, § 11357, relating to the possession of marijuana, does not apply to a patient who possesses marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician. Although, defendant could not show that her physician "recommended" marijuana to her to treat her migraine headaches, the record was unclear as to whether or not any physician had "approved" defendant's use of marijuana. It was possible that, on retrial, defendant

could show that the quantity of marijuana possessed, and the form and manner in which it was possessed, was reasonably related to her current medical needs. Second, *Health & Saf. Code*, § 11362.5, does not exempt the transportation of marijuana allegedly used or to be used for medical purposes from prosecution under *Health & Saf. Code*, § 11360. However, if the quantity transported and the method, timing, and distance of the transportation are reasonably related to the patient's current medical needs, there can be an implied defense to a *Health & Saf. Code*, § 11360, charge. In this case, there was a remote possibility that defendant could establish that the two pounds of marijuana she was transporting at the time of her arrest met this test. *People v. Trippet* (1997, Cal App 1st Dist) 56 Cal App 4th 1532, 66 Cal Rptr 2d 559, 1997 Cal App LEXIS 649, rehearing denied (1997, Cal App 1st Dist) 57 Cal App 4th 754, 1997 Cal App LEXIS 706, review denied (1997, Cal) 1997 Cal LEXIS 8225.

For a defendant to be able to avoid criminal prosecution or sanction pursuant to *H & S C* § 11362.5(b)(1)(B), when charged with possession or cultivation of marijuana in violation of *H & S C* §§ 11357, 11358, he or she must be able to defend on the ground that these provisions do not apply because he or she is a qualified patient or primary caregiver, *H & S C* § 11362.5(d). *People v. Mower* (2002) 28 Cal 4th 457, 122 Cal Rptr 2d 326, 49 P3d 1067, 2002 Cal LEXIS 4520.

Diabetic criminally accused of possession and cultivation of marijuana at advice of his physician was allowed to raise his status as qualified patient under Compassionate Use Act of 1996 to move for dismissal of indictment; *H & S C* § 11362.5(d) provided that *H & S C* § 11357, criminalizing the possession of marijuana, and *H & S C* § 11358, criminalizing the cultivation of marijuana, did not apply to a patient, or to a patient's primary caregiver, who possessed or cultivated marijuana for medical purposes. *People v. Mower* (2002) 28 Cal 4th 457, 122 Cal Rptr 2d 326, 49 P3d 1067, 2002 Cal LEXIS 4520.

Deputy sheriff had probable cause to search defendant's car for marijuana after he detected its odor, even though defendant had a marijuana prescription. It was reasonable for the detective to suspect that even if the defendant made only personal use of the marijuana found in the passenger area, defendant might stash additional quantities for future use in other parts of the vehicle, including the trunk. *People v. Strasburg* (2007, Cal App 1st Dist) 148 Cal App 4th 1052, 56 Cal Rptr 3d 306, 2007 Cal App LEXIS 407, modified (2007, Cal App 1st Dist) 2007 Cal App LEXIS 493, review denied (2007, Cal) 2007 Cal LEXIS 7329.

4.5. Destruction of Seized Marijuana

Motion to return a portion of seized marijuana was properly denied, even though the State conceded that the petitioner was a qualified patient and even though the State had dismissed charges against him in the interests of justice, because the amount of marijuana seized (4.5 pounds dried, 10 pounds drying, and 46 plants) confirmed that the petitioner was not in lawful possession. *Chavez v. Superior Court* (2004, Cal App 4th Dist) 123 Cal App 4th 104, 20 Cal Rptr 3d 21, 2004 Cal App LEXIS 1739, review denied (2004, Cal) 2004 Cal LEXIS 12587.

B. EVIDENCE

5. In General

It is essential that defendant have physical or constructive possession, coupled with knowledge of presence and narcotic character of substance, in order for him to be guilty of crime of unlawful possession of marijuana. *People v. Rodriguez* (1957, 2nd Dist) 151 Cal App 2d 598, 312 P2d 272, 1957 Cal App LEXIS 1803.

It is not necessary to prove person's connection with marijuana in order to establish essential elements necessary to prove corpus delicti of crime of possession of marijuana. *People v. Sullivan* (1963, Cal App 2d Dist) 214 Cal App 2d 404, 29 Cal Rptr 515, 1963 Cal App LEXIS 2622.

The essential elements of the crime of possession of marijuana are dominion and control thereof coupled with knowledge of its presence and narcotic character. *Pinizzotto v. Superior Court of Los Angeles County* (1968, Cal App 2d

Dist) 257 Cal App 2d 582, 65 Cal Rptr 74, 1968 Cal App LEXIS 2482.

In a prosecution for possession of marijuana, the evidence was sufficient to support defendant's conviction, where it was shown that he exercised dominion and control over the contraband, that he had knowledge of its presence, and that he had knowledge of its narcotic character. *People v. Beal* (1968, Cal App 2d Dist) 268 Cal App 2d 481, 73 Cal Rptr 787, 1968 Cal App LEXIS 1331.

A conviction for possession of marijuana may be upheld where there is evidence that the defendant aided and abetted another in committing the crime of possession of narcotics. *People v. Francis* (1969) 71 Cal 2d 66, 75 Cal Rptr 199, 450 P2d 591, 1969 Cal LEXIS 234.

