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JOVAN JACKSON

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

CENTRAL DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. JOVAN JACKSON, Defendant.	Case No. SCD222793 D.A. No. ACO885 **DEFENDANT'S MOTION FOR NEW TRIAL** Date: December 15, 2010 Time: 9:00 a.m. Place: Department 15

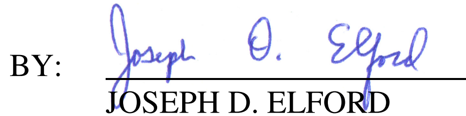
TO: THE CLERK OF THE COURT, DISTRICT ATTORNEY BONNIE DUMANIS AND DEPUTY DISTRICT ATTORNEY CHRIS LINDBERG:

PLEASE TAKE NOTICE that on December 15, 2010, at 9:00 a.m. or as soon thereafter as counsel can be heard in the Courtroom of The Honorable Howard Shore, Department 15, San Diego Superior Court, Defendant Jovan Jackson will move the Court for its order granting a new trial

pursuant to Penal Code § 1181. This motion is based on this notice of motion and motion, the accompanying memorandum in support of the motion, the accompanying exhibits, the entire court file in this case, and whatever additional evidence and authorities are presented at a hearing on the matter.

Dated: December 6, 2010

Respectfully submitted,

BY: 

JOSEPH D. ELFORD

Counsel for Defendant
JOVAN JACKSON

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Both the California electorate and its Legislature have declared that seriously ill persons who need marijuana to alleviate their suffering have the right to obtain and use marijuana where that use has been deemed appropriate by a licensed physician. To ensure that those seriously ill persons who are too sick or otherwise unable to cultivate their own medicine have access to this medicine, the Legislature enacted the Medical Marijuana Program Act, which provides that medical marijuana patients who associate collectively to cultivate marijuana shall not be subject to criminal sanction for cultivation, sales of marijuana, and maintaining a place where marijuana is sold. In accordance with this law; indeed, precisely as it was intended, defendant Jovan Jackson ("Jackson") formed the medical marijuana collective Answerdam to provide marijuana to the seriously ill. He was then prosecuted not once, but twice for performing this humanitarian act.

After Mr. Jackson was acquitted the first time for implementing California's medical marijuana laws, the prosecutor pursued a second prosecution against him and sought to exclude his

medical marijuana collective defense. Despite the fact that the Attorney General has recognized the legality of storefront medical marijuana dispensaries under California law and the Court of Appeal has effectively done so as well, this Court granted the prosecution's motion, thereby depriving Jackson of his only viable defense. In doing this, this Court ignored persuasive and binding authority establishing Mr. Jackson's right to present his defense to a jury. Standing alone, this error requires a new trial.

This error, however, does not stand alone, but is coupled with this Court's failure to dismiss this prosecution on double jeopardy grounds. From 2008 to 2009, Jovan Jackson continuously operated the Answerdam collective that is the subject of both the acquittal and the subsequent conviction. Under the double jeopardy clauses of both the state and federal constitutions, the government may not successively prosecute a person for engaging in a continuous course of conduct. This Court erred in allowing this prosecution of Mr. Jackson to proceed, notwithstanding Mr. Jackson's double jeopardy rights. This error also constitutes grounds for granting the instant motion.

LEGAL STANDARDS

Every person convicted of a crime has the right to have a motion for new trial heard and determined by the trial judge. (*People v. Prudencio* (1928) 93 Cal.App. 241, 246.) To this end, Penal Code Section 1181 provides in pertinent part as follows:

> When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only:
>
> * * *
>
> 5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, and when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury. . . .

Furthermore, "[s]ince the duty of the trial court to afford every defendant in a criminal case a fair and impartial trial is of constitutional dimension, the inherent power of the court to correct matters by granting a new trial transcends statutory limitations." (*People v. Cardenas* (1981) 114 Cal.App.3d 643, 647 [citing *People v. Oliver* (1975) 46 Cal.App.3d 747, 751].)

ARGUMENT

I. THIS COURT ERRED IN EXCLUDING MR. JACKSON'S MEDICAL MARIJUANA COLLECTIVE DEFENSE

A. This Court Erred in Requiring Mr. Jackson to Prove That He Had the Specific Intent to Cultivate Marijuana

Health and Safety Code Section 11362.775, the cornerstone of the Medical Marijuana Program Act (Health & Saf. Code § 11362.7 *et seq.*) [hereinafter "MMPA"], provides as follows:

> 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 Sections 11357, 11358, 11359, 11360, 11366, 11366.5, 11570.

