IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLANT DISTRICT, DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOVAN JACKSON,

Defendant and Appellant.

Case No. D058988

San Diego County Superior Court, Case No. SCD222793
The Honorable Howard H. Shore, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

Appellant owned and operated a storefront marijuana dispensary that served over 1,600 customers. He was charged with the unlawful sale of marijuana and possession of marijuana for sale. At trial appellant sought to claim that his marijuana business qualified as a collective or cooperative cultivation association and was therefore entitled to protection under Health and Safety Code section 11362.775.[1] The trial court ruled that appellant had not presented sufficient evidence that the customers of his business were coming together in order to collectively or cooperatively cultivate marijuana. As such, the trial court excluded that particular defense.

Appellant's sole claim on appeal is that the trial court erred by excluding his asserted defense under section 11362.775. Central to his claim is interpretation of section 11362.775, and precisely what type of group can claim protection for "associat[ing] within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes." A defense under section 11362.775 requires a showing that: (1) each participant in the collective or cooperative cultivation was a qualified patient, a person with a valid identification card, or a designated primary caregiver; and (2) the participants associated with one another for the purpose of collectively or cooperatively cultivating marijuana for medical purposes. As will be discussed in detail below, the plain language of the statute requires that patients and caregivers associate with one another on collective or cooperative cultivation "projects;" the defense does not extend so far as to protect a distribution system where a few cultivators grow as much marijuana as they can in order to supply it to a comparatively large group of patients and caregivers who make only monetary

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

contributions to a commercial enterprise. Because appellant failed to present sufficient evidence at the 402 hearing that his activity satisfied the requirements of section 11362.775—indeed, the evidence presented conclusively established that appellant's business was outside the scope of the statute's protection—the trial court properly excluded the proffered defense.

STATEMENT OF THE CASE

A jury convicted appellant of the unlawful sale of marijuana (Count 1; § 11360, subd. (a)), and two counts of possession of marijuana for sale (Counts 2 & 3; § 11359). (3 CT 539-541.)

On December 15, 2010, the trial court granted appellant three years of formal probation with specified terms and conditions. (4 CT 735-738.)

On January 14, 2011, appellant filed a notice of appeal. (4 CT 743.)

STATEMENT OF FACTS

I. PROSECUTION EVIDENCE

A. Introduction

Appellant set up and operated a storefront marijuana dispensary called Answerdam located in the Kearny Mesa area of San Diego. (See 4 RT 406-407, 412-414, 483-486, 494-497, 507-512; 6 RT 902-906, 913-915; 8 RT 1033-1035.) Appellant was the manager of the business (4 RT 483-486, 494-497), handling duties such as setting up the corporation (8 RT 1033-1035), securing and signing the lease for the building (6 RT 902-903), hiring and paying employees (6 RT 912-914), arranging employee schedules (6 RT 914-915), and managing the business's finances (4 RT 507-512).

B. July 16, 2009—Undercover Buy (Counts 1 and 2)

San Diego Police Detective Mark Carlson became aware of appellant's marijuana business through a local advertisement and started

conducting surveillance of the store. (4 RT 406-411.) As a part of that surveillance, Detective Carlson arranged for Michael Mendez—an undercover officer with the San Diego Police Department—to purchase marijuana from appellant's store. (See 4 RT 412-415.)

Officer Mendez used an alias to obtain a physician's recommendation for the use of marijuana. (7 RT 960-962.) Specifically, Officer Mendez met with Dr. Donald Clark and fabricated an ailment in order to obtain a recommendation for the use of marijuana. (7 RT 960-961.) Officer Mendez paid Dr. Clark $100 in exchange for the recommendation. (7 RT 961-962.)

On July 16, 2009, Officer Clark took his physician's recommendation to appellant's store and purchased marijuana. (7 RT 963-964, 969-972.)

C. September 9, 2009—Search (Count 3)

As part of the ongoing surveillance, Detective Carlson obtained a search warrant for appellant's store. (4 RT 420.) On September 9, 2009, Detective Carlson served the warrant and seized several jars and bags of marijuana, concentrated hashish, various edible marijuana products, various marijuana paraphernalia, and several digital scales. (4 RT 428-432, 455.)

II. DEFENSE EVIDENCE

The defense called Dr. Donald Clark who discussed how he issued a recommendation for the use of medical marijuana to both Officer Mendez and to appellant. (8 RT 1044-1047 [Officer Mendez], 1049-1051 [appellant].)

ARGUMENT

I. THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY AS TO COLLECTIVE OR COOPERATIVE CULTIVATION UNDER SECTION 11362.775 BECAUSE APPELLANT DID NOT PRESENT SUFFICIENT EVIDENCE TO SUPPORT SUCH A DEFENSE

Appellant argues that the trial court prejudicially erred by failing to instruct the jury as to the defense of collective or cooperative cultivation of medical marijuana under section 11362.775. (AOB 18-44.)[2] Respondent disagrees. Appellant failed to present sufficient evidence that he was associating with qualified patients and primary caregivers for the purpose of collectively or cooperatively cultivating marijuana within the meaning of the statute. As such, the trial court properly denied his request to so instruct the jury.

A. Relevant Proceedings

1. Written Motions And Preliminary Discussions

Prior to trial, the prosecution filed an in limine motion seeking to exclude any asserted defense under the Compassionate Use Act (CUA) or the Medical Marijuana Program Act (MMP). (2 CT 201-247 [motion], 248-358 [attachments].) Specifically, the prosecution argued: (1) appellant did not qualify as a primary caregiver under sections 11362.5 and 11362.7; and (2) appellant was not collectively or cooperatively cultivating marijuana under section 11362.775. (2 CT 201-247.)

The defense filed an opposition motion, arguing that appellant did qualify as a primary caregiver, and that his storefront dispensary was

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[2] Appellant expressly acknowledges in his opening brief that he is not challenging the trial court's denial of a "primary caregiver" defense under section 11362.765. (AOB 38-39.) As such, respondent limits its focus to the trial court's denial of a collective or cooperative cultivation defense under section 11362.775.

entitled to protection as a collective or cooperative cultivation project under section 11362.775. (2 CT 377-383.)

