IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,	)	No. D058988
	)	San Diego County Superior Court
Plaintiff and Respondent,	)	No. SCD222793
v.	)	Hon. Howard Shore, Presiding
JOVAN JACKSON,	)	
Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF

JOSEPH D. ELFORD (SBN 189934)
Americans for Safe Access
1322 Webster Street, Suite 402
Telephone: (415) 573-7842
Fax: (510) 251-2036

Attorney for Appellant
JOVAN JACKSON

By appointment of the Court of Appeal under the Appellate Defenders, Inc. assisted case program

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INTRODUCTION

The Medical Marijuana Program Act (Health & Saf. Code, § 11362.7 et seq.[1]) (hereinafter "MMPA") was designed to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats. 2003, ch. 875 (S.B. 420), § 1, subd. (b)(3).) As construed by the courts, it represents the Legislature's response to the voters' challenge in enacting the Compassionate Use Act (§ 11362.5) (hereinafter "CUA") for the state to create a system to distribute marijuana to the seriously ill. Appellant Jovan Jackson (hereinafter "Jackson") carried out the promises of these laws by cultivating marijuana with other qualified patients for distribution to the collective's members. Under the law, he was entitled to a defense to the marijuana sales charges brought against him. It was erroneous for the trial court to preclude it.

I. THE TRIAL COURT ERRED IN EXCLUDING JACKSON'S MEDICAL MARIJUANA COLLECTIVE DEFENSE

Despite the lack of any requirement in the MMPA that some threshold proportion of medical marijuana collective members must participate "in some way" in the cultivation and distribution of marijuana in order for a member to be afforded a medical marijuana collective defense, the Attorney General contends that such defense does not extend to qualified patients and primary caregivers "who acquire[] marijuana from a small group of cultivators and then distributes that marijuana to a large group of patients and caregivers who make only

monetary contributions to the enterprise." (Respondent's Brief (hereinafter "RB") at p. 15 [footnote omitted]; see also RB at p. 19 ["The statute, however, does not envision an association in which a patient or caregiver acquires marijuana from a small group of cultivators who grow as much marijuana as they can and then distributes that marijuana to a large group of patients and caregivers who merely pay money for it."].) Neither the statutory language of the MMPA nor its purpose supports this purported exception.

Instead, section 11362.775, one of the main provisions of the MMPA, was enacted as the Legislature's response to the voters' challenge to create a distribution system of marijuana to the seriously ill. (See *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 785 (hereinafter *Urziceanu*); see also *People v. Colvin* (2012) 203 Cal.App.4th 1029, 135 (hereinafter *Colvin*) ["In response to the CUA's encouragement to 'implement a plan to provide for the safe and affordable distribution of marijuana to all patients' in need of it (§ 11362.5, subd. (b)(1)(C)), our Legislature enacted the MMPA (§ 11362.7 et seq.)"]; *People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1014 (hereinafter *Hochanadel*) [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"].) Through the enactment of section 11362.775, the Legislature sought to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation

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[1] All statutory references are to the Health and Safety Code, unless otherwise noted.

projects" (Stats. 2003, ch. 875 (S.B. 420), § 1, subd. (b)(3)) by protecting qualified medical marijuana patients from criminal sanctions for, among other things, selling marijuana and maintaining a place where marijuana is sold (§ 11362.775). In short, the MMPA allows for storefront medical marijuana dispensaries where the marijuana is cultivated by the members of the collective. (See Attorney General Guidelines at p. 11 [CT Vol. 2 at p. 299].) This is what Jackson did, so he should have been entitled to a defense under the MMPA.