Notwithstanding the fact that this provision provides exemptions to criminal sanctions for sales of marijuana and maintaining a place where marijuana is sold, this Court interpreted it to require that one who is a member of a medical marijuana collective may avail himself of the statute's protections only if he has a specific intent to cultivate marijuana that predominates over his intent to distribute marijuana to the seriously ill. This Court rendered its decision in this regard as follows:

> I indicated in our discussions last week what my understanding of [Health and Safety] Code Section 11362.775 was, and I indicated that it was analogous to a specific intent crime in the sense that the language talks about association within the State of California, in order collectively or cooperatively to cultivate marijuana for medical purposes. And the phrase "in order to" is in my mind the same as "for the purpose of," which is the equivalent of a specific intent.
>
> In other words, it is insufficient, in my view, to have an association unless the association is for the specific purpose stated in the statute. The evidence appears to

indicate that the purpose of marijuana cultivated by others, which is not part of the language of the statute, not for the purpose of cultivating marijuana.

* * *

I do not find there is sufficient evidence before me at this time to raise a reasonable doubt regarding – associating for the purpose of cultivating marijuana, so my tentative ruling remains the same, that there is insufficient evidence to present that defense at this time.

(Reporter's Transcript [hereinafter "RT"] 8/30/2010 at pp. 65, 66, 68 [attached to Notice of Lodged Documents, filed herewith [hereinafter "Lodged Documents"] as Exh. A]; see also RT 8/30/2010 at p. 67 ["people who belong to this association belonged for the purpose of obtaining marijuana, not for the purpose of cultivating it"].) Later, this Court affirmed its ruling as follows:

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.

(RT 8/31/2010 at p. 147.)

Contrary, however, to this Court's novel interpretation of Health and Safety Code Section 11362.775 as requiring a specific intent to cultivate marijuana by all members, the statute is not so limited. On its face, the statute describes an association of qualified patients who are exempt from criminal liability for, among other things, sales of marijuana and maintaining a place where marijuana is sold. (11362.775 [citing Health & Safety Code § 11360, 11570].) The statute does not say that each individual member of the association (or collective) must have the specific intent to cultivate; instead, it states that qualified patients "who associate within the State of California in order to collectively or cooperatively to cultivate marijuana for medical purposes" shall not be

subject to criminal liability for sales. The use of the terms "associate," "collectively," and "cooperatively," when considered in light of the exemption from criminal liability for sales, depict an association of patients who cultivate marijuana *and* distribute it to their membership. This is precisely what Answerdam did, as the marijuana sold by Answerdam was cultivated by its membership. It was error for this Court to prevent Mr. Jackson from presenting a medical marijuana collective defense.

Not only is Jackson's interpretation of the Medical Marijuana Program Act as providing a defense to dispensers of marijuana through medical marijuana collectives consistent with its plain language, but it also fosters its purpose. The starting place for interpreting Health and Safety Code Section 11362.775 is the Compassionate Use Act (Health & Safety Code § 11362.5) [hereinafter "the CUA"], since the MMPA was passed to further the initiative's purposes. The CUA, enacted in 1996, was designed "[t]o 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. . . ." (Health & Safety Code § 11362.5, subd. (b)(1)(A) [Italics added].) Although the CUA did not expressly provide a mechanism to provide access to marijuana for the seriously ill, it sought "[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." (Health & Safety Code § 11362.5, subd. (b)(1)(C) [Italics added].) The MMPA, in particular, Section 11362.775, constituted the Legislature's response to the voters' challenge. (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 785; see also *People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1014 [noting that the CUA "directed the state to create a statutory plan to provide for the safe and affordable distribution of medical marijuana to qualified patients"].) It was expressly designed to "[e]nhance the *access* of patients and caregivers to medical marijuana through collective, cooperative

cultivation projects." (Stats. 2003, C. 875, Section 1, subd. (b)(3) [Italics added].) When Section 11362.775 is read in light of the stated purposes of California's medical marijuana laws to provide for "safe and affordable distribution of marijuana" to qualified patients and to enhance "access" of marijuana through collective and cooperative cultivation projects, it cannot be narrowly construed as allowing a legal defense only for cultivators and not for distributors. So long as both the cultivators and distributors are all members of the same collective, that association is legal under California law and all of the members, no matter what their particular role, should be permitted to assert a medical marijuana collective defense.

