IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

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

---

APPELLANT'S OPENING BRIEF

JOSEPH D. ELFORD
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

TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (con't)

Statutes

TABLE OF AUTHORITIES (con't)

Other Authorities

INTRODUCTION

Both the California electorate and its Legislature have declared that seriously ill Californians who might benefit from the use of marijuana as medicine have the right to obtain and use marijuana where that therapy has been deemed appropriate by a physician. Because many of these seriously persons are too sick or are otherwise unable to cultivate the medicine they need to alleviate their suffering, the California electorate challenged the Legislature to design a system for cultivating and distributing marijuana to qualified patients when they enacted the Compassionate Use Act (hereinafter CUA or the Act) in 1996. To meet the voters' challenge, in 2003, the Legislature enacted the Medical Marijuana Program Act (hereinafter MMPA), which provides that medical marijuana patients who associate collectively or cooperatively to cultivate marijuana shall not be subject to criminal sanction for cultivating marijuana, selling marijuana, or maintaining a place where marijuana is sold. This law establishes that medical marijuana collectives that dispense marijuana to their members are not subject to state criminal sanctions for marijuana sales.

In accordance with this law, indeed, precisely as the law was intended, appellant Jovan Jackson (hereinafter Jackson) formed the medical marijuana collective Answerdam Alternative Care (hereinafter Answerdam), a medical marijuana collective comprised of approximately 1,600 qualified medical marijuana patients in San Diego. Despite his

compliance with the CUA and MMPA, the County of San Diego raided and prosecuted Jackson not once, but twice for operating Answerdam, as Jackson was acquitted in his first trial. These actions by the San Diego Police Department (hereinafter SDPD) was, as revealed in the trial court proceedings, part of a larger effort by state and federal authorities to eradicate all medical marijuana dispensaries in San Diego.

At his first trial, Jackson was acquitted of the marijuana charges against him, since he was properly engaged in the implementation of California's medical marijuana laws. Dissatisfied with this outcome, the San Diego District Attorney's Office pursued a second prosecution against Jackson -- this time seeking to exclude his medical marijuana collective defense because he managed a storefront dispensary. And this time around, the trial court did what the prosecution requested. In doing so, the trial court referred to California's "medical marijuana laws [as] a scam" (RT 1451) and described Answerdam as a place where people got their "dope" (RT 1450). Not only did the trial court ignore the Legislature and electorate's desire to "[e]nhance the access of patients and caregivers to medical marijuana," but it ignored, as well, the statute's express exemption from criminal sanctions for medical marijuana patients who sell marijuana to other collective members. While the trial court may think what it will about the wisdom of California's medical marijuana laws, these laws, in conjunction with both the state and federal constitutions, ensured Jackson

an affirmative defense to the marijuana sales charges against him for participating in the operation of a medical marijuana collective. This erroneous preclusion of Jackson's only viable defense requires reversal.

STATEMENT OF APPEALABILITY

Appellant Jackson appeals from a final judgment that disposes of all issues between the parties. As such, the judgment is appealable pursuant to Penal Code section 1237.

STATEMENT OF THE CASE

On September 11, 2009, the People charged appellant Jackson with: (1) one count of sale of marijuana, in violation of Health and Safety Code[1] section 11360, subdivision (a), while on bail, in violation of Penal Code section 12022.1; (2) one count of possession of marijuana for sale, in violation of section 11359, while on bail, in violation of Penal Code section 12022.1; and (3) one count of possession of marijuana for sale, in violation of section 11359. (CT 1 at pp. 1-4; see also CT 1 at p. 116.) On August 13, 2010, the People filed a motion *in limine* to exclude any affirmative defense under the CUA or MMPA. (CT 2 at p. 1.) The trial court granted this motion on August 30, 2010. (RT 2 at p. 212.) After six days of trial and

///

///

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

deliberations, the jury convicted Jackson on all counts on September 28, 2010. (RT 8 at pp. 1192, 1193.)[2]

On December 15, 2010, the trial court suspended imposition of judgment and granted Jackson a three-year term of probation, subject to 180 days in custody with credit for 48 days time served. (RT 12/15/10 at pp. 1453, 1454.) Later, on January 27, 2011, the trial court granted Jackson's motion for bail pending appeal, so he is not currently in custody. (RT Augment 2.)

STATEMENT OF FACTS

A. California's Medical Marijuana Laws

On November 4, 1996, the California electorate enacted the CUA, section 11362.5, "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana

---

[2] After trial, the trial court also found Jackson guilty of violating Penal Code section 12022.1 based on two prior controlled substance possession convictions, which had been reduced to misdemeanors. (See RT 8 at pp. 1207, 1208) While this was likely erroneous, since Penal Code section 12022.1 requires a felony conviction as a prerequisite to the enhancement (see *In re Ramey* (1999) 70 Cal.App.4th 508, 512), it does not appear to have altered the trial court's sentencing of Jackson.

provides relief." (§ 11362.5, subd. (b)(1)(A).) Although the Act did not expressly provide for a distribution system for marijuana to the seriously ill, it sought "[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (§ 11362.5, subd. (b)(1)(C).) To meet the voters' challenge, on September 10, 2003, the California Legislature passed S.B. 420, also known as the "Medical Marijuana Program Act" or "the MMPA" (§§ 11362.7 et seq), which provides that "[q]ualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570." (§ 11362.775.) In passing the MMPA, the Legislature declared at the outset its purpose 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)) and to "[p]romote uniform and consistent application of the act among the counties within the state" (Stats. 2003, ch. 875, § 1, subd. (b)(2)). Five years later, in August of 2008, the Attorney General opined that a "properly organized and operated collective or cooperative that dispenses medical marijuana through

a storefront may be lawful under California law. . . ." (CT 2 at p. 299; Attorney General Guidelines at p. 11; see also § 11362.778 [recognizing that localities may pass laws to regulate medical marijuana "dispensaries"].)