To overcome this straightforward interpretation of the statutory language of § 11362.775 proffered by Jackson, the Attorney General contends that, to be afforded the statute's protections, "individuals who associate in order collectively or cooperatively to cultivate marijuana must evince some united action or purpose—they must 'come together'—in a manner distinct from merely a commercial supplier—consumer relationship." (RB at p. 17 [citing Webster's New International Dictionary at p. 132].) Other collectives and cooperatives, like REI and the Davis Food Co-Op, however, allow for a consumer-supplier relationship, so long as the patrons of the collective contribute in some way, monetarily or otherwise, to the collective. (Corp. Code, § 12201; see also Corp. Code, § 12243 ["If the corporation is organized to provide goods or services to its members, the corporation's 'patrons' are those who purchase those types of goods from, or use those types of service of, the corporation"].) Because medical marijuana collectives and cooperatives are largely comprised of persons who are too sick or otherwise unable to cultivate the medicine they need at home, no more

should be expected of them, absent an express statement to this effect from the Legislature.

Thus, when the Attorney General made precisely the same argument regarding active participation in the collective as it is making here, the court in *Colvin, supra*, expressly rejected it. Bearing emphasis here, the court explained in *Colvin, supra*, as follows:

> [I]n general, cooperatives are organizations that provide services for use primarily by their members. (Gurnick, Consumer Cooperatives: *What They Are and How They Work* (July/Aug.1985, 8 L.A. Lawyer No. 5, p. 23.) "Entities such as production, service, purchasing, and marketing cooperatives engage on a cooperative basis in producing or procuring goods, services or supplies for members and patrons and promoting use of their members' products and services." (*Ibid.*) Cooperatives perform functions its individual members could not do alone as effectively and conduct business for the mutual benefit of members. (*Id.* at pp. 23, 24.)
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> The Attorney General does not argue otherwise, instead maintaining that a medical marijuana cooperative seeking the protections of section 11362.775 must establish that some number of its members participate in the process in some way. The Attorney General does not specify *how* many members must participate or in *what* way or ways they must do so, except to imply that Holistic, with its 5,000 members and 14 growers, is simply too big to allow any "meaningful" participation in the cooperative process; hence, it cannot be a "cooperative" or a "collective" in the way section 11362.775 intended. But this interpretation of section 11362.775 would impose on medical marijuana cooperatives requirements not imposed on other cooperatives. A grocery cooperative, for example, may have members who grow and sell the food and run a store out of which the cooperative's products are sold. But not everyone who pays a fee to become a member participates in the cooperative other than to shop at it.

(*Colvin*, *supra*, 203 Cal.App.4th at pp. 1038-1039, italics in original.) This description of a cooperative also describes Answerdam.

The best the Attorney General can muster for its narrow interpretation of section 11362.775 as requiring some undefined percentage of the collective or cooperative to be actively involved in its operation is that the Legislature states its intent to foster the establishment of "cultivation projects" to ensure a supply of marijuana to qualified patients. (See RB at p. 17.) Without any citation to authority, the Attorney General asserts that "[t]he word 'project' does not naturally suggest a broad wholesale-retail system such as the one appellant engaged in here. It suggests, instead, a collaborative effort." (RB at p. 17 [footnote omitted].) The ordinary meaning of a "project," however, is "a proposal of something to be done; plan; scheme." (Webster's New World Dictionary (3d College ed. 1994) p. 6.) Here, the record establishes that Jackson had a plan to cultivate marijuana for the seriously ill, as he testified that he and four others did this for Answerdam's membership. (RT Vol. 2 at pp. 136,l 163, 175, 183.) He was therefore engaged in a "cultivation project" within the meaning of the statute under its ordinary meaning.[2]

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[2] The trial court curiously states: "Obviously, as I pointed out, all marijuana is cultivated. If everyone who distributed marijuana was a cultivator, then there would be no need for the defense." (RT Vol. 2 at p. 211.) This observation makes absolutely no sense, since the MMPA was designed to afford a defense to qualified medical marijuana patients who cultivate for others. (See *Urziceanu, supra*, 132 Cal.App.4th at p. 785; *Colvin, supra*, 203 Cal.App.4th at p. 1035; *Hochanadel, supra*, 176 Cal.App.4th at p. 1014.)

