

HOW TO DEFEND A MEDICAL MARIJUANA PATIENT IN CALIFORNIA

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I. INTRODUCTION

Background: On November 4, 1996, California voters passed Proposition 215, also known as the Compassionate Use Act (“CUA”), to “ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes” without criminal penalty. Cal. Health & Safety Code (“H & S”) § 11362.5(b)(1). Since then, hundreds of medical marijuana patients and those who supply them with the medicine they need have been searched, arrested and prosecuted for marijuana violations, in large part because the CUA has been interpreted in a very obscure manner. Recognizing this, the California Legislature passed SB 420, or the “Medical Marijuana Program Act” (“MMPA”), which was signed into law on October 13, 2003, with an effective date of January 1, 2004. This outline is intended to help criminal defense practitioners understand medical marijuana law in California and serve as effective advocates for their clients.

Overview: The CUA provides basic protections for medical marijuana patients and their primary caregivers from prosecution for cultivation and possession of marijuana for medical use. Since it became effective on November 5, 1996, California courts of appeal have, for the most part, narrowly construed its provisions, fearing an “open sesame” for marijuana distribution not intended by the California voters. *See People v. Trippett* (1st Dist. 1997) 56 Cal.App.4th 1532, 1546, 66 Cal.Rptr.2d 559. As a result of their extreme caution, medical marijuana patients and their caregivers have been left largely unprotected from arrest and prosecution for transporting and distributing medical marijuana, as well as the seizure of their medicine, even when they had valid documentation proving their eligibility for the protections of the CUA. Their fates depended largely on the discretion of the local police, which has proved a mixed blessing due to vast disparities in the local guideline amounts of marijuana that a qualified patient could possess without fear of legal repercussion. This problem has been considerably exacerbated by local bans of medical marijuana dispensaries, which is the subject of a pending California Supreme Court case. *See City of Riverside v. Inland Empire Patient’s Health and Wellness Ctr., Inc.* (2011) 133 Cal.Rptr.3d 363, *review granted* Jan. 18, 2012.

Purpose: Expressly motivated by “reports from across the state [that] 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, prevented qualified patients and designated primary caregivers from obtaining the protections afforded by the act,” the California Legislature passed Senate Bill 420, Stats. 2003 c.875 (“SB 420”) on September 10, 2003. *See* SB 420 § 1(a)(2). SB 420 does not, and cannot, amend or restrict the provisions of the CUA, but, instead, seeks only to clarify or, in some cases, to expand upon it. *See* Letter from John Vasconcellos & Mark
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Leno to The Hon. John Burton, dated Sept. 10, 2003 (printed in Historical and Statutory Notes to Cal. Health & Safety Code § 11362.7) (noting that Proposition 215 cannot be amended by the Legislature); *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1483-84, 76 Cal.Rptr.2d 342 (“When a statute enacted by the initiative process is involved, the Legislature may amend it only if the voters specifically gave the Legislature that power, and then only upon whatever conditions the voters attached to the Legislature's amendatory powers”); *see also* Cal. Const., Art. 2, § 10(c) (the Legislature “may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval”).

The four most noteworthy features of the new law are that it: (1) establishes threshold minimum quantities of marijuana that a qualified patient may possess without having to demonstrate “reasonable personal use;” (2) explicitly protects qualified patients and primary caregivers from prosecution for transportation and “non-profit” sales of marijuana; (3) creates a voluntary identification card system that can be checked instantly by law enforcement, which provides immunity from arrests and seizures; and (4) “promote[s] uniform and consistent application of the [CUA] among the counties within the state’ and ‘enhanc[es] the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects.” *See County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 864, 121 Cal.Rptr.3d 722, citation and quotations omitted. This outline focuses almost exclusively on the protections afforded by the CUA and SB 420 to non-cardholding patients and caregivers, since significant delay in the implementation of the identifications card system is expected. [It should be noted that most of the provisions of SB 420, H & S § 11362.765 *et seq.*, apply even to those who do not obtain valid identification cards.] Meanwhile, defense counsel should argue that the protections afforded by the voluntary identification care system should be extended to qualified patients who have documentation that would otherwise entitle them to an identification card (H & S § 11362.71(e)), since they should not be deprived of the protections intended by the Legislature due to bureaucratic delay.

Evolution of the Law: Understanding the progression of the case law and statutes is essential to effective advocacy because the courts have not been consistent in their interpretation of California’s medical marijuana laws. In the early years, after the CUA was enacted in November of 1996, California courts of appeal issued rather restrictive constructions of its provisions. *See, e.g., People v. Trippett* (1st Dist. 1997) 56 Cal.App.4th 1532, 66 Cal.Rptr.2d 559 (CUA does not apply to transportation, except, perhaps, under very limited circumstances); *Lungren v. Peron* (1st Dist. 1998) 59 Cal.App.4th 1383, 70 Cal.Rptr.2d 20 (CUA does not apply to cooperatives). This case law was abrogated, in part, on July 18, 2002, when the Supreme Court of California issues its only published decision on the CUA to date. *People v. Mower* (2002) 28 Cal.4th 457, 122 Cal.Rptr.2d 326. Then, on October 12, 2003, SB 420 was signed into law, which enables defense counsel to argue that adverse authority decided before *Mower* (July 18, 2002) or SB 420 (Oct. 12, 2003) is no longer good law in light of either, or both, of their provisions.

Retroactivity: Both the CUA and SB 420 are retroactive. The general rule is that a criminal defendant is entitled to the benefit of a change in law, unless that law contains a savings clause. *See People v. Babylon* (1985) 39 Cal.3d 719, 722, 216 Cal.Rptr. 123; *see also People v. Rossi* (1976) 18 Cal.3d 295, 304 134 Cal.Rptr. 64 (quoting *Bell v. Maryland* (1964) 378 U.S. 226, 230, 84 S.Ct. 1814 (“the universal common-law rule that when the legislature repeals a criminal statute or otherwise removes the State’s condemnation from conduct deemed criminal, this action requires the dismissal of a pending criminal proceeding charging such conduct”). Because neither the CUA nor SB 420 contains such a clause, they almost certainly apply retroactively. *See People v. Trippett* (1st Dist. 1997) 56 Cal.App.4th 1532, 1544-45, 66 Cal.Rptr.2d 559, 567 (holding that CUA applies retroactively). [Technically speaking, SB 420 cannot be retroactive, since it merely clarifies, rather than amends, the CUA. *See supra*. However, to the extent SB 420 enlarges the protections available to criminal defendants and is challenged for doing so, defense counsel should argue that the law amends the legislatively enacted proscriptions against marijuana possession and use, rather than the CUA.]

II. PRELIMINARY CONSIDERATIONS

General Rule: Courts have held that the CUA does not afford qualified patients complete immunity from criminal sanction, but, instead, provides an *affirmative defense* to prosecution, which can be raised as a defense at trial or by a motion to set aside an indictment or information prior to trial for lack of reasonable or probable cause. *People v. Mower* (2002) 28 Cal.4th 457, 464 & 469, 122 Cal.Rptr.2d 326, 331 & 335. Put another way, the “medical marijuana defense” provided by the CUA negates an element of the crime, insofar as an element of any marijuana offense is that the possession or cultivation of the marijuana is “unlawful.” *People v. Mower* (2002) 28 Cal.4th 457, 482, 122 Cal.Rptr.2d 326, 345-46.