B. Jackson's Formation and Operation of Answerdam

With these laws in mind, in 2007, appellant Jackson, who is a qualified medical marijuana patient and Navy veteran who uses marijuana to treat chronic pain associated with temporomandibular joint syndrome (see RT 2 at pp. 135, 136; RT 8 at p. 1049; RT 12/15/10 at p. 1432; see also RT 3 at p. 240 [trial court finding prima facie evidence of Jackson's status as a qualified patient]), formed the Answerdam collective with other qualified medical marijuana patients to provide for the medical marijuana needs of its membership. (See CT 7; RT 2 at pp. 136, 163, 175.)

Contrary to Jackson's expectation that he would be afforded a medical marijuana collective defense based on his compliance with California law, especially since he was afforded such defense at his first trial, the prosecutor filed a motion *in limine* on August 13, 20110, to exclude such defense based on his view that *all* storefront medical marijuana dispensaries are illegal. (See CT 2 at. p. 201; RT 2 at pp. 198, 199; see also RT 2/26/10 at p. 96 [Officer Mendez testifying that no medical marijuana dispensaries are legal].) The People contended that, in enacting section 11362.775, the Legislature intended only "to allow

collective or cooperative cultivation projects, not corporations that open a storefront and sell marijuana." (RT 2 at pp. 198, 199.) In other words, according to the District Attorney's Office of San Diego, to qualify as a legal medical marijuana collective, everyone in the collective must participate in the cultivation, as with a "community garden." (See RT 2 at pp. 199, 200.) According to the People, "[t]he defendant and all those who joined with (him her /) [must show] direct[] participat[ion], in an equal fashion, in the cultivation of marijuana by planting, watering, fertilizing, protecting the plants from pests, and pruning, for the entire duration of the cultivation." (CT 2 at p. 354 [People's Proposed Jury Instruction #1]; see also CT 2 at p. 358 [People's Proposed Jury Instruction #2] ["Payment of money is not sufficient by itself to show association in a collective or cooperative cultivation project."].)

The People's *in limine* motion prompted the trial court to hold an Evidence Code section 402 hearing on August 30, 2010. Jackson testified at the Evidence Code section 402 hearing as follows:

At its inception, each participant in the Answerdam collective signed a Membership Agreement stating, among other things: "I understand 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) and "I understand that as a registered member I contribute a gardening fee for the medical cannabis to be grown, and receive the harvest at no future charge"

(CT 1 at p. 18). Before patients were allowed entry into the collective, the collective verified their status as a qualified patient with their physician and they had to read and agree to the membership agreement. (See RT 2 at p. 172 [Jackson testifying that one must present a physician's recommendation and sign the collective agreement in order to obtain marijuana from Answerdam]; RT 6 at pp. 921, 922, 926, 927 [Answerdam security guard testifying that he checked medical marijuana paperwork before he allowed entry into the collective]; see also RT 6 at p. 928 [security guard testifying that he asked persons without proper paperwork to leave facility].) In short, in 2007, Jackson believed he was forming a legal medical marijuana collective. (RT 2 at p. 136 [Jackson testifying: "Answerdam is a collective, a medical marijuana collective"]); RT 2 at pp. 163, 175; see also RT 2. Augment at p. 27 [trial court recognizing "the collective outwardly was based on a belief the California law protected the defendant"; see also CR 7; RT Augment 2 at p. 30 [trial court stating "This was a case involving – from everything I could tell – otherwise law-abiding, peaceful people"].)[3]

---

[3] After Jackson was arrested and prosecuted in 2008, Answerdam changed its membership agreement to one designating Jackson as the primary caregiver for the members in an effort to comply with all requirements of California law. (See CT 1 at pp. 18, 58) Jackson testified in the pre-trial proceedings that this change of form did not impact his understanding of the collective as a jointly owned organization to supply marijuana to its seriously ill members, as memorialized in the original membership agreement. (See CT 1 at p. 18; RT 2 at pp. 136, 163, 175) Support for this

C. San Diego's Crackdown on Medical Marijuana Collectives

Several months after the formation of Answerdam, in 2008, federal and state task force agents formed a joint task force to investigate and raid medical marijuana collectives in San Diego County in an effort to eliminate them. (See CT 1 at p. 7; RT 2/26/10 at pp. 67, 68; see also RT 7 at pp. 980, 981 [Officer Mendez testifying that the SDPD was investigating all of the medical marijuana dispensaries in San Diego].) To this end, on June 12 and July 24, 2008, the SDPD sent an undercover officer posing as a qualified patient with facially valid documentation to join the Answerdam collective and make two small purchases of marijuana there on separate occasions. (See CT 1 at pp. 7, 8, 51.) Using this information, the SDPD, along with agents from the Drug Enforcement Administration (hereinafter DEA), obtained a search warrant and executed it at Answerdam on August 5, 2008. (See CT 1 at pp. 8, 51.) Inside, they found a clean and secure dispensing collective, 5.25 pounds of marijuana and $280. (See CT 1 at pp. 9, 51.) They also executed a search warrant at Jackson's residence where they found just over one pound of marijuana, fourteen tablets of MDMA, and three pills of Xanax. (CT 1 at p. 51.) Because of this, the People

---

understanding is provided by collective member Paul Ford, a cancer patient, who testified that he understood that the payments he made to Answerdam were "for the collective's overhead to supply that medicine to me." (RT 2 at p. 113) It bears noting that the Attorney General Guidelines had yet to be issued when the change of form was made.

charged Jackson with three counts of marijuana sales, in violation of section 11360, subdivision (b); two counts of possession of more than one ounce of marijuana, in violation of section 11357, subdivision (c); and two counts of possession of a controlled substance. (See RT 1 at pp. 9-10; RT 8 at pp. 1207, 1208.)

