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California Senate Bill Number: SB 420 -- Bill Text

INTRODUCED FEBRUARY 20, 2003 BY Senator Vasconcellos

PASSED SENATE SEPTEMBER 11, 2003

PASSED ASSEMBLY SEPTEMBER 10, 2003

(Principal coauthor: Assembly Member Leno. Coauthors: Assembly Members Goldberg, Hancock, and Koretz)

An act to add Article 2.5 (commencing with Section 11362.7) to Chapter 6 of Division 10 of the Health and Safety Code, relating to controlled substances.

LEGISLATIVE COUNSEL'S DIGEST

SB 420, Vasconcellos. Medical marijuana.

Existing law, the Compassionate Use Act of 1996, prohibits any physician from being punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes. The act prohibits the provisions of law making unlawful the possession or cultivation of marijuana from applying to a patient, or to a patient' s primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

This bill would require the State Department of Health Services to establish and maintain a voluntary program for the issuance of identification cards to qualified patients and would establish procedures under which a qualified patient with an identification card may use marijuana for medical purposes. The bill would specify the department's duties in this regard, including developing related protocols and forms, and establishing application and renewal fees for the program.

The bill would impose various duties upon county health departments relating to the issuance of identification cards, thus creating a state-mandated local program.

The bill would create various crimes related to the identification card program, thus imposing a state-mandated local program. This bill would authorize the Attorney General to set forth and clarify details concerning possession and cultivation limits, and other regulations, as specified. The bill would also authorize the Attorney General to recommend modifications to the possession or cultivation limits set forth in the bill. The

bill would require the Attorney General to develop and adopt guidelines to ensure the security and no diversion of marijuana grown for medical use, as specified.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that no reimbursement is required by this act for specified reasons.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. (a) The Legislature finds and declares all of the following:

(1) On November 6, 1996, the people of the State of California enacted the Compassionate Use Act of 1996 (hereafter the act), codified in Section 11362.5 of the Health and Safety Code, in order to allow seriously ill residents of the state, who have the oral or written approval or recommendation of a physician, to use marijuana for medical purposes without fear of criminal liability under Sections 11357 and 11358 of the Health and Safety Code.

(2) However, reports from across the state have revealed problems and uncertainties in the act that have impeded the ability of law enforcement officers to enforce its provisions as the voters intended and, therefore, have prevented qualified patients and designated primary caregivers from obtaining the protections afforded by the act.

(3) Furthermore, the enactment of this law, as well as other recent legislation dealing with pain control, demonstrates that more information is needed to assess the number of individuals across the state who are suffering from serious medical conditions that are not being adequately alleviated through the use of conventional medications.

(4) In addition, the act called upon the state and the federal government to develop a plan for the safe and affordable distribution of marijuana to all patients in medical need thereof.

(b) It is the intent of the Legislature, therefore, to do all of the following:

(1) Clarify the scope of the application of the act and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers.

(2) Promote uniform and consistent application of the act among the counties within the state.

(3) Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects.

(c) It is also the intent of the Legislature to address additional issues that were not included within the act, and that must be resolved in order to promote the fair and orderly implementation of the act.

(d) The Legislature further finds and declares both of the following:

(1) A state identification card program will further the goals outlined in this section.

(2) With respect to individuals, the identification system established pursuant to this act must be wholly voluntary, and a patient entitled to the protections of Section 11362.5 of the Health and Safety Code need not possess an identification card in order to claim the protections afforded by that section.

(e) The Legislature further finds and declares that it enacts this act pursuant to the powers reserved to the State of California and its people under the Tenth Amendment to the United States Constitution.

SEC. 2. Article 2.5 (commencing with Section 11362.7) is added to Chapter 6 of Division 10 of the Health and Safety Code, to read:

Article 2.5. Medical Marijuana Program

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11362.7. For purposes of this article, the following definitions shall apply:

(a) "Attending physician" means an individual who possesses a license in good standing to practice medicine or osteopathy issued by the Medical Board of California or the Osteopathic Medical Board of California and who has taken responsibility for an aspect of the medical care, treatment, diagnosis, counseling, or referral of a patient and who has conducted a medical examination of that patient before recording in the patient's medical record the physician's assessment of whether the patient has a serious medical condition and whether the medical use of marijuana is appropriate.

(b) "Department" means the State Department of Health Services.

(c) "Person with an identification card" means an individual who is a qualified patient who has applied for and received a valid identification card pursuant to this article.

(d) "Primary caregiver" means the individual, designated by a qualified patient or by a person with an identification card, who has consistently assumed responsibility for the housing, health, or safety of that patient or person, and may include any of the following:

(1) In any case in which a qualified patient or person with an identification card receives medical care or supportive services, or both, from a clinic licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2, a health care facility licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2, a residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 (commencing with Section 1568.01) of Division 2, a residential care facility for the elderly licensed pursuant to Chapter 3.2 (commencing with Section 1569) of Division 2, a hospice, or a home health agency licensed pursuant to Chapter 8 (commencing with Section 1725) of Division 2, the owner or operator, or no more than three employees who are designated by the owner or operator, of the clinic, facility, hospice, or home health agency, if designated as a primary caregiver by that qualified patient or person with an identification card.

(2) An individual who has been designated as a primary caregiver by more than one qualified patient or person with an identification card, if every qualified patient or person with an identification card who has designated that individual as a primary caregiver resides in the same city or county as the primary caregiver.

(3) An individual who has been designated as a primary caregiver by a qualified patient or person with an identification card who resides in a city or county other than that of the primary caregiver, if the individual has not been designated as a primary caregiver by any other qualified patient or person with an identification card.

(e) A primary caregiver shall be at least 18 years of age, unless the primary caregiver is the parent of a minor child who is a qualified patient or a person with an identification card or the primary caregiver is a person otherwise entitled to make medical decisions under state law pursuant to Sections 6922, 7002, 7050, or 7120 of the Family Code.

(f) "Qualified patient" means a person who is entitled to the protections of Section 11362.5, but who does not have an identification card issued pursuant to this article.

(g) "Identification card" means a document issued by the State Department of Health Services that document identifies a person authorized to engage in the medical use of marijuana and the person's designated primary caregiver, if any.

(h) "Serious medical condition" means all of the following medical conditions:

(1) Acquired immune deficiency syndrome (AIDS).

(2) Anorexia.

(3) Arthritis.

(4) Cachexia.

(5) Cancer.

(6) Chronic pain.

(7) Glaucoma.