The evidence was sufficient to support defendant's conviction of possessing marijuana, where it was shown that, on his arrest, he had had possession and control of premises that contained a large quantity of marijuana and hashish and that he had been present in a room which smelled strongly of marijuana smoke and in which there was marijuana smoking paraphernalia and usable quantities of marijuana in plain sight as well as scattered marijuana debris, and where his knowledge of the narcotic character of marijuana was shown by the marijuana debris found in his pocket and by a large amount of marijuana concealed in his garage and under the rug in his house. *People v. Clay* (1969, Cal App 4th Dist) 273 Cal App 2d 279, 78 Cal Rptr 56, 1969 Cal App LEXIS 2166.

A magistrate was justified in holding defendant to answer for the crime of possession of marijuana, and the requirements that the People must prove that the accused exercised dominion and control over the drug, that he had knowledge of its presence, and that he had knowledge of its narcotic character, were met, even though defendant was arrested before he opened a package he received from the post office, where a letter enclosed in the package, which contained marijuana, showed that defendant ordered the marijuana and was fully aware of its character, where he inquired of the post office at least twice before he received the package, and where he must have known what the package contained when he finally picked it up and took it to his car. *People v. Schachten* (1969, Cal App 5th Dist) 276 Cal App 2d 278, 80 Cal Rptr 718, 1969 Cal App LEXIS 1803.

To convict an accused of possession of marijuana it must be proved that he had knowledge of its presence and of its character, and that he had either actual or constructive possession of a usable quantity thereof. *People v. Valerio* (1970, Cal App 4th Dist) 13 Cal App 3d 912, 92 Cal Rptr 82, 1970 Cal App LEXIS 1300.

6. Possession

In a prosecution for possession of marijuana, it is incumbent on the state to prove that the defendant had at least constructive possession of the narcotic and that he knowingly possessed it. *People v. Martin* (1946, Cal App) 76 Cal App 2d 317, 172 P2d 910, 1946 Cal App LEXIS 715.

A defendant accused of possession of marijuana is sufficiently advised of the charge against him by an information alleging possession of flowering tops and leaves of Indian hemp, being cannabis sativa. *People v. Martinez* (1953, Cal App) 117 Cal App 2d 701, 256 P2d 1028, 1953 Cal App LEXIS 1869.

Exclusive possession of marijuana need not be shown where two or more persons are charged with possession. *People v. Cuevas* (1955, Cal App 2d Dist) 131 Cal App 2d 393, 280 P2d 831, 1955 Cal App LEXIS 2063.

Though it is necessary, on charge of illegal possession of narcotics, to show defendant's knowledge, possession need not be exclusive, may be constructive as well as physical, and may be shown by circumstances as well as by direct evidence. *People v. Nelson* (1959, Cal App 1st Dist) 171 Cal App 2d 356, 340 P2d 718, 1959 Cal App LEXIS 1834, overruled (1966) 64 Cal 2d 842, 52 Cal Rptr 4, 415 P2d 819, 1966 Cal LEXIS 318.

In prosecution for possession of marijuana, exclusive possession of marijuana was not necessary, since though others may have had access to house, or even defendant's bedroom (where marijuana was found on top of closet), this

would not in itself give them access to closet; finding marijuana among defendant's personal effects in his room in out-of-the-way place on his shelf above his closet raised reasonable and permissible inference that narcotic was his though another person may have had access to house and his room or even shared same with him. *People v. Bretado* (1960, Cal App 2d Dist) 178 Cal App 2d 465, 3 Cal Rptr 216, 1960 Cal App LEXIS 2616.

Conviction of possession of narcotics can be sustained on basis of defendant's possession both before and after transportation involved and apart from such transportation. *People v. Roland* (1960, Cal App 1st Dist) 183 Cal App 2d 780, 6 Cal Rptr 895, 1960 Cal App LEXIS 1828.

That marijuana cigarette was in defendant's possession and control was shown by evidence that cigarette was found in cigarette package lying inches from where defendant was seated in car; this possession, with knowledge of cigarette's narcotic nature, could reasonably be inferred from its secretion in ordinary cigarette package. *People v. Powell* (1965, Cal App 2d Dist) 236 Cal App 2d 881, 46 Cal Rptr 415, 1965 Cal App LEXIS 886.

A finding that defendant knowingly possessed the marijuana found in his trouser pocket after his arrest for suspected rape was sufficiently supported, as against his contention that hostile persons had access to his clothing for over an hour while he was separated from it, by other evidence implying that no other person had, in fact, placed anything in his trousers, and that the marijuana was there when he disrobed, such evidence including the fact that the suspected rape victim, who later testified that she had consented to the intercourse, was found apparently unconscious, with her pupils dilated. *People v. Jones* (1967, Cal App 2d Dist) 255 Cal App 2d 163, 62 Cal Rptr 848, 1967 Cal App LEXIS 1253, cert den (1968) 391 US 927, 20 L Ed 2d 667, 88 S Ct 1827, 1968 US LEXIS 1745.

The elements of the offense of possession of marijuana are actual control and dominion or the right to exercise control or dominion over the drug with knowledge of its presence and narcotic character, and a person has possession of marijuana when he has physical control thereof with intent to exercise such control, or, having had such physical control, has not abandoned it and no other person has that possession. The control incident to possession may be actual or constructive, and a person is in actual possession of marijuana which he holds in his hand, and is in constructive possession of other marijuana which he keeps at a place where it is subject to his control and dominion even though he is not present at that place. *People v. Von Latta* (1968, Cal App 4th Dist) 258 Cal App 2d 329, 65 Cal Rptr 651, 1968 Cal App LEXIS 2419.