D. Jackson's Acquittal at His First Trial

At this first trial of Jackson, which is not the subject of this appeal, the jury heard evidence that Jackson was managing a medical marijuana collective in conformity with state law. (See CT 1 at pp. 139-140.) At the conclusion of this first trial, the court properly instructed the jury as follows regarding a medical marijuana collective defense based on the language of section 11362.775:

> A person is not guilty of the crimes charged in Counts 1 - 5 if his actions are exempted under the Medical Marijuana Program. The Medical Marijuana Program provides that qualified patients [and their designated primary caregivers] may associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes.
>
> A *qualified patient* is someone for whom a physician has previously recommended or approved the use of marijuana for medical purposes.
>
> * * *
>
> *Collectively* means involving united action or cooperative effort of all members of a group.
>
> *Cooperatively* means working together or using joint effort toward a common end.

Cultivate means to foster the growth of a plant.

If you have reasonable doubt about whether, at the time of the crimes charged in Counts 1 - 5, the defendant was a qualified patient [or primary caregiver], and that he committed the crimes solely because he was associating within the State of California in order collectively or cooperatively to cultivate marijuana, you must find the defendant not guilty.

(CT 2 at p. 320, italics in original.) The jury acquitted Jackson of all of the marijuana counts on December 1, 2009. (See 1 at pp. 9-10; CR 2 at pp. 348-351.)[4]

After the jury returned this verdict, they held a press conference that was transcribed and submitted *by the People* in the proceedings below. (CT 2 at pp. 348-351.)[5] At this press conference, the jurors explained their verdict as follows:

[Statement of Jury Foreman:] [T]o give everybody the gist of why we, um, why, why we decided on not guilty for his first five counts, it was all contingent on the medical marijuana defense and lack of definition within the state law as far as what constitutes a collective or a cooperative. . . . So, um, just for the lack of definition of that state law was really the key.

* * *

---

[4] Jackson received probation for the two pill charges. (See CT 1 at p. 140) This is not at issue here.

[5] This makes this evidence admissible here, since the jury testimony is not being used to impeach *their* verdict. (Cf. Evid. Code, § 1150 [juror affidavits are not admissible to impeach *their* verdict], italics added; *United States v. Barragan-Cepeda* (9th Cir. 1994) 29 F.3d 1378, 1380 [holding that Fed.R.Evid. 606(b), which prohibits use of juror testimony to impeach verdict, is inapplicable where testimony is submitted to establish that an issue was decided in defendant's favor at an earlier trial])

> Um, the prosecution gave his . . . kind of narrow definition during the, the closing arguments, but there was nothing in the law that really backed that up.
>
> * * *
>
> [Statement of Juror Wright:] And what we saw there was that everyone who was a member of Answerdam, making at least monetary contribution and that we felt that the law was vague on whether the monetary contribution which ultimately goes towards cultivation is considered a cooperative effort or not. And because we had no definition of cooperative effort, it was not defined in the law that the cooperative effort needs to be literally raking and growing the plants. And because we were on the fence about that, we had to find the defendant innocent.

(CT 2 at pp. 349, 350.)

E. Jackson's Second Trial

Dissatisfied with this outcome, the SDPD continued to investigate Answerdam (RT 2 at pp. 74, 77), which had remained together throughout the first prosecution. (RT 2 at pp. 74, 77.) As SDPD Detective Mark Carlson testified: "During that investigation, Jovan Jackson was arrested and charged, and ultimately there was a court trial, and that led from there -- further investigation continued." (RT 2 at p. 68) "Basically it was a second or continued investigation of Answerdam." (RT 2 at p. 77; see also RT 2/26/10 at p. 68 ["There was one investigation, and then the activity had not ceased"].) On July 16, 2009, SDPD agent Michael Mendez (hereinafter Mendez) executed an undercover operation at Answerdam by posing as a qualified medical marijuana patient after he obtained a medical marijuana

recommendation from a licensed physician by telling the physician that he needed marijuana to treat chronic pain associated with a back injury. (See RT 2/26/10 at p. 29; RT 5 at p. 849; RT 7 at pp. 961, 962, 980; RT 8 at p. 1044.) Upon arriving at Answerdam, Mendez presented a facially valid California driver's license (with a fictitious name) along with a facially valid physician's recommendation and telephone number. (RT 7 at pp. 965, 979, 987; RT 2/26/10 at 11-12, 20, 22.) He then signed a membership agreement form designating Jackson as his primary caregiver. (RT 7 at p. 988; RT 2/26/10 at 12, 23, Exh. 5.) Using this subterfuge, Mendez purchased seven grams of marijuana at Answerdam for $130. (RT 7 at p. 971; see RT 2/26/10 at 14, 15; RT 5 at p. 838.)