Based on the language and purpose of Section 11362.775, the court in *Urziceanu, supra*, found that Section 11362.775 "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." (*Urziceanu*, *supra*, 132 Cal.App.4th at p. 785.) In that case, the defendant contended that he created a "legal cooperative" to grow and supply medical marijuana to qualified patients, which was distributed from his home. (Id. at p.759.) While the defendant cultivated much of the marijuana he sold, he would sometimes receive marijuana donated by individual members and he would sometimes "buy marijuana on the black market by the pound to supply the members." (Id. at p. 764.) Prior to trial, the court refused to allow defendant to present a defense under the CUA, reasoning that this statute did not provide defendant a right to provide medical marijuana through a collective. (See id. at p. 767.) On appeal, the court agreed with this interpretation of the CUA, but reversed the conviction for conspiracy to sell marijuana and remanded for a new trial because the MMPA now provided defendant with a viable defense. The court reasoned as follows:

> The Legislature . . . exempted those qualifying patients and primary caregivers who collectively or cooperatively cultivate marijuana for medical purposes from criminal

sanctions for possession for sale, transportation or furnishing marijuana, maintaining a location for unlawfully selling, giving away, or using controlled substances, managing a location for the storage, distribution of any controlled substance for sale, and the laws declaring the use of property for these purposes a nuisance. . . . [The MMPA'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.*

(*Urziceanu*, *supra*, 132 Cal.App.4th at p. 785 [Italics added]; see also *Qualified Patients Association v. City of Anaheim* (2010) 187 Cal.App.4th 734, 749 [petition for review denied Dec. 1, 2010] [noting that the MMPA "identifies groups that may lawfully distribute medical marijuana to patients under the CUA"] [quoting *Hochanadel, supra,* 176 Cal.App.4th at p. 1013].) This case is on all fours, as Mr. Jackson was a member of a "medical marijuana cooperative[] that would receive reimbursement of marijuana." Like Urziceanu, Jackson should receive a new trial.

Further support for Jackson's interpretation of Section 11362.775 as providing a defense to all members of a medical marijuana collective, even if they do not personally cultivate marijuana, are the "Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use" promulgated by the California Attorney General. (See http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf [hereinafter "Attorney General Guidelines"].) In a section entitled "Collectives Should Acquire, Possess, and Distribute Only Lawfully Cultivated Marijuana," the Attorney General opined as follows:

> Collectives and cooperatives should acquire marijuana only from their constituent members, because only marijuana grown by a qualified patient or his or her primary caregiver may lawfully be transported by, or distributed to, other members of a collective or cooperative. (§§ 11362.765, 11362.775.) The collective or cooperative may then allocate it to other members of the group. Nothing allows marijuana to be purchased from outside the collective or cooperative for distribution to its members. Instead, the cycle should be a closed-circuit of marijuana cultivation and consumption with no purchases or sales to or from non-members. To help prevent diversion of medical marijuana to non-medical markets, collectives and cooperatives should document each member's contribution of labor, resources, or money to the enterprise. They also should track and record the source of their marijuana.

(Attorney General Guidelines at p. 10.) Later, the Attorney General affirms that collectives and cooperatives may distribute marijuana to their membership "based on fees that are reasonably calculated to cover overhead costs and operating expenses" and that these entities "may credit its members for marijuana they provide to the collective, which it may then allocate to other members. (§ 11362.765(c).)." (Id. at p. 10; see also *ibid.* ["Members also may reimburse the collective or cooperative for marijuana that has been allocated to them."].) Finally, the Attorney General expressly addresses storefront dispensaries and opines that a "properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law. . . ." (Attorney General Guidelines at p. 11; see also *Qualified Patients Association, supra,* 187 Cal.App.4th at pp. 751-752 [relying on Attorney Guidelines to reject City's argument that any medical marijuana outlet it designates as a "dispensary" violates California's medical marijuana laws].)

Taken together, these provisions of the Attorney General Guidelines envision medical marijuana collectives that include among its members persons who are tasked with purchasing and selling marijuana to the collective's membership through storefront dispensaries. (See Attorney General Guidelines at p. 10 ["the cycle should be a closed-circuit of marijuana cultivation and consumption with no purchases or sales to or from non-members"].) This was the role this Court found Mr. Jackson had assumed with Answerdam. (See RT 8/30/2010 at p. 67.) Under the Attorney General Guidelines, which the California Supreme Court has found to properly interpret California law (*People v. Mentch* (2008) 45 Cal.4th 274, 285 fn. 6), Mr. Jackson should have been allowed a defense.