Searches: Because the CUA is regarded as providing an affirmative defense, rather than affording complete immunity, some courts have held it not to provide grounds for the suppression of evidence obtained from an otherwise valid search *pursuant to a warrant*, or grounds for reversal of a conviction, solely because the police failed to conduct an adequate investigation of defendant’s status as a qualified patient or caregiver prior to conducting (or completing) a search. *People v. Fisher* (3d Dist. March 14, 2002) 96 Cal.App.4th 1147, 1149, 117 Cal.Rptr.2d 838, 839 (holding that law enforcement officers are not required to abandon a search for marijuana authorized by a search warrant when a resident of the premises produces documents that suggest he is a qualified patient). This holding, however, may be challenged as no longer good law in light of the *Mower* court’s declaration that probable cause depends upon all of the surrounding facts, including those that reveal a person’s status as a qualified patient or primary caregiver under the CUA. *People v. Mower* (July 18, 2002) 28 Cal.4th 457, 464 & 469, 122 Cal.Rptr.2d 326, 331 & 334-35. Thus, in *County of Butte v. Superior Court* (2009) 175 Cal.App.4th 729, 96 Cal.Rptr.3d 421, the court held that a qualified patient may state a civil claim for the violation of due process and unreasonable search and seizure where law enforcement compels him to destroy medical marijuana that is lawfully possessed under California law

without a warrant. This provides a strong basis for suppression of illegally obtained marijuana in appropriate cases.

Arrests: The same law applies to arrests as to searches, except that SB 420 was explicitly enacted to avoid the “unnecessary arrest and prosecution” of qualified patients and their designated primary caregivers (SB 420 § 1(b)(1)) and it expressly forbids the arrest of any person or designated primary caregiver in possession of a valid identification card for the possession, transportation, delivery, or cultivation of up to eight ounces of dried marijuana and/or six mature (or twelve immature) plants, unless there is reasonable cause to believe that the card is fraudulent or the person is violating other marijuana laws, such as distribution for non-medical use. *See* H & S Code § 11362.71(e); *see also* H & S § 11362.78 (forbidding law enforcement officers from refusing to accept identification cards issued by the DPH unless they have reasonable cause to believe that the information contained therein is false or the card is being used fraudulently); *see also County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 81 Cal.Rptr.3d 461 (affirming validity of state medical marijuana identification card program under both state and federal law).

Motion for Return of Property: If no charges are brought against a defendant, or he prevails in a pretrial hearing or at trial, he may file a motion or commence a civil action for the return of his marijuana, or for monetary damages if the marijuana has been harmed or destroyed. *See City of Garden Grove v. Superior Court* (2008) 157 Cal.App.4th 355, 68 Cal.Rptr.3d 656; *County of Butte, supra*. Ordinarily, motions for the return of property are governed by Penal Code § 1538.5, which vests in the courts the explicit power to return property seized pursuant to a warrant, which is held in evidence. Penal Code § 1536, however, imposes duties upon the police both to retain the property seized pending a court order regarding its disposition and to return the property if it is being withheld unjustly. *Hibbard v. City of Anaheim* (1984) 162 Cal.App.3d 270, 276, 208 Cal.Rptr. 733. And courts retain no less control over property seized by police without a warrant. *Gershenhorn v. Superior Court* (Cal.App.2d Dist. 1964) 227 Cal.App.2d 361, 366, 38 Cal.Rptr. 576. Thus, in *Garden Grove, supra*, the court held that due process *requires* the return of medical marijuana lawfully possess by a patient. *Id.* at pp. 386-389. So, a defendant (or putative defendant) may institute a summary proceeding for nonstatutory motion for return of property, even if no charges are brought against him (*Gershenhorn, supra*, 227 Cal.App.2d at 366, or after the criminal case is complete (*People v. Superior Court, Orange County* (Cal.App.4th Dist. 1972) (court had jurisdiction to hear motion for return of property made at return of “not guilty” verdict). Alternatively, a defendant may commence a civil action for the return of his property by filing a petition for writ of mandate under Cal. Code of Civil Procedure § 1085. If the police wrongfully destroy the property in the interim, or the marijuana has spoiled, the court may require the police to pay damages. *See Butte, supra; Holt v. Kelly* (1978) 20 Cal.3d 560, 565, 143 Cal.Rptr. 625; *Long v. City of Los Angeles* (1998) 68 Cal.App.4th 782, 787, 80 Cal.Rptr.2d 583; *Hibbard, supra*, 162 Cal.App.3d at 276-77; *People v. Municipal Court, County of Mendocino (Christopher Joseph Brown)*, No. 97-77843, Order Discharging Emergency Petition for Writ of Mandate (March 9, 1998).

Motion for Determination of Factual Innocence: Under similar circumstances, a former defendant may file a motion for determination of factual innocence under Penal Code § 851.8(c). The burden and standard of proof are essentially the same as that involved in a § 995 hearing or at trial, which is that “no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made.” Penal Code § 851.8(b); *see People v. Matthews* (1992) 7 Cal.App.4th 1052, 1056-57, 9 Cal.Rptr.2d 348 (proof of affirmative defense may form a basis for finding of factual innocence). A sample motion for determination of factual innocence in a medical marijuana case is available at <http://drugpolicyalliance.org/docUploads/malonefactinn.pdf>.

Motion for Sealing of Court Files and Destruction of Police Records: Along with a motion for determination of factual innocence, defense counsel should file a motion for sealing of court files and destruction of police records. Section 851.8(b) of the Penal Code directs the court to order law enforcement to seal and later destroy their records of a defendant’s arrest if it finds the arrestee factually innocent.

III. PRETRIAL PROCEEDINGS

Motion to Set Aside the Indictment or Information: The two established vehicles for raising the medical marijuana defense under the CUA are: (1) through a motion to set aside the indictment or information before trial under Penal Code § 995 and/or (2) as an affirmative defense at trial. *People v. Mower* (2002) 28 Cal.4th 457, 464, 469-70 & 473-74, 122 Cal.Rptr.2d 326, 331, 335-36 & 338-39; *see People v. Jackson* (2012) 210 Cal.App.4th 525, 148 Cal.Rptr.3d 375. To prevail on a section 995 motion to dismiss, the defendant must show that, in light of the evidence presented to the grand jury or the magistrate regarding his status as a qualified patient or primary caregiver, he was indicted “without reasonable or probable cause” to believe that he was guilty of the unlawful possession or cultivation of marijuana. *People v. Mower* (2002) 28 Cal.4th 457, 473, 122 Cal.Rptr.2d 326, 338 (quoting Penal Code §§ 995(a)(1)(B) & (2)(B)). Because the prosecutor has an obligation to present exculpatory evidence to the grand jury (Penal Code § 939.71) and the defendant may present such evidence to the magistrate (Penal Code § 866(a)), evidence of a defendant’s status as a qualified patient or primary caregiver may be presented at the hearing on the section 995 motion. *See People v. Mower* (2002) 28 Cal.4th 457, 473 n.5, 122 Cal.Rptr.2d 326, 338 n.5. The strategy considerations with respect to what evidence to present is basically the same as those pertaining to presenting the defense at trial, described *infra*, which includes the doctor’s recommendation, patient’s testimony of personal use, and expert testimony, if necessary.