Accompanying Mendez in the undercover operation conducted on July 16, 2009, was SDPD Detective Carlson, who was cross-deputized as a federal agent and served as the lead investigating agent of Answerdam. (See RT 2/26/10 at p. 65; RT 2 at p. 68; RT 4 at 402-404, 412, 520.) He waited in a police car in the parking lot. (See RT 7 at p. 956.) Seven weeks later, based on Mendez's small purchase of $130 of marijuana from Answerdam, on September 9, 2009, Carlson and members of the DEA executed a search warrant at Answerdam in which he found approximately thirteen ounces of marijuana, less than one ounce of concentrated cannabis, and approximately nine marijuana edibles. (RT 2/26/10 at 56, 63, 101; RT 5 at pp. 866, 869, 870.) Although Jackson was not present at the time of

the raid (RT 5 at p. 806) and no other controlled substances were found by the police (RT 5 at p. 871), the People charged Jackson with the three marijuana sales charges at issue here. (CT 1 at p. 2; see also CT 1 at p. 116.)

Prior to trial, at the Evidence Code section 402 hearing, Jackson testified that he cultivated marijuana for Answerdam from December 2008 to September 2009, along with approximately four other members of Answerdam. (RT 2 at pp. 136, 137, 143, 144, 182; see also RT 2 at p. 211 [court assumes that persons who cultivated marijuana with Jackson for Answerdam were members of the collective].) All of this marijuana went exclusively to the Answerdam collective and Jackson testified that this was the exclusive source of marijuana for Answerdam in 2009. (RT 2 at pp. 155, 156, 183.) Jackson further testified: "No one owns Answerdam;" the money collected there goes to the association. (RT 2 at p. 163.) The members of Answerdam owned the collective with money received going "to the fulfillment of Answerdam's purpose," which is stated on the collective agreement form. (RT 2 at p. 174.) At the time of the September 9, 2009, raid, there were approximately 1676 qualified patients who had, at one time or another, become members of Answerdam. (See RT 4 at pp. 428, 463; RT Augment 1 at p. 4.) It is noteworthy that this figure only represents the number of signed membership agreements found at Answerdam during the raid of September 9, 2009 (*ibid*) – no evidence

demonstrates that all of these members were active throughout the relevant period.

Rather than explicitly accepting the prosecution's interpretation of section 11362.775 as requiring that all members of a medical marijuana collective actively participate in the cultivation of marijuana (see See RT 2 at pp. 199, 200; but see RT 2/26/10 at pp. 142-144), the trial court came up with its own interpretation of section 11362.775 as requiring that a defendant must have a specific intent to cultivate marijuana, instead of an intent to obtain or distribute it. (See RT 2 at pp. 132, 133.) Even while later admitting its need for appellate guidance as to the scope of section 11362.775 (RT Augment 2 at p. 28), the trial court employed its interpretation to exclude Jackson's medical marijuana collective defense. (RT 2 at p. 212.) Notwithstanding the Attorney General's guidance that a "properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law" (CT 2 at p. 299; Attorney General Guidelines at p. 11), the trial court held that a qualified patient who operates a storefront medical marijuana dispensary cannot avail himself of a defense under section 11362.775. In the trial court's view, "This was a retail marijuana store, not an association to collectively or cooperatively to cultivate marijuana." (RT 12/15/10 at p. 1415.) Combining this interpretation with its personal disbelief of Jackson's testimony that he assisted in the cultivation of the marijuana that

was sold by Amswerdam in 2009, the trial court excluded Jackson's medical marijuana collective defense. (RT 2 at p. 212.)

And the prosecutor took full advantage of this ruling at trial. At the very outset of his opening statement, without any proof of profiteering by Jackson, the prosecutor exhorted the jury as follows:

> Ladies and gentlemen, this case is about nothing more than selling drugs and making money. The defendant in the case was operating a for-profit, retail marijuana store, where he'd sell to whoever walked in with a marijuana card numerous times a day. (RT Augment 1 at p. 1:15-19.)
>
> * * *
>
> As the court told you during jury selection, medical marijuana does not apply. It's not a legal defense, not here, not in the case of, not under our facts. What we have here is selling drugs and making money. Nothing more. (RT Augment 1 at p. 1:23-27.)
>
> * * *
>
> Medical marijuana is not a defense here. It doesn't apply, not in this case, not here. What we have here is simply selling drugs and making money, nothing less, nothing more. (RT Augment 1 at p. 8:7-10.)

The People, then, presented largely undisputed evidence that Jackson managed the Answerdam collective at 6645 Convoy Court in San Diego, but it did not prove that Jackson made any profit from Answerdam

///

///

///

because it was not required to do so. (See RT 8 at 116; cf. RT 2 at p. 207 [court notes that it is not ruling on defense based on profit].)[6] Despite this lack of evidence of profiteering, the prosecutor continued to seize upon the trial court's *in limine* ruling in his closing argument by imploring the jury as follows:

> The defendant in this case was selling drugs and making money. Nothing more. . . . Just like any other drug dealer. (RT 8 at p. 1113.)
>
> * * *
>
> [N]o doubt that he was making money, no doubt this business is profitable. (RT 8 at p. 1131.)
>
> * * *
>
> The law doesn't apply to [medical marijuana sales]; you didn't get a defense instruction on that; you're not to consider that; it's not relevant. (RT 8 at p. 1135.)
>
> * * *
>
> The defendant was selling drugs and making money through Answerdam. He was making a lot of money, but this business, the defendant's business is not an excuse for his conduct, does not relieve him of responsibility legally for what he did and he's guilty of the charges. (RT 8 at p. 1139.)
>
> * * *

[6] The People did present evidence that Answerdam had obtained *revenue* of approximately thirty thousand dollars from July to part of September, 2009. (RT 4 at pp. 509-512) This amount of gross revenue, however, does not account for any overhead expenses paid by Answerdam, so it cannot be equated with profit.

> When you look at all the evidence, you will see he was merely selling drugs, and the only reason he was selling drugs was to make money. (RT 8 at p. 1173.)

