IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

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

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**APPELLANT'S ANSWER TO THE AMICUS CURIAE BRIEF OF THE SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE IN SUPPORT OF RESPONDENT**

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

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## INTRODUCTION

Apparently not satisfied with the Attorney General's rejection of it's interpretation of the collective/cooperative provision of the Medical Marijuana Program Act (Health & Saf. Code, § 11362.775) [hereinafter *MMPA*] as requiring all members of a medical marijuana collective to actively participate in marijuana cultivation to enable one to present a medical marijuana collective defense, the San Diego County District Attorney's Office [hereinafter *San Diego* or *San Diego District Attorney*] has taken the highly unusual step of filing its own *Amicus Curiae* Brief in this criminal appeal. In this brief, the San Diego District Attorney proposes an extremely narrow interpretation of section 11362.775 as affording a defense to medical marijuana collective members only where each and every one of them actively participates in the cultivation of marijuana for the collective. Neither the statutory language nor the Legislature's intent in enacting it support the overly restrictive interpretation of section 11362.775 urged upon this Court by the San Diego District Attorney. Instead, the MMPA provides for associations of qualified medical marijuana patients and their primary caregivers who join together in some fashion to plan for the cultivation of marijuana to be distributed among the collective's members. Contrary to San Diego's view, this may be accomplished through storefront medical marijuana dispensaries.

Since the initial filing of this appeal, several authorities have emerged that have affirmed this interpretation of the MMPA. In *People v. Colvin* (2012) 203 Cal.App.4th 1029, 137 Cal.Rptr.3d 856, the court rejected the view that all members of a medical marijuana collective must participate in the collective's operations and allowed the operator of the storefront dispensary to present a medical marijuana collective defense under section 11362.775 to the marijuana charges against him. **Cite.** More recently, in *County of Los Angeles v. Alternative Medicinal Cannabis Collective* (2012) -- Cal.Rptr.3d --, 2012 WL 2511800 [hereinafter *AMCC*], the court not only held that medical marijuana dispensaries are legal under State law, but also that State law deems their existence so fundamental to the proper functioning of the MMPA that municipalities cannot use their zoning powers to ban them. (*Id.* at p. *2.) San Diego's attempt to accomplish such an effective ban through raids and criminal prosecutions is even more offensive, especially since the rule of lenity requires the adoption of the defendant's reasonable interpretation of the MMPA, which is shared by several authorities, in this criminal case.

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## ARGUMENT

### I. RETAIL SALES OF MEDICAL MARIJUANA BY COLLECTIVES AND COOPERATIVES ARE PERMITTED BY THE MMPA

Contrary to San Diego's contention that "section 11362.775 does not support retail marijuana stores such as Answerdam" (San Diego *Amicus Curiae* Brief at pp. 5, 14-16), several authorities interpreting this section in view of the statutory scheme as a whole have held that retail sales of marijuana by collectives are legal under State law.

In *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 785, the court construed the MMPA as the State's initial response to the voters' request for a safe and affordable distribution system of marijuana to the seriously ill. (*Id.* at 785; cf. Health & Safety Code, § 11362.5, subd. (b)(1)(C) [encouraging "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"].) The *Urziceanu* court described the MMPA as "represent[ing] a dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers and fits the defense defendant attempted to present at trial. *Its 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*."

(132 Cal.App.4th at p. 785, italics added; see also *420 Caregivers, LLC v. City of Los Angeles* (July 3, 2012 No. B230436) -- Cal.Rptr.3d --, 2012 WL 2552150, at p. *17 ["The MMPA significantly expands the list of offenses to which the defense of medical marijuana use applies, and specifically includes sales of marijuana"].) The *Urziceanu* court properly understood that the Legislature intended the MMPA to establish medical marijuana collectives and cooperatives as the mechanisms to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate. . . ." (132 Cal.App.4th at pp. 782-783; cf. Health & Saf. Code, § 11362.5, subd. (b)(1)(A); 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], italics added.)

Elaborating on these points, the court in *People v. Colvin* (2012) 203 Cal.App.4th 1029, 137 Cal.Rptr.3d 856, again identified the MMPA as the Legislature's attempt to create a distribution system of marijuana to the seriously ill. (*Id.* at p. 859.) Responding to the Attorney General's contention that "section 11362.775 does not condone a condone 'a large-scale, wholesale-retail marijuana network' like Holistic, which has approximately 5,000 members," the court held that "[n]othing on the face

of the statute or in its legislative history supports this interpretation." (*Id.* at p. 1037.)

