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December 6, 2012

Mr. Frank A. McGuire
Clerk of the Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

RE: ***People v. Jovan Christian Jackson*** **D058988,** decided October 24, 2012
Published opinion at 210 Cal.App.4th 525
Letter Requesting the Court Grant Review on the Court's Own Motion

Dear Mr. McGuire:

Please bring the following to the attention of the Court. The District Attorney of San Diego County respectfully requests that the Court grant review on the Court's own motion in the above-captioned case.

Summary of the Problem

The statute at issue in this case, Health and Safety Code section 11362.775,[1] provides an affirmative defense to those who "associate ... in order collectively or cooperatively to cultivate marijuana for medical purposes," but the Courts of Appeal have failed to decide what conduct this language allows. This defense is often invoked by individuals involved in the retail sale of marijuana. Generally, they argue that this section protects retail marijuana stores and all commercial marijuana activity, so long as those involved have a doctor's recommendation to use marijuana for medical purposes.[2]

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[1] All further references are to the Health and Safety Code.

[2] As a practical matter, such recommendations are easy to come by. The undercover police officer in this case was able to obtain one after a cursory examination and the payment of a $100 (upon redemption of a coupon from the doctor).

underlying case in the trial court, and filed an *amicus* brief with Division One of the Fourth Appellate District Court of Appeal in support of the People.

Issues Presented

(1) What is the scope of the affirmative defense provided by Health and Safety Code section 11362.775 to those who "associate ... in order collectively or cooperatively to cultivate marijuana for medical purposes ...?"

(2) May the owner and operator of a retail marijuana store, incorporated as a Nevada L.L.C., who sells marijuana to those with a doctor's recommendation for its use, assert this affirmative defense based on the evidence that he, with the help of approximately five others, grew a small portion of the marijuana sold to over 1,600 individuals who, aside from the marijuana transaction, did not participate in the cultivation or the activities of the corporation in any way?

(3) Does the language found in section 11362.765 that "nothing in this section shall ... authorize any individual or group to cultivate or distribute marijuana for profit" also apply, as Division One of the Fourth Appellate District found, to section 11362.775? If so, how should profit be determined and what costs, salaries, and expenses are allowable?

Court of Appeal's Holdings

In a decision certified for publication issued on October 24, 2012, Division One of the Fourth Appellate District Court of Appeal held as follows:

(1) "[Section 11362.775] requires that a defendant show that members of the collective or cooperative: (1) are qualified patients who have been prescribed marijuana for medicinal purposes, (2) collectively associate to cultivate marijuana, and (3) are not engaged in a profit-making enterprise." (*People v. Jackson* (2012) 210 Cal.App.4th 525, 529 (*Jackson*).)[4]

(2) "[T]he collective or cooperative association required by the act need not include active participation by all members in the cultivation process but may be limited to financial support by way of marijuana purchases from the organization." (*Jackson*, *supra*, at pp. 529-530.)

(3) "In enacting [section 11362.768],[5] the Legislature seemed to express its understanding that contrary to the court's statement in *People ex rel. Trutanich v. Joseph* (2012) 204 Cal.App.4th 1512 the MMPA permits retail dispensaries." (*Jackson*, *supra*, 210 Cal.App.4th at p. 537.)

Petition for Rehearing

A petition for rehearing was filed by the Attorney General on November 14, 2012. The Fourth Appellate District denied the petition for rehearing on November 20, 2012 and the time for the parties to petition for review lapsed on December 3, 2012.

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[4] The issue of nonprofit operation was not a basis for the trial court's decision and was not briefed or argued by the parties or *amicus* in the court of appeal.

[5] This section bars operation within a 600 foot radius of a school.

Grounds for Review

Review is necessary in order to settle an important question of law. (Cal. Rules of Ct., rule 8.500(b)(1).) Additionally, review is necessary to secure uniformity of decision. (*Ibid.*)

1. The Scope of the Affirmative Defense Provided by Section 11362.775 is an Important Question of Law.

Since the enactment of the Compassionate Use Act (section 11362.5)[6] in 1996, the district attorney (and other district attorneys in the state) has regularly evaluated and prosecuted cases in which individuals were selling marijuana in San Diego County through retail marijuana stores (such as 'Answerdam,' [sic] the one operated by the defendant here.) Like the defendant, the operators of these retail marijuana stores claim their activities are authorized by the CUA (*ibid.*) or the Medical Marijuana Program Act[7] (§ 11362.7 et seq.).