The evidence was sufficient to sustain defendant's conviction of possession of marijuana even though the narcotic was not produced in court, where the arresting officer, who had had many years of experience and whose testimony was not objected to, said that in his opinion a cigarette smoked by defendant in his presence contained marijuana, and where his opinion was in part based on the odor and appearance of the cigarette. *People v. Marinos* (1968, Cal App 2d Dist) 260 Cal App 2d 735, 67 Cal Rptr 452, 1968 Cal App LEXIS 1910.

It is not required that a person have the exclusive or physical possession of marijuana before a conviction may be had under the provisions of Health & Saf Code, former § 11530; and possession may be established under the doctrine of constructive possession. *People v. Patton* (1968, Cal App 2d Dist) 264 Cal App 2d 637, 70 Cal Rptr 484, 1968 Cal App LEXIS 2127.

In a prosecution for illegal possession of marijuana, a combination of odor and observable smoke established the fact of marijuana use, where, when defendant complied with the request of police officers to roll down his car window, the officers smelled the odor of burning marijuana and saw a thick cloud of smoke, and where the fact that the smoke was produced by burning marijuana rather than ordinary tobacco was within the expertise of the officers. *People v. Brown* (1969, Cal App 2d Dist) 271 Cal App 2d 391, 76 Cal Rptr 568, 1969 Cal App LEXIS 2393.

To convict a defendant of possessing marijuana, it is not necessary that the narcotic should have been in defendant's exclusive possession. *People v. Clay* (1969, Cal App 4th Dist) 273 Cal App 2d 279, 78 Cal Rptr 56, 1969 Cal App LEXIS 2166.

A defendant may be convicted as a principal of possession of marijuana if he aided and abetted the possession of another, even though there is no evidence that he, himself, had possession; the test is whether the accused in any way, direct or indirectly, aided the perpetrator by acts or encouraged him by words or gestures. *People v. Valerio* (1970, Cal App 4th Dist) 13 Cal App 3d 912, 92 Cal Rptr 82, 1970 Cal App LEXIS 1300.

In a prosecution for possession of marijuana, it is necessary to a finding of either actual or constructive possession that the accused had the right to exercise dominion and control over the contraband or at least that he had the right to exercise dominion and control over the place where it was found; conviction is not precluded, however, if defendant's right to exercise dominion and control over the place where the contraband was located is shared with another. *People v. Valerio* (1970, Cal App 4th Dist) 13 Cal App 3d 912, 92 Cal Rptr 82, 1970 Cal App LEXIS 1300.

7. Knowledge

A conviction of planting and cultivating marijuana plants in violation of this section was sustained by evidence that marijuana plants were growing among the tomato plants in the defendant's backyard, and that his neighbors had seen him digging and cultivating around the vines. *People v. Gregoris* (1945, Cal App) 70 Cal App 2d 716, 161 P2d 568, 1945 Cal App LEXIS 1123.

In nonjury prosecution for illegal possession of marijuana found in defendant's apartment, fact that court was not satisfied beyond reasonable doubt that codefendant had possession of narcotics is insufficient reason for finding that defendant did. *People v. Antista* (1954, Cal App) 129 Cal App 2d 47, 276 P2d 177, 1954 Cal App LEXIS 1562.

Awareness that plant was narcotic must be shown to sustain conviction of planting and cultivating marijuana. *People v. Gorg* (1955) 45 Cal 2d 776, 291 P2d 469, 1955 Cal LEXIS 367.

Conviction was sustained by evidence that defendant was familiar with marijuana and watered and cared for marijuana plants growing on property under his dominion and control. *People v. McDaniel* (1957, Cal App 3d Dist) 154 Cal App 2d 475, 316 P2d 660, 1957 Cal App LEXIS 1654.

Conviction was sustained by evidence that defendant was familiar with marijuana and that marijuana plants grew on residential property under his dominion and control. *People v. McDaniel* (1957, Cal App 3d Dist) 154 Cal App 2d 475, 316 P2d 660, 1957 Cal App LEXIS 1654.

Defendant's knowledge of presence of marijuana cigarettes in box located in his room had to be shown to sustain conviction of illegal possession of marijuana, and uncontradicted fact that they were found in his personal effects, on top of closet in his bedroom, justified inference that he knew of their presence. *People v. Bretado* (1960, Cal App 2d Dist) 178 Cal App 2d 465, 3 Cal Rptr 216, 1960 Cal App LEXIS 2616.

Essential ingredient of offense of unlawful possession of marijuana is defendant's knowledge of marijuana character of article allegedly possessed by him. *People v. Leyva* (1960, Cal App 4th Dist) 187 Cal App 2d 249, 9 Cal Rptr 469, 1960 Cal App LEXIS 1380.

Conviction of unlawfully planting and cultivating marijuana was supported by evidence that defendant showed friend about dozen small plants growing in defendant's back yard and told him that they were marijuana, that friend saw defendant water plants on several other occasions, that neighbor also saw plants in defendant's back yard and saw defendant patting soil down around them and watering them, that defendant, at his friend's suggestion, subsequently moved plants and replanted them in wooded area some distance from defendant's house and was observed by his friend watering them there, and that deputy sheriff observed defendant approaching plot containing plants cautiously, looking in all directions before bending over plants. *People v. Crawford* (1961, Cal App 1st Dist) 198 Cal App 2d 71, 17 Cal Rptr 702, 1961 Cal App LEXIS 2506.

There was sufficient evidence to support defendant's conviction for possession of marijuana, a violation of former

H & S C § 11530, where marijuana was found in a coat that defendant admitted was his. The trial court properly concluded that defendant had knowledge of the existence of the marijuana. *People v. Contreras* (1963, Cal App 2d Dist) 211 Cal App 2d 641, 27 Cal Rptr 619, 1963 Cal App LEXIS 2954.