Defenseless to the charges against him, Jackson was convicted by the jury on all three marijuana sales counts on September 28, 2010 (RT 8 at p. 1192, 1193) and the trial court found true the additional offense of violating Penal Code section 12022.1 (RT 8 at pp. 1207, 1208). This appeal followed.

ARGUMENT

THE TRIAL COURT VIOLATED JACKSON'S CONSTITUTIONAL AND STATUTORY RIGHT TO PRESENT AN AFFIRMATIVE DEFENSE WHEN IT EXCLUDED JACKSON'S MEDICAL MARIJUANA COLLECTIVE DEFENSE

A. Legal Standards

Because "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [106 S.Ct. 2142, 2146, 90 L.Ed.2d 636], quotation omitted), they are entitled to present evidence on any legally cognizable defense, unless "it is clear that the evidence to be offered by the defendant can, under no interpretation, be considered sufficient," *United States v. Johnson* (7th Cir. 1994) 32 F.3d 304, 307; cf. *United States v. Contento-Pachon* (9th Cir. 1984) 723 F.2d 691, 693 ["the trial court rarely rules on a defense as a matter of law"]). Under the federal constitution, "[o]nly slight evidence will create the factual issue necessary to get the defense to the jury, even [if] the evidence is 'weak, insufficient,

inconsistent, or of doubtful credibility.'" (*United States v. Gurolla* (9th Cir. 2003) 333 F.3d 944, 956, quoting *United States v. Becerra* (9th Cir. 1993) 992 F.2d 960, 963.)

Based on these constitutional principles, Evidence Code section 402 permits a defendant to present an affirmative defense to a jury where he presents sufficient evidence to raise a reasonable doubt on the elements of the defense. (See *People v. Jones* (2003) 112 Cal.App.4th 341, 350.) Because the facts underlying a medical marijuana defense only require the defendant to raise a reasonable doubt about the prosecution's case (see *id.* at p. 350, quoting *People v. Mower* (2002) 28 Cal.4th 457, 481), the gatekeeping function of Evidence Code section 402 is satisfied where the defendant produces sufficient evidence of the elements of the defense at a section 402 hearing to raise a reasonable doubt about the existence of the defense (see *Jones, supra,* 112 CalApp.4th at p. 350). Issues of credibility are for the jury, not the trial court, to decide. (*Id.* at p. 351; see *People v. Lucas* (1995) 12 Cal.4th 415, 466, 467; *People v. Villanueva* (2008) 169 Cal.App.4th 41, 49 ["In determining whether substantial evidence supports a defense, the trial court must leave issues of witness credibility to the jury"], citing *People v. Elize* (1999) 71 Cal.App.4th 605, 615; *People v. Sanchez* (2003) 113 Cal.App.4th 325, 330 ["It is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence"], citations omitted; *People v. Brashier* (1969)

271 Cal.App.2d 298, 306 ["The essence of a trial by jury is that controversies in proof . . . shall be resolved by the jury"]; *United States v. Gurolla, supra,* 333 F.3d at p. 956 ["The credibility of the defendant's explanations is a matter for the jury to determine"].) In other words, "a defendant has a constitutional right to have the jury determine every material issue presented by the evidence; . . . An erroneous error to instruct an affirmative defense relied upon by the defendant constitutes a denial of this right which is 'in itself a miscarriage of justice. . . .'" (*People v. Stewart* (1976) 16 Cal.3d 133, 141, citations and quotation omitted.)

B. The Trial Court Erred in Depriving Jackson His Defense and Usurping the Jury's Role of Making Credibility Determinations

Health and Safety Code section 11362.775, the cornerstone of the MMPA, provides as follows:

> Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, 11570.

Because this affirmative defense to distribution requires only that a qualified patient associate with others to cultivate marijuana, Jackson presented sufficient evidence at the Evidence Code section 402 hearing that he associated with others to cultivate marijuana to have the issue submitted

to the jury. At the Evidence Code section 402 hearing, Jackson testified as follows:

> Q. And what is Answerdam?
>
> A. Answerdam is a collective, a medical marijuana collective.
>
> Q. And at some point during your involvement in Answerdam, did you cultivate marijuana?
>
> A. Yes.
>
> * * *
>
> A. Um, basically I was responsible for setting up the grow, providing just the assistance and helping to set everything. . . .

(RT 2 at pp. 136, 137)

> Q. The people that were tending the plants that were, you know, watering and fertilizing and doing that sort of thing, was that Kirsty and Mike?
>
> A. No, No. I was there – I had to do that -- a lot of the work because they couldn't always come and tend to the plants, so basically it was my job to make sure that . . .
>
> Q. So you were tending to the plants?
>
> A. Right.

(RT 2 at p. 157; see also RT 2 at p. 143 ["Q. So in addition to renting the building, you also assisted in the actual cultivation of marijuana? A. Yes."].) Jackson then testified that he and four other members of the

collective produced several pounds of marijuana in 2009, which was the exclusive source of marijuana for Answerdam that year. (RT 2 at p. 183.)[7]

Standing alone, this testimony was sufficient to entitle Jackson to have his medical marijuana collective defense heard by the jury. (See *People v. Jones, supra,* 112 Cal.App.4th at 350 [discussed *infra*]; RT 2 at p. 204 [defense counsel requesting to have medical marijuana collective defense admitted based on sufficiency of the evidence].) This testimony, however, does not stand alone, but is buttressed by Jackson's production of receipts for the purchase of marijuana cultivation equipment (see RT 2 at p. 75); his payment of a lease for the cultivation site (see RT 2 at p. 143), and Detective Carlson's testimony that he observed some cultivation equipment at Answerdam (RT 2/26/10 at pp. 96, 97, 103; RT 2 at p. 102.) Detective Carlson testified as follows:

> Q. But was there evidence of growing marijuana found during the investigation of the Answerdam organization?
>
> A. Well, we found that people were growing, based on the records. We also found that there was some grow equipment, some grow light ballasts and trays in 6631, which I observed in that location on, I believe, it was May 13th and July 13th of 2009.