The trial court preliminarily discussed the issue and scheduled a hearing under Evidence Code section 402 to permit the parties to present evidence regarding the asserted defense. (1 RT 49-57.)

2. Evidence Code Section 402 Hearing

Appellant presented the testimony of three witnesses. San Diego Police Officer Mark Carlson testified that he was the lead investigator regarding appellant's Answerdam collective. (2 RT 67-68.) During the course of Officer Carlson's investigation, he conducted surveillance and executed two search warrants at the collective. (See 2 RT 68, 73-74, 77-78.) During one of those searches, Officer Carlson observed some "grow equipment" including "a couple of grow light ballasts, a couple of house fans and a couple of grower reservoir trays . . ." (2 RT 74.) He also found various lists of names within the business and on a cell phone associated with the business; some of those names included the notation "grower" or "GR." (2 RT 79-81.) Officer Carlson never observed any marijuana being grown at the dispensary, and on a subsequent search the grow equipment he previously saw was no longer there. (2 RT 90-97.)

Paul Ford was a cancer patient who was a member of Answerdam and who had previously purchased marijuana from appellant's store. (2 RT 110-113.) Ford never saw marijuana being grown at the store and he never participated in the growing of marijuana. (2 RT 118-119.)

Following the testimony of Officer Carlson and Paul Ford, the defense initially indicated that it did not have any additional evidence to present. (2 RT 128.) The court heard brief argument from both sides (2 RT 128-130) and then tentatively indicated that it did not believe appellant had met his burden of presenting sufficient evidence to establish a reasonable doubt as to guilt. (2 RT 130-133.) The court tentatively ruled to exclude the

defense. (2 RT 133.) Based on the court's tentative ruling, appellant decided to reopen his presentation of evidence and testify on his own behalf. (2 RT 133.)

Appellant testified that from approximately February 2009 to September 2009 he was involved with growing marijuana for Answerdam. (2 RT 136-137, 152.) Appellant personally purchased much of the growing equipment and presented receipts for his purchases. (2 RT 137-140.) He placed that equipment into a separate leased building in the Clairemont area where he conducted the growing operation. (2 RT 140-141.) Appellant and about five other people participated in growing the marijuana. (2 RT 143-144, 146.) Appellant had two harvests of marijuana from the grow operation that yielded a total of "a couple of pounds." (2 RT 155-156.) However, of those couple of pounds, some of the marijuana was unusable and had to be thrown away. (2 RT 159.) Appellant testified that he did not know whether there were any other sources for the marijuana that was sold at his store. (2 RT 184.)

Following the presentation of evidence, the court ordered a recess of the hearing until the following day to give counsel time to prepare their arguments and to give the court time to review the relevant law. (2 RT 191-192.)

3. Arguments And Court's Ruling

The following day, the court reopened the hearing and indicated that because the defense had the burden of proof, it would be permitted to argue first. (2 RT 193.)

Defense counsel argued there was sufficient evidence to present a "collective or cooperative cultivation" defense under section 11362.775. (2 RT 193.) Defense counsel noted that appellant and "four or five other individuals" were growing marijuana for the storefront dispensary, and that

the dispensary was used to serve the marijuana needs of its more than 1,600 "patients." (2 RT 194-196.)

The prosecution argued that there was no evidence of a collective or cooperative growing operation. (2 RT 196-201.) Rather, the evidence showed that appellant—with the minimal assistance of a few other people—grew some of the marijuana that was sold at the store to the more than 1,600 customers. (2 RT 196-201.) Those 1,600 customers were not involved with the growing operation and were simply coming to the store to purchase marijuana. (2 RT 196-201.) The prosecutor also noted that the small amount of marijuana appellant yielded from his personal grow operation was insufficient to supply the large amount of marijuana that was sold from the store. (2 RT 197.) This was not a collective or cooperative growing operation, but a business established by appellant to make a profit by acquiring marijuana from a few growers and selling it to over 1,600 customers. (2 RT 196-201.) The prosecutor argued that more evidence would be needed to establish that appellant's store amounted to a group of people collectively or cooperatively cultivating marijuana. (2 RT 196-201.)

In his reply argument defense counsel reiterated his belief that sufficient evidence was presented to establish that appellant's store amounted to a collective or cooperative cultivation operation. (2 RT 201-204.)

The court issued a detailed ruling denying the defense. (2 RT 204-212.)[3] The court stated initially that the burden was on the defense to present sufficient evidence that the asserted defense could raise a

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[3] At the outset of its ruling, the trial court correctly noted that, at the time, "what exactly a collective or cooperative is under Health and Safety Code section 11362.775 is an issue which has not been definitively addressed by any Court of Appeal or the California Supreme Court." (2 RT 204.)

reasonable doubt in the minds of reasonable jurors. (2 RT 204-205.) The court noted the defense "threshold was law" and that the court was "giving the defense the benefit of the doubt and assuming the truth of the defense facts as presented in the evidence . . ." (2 RT 206.)

The court identified the central issue as the meaning of the language in section 11362.775 regarding collective or cooperative cultivation. (2 RT 207.) The court noted that under the plain language of the statute, any collective or cooperative association must be "for the purpose of cultivating marijuana." (2 RT 208.) The court summarized the basis of its ruling as follows:

> And there's no question that Mr. [Paul] Ford, at least, was someone who had no discussions with the Answerdam collective about cultivation. He indicated he was never told the purpose of the dispensary was for cultivation. He was told that basically if he filled out the forms and paid a certain amount of money that he would get the marijuana that he needed and desired.
>
> There's nothing in the record to indicate he was atypical. The defense presented him as a witness. It's pretty obvious from both the preliminary hearing transcript and the transaction that was described at that time and Mr. Ford's testimony that there was no attempt to inform the people who came to Answerdam that they were a collective designed to cultivate marijuana. They were simply a dispensary distributing marijuana cultivated by others, which is not covered by Health and Safety Code section 11362.775.
>
> Now, the defendant testified that he engaged in the act of cultivation and described in detail—and again I'm assuming to be true everything he said—where the cultivation took place, the cultivation activities. He said he believed there were about five other members involved in the cultivation. There was also an electrician that was called upon, who was not a member, to deal with some of the more technical electrical matters.
>
> The defendant only knew that the other people were members, he testified, because that's what they told him. There's no independent evidence of that, but I'm assuming for