Nor does the California Supreme Court's decision in *People v. Mentch, supra*, alter any of this reasoning. *Mentch, supra,* did not address the operative provision of the MMPA at issue here,

Health & Safety Code § 11362.775, but, rather, addressed the very distinct issues (1) whether one can qualify as a primary caregiver under the CUA solely by providing marijuana to a qualified patient and (2) whether one who provides marijuana can qualify for protection under Health & Safety Code § 11362.765, subd. (a) for assisting in the administration of medical marijuana. Neither of these are issue at issue here, as Mr. Jackson is not contending that he is a primary caregiver of all of the members of Answerdam or that he qualifies for legal protection for assisting in the administration of medical marijuana. (See *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 680 ["An opinion is not authority for propositions not considered"].) Instead, the issue here is the proper application of Section 11362.775, which was properly interpreted in *Urziceanu, supra,* and the Attorney General Guidelines as allowing for medical marijuana collectives that distribute marijuana. Not only does *Mentch, supra,* not undermine these authorities, but it cites *Urziceanu, supra*, with approval (see *Mentch, supra*, 45 Cal.4th at pp. 283, 285, 289) and states that the Attorney General Guidelines "are wholly consistent with case law and the statutory text" (id. at p. 285 fn. 6.). This Court erred in precluding a defense recognized by the court in *Urziceanu, supra,* and the Attorney General Guidelines. A new trial is needed.

B. The Rule of Lenity Mandates the Adoption of Defendant's Reasonable Interpretation of Section 11362.775 as Providing a Defense to Dispensers of Marijuana Through Medical Marijuana Collectives

At the barest minimum, Jackson's interpretation of Section 11362.775 is reasonable, so the rule of lenity mandates its adoption in this criminal case. (*See, e.g., United States v. Bass* (1971) 404 U.S. 336, 347-50 ["where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."]; *People v. Ralph* (1944) 24 Cal.2d 575, 581 ["the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute"] [quoting *Ex parte Rosenheim* (1890) 83 Cal. 388, 391]; accord *People*

ex rel. Lungren v. Superior Court (1996) 14 Cal.4th 294, 312; see also *United States v. Wiltberger* (1820) 5 Wheat 76, 95, 5 L.Ed. 37 ["The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself"].) Under the rule of lenity, when "the language of a penal law is reasonably susceptible of two interpretations, courts are to construe the law 'as favorably to criminal defendants as reasonably permitted by the statutory language and circumstances of the application of the particular law at issue.'" (*People v. Robles* (2000) 23 Cal.4th 1106, 1115 [quoting *People v. Gardeley* (1996) 14 Cal.4th 605, 622; *People v. Overstreet* (1986) 42 Cal.3d 891, 896].) "This rule 'protects the individual against arbitrary discretion by officials and judges and guards against judicial usurpation of the legislative function which would result from enforcement of penalties when the legislative branch did not clearly prescribe them.'" (*Ibid.* [quoting *People v. Overstreet, supra,* at p. 896].)

Here, Mr. Jackson's interpretation of Section 11362.775 is shared by the Court of Appeal and the Attorney General. It promotes the purpose of the statute to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects" (Stats, 2003, C. 875 (S.B. 420), Section 1, subd. (b)(3).) Under these circumstances, it cannot be said that the Legislature has "clearly proscribed" the conduct for which Mr. Jackson was convicted. The rule of lenity mandates the adoption of defendant's interpretation of the statute, which will require a new trial.

C. This Court Erred in Excluding Mr. Jackson's Medical Marijuana Collective Defense, Even if it Correctly Interpreted Section 11362.775 as Requiring a Specific Intent by Mr. Jackson to Cultivate Marijuana

Even if this Court's interpretation of Section 11362.775 is correct, and the rule of lenity is somehow found not to apply, this Court nevertheless erred in excluding Mr. Jackson's medical

marijuana collective defense, since Mr. Jackson presented sufficient evidence at the Evidence Code Section 402 hearing that he intended to cultivate marijuana to have the issue submitted to the jury.