(8) Migraine.

(9) Persistent muscle spasms, including, but not limited to, spasms associated with multiple sclerosis.

(10) Seizures, including, but not limited to, seizures associated with epilepsy.

(11) Severe nausea.

(12) Any other chronic or persistent medical symptom that either:

(A) Substantially limits the ability of the person to conduct one or more major life activities as defined in the Americans with Disabilities Act of 1990 (Public Law 101-336).

(B) If not alleviated, may cause serious harm to the patient's safety or physical or mental health.

(i) "Written documentation" means accurate reproductions of those portions of a patient's medical records that have been created by the attending physician, that contain the information required by paragraph (2) of subdivision (a) of Section 11362.715, and that the patient may submit to a county health department or the county's designee as part of an application for an identification card.

11362.71. (a) (1) The department shall establish and maintain a voluntary program for the issuance of identification cards to qualified patients who satisfy the requirements of this article and voluntarily apply to the identification card program.

(2) The department shall establish and maintain a 24-hour, toll-free telephone number that will enable state and local law enforcement officers to have immediate access to information necessary to verify the validity of an identification card issued by the department, until a cost-effective Internet Web-based system can be developed for this purpose.

(b) Every county health department, or the county's designee, shall do all of the following:

(1) Provide applications upon request to individuals seeking to join the identification card program.

(2) Receive and process completed applications in accordance with Section 11362.72.

(3) Maintain records of identification card programs.

(4) Utilize protocols developed by the department pursuant to paragraph (1) of subdivision (d).

(5) Issue identification cards developed by the department to approved applicants and designated primary caregivers.

(c) The county board of supervisors may designate another health-related governmental or nongovernmental entity or organization to perform the functions described in subdivision (b), except for an entity or organization that cultivates or distributes marijuana.

(d) The department shall develop all of the following:

(1) Protocols that shall be used by a county health department or the county's designee to implement the responsibilities described in subdivision (b), including, but not limited to, protocols to confirm the accuracy of information contained in an application and to protect the confidentiality of program records.

(2) Application forms that shall be issued to requesting applicants.

(3) An identification card that identifies a person authorized to engage in the medical use of marijuana and an identification card that identifies the person's designated primary caregiver, if any. The two identification cards developed pursuant to this paragraph shall be easily distinguishable from each other.

(e) No person or designated primary caregiver in possession of a valid identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to this article, unless there is reasonable cause to believe that the information contained in the card is false or falsified, the card has been obtained by means of fraud, or the person is otherwise in violation of the provisions of this article.

(f) It shall not be necessary for a person to obtain an identification card in order to claim the protections of Section 11362.5.

11362.715. (a) A person who seeks an identification card shall pay the fee, as provided in Section 11362.755, and provide all of the following to the county health department or the county's designee on a form developed and provided by the department:

(1) The name of the person, and proof of his or her residency within the county.

(2) Written documentation by the attending physician in the person' s medical records stating that the person has been diagnosed with a serious medical condition and that the medical use of marijuana is appropriate.

(3) The name, office address, office telephone number, and California medical license number of the person's attending physician.

(4) The name and the duties of the primary caregiver.

(5) A government-issued photo identification card of the person and of the designated primary caregiver, if any. If the applicant is a person under 18 years of age, a certified copy of a birth certificate shall be deemed sufficient proof of identity.

(b) If the person applying for an identification card lacks the capacity to make medical decisions, the application may be made by the person's legal representative, including, but not limited to, any of the following:

(1) A conservator with authority to make medical decisions.

(2) An attorney-in-fact under a durable power of attorney for health care or surrogate decision maker authorized under another advanced health care directive.

(3) Any other individual authorized by statutory or decisional law to make medical decisions for the person.

(c) The legal representative described in subdivision (b) may also designate in the application an individual, including himself or herself, to serve as a primary caregiver for the person, provided that the individual meets the definition of a primary caregiver.

(d) The person or legal representative submitting the written information and documentation described in subdivision (a) shall retain a copy thereof.

11362.72. (a) Within 30 days of receipt of an application for an identification card, a county health department or the county's designee shall do all of the following:

(1) For purposes of processing the application, verify that the information contained in the application is accurate. If the person is less than 18 years of age, the county health department or its designee shall also contact the parent with legal authority to make medical decisions, legal guardian, or other person or entity with legal authority to make medical decisions, to verify the information.

(2) Verify with the Medical Board of California or the Osteopathic Medical Board of California that the attending physician has a license in good standing to practice medicine or osteopathy in the state.

(3) Contact the attending physician by facsimile, telephone, or mail to confirm that the medical records submitted by the patient are a true and correct copy of those contained in the physician's office records. When contacted by a county health department or the county' s designee, the attending physician shall confirm or deny that the contents of the medical records are accurate.

(4) Take a photograph or otherwise obtain an electronically transmissible image of the applicant and of the designated primary caregiver, if any.

(5) Approve or deny the application. If an applicant who meets the requirements of Section 11362.715 can establish that an identification card is needed on an emergency basis, the county or its designee shall issue a temporary identification card that shall be valid for 30 days from the date of issuance. The county, or its designee, may extend the temporary identification card for no more than 30 days at a time, so long as the applicant continues to meet the requirements of this paragraph.

(b) If the county health department or the county's designee approves the application, it shall, within 24 hours, or by the end of the next working day of approving the application, electronically transmit the following information to the department:

(1) A unique user identification number of the applicant.

(2) The date of expiration of the identification card.

(3) The name and telephone number of the county health department or the county's designee that has approved the application.

(c) The county health department or the county's designee shall issue an identification card to the applicant and to his or her designated primary caregiver, if any, within five working days of approving the application.

(d) In any case involving an incomplete application, the applicant shall assume responsibility for rectifying the deficiency. The county shall have 14 days from the receipt of information from the applicant pursuant to this subdivision to approve or deny the application.

11362.735. (a) An identification card issued by the county health department shall be serially numbered and shall contain all of the following:

(1) A unique user identification number of the cardholder.

(2) The date of expiration of the identification card.

(3) The name and telephone number of the county health department or the county's designee that has approved the application.

(4) A 24-hour, toll-free telephone number, to be maintained by the department, that will enable state and local law enforcement officers to have immediate access to information necessary to verify the validity of the card.

(5) Photo identification of the cardholder.

(b) A separate identification card shall be issued to the person's designated primary caregiver, if any, and shall include a photo identification of the caregiver.