“Informal Request” to Dismiss Complaint in Furtherance of Justice: In addition to these established mechanisms for asserting a medical marijuana defense, a defendant may “informally suggest” that the magistrate or superior court dismiss the information or complaint “in the interests of justice” under Penal Code § 1385. *People v. Konow* (2004) 32 Cal.4th 995, 1022, 12 Cal.Rptr.3d 301, 320. Counsel may do this at any time, even as early as the arraignment, or in connection with a demurrer to the complaint, when the evidentiary foundation is laid through the submission of the doctor’s recommendation by declaration under Evidence Code § 1590. More frequently, defense counsel will establish

that the charged activity involves medical marijuana at the preliminary hearing and make the informal request under Penal Code § 1385 at that time or in connection with a motion to set aside the information under Penal Code § 995. This may present the best hope for dismissal in cases where the defendant does not meet the technical criteria for the medical marijuana defense, as where the defendant distributed marijuana through a dispensary. *See People v. Konow* (2004) 32 Cal.4th 995, 1028, 12 Cal.Rptr.3d 301, 325 (affirming superior court's setting aside of information under section 995 where magistrate expressed willingness to do this, but erroneously believed that he was precluded from doing so by previous order of superior court).

Motion to Preclude Defense Under Evidence Code § 402: In the weeks leading up to trial, defense counsel should be especially wary of a prosecution motion under Evidence Code § 402 to preclude the medical marijuana defense. *People v. Jackson* (2012) 210 Cal.App.4th 525, 148 Cal.Rptr.3d 375. Evidence Code § 402 precludes irrelevant and potentially confusing matters from the jury's consideration, including evidence of an imperfect medical marijuana defense. Thus, in *People v. Galambos* (3d Dist. 2002) 104 Cal.App.4th 1147, 1158, 128 Cal.Rptr.2d 844, 852, the court held that the trial court may order a hearing under section 402 upon the prosecutor's request to determine whether there is sufficient evidence to sustain each element of the medical marijuana defense. The same proceeding occurred in *People v. Jackson* (2012) 210 Cal.App.4th 525, 148 Cal.Rptr.3d 375.

Burden of Proof: At a section 402 hearing, the defendant has the burden of producing sufficient evidence to raise a reasonable doubt on each element of the defense. *People v. Mower* (2002) 28 Cal.4th 457, 481, 122 Cal.Rptr.2d 326, 345; *People v. Jackson* (2012) 210 Cal.App.4th 525, 533, 148 Cal.Rptr.3d 375; *People v. Jones* (3d Dist. 2003) 112 Cal.App.4th 341, 350, 4 Cal.Rptr.3d 916, 922. The standard for evaluating the sufficiency of the evidence presented is "whether a reasonable jury, accepting all the evidence as true" could find the elements of the defense; that is, the evidence is sufficient for the jury to decide that there is reasonable doubt. *See People v. Trippett* (1st Dist. 1997) 56 Cal.App.4th 1532, 1539, 66 Cal.Rptr.2d 559; *People v. Jones* (3d Dist. 2003) 112 Cal.App.4th 341, 350, 4 Cal.Rptr.3d 916, 922; *see also People v. Lucas* (1995) 12 Cal.4th 415, 467, 48 Cal.Rptr.2d 525 ("[T]he 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."); *accord People v. Jackson* (2012) 210 Cal.App.4th 525, 148 Cal.Rptr.3d 375.

Compelled Disclosure of Defense: Because the prosecutor's request for a section 402 hearing arguably compels the defendant to disclose his defense prematurely, defense counsel should not do so voluntarily, unless he is confident that he can make a sufficient threshold showing to survive a section 402 hearing. Otherwise, through voluntary disclosure, defense counsel waives any such claim. *See People v. Galambos* (3d Dist. 2002) 104 Cal.App.4th 1147, 1155, 128 Cal.Rptr.2d 844, 850 (rejecting defendant's contention on appeal that he was prematurely compelled to reveal his defense at section 402 hearing because his

trial counsel volunteered at a readiness conference that he intended to rely on a medical marijuana defense at trial).

Compelled Self-Incrimination: For similar reasons, defense counsel should contend that an order requiring him to make an offer of proof before trial amounts to compelled self-incrimination, in violation of the Fifth Amendment to the Federal Constitution and Article I, Section 15 of the California Constitution. *Cf. People v. Galambos* (3d Dist. 2002) 104 Cal.App.4th 1147, 1159-60, 128 Cal.Rptr.2d 844, 852-53 (finding the issue waived in proceedings below).

Ex Parte Under Seal Offers of Proof: To obviate the compulsion concerns described above, the *Galambos* court endorsed the use of an *in camera* proceeding, outside the presence of the prosecutor, for the defendant to make his offer of proof. *People v. Galambos* (3d Dist. 2002) 104 Cal.App.4th 1147, 1159, 128 Cal.Rptr.2d 844, 853. In *Jackson, supra*, extensive public pretrial proceedings were held regarding Jackson's medical marijuana collective defense.

Motion *in limine* to exclude reference at trial to quantities cited in SB 420: Defense counsel should also make affirmative use of Evidence Code § 402 to exclude reference at trial to the quantities of marijuana listed in SB 420, unless his client did not exceed those quantities, in which case he should use SB 420 to seek to dismiss the prosecution. *See People v. Kelly* (2010) 47 Cal.4th 1008, 222 P.3d 286 (holding that Medical Marijuana Program Act (MMPA or SB 420) is invalid to extent it amends the voter-enacted Compassionate Use Act (CUA) by burdening a defense that would be available pursuant to the CUA. Although its language could have been far clearer, SB 420 was intended to establish a floor, not a ceiling, on the amount of marijuana a qualified patient or his primary caregiver may possess. *See H & S § 11362.77(a)* (“A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature plants per qualified patient.”). This legislative intent was clarified in a letter by its authors, which was enrolled in the legislative digests of both houses of the Legislature and codified in the Historical and Statutory Notes to Cal. Health & Safety Code § 11362.7. *See Letter from John Vasconcellos & Mark Leno to The Hon. John Burton*, dated Sept. 10, 2003 (reprinted in Historical and Statutory Notes to Cal. Health & Safety Code § 11362.7). Despite this, prosecutors have sought to introduce the threshold quantities of marijuana listed in SB 420 to persuade a jury that a defendant who cultivates or possesses larger quantities exceeds an amount consistent with personal use, and the Court found that this was impermissible. *See Kelly, supra*. To avoid this unintended use of SB 420, defense counsel should file a motion *in limine* to exclude any reference to the SB 420 quantities at trial as irrelevant (*see* Evid. Code § 351) or, if marginally relevant to defendant's intent, unduly prejudicial, confusing, and misleading (Evid. Code § 352), since the issue is whether the quantity of marijuana is reasonably related to the patient's current medical needs (*see* CALJIC 12.24.1), not whether it exceeds the SB 420 amounts. *Cf. People v. Persky* (1959) 167 Cal.App.2d 134, 141-42, 334 P.2d 219 (trial court did not err in excluding evidence of sales tax regulation as proof of industry practice, since it was

collateral to central triable issues); *see also People v. Mower* (2002) 28 Cal.4th 457, 485 n.10, 122 Cal.Rptr.2d 326, 347 n.10 (noting that jury did not hear any argument, or receive any instructions, that authorized or invited it to find defendant guilty of violating county's three-plant policy).