As case law has slowly developed in this area, the specific protection claimed by marijuana sellers has likewise evolved. Initially, many selling marijuana for medical purposes claimed to be primary caregivers for their customers and were thus protected by both sections 11362.5 and 11362.765, subdivisions (a), (b)(2), and (c). However, such claims were no longer legally viable following the decision of the First Appellate District Court of Appeal in *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383 (*Peron*) ["The contention that respondents became 'primary caregiver[s]' for patients ... simply because the sales are conditioned upon and preceded by respondents' designation by their customers as such, is clearly a subterfuge designed to subvert the plainly expressed intent of section 11362.5 continuing the proscriptions of marijuana sale and possession for sale." (*Id.* at p. 1397)] and *People v. Mentch* (2008) 45 Cal.4th 274 (*Mentch*) ["We hold that a defendant whose caregiving consisted principally of supplying marijuana and

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[6] Hereinafter CUA.

[7] Hereinafter MMPA.

instructing on its use ... cannot qualify as a primary caregiver under the Act. ... [N]othing in the Legislature's subsequent 2003 Medical Marijuana Program [citation omitted] alters this conclusion or offers any additional defense ...." (*Id.* at pp. 277-278.)]

Although Jackson, the defendant here, required his customers to designate him as their primary caregiver, he failed to engage in any caregiving activity and did not advance such a claim in the Court of Appeal. As a general matter, the primary caregiver defense is now rarely advanced by those selling marijuana.

Rather, many operators of retail marijuana stores now claim, as the defendant did here, to be protected by the affirmative defense provided by section 11362.775. Like the defendant, they favor a very expansive interpretation of that section, arguing that retail marijuana sales are allowed so long as the participants are either qualified patients or primary caregivers pursuant to the CUA and the MMPA and, at some point, they agree to be members. Membership comes with no particular duties or rights, rather it is a transitory relationship entered into as an antecedent to the purchase of marijuana. Thus revisiting, in a slightly different form, the issues that the appellate court in *Peron* found in a primary caregiver context, namely, that the member "may never patronize [the] establishment again;" the membership "is admittedly transitory and not exclusive;" the member "is admittedly free" to join a new group "on a daily basis ... dependent solely on whenever and from whom the patient decides to purchase marijuana." (*Peron*, *supra*, 59 Cal.App.4th at p. 1397.)

The district attorney believes that a fair reading of the plain language of section 11362.775 does not support such an expansive interpretation. Rather, the plain language of the statute provides a much more limited protection to those who cultivate marijuana together for medical purposes.

The published opinion by the Fourth Appellate District in this case does not resolve the issue. The appellate court did not attempt to determine the scope of the activity envisioned by the language in section 11362.775 that qualified individuals could "associate ... in order collectively or cooperatively to cultivate marijuana for medical

purposes ...." In fact, nowhere in the decision does the Court of Appeal state exactly what it means to associate in order to collectively or cooperatively cultivate marijuana.

Rather, the appellate court grafted the ban on profit in section 11362.765 to section 11362.775. Such an interpretation is in conflict with the plain language of section 11362.765 which limits the ban on profit to "this section."[8] The use of both the terms "section" and "article" in section 11362.765 clearly shows that the Legislature's intent was to limit the non-profit language to section 11362.765, which specifically allows primary caregivers to receive "reasonable compensation." (Section 11362.765, subd. (c).)

Non-profit operation is a nebulous concept subject to manipulation. As the appellate court noted in *Peron*, while discussing an order by the trial court in that case which allowed the sale of marijuana on a non-profit basis:

> Even if [the CUA] did, *arguendo*, allow such activities if conducted on a "non-profit" basis, the modifying order did not preclude [Peron and others] from profiting therefrom; e.g., no guidance was provided as to what "overhead" was, or what limitations were placed on items designated as such by [Peron and others]. They remained free under the modifying order to designate or change in their discretion their own salaries, bonuses, or remuneration, claim these as expense deductions against gross sales receipts, and report no profits. By such means, literal conformity could be made with the court's expressed intent [that Peron and others] make no profit in the operation of their enterprise.

(*Id.* at pp. 1391-1392.)

As one commentator[9] observed:

> This is not to say that § 11362.775 should be read as authorizing profit, but rather that compensation and profit fall outside the range of activity specifically authorized by § 11362.775. Thus, a court attempting to

[8] "[N]othing in this section shall authorize the individual to smoke or otherwise consume marijuana unless otherwise authorized by this article, nor shall anything in this section authorize any individual or group to cultivate or distribute marijuana for profit." (Section 11362.765, subd. (a).)