11362.74. (a) The county health department or the county's designee may deny an application only for any of the following reasons:

(1) The applicant did not provide the information required by Section 11362.715, and upon notice of the deficiency pursuant to subdivision (d) of Section 11362.72, did not provide the information within 30 days.

(2) The county health department or the county's designee determines that the information provided was false.

(3) The applicant does not meet the criteria set forth in this article.

(b) Any person whose application has been denied pursuant to subdivision (a) may not reapply for six months from the date of denial unless otherwise authorized by the county health department or the county's designee or by a court of competent jurisdiction.

(c) Any person whose application has been denied pursuant to subdivision (a) may appeal that decision to the department. The county health department or the county's designee shall make available a telephone number or address to which the denied applicant can direct an appeal.

11362.745. (a) An identification card shall be valid for a period of one year.

(b) Upon annual renewal of an identification card, the county health department or its designee shall verify all new information and may verify any other information that has not changed. (c) The county health department or the county's designee shall transmit its determination of approval or denial of a renewal to the department.

11362.755. (a) The department shall establish application and renewal fees for persons seeking to obtain or renew identification cards that are sufficient to cover the expenses incurred by the department, including the startup cost, the cost of reduced fees for Medi-Cal beneficiaries in accordance with subdivision (b), the cost of identifying and developing a cost-effective Internet Web-based system, and the cost of maintaining the 24-hour toll-free telephone number. Each county health department or the county's designee may charge an additional fee for all costs incurred by the county or the county's designee for administering the program pursuant to this article.

(b) Upon satisfactory proof of participation and eligibility in the Medi-Cal program, a Medi-Cal beneficiary shall receive a 50 percent reduction in the fees established pursuant to this section.

11362.76. (a) A person who possesses an identification card shall:

(1) Within seven days, notify the county health department or the county's designee of any change in the person's attending physician or designated primary caregiver, if any.

(2) Annually submit to the county health department or the county' s designee the following:

(A) Updated written documentation of the person's serious medical condition.

(B) The name and duties of the person's designated primary caregiver, if any, for the forthcoming year.

(b) If a person who possesses an identification card fails to comply with this section, the card shall be deemed expired. If an identification card expires, the identification card of any designated primary caregiver of the person shall also expire.

(c) If the designated primary caregiver has been changed, the previous primary caregiver shall return his or her identification card to the department or to the county health department or the county's designee.

(d) If the owner or operator or an employee of the owner or operator of a provider has been designated as a primary caregiver pursuant to paragraph (1) of subdivision (d) of Section 11362.7, of the qualified patient or person with an identification card, the owner or operator shall notify the county health department or the county's designee, pursuant to Section 11362.715, if a change in the designated primary caregiver has occurred.

11362.765. (a) Subject to the requirements of this article, the individuals specified in subdivision (b) shall not be subject, on that sole basis, to criminal liability under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570. However, nothing 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.

(b) Subdivision (a) shall apply to all of the following:

(1) A qualified patient or a person with an identification card who transports or processes marijuana for his or her own personal medical use.

(2) A designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medical purposes, in amounts not exceeding those established in subdivision (a) of Section 11362.77, only to the qualified patient of the primary caregiver, or to the person with an identification card who has designated the individual as a primary caregiver.

(3) Any individual who provides assistance to a qualified patient or a person with an identification card, or his or her designated primary caregiver, in administering medical

marijuana to the qualified patient or person or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person.

(c) A primary caregiver who receives compensation for actual expenses, including reasonable compensation incurred for services provided to an eligible qualified patient or person with an identification card to enable that person to use marijuana under this article, or for payment for out-of-pocket expenses incurred in providing those services, or both, shall not, on the sole basis of that fact, be subject to prosecution or punishment under Section 11359 or 11360.

11362.77. (a) A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified patient.

(b) If a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient' s medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs.

(c) Counties and cities may retain or enact medical marijuana guidelines allowing qualified patients or primary caregivers to exceed the state limits set forth in subdivision (a).

(d) Only the dried mature processed flowers of female cannabis plant or the plant conversion shall be considered when determining allowable quantities of marijuana under this section.

(e) The Attorney General may recommend modifications to the possession or cultivation limits set forth in this section. These recommendations, if any, shall be made to the Legislature no later than December 1, 2005, and may be made only after public comment and consultation with interested organizations, including, but not limited to, patients, health care professionals, researchers, law enforcement, and local governments. Any recommended modification shall be consistent with the intent of this article and shall be based on currently available scientific research.

(f) A qualified patient or a person holding a valid identification card, or the designated primary caregiver of that qualified patient or person, may possess amounts of marijuana consistent with this article.

11362.775. Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570.

11362.78. A state or local law enforcement agency or officer shall not refuse to accept an identification card issued by the department unless the state or local law enforcement agency or officer has reasonable cause to believe that the information contained in the card is false or fraudulent, or the card is being used fraudulently.

11362.785. (a) Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment or on the property or premises of any jail, correctional facility, or other type of penal institution in which prisoners reside or persons under arrest are detained.

(b) Notwithstanding subdivision (a), a person shall not be prohibited or prevented from obtaining and submitting the written information and documentation necessary to apply for an identification card on the basis that the person is incarcerated in a jail, correctional facility, or other penal institution in which prisoners reside or persons under arrest are detained.

(c) Nothing in this article shall prohibit a jail, correctional facility, or other penal institution in which prisoners reside or persons under arrest are detained, from permitting a prisoner or a person under arrest who has an identification card, to use marijuana for medical purposes under circumstances that will not endanger the health or safety of other prisoners or the security of the facility.

(d) Nothing in this article shall require a governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the medical use of marijuana.

11362.79. Nothing in this article shall authorize a qualified patient or person with an identification card to engage in the smoking of medical marijuana under any of the following circumstances:

(a) In any place where smoking is prohibited by law.

(b) In or within 1,000 feet of the grounds of a school, recreation center, or youth center, unless the medical use occurs within a residence.

(c) On a school bus.

(d) While in a motor vehicle that is being operated.

(e) While operating a boat.

11362.795. (a) (1) Any criminal defendant who is eligible to use marijuana pursuant to Section 11362.5 may request that the court confirm that he or she is allowed to use medical marijuana while he or she is on probation or released on bail.

(2) The court's decision and the reasons for the decision shall be stated on the record and an entry stating those reasons shall be made in the minutes of the court.

(3) During the period of probation or release on bail, if a physician recommends that the probationer or defendant use medical marijuana, the probationer or defendant may request a modification of the conditions of probation or bail to authorize the use of medical marijuana.