Because "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [quotation omitted]), they are entitled to present evidence on any legally cognizable defense, unless "it is clear that the evidence to be offered by the defendant can, under no interpretation, be considered sufficient" (*United States v. Johnson* (7th Cir. 1994) 32 F.3d 304, 307; cf. *United States v. Contento*-Pachon (9th Cir. 1984) 723 F.2d 691, 693 ["the trial court rarely rules on a defense as a matter of law"]). "Only slight evidence will create the factual issue necessary to get the defense to the jury, even [if] the evidence is 'weak, insufficient, inconsistent, or of doubtful credibility.'" (*United States v. Becerra* (9th Cir. 1993) 992 F.2d 960, 963 [quotation omitted].) Under Evidence Code Section 402, a defendant need only present sufficient evidence to raise a reasonable doubt on the elements of a medical marijuana defense to be entitled to its presentation to a jury. (*People v. Jones* (2003) 112 Cal.App.4th 341, 350.)

In this case, before excluding Mr. Jackson's medical marijuana collective defense, this Court heard testimony that Jackson had, in fact, participated in the cultivation of medical marijuana for Answerdam. At the Evidence Code Section 402 hearing, Jackson testified as follows:

> Q. And what is Answerdam?
>
> A. Answerdam is a collective, a medical marijuana collective.
>
> Q. And at some point during your involvement in Answerdam, did you cultivate marijuana?
>
> A. Yes.

* * *

A. Um, basically I was responsible for setting up the grow, providing just the assistance and helping to set everything. . . .

(RT 8/30/2010 at pp. 71-72.)

Q. The people that were tending the plants that were, you know, watering and fertilizing and doing that sort of thing, was that Kirsty and Mike?

A. No, No. I was there -- I had to do that -- a lot of the work because they couldn't always come and tend to the plants, so basically it was my job to make sure that . . .

Q. So you were tending to the plants?

A. Right.

(RT 8/30/2010 at p. 92; see also RT 8/30/2010 at p. 78 ["Q. So in addition to renting the building, you also assisted in the actual cultivation of marijuana? A. Yes."].)

Standing alone, this testimony by the defendant was sufficient to entitle Jackson to have his medical marijuana collective defense heard by the jury. (See *People v. Jones, supra,* 112 Cal.App.4th at 350 [discussed *infra*].) This testimony, however, does not stand alone, but is buttressed by Jackson's production of receipts for the purchase of marijuana cultivation equipment (see RT 8/30/2010 at p. 75), as well as Deputy Detective Carlson's testimony that he observed some cultivation equipment at Answerdam (RT 8/30/2010 at p. 37.) Detective Carlson testified as follows:

Q. But was there evidence of growing marijuana found during the investigation of the Answerdam organization?

A. Well, we found that people were growing, based on the records. We also found that there was some grow equipment, some grow light ballasts and trays in 6631, which I observed in that location on, I believe, it was May 13th and July 13th of 2009.

(RT 8/30/2010 at p. 37.)

At the barest minimum, this testimony by the defendant and others, especially when combined with the documentary evidence submitted by Jackson, was sufficient to create a reasonable

doubt whether Jackson specifically intended to cultivate marijuana, so the jury should have been permitted to hear it. The exclusion of the defense under these circumstances constitutes error. (Cf. *Jones, supra,* 112 Cal.App.4th at pp. 350-351 [holding that it was error for trial court to exclude defendant's Compassionate Use Act defense from jury where defendant testified at Section 402 hearing that his doctor told him that marijuana "might help" his migraines; "The trial court's role was simply to decide whether there was evidence, which, if believed by the jury, was sufficient to raise a reasonable doubt as to whether Dr. Morgan approved defendant's marijuana use. Defendant's testimony constituted such evidence."]; see also *People v. Lucas* (1995) 12 Cal.4th 415, 467 ["the judge's function on questions of this sort is merely to determine whether there is evidence sufficient to permit a jury to decide the question"].)

II. THE SUCCESSIVE PROSECUTION OF MR. JACKSON FOR A CONTINUING OFFENSE AFTER HIS ACQUITTAL FOR THAT OFFENSE VIOLATES HIS RIGHT NOT TO BE SUBJECT TO MULTIPLE CONVICTIONS FOR THE SAME OFFENSE, IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS

The double jeopardy clause of the fifth amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Likewise, article I, Section 15 of the California Constitution provides that "Persons may not twice be put in jeopardy for the same offense." Here, according to the police, Mr. Jackson continuously ran the medical marijuana collective Answerdam from 2008 to 2009, which is the conduct for which he had been previously acquitted. (See RT 8/30/2010 at p. 9.) It violates Mr. Jackson's right to be free from double jeopardy to subject him to this prosecution for this continuing offense.