> the purpose—for the sake of argument that they were, in fact, members.
>
> So assuming there was cultivation going on and that at least some members were involved, that still leaves us with the evidence that was presented that there were well over 1,000 people involved in this so-called collective or cooperative, and a very, very small percentage of those—a miniscule percentage were involved in the act of cultivation.
>
> That certainly does not in any way establish that the association was for the purpose of cultivation. It only establishes that some of the people may have been cultivating. That's very different. Obviously, as I pointed out, all marijuana is cultivated. If everyone who distributed marijuana was a cultivator, then there would be no need for the defense.
>
> It's clear that, as I said, the statute says that the association has to be for the purpose of cultivating marijuana. There is no evidence in the record that that was the purpose of this association. Indeed, the evidence points to quite the contrary, that the purpose of the association was for the distribution of marijuana that was cultivated by others whether or not members.
>
> And in my mind, there's no plausible basis on which this defense could go to the jury. It could not possibly raise a reasonable doubt using the language of 11362.775.
>
> So based on the evidence and my assessment of the law, I do not believe there is a basis to present this defense to the jury. And that will be my final ruling.

(2 RT 210-212.)[4]

B. General Legal Principles

1. Relevant Provisions Of California's Medical-Marijuana Laws

[4] The court also ruled that appellant had not presented any evidence to sufficiently establish that he was entitled to a defense as a "primary caregiver" under section 11362.765. (2 RT 208-210, 228-231; 3 RT 238-249.) As stated, appellant is not challenging that ruling. (AOB 38-39.)

In 1996, California voters passed Proposition 215 (§ 11362.5), also known as the Compassionate Use Act (CUA). Section 11362.5 provides:

> 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.)

One purpose of the CUA was "[t]o ensure that seriously ill Californians [would] have the right to obtain and use marijuana for medical purposes. . . ." (§ 11362.5, subd. (b)(1)(A).) However, ". . . the CUA is a narrowly drafted statute [which is] designed to allow a qualified patient and his or her primary caregiver to possess and cultivate marijuana for the patient's personal use despite the penal laws. . . ." (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 772-773 (*Urziceanu*).)

Under the CUA, this personal use requirement means that a group of qualified patients or primary caregivers cannot collectively cultivate marijuana and distribute the marijuana to other qualified patients or primary caregivers; rather, a qualified patient or primary caregiver can cultivate medical marijuana only for the personal use of that qualified patient or that primary caregiver's patient. (*Urziceanu*, *supra*, 132 Cal.App.4th at p. 769; see, e.g., *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165-1169; *People v. Young* (2001) 92 Cal.App.4th 229, 235-238).

Another purpose of the CUA was "[t]o 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." (§ 11362.5, subd. (b)(1)(C).) To that end, in 2003, the California Legislature promulgated the Medical Marijuana Program Act (MMP). (Stats. 2003, ch. 875, § 1.)

The MMP was passed to "[c]larify the scope of the application" of the CUA, partly because "reports from across the state have revealed problems and uncertainties in the [CUA] 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 caregivers from obtaining the protections afforded by the act." (Stats. 2003, ch. 875, § 1, subds. (a)(2), (b)(1).) One of the ways the MMP tried to remedy that problem was to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats. 2003, ch. 875, § 1, subd. (b)(3).)

This purpose is reflected in section 11362.775, which provides:

> Qualified patients, persons with 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 that basis be subject to state criminal sanctions under Section 11357 [possession of marijuana], 11358 [cultivation of marijuana], 11359 [possession for sale of marijuana], 11360 [transportation, sale, furnishing, administering, giving away marijuana], 11366 [maintaining a place for sale or use of controlled substance], 11366.5 [renting, leasing, making available a place for manufacturing, storing, or distributing controlled substance], or 11570 [place used for selling, serving, storing, keeping, manufacturing, giving away controlled substance is nuisance].

(§ 11362.775.)

In addition, the MMP directed the California Attorney General to "develop and adopt appropriate guidelines to ensure the security and nondiversion of marijuana grown for medical use by patients qualified under the [CUA]." (§ 11362.81, subd. (d).) In August 2008, the California Attorney General's Office issued Guidelines for the Security and Non–Diversion of Marijuana Grown for Medical Use ("A.G. Guidelines"). (See <http://ag.ca.gov/cms_attachments/press/pdfs/n1601_

medicalmarijuanaguidelines.pdf>.) As relevant here, this document sets out "suggested guidelines and practices for operating collective growing operations." (A.G. Guidelines at pp. 9-11.) Among other things, the guidelines state that, while California law does not expressly recognize "dispensaries," a collective or cooperative growing operation "that dispenses medical marijuana through a storefront may be lawful" under section 11362.775. (*Id*. at p. 11.) The guidelines explain that any group seeking to collectively or cooperatively cultivate marijuana within the meaning of that statute should, among other things, adhere to certain formal requirements, refrain from distributing marijuana outside the group, and operate on a non-profit basis. (*Id*. at pp. 9-11.) The guidelines also stated that "dispensaries that merely require patients to complete a form summarily designating the business owner as their primary caregiver—and then offering marijuana in exchange for cash "donations"—are likely unlawful. (*Id*. at p. 11.) The A.G. Guidelines are not binding, but are entitled to "considerable weight." (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 748; *People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1011.)