(4) The court's consideration of the modification request authorized by this subdivision shall comply with the requirements of this section.

(b) (1) Any person who is to be released on parole from a jail, state prison, school, road camp, or other state or local institution of confinement and who is eligible to use medical marijuana pursuant to Section 11362.5 may request that he or she be allowed to use medical marijuana during the period he or she is released on parole. A parolee's written conditions of parole shall reflect whether or not a request for a modification of the conditions of his or her parole to use medical marijuana was made, and whether the request was granted or denied.

(2) During the period of the parole, where a physician recommends that the parolee use medical marijuana, the parolee may request a modification of the conditions of the parole to authorize the use of medical marijuana.

(3) Any parolee whose request to use medical marijuana while on parole was denied may pursue an administrative appeal of the decision. Any decision on the appeal shall be in writing and shall reflect the reasons for the decision.

(4) The administrative consideration of the modification request authorized by this subdivision shall comply with the requirements of this section.

11362.8. No professional licensing board may impose a civil penalty or take other disciplinary action against a licensee based solely on the fact that the licensee has performed acts that are necessary or appropriate to carry out the licensee's role as a designated primary caregiver to a person who is a qualified patient or who possesses a lawful identification card issued pursuant to Section 11362.72. However, this section shall not apply to acts performed by a physician relating to the discussion or recommendation of the medical use of marijuana to a patient. These discussions or recommendations, or both, shall be governed by Section 11362.5.

11362.81. (a) A person specified in subdivision (b) shall be subject to the following penalties:

(1) For the first offense, imprisonment in the county jail for no more than six months or a fine not to exceed one thousand dollars ($1,000), or both.

(2) For a second or subsequent offense, imprisonment in the county jail for no more than one year, or a fine not to exceed one thousand dollars ($1,000), or both.

(b) Subdivision (a) applies to any of the following:

(1) A person who fraudulently represents a medical condition or fraudulently provides any material misinformation to a physician, county health department or the county's designee, or state or local law enforcement agency or officer, for the purpose of falsely obtaining an identification card.

(2) A person who steals or fraudulently uses any person's identification card in order to acquire, possess, cultivate, transport, use, produce, or distribute marijuana.

(3) A person who counterfeits, tampers with, or fraudulently produces an identification card.

(4) A person who breaches the confidentiality requirements of this article to information provided to, or contained in the records of, the department or of a county health department or the county's designee pertaining to an identification card program.

(c) In addition to the penalties prescribed in subdivision (a), any person described in subdivision (b) may be precluded from attempting to obtain, or obtaining or using, an identification card for a period of up to six months at the discretion of the court.

(d) In addition to the requirements of this article, the Attorney General shall develop and adopt appropriate guidelines to ensure the security and non-diversion of marijuana grown for medical use by patients qualified under the Compassionate Use Act of 1996.

11362.82. If any section, subdivision, sentence, clause, phrase, or portion of this article is for any reason held invalid or unconstitutional by any court of competent jurisdiction, that portion shall be deemed a separate, distinct, and independent provision, and that holding shall not affect the validity of the remaining portion thereof.

11362.83. Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because in that regard this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

In addition, no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for other costs mandated by the state because this act includes additional revenue that is specifically intended to fund the costs of the state

mandate in an amount sufficient to fund the cost of the state mandate, within the meaning of Section 17556 of the Government Code.

**** Footnotes to the above:***

11366. Every person who opens or maintains any place for the purpose of unlawfully selling, giving away, or using any controlled substance which is (1) specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (13), (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b), (c), paragraph (1) or (2) of subdivision (d), or paragraph (3) of subdivision (e) of Section 11055, or (2) which is a narcotic drug classified in Schedule III, IV, or V, shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison.

11366.5. (a) Any person who has under his or her management or control any building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, who knowingly rents, leases, or makes available for use, with or without compensation, the building, room, space, or enclosure for the purpose of unlawfully manufacturing, storing, or distributing any controlled substance for sale or distribution shall be punished by imprisonment in the county jail for not more than one year, or in the state prison.

(b) Any person who has under his or her management or control any building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, who knowingly allows the building, room, space, or enclosure to be fortified to suppress law enforcement entry in order to further the sale of any amount of cocaine base as specified in paragraph (1) of subdivision (f) of Section 11054, cocaine as specified in paragraph (6) of subdivision (b) of Section 11055, heroin, phencyclidine, amphetamine, methamphetamine, or lysergic acid diethylamide and who obtains excessive profits from the use of the building, room, space, or enclosure shall be punished by imprisonment in the state prison for two, three, or four years.

(c) Any person who violates subdivision (a) after previously being convicted of a violation of subdivision (a) shall be punished by imprisonment in the state prison for two, three, or four years.

(d) For the purposes of this section, "excessive profits" means the receipt of consideration of a value substantially higher than fair market value.

11570. Every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance, precursor, or analog specified in this division, and every building or place wherein or upon which those acts take place, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

Filed 5/22/08

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PATRICK K. KELLY, Defendant and Appellant.	B195624 (Los Angeles County Super. Ct. No. VA092724)
In re PATRICK K. KELLY on Habeas Corpus.	B201234

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Schuur, Temporary Judge. (Pursuant to Cal. Const., art VI, § 21.) Reversed and remanded.

PETITION for writ of habeas corpus. Denied.

Gloria C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part II of the Discussion.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and Ana R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In 1996, California voters approved Proposition 215, the Compassionate Use Act (CUA). The CUA provides that a patient who possesses or cultivates marijuana for his or her personal medical purposes upon a doctor's recommendation is not liable for certain marijuana-related offenses. Although the CUA states that the marijuana possessed or cultivated must be for the patient's "personal medical purposes," the CUA does not place a numeric cap on how much marijuana a patient may possess or cultivate. The Legislature, however, thereafter enacted, without the voters' approval, Health and Safety Code section 11362.77.[1] That section caps the amount of marijuana a patient may have at eight ounces of dried marijuana and six mature or twelve immature marijuana plants, unless the patient has a doctor's recommendation that the specified quantity does not meet the patient's needs.

Defendant, appellant, and petitioner Patrick Kelly had a doctor's recommendation to use marijuana. But he did not have a doctor's recommendation to have more than eight ounces of dried marijuana. After getting a search warrant, law enforcement officers searched defendant's home. Officers found about 12 ounces of dried marijuana and marijuana plants. At defendant's trial for sale and cultivation of marijuana, the prosecutor, relying on section 11362.77, argued that because defendant possessed 12

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

ounces of dried marijuana but lacked a recommendation to possess more than eight ounces, defendant was guilty of the charged offenses.