That visible particles of marijuana were contained in kitchen tablecloth, toothbrush holder, pipe, paper bundle, and leather case was sufficient to warrant charge of knowledgeable possession of marijuana. *People v. Hodson* (1964, Cal App 2d Dist) 225 Cal App 2d 554, 37 Cal Rptr 575, 1964 Cal App LEXIS 1403.

In a prosecution for the illegal possession of marijuana (Health & Saf Code, former § 11530), the People must prove that the accused exercised dominion and control over the marijuana, that he knew of its presence on his person, and that he knew of its narcotic character. *People v. Thomas* (1966, Cal App 5th Dist) 246 Cal App 2d 104, 54 Cal Rptr 409, 1966 Cal App LEXIS 1008.

In order to convict a defendant of the crime of possession or cultivation of marijuana, the prosecution has the burden of proving that he was aware of the narcotic aspect of the offense. *People v. Willmirth* (1966, Cal App 5th Dist) 247 Cal App 2d 513, 55 Cal Rptr 678, 1966 Cal App LEXIS 992.

Probable cause sufficient for an information charging possession, planting and cultivation of marijuana (Health & Saf Code, former § 11530) was shown by evidence that, inter alia, a bed of nine growing plants of marijuana, cut out of the grass lawn in defendant's backyard, was weeded, tended to and irrigated by him in the same fashion as his tomato plants, and that the lawn was neglected. *People v. Willmirth* (1966, Cal App 5th Dist) 247 Cal App 2d 513, 55 Cal Rptr 678, 1966 Cal App LEXIS 992.

The evidence in a prosecution for possession of marijuana (Health & Saf Code, former § 11530) supported the inference that defendant had knowledge of the presence of marijuana in the apartment he shared with another, that he had physical custody of the contraband, and that he knew it to be a narcotic, where he rented the apartment under an assumed name, where he claimed he had just come from New York, but numerous persons were seen making short visits to the apartment, where a few days before his arrest marijuana was seen in his former apartment in a bag similar to one later seen on his dresser, where he was found asleep in the apartment next to a marijuana roach lying on top of a coffee table, and other marijuana was found in the apartment. *People v. Yeoman* (1968, Cal App 2d Dist) 261 Cal App 2d 338, 67 Cal Rptr 869, 1968 Cal App LEXIS 1751, overruled *People v. De Santiago* (1969) 71 Cal 2d 18, 76 Cal Rptr 809, 453 P2d 353, 1969 Cal LEXIS 230.

Knowledge of the presence of contraband is a necessary element of criminal marijuana possession. *People v. Van Syoc* (1969, Cal App 4th Dist) 269 Cal App 2d 370, 75 Cal Rptr 490, 1969 Cal App LEXIS 1656.

Proof that marijuana plants were growing on the sundeck of a residence, coupled with evidence that defendants had control of the premises, was sufficient to support their conviction of cultivating marijuana; marijuana plants do not grow in pots and planters by chance, and when they are found growing in that manner it is reasonable to infer those who controlled and occupied the premises had something to do with their planting, cultivation or care. While this may not be the only reasonable inference deducible from such evidence, it is sufficient that it is one which may be fairly drawn. *People v. Vermouth* (1974, Cal App 4th Dist) 42 Cal App 3d 353, 116 Cal Rptr 675, 1974 Cal App LEXIS 1229.

8. Intent

Specific intent to violate the law is not an element of the crime of possession of marijuana under Health & Saf Code, former § 11530; only dominion, control, and knowledge of the narcotic character of the substance need be shown; and it was not error in such a case for the prosecutor to remark in his closing argument that defendant's reasons for possession were irrelevant and the fact that he possessed the marijuana intending to possess it was enough under the code section. *People v. Williams* (1967, Cal App 2d Dist) 254 Cal App 2d 436, 62 Cal Rptr 87, 1967 Cal App LEXIS 1414.

9. Identity of Substance

A finding that a substance found on defendant's premises was marijuana is sustained by testimony to that effect of a chemist who analyzed the substance, and by evidence that a few weeks before the substance was found, a quantity of marijuana was brought onto the premises. *People v. Jones* (1952, Cal App) 113 Cal App 2d 567, 248 P2d 771, 1952 Cal App LEXIS 1406.

Defendant's admission that cigarettes found on his clothing were marijuana was sufficient to show their character. *People v. Calderon* (1962, Cal App 3d Dist) 205 Cal App 2d 566, 23 Cal Rptr 62, 1962 Cal App LEXIS 2166.

The narcotic character of a substance may be proved by circumstantial evidence; and in a prosecution for selling and giving away marijuana, the evidence clearly constituted substantial proof that a package purchased by defendant contained marijuana where, although it did not appear that the package was seized and analyzed, it was one of four packages contained in a sack distributed by the carrier thereof to each of four persons, one of whom was defendant, and it was stipulated that an examination revealed that the substance in the package handed to one of such persons other than defendant was marijuana. *People v. Francis* (1969) 71 Cal 2d 66, 75 Cal Rptr 199, 450 P2d 591, 1969 Cal LEXIS 234.

In a prosecution for possession of marijuana, it was sufficiently established that the contraband found in defendant's house was marijuana, where, although the case was submitted on the preliminary transcript in which a stipulation to the effect that it was marijuana had been restricted to the preliminary hearing, such stipulation, by agreement between the district attorney and defense counsel, was carried over into the trial itself, and where, at the trial, trained narcotics officers testified, without objection, that the substances found were marijuana and its derivative hashish. *People v. Clay* (1969, Cal App 4th Dist) 273 Cal App 2d 279, 78 Cal Rptr 56, 1969 Cal App LEXIS 2166.