2. The Law Concerning Affirmative Defense Instructions

A trial court has an obligation to give a jury instruction on any affirmative defense "for which the record contains substantial evidence—evidence sufficient for a reasonable jury to find in favor of the defendant—unless the defense is inconsistent with the defendant's theory of the case." (*People v. Mentch* (2008) 45 Cal.4th 274, 287-288, quotation marks and alterations omitted.) Substantial evidence is generally defined, including in this context, as evidence that is "reasonable, credible, and of solid value." (*People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1055, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

In determining whether there is evidence sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether "there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt." (*People v. Salas* (2006) 37 Cal.4th 967, 982, quoting *People v. Jones* (2003) 112 Cal.App.4th 341, 351.) Any doubts as to the sufficiency of the evidence should be resolved in favor of the defendant. (*People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.) "Even so, the test is not whether *any* evidence is presented, no matter how weak. Instead, the jury must be instructed when there is evidence that 'deserve[s] consideration by the jury, i.e., "evidence from which a jury composed of reasonable [people] could have concluded"' that the specific facts supporting the instruction existed." (*People v. Petznick* (2003) 114 Cal.App.4th 663, 677, quoting *People v. Flannel, supra,* 25 Cal.3d at p. 684.) As stated, the appropriate test is whether there is substantial evidence which, if believed by the jury, is sufficient to raise a reasonable doubt. (*People v. Mentch*, *supra*, 45 Cal.4th at p. 288, citing *People v. Salas*, *supra*, 37 Cal.4th at pp. 982-983.) The issue is reviewed on appeal under the same standard. (*People v. Mentch*, *supra*, 45 Cal.4th at p. 288.)

C. The Trial Court Correctly Excluded Appellant's Proffered Defense

1. Appellant's Proffered Evidence Did Not Justify a Defense under Section 11362.775

A defense under section 11362.775 requires a showing that: (1) each participant in the collective or cooperative cultivation project was a qualified patient, a person with a valid identification card, or a designated primary caregiver; and (2) the participants associated with one another for the purpose of collectively or cooperatively cultivating marijuana for medical purposes. (See § 11362.775.) Although there is no standard collective-or-cooperative-cultivation defense instruction based on section

11362.775, certain parameters of the defense are easily identifiable. (See Com. to CALJIC No. 12.24.1 (Fall 2008 ed.) p. 873.) For example, participation in a collective or cooperative cultivation project by a person who is not an authorized patient, primary caregiver, or cardholder would not be protected by section 11362.775. This follows simply from the express language of the statute, and it comports with the A.G. Guidelines, which state that distribution of marijuana within a collective or cooperative cultivation project should constitute a "closed circuit." (A.G. Guidelines at p. 10.)

Also immediately apparent, although not contained in the express language of section 11362.775, is the requirement that a collective or cooperative cultivation project not distribute marijuana for profit. The Legislature expressly prohibited profit with respect to certain ancillary activities that the MMP authorized caregivers and their assistants to undertake for medical-marijuana patients. (§ 11362.765, subd. (a).) Although this specific limitation was not reiterated in relation to section 11362.775, nothing indicates that the Legislature thereby meant to signal a decriminalization of for-profit marijuana distribution in the closely related context of collective or cooperative cultivation. The A.G. Guidelines, moreover, mandate that collective or cooperative cultivation be non-profit (A.G. Guidelines at pp. 9-10), and at least two decisions of the California Court of Appeal are in accord (see *Qualified Patients Assn. v. City of Anaheim*, *supra*, 187 Cal.App.4th at p. 746; *People v. Hochanadel*, *supra*, 176 Cal.App.4th at p. 1018).

Less explicit than these boundaries, but nonetheless readily discoverable through a plain reading of the statute, is what is at issue here: the scope of activity protected by section 11362.775's right to associate for the purpose of collectively or cooperatively cultivating marijuana for medical purposes. As will be explained, the trial court here properly

determined that, even viewing the evidence in the light most favorable to appellant, his proposed medical-marijuana defense was not available as a matter of law because section 11362.775 does not extend so far as to protect a patient or caregiver who acquires marijuana from a small group of cultivators and then distributes that marijuana to a large group of patients and caregivers who make only monetary contributions to the enterprise.[5]

Construction of a statute begins with ascertaining "the intent of the Legislature so as to effectuate the purpose of the law. Because the statutory language is generally the most reliable indicator of that intent, we look first at the words themselves, giving them their usual and ordinary meaning." (*People v. Wright* (2006) 40 Cal.4th 81, 92, quotation marks and citations omitted.) The MMP itself does not define the terms "associate," "collectively," or "cooperatively." Their "usual and ordinary meaning," however, is reflected in their dictionary definitions. (See *Hammond v. Agran* (1999) 76 Cal.App.4th 1181, 1189 ["in the absence of a specifically defined meaning, a court looks to the plain meaning of a word as understood by the ordinary person, which would typically be a dictionary

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[5] In the opening brief, appellant insists that the trial court "usurped" the jury's role by declining to permit him to present evidence on his medical-marijuana defense. (AOB 23-26.) However, as the Supreme Court explained in *Mentch*, "trial courts are still responsible for acting as gatekeepers and determining whether the evidence presented, considered in the light most favorable to the defendant, could establish an affirmative defense—here, whether it could give rise to a reasonable doubt as to the existence of an established, legally cognizable [medical-marijuana defense]." (*People v. Mentch*, *supra*, 45 Cal.4th at p. 290.) As in *Mentch*, the trial court in this case "appropriately recognized that the right to a jury resolution of all disputed factual issues is to be jealously protected" (*ibid*.), and, in fact, the court *assumed as true*, all of appellant's factual assertions (see 2 RT 210-212). Nonetheless, and also as in *Mentch*, the trial court "properly fulfilled its role" by determining that appellant's proposed defense was not available as a matter of law. (*People v. Mentch*, *supra*, 45 Cal.4th at p. 290.)

definition"]; *Rice v. Superior Court* (1982) 136 Cal.App.3d 81, 86 [to ascertain legislative intent, "the court should first look to the plain dictionary meaning of the words of the statute and their juxtaposition by the Legislature"]).