Lastly, the Attorney General contends that "[t]he statutory scheme of California's medical marijuana laws as a whole . . . does not support as expansive reading of the collective or cooperative cultivation defense as appellant suggests." (RB at p. 18 [citation omitted].) Once again, the statutory scheme refutes this. When the electorate enacted the CUA in 1996, the voters challenged the state to "implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (§ 11362.5, subd. (b)(1)(C).) The Legislature did this through the enactment of § 11362.775. (See *Colvin, supra*, 203 Cal.App.4th at p. 1035; *Urziceanu, supra*, 132 Cal.App.4th at p. 785.) Its fulfillment of the promises made by the electorate in 1996 should be interpreted as such.

For these reasons and others, the court in *Colvin, supra*, expressly rejected the very same argument as that advanced by the Attorney General here – that section 11362.775 "applies only to those cooperatives involving 'some united action or participation among all' members." (*Colvin, supra*, 203 Cal.App.4th at p. 1032.) *Colvin*, *supra*, involved a qualified medical marijuana patient who was transporting just over a pound of marijuana from one medical marijuana collective to another. Based on this, Colvin was arrested and charged with: transporting marijuana, in violation of § 11360, subd. (a); possession of concentrated cannabis, in violation of § 11357, subd. (a); and possession of cocaine, in violation of § 11350, subd. (a). (See *id.* at p. 1034.) When Colvin attempted at trial to interpose a medical marijuana collective defense under § 11362.775 to the transportation

charge against him, the trial court found him ineligible for that defense because, in its view, the transportation "had nothing to do with the cultivation process." (*Id.* at p. 1034.) On appeal, the court reversed this erroneous exclusion of Colvin's defense. (*Id.* at pp. 1040-1041.)

Understanding the importance of the novel question presented, the court analyzed in detail, and rejected, the trial court and the Attorney General's exceedingly narrow interpretations of § 11362.775. The court reasoned in language equally appropriate here as follows:

> It is unclear what the trial court meant when it said that Colvin's transportation of marijuana was unrelated to the cultivation process and was outside what section 11362.775 allows. There was no evidence that Colvin's transportation of one pound of marijuana was for anything other than Holistic. To the extent the trial court ruled as it did because it believed that only cooperative or collective *cultivators* of marijuana can transport the product, Colvin/Holistic is a cultivator: Holistic has three on-site "grow rooms," which the LAPD visited. Fourteen members of Holistic also grow marijuana for Holistic off-site. All of the marijuana Holistic distributes is from a cooperative member; none of it is acquired from an outside source. Thus, even under a reading of section 11362.775 limiting transportation of marijuana only to cooperatives that cultivate it, then Colvin was entitled to the immunity.
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> The Attorney General's only response is that section 11362.775 does not condone "a large-scale, wholesale-retail marijuana network" like Holistic, which has approximately 5,000 members. The Attorney General argues that a collective or cooperative cultivation "must entail some united action or participation among all those involved, as distinct from merely a supplier-consumer relationship." There must be, the Attorney General suggests, "some modicum of collaboration" in which qualified patients and caregivers "'come together' " in "some way."
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> Nothing on the face of the statute or in its legislative history supports this interpretation.

(*Colvin, supra*, 203 Cal.App.4th at 1037.)

Just as it was erroneous for the trial court in *Colvin* to preclude the defendant from presenting a medical marijuana collective defense because "not enough" members of the collective actively participated in the cultivation process, so, too, was it erroneous for the trial court here to exclude Mr. Jackson's medical marijuana collective defense on this very basis. The statutory language of the MMPA does not restrict the defense provided by section 11362.775 to medical marijuana collectives of a certain size. (*Colvin, supra*, 203 Cal.App.4th at p. 1037.) To reiterate, "[n]othing on the face of the statute or its legislative history supports this interpretation." (*Ibid.*) To the contrary, this interpretation of the MMPA advanced by the Attorney General undermines its purpose, as the court recognized in *Colvin*:

> Taken to its logical conclusion, an effect of imposing the Attorney General's suggested requirement likely would be to limit drastically the size of medical marijuana establishments. It may be that the Legislature, in trying to implement voters' wishes, envisioned small community or neighborhood marijuana gardens. That may be good policy. But nothing on the face of section 11362.775, or in the inherent nature of a cooperative or collective, requires some unspecified number of members to engage in unspecified "united action or participation" to qualify for the protection of section 11362.775. If such a requirement is what the Legislature intended, then it can say so; but the Attorney General's vague qualifier provides little direction or guidance to, among others, qualified patients, primary caregivers, law enforcement, and trial courts. Rather, imposing the Attorney General's requirement would, it seems to us, contravene the intent of the MMPA by limiting patients' access to medical marijuana and leading to inconsistent applications of the law.

(*Id.* at p. 1041.) The same is true here.

Nor do any of the cases cited by respondent compel a different result. *Urziceanu, supra*, cited in Jackson's opening brief (Appellant's Opening Brief (hereinafter "AOB") at pp. 31-33) and, as described by the court in *Colvin*, *supra*, strongly supports Jackson's interpretation of the MMPA as providing him a defense. Like the medical marijuana collectives at issue in *Urziceanu, supra,* and *Colvin, supra*, applicants for membership in Jackson's Answerdam collective went through a screening process in which the collective verified their status as a qualified medical marijuana patient before they were allowed membership. (Cf. *Colvin, supra*, 203 Cal.App.4th at p. 1039.) And they also had to sign a collective membership agreement. (Compare *Colvin, supra*, 203 Cal.App.4th at p. 1033 fn. 4 with CT Vol. 1 at p. 18; see CT Vol. 1 at pp. 28-29.) Whereas the Attorney General contends that that the larger size of Jackson's collective precludes him from presenting a medical marijuana marijuana collective defense (RB at p. 25), the court in *Urziceanu, supra*, did not say this; instead, as the court observed in *Colvin*, "section 11362.775 does not, on its face, permit the former [Urziceanu's collective] and disallow the latter [Colvin's collective] based on the cooperative's size and the extent to which members participate in it." (*Colvin, supra*, 203 Cal.App.4th at p. 1040.)[3] Like Messers Urziceanu and Colvin, Jackson should have been afforded his medical marijuana collective defense.[4]

[3] The Attorney General drastically overstates the size of Jackson's medical marijuana collective by repeatedly stating that it had 1,600 members. (See, e.g.

II. THE RULE OF LENITY MANDATES THE ADOPTION OF JACKSON'S REASONABLE INTERPRETATION OF THE MMPA

As *Urziceanu*, *supra, Colvin*, *supra,* and the other authorities cited by Jackson demonstrate, the statutory language of section 11362.775 and the legislative intent in enacting it support Jackson's interpretation of the MMPA. The rule of lenity mandates that the Attorney General's construction of the statute as requiring some undefined percentage of the collective's membership to participate in the cultivation or distribution of marijuana must be rejected. (Cf. *State v. Brown* (2012) 166 Wash.App. 99, 105, 269 P.3d 359, 362 [applying rule of lenity to medical marijuana defense]; *United States v. Worstine* (N.D. Ind. 1992) 808 F.Supp. 663 [applying rule of lenity to affirmative defense].)

Jackson does not contend that section 11362.775 is unconstitutionally vague, but he does contend that it is ambiguous. That ambiguity is demonstrated quite clearly by the People's inconsistency in interpreting the statute at the various stages of this case. At the most restrictive extreme, the District Attorney

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RB at pp. 1, 7.) As noted in appellant's opening brief, this figure only represents the number of patients who had become members of Answerdam at one time or another; it does not reflect the number of active members. (See AOB at p. 23; RT Vol. 4 at pp. 428, 463; RT Augment Vol. 1 at p. 4.)