In a prosecution for illegal possession of marijuana submitted to the court on the transcript of defendant's preliminary examination, the substance found on defendant's person was established to be marijuana, where a trained narcotics agent testified, without objection, that he recognized it as marijuana, and where, moreover, before submitting the case on the preliminary transcript defense counsel and the deputy district attorney stipulated that the substance described as marijuana also be so described in Superior Court in addition to the testimony present in the preliminary transcript. *People v. Locke* (1969, Cal App 4th Dist) 274 Cal App 2d 541, 79 Cal Rptr 367, 1969 Cal App LEXIS 2081.

In a juvenile proceeding the evidence was insufficient to support a true finding that the juvenile possessed concentrated cannabis in violation of *Health & Saf. Code*, § 11357, subd. (a), where a police officer testified that defendant, while being booked, had removed several items from his pocket which "resembled hashish," but the officer had not been qualified as an expert in spotting narcotics nor did he testify to his background or knowledge regarding drugs, where the juvenile admitted that the items were indeed hashish and that he and his friends had smoked some of the substance, and where, although a chemical analysis of the substance had been run, no evidence as to the results were introduced at trial. The identification of narcotics as such requires the opinion of an expert. Identification by the user is permitted only where there is evidence showing the user knows the nature of the drugs due to his past use and testimony as to the reactions he experiences while under the influence. *In re Waylon M.* (1982, Cal App 4th Dist) 129 Cal App 3d 950, 181 Cal Rptr 413, 1982 Cal App LEXIS 1386.

10. Usable Quantity

A court could not infer possession of marijuana from debris found in defendant's pocket unless that debris constituted a usable quantity. *People v. Villalobos* (1966, Cal App 2d Dist) 245 Cal App 2d 561, 54 Cal Rptr 60, 1966 Cal App LEXIS 1492.

Though a court might, at some point, take judicial notice that a certain quantity or condition of narcotic substance is

usable, 50 milligrams of marijuana scraped from a pocket does not reach the status of a usable quantity of narcotic. *People v. Villalobos* (1966, Cal App 2d Dist) 245 Cal App 2d 561, 54 Cal Rptr 60, 1966 Cal App LEXIS 1492.

Where the quantity of marijuana is so minute as to bring into question whether or not it is a usable quantity, the burden is on the prosecution to prove that fact. *People v. Villalobos* (1966, Cal App 2d Dist) 245 Cal App 2d 561, 54 Cal Rptr 60, 1966 Cal App LEXIS 1492.

In a prosecution for unlawful possession and transportation of marijuana in which there was no testimony as to whether certain fragments of marijuana, themselves, or a partially smoked marijuana cigarette, itself, constituted a usable quantity, it could not be inferred that they did so, but it could be so inferred as to the cigarette, which was only partially smoked and which was approximately one and one-half inches long. *People v. Valerio* (1970, Cal App 4th Dist) 13 Cal App 3d 912, 92 Cal Rptr 82, 1970 Cal App LEXIS 1300.

In a prosecution for possession of marijuana (Health & Saf Code former § 11530), the prosecution bears its burden when it shows the substance defendant possessed was marijuana and it was of a quantity that could be potentiated by consumption in any of the manners customarily employed by users, rather than useless traces or debris of narcotic. *People v. Piper* (1971, Cal App 4th Dist) 19 Cal App 3d 248, 96 Cal Rptr 643, 1971 Cal App LEXIS 1275.

In a prosecution for possession of marijuana (Health & Saf Code, former § 11530), it was immaterial whether or not a "usable" quantity of marijuana had been established by a quantitative analysis showing the particular marijuana defendant possessed had a potential to produce a narcotic effect on one using it, where the prosecution sustained its burden of proof by showing defendant possessed 13.6 grams of marijuana, enough to make about 34 cigarettes. *People v. Piper* (1971, Cal App 4th Dist) 19 Cal App 3d 248, 96 Cal Rptr 643, 1971 Cal App LEXIS 1275.

The legislative intent behind the law regulating the possession of marijuana is to regulate the possession of marijuana in any form; no distinction is made between a high grade and low grade plant, and the fact a particular plant may contain a low level of tetrahydrocannabinol (THC), or a person possessing marijuana has developed a high tolerance to its narcotic effect, is immaterial. *People v. Piper* (1971, Cal App 4th Dist) 19 Cal App 3d 248, 96 Cal Rptr 643, 1971 Cal App LEXIS 1275.

Although to sustain a conviction for possession of marijuana the evidence must show possession of a usable quantity thereof, it is not necessary to show possession of such amount of the active components (tetrahydrocannabinol and cannabidiol) as would be sufficient to produce a narcotic effect. *People v. Pohle* (1971, Cal App 4th Dist) 20 Cal App 3d 78, 97 Cal Rptr 364, 1971 Cal App LEXIS 1151.

11. Proof by Circumstantial Evidence

Illegal possession of contraband substance and knowledge of its narcotic character may be established by circumstantial evidence and defendant's extrajudicial admissions that he knew substance to be marijuana and that he possessed it. *People v. Weathers* (1958, Cal App 1st Dist) 162 Cal App 2d 545, 328 P2d 222, 1958 Cal App LEXIS 1905.

Constructive possession of narcotics may be proved by circumstantial as well as direct evidence. *People v. Cahill* (1958, Cal App 4th Dist) 163 Cal App 2d 15, 328 P2d 995, 1958 Cal App LEXIS 1460.