The prosecutor's argument was improper. It was improper because the CUA can only be amended with voters' approval. Voters, however, did not approve the eight-ounce limit and other caps in section 11362.77; hence, section 11362.77 unconstitutionally amends the CUA. It was prejudicial error therefore to allow the prosecutor to argue that defendant could be found guilty of the charged crimes if he had more than eight ounces of dried marijuana and did not have a doctor's recommendation to have more than that amount.

Defendant is entitled to a retrial because it was error to admit evidence and argument regarding section 11362.77. He is not, however, entitled to suppression of evidence, an issue he raises in his petition for writ of habeas corpus, consolidated with the appeal and addressed in the nonpublished portion of this opinion. We therefore reverse the judgment and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *A doctor gives a recommendation to defendant to use marijuana.*

Defendant suffers from, among other things, hepatitis C, chronic back problems (including ruptured disks), nausea, fatigue, mood problems, cirrhosis, and loss of appetite. Defendant has tried to treat the pain his ailments cause with epidurals, pain therapy, hot and cold braces, nerve simulators, and medication. Dissatisfied with this treatment plan, in part due to the cost of pain management pills,[2] defendant sought a recommendation to use marijuana. On February 20, 2005, Dr. Eve Elting at Medicann, a physician-owned organization that evaluates patients who want cannabis for medical reasons, saw defendant. Dr. Elting reviewed his medical records, had him fill out a 15-page form, and talked to him. After evaluating defendant, Dr. Elting gave him a written

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[2] The medication costs $1,387 per month; defendant receives $1,034 per month in social security.

recommendation, good for one year, to use marijuana. The recommendation was renewed on January 16, 2006. Dr. Elting did not recommend a dosage.

Unable to afford marijuana from a dispensary, defendant began growing it at home for his personal use. He consumes between one and two ounces of marijuana per week. It lessens his nausea, although its effectiveness has decreased over time. Defendant denied ever selling marijuana.

B. *Defendant's home is searched.*

In October 2005, a confidential informant told a law enforcement officer that he or she suspected defendant of growing marijuana. Deputy Michael Bartman went to the informant's home, from where he could see marijuana plants growing in defendant's backyard. Law enforcement officers, after getting a warrant, searched defendant's home. They found marijuana plants[3] and vacuum sealed baggies containing a total of approximately 12 ounces of dried marijuana. Attached to a marijuana plant was a homemade trip wire constructed from Christmas wrapping and bells. Defendant explained that the homemade alarm system was for general protection rather than specifically to protect the marijuana plants, because his backyard is accessible from the driveway. Deputies also recovered a scale and a loaded gun from a nightstand in the master bedroom. No pagers, cell phones, pay-owe sheets, money, safes or elaborate growing systems were found.

The doctor's original recommendation to use marijuana was in the master bedroom. A copy of the recommendation was taped to the garage. A deputy called the phone number on the note and was told that defendant had a "prescription" to use marijuana.

C. *Expert testimony at trial.*

Deputy Michael Bartman testified that the marijuana recovered from defendant's home was possessed for sale. Despite the absence of nickel and dime bags, the deputy

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3 It is unclear whether defendant had seven potted plants plus additional plants alongside the garage or just seven plants total.

believed that defendant packaged the marijuana in larger quantities to supply other sellers. The deputy, however, has minimal experience concerning marijuana used for medicinal purposes.

Christopher Conrad, the defense's medical marijuana expert, testified that storing marijuana in baggies is consistent with medicinal use. One-ounce baggies are consistent with sale, but not two-ounce baggies, such as were found at defendant's home. If defendant used the marijuana at a rate of two ounces a week, the 12 ounces of dried marijuana found at his home would last him a little over six weeks.

II. Procedural background.

An information charged defendant with count 1, possessing marijuana for sale (§ 11359) and with count 2, cultivating marijuana (§ 11358). A jury, on October 31, 2006, found defendant guilty of the lesser offense of possessing more than 28.5 grams of marijuana (§ 11357, subd. (c)) and of count 2. On December 6, the trial court sentenced defendant to three years' probation under the term and condition, among others, he serve two days in jail. This timely appeal followed.

DISCUSSION

I. Section 11362.77 is unconstitutional because it amends the CUA.

At defendant's trial, the prosecutor, over defendant's objection,[4] was allowed to argue that defendant could not possess more than eight ounces of dried marijuana unless he had a physician's recommendation he needed more than that amount. But the Health and Safety Code section the prosecutor relied on in making this argument—section 11362.77—unconstitutionally amends the CUA. Therefore, allowing the prosecutor to make this argument was prejudicial error, as we explain.

A. *Proposition 215 and the Medical Marijuana Program.*

At the November 5, 1996, General Election, voters approved Proposition 215, which added section 11362.5, the CUA. The CUA ensures that "Californians who obtain

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[4] Defendant moved in limine to exclude testimony and argument regarding section 11362.77, subdivision (a), on the ground it is unconstitutional.

and use marijuana for specified medical purposes upon the recommendation of a physician are not subject to certain criminal sanctions." (*People v. Wright* (2006) 40 Cal.4th 81, 84.) To that end, the CUA provides, in part: "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (§ 11362.5, subd. (d).)[5] The CUA does not grant immunity from arrest. (*People v. Mower* (2002) 28 Cal.4th 457, 468-469.) It grants a limited immunity from prosecution. Thus, a defendant may move to set aside an

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[5] The CUA provides in full: "(a) This section shall be known and may be cited as the Compassionate Use Act of 1996. [¶] (b)(1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows: [¶] (A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. [¶] (B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction. [¶] (C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana. [¶] (2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes. [¶] (c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes. [¶] (d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician. [¶] (e) For the purposes of this section, 'primary caregiver' means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person." (§ 11362.5.)

indictment or information before trial or raise a defense under the CUA at trial. (*Id.* at pp. 470-475.)