And, in *County of Los Angeles v. Alternative Medicinal Cannabis Collective* (2012) -- Cal.Rptr.3d --, 2012 WL 2511800 [hereinafter *AMCC*], the court held that the County of Los Angeles' complete ban on medical marijuana dispensaries conflicts with, and is thus preempted by California's medical marijuana laws. (*Id.* at p. *2.) The court reasoned that, "[b]y enacting the MMP, the Legislature expressly authorized collective, cooperative cultivation projects as a lawful means to obtain medical marijuana under California law." (*Id.* at p. *9 [citing Health & Safety Code, § 11362.775].) Because "[t]he Legislature also expressly chose to place such projects beyond the reach of nuisance abatement under section 11570, if predicated solely on the basis of the project's medical marijuana activities," a complete ban on medical marijuana dispensaries in a municipality as a zoning ordinance is foreclosed by the MMPA. (*Id.* at pp. *9-12.) Stated succinctly:

> [The] County's per se ban on medical marijuana dispensaries prohibits what the Legislature authorized in section 11362.775. The contradiction is direct, patent, obvious, and palpable: County's total, per se nuisance ban against medical marijuana dispensaries directly contradicts the Legislature's intent to shield collective or cooperative activity from nuisance abatement "solely on the basis" that it involved distribution of medical marijuana authorized by section 11362.775. Accordingly, County's ban is preempted.

(*Id.* at p. *12.) Here, San Diego is attempting to accomplish through a criminal action what it is prohibited from doing by a zoning ordinance.

Further underscoring the Legislature's intent to allow medical marijuana collectives to distribute marijuana is its amendment of the MMPA in 2010. Health and Safety Code section 11362.768, subdivision (b) provides: "No medical marijuana cooperative, collective, dispensary, operator, establishment, or provider who possesses, cultivates, or distributes medical marijuana pursuant to this article shall be located within a 600-foot radius of a school." Subdivision (e) of this section, in turn, limits its application "to a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider that is authorized by law to possess, cultivate, or distribute medical marijuana and that has a *storefront or mobile retail outlet* which ordinarily require a local business license." ([Italics added].) "[T]he repeated use of the term 'dispensary' throughout the statute and the reference in subdivision (e) to a 'storefront or mobile retail outlet' make it abundantly clear that the medical marijuana cooperatives or collectives authorized by section 11362.775 are permitted by state law to perform a dispensary function." (*AMCC, supra*, at pp. *9-*10.) [1]

[1] In one outlying case, *People ex rel. Trutanich v. Joseph* (2012) 204 Cal.App.4th 1512, 140 Cal.Rptr.3d 9, the court conclusorily stated that § 11362.775 "does not cover dispensing or selling marijuana." (*Id.* at p. 1523.) This statement appears limited to the unique facts of the case, since

In an attempt to overcome these authorities supporting Jackson's interpretation of the MMPA, San Diego contends that this Court should deviate from the well-reasoned analysis and conclusions of *Urziceanu, supra*, and *Colvin, supra*. (See San Diego *Amicus Curiae* Brief at pp. 3-5, 19-23.)[2] As for *Urziceanu*, San Diego claims that it was incorrectly decided (San Diego *Amicus Curiae* Brief at p. 23) and conflicts with the Legislature's intent in enacting the MMPA (San Diego *Amicus Curiae* Brief at p. 21). For these propositions, San Diego notes that one immunity provided by Health and Safety Code section 11362.775 -- from prosecution for offenses under section 11360 -- may mean only that the Legislature intended to immunize patient-members of medical marijuana collectives from criminal sanctions for marijuana transportation (not sales), since both transportation and sales are covered by section 11360. (San Diego *Amicus Curiae* Brief at pp. 21-22.)

While it is true that some of the penal provisions included in section 11362.775 involve transportation, in addition to sales, as San Diego contends, other criminal statutes rendered inapplicable to medical

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the court explained that "[t]he marijuana sales activity that occurred at Organica's premises was not authorized or protected under the CUA as a matter of law, and Joseph failed to present any admissible evidence to establish a defense under the MMPA." (See *id.* at 1521.). To the extent one construes this statement more broadly to preclude all sales of medical marijuana to qualified patients, such interpretation conflicts with the courts' decisions in *Urziceanu, Colvin,* and *AMCC, supra.*

[2] San Diego does not address *AMCC, supra*, which was decided after it filed its brief.