IV. DEFENSES AT TRIAL

Elements for Individual Patients: The basic medical marijuana defense for individual patients consists of the following four elements:

(1) the medical use of marijuana has been recommended or approved by a physician; (2) the physician has determined that the person's health would benefit from the use of marijuana in the treatment of an illness for which marijuana provides relief; (3) the marijuana at issue was for the personal medical use of a qualified patient and (4) the quantity of marijuana, and the form in which it was possessed, were reasonably related to the patient's current medical needs. *See* CALJIC 12.24.1; *People v. Trippett* (1st Dist. 1997) 56 Cal.App.4th 1532, 1550-51, 66 Cal.Rptr.2d 559, 571.

Persons Included: The CUA applies generally to two classes of persons: (1) "qualified patients" who receive a doctor's recommendation or approval to use marijuana for medical use (*see* H & S § 11362.5(d)), and to (2) "designated primary caregivers" who have consistently assumed the responsibility for the housing, health, or safety of a qualified patient (H & S § 11362.5(e)). SB 420 expands the protections of the CUA to include those who assist qualified patients and primary caregivers cultivate marijuana for qualified patients, or to help them administer it. H & S § 11362.765(b)(3).

Illnesses Included: The CUA broadly applies to eight enumerated illnesses, including cancer, AIDS and chronic pain, and "any other illness for which marijuana provides relief." H & S § 11362.5(a)(1)(A); *People v. Tilehkooh* (3d Dist. Dec. 8, 2003) 7 Cal.Rpt.3d 226, 232, 2003 WL 22883933, at *4. Despite this wide-ranging definition, the Legislature "clarified" in SB 420 that a "serious medical condition" means: AIDS, anorexia, arthritis, cachexia, cancer, chronic pain, glaucoma, migraine, persistent muscle spasms, seizures, severe nausea, and "[a]ny other chronic pain or persistent medical symptom that either" "limits the ability of the person to conduct one or more major life activit[y] as defined in the Americans with Disabilities Act of 1990 (P.L. 101-336)" or "may cause serious harm to the patient's safety or physical or mental health." SB 420 § 11362.7(h). By its terms, this definition applies only to the criteria for obtaining a voluntary identification card under SB 420, not to the CUA. To the extent this definition is used by prosecutors to seek to narrow the applicability of the CUA, for instance, by excluding illnesses such as anxiety and backaches, this violates the rule against legislative amendments of voter-approved initiatives. *See Kelly, supra; Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1483-84, 76 Cal.Rptr.2d 342. In *People v. Spark* (5th Dist. Aug. 2, 2004) 2004 WL 1718172, which involved defendant's claims that he used marijuana to treat back pain on the advice of his physician, the court held that the medical marijuana defense does not require a defendant to prove that he or she is "seriously ill." *See also id.* ("A physician's determination on

this medical issue is not to be second-guessed by jurors who might not deem the patient’s condition to be sufficiently ‘serious’”).

Illnesses/Treatments: A good source of doctor and patient testimony on the use of marijuana to alleviate nausea and pain, as well as symptoms associated with epilepsy, HIV/AIDS can be found at <http://www.drugpolicy.org/marijuana/medical/challenges/litigators/legal/physician>. Defense counsel should elicit such testimony from the defendant and his expert.

Recommendation/Approval: The first element of the medical marijuana defense requires the defendant to present evidence of “the written or oral recommendation or approval of a physician.” Health & Safety Code § 11362.5(d).

Need not be in writing: By the express terms of § 11362.5(d), neither a physician’s recommendation nor his approval must be in writing.

An “approval” requires less than a “recommendation”: Courts have held that an “approval” connotes a less formal act than a “recommendation.” *People v. Jones* (3d Dist. 2003) 112 Cal.App.4th 341, 347, 4 Cal.Rptr.3d 916, 920 (quoting *People v. Trippett* (1st Dist. 1997) 56 Cal.App.4th 1532, 66 Cal.Rptr.2d 559).

Whereas a “recommendation” suggests that *the physician* had raised the subject of medical marijuana use and presented it to the patient as a treatment, an “approval” suggests that *the patient* raised the issue and the physician merely “expresses to the patient a favorable opinion of marijuana use for treatment of the patient’s illness.” *People v. Jones* (3d Dist. 2003) 112 Cal.App.4th 341, 344 & 347, 4 Cal.Rptr.3d 916, 918 & 920. Thus, even where the doctor later denied having recommended marijuana to the patient, the defendant’s testimony that he raised the issue with his doctor and the doctor told him that his use of marijuana for migraine headaches “might help, go ahead” was found sufficient to permit a jury to conclude that there was reasonable doubt whether the doctor gave his approval. *People v. Jones* (3d Dist. 2003) 112 Cal.App.4th 341, 347-51, 4 Cal.Rptr.3d 916, 920-23.

Need not necessarily come from patient’s primary doctor: The CUA requires only that the recommendation or approval come from a licensed physician or osteopath, rather than unlicensed “medical personnel.” See H & S § 11362.7(a); *People v. Rigo* (1999) 69 Cal.App.4th 409, 415, 81 Cal.Rptr.2d 624; *People v. Ward* (3d Dist. March 28, 2003) 2003 WL 1611221 (unpublished opinion).¹ One court has held in an unpublished opinion that the recommending physician need not be the patient’s “treating” or “primary” physician; nor must she review particular medical records or conduct particular examinations. *People v. Chasco* (3d Dist. 2003) 2003 WL 288993, at *5 (unpublished opinion). The California

¹ Rule 977(a) of the California Rules of Court prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published. This manual cites these unpublished decisions only for guidance to practitioners.

Medical Board, on the hand, has its own criteria. *See* http://www.mbc.ca.gov/medical_marijuana_cma-recommend.pdf

Need not necessarily be obtained prior to the charged conduct: Where “exigent circumstances” explain a defendant’s failure to obtain a doctor’s recommendation before his arrest, he may argue that a later-acquired approval or recommendation qualifies him for the medical marijuana defense, since the CUA does not expressly require the recommendation to be acquired first. *See People v. Trippett* (1st Dist. 1997) 56 Cal.App.4th 1532, 1548 n.13, 66 Cal.Rptr.2d 559, 569 n.13 (conceiving of exigent circumstances in which the physician’s approval might be contemporaneous with the possession, or even subsequent to the possession of marijuana, although prior to actual usage); *see also People v. Mower* (2002) 28 Cal.4th 457, 465, 122 Cal.Rptr.2d 326 (noting that defendant’s use of marijuana prior to obtaining a recommendation from his physician does not necessarily serve to defeat a medical marijuana defense). Courts, however, are not likely to be amenable to such argument, absent a solid explanation for the delay. For instance, an approval obtained more than three months after defendant’s arrest was found not to satisfy the requirement of “exigent circumstances” in *People v. Rigo* (1st Dist. 1999) 69 Cal.App.4th 409, 413, 81 Cal.Rptr.2d 624, 627.