Knowledge of presence of and dominion or control over marijuana in violation of this section can be proved by circumstantial evidence. *People v. Finn* (1965, Cal App 5th Dist) 232 Cal App 2d 422, 42 Cal Rptr 704, 1965 Cal App LEXIS 1481.

The essential elements of the crime of possession of marijuana, namely, proof of possession of the narcotic coupled with knowledge of its presence and narcotic character, may be established by circumstantial evidence and reasonable inferences which may be drawn therefrom. *People v. Cole* (1967, Cal App 2d Dist) 255 Cal App 2d 237, 62 Cal Rptr

874, 1967 Cal App LEXIS 1267.

Circumstantial evidence may be used to prove the elements of the charge of possession of marijuana. *People v. Irvin* (1968, Cal App 1st Dist) 264 Cal App 2d 747, 70 Cal Rptr 892, 1968 Cal App LEXIS 2142.

In a prosecution for violation of Health & Saf Code, former § 11530, (possession of marijuana) possession and knowledge may be proved circumstantially, and neither exclusive possession of the premises nor physical possession of the drug is essential to sustain a conviction. *People v. Tappan* (1968, Cal App 1st Dist) 266 Cal App 2d 812, 72 Cal Rptr 585, 1968 Cal App LEXIS 1574.

To justify a conviction of unlawful possession of marijuana, the prosecution must prove actual or constructive possession by defendant and knowledge of its presence and narcotic character; but these essential facts may be proved by circumstantial evidence and reasonable inferences which may be drawn from such evidence. *People v. Toulson* (1969, Cal App 2d Dist) 272 Cal App 2d 181, 77 Cal Rptr 271, 1969 Cal App LEXIS 2259, cert den (1970) 397 US 946, 25 L Ed 2d 127, 90 S Ct 964, 1970 US LEXIS 2832.

Proof that defendant exercised dominion and control over marijuana with knowledge of its presence and of its narcotic character and that such possession was for the purpose of sale may be established by circumstantial evidence and any reasonable inferences to be drawn therefrom. The possession need not be exclusive. *People v. Gordon* (1970, Cal App 2d Dist) 10 Cal App 3d 454, 89 Cal Rptr 214, 1970 Cal App LEXIS 1854.

Proof of the crime of illegal possession of marijuana requires a three-part showing: That the accused exercised dominion and control over the drug; that he had knowledge of its physical presence; and that he had knowledge of its narcotic character; and each of these elements may be proved by circumstances that will inferentially show "constructive possession" when added together. *People v. Thompson* (1970, Cal App 2d Dist) 13 Cal App 3d 47, 91 Cal Rptr 341, 1970 Cal App LEXIS 1217.

C. JUDGMENT AND SENTENCE

12. In General

No violation of the multiple prosecution proscription occurred, in separately prosecuting defendant for possession of marijuana and possession of marijuana for sale, where no harassment of the defendant or waste of public funds occurred, and no act or course of conduct played a significant part where separate prosecutions for possession of marijuana and possession of marijuana with intent to sell were based on defendant's actual possession with three others at a house 30 miles from his house, and his constructive possession of a larger amount hidden in the garage of his house, where both cases originally were pending at the same time, and where defendant did not at any time ask that the cases be consolidated. *People v. Von Latta* (1968, Cal App 4th Dist) 258 Cal App 2d 329, 65 Cal Rptr 651, 1968 Cal App LEXIS 2419.

In a prosecution for illegal possession of marijuana in which defendant was convicted and sentenced to imprisonment in the State Prison, remand to the trial court for reconsideration of probation and sentence was required, where the judgment of conviction had not become final prior to the effective date of the 1968 amendment to Health & Saf Code, former § 11530, providing for alternative sentences of imprisonment in the county jail for not more than one year or in the State Prison for one to ten years where no prior narcotic offenses are shown, although at the time defendant was sentenced the penalty prescribed was imprisonment in the State Prison for one to ten years with possible probation which could be conditional on a county jail term for a period not exceeding one year. *People v. White* (1969) 71 Cal 2d 80, 75 Cal Rptr 208, 450 P2d 600, 1969 Cal LEXIS 235.

In a prosecution for illegal possession of marijuana, it could not be said as a matter of law, and defendant failed to carry the burden of showing that the trial court abused its discretion in denying defendant's request for probation, where

defendant's only offering to support his request was a favorable report from his former probation officer, and there were many material facts in evidence which were known and considered by the court tending to disfavor probation. *People v. Brown* (1969, Cal App 2d Dist) 271 Cal App 2d 391, 76 Cal Rptr 568, 1969 Cal App LEXIS 2393.

On convicting a defendant of possession of marijuana, it was reversible error to sentence him to imprisonment in the state prison, where the court gave no consideration to the alternative dispositions available under Health & Saf Code, former § 11530, as amended in 1968. *People v. Duke* (1969, Cal App 2d Dist) 276 Cal App 2d 630, 81 Cal Rptr 69, 1969 Cal App LEXIS 1848.

In a prosecution for possessing marijuana, the trial court acted within its discretion and the powers conferred by Pen Code, § 1203.1, where it imposed a fine as a condition of defendant's probation. *People v. Christensen* (1969, Cal App 4th Dist) 2 Cal App 3d 546, 83 Cal Rptr 17, 1969 Cal App LEXIS 1437.

In a prosecution for possession of marijuana, there was no error in denial of probation for the current offense, where there was nothing in the record to show that the district attorney was unaware of his power to dismiss a prior conviction which would render defendant eligible for probation, and where no rule required the trial judge to ask the district attorney to exercise his power to move the dismissal of the prior or to strike it from the accusatory pleading prior to the pronouncement and sentence. *People v. Sproul* (1969, Cal App 2d Dist) 3 Cal App 3d 154, 83 Cal Rptr 55, 1969 Cal App LEXIS 1367.