Under the double jeopardy clause of the federal constitution, "[o]nly one prosecution is permissible for a continuing offense." (1 Wharton's Criminal Law § 60 (15th ed.) [citing *Re Snow* (1887) 120 U.S. 274, 7 S.Ct. 556; *Re Nielsen* (1889) 1331 U.S. 176, 9 S.Ct. 672].) "When the

offense charged consists of a series of acts extending over a period of time, an acquittal or conviction for an offense covering a portion of that period is a bar to a prosecution covering the entire period." (*Ibid.* [citations omitted].) Thus, for instance, a conviction for possessing a still in one month is a bar to a subsequent indictment for possessing that same still one month later. (*Statham v. State* (1932) 25 Ala.App. 135, 141 So. 915.) So too, does the double jeopardy clause bar a subsequent prosecution for keeping a place which is a common nuisance. (*State v. Arsenault* (1909) 106 Me. 192, 76 A. 410; *State v. Brownrigg* (1895) 87 Me. 500, 33 A. 11.) "[W]hen the essence of the offense charged in a second action is the same as the offense in a previously dismissed action the second action will be barred." (*Wallace v. Municipal Court* (1983) 140 Cal.App.3d 100, 107 [citation omitted].)

Comparing the information from the first case against Jackson (Lodged Documents, Exh. B) with the information in this one (Lodged Documents, Exh. C) reveals that he has been subject to double jeopardy. The first information charges Jackson with possession of marijuana for sale, in violation of Health and Safety Code Section 11359, on or about August 5, 2008, based on his affiliation with Answerdam. (See Lodged Documents, Exh. B at p. 2.) The information in this case, similarly, charges Mr. Jackson with two counts of possession of marijuana for sale, in violation of Health and Safety Code Section 11359, as well as one count of sale of marijuana, in violation of Health and Safety Code Section 11360, on or about July 16, 2009, and September 9, 2009, based on Jackson's continuing involvement in Answerdam. (See Lodged Documents, Exh. C at p. 2.)

That these two sets of charges against Jackson involve a single continuing offense is established by Jackson's testimony that he continued to pay rent on the Answerdam establishment throughout this entire time. (See RT 8/30/2010 at p. 76; see also RT 8/30/2010 at p. 21 [Mr. Rogers noting that "many if not most of the patients from 2008 were also members in 2009"].) And the

police confirm that the offense was a continuing one, as the lead investigating officer, Detective Carlson, testified as follows:

> Q. Was it, in fact, an ongoing investigation of Answerdam since 2008?
>
> A. Fair to say it appeared that the organization was continuing to engage in the business of selling marijuana, which was – became aware or after we had conducted those search warrants on August 5th, 2008, and due to that renewed investigation.

(See also RT 8/30/2010 at p. 12 ["Basically it was a second or continued investigation of Answerdam"].)

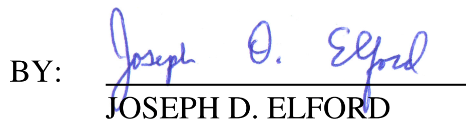
Based on this admission, the undisputed facts of the case, and the authorities cited above, it was error for this Court to let this prosecution to proceed. This Court should, instead, grant the instant motion and dismiss the marijuana charges against Jackson.

CONCLUSION

For the foregoing reasons, Jackson respectfully requests that his motion for a new trial be granted.

Dated: December 6, 2010

Respectfully submitted,

BY: 

JOSEPH D. ELFORD

Counsel for Defendant
JOVAN JACKSON

CERTIFICATE OF SERVICE

I am a resident of the State of California over the age of eighteen years and not a party to this action. My business address is 1322 Webster St., Suite 402, Oakland, CA 94612. On December 6, 2010, I served the within document:

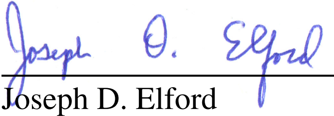
DEFENDANT'S MOTION FOR NEW TRIAL

via electronic transmission upon:

Christopher Lindberg
Office of the District Attorney
P.O. Box 121011
San Diego, CA 92112

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on this 6th day of December, 2010, in Oakland, California.



Joseph D. Elford