To " '[c]larify the scope of the application of the [CUA] and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers[,]' " the Legislature, in 2003, introduced Senate Bill No. 420, the Medical Marijuana Program (MMP), which added section 11362.7 et seq. (*People v. Wright*, *supra*, 40 Cal.4th at p. 93.) The MMP seeks to " 'address additional issues that were not included within the [CUA], and that must be resolved in order to promote the fair and orderly implementation of the [CUA]' [Citation.]" (*Ibid.*) To those ends, the MMP, among other things, establishes a voluntary program for the issuance of identification cards to "qualified patients"—patients entitled to protection under the CUA but who do not have an identification card. (§§ 11362.7, subd. (f), 11362.71.) Participation in the program is not mandatory. But there is an advantage to participating in it: participants are not subject to arrest for possession, transportation, delivery or cultivation of medical marijuana "in an amount established" under the MMP. (§ 11362.71, subd. (e).)

Section 11362.77, subdivision (a), establishes the amount of marijuana a qualified patient or primary caregiver may possess; namely, no more than eight ounces of dried marijuana plus six mature or twelve immature marijuana plants.[6] If a qualified patient or

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6 Section 11362.77 provides in full: "(a) A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified patient. [¶] (b) If a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs. [¶] (c) Counties and cities may retain or enact medical marijuana guidelines allowing qualified patients or primary caregivers to exceed the state limits set forth in subdivision (a). [¶] (d) Only the dried mature processed flowers of female cannabis plant or the plant conversion shall be considered when determining allowable quantities of marijuana under this section. [¶]

primary caregiver has a physician's recommendation that this quantity does not meet the patient's medical needs, the patient or caregiver may possess an amount of marijuana consistent with the patient's needs. (§ 11362.77, subd. (b).) These quantity limits apply to people who are not voluntarily participating in the identification cardholder program. (§§ 11362.77, subds. (a) & (f).) Therefore, defendant, who is not a cardholder but is a qualified patient, must comply with section 11362.77. [7]

(e) The Attorney General may recommend modifications to the possession or cultivation limits set forth in this section. These recommendations, if any, shall be made to the Legislature no later than December 1, 2005, and may be made only after public comment and consultation with interested organizations, including, but not limited to, patients, health care professionals, researchers, law enforcement, and local governments. Any recommended modification shall be consistent with the intent of this article and shall be based on currently available scientific research. [¶] (f) A qualified patient or a person holding a valid identification card, or the designated primary caregiver of that qualified patient or person, may possess amounts of marijuana consistent with this article."

[7] The Attorney General argues that the limits in section 11362.77 apply only to cardholders. Because defendant is *not* a cardholder, the Attorney General argues that we need not reach the constitutional issue. The argument is meritless. It is meritless because, first, section 11362.77, subdivision (a), plainly states its quantity limits apply to "qualified patients." A "[q]ualified patient" is "a person who is entitled to the protections of [the CUA], but who does *not* have an identification card issued pursuant to this article." (§ 11362.7, subd. (f), italics added.) Also, section 11362.77, subdivision (f), states, "A qualified patient or a person holding a valid identification card, or the designated primary caregiver of that qualified patient or person, may possess amounts of marijuana consistent with this article."

Although these provisions of the MMP make it clear that the quantity limits in section 11362.77 apply to noncardholder qualified patients and to cardholders, the Attorney General cites to statements in the MMP's legislative history that indicate the quantity limits were intended to apply only to people who voluntarily participate in the identification program. Here is an example of such a statement: "Nothing in this Act shall amend or change Proposition 215, nor prevent patients from providing a defense under Proposition 215 for their possession or cultivation of amounts of marijuana exceeding the limits in this article, whether or not they qualify for the exceptions in Section[] 11362.77(b) or (c). The limits set forth in Section 11362.77(a) only serve to provide immunity from arrest for patients taking part in the voluntary ID card program, they do not change Section 11362.5 (Proposition 215), which limits a patient's possession

B. *Section 11362.77 amends the CUA, and therefore it is unconstitutional.*

Legislative acts, such as the MMP, are entitled to a strong presumption of constitutionality. The Legislature nonetheless cannot amend an initiative, such as the CUA, unless the initiative grants the Legislature authority to do so. (Cal. Const., art. II, § 10, subd. (c);[8] *People v. Cooper* (2002) 27 Cal.4th 38, 44; *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1251-1253, 1256.) The CUA does not grant the Legislature the authority to amend it without voter approval. Therefore, if section 11362.77, which was enacted without voter approval, amends the CUA, then it is unconstitutional.

"An 'amendment' is ' " 'any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form, . . .' [Citation.] A statute which adds to or takes away from an existing statute is considered an amendment. [Citation.]" ' [Citation.]" (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 22; see

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or cultivation of marijuana to that needed for 'personal medical purposes.' " (Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of Sen. Bill No. 420 (2003-2004 Reg. Sess.) Sept. 9, 2003, p. 6.)

Such expressions of legislative intent in the MMP's drafting history cannot be relied on to contradict the plain, express meaning of a statute clear on its face. "While certain legislative reports may be indicative of legislative intent [citation], 'they cannot be used to nullify the language of the statute as it was in fact enacted.' [Citation.] Nor can the understanding of individual legislators who cast their votes in favor of a measure be used for this purpose. [Citation.]" (*Planned Parenthood Affiliates v. Swoap* (1985) 173 Cal.App.3d 1187, 1193.)

Moreover, even if we assumed that section 11362.77 applies only to voluntary cardholders, it was, in this case, applied to defendant, a noncardholder.

[8] Article II, section 10, subdivision (c), of the California Constitution provides: "The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval."

also *People v. Cooper, supra,* 27 Cal.4th at p. 44.) Whether an act amends existing law is determined " 'by an examination and comparison of its provisions with existing law. If its aim is to clarify or correct uncertainties which arose from the enforcement of the existing law, or to reach situations which were not covered by the original statute, the act is amendatory, *even though in its wording* it does not purport to amend the language of the prior act.' [Italics in original.]" (*Franchise Tax Bd. v. Cory* (1978) 80 Cal.App.3d 772, 777.)

When deciding whether a legislative act amends an initiative, we must keep in mind that " '[i]t is " 'the duty of the courts to jealously guard [the people's initiative and referendum power]' . . . . '[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right [to local initiative or referendum] be not improperly annulled.' " [Citation.]' [Citations.] Any doubts should be resolved in favor of the initiative and referendum power, and amendments which *may* conflict with the subject matter of initiative measures must be accomplished by popular vote, as opposed to legislatively enacted ordinances, where the original initiative does not provide otherwise. [Citations.]" (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1485-1486.)