The word "collective," used as an adjective, is defined as, "involving or characterized by the united action or cooperative endeavors of all members of an aggregation or group as distinct from that of individuals." (Webster's New International Dictionary (3d ed. 1961) p. 445.) Used as a noun, the word is defined as, "a cooperative unit or organization: *specif*: collective farm." (*Ibid.*) The term "collective farm" is, in turn, defined as, "a farm (as in a communist country) consisting of many small holdings collected into a single unit for joint operation under public supervision." (*Ibid.*)

The word "cooperative," used as an adjective, is defined as "marked by working together or by joint effort toward a common end." (*Id.* at p. 501.) Used as a noun, the word is defined as, "an enterprise or organization owned by and operated for the benefit of those using its services." (*Ibid.*) The word "cooperative," used as an adjective, is defined as "marked by working together or by joint effort toward a common end." (*Id*. at p. 501.) Used as a noun, the word is defined as, "an enterprise or organization owned by and operated for the benefit of those using its services." (*Ibid*.) In addition, the term "cooperative" has a particular legal meaning in other contexts. Under the Corporations Code and the Food and Agriculture Code, a cooperative must be formally incorporated, democratically controlled, and not for profit, and the earnings of the cooperative must be used for the general welfare of the members or equitably distributed among them. (Corp. Code, §§ 12200, et seq.; Food & Agric. Code, §§ 54002, et seq.)

The word, "associate," used as a verb, means "to come together as partners, fellow workers, colleagues, friends, companions, or allies."

(Webster's New International Dictionary (3d ed. 1961) p. 132.) Moreover, like the term "cooperative," the term "association" has meaning particular to other areas of the law. For example, an "association" may be "a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development" (Civ. Code, § 1351, subd. (a)), a corporation organized under the Food and Agriculture Code (Food & Agric. Code, § 54002), or "an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not." (Corp. Code, § 18035, subd. (a).) Such an association, however, must be formalized; neither mere property relationship, such as joint tenancy, tenancy in common, or community property, nor personal relationship, such as marriage or domestic partnership, is in itself sufficient. (Corp. Code, § 18035, subds. (b), (c).)

The common thread discernible from these definitions is that individuals who associate in order collectively or cooperatively to cultivate marijuana must evince some united action or purpose—they must "come together"—in a manner distinct from merely a commercial supplier-consumer relationship. (Webster's New International Dictionary, *supra*, at p. 132.) Indeed, the Legislature itself envisioned that section 11362.775 would permit patients and caregivers to participate in collective or cooperative "cultivation projects." (Stats. 2003, ch. 875, § 1, subd. (b)(3); see *People v. Wright*, *supra*, 40 Cal.4th at p. 92 ["In construing the MMP, we are also aided by the Legislature's extensive declaration of intent"].) The word "project" does not naturally suggest a broad wholesale-retail system such as the one appellant engaged in here. It suggests, instead, a collaborative effort.[6]

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[6] Appellant posits that section 11362.775 envisions collective or cooperative cultivation projects that would operate like grocery (continued…)

The statutory scheme of California's medical marijuana laws as a whole, moreover, does not support as expansive a reading of the collective or cooperative cultivation defense as appellant suggests. (See *Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 488 [court must interpret statute to harmonize with entire statutory system of which it is a part].) The CUA was not a marijuana-law "open sesame" (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1546), and neither was the MMP. The MMP's main focus was a voluntary program under which medical marijuana patients and primary caregivers may apply for an identification card to protect them from arrest for violations of state marijuana laws. (See §§ 11362.71-11362.76, 11362.78, 11362.81.)[7] As for defenses against criminal liability, the MMP did two things: (1) it extended protection to activities incidental to the possession or cultivation of medical marijuana, such as the transportation or processing of marijuana by patients and primary caregivers, and their assistants (§ 11362.765); and (2) it extended protection to participants in collective or cooperative cultivation projects (§

(…continued)
cooperatives, permitting members to make financial contributions "in exchange for the goods distributed." (AOB 37.) But the Legislature, through section 11362.775, did not authorize medical-marijuana "cooperatives" as such; rather, it authorized association "in order collectively or cooperatively to cultivate marijuana for medical purposes." (§ 11362.775.) Grocery cooperatives do not deal in otherwise unlawful goods and are not subject to any statutory restriction akin to section 11362.775. While California's legal definition of a "cooperative" may be one relevant consideration of many in assessing the meaning of the statute, it does not, by itself, define the scope of section 11362.775.

[7] Appellant is incorrect in stating that section 11362.775 was "the cornerstone" and "the main provision" of the MMP. (AOB 20, 30.) The California Supreme Court itself has described the identification card program as "the heart of the MMP." (*People v. Kelly* (2010) 47 Cal.4th 1008, 1014.)

11362.775). The MMP specifically prohibited profit for caregivers supplying marijuana to patients (§ 11362.765, subd. (a)), and carefully preserved restrictions on where medical marijuana may be used (§§ 11362.785, 11362.79). Thus, the MMP was designed to address ambiguities and gaps in the CUA—that is, to "[c]larify the scope of the application" of the CUA (Stats. 2003, ch. 875, § 1, subd. (b)(1))—but not to widely expand its limited decriminalization of marijuana use for medical purposes. (See generally Stats. 2003, ch. 875, § 1.)

Guided by the foregoing principles, it is evident that the enactment of section 11362.775 did not signal the legitimization of broad, retail distribution of marijuana, but was meant instead to "[e]nhance the access of patients and caregivers to medical marijuana" by allowing collective or cooperative cultivation activities—something the scope of the CUA did not embrace. (Stats. 2003, ch. 875, § 1, subd. (b)(3).) The associational right afforded by section 11362.775 is best interpreted in this light as incrementally expanding the CUA's individual cultivation right by permitting groups of patients and caregivers to mutually assist each other in satisfying their respective medical needs. The statute, however, does not envision an association in which a patient or caregiver acquires marijuana from a small group of cultivators who grow as much marijuana as they can and then distributes that marijuana to a large group of patients and caregivers who merely pay money for it.