(RT 2 at p. 102.)

---

[7] It bears noting that only thirteen ounces of dried marijuana were found at Answerdam when it was raided on September 9, 2010. (RT 2/26/10 at. P. 56)

This testimony by Jackson, especially when considered in light of the documentary evidence submitted by him, was more than sufficient to create a reasonable doubt whether Jackson intended to associate with others cultivate marijuana for Answerdam, so the jury should have been permitted to hear it. (See *Jones, supra; Windus, infra.*)

Rather than allowing the jury to perform its constitutional function, the trial court usurped its role based on its belief that five people could not cultivate enough marijuana to sustain a 1600 member collective. (See RT 12/15/10 at p. 1417.) The proper finding whether Jackson established a medical marijuana defense, which was dependant on who cultivated the marijuana sold by Answerdam, should have been one for the *jury* to decide. (See *ante* at pp. 14, 15.) In usurping the jury's function, the trial court overlooked the fact that the evidence strongly suggests that the great majority of the approximately 1,600 patients who had joined Answerdam since it was formed in 2007 were no longer active members, since only thirteen ounces of marijuana was found at Answerdam when it was raided in September of 2009. (RT 2/26/10 at. p. 56; cf. *People v. Windus* (2008) 165 Cal.App.4tth 634, 643 [holding that jury, not trial court, should determine whether 1.5 pounds of marijuana possessed by defendant was for his personal medical use].) Jackson testified that he and four others

cultivated multiple pounds of marijuana for distribution by the collective and, if believed by the jury, this would have sustained his defense.[8]

Underscoring the point that the trial court's exclusion of Jackson's medical marijuana defense was erroneous is *Jones, supra.* In *Jones*, the defendant was subjected to an Evidence Code section 402 hearing where he testified, contrary to the testimony of his physician, that his physician approved his medical marijuana use by stating that it "might help, go ahead" in response to Jones' inquiry regarding marijuana to treat his migraine headaches. (112 Cal.App.4th at pp. 350, 351.) Incredulous, the trial court asserted its "gate-keeping" function and excluded the defense. (*Id.* at p. 349.) After the defenseless Jones was convicted, the Court of Appeal reversed, stating the following rules of law that are dispositive here:

> As our Supreme Court recently explained in *People v. Mower* [(2002) 28 Cal.4th 457, 481], 122 Cal.Rptr.2d 326, 49 P.3d 1067 (which was decided three months after the second section 402 hearing in this case), "as to the facts underlying the defense provided by [the Compassionate Use Act], defendant is required merely to raise a reasonable doubt."
>
> * * *

[8] Detective Mendez testified that he observed four different strains of marijuana at the Answerdam collective (RT 4 at p. 436-438), but it is not uncommon for a single cultivator to produce multiple strains of marijuana (cf. Vitiello, Michael, *Legalizing Marijuana: California's Pot of Gold?* (2009) 2009 Wisconsin L. Rev. 1349, 1375 fn. 172 [noting that the goal of the Marijuana Growers Handbook is "to build strains that are designed exclusively for particular medical conditions, yet are easy and fast for the consumer to grow"]).

> If the defendant produces evidence at the section 402 hearing sufficient to raise a reasonable doubt as to whether he had a physician's approval to use marijuana, then the gate-keeping function of a section 402 hearing is satisfied and the defense should go to the jury to decide. Only if the defendant fails to produce sufficient evidence to raise a reasonable doubt about the existence of an approval is the trial court justified in keeping the matter from the jury. (See *People v. Lucas* (1995) 12 Cal.4th 415, 467 ["the judge's function on questions of this sort is merely to determine whether there is evidence sufficient to permit a jury to decide the question"].)
>
> * * *
>
> Because defendant's testimony was sufficient to raise a reasonable doubt over the fact of the physician's approval, the trial court erred in barring defendant from presenting his Compassionate Use defense to the jury.
>
> * * *
>
> Because the Compassionate Use Act defense was ultimately a question for the jury, it was not for the trial court to decide whether Dr. Morgan was more credible than defendant. The trial court's role was simply to decide whether there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt as to whether Dr. Morgan approved defendant's marijuana use. Defendant's testimony constituted such evidence. Thus, defendant should have been allowed to present his Compassionate Use Act defense to the jury, and the trial court erred in granting the prosecution's motion to exclude that defense.

(*Id.* at pp. 350, 351.)

The trial court in this case usurped the jury function in the same manner, as it made a credibility determination to reject Jackson's testimony that, if believed by a jury, would have supported Jackson's medical marijuana dispensary defense. (See also *People v. Windus, supra,* 165

Cal.App.4th at pp. 641, 643 [reversing trial court for excluding medical marijuana defense because defendant presented sufficient evidence that 1.5 pounds of marijuana possessed by defendant was for his personal medical use]; see also *People v. Flannel* (1979) 25 Cal.3d 668, 685 ["doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused"]; *People v. Bernal* (1959) 174 Cal.App.2d 777, 781 [in prosecution for sale of marijuana, question whether cigarette allegedly found by officers in garage nearest defendant's home was planted there by officer as claimed by defendant or whether in fact it belonged to defendant was for jury]; *People v. Gaytan* (1940) 38 Cal.App.2d 83, 87, 88 [specific intent is jury question]; *People v. Pena* (1983) 149 Cal.App.3d Supp. 14, 28 ["In view of the fact that duress was appellant's only defense, it was error for the trial court to refuse to instruct the jury regarding the availability of the defense"].)

