Marijuana Litigation in Alaska

by **Bill Satterberg** Jr., Counsel to **David Noy**
LOWRS@worldnet.att.net

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On July 28, 2001, two zealous North Pole, Alaska, police officers decided that they could smell marijuana growing in David Noy's residence. At the time, the officers were located approximately three hundred feet away. There was a 15 mph wind blowing, bulldozers had been working on the street outside of David's house tearing up vegetation, David was barbecuing salmon and ribs on the grill, there was a trailer full of trash in the front yard, and his house was wrapped in a Visquene vapor barrier. Notwithstanding what many would interpret as an unlikely olfactory event, the officers nevertheless arrived at David's house and declared the location a crime scene. Approximately ten guests who were visiting were ordered to remain on premises and were physically searched in front of their children. Nobody was allowed to leave or enter the house unless David consented to a search of the residence. Ultimately, to avoid further embarrassment to his guests, David consented to a search.

Inside the house, the officers went through a closed door and down a set of steps into the basement. They passed through another closed door and then, behind a curtain in the hot water heater room, they found five six-inch tall marijuana plants. These plants, the officers testified, were the source of their olfactory delight.

David was charged with marijuana possession as a Misconduct in the Fifth Degree, a Class A misdemeanor. At trial, David was acquitted of the Misconduct in the Fifth Degree, but was convicted of Misconduct in the Sixth Degree, a Class B misdemeanor. Because Misconduct in the Sixth Degree fell completely within the guidelines set forth in *Ravin vs. State of Alaska,* a 1975 case legalizing marijuana in Alaska, David chose to appeal the decision.

It should be noted that, after *Ravin* was decided in 1975, the voters eventually re-criminalized marijuana by means of a voter initiative, which was subsequently enacted into law by the Legislature in 1990. At no time whatsoever had the Alaska *Constitution* been amended, however. As such, David Noy's argument was that the re-criminalization of marijuana was an illegal act and unconstitutional, under the *Ravin* Decision and given Alaska's right to privacy as set forth in Article 1, Section 22 of the Alaska *Constitution*.

Upon appeal, David also argued that he had a medical right of necessity to use the marijuana to control medical conditions.

The Court of Appeals decided in August of 2003 that David Noy's position was correct, and that *Ravin* was still good constitutional law in Alaska and the re-criminalization of marijuana was unconstitutional. The Court of Appeals disagreed with David, however, regarding his common law right of medical necessity, and denied that portion of the appeal.

Subsequently, the State of Alaska sought a review of the Court of Appeals Decision on what is known as a Petition for Rehearing. In a nine page Opinion, the Court of Appeals again denied the State's motion, and made it quite clear that *Ravin* was still good law in Alaska and that the re-criminalization of marijuana was unconstitutional.

The State of Alaska now seeks review from the Alaska Superior Court under a Petition for Hearing. The Alaska Supreme Court has the ability to decide to either accept or reject the State of Alaska's Petition for Hearing.

In the case currently before the Alaska Supreme Court, the State of Alaska is once again attacking marijuana, claiming that it is a dangerous drug, leads to criminal behavior and further drug use, and is physically and psychologically harmful. In essence, the State of Alaska is seeking to reopen the underpinnings of the *Ravin* decision with respect to the effects of marijuana.

Noy's Opposition to the State's Petition for Hearing was filed in January, and argues that review is not necessary. Noy's Cross-Petition for Hearing was also filed in January. In the Cross-Petition, Noy has asked the Alaska Supreme Court to consider the medical necessity as a defense to the possession of marijuana, and has furthermore asked to have the amount of marijuana that is legal within the home raised from four ounces to eight ounces, which was the threshold level which existed prior to the re-criminalization of marijuana. It should be noted in this regard that the Court of Appeals decided that the break-over point for legal versus illegal possession of marijuana in the home would be at four ounces, based upon subsequent legislative enactments.

The Supreme Court can decide to either accept or reject the Petitions for Hearing. If the Supreme Court chooses to deny the Petitions for Hearing, the decision of the Alaska Court of Appeals will stand. On the other hand, if the Supreme Court grants one or both Petitions for Hearing, it is likely that additional briefing will be ordered and, ultimately, the Supreme Court will once again address the issue. As of May 12, 2004, the Alaska Supreme Court has yet to reach any decision on the issues raised in either of the Petitions which have been submitted, nor has there been any indication of when a decision will be forthcoming.

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MPP/MAPS is substantially assisting in these appellate proceedings by providing grant funding to the case. This funding enables Noy's counsel (my firm) to devote the significant time and resources to the case which has been necessitated by the State of Alaska's Opposition, which is attempting to overturn the underlying *Ravin* decision in the process of addressing the issues of Alaska's constitutional right to privacy raised in *Noy*. The ultimate outcome of the appeal will depend upon whether or not the Alaska Supreme Court decides to revisit *Ravin*. We are hopeful for a decision on whether or not the case will be accepted for full review by the middle of summer 2004. •