Quantity: The issue that is most likely to be the subject of dispute in criminal cases is whether the quantity of marijuana cultivated or possessed by a qualified patient or primary caregiver is intended for personal use, rather than distribution. At one end of the spectrum, SB 420 establishes absolute threshold minimums, or floors, on the amount of marijuana a qualified patient or person with an identification card may possess without any criminal repercussion, including searches and arrests. *See* H & S §§ 1362.71(e) & 11362.77(a) & (f) (eight ounces of dried marijuana and six mature (or twelve immature) plants). Although some prosecutors will argue otherwise, *these floors were not intended to -- and do not -- set a ceiling on the amount of marijuana a qualified patient or primary caregiver may possess. See Kelly, supra.* Instead, the standard, both before and after the passage of SB 420, is whether the amount of marijuana at issue is “reasonably related to the patient’s current medical needs.” *See People v. Trippett* (1st Dist. 1997) 56 Cal.App.4th 1532, 1549, 66 Cal.Rptr.2d 559, 570. Defense counsel should seek to exclude any consideration of the floors established by SB 420 at the preliminary hearing and/or trial in cases involving above-threshold amounts. *See infra.*

SB 420 Amounts: Due to extreme variations in local guidelines established regarding the number of marijuana plants qualified persons could cultivate and possess without government interference, SB 420 set floor limits below which no county may go. H & S § 11362.77. The floors are as follows: “A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature plants per qualified patient.” H & S § 11362.77(a); *see also* H & S 11362.77(f) (clarifying that qualified patient and primary caregivers “may possess amounts of marijuana

consistent with this article”).² Local governments, recommending physicians, and the Attorney General may increase such amounts. H & S §§ 11362.77(b), (c) & (e). Thus, defense counsel should consult the local guidelines, if any, as well as the specific recommendation of the physician to determine whether to make an argument that his client is immune from arrest and prosecution.

Fact-based inquiry into reasonable medical needs: For cases involving quantities of marijuana greater than those absolutely protected by SB 420 or the local guidelines, the dispositive question is whether “the quantity possessed by the patient or the primary caregiver, and the form and manner in which it is possessed, [is] reasonably related to the patient’s current medical needs.” *People v. Trippett* (1st Dist. 1997) 56 Cal.App.4th 1532, 1549, 66 Cal.Rptr.2d 559, 570. The trier of fact will resolve this question based on such factors as the approving physician’s opinion regarding the frequency and dosage the patient needs. *Id.*; compare *People v. Mower*, *supra*, 28 Cal.4th at 484-85, 122 Cal.Rptr.2d 326 (jury question whether defendant possessed and cultivated 31 marijuana plants entirely for his own personal medical use); *People v. Jones* (3d Dist. 2003) 112 Cal.App.4th 341, 345-46, 4 Cal.Rptr.3d 916, 919 (error for court to preclude medical marijuana defense because quantity possessed by defendant did not, in court’s view, bear any “rational relation to someone [who] has migraines three or four times a year”). To establish personal medical use, defense counsel will likely need to call the physician who recommended marijuana to testify at trial and, perhaps, the defendant as well. It is also recommended that defense counsel seek funds to hire an expert to opine that the quantity of dried marijuana or usable marijuana expected to be produced from the plants found was consistent with defendant’s medical needs.

Projected Yields: Where the police discover plants, rather than dried marijuana, a hotly disputed issue will be the amount of usable marijuana likely to be produced from the number of plants. Both sides will likely call experts to testify, and the defendant may do so as well, since his intent is dispositive.

The first important factor to consider is that there is a high rate of attrition for marijuana plants, so it makes sense for a patient to cultivate more than he needs to ensure an adequate supply. Since many defendants are novice marijuana cultivators, they may produce more marijuana than intended, which is especially true in cases involving unusually large plants. Thus, where a defendant is a first-time grower, defense counsel should explore the possibility of a mistake of fact defense or mistake of fact instruction to argue that the defendant had a mistaken, but reasonable, belief that he needed to cultivate a large number of plants to yield a useable quantity of marijuana consistent with his personal medical use. See *infra*; *People v. Hall* (Ct. App. 3d Dist. April 21, 2003) 2003 WL 1908056, at *14-*15 (unpublished opinion).

Yield estimates based on the number of plants vary, but usually reflect the height and diameter of the plants. One rule of thumb is that well-maintained

² Only the “dried mature flower of female cannabis plant” or the plant conversion shall be considered in this calculation. See Cal. Health & Safety Code § 11362.77(d).

indoor plants yield, on average, three to five ounces of marijuana. *See People v. Hall* (Ct. App. 3d Dist. April 21, 2003) 2003 WL 1908056, at *2 (unpublished opinion) (testimony of prosecution expert).

To determine the projected yield of mature marijuana plants, experts use various methodologies, which leads to divergent testimony by defense and prosecution experts. One common methodology favored by defense experts is based on a 1992 DEA study entitled “Cannabis Yields.” According to this study, the fresh (or wet) weight of each marijuana plant (roots and leaves included) is multiplied by 0.1437 to obtain an estimate of usable dry weight material. *See* www.drugpolicy.org/marijuana/medical/challenges/litigators/legal/plantyeilds/dea_plantyeilds.com. Another important consideration in determining the amount of usable marijuana a defendant cultivates is the number of annual grow cycles, which varies from a one-year cycle for outdoor plants to a three-month cycle for indoor plants. Where an indoor grow is involved, defense counsel should check the defendant’s electrical usage to determine whether the grow cycles were continuous.

Some localities have passed restrictions (or bans) on the amount of marijuana a qualified patient may cultivate outdoors, depending on parcel size. *See, e.g. Browne v. Tehama* (Ct. App. 3d Dist. Feb. 6, 2013) 2013 WL 441604, 13 Cal. Op. Daily Serv. 1457. These restrictions have been upheld by the court when faced with facial challenges, *id.*, but they may yet be invalidated on an as applied basis, if the patient needs to cultivate quantities of marijuana exceeding the local restrictions for his personal medical use. Defense counsel should argue that these quantities should not be used in a criminal case to prove that a patient has exceeded his personal use.

Average Personal Use: Defense and prosecution experts also view reasonably necessary personal use very differently, as prosecutors are most accustomed to recreational marijuana users who typically do not consume nearly as much marijuana as do patients. Although the average consumption of patients varies according to the illness and method of ingestion, one defense expert has testified that a heavy-using medical marijuana patient can consume between six to twelve pounds of marijuana per year. *Hall, supra*, 2003 WL 1908056 at *5. A useful fact for cross-examination of prosecution experts is that patients are given more than six pounds of marijuana per year under the federal IND program.

Potency/Form: A patient who ingests marijuana in edible form must consume three to five times as much as one who ingests it through smoking to achieve the same result. *Hall, supra*, 2003 WL 1908056 at *5. Thus, a heavy-using medical marijuana patient who consumes it exclusively through edibles can consume as much as fifty pounds (or more) of marijuana per year.