[4] Respondent also mentions *City of Lake Forest v. Evergreen Holistic Collective* (1997) 203 Cal.App.4th 1413, but that case is now under review by the California Supreme Court, so it is no longer citable authority. The Attorney General also notes that the court in *People ex rel. Trutanich v. Joseph* (2012) 204 Cal.App.4th 1512, 1523, issued a conclusory statement that section 11362.775 "does not cover dispensing or selling marijuana." (RB at p. 29.) Because this statement is not accompanied by any substantive analysis or reasoning, this Court should not accord it any weight.

contended in the proceedings below that all members of a medical marijuana collective must "physical[ly] participate[] in the cultivation of the plants" to qualify for the defense provided by section 11362.775. (CT Vol. 2 at pp. 218, 221-222; see also CT Vol. 2 at p. 221 ["To claim the immunity, you must engage in the act."].) On appeal, the Attorney General expressly rejects this interpretation of the MMPA – section 11362.775 "does not mean that every participant in a collective or cooperative cultivation project is required to personally engage in the act of cultivating, or farming the marijuana. Such a requirement would restrict operation of the statute to a degree that would be inconsistent with the Legislature's stated intent to facilitate access to medical marijuana through cultivation projects." (RB at p. 20 [footnote omitted].) The Attorney General's interpretation, while less restrictive than the District Attorney's earlier construction, unnecessarily injects ambiguity into the statutory scheme by requiring an undefined percentage of a collective's membership to participate in its operations. (See also RB at p. 20 ["it is unnecessary in this case to determine with precision where the boundaries of collective and cooperative cultivation lie under section 11362.775"].) Jackson's interpretation of the statute, by sharp contrast, is moored to its statutory language and provides a straightforward application of its terms -- qualified medical marijuana patients who associate collectively to cultivate marijuana for the members of the association shall not be subject to criminal penalties for sales of marijuana and maintaining a place where

marijuana is sold. The rule of lenity mandates the adoption of this interpretation of the statute in this criminal case.

In light of the People's changing interpretation of § 11362.775, it is hardly surprising that the courts have disagreed over how to interpret this affirmative defense. Whereas the courts in *Urziceanu, supra*, and *Colvin, supra*, allow a defense under section11362.775 for storefront dispensaries without regard to the proportion of their membership who actively participate in the cultivation or distribution of marijuana, the trial court here required some undefined percentage of the collective to be so involved, and the court in *Joseph, supra*, went so far as to say that section 11362.775 "does not cover dispensing or selling marijuana" at all. (*Joseph, supra*, 204 Cal.App. 4th at p. 1523.) "Given the different definitional interpretations the courts have adopted for [the statute], the rule of lenity applies." (*People v. Wooten* (2001) 93 Cal.App.4th 422, 436.)

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

DATED: June 5, 2012

Respectfully submitted,

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JOSEPH D. ELFORD

Counsel for Appellant
JOVAN JACKSON

CERTIFICATION REGARDING BRIEF FORM

I, Joseph D. Elford, declare as follows:

I am the attorney for appellant in this matter. On this day, I performed a word count of the foregoing Appellant's Reply Brief, which revealed a total of 3,220 words.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 5th day of June, 2012, in Oakland, California.

_____

Joseph D. Elford

CERTIFICATE OF SERVICE

I am a resident of the State of California and over the age of eighteen years. My business address is 1322 Webster St., Suite 402, Oakland, CA 94612. On June 5, 2012, I served the within document(s):

APPELLANT'S REPLY BRIEF

Via first-class mail to:

Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
(Respondent)

Howard Cohen
Appellate Defenders, Inc.
555 West Beech Street, Suite 300
San Diego, CA 92101-2939

California Supreme Court
350 McAllister St.
San Francisco, CA 94102-4783
(4 Copies)

Honorable Howard H. Shore
San Diego County Superior Court
Central Division
220 W. Broadway
San Diego, CA 92101

Deputy District Attorney
Christopher Lindberg
P.O. Box 121011
San Diego, CA 92112

Jovan Jackson
3575 Grove St. #144
San Diego, CA 91945

Via overnight mail to:

Court of Appeal
Fourth Appellate District, Division One
Symphony Towers
750 B Street, Suite 300
San Diego, CA 92101
(original and four copies)

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

Executed on this __ day of June, 2012, in Oakland, California.

_____
Joseph D. Elford