C. The Trial Court Erred in Engrafting Upon Section 11362.775 a Requirement That a Defendant Must Have a Specific Intent to Cultivate Marijuana That Predominates Over His Intent to Distribute It in Order to Avail Himself of a Medical Marijuana Collective Defense

To overcome Jackson's entitlement to present his medical marijuana collective defense to the jury, the trial court essentially found that a qualified patient may only avail himself of such defense where his specific intent to cultivate marijuana predominates over an intent by the association to distribute it. Despite the fact that section 11362.775 exempts qualified

patients from criminal sanction for marijuana sales (§ 11360) and maintaining a place where marijuana is sold (§ 11570), the trial court rendered its decision in this regard as follows:

> I indicated in our discussions last week what my understanding of Welfare and Institutions Code [Health and Safety Code] Section 11362.775 was, and I indicated that it was analogous to a specific intent crime in the sense that the language talks about association within the State of California, in order collectively or cooperatively to cultivate marijuana for medical purposes. And the phrase "in order to" is in my mind the same as "for the purpose of," which is the equivalent of a specific intent.
>
> In other words, it is insufficient, in my view, to have an association unless the association is for the specific purpose stated in the statute. The evidence appears to indicate that the purpose of was for the purpose of distributing marijuana cultivated by others, which is not part of the language of the statute, not for the purpose of cultivating marijuana.
>
> * * *
>
> I do not find there is sufficient evidence before me at this time to raise a reasonable doubt regarding – associating for the purpose of cultivating marijuana, so my tentative ruling remains the same, that there is insufficient evidence to present that defense at this time.

(RT 2 at pp. 130, 131, 133.) The trial court added that the "people who belong to this association belonged for the purpose of obtaining marijuana, not for the purpose of cultivating it." (RT 2 at p. 132.)

This case, however, is about Jackson, who testified that he assisted in the cultivation of marijuana that was distributed by Answerdam to its membership in 2009. (RT 2 at pp. 155, 156, 183.) Notwithstanding this

testimony, the trial court affirmed its ruling excluding a medical marijuana collective defense as follows:

> It's clear that, as I said, the statute says that the association has to be for the purpose of cultivating marijuana. There is no evidence in the record that that was the purpose of this association. Indeed, the evidence points to quite the contrary, that the purpose of the association was for the distribution of marijuana that was cultivated by others whether or not members.
>
> And in my mind, there's no plausible basis on which this defense could go to the jury. It could not possibly raise a reasonable doubt using the language of 11362.775.
>
> So based on the evidence and my assessment of the law, I do not believe there is a basis to present this defense to the jury. And that will be my final ruling.

(RT 2 at p. 212.) The court based its opinion, without *any* basis in law, on the fact that only a small percentage of Answerdam's membership participated in the cultivation. (RT 2 at p. 212; see also RT 12/15/10 at p. 1427 ["In other words, it's not sufficient that some of the members may grow marijuana"].) Later, the court suggested that it simply did not believe that Jackson cultivated the marijuana distributed by Answerdam in 2009. (See RT 2/15/10 at pp. 1426-1427.)

Contrary, however, to the trial court's novel interpretation of section 11362.775 as requiring some unknown percentage of the members of a medical marijuana collective to have the specific intent to cultivate marijuana, or that this intent must predominate over an intent to distribute marijuana, the statute on its face is not so limited. On its face, the statute describes an association of qualified patients who collectively or

cooperatively cultivate marijuana for medical purposes who are not thereby subject to criminal liability for, among other things, sales of marijuana and maintaining a place where marijuana is sold. (§ 11362.775, citing §§ 11360, 11570.) The statute does not say that each individual member of the association (or collective) must have the specific intent to cultivate marijuana; instead, it states that qualified patients "who associate within the State of California in order to collectively or cooperatively to cultivate marijuana for medical purposes" shall not be subject to criminal liability for sales. The use of the terms "associate," "collectively," and "cooperatively," when considered in light of the exemption from criminal liability for sales, depict an association of patients who cultivate marijuana *and* distribute it to their membership. (See *Traudt v. City of Dana Point* (2011) 199 Cal.App.4th 886, 896 [noting that patient-member of a collective seeks "to represent an association or group of persons cooperatively and collectively vested with the right to make medical marijuana available through dispensaries"]; cf. *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 785.) This is precisely what Answerdam did, as Jackson presented pre-trial testimony that the marijuana sold by Answerdam was cultivated by himself and four others. (RT 2 at pp. 155, 156, 183.) The trial court erred in preventing Jackson from asserting a medical marijuana collective defense based on its erroneous interpretation of section 11362.775 as requiring some undefined percentage of medical marijuana collectives to participate

in the cultivation. (See RT 2 at p. 212; see also RT 12/15/10 at p. 1427 ["In other words, it's not sufficient that some of the members may grow marijuana."].)