An unauthorized grant of grace or clemency, achieved by imposing a county jail sentence in a marijuana possession case where a sentence to state prison alone was required, did not have the effect of reducing the offense to that of a misdemeanor. *People v. Sproul* (1969, Cal App 2d Dist) 3 Cal App 3d 154, 83 Cal Rptr 55, 1969 Cal App LEXIS 1367.

Conditioning the probation of one convicted of possessing marijuana on submission to search and seizure by a probation officer or peace officer during day or night, with or without a search warrant, is not unconstitutional. *People v. Fitzpatrick* (1970, Cal App 1st Dist) 3 Cal App 3d 824, 84 Cal Rptr 78, 1970 Cal App LEXIS 1175.

An order entered by a trial court in 1976 revoking the probation of, and sentencing, a defendant to six months in county jail for a 1971 offense of possession of marijuana, in 1971 a felony, was in excess of the court's jurisdiction, in light of the amendment to Health & Saf. Code, § 11357, subd. (b), effective January 1st, 1976, making unauthorized possession of not more than one ounce of marijuana a misdemeanor punishable by a fine of not more than \$100, and defendant was entitled to a writ of habeas corpus commanding the trial court to vacate its order and enter a new order imposing on him a fine not to exceed \$100, and correcting its records to show the conviction as a misdemeanor, where the amount of marijuana possessed was approximately six grams, less than one-fourth ounce, and where proceedings had been suspended and no final judgment had been entered until after the amendatory statute became effective, even though the commission of the offense occurred before that date. *In re May* (1976, Cal App 2d Dist) 62 Cal App 3d 165, 133 Cal Rptr 33, 1976 Cal App LEXIS 1892.

A defendant convicted of unlawful possession of marijuana, at the time a felony (Health & Saf. Code, § 11357), was entitled to the benefits of the lesser punishment provided by an amendment to the statute reducing the offense of unauthorized possession of marijuana to a misdemeanor, where defendant's conviction had not become final at the time the amendment became effective, and he was further entitled to petition the superior court to have the records of his arrest and conviction destroyed. *People v. Podesto* (1976, Cal App 5th Dist) 62 Cal App 3d 708, 133 Cal Rptr 409, 1976 Cal App LEXIS 1948.

On being placed on probation for possession of marijuana, one of the conditions of which was registration with the local law enforcement agency pursuant to H & S C § 11590, defendant was entitled to modification of the probation order to the extent of deleting such condition, where, before his judgment of conviction became final, H & S C § 11357, took effect, making his offense punishable only as a misdemeanor, namely, a class of offense to which, under the express terms of H & S C § 11590, the registration requirement was inapplicable. *People v. Chapman* (1978) 21 Cal 3d

124, 145 Cal Rptr 672, 577 P2d 1012, 1978 Cal LEXIS 216.

Time in custody may be imposed against a ward of the juvenile court who has been placed on probation in the custody of a parent on condition that he obey all laws, on proof of his possession of less than one ounce of marijuana in violation of *Health & Saf. Code, § 11357*, even though that offense is not an offense punishable by incarceration. *In re Phillip A.* (1980, Cal App 2d Dist) 109 Cal App 3d 1004, 169 Cal Rptr 88, 1980 Cal App LEXIS 2220.

The trial court erred in denying a request for a diversion hearing (*Pen. Code, § 1000* et seq.) by a defendant convicted of possession of less than one ounce of marijuana, a misdemeanor (*Health & Saf. Code, § 11357*, subd. (b)). *Pen. Code, § 1000*, subd. (a), lists the offenses for which diversion is permitted, and specifically lists *Health & Saf. Code, § 11357*, with no exception for subd. (b) thereof. Although *Health & Saf. Code, § 11357*, subd. (b), provides a separate scheme for diversion for offenses involving small amounts of marijuana, and provides mandatory diversion for persons with three or more convictions within a two-year period, other persons convicted under the subdivision may choose diversion or the criminal penalty. *People v. Squier* (1993, Cal App 3d Dist) 15 Cal App 4th 235, 18 Cal Rptr 2d 536, 1993 Cal App LEXIS 442.

13. Sentence after Prior Conviction

In a prosecution for possession of marijuana, where defendant was charged with, and admitted, a previous conviction of an identical offense, the court had no legal alternative but to commit defendant to State prison. *People v. Thatcher* (1967, Cal App 1st Dist) 255 Cal App 2d 830, 63 Cal Rptr 492, 1967 Cal App LEXIS 1346.

Under *Pen Code, § 669*, relating to determination of the running of two or more successive sentences, it was the trial court's duty to direct whether the term of imprisonment imposed by it on a second conviction of possession of marijuana should be served consecutively to or concurrently with that imposed in a prior conviction of marijuana possession, and to do so after defendant had been convicted on his guilty plea of an offense of forgery subsequent to his two convictions of marijuana possession for which he had not yet been imprisoned. *People v. Perez* (1968, Cal App 2d Dist) 259 Cal App 2d 371, 66 Cal Rptr 473, 1968 Cal App LEXIS 1980.