This does not mean that every participant in a collective or cooperative cultivation project is required to personally engage in the act of cultivating, or farming, the marijuana. Such a requirement would restrict operation of the statute to a degree that would be inconsistent with the Legislature's stated intent to facilitate access to medical marijuana through

cultivation projects.[8] Rather, a participant's particular contribution to the project might be in some supportive role other than directly cultivating the plants, such as providing administrative or logistical help. And a participant's contribution could even be purely financial, so long as the project was a true association of patients and caregivers mutually assisting each other in satisfying their respective medical needs for marijuana.

But it is unnecessary in this case to determine with precision where the boundaries of collective and cooperative cultivation lie under section 11362.775, because appellant's Answerdam operation plainly fell far short of the standard even under the most expansive reading of the statute. Without dispute, appellant's dispensary was engaged in distributing marijuana grown by a relatively small group of cultivators to individuals who made only a financial contribution to the "cultivation." Indeed, appellant presented no evidence, much less substantial evidence, that he "came together" with the members of Answerdam in the manner discussed above.[9] Instead, the proffered evidence showed that the cultivation was undertaken exclusively by a small number of participants (five or six), while the marijuana was distributed to more than 1,600 patients and caregivers who simply walked into the dispensary off the street, presented a physician's recommendation, summarily completed a form, and exchanged money for marijuana. (See 2 RT 114-119 [testimony of Paul Ford].)

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[8] The court below implicitly agreed with this notion when it pointed out that "[i]f everyone who distributed marijuana was a cultivator, then there would be no need for the defense." (2 RT 212.)

[9] As a threshold matter, appellant introduced no evidence to establish that each participant was a qualified patient, identification card holder, or primary caregiver.

As the trial court described appellant's marijuana operation in its ruling:

> [A]ssuming there was cultivation going on and that at least some members were involved, that still leaves us with the evidence that was presented that there were well over 1,000 people involved in this so-called collective or cooperative, and a very, very small percentage of those—a miniscule percentage were involved in the act of cultivation.
>
> That certainly does not in any way establish that the association was for the purpose of cultivation. It only establishes that some of the people may have been cultivating. That's very different. Obviously, as I pointed out, all marijuana is cultivated. If everyone who distributed marijuana was a cultivator, then there would be no need for the defense.
>
> It's clear that, as I said, *the statute says that the association has to be for the purpose of cultivating marijuana*. *There is no evidence in the record that that was the purpose of this association*. Indeed, the evidence points to quite the contrary, that the purpose of the association was for the distribution of marijuana that was cultivated by others whether or not members.

(2 RT 211-212, emphasis added.)

The trial court's conclusion was correct. Had the Legislature intended to authorize the type of wholesale-retail marijuana distribution arrangement in which appellant was engaged, section 11362.775's establishment of an affirmative defense protecting the right to associate for the purpose of "collectively or cooperatively cultivating" medical marijuana "seems an odd way of doing it." (*People v. Chambers* (1982) 136 Cal.App.3d 444, 453 [criticizing argument that Legislature overruled Supreme Court precedent despite adoption of Law Revision Commission comments acknowledging that precedent]; see also *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192 [Legislature is presumed to have "meant what it said" based on ordinary meaning of statutory language].) And to the extent California's statutory scheme does not facilitate the

availability of marijuana to the extent, or in the manner, preferred by appellant or other medical-marijuana users (see AOB 37 [”Medical marijuana patients who are too sick or, for other reasons, are unable to cultivate their own medicine rely on these collectives to sell it to them . . . .”]), that policy decision lies with the Legislature, not the courts. (See *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632 [“In interpreting statutes, we follow the Legislature’s intent, as exhibited by the plain meaning of the actual words of the law, whatever may be thought of the wisdom, expediency, or policy of the act”].)[10]

As this Court has observed, “[n]othing in section 11362.775, or any other law, prohibits cooperatives and collectives from maintaining places of business.” (*People v. Hochanadel*, *supra*, 176 Cal.App.4th at p. 1018.)[11] However, a defendant operating a storefront “dispensary” must still “produce facts sufficient to show [that he or she was] operating a true cooperative or collective, and that [he or she was] otherwise in substantial compliance with the CUA and MMPA,” to be able to raise a defense at trial under section 11362.775. (*Ibid*.) For the reasons explained, the Legislature did not have in mind the type of expansive wholesale-retail operation that

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[10] Further, California law takes account of those who are “too sick” to obtain their own “medicine” (AOB 37) by permitting those patients to designate a primary caregiver to act on their behalf. (See §§ 11362.5, subd. (a), 11362.7, subd. (d); see also § 11362.765.)

[11] In support of his position, appellant points to section 11362.768, which became effective January 1, 2011, and places geographic limits on, among other things, medical-marijuana dispensaries. (AOB 35-36.) But Respondent does not contest that it may be possible for a “dispensary” to operate lawfully under the aegis of section 11362.775. (See A.G. Guidelines at p. 11; accord, *People v. Hochanadel*, *supra*, 176 Cal.App.4th at p. 1018.) The mere fact that the Legislature has now acknowledged medical-marijuana “dispensaries,” of course, does not answer the question of what section 11362.775 permits a dispensary to do.

appellant was operating when it enacted section 11362.775. Therefore, appellant's proffered defense was correctly rejected.

2. Relevant Court of Appeal Decisions Addressing Section 11362.775, Including Recent Ones, Do Not Assist Appellant

The Third District Court of Appeal's decision in *People v. Urziceanu*, *supra*, 132 Cal.App.4th 747, issued shortly after the MMP was enacted, is instructive here. In *Urziceanu*, the court observed, in discussing section 11362.775, that the statute's "specific itemization of the marijuana sales law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana." (*Id.* at p. 785.) The *Urziceanu* court did not explore all the contours of section 11362.775, but ultimately held only that the defendant there "produced substantial evidence that suggests he would fall within the purview of" the section. (*Id.* at p. 786.)