Exculpatory Facts: Facts suggesting that marijuana cultivation or possession by a defendant is for his personal medical use, rather than for sale, are as follows: the lack of substantial foot traffic into and out of defendant’s home; no telephone calls or visitors received during the search of his residence; no money or pay/owe records, scales, or

plastic bags. These facts should be elicited on cross-examination of the prosecution's law enforcement witnesses, especially if they testify as experts.

Inculpatory Facts: Facts which cast suspicion on the defendant include: his lack of gainful employment; scales and/or plastic bags are found at his home. Even if there are scales and/or plastic bags, however, the defendant may have needed them to measure his medicine, especially for cooking, or for storage, as plastic bags reduces spoilage through air exposure.

Elements for Collectives and Cooperatives: Perhaps the most confused area of California's medical marijuana laws involve the distinction between collectives and cooperatives, which were made legal in 2003, and "primary caregivers," which were a facet of the CUA. *See People v. Urziceanu* (2005) 132 Cal.App.4th 747, 785. Many medical marijuana dispensaries or collectives have sought unsuccessfully to argue that they should be afforded a "primary caregiver" instruction at trial. *See People v. Mentch* (2008) 45 Cal.4th 274, 195 P.3d 1061 (rejecting such instruction). The better avenue for dispensary operators and their cultivators, therefore, is to argue a medical marijuana collective/cooperative defense under the MMPA, rather than a primary caregiver defense under the CUA.

Application to Cooperatives and Their Suppliers: Prior to the enactment of SB 420, cooperatives and their suppliers received virtually no legal protection in the courts. One court of appeal held that neither cooperatives nor the individuals who operate them qualified as primary caregivers, even if formally designated as such by the patient-members, because they did not *consistently* assume the responsibility for the health or safety of their members, since "[t]he purchasing patient may never patronize [their] establishment again; [their] designation is admittedly transitory and not exclusive." *Lungren v. Peron* (1st Dist. 1998) 59 Cal.App.4th 1383, 1397, 70 Cal.Rptr.2d 20, 29-30. As a result, those who cultivated marijuana to supply the cooperatives were found ineligible for the medical marijuana defense. *People v. Galambos* (3d Dist. 2002) 104 Cal.App.4th 1147, 1167, 128 Cal.Rptr.2d 844, 858-59.

The MMPA Defense: SB 420 has abrogated at least a portion of these holdings. *See People v. Urziceanu* (2005) 132 Cal.App.4th 747, 785. After expressly declaring the Legislature's intent to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects," SB 420 § 1(b)(3), SB 420 exempts collectives and cooperatives formed in California for cultivating marijuana for medical purposes from prosecution for cultivation and distribution of marijuana, and for maintaining a place where marijuana is used and sold, H & S § 11362.775. Thus, in *People v. Jackson* (2012) 210 Cal.App.4th 525, 533, 148 Cal.Rptr.3d 375, the court held that the MMPA (or SB 420) does not require all collective members to participate directly in the cultivation and that its large size does not preclude an MMPA defense. It established the following three elements for a medical collective defense: "The defense the MMPA provides to patients who participate in collectively or

cooperatively cultivating marijuana requires that a defendant show that members of the collective or cooperative: (1) are qualified patients who have been prescribed marijuana for medicinal purposes, (2) collectively associate to cultivate marijuana, and (3) are not engaged in a profit-making enterprise.” *Id.* at p. 529; accord *People v. Colvin* (2012) 203 Cal.App.4th 1029, 137 Cal.Rptr.3d 856.

Qualified Primary Caregiver: The CUA defines a “primary caregiver” as “the individual designated by [a qualified patient] who has consistently assumed responsibility for the housing, health, *or* safety of that person.” H & S § 11362.5(e) (emphasis added). This creates two elements: (1) designation by a qualified patient, and (2) having assumed consistent responsibility for the housing, health or safety of the patient. *See People v. Mower* (2002) 28 Cal.4th 457, 475, 122 Cal.Rptr.2d 326, 340.

1. Designation

Application Where Designation Is Made By One Who Is Not a Qualified Patient: The designation must be made by one who is, in fact, a qualified patient, and defense counsel should be prepared to prove this at trial. If, on the other hand, a defendant claiming status as a primary caregiver was designated as such by one who does not technically qualify as a qualified patient (because his recommendation is invalid, or for some other reason), the court may exclude the medical marijuana defense at trial. Even under these circumstances, so long as the defendant reasonably believed that the person who designated him as her primary caregiver was a qualified patient, defense counsel may assert an alternative defense based on a mistake of fact. *See infra.*

Designation Should Be Listed on Qualified Patient’s Identification Card: Now that the voluntary identification card system has been implemented, the designated primary caregiver of a card-carrying qualified patient should be listed on her card. *See* H & S 11362.7(g). Defense counsel should verify this well in advance of trial, although the lack of such formal designation is not necessarily fatal to a medical marijuana defense, as this may have been the result of oversight or the designation was made after the card was obtained.

2. Consistent Responsibility for the Housing, Health, or Safety of the Patient

Must be 18 Years Old: SB 420 has established that a primary caregiver must be 18 years old, unless he or she is the parent of a minor child who is a qualified patient. H & S § 11362.7(e).

May Include Employees of Health Care Facilities: SB 420 permits the owner or operator of a clinic, health care facility, residential care facility, hospice or home health agency, or up to three of his designated employees, to serve as the primary caregiver(s) for qualified patients who designate the owner or operator of

the facility as such and the qualified patient receives medical care or supportive services, or both, from the facility. H & S § 11362.7(d)(1).

May Serve More Than One Patient If All Reside Within Same City or County: An individual may serve as the designated primary caregiver for more than one qualified patient, if all reside in the same city or county. H & S § 11362.7(d)(2). A primary caregiver, however, may serve only one qualified patient if they do not reside in the same city or county, at least seemingly according to SB 420. H & S § 11362.7(d)(3). In such cases, defense counsel should argue that SB 420 does not explicitly contain such limitation, and, if it did, this would violate the rule against legislative amendments of voter-approved initiatives. *See Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1483-84, 76 Cal.Rptr.2d 342; *see also* Cal. Const., Art. 2, § 10(c).

Application Where Sole Responsibility Is To Provide Medical Marijuana to a Patient: Before the passage of SB 420, courts held that merely cultivating marijuana for a qualified patient did not qualify one as a primary caregiver, despite protestations that such cultivation was necessary to supply patients with medicine important to their health. *See People v. Mower* (2002) 28 Cal.4th 457, 475, 122 Cal.Rptr.2d 326, 340 (finding no evidence that defendant had consistently assumed responsibility for housing, health, or safety of two individuals for whom he may have supplied medical marijuana); *Mentch, supra*; *People v. Fenili* (1st Dist. Feb. 26, 2003) 2003 WL 49589, at *4 (unpublished opinion) (holding that cooperative servicing 48 patient members did not qualify as a primary caregiver).