[9] To be candid, the commentator is the undersigned.

> describe the limits of permissible activity within § 11362.775's authorization of collective and cooperative cultivation would be ill advised to rely on an interpretation that forbids profit to actually restrict profit making. Such an interpretation of § 11362.775 merely repeats the mistake made by the trial court in *Peron* and invites literal conformity without any actual conformity. It is akin to a parent telling a teenager to be home at a 'reasonable hour' but allowing the teenager to decide what time is 'reasonable'—a useless and unenforceable restriction.
>
> While it may be tempting to take § 11362.765's ban on profit and apply it to § 11362.775, since such an approach appears to set a boundary for what is permissible in a collective and cooperative cultivation project, this apparent boundary is a mirage that, in practice, may prove to be completely unworkable. How should a jury, instructed that a defendant may, as part of a collective and cooperative cultivation project, exchange marijuana for money so long as she does not profit and all participants have a doctor's recommendation for its use, reach a decision? Would the jury be tasked with examining the defendant's books (if they exist) and determining which expenses (whether for salary or other costs) were appropriate and which were not? Would a defendant who, through poor management, failed to make a profit and one who, through business savvy, managed to hide any profit, have immunity from criminal sanction, while one made a profit through efficient management, yet who lacked the guile to hide it, be guilty of a crime? Deciding criminal liability based on whether one is able to make a profit but unable or unwilling to hide it seems rather absurd at best and un-American at worst. Profit, then, is of little use in defining the limits and boundaries of associating 'in order collectively or cooperatively to cultivate marijuana for medical purposes.' "

(Lindberg, *Room for Abuse: A Critical Analysis of the Legal Justification for the Marijuana Storefront "Dispensary."* (2010) 40 Sw.U. L.Rev. 59, 111.)

The upshot of this decision by the Fourth Appellate District in this case is to layer one set of uncertainties atop another. Those legitimately involved in compassionate use, law enforcement, prosecutors and the courts will now have to determine the scope of the nonprofit[10] operation allowed by the appellate court's decision, while still being faced

[10] Particularly, which costs, salaries, and other expenses are allowable, and which are not.

with interpreting the scope of the affirmative defense provided by section 11362.775 to those who "associate ... in order collectively or cooperatively to cultivate marijuana for medical purposes..." since the appellate court below failed to explain this language. This Court should grant review in order to resolve the meaning of the language of section 11362.775 and set aside the decision below, which merely compounds the problem.

2. There is a Lack of Uniformity of Decision.

The decision below has deepened already muddy waters. Recently, in *People v. Colvin* (2012) 203 Cal.App.4th 1029 (*Colvin*), the Second District Court of Appeal, Division Three, held that section 11362.775 applied to a defendant transporting marijuana from one store to another. (*Id.* at p. 1032.) The appellate court found that the member customers need not be involved in the organization in any way in order for the defendant, who was the operator, to assert the defense provided by section 11362.775. "[N]othing on the face of section 11362.775 ... requires some unspecified number of members to engage in unspecified 'united action or participation' to qualify for the protection of section 11362.775." (*Id.* at p. 1041.)

It should be noted that *Colvin* did not indicate that nonprofit operation was required, thus omitting the third requirement found by the Court of Appeal in the instant case. (*Colvin*, *supra*, 203 Cal.App.4th at p. 1037.)

Shortly after *Colvin*, however, the Second Appellate District Court of Appeal, Division Two, in *People ex. rel. Trutanich v. Joseph*, *supra*, 204 Cal.App.4th 1512 (*Joseph*), observed that selling marijuana, as was done in *Jackson* and *Colvin*, is not protected by section 11362.775. The appellate court said, "Neither section 11362.775 nor section 11362.765 immunizes the marijuana sales activity conducted at [the dispensary.] Section 11362.775 protects group activity 'to cultivate marijuana for medical purposes.' It does not cover dispensing or selling marijuana." (*Id.* at p. 1523.)

Division One of the Fourth Appellate District in this case, however, specifically allows the sale of marijuana, saying "the MMPA permits retail dispensaries." (*Jackson*, *supra*, 210 Cal.App.4th at p. 537.)