In *Urziceanu*, the evidence showed that the defendant and his partner ran a medical marijuana cooperative called "FloraCare" out of a house in Citrus Heights, where they grew more than 300 marijuana plants. (*People v. Urziceanu*, *supra*, 132 Cal.App.4th at pp. 759-760, 764.) According to the defendant and his partner, there were "a few hundred" members of Flora Care. (*Id.* at pp. 763-764.) Each prospective member of FloraCare was required to fill out a membership agreement form averring that the member had been diagnosed with a serious illness and had received a recommendation or approval from a physician to use marijuana to treat the illness. The membership agreement required members to pay a $25 annual fee plus the costs of goods and services provided by FloraCare. (*Id.* at pp. 760, 763-764.) According to the defendant, FloraCare required each prospective member to produce valid identification and his or her original

physician's recommendation, which was verified by contact with the physician unless the prospective member had already been verified by another marijuana club. (*Id.* at p. 764.) Also, according to the defendant and his partner, some of the plants grown at the FloraCare house were owned by individual members of FloraCare, and all of the plants were grown for the members of FloraCare. (*People v. Urziceanu*, *supra*, 132 Cal.App.4th at p. 764.) At least "a dozen" members assisted with pruning and growing the marijuana. The defendant or one of the members would often deliver marijuana to other members. In addition, "[u]pwards of 15 members" assisted FloraCare in processing new memberships. Members who assisted with such work were often reimbursed in the form of gas money or marijuana. (*Ibid.*)

The defendant in *Urziceanu* also presented testimony from FloraCare patients. The patients verified that they were required to pass screening before receiving marijuana from FloraCare. Some patients testified that they owned a number of the marijuana plants grown at FloraCare. Others testified that they made "donations" in return for marijuana; but sometimes marijuana was provided to members free of a return "donation." Patients also testified that they volunteered at FloraCare, or donated money, food, clothing, or supplies. (*Id.* at p. 766.)

Urziceanu underscores what was missing from appellant's proffer in support of his collective-or-cooperative-cultivation defense in this case. In *Urziceanu*, it was shown that several members of FloraCare directly participated in the growing of marijuana at an identifiable garden, and many other members were involved in processing memberships, delivering marijuana to other members, verifying the paperwork of prospective members, and other activities in support of the project. (See *People v. Urziceanu*, *supra*, 132 Cal.App.4th at pp. 764-765.) These additional duties are examples of the type of conduct that members of a collective or

cooperative cultivation project could engage in other than the direct cultivation of marijuana. Unlike appellant's proffer in this case, the operation in *Urziceanu* was limited to "a few hundred members," and it does not appear that FloraCare distributed marijuana primarily to patients and caregivers who made only financial contributions to the project. Under those circumstances, there was at least sufficient evidence to raise a question for the jury whether the defendant was protected by section 11362.775.

Here, in contrast, no reasonable construction of the proffered evidence—involving the distribution of marijuana cultivated (perhaps) by a few people to more than 1,500 patients in exchange for money alone—could have supported a collective-or-cooperative cultivation defense.

Also relevant is the recent decision in *City of Lake Forest v. Evergreen Holistic Collective* (2012) 203 Cal.App.4th 1413 (*Evergreen*). In *Evergreen*, Division Three of this Court expressly invalidated an interpretation of section 11362.775 that would encompass the type of wholesale-retail operation appellant was engaged in here. Specifically, *Evergreen* held that to qualify for protection under section 11362.775, a dispensary must not only cultivate its own marijuana, but it must do so at the same location where it distributes that marijuana to its members. (*Evergreen, supra,* at pp. 1442-1444.) In reaching this conclusion, the court noted that in enacting section 11362.775, the Legislature did not envision a model whereby far-flung cultivation sites could provide marijuana to store-front dispensaries, which would, in turn, distribute the marijuana to patients. (*Ibid.*) Rather, the Legislature intended for individuals to set up and operate local "cultivation projects" which would grow and distribute marijuana at the cultivation site itself. (*Ibid.*)

But while *Evergreen* provides useful guidance on some points, the rule espoused by that court—permitting unlimited marijuana distribution so

long as the marijuana is grown on-site—is unworkable and inconsistent with the terms of the collective cultivation statute. The *Evergreen* court's construction of section 11362.775 would sanction unfettered distribution of marijuana to patients with no direct or indirect connection to its cultivation, other than their patronage of a storefront dispensary that happens to reside on the same property as a large warehouse or farm used to grow the marijuana. For the reasons already explained, this approach fails to take into account the Legislature's vision of section 11362.775 as permitting collective or cooperative cultivation projects in which the participants actually worked together in some way, and not broad wholesale-retail businesses that distribute marijuana from a few growers to thousands of patients who provide purely financial contributions.

In any event, appellant's proffer would have failed in this case even under the rule announced in *Evergreen*. In the present case, not only did appellant not cultivate marijuana at the location of his dispensary, the small amount of marijuana that he cultivated off-site was insufficient to have supplied the 1,600 customers the amount of marijuana they purchased from appellant over the course of more than a year. As such, appellant necessarily would have had to obtain marijuana from other third-party sources. This is the very type of cultivation model the *Evergreen* court held was *not* entitled to protection. (*Evergreen, supra,* at pp. 1442-1444.)

Also, the Second District Court of Appeal recently decided *People v. Colvin* (2012) 203 Cal.App.4th 1029 (*Colvin*), in which it addressed what type of conduct comes under the protection offered by section 11362.775. In *Colvin*, the defendant co-owned and operated two marijuana dispensaries in Los Angeles. (*Id.* at pp. 1032-1033.) About 14 members of those cooperatives, including the defendant, actively participated in growing marijuana. (*Id*. at p. 1033.) They grew marijuana on-site at the location of

the dispensary, and also received marijuana from other growers in Los Angeles and Humboldt Counties. (*Ibid*.)