Offenses Included: Until the enactment of SB 420, the CUA expressly provided protection only for the possession (H & S § 11357) and cultivation (H & S § 11358) of marijuana for medical use. *See* H & S § 11362.5(d) (citing H & S § 11357 & 11358). SB 420 expressly extends this protection to: possession of marijuana for sale (H & S § 11359); transportation of marijuana (H & S § 11360(a)); distribution of marijuana (H & S § 11360(a)); and maintaining or leasing a place for the sale or use of marijuana (H & S §§ 11366, 11366.5 & 11570). *See* H & S § 11362.765(a). The statute also protects individuals who assist qualified patients and their primary caregivers in cultivating marijuana for medical use and in helping qualified patients to administer it. H & S § 11362.765(b)(3).

Transportation: SB 420 provides a defense for a “qualified patient *or* a person with an identification card who transports or processes marijuana for his or her own personal medical use.” H & S § 11362.765(b)(1) (emphasis added); *Garden Grove, supra*. It also provides a defense for designated primary caregivers who transport no more than eight ounces of dried marijuana *and* up to six mature (or twelve immature) plants *per qualified patient* or person with an identification card who has designated that person as their primary caregiver. *See* H & S §§ 11362.765(b)(2) & 11362.77. [These provisions effectively overrule prior case

law which holds that the CUA does not provide a defense to the transportation of marijuana for medical purposes, except under very limited circumstances. *See People v. Young* (3d Dist. 2001) 92 Cal.App.4th 229, 237, 111 Cal.Rptr.2d 726, 731; *People v. Trippett* (1st Dist. 1997) 56 Cal.App.4th 1532, 1550-51, 66 Cal.Rptr.2d 559, 571.] Thus, SB 420 provides absolute protection for the transportation of sub-threshold quantities of marijuana (less than 6 mature plants and 8 ounces of dried marijuana). If the quantity exceeds these amounts, the test for personal medical use under the former cases, which likely survives the passage of SB 420, is “whether the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient’s current medical needs.” *People v. Trippett* (1st Dist. 1997) 56 Cal.App.4th 1532, 1550-51, 66 Cal.Rptr.2d 559, 571.

Sales: SB 420 and the cases construing it, yet again, impact the law in this area. Before SB 420, courts of appeal held that the CUA does not provide a defense to marijuana distribution (Penal Code § 11360(a)), regardless whether the seller obtains a profit, because it only provides exceptions to criminal penalties for possession (Penal Code § 11358) and cultivation of marijuana (Penal Code § 11359). *People v. Galambos* (3d Dist. 2002) 104 Cal.App.4th 1147, 1168, 128 Cal.Rptr.2d 844, 860; *see also Lungren v. Peron* (1st Dist. 1998) 59 Cal.App.4th 1383, 1399, 70 Cal.Rptr.2d 20, 31 (permitting only a “*bona fide* reimbursement of costs.”) SB 420 increases the amount of compensation a primary caregiver may receive for cultivating marijuana for distribution to qualified patients, including “reasonable compensation for services provided” and out-of-pocket expenses. H & S § 11362.765(c). The statute also exempts collectives and cooperatives formed in California to cultivate marijuana for medical purposes from prosecution for transportation and sales, H & S § 11362.775, which enables them to be reimbursed for cultivating marijuana for qualified patients, including a reasonable amount of compensation for their labor, so long as they operate on a not for profit basis. *See People v. Jackson, supra*, 210 Cal.App.4th at pp. 529-530 (“As we interpret the MMPA, the collective or cooperative association required by the act need not include active participation by all members in the cultivation process but may be limited to financial support by way of marijuana purchases from the organization.”); *but cf. People ex rel. Trutanich v. Joseph* (2012) 204 Cal.App.4th 1512, 1523, 140 Cal.Rptr.3d 9 (observing that MMPA “does not cover dispensing and selling marijuana”) (rejected by *Jackson*).

Offenses Not Included: The CUA does not permit one to operate a motor vehicle or boat while under the influence of marijuana, or to smoke it near a school, on a schoolbus, or any place where smoking is prohibited by law. H & S § 11362.79.

New Offenses: SB 420 creates the following new offenses: (1) fraudulently representing a medical condition to obtain an identification card (H & S § 11362.81(b)(1)); (2) stealing or fraudulently using an identification card to acquire, possess, cultivate, transport or distribute marijuana (H & S § 11362.81(b)(2)); (3) counterfeiting or tampering with an identification card (H & S § 11362.81(b)(3), and (4) breaching the confidentiality of patient records (H & S § 11362.81(b)(4).

A first offense is punishable by up to six months imprisonment or a one thousand dollar fine, or both. H & S § 11362.81(a)(1). Any subsequent offense is punishable by up to one-year imprisonment or a one thousand dollar fine, or both. H & S § 11362.81(a)(2). In addition, the person may be precluded from obtaining or using an identification card for up to six months, at the discretion of the court. H & S § 11362.81(c).

V. MEDICAL MARIJUANA DEFENSES OTHER THAN THOSE PROVIDED BY THE CUA AND THE MMPA

***Mistake of Fact Defense:** Because an “honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense,” (*People v. Lucero* (1988) 203 Cal.App.3d 1011, 1016, 250 Cal.Rptr. 354; *see also People v. Hall* (Ct. App. 3d Dist. April 21, 2003) 2003 WL 1908056, at *14-*15 (unpublished opinion)), defense counsel should seek a mistake of fact instruction (CALJIC No. 4.35) in a variety of situations in a medical marijuana case, such as where the defendant mistakenly believed that he was designated as the primary caregiver by one who was not, in fact, a qualified patient, or that a doctor “approved” his medical marijuana use, or that he was mistaken about the number of marijuana plants that would be needed to yield a usable amount of amount of marijuana for personal use. [Note that the defendant’s mistaken belief need not be reasonable if it relates to a specific intent crime, such as cultivation or possession with intent to distribute. *See* Notes to CALJIC No. 4.35; *People v. Hall* (Ct. App. 3d Dist. April 21, 2003) 2003 WL 1908056, at *14.] The mistake of fact defense, however, does not apply where the defendant is mistaken about the applicability of the law to him, *i.e.*, he did not realize he had to obtain a doctor’s recommendation or the designation of a qualified patient as his primary caregiver. *See People v. Young* (3d Dist. 2001) 92 Cal.App.4th 229, 233-34, 111 Cal.Rptr.2d 726, 728-29 (prior to enactment of SB 420, defendant’s mistaken belief that CUA provided a defense to transportation of marijuana for medical purposes found to be inexcusable mistake of law); *People v. Delgadillo* (3d Dist. March 28, 2002) 2002 WL 471364, at *4 (unpublished opinion) (defendant’s mistaken belief that CUA made his selling of marijuana to cannabis clubs legal held inexcusable mistake of law).

Medical Necessity Defense: If a defendant cannot establish all of the elements of the medical marijuana defense, he may attempt to assert a medical necessity defense; however, this defense may no longer apply to medical marijuana cases after the enactment of the CUA.

Elements: An individual claiming the defense of necessity must establish six elements: (1) the act charged as criminal must have been done to prevent a significant evil; (2) there must have been no adequate alternative to the commission of the act; (3) the harm caused by the act must not be disproportionate to the harm avoided; (4) the accused must entertain a good-faith belief that his act was necessary to prevent the greater harm; (5) such belief must be objectively reasonable under all the circumstances; and (6) the accused must

not have substantially contributed to the creation of the emergency. *People v. Trippett* (1st Dist. 1997) 56 Cal.App.4th 1532, 1538, 66 Cal.Rptr.2d 559, 563.