Marijuana sales were not allowed by the CUA. "The sale and possession for sale of marijuana continue to be proscribed by sections 11360(a) and 11359 following enactment of [the Compassionate Use Act.] The lack of profit to the seller or possessor does not exempt such activities from prosecution." (*Peron*, *supra*, 59 Cal.App.4th at p. 1389.)

The MMPA did not undertake to change the CUA. "The legislative history further states, 'Nothing in [the MMPA] shall amend or change Proposition 215 [....]' " (*People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1008, italics in original omitted.) Thus, the sale of marijuana should remain illegal.

In *People v. Urziceanu* (2005) 132 Cal.App.4th 747, however, the Third Appellate District Court of Appeal observed that, "[the] specific itemization of the marijuana sales law [in section 11362.775] indicates it contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided ...." (*Id.* at p. 785.)[11]

But subsequently, this Court in *Mentch*, *supra*, 45 Cal.4th 274 found that the specific itemization of the marijuana sales law in another part of the MMPA did *not* govern the scope of the immunity provided, as posited by *Urziceanu*, but rather the scope was determined by the engaged in conduct. (*Id.* at pp. 290-292.) This Court reasoned that, "[w]hile the [MMPA] does convey additional immunities against cultivation and possession for sale charges to specific groups of people, *it does so only for specific actions*; it does not provide globally that the specified groups of people may never be charged with cultivation or possession for sale." (*Mentch*, *supra*, at p. 290, italics added.)

Section 11362.765, this Court found, "identifies both the groups of people who are to receive immunity and the 'sole basis,' *the range of their conduct*, to which the immunity applies ...." (*Mentch*, *supra*, 45 Cal.4th at p. 291, italics added.) Thus, "to the

[11] The court did not explain what was required to be a "medicinal marijuana cooperative."

extent [the defendant] went beyond the immunized range of conduct, ... he would, once again, subject himself to the full force of the criminal law." (*Id.* at p. 292.)

Under *Mentch*, it is not the inclusion of the marijuana sales law that governs the scope of the immunity, but rather whether the defendant engaged in the described range of conduct.

Applying this reasoning here, the proper inquiry for the appellate court below to make was whether the defendant engaged in the range of conduct described in section 11362.775, to wit: did he "associate ... in order collectively or cooperatively to cultivate marijuana ...?" Answering such a question, would provide the guidance that the district attorney and others now seek, and definitively illuminate the contours of a defense arising under section 11362.775; specifically, whether it allows the retail sale of marijuana. The District Attorney of San Diego County, as an interested party, respectfully requests that the Court grant review on the Court's own motion in the above-captioned case to resolve this important question.

Respectfully,

BONNIE M. DUMANIS
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By

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Attorneys for the People

Michael Schwartz - April 1st MCLE classes

From: Lisa Lyytikainen
To: DA Attorneys; DA Investigators; MCLE 2; MCLE1
Date: 3/15/2013 4:16 PM
Subject: April 1st MCLE classes

Mark your calendars for the following MCLE classes: **Both classes are mandatory for some units.**

1) Topic: **Marijuana Law**
Date: April 1, 2013 (court holiday)
Time: 9:30 - 10:30 am
Location: HOA: Lower Plaza Assembly Room
Speaker: John Poore, DDA
MCLE: 1.00 hour detection/prevention substance abuse
Mandatory for: Narcotics, Gen. Felonies, Misdemeanor Unit.

This course will cover the current state of the Medical Marijuana Law in California including The Compassionate Use Act (Prop 215), Medical Marijuana Program Act (SB 420), the 2008 Attorney General Guidelines, and recent Court of Appeals decisions. This course will also address: marijuana culture, marijuana use/abuse, medical marijuana defenses including collectives and cooperatives, as well as trial tactics.

2) Topic: **Subpoenas**
Date: April 1, 2013 (court holiday)
Time: 2:00 - 3:00 pm
Location: HOA, Lower Plaza Assembly Room
Speaker: Chuck Hughes, Chief Deputy District Attorney
MCLE: 1.00 hour general
Mandatory for: Gangs, Narcotics, Special Prosecutions, Juvenile, Major Crimes, SAFP, Misdemeanors, Gen. Felonies. Paralegals strongly encouraged to attend.

This class will discuss legal considerations and practical strategies for the effective and efficient use of mailed and personal service subpoenas, on-call status, and interstate witnesses.

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The Ventura County District Attorney's Office is a State Bar approved MCLE provider. The above listed classes will qualify for the number of MCLE credits listed in the descriptions above.