In this case, we do not think that section 11362.77 *may* amend the CUA. It clearly *does*. The CUA provides that the offenses of possession and cultivation of marijuana shall not apply to a patient who possesses or cultivates marijuana for his or her personal medical purposes upon the recommendation or approval of a physician. (§ 11362.5, subd. (d).) The CUA does not quantify the marijuana a patient may possess. Rather, the only "limit" on how much marijuana a person falling under the Act may possess is it must be for the patient's "personal medical purposes."[9] (*Ibid.*)

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9 Nevertheless, the CUA does not give patients a free pass to possess unlimited quantities of marijuana. (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1549.) Rather, the "rule should be that the quantity possessed by the patient or the primary caregiver, and the form and manner in which it is possessed, should be reasonably related to the patient's current medical needs." (*Ibid.*)

Ballot materials make clear that this is the only "limitation" on how much marijuana a person under the Act may possess. An argument against the CUA was it "allows unlimited quantities of marijuana to be grown anywhere . . . in backyards or near schoolyards without any regulation or restrictions. This is not responsible medicine. It is marijuana legalization." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), argument against Prop. 215, p. 61.) San Francisco District Attorney Terence Hallinan responded, "Proposition 215 does not allow 'unlimited quantities of marijuana to be grown anywhere.' It only allows marijuana to be grown for a patient's personal use. Police officers can still arrest anyone who grows too much, or tries to sell it." (*Ibid.*, rebuttal to argument against Prop. 215, p. 61.) According to these ballot statements, the CUA does not place a numeric cap on how much marijuana is sufficient for a patient's personal medical use.

Section 11362.77, however, does just that. It specifies that a qualified patient may possess eight ounces of dried marijuana plus six mature or twelve immature marijuana plants. (§ 11362.77, subd. (a).) A qualified patient may possess a greater quantity if the patient has a doctor's recommendation that the quantity in subdivision (a) does not meet the qualified patient's medical needs. (§ 11362.77, subd. (b).) In other words, section 11362.77, subdivision (a), has clarified what is a reasonable amount for a patient's personal medical use, namely, eight ounces of dried marijuana.

But clarifying the limits of "reasonableness" is amendatory. (See, e.g., *California Lab. Federation v. Occupational Safety & Health Stds. Bd.* (1992) 5 Cal.App.4th 985.) *California Lab. Federation* concerned an unconstitutional amendment to Code of Civil Procedure section 1021.5, which codifies the private attorney general-attorney-fee doctrine. Code of Civil Procedure section 1021.5 contains no express limit on the size of a fee award, although the statute necessarily implies that a party may recover only a "reasonable" fee. (5 Cal.App.4th at pp. 993-995.) The Legislature's Budget Act, however, imposed a $125 per hour cap on fee-award payments under Code of Civil Procedure section 1021.5. The cap was impermissibly amendatory even if it aimed

merely to clarify or to correct uncertainties in existing law. (5 Cal.App.4th at p. 995.)[10] By imposing substantive conditions where there were none, the challenged provision was amendatory. (*Ibid.*)

The Legislature's imposition of quantity limits in section 11362.77 similarly amends the CUA. Section 11362.77 imposes a numeric cap where the CUA imposed none. Indeed, the Legislature itself recognized it had overstepped its bounds in imposing the cap. In 2004, Senator John Vasconcellos, who introduced the MMP, authored and introduced Senate Bill No. 1494. Senate Bill No. 1494 would have amended section 11362.77 by, among other things, deleting the eight-ounce and plant limits as follows: "A qualified patient, a person with an identification card, or any designated primary caregiver may possess *any amount* of marijuana consistent with the medical needs of that qualified patient or person with an identification card."[11] (Italics added.)

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[10] The Budget Act provision was struck down under the single subject rule of section 9 of article IV of California Constitution. The analysis of what constitutes an amendment is the same as under section 10 of article II.

[11] Section 11362.77 would have also provided: "(b)(1) A person with an identification card or a primary caregiver with an identification card shall not be subject to arrest for possessing eight ounces or less of dried marijuana per person with an identification card, and maintaining six or fewer mature or 12 or fewer immature marijuana plants per person with an identification card. [¶] (2) Nothing in this section is intended to affect any city or county guidelines to the extent that the amounts contained in those guidelines exceed the quantities set forth in paragraph (1). [¶] (c) If a physician determines that the quantities specified in subdivision (b) do not meet the medical needs of the person with an identification card, that person or that person's primary caregiver with an identification card may possess an amount of marijuana consistent with those medical needs and shall not be subject to arrest for possessing that amount. [¶] (d) Only the dried mature processed flowers of female cannabis plant or the plant conversion shall be considered when determining allowable quantities of marijuana under this section. [¶] (e) The Attorney General may recommend modifications to the possession or cultivation limits set forth in this section. These recommendations, if any, shall be made to the Legislature no later than December 1, 2005, and may be made only after public comment and consultation with interested organizations, including, but not limited to, patients, health care professionals, researchers, law enforcement, and local governments. Any recommended modification shall be consistent with the intent of this article and shall be based on currently available scientific research."

In introducing Senate Bill No. 1494, Senator Vasconcellos acknowledged the MMP's constitutional flaw when he said, " '[Senate Bill No. 1494] is a clean-up bill . . . intended to correct a drafting error in my medical marijuana bill signed into law last year. . . . [The MMP's] language may be problematic because it states that all qualified patients (with or without identification cards) are subject to guidelines provided in [the] statute. Despite intent language in our bill stating that the program is intended to be voluntary, many advocates argued that it amends the initiative by making the guidelines mandatory—therefore making it unconstitutional. In order to avoid any legal challenges, it is important to make a distinction between "qualified patient" (which applies to all patients) and "persons with identification cards." ' " (Assem. Com. on Pub. Safety on Sen. Bill No. 1494 (2003-2004 Reg. Sess.) June 8, 2004; see also Sen. Health and Human Services, com. on Sen. Bill No. 1494 (2003-2004 Reg. Sess.) Mar. 24, 2004 [the change effected by the MMP "could be viewed as an unlawful amendment to Proposition 215, an initiative that did not provide a mechanism for amendments"].)

Deleting the quantity limits in the manner suggested by Senate Bill No. 1494 would have corrected the constitutional problem created when the Legislature enacted the MMP without voter approval. Governor Schwarzenegger, however, vetoed the bill, citing a concern that the bill removed "[r]easonable and established quantity guidelines." (Governor Arnold Schwarzenegger, letter to the Members of the California State Senate re Sen. Bill No. 1494, July 19, 2004.) That may be a valid concern. Nevertheless, it is a concern that cannot be addressed by the Legislature acting without the voter's approval. We therefore now hold that section 11362.77 unconstitutionally amends the CUA, and it must be severed from the MMP.[12]

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12 The MMP has a severability clause: "If any section, subdivision, sentence, clause, phrase, or portion of this article is for any reason held invalid or unconstitutional by any court of competent jurisdiction, that portion shall be deemed a separate, distinct, and independent provision, and that holding shall not affect the validity of the remaining portion thereof." (§ 11362.82.)