In a case in which the petitioner, after pleading guilty to a charge of possession of marijuana (*Health & Saf Code, former § 11530*), was granted probation, the trial court was justified in the modification of the original conditions of probation, which required, in part, that the petitioner live with her parents and eschew association with known users or possessors of dangerous drugs, to preclude association with "reputed" users of such drugs as well, and, under the peculiar circumstances of the case, in the imposition of the conditions, as modified, even though they effectually precluded the petitioner from living with her husband, where the fact that the petitioner was married to and proposed to live with a person charged at that time with involvement in the narcotics traffic was not brought to the court's attention until modification of the original conditions was sought, where the repetition of her offense after arrest and her tendency to minimize her involvement with narcotics did not reflect well upon her chances for rehabilitation, and where, with respect to her marriage, the order of the court, which undoubtedly weighed the public policy favoring marriage in relation to the policy favoring rehabilitation, did not sever the marital relation but only temporarily restricted it. *In re Peeler* (1968, Cal App 3d Dist) 266 Cal App 2d 483, 72 Cal Rptr 254, 1968 Cal App LEXIS 1534.

In a second prosecution for illegal possession of marijuana, charging a prior conviction of the same offense, which resulted in a finding of guilt and that the prior conviction was true, in denial of probation and sentence to the state prison on the second offense, and in revocation of probation and sentence to prison on the first offense, remand to the trial court for reconsideration of the sentence on the first conviction was required, where, by reason of an amendment to *Health & Saf Code, former § 11530*, a presently permissible sentence to the county jail could result in possible benefit to defendant under *Pen Code, § 1203* (conditions under which probation may be granted on a subsequent conviction of a felony), and would eliminate a prior conviction of felony which could be used as the basis of the impeachment of defendant in any action in which he might be called to testify as a witness. *People v. Sproul* (1969, Cal App 2d Dist) 3 Cal App 3d 154, 83 Cal Rptr 55, 1969 Cal App LEXIS 1367.

Defendant was ineligible for probation upon his subsequent conviction for possession of marijuana, where his conviction in a prior case for a like offense was a felony offense within the purview of Health & Saf Code, former §§ 11504 and 11530. *People v. Sproul* (1969, Cal App 2d Dist) 3 Cal App 3d 154, 83 Cal Rptr 55, 1969 Cal App LEXIS 1367.

The trial court did not abuse its discretion in revoking defendant's probation on a prior conviction for possession of marijuana, where his second conviction of a like offense was not illegal as based on the fruit of an unlawful search, and where, had there been no second conviction, the trial court would have been warranted in revoking probation, in that circumstances not warranting a conviction may fully justify a court in revoking probation on a prior offense. *People v. Sproul* (1969, Cal App 2d Dist) 3 Cal App 3d 154, 83 Cal Rptr 55, 1969 Cal App LEXIS 1367.

Health & Saf. Code, § 11357 (providing the punishment for possession of marijuana), along with other legislation enacted along with it, reflects a growing regard of marijuana possession as a relatively minor offense. Thus, *Health & Saf. Code*, § 11357, subd. (b), sets forth an entirely separate statutory scheme where possession of a small amount of marijuana is concerned; the lenient treatment provided by this section for repeat offenders is intended solely for those whose charged and prior offenses are both for marijuana possession. *People v. Paz* (1990, Cal App 6th Dist) 217 Cal App 3d 1209, 266 Cal Rptr 468, 1990 Cal App LEXIS 96.

Defendant, convicted of cocaine possession, was properly denied diversion for rehabilitation under *Pen. Code*, § 1000, subd. (a)(1), based on his prior conviction of marijuana possession under *Health & Saf. Code*, § 11357, subd. (b). Despite the leniency of § 11357, subd. (b), marijuana is a controlled substance and a conviction for possession of even a small amount disqualifies a defendant from diversion. Although *Pen. Code*, § 1000, subd. (a), was amended to provide an exception as to the provisions of *Health & Saf. Code*, § 11357, subd. (b), the Legislature did not mean that a prior § 11357, subd. (b), conviction will not disqualify a person from diversion, as could have been accomplished by inserting the language of exception in *Pen. Code*, § 1000, subd. (a)(1), rather than in the introductory paragraph; the exception means that persons falling within the provisions of *Health & Saf. Code*, § 11357, subd. (b), are excepted entirely from the district attorney's determination of eligibility for diversion. The favorable treatment provided for marijuana possession is reserved for those, unlike defendant, whose offenses do not indicate a pattern of increasingly serious drug use. *People v. Paz* (1990, Cal App 6th Dist) 217 Cal App 3d 1209, 266 Cal Rptr 468, 1990 Cal App LEXIS 96.

D. APPEAL AND ERROR

14. Jurisdiction

Juvenile court that placed a minor on probation upon a plea to possession of marijuana, *Cal. Health & Safety Code* § 11357(b), retained jurisdiction to revoke the probation. Irregularities in the plea proceedings did not prejudice the minor. *In re Omar R.* (2003, Cal App 3d Dist) 105 Cal App 4th 1434, 129 Cal Rptr 2d 912, 2003 Cal App LEXIS 169, review denied (2003, Cal) 2003 Cal LEXIS 2695.

15. Suppression of evidence

For purposes of an investigative detention, an officer lacked reasonable suspicion that defendant was drinking alcohol in a "public place" because the purported drinking occurred inside a gated apartment complex; the complex, with a guarded electric gate that closed automatically, was not public even if the gate was periodically propped open. Therefore, the fruits of the detention should have been suppressed in defendant's drug trial, in which he was charged under *H & S C* §§ 11350(a), 11357(b), and 11378. *People v. Krohn* (2007, Cal App 4th Dist) 149 Cal App 4th 1294, 58 Cal Rptr 3d 60, 2007 Cal App LEXIS 614.

SUGGESTED FORMS

Allegation Charging Unlawful Possession of Marijuana