The dispensaries were established under a nonprofit corporation in 2005, were opened in 2006, and were registered with the City of Los Angeles in 2007. (*Ibid*.) The corporation conferred with the Los Angeles Police Department and was informed that the "live scan application met the standard in the Medical Marijuana Collective Ordinance and would be forwarded to the Office of the City Clerk for the next step in the ordinance registration process." (*Ibid*.) Any person who sought to purchase marijuana from one of the dispensaries was required to wait while dispensary employees checked that the person possessed a currently valid physician's recommendation. (*Ibid*.) Once the validity of the recommendation was confirmed, the person would fill out a membership application and a patient information sheet. (*Ibid*.) They would then be given a prescription number that would be used to track all purchases, limit the quantity of marijuana that could be purchased, track the expiration of the physician's recommendation, and document the person's verified medical condition. (*Ibid*.) People who obtained marijuana from the dispensaries would pay a "charter fee," determined each quarter based on the person's individual needs, that would then be applied to growing marijuana for that person. (*Ibid*.)

The defendant in *Colvin* was arrested transporting over a pound of marijuana between the two dispensaries. (*Id*. at p. 1035.) At trial, the court ruled that the defendant would not be permitted to present a defense under section 11362.775 because "the transportation . . . had nothing to do with the cultivation process." (*Ibid*.) The Court of Appeal reversed, holding that the defendant was entitled to protection under section 11362.775. (*Id*. at pp. 1034-1041.) In so doing, the court rejected the notion that every member of a collective or cooperative cultivation project must directly

participate in the cultivation of marijuana. (*Id*. at pp. 1039-1040.) The *Colvin* court gave great weight to the facts that the defendant complied with local regulations and operated a "closed-circuit" of marijuana cultivation whereby all of the marijuana sold at the dispensaries was grown by it members, with some of it grown on-site. (*Ibid*.) The court expressly rejected the argument that section 11362.775 could not be read so broadly as to encompass a broad wholesale-retail model of distribution.

Like the rule articulated by the *Evergreen* court, the *Colvin* court's interpretation of section 11362.775 strays from the letter and spirit of section 11362.775. For all of the reasons already explained, the Legislature did not intend to protect an association in which a patient or caregiver acquires marijuana from a small group of cultivators who grow as much marijuana as they can and then distributes that marijuana to a large group of patients and caregivers who merely pay money for it. Further, the *Colvin* court places undue emphasis on mere compliance with local regulations, an entirely separate issue from whether a project comes within the scope of section 11362.775 in the first place.

In any event, *Colvin* is distinguishable on its facts. Unlike in *Colvin*, in the present case appellant failed to present evidence that all of the marijuana sold at his storefront dispensary was grown by members of the dispensary. Rather, the only evidence presented regarding cultivation was the "couple of pounds"—part of which was unusable and had to be discarded—that was grown off-site by appellant and a few others. (2 RT 155-156, 159.) As stated, this small amount of marijuana was insufficient to support the large number of sales to over 1,600 customers that took place at appellant's storefront dispensary. Also, unlike in *Colvin*, appellant presented no evidence that the customers of his dispensary would pay something similar to a "charter fee," the amount of which was directly based on each person's individual needs, that would then be applied to

growing marijuana for that person. (*Ibid*.) Indeed, appellant's dispensary simply operated like a retail store where anybody with a physician's recommendation could walk in off the street and purchase marijuana.

Finally, in *People ex rel. Trutanich v. Joseph* (March 26, 2012, B232248) ___ Cal.App.4th ___ [2012 WL 1004770], the Second District Court of Appeal issued an opinion conflicting with *Colvin*, holding that "[s]ection 11362.775 protects group activity to cultivate marijuana for medical purposes. It does not cover dispensing or selling marijuana." (People ex rel. *Trutanich v. Joseph, supra*, at p. 6.)

3. The Rule of Lenity Does Not Assist Appellant

Finally, appellant invokes the rule of lenity, urging this Court to adopt his purported "reasonable interpretation" of section 11362.775 over a contrary interpretation that would be unfavorable to him. (AOB 40-44.) The Supreme Court has long held that "when language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted." (*In re Tarar* (1990) 52 Cal.2d 250, 256.) What appellant ignores, however, is that this rule "is subordinate to the one providing that '. . . when interpreting a statute, . . . its purpose is paramount: we "should ascertain the intent of the Legislature so as to effectuate the purpose of the law ."'" (*People v. Bradely* (1983) 146 Cal.App.3d 721, 725 [quoting *People v. Davis* (1981) 29 Cal.3d 814, 828].) Here, as stated, it is plain that appellant's activity was outside the scope of what section 11362.775 protects, even if some particular aspects of the statute could be open to debate.

Indeed, it is well established that the rule of lenity does not apply every time there are two or more reasonable interpretations of a penal statute. (*People v. Cole* (2006) 38 Cal.4th 964, 986.) Rather, the rule applies "'only if the court can do no more than guess what the legislative

body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule.'" (*People v. Avery* (2002) 27 Cal.4th 49, 58.) In other words, "the rule of lenity is a tie-breaking principle, of relevance when '"two reasonable interpretations of the same provision stand in relative equipoise. . . ."'" (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1102, fn. 30.) As the California Supreme Court recently reiterated, a reviewing court errs by invoking the rule of lenity in situations short of this extreme. (See *People v. Manzo* (2012) 53 Cal.4th 880, 889-890; see also *People v. Mentch*, *supra*, 45 Cal.4th at pp. 290-292 [resolving disputed interpretations of CUA's "caregiver" provision without invoking rule of lenity].)

4. The Trial Court Properly Rejected Appellant's Proffered Defense Under Section 11362.775

In short, there was no substantial evidence presented at trial to show that appellant "came together" to with other patients and caregivers in an effort to mutually assist each other in satisfying their respective medical needs, as required by section 11362.775. Instead, his own evidence showed that his dispensary simply acquired marijuana from a few growers and then distributed that marijuana to thousands of patients who merely exchanged money for it. Accordingly, the trial court properly denied the defense request to instruct the jury pursuant to section 11362.775.

CONCLUSION

Respondent respectfully requests that this court affirm the judgment below.

Dated: April 25, 2012 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains **8,966** words.

Dated: April 25, 2012

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