The Attorney General urges us to avoid this outcome by finding that, in any event, defendant has not demonstrated prejudice because he was allowed to and did present a defense under the CUA. The Attorney General points out that the jury instructions did not reference the eight-ounce or other quantity limits. Rather, the jury was instructed on the CUA defense as follows: "Possession or cultivation of marijuana is not unlawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuana for personal medical purposes when a physician has recommended or approved such use. The amount of marijuana possessed or cultivated must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or cultivate marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this charge."

This instruction is consistent with the CUA, and, by itself, raises no constitutional problem. The problem, however, is not with the instruction. It is with the prosecutor's references to section 11362.77 while examining witnesses and in argument. The prosecutor asked Christopher Conrad and Dr. Elting to confirm that section 11362.77, subdivision (a), says that a qualified patient can possess no more than eight ounces of dried marijuana, unless they have a medical recommendation to exceed that amount. The prosecutor then repeatedly argued that defendant did not have a recommendation to possess more than eight ounces of dried marijuana: "The facts are that the defendant has [a] physician's statement that he can use marijuana for medical purposes. That's not in dispute, . . . But, what's also clear is that the law says he can only have eight ounces of dried mature female plant. And testimony by the defense expert Mr. Conrad stated that the amount that was recovered which was about . . . 12 ounces. [¶] Well, guess what? Twelve ounces is still more than eight ounces of marijuana . . . . So what happens if the defendant has more than eight ounces of the dried marijuana stuff? Then, there has to be some evidence to show that the doctor recommended more than that. And there is no evidence, . . . It's not disputed that there is no evidence presented to show that the defendant has any medical recommendation that exceeds the eight ounces." The

prosecutor continued, "If, for example, you decide, well you know what? I don't think he intend[ed] to possess for sale. But, you know what? What he can possess is only eight ounces. . . . So, the excess that he possess[ed], the other four ounces you can consider that in the possession charge. . . ."

After reading section 11362.77, subdivision (a), to the jury, the prosecutor said, "What does that mean? He can have eight ounces of the dried stuff. We know he has 12 at least, he can have eight ounces of the stuff or he can have six immature plants. Evidence was that they found seven plants in this particular case. But you know what? We're not saying, no, you can't have what you need. That's not what the law says. The law says before you can have more than that you need a doctor's recommendation. He doesn't have a doctor's recommendation, Ladies and Gentleman." "[Y]ou can't have more than eight ounces, unless he has [a] recommendation and he doesn't have that."

Therefore, although the jury was properly instructed that defendant could possess an amount of marijuana reasonably related to his current medical needs, the prosecutor improperly argued that eight ounces—but no more—was "reasonable" in the absence of a doctor's recommendation, which defendant did not have. This was prejudicial error. We cannot conclude that the jury found defendant guilty because they believed the amount of marijuana he possessed and cultivated was not reasonably related to his medical needs, as opposed to believing defendant was guilty because he had more marijuana than section 11362.77 says he may have. Defendant therefore is entitled to a reversal of the judgment.

II. The petition for writ of habeas corpus.

Notwithstanding our reversal of the judgment and remand of this matter, we still must address the petition for writ of habeas corpus filed by defendant and petitioner and consolidated with the appeal. Defendant asserts in the petition that his trial counsel was ineffective because he failed to move to suppress the evidence. On this point, we disagree.

To prevail on an ineffective assistance of counsel claim, a defendant "must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable

determination would have resulted in the absence of counsel's failings. [Citations.]" (*People v. Price* (1991) 1 Cal.4th 324, 440; see also *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) There is a presumption trial counsel's performance comes within the wide range of reasonably professional assistance and that counsel's actions were a matter of sound trial strategy. (*Strickland v. Washington* (1984) 466 U.S. 668, 689-690; *People v. Lewis* (1990) 50 Cal.3d 262, 288.)

Defendant premises his contention that his trial counsel was ineffective for failing to move to suppress evidence on *People v. Mower, supra,* 28 Cal.4th 457. In *Mower*, officers recovered 31 marijuana plants from the home of the defendant, whose doctor recommended he use marijuana. At his trial for possession and cultivation of marijuana, the defendant argued that the CUA provides a " 'complete' " immunity from prosecution and arrest, thus obligating law enforcement officers to " 'investigate first, arrest later.' " (*Id.* at p. 468.) The court rejected this argument, but nevertheless noted that law enforcement officers, before they may lawfully arrest a person for any crime, must have probable cause, which includes all of the surrounding facts such as "those that reveal a person's status as a qualified patient" under the CUA. (*Id.* at pp. 468-469.)

Relying on this language, defendant argues that probable cause did not support the search warrant because law enforcement officers did not investigate first whether defendant was a qualified patient under the CUA. *Mower* does not support such a notion. *Mower* briefly alludes to the relevancy a doctor's recommendation to use marijuana may have on whether there is probable cause to *arrest* a person for a marijuana-related crime. *Mower* does not discuss or impose any requirement on officers to investigate the existence of a doctor's recommendation to use marijuana before a *search warrant* may be issued. Here, a confidential citizen informant told a deputy that defendant was possibly growing marijuana at his home. From the informant's property, the deputy saw several marijuana plants growing in defendant's backyard. These facts established probable cause to issue the search warrant, and the existence of a doctor's recommendation to use marijuana—whether or not the deputy knew about it—did not negate probable cause to

issue the search warrant. Defendant's trial counsel therefore did not render ineffective assistance by failing to move to suppress evidence.

DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings. The petition for writ of habeas corpus is denied.

CERTIFIED FOR PARTIAL PUBLICATION

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING. J.

Proposition 215: Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure adds a section to the Health and Safety Code; therefore, new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. Section 11362.5 is added to the Health and Safety Code, to read:

11362.5. (a) This section shall be known and may be cited as the Compassionate Use Act of 1996.

(b)(1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

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

(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

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

(e) For the purposes of this section, "primary caregiver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.

SEC. 2. If any provision of this measure or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of the measure that can be given effect without the invalid provision or application, and to this end the provisions of this measure are severable.