marijuana collectives in section 11362.775 focus on marijuana distribution. Health and Safety Code section 11359, for instance, involves possession of marijuana for sale. Similarly, Health and Safety Code section 11366 makes it a crime to maintain a place where marijuana is sold, used, or given away. Health and Safety Code section 11366.5, in turn, involves the rental of places where marijuana is manufactured, stored, or distributed. Likewise, Health and Safety Code section 11570 involves nuisance abatement actions for maintaining a place where marijuana is sold, served, stored, kept, manufactured, or given away. The Legislature's intentional inclusion in the MMPA of exemptions for marijuana distribution proscribed by sections 11359, 11366, 11366.5 and 11570 evidences its intent to exempt qualified patients who are members of medical marijuana collectives from distribution-related charges.

## II. NOT EVERY MEMBER OF A MEDICAL MARIJUANA COLLECTIVE MUST PHYSICALLY TILL THE SOIL TO FORM A LEGITIMATE MEDICAL MARIJUANA COLLECTIVE UNDER HEALTH AND SAFETY CODE SECTION 11362.775

In taking an even harder-line approach than the Attorney General to the MMPA, the San Diego District Attorney contends that every member of a medical marijuana collective must physically participate in the cultivation of the marijuana plants to be afforded a defense under section 11362.775. (See San Diego *Amicus Curiae* Brief at pp. 10-12.) On its view, even if a medical marijuana patient joins a medical marijuana collective, helps clear

the land used for marijuana cultivation, buys the fertilizer for the crop, and dries and packages the crop, he would not be eligible for a defense under section 11362.775, since "[a]ctivities that directly or indirectly support the act of cultivation do not qualify as cultivation." (San Diego *Amicus Curiae* Brief at p. 10.) Especially when considered in light of the fact that seriously ill Californians who are qualified patients are more likely than the average person to be physically unable to till the soil and plants, this highly restrictive interpretation of the MMPA leads to an absurd result. (See, e.g, *People v. Broussard* (1993) 5 Cal.4th 1067, 1071 ["if a proposed interpretation results in absurd results, we must reject the interpretation in favor of one that fulfills the Legislature's purpose"].)

Instead, the Legislature has defined a "cooperative" as an organization designed to provide goods or services to the members of the cooperative according to their patronage "in the form of cash, property, evidences of indebtedness, capital credits, memberships, or services." (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"].) The statutory language envisions "cultivation projects," which are designed with the "plan" or "scheme" to cultivate marijuana for the medical purposes of the membership. (See Appellant's Reply Brief at p. 5.) Answerdam meets these statutory criteria,

as its Membership Agreement states that it was formed with the "understand[ing] that all medical cannabis provided is collectively grown for members and owned by those members." (CT 1 at p. 18; see CT 1 at pp. 28-29.) The association needs the patronage of its members in the form of cash or property to keep the cultivation cycle going.

## III. THE RULE OF LENITY MANDATES THE ADOPTION OF JACKSON'S REASONABLE INTERPRETATION OF SECTION 11362.775

Conspicuously absent from the San Diego District Attorney's Brief is any mention of the rule of lenity, which requires the adoption of Jackson's reasonable interpretation of section 11362.775 in this criminal case. (See Appellant's Opening Brief at pp. 40-44 and cases cited therein.) Not only is this interpretation of the MMPA shared by the courts in *Urziceanu, Colvin,* and *AMCC, supra*, but the instant *amicus* brief further reveals the disagreement between the Attorney General and the San Diego District Attorney over the proper interpretation of the statute. (Compare San Diego *Amicus Curiae* Brief at pp. 10-12 [contending that all members of medical marijuana collectives must physically engage in the cultivation of marijuana] with Respondent's Brief at p. 20 [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"] [footnote omitted].) Where there are such divergent interpretations of a criminal statute by the authorities charged with enforcing it, the rule of lenity applies. (See *People v. Wooten* (2001) 93 Cal.App.4th 422, 436.)

## CONCLUSION

For the foregoing reasons, the judgment should be reversed.

DATED: July 30, 2012

Respectfully submitted,

_____
JOSEPH D. ELFORD

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## CERTIFICATE OF WORD COUNT

I, JOSEPH D. ELFORD, declare as follows:

I am the attorney for Amicus Curiae Americans for Safe Access in this matter. On July 30, 2012, I performed a word count of the above-enclosed brief, which revealed a total of **xx** words.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this __ day of July 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 July 30, 2012, I served the within document(s):

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