Applicability to a Medical Marijuana Case: Although one court of appeal has held that the medical necessity defense is preempted by the medical marijuana defense of the CUA, *People v. Galambos* (3d Dist. 2002) 104 Cal.App.4th 1147, 1161, 128 Cal.Rptr.2d 844, 855, another appellate court, in an earlier case, continued to treat it as an independent defense after the passage of the CUA *People v. Trippett* (1st Dist. 1997) 56 Cal.App.4th 1532, 1538-40, 66 Cal.Rptr.2d 559, 563-64. That court, however, found that the defendant had not satisfied the elements of the defense because she failed to show that conventional treatments were not effective in treating her nausea. *People v. Trippett* (1st Dist. 1997) 56 Cal.App.4th 1532, 1538-40, 66 Cal.Rptr.2d 559, 563-64 (holding that defendant failed to establish lack of available alternatives because treatment of nausea could have been accomplished with Marinol).

Religious Freedom Defense: A defendant who has strongly held personal religious beliefs supporting her use of marijuana may also assert a claim that the laws against such use violate the free exercise clause of the First Amendment. *See, e.g., People v. Trippett* (1st Dist. 1997) 56 Cal.App.4th 1532, 1541-43, 66 Cal.Rptr.2d 559, 564-66. The assertion of such defense, however, may undermine a claimed medical marijuana defense and courts have been resistant to its assertion. *See id.* at 1541-43 & 1547, 66 Cal.Rptr.2d at 564-66 & 568.

Vagueness: Another possible defense is that the CUA and SB 420 are unconstitutionally vague. To pass constitutional muster, a statute must: (1) inform ordinary citizens of the conduct that is required or prohibited and (2) provide law enforcement with explicit guidelines to prevent arbitrary and discriminatory enforcement. *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108. SB 420 essentially recognizes that the CUA is vague, as it was explicitly enacted to “[c]larify the scope of the application of the [CUA]” and “provide needed guidance to law enforcement officers” because “reports from across the state have revealed problems and uncertainties in the act that have impeded the ability of law enforcement officers to enforce its provisions as the voters intended.” SB 420 § 1(a)(2) & (b)(1); *cf. General Electric Co. v. EPA*, 53 F.3d 1324, 1332 (D.C. Cir. 1995) (clarification of regulation suggests that it was vague prior to clarification). It should be noted, however, that prior to SB 420 one court, in an unpublished opinion, rejected the contention that the CUA is unconstitutionally vague because it fails to define with adequate certainty how many plants can be grown or possessed for personal medical use. *People v. Hall* (3d Dist. 2003) 2003 WL 1908056, at *6 (unpublished opinion); *see also People v. Galambos* (3d Dist. 2002) 104 Cal.App.4th 1147, 155, 128 Cal.Rptr.2d 844, 850 (noting that trial court denied such challenge); *Lungren v. Peron* (1st Dist. 1998) 59 Cal.App.4th 1383, 1393, 70 Cal.Rptr.2d 20, 27 (resorting to legislative history of CUA to resolve “any claimed ambiguity” in statutory language).

VI. PUNISHMENT/COLLATERAL CONSEQUENCES

Probation/Bail: SB 420 and the CUA also affect the punishments imposed against those who are accused and convicted of various crimes. SB 420 expressly authorizes qualified patients to request that the trial court confirm that they may use marijuana for medical use while on probation or released on bail. H & S § 11362.795(a)(1). Prior to this, courts were inconsistent in their treatment of the issue. *Compare People v. Bianco* (3d Dist. 2001) 93 Cal.App.4th 748, 753, 113 Cal.Rptr.2d 392, 397 (holding that it is within the trial court’s discretion to impose a probation condition prohibiting all marijuana use for the offense of marijuana cultivation where defendant was a long-time marijuana user and his marijuana use was found to have contributed to his offense) *with People v. Tilehkooh* (3d Dist. Dec. 8, 2003) 7 Cal.Rpt.3d 226, 234-36, 2003 WL 22883933, at *6-*8 (criticizing *Bianco* and holding that no rehabilitative purpose is served by such probation condition in cases where there is no claim of diversion or violent behavior by defendant). Even if the court imposes a probation condition forbidding all marijuana use, defense counsel should assert the CUA as a defense in any probation revocation proceedings brought against a qualified patient. *See Tilehkooh*, 7 Cal.Rpt.3d 226, 234-36, 2003 WL 22883933, at *6-*8.

Parole: As with probation, SB 420 authorizes qualified patients to request that they be permitted to use medical marijuana while released on parole. H & S § 11362.795(b)(1). It also provides for the right to an administrative appeal of the denial of such request. H & S § 11362.795(b)(2).

Proposition 36: The CUA does not change a defendant’s eligibility for diversion under Proposition 36; however, a defendant may argue that cultivation of marijuana for medical use is not an excluded “production” of drug offense, since the voters and the Legislature have expressed their intent that such offense is nonviolent. *Compare People v. Tiedje* (5th Dist. Aug. 15, 2003) 2003 WL 21949784 (unpublished opinion) (analyzing and rejecting such argument) *with People v. Jones* (3d Dist. 2003) 112 Cal.App.4th 341, 351 n.5, 4 Cal.Rptr.3d 916, 923 n.5 (reserving issue).

Inmates: SB 420 authorizes inmates to apply for medical marijuana identification cards, and for penal institutions to permit inmates and pretrial detainees with valid identification cards to use medical marijuana in prison or while under arrest. H & S § 11362.785(b) & (c). This decision is discretionary with the institution, however, so suits to compel penal institutions to do this are unlikely to succeed.

Child Custody: Notwithstanding the CUA, a court may deny or limit custody to a parent based on his marijuana use, if such custody decision is in the best interests of the child. *In re Marriage of Noor* (Aug. 29, 2003) 2003 WL 22026583 (unpublished opinion).

Licensing revocation: SB 420 forbids professional licensing boards from penalizing licensees from acting as primary caregivers. H & S § 11362.8.

VII. APPELLATE CONSIDERATIONS

Waiver: Because the medical marijuana defense has been found not jurisdictional in its fundamental sense, it is subject to the principles of waiver and forfeiture if not raised before the trial court. *People v. Mower* (2002) 28 Cal.4th 457, 475 n.6, 122 Cal.Rptr.2d 326, 339 n.6. Thus, if there is any merit to a medical marijuana defense, defense counsel should establish an evidentiary foundation for it at or before trial and request a jury instruction on the defense. *See* CALJIC 12.24.1.

Standard of Review for Preclusion of Defense: The standard of review on appeal of a trial court's exclusion of the medical marijuana defense is "whether there is evidence deserving of consideration from which reasonable jurors could conclude" that the elements of the defense have been satisfied. *People v. Trippett* (1st Dist. 1997) 56 Cal.App.4th 1532, 1539, 66 Cal.Rptr.2d 559; *accord Jackson, supra*.