Not only is Jackson's interpretation of the MMPA consistent with its plain language, but it also fosters the statute's purpose. The starting place for interpreting section 11362.775 is the CUA, since the MMPA was passed to further the initiative's purposes. The CUA was designed "[t]o ensure that seriously ill Californians have the right *to obtain* and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician. . . ." (§ 11362.5, subd. (b)(1)(A), italics added.) Although the CUA did not expressly provide a mechanism to provide access to marijuana for the seriously ill, it sought "[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable *distribution* of marijuana to all patients in medical need of marijuana." (§ 11362.5, subd. (b)(1)(C), italics added.) Section 11362.775, the main provision of the MMPA, constituted the Legislature's response to the voters' challenge. (*Urziceanu, supra,* 132 Cal.App.4th at p. 785; see also *People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1014 [noting that the CUA "directed the state to create a statutory plan to provide for the safe and affordable distribution of medical marijuana to qualified patients"].) The Legislature expressly designed the MMPA to "[e]nhance the *access* of patients and caregivers to medical

marijuana through collective, cooperative cultivation projects." (Stats. 2003, ch. 875, § 1, subd. (b)(3), italics added.) When section 11362.775 is read in light of the stated purposes of California's medical marijuana laws to provide for "safe and affordable distribution of marijuana" to qualified patients and to enhance "access" of marijuana through collective and cooperative cultivation projects, it cannot be narrowly construed as allowing a legal defense only for cultivators and not to distributors (or recipients) of marijuana, as the trial court found. (See RT 2 at p. 212.) So long as the cultivators, distributors, and patient-recipients are all members of the same collective, that association is legal under California law and all of the members, no matter their particular role, should be permitted a medical marijuana collective defense.[9]

Based upon the language and purposes of section 11362.775, the court in *Urziceanu, supra*, found that section 11362.775 "contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana." (*Urziceanu, supra*, 132 Cal.App.4th at p. 785, italics added.) In that case, the defendant contended that he formed a "legal cooperative" to grow and supply medical marijuana

---

[9] Otherwise, minimum wage workers at the collective would be defenseless to charges of marijuana sales, no matter the source of the marijuana. This would be a patently unfair, and absurd result.

to qualified patients, which was distributed from his home. (*Id.* at p. 759.) While Mr. Urziceanu cultivated much of the marijuana he sold, he would sometimes receive marijuana donated by individual members and he would sometimes "buy marijuana on the black market by the pound to supply the members." (*Id.* at p. 764.) Prior to trial, the court refused to allow Urziceanu to present a defense under the CUA, reasoning that this statute did not provide the defendant a right to provide medical marijuana through a collective. (*Id.* at p. 767.) On appeal, the court agreed with this interpretation of the CUA, but reversed Urziceanu's conviction for conspiracy to sell marijuana and remanded for a new trial, because the subsequently enacted MMPA provided Urziceanu with a defense. The Court of Appeal reasoned as follows:

> The Legislature . . . exempted those qualifying patients and primary caregivers who collectively or cooperatively cultivate marijuana for medical purposes from criminal sanctions for possession for sale, transportation or furnishing marijuana, maintaining a location for unlawfully selling, giving away, or using controlled substances, managing a location for the storage, distribution of any controlled substance for sale, and the laws declaring the use of property for these purposes a nuisance. . . . [The MMPA's] *specific itemization of the marijuana sales law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana.*

(*Urziceanu*, *supra*, 132 Cal.App.4th at p. 785, italics added; see also *Traudt, supra*, 199 Cal.App.4th at p. 896 [noting that plaintiff argues "to represent an association or group of persons cooperatively and collectively

vested with the right to make medical marijuana through dispensaries"]; *Qualified Patients Association v. City of Anaheim* (2010) 187 Cal.App.4th 734, 749 [noting that the MMPA "identifies groups that may lawfully distribute medical marijuana to patients under the CUA"], quoting *Hochanadel, supra,* 176 Cal.App.4th at p. 1013; *Hochanadel, supra*, 176 Cal.App.4th at p. 1018 ["Nothing in section 11362.775, or any other law, prohibits [medical marijuana] cooperatives and collectives from maintaining a place of business"].) This case is on all fours with *Urziceanu, supra*, and its progeny, as Mr. Jackson was a member of a "medical marijuana cooperative[] that would receive reimbursement of marijuana." (Cf. *Urziceanu,* supra, 132 Cal.App.4th at p. 785.) Like Urziceanu, Jackson should be afforded a new trial based on the erroneous exclusion of his defense.[10]

---

[10] In the proceedings below, the People argued that *Urziceanu* was wrongly decided by contending:

> Under the *Urziceanu* formulation, however, the permitted conduct could be much broader. It would allow a "marijuana cooperative" to form to essentially sell, not grow, marijuana. The court does not define what it means by "marijuana cooperative" or what is required for an organization to qualify as a "marijuana cooperative." The Court notes no particular requirement that the marijuana be grown by the members, acting together. Nor does the Court note that the marijuana must be distributed only to members who were part of the group effort to cultivate.

Further support for Jackson's interpretation of section 11362.775 as providing a defense to all members of a medical marijuana collective, even if some unknown threshold percentage of the collective's membership does not personally cultivate marijuana, are the "Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use" promulgated by the California Attorney General. (See http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf [hereinafter Attorney General Guidelines] [found at CT 2 at pp. 289-299].) In these Guidelines, the Attorney General opines that medical marijuana collectives and cooperatives may distribute marijuana to their members "based on fees that are reasonably calculated to cover overhead costs and operating expenses" and that these entities "may credit its members for marijuana they provide to the collective, which it may then allocate to other members. (§ 11362.765(c))." (CT 2 at p. 298; Attorney General Guidelines at p. 10; see also *ibid.* ["Members also may reimburse the collective or cooperative for marijuana that has been allocated to them."].) Later, the Attorney General expressly addresses storefront dispensaries and opines that a "properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law. . . ." (CT 2 at p. 299; Attorney General

---

(CT 2 at p. 238) Appellant agrees with this description of the *Urziceanu* holding, but strenuously disagrees with the People whether *Urziceanu, supra,* was correctly decided.

Guidelines at p. 11; see also *Qualified Patients Association, supra,* 187 Cal.App.4th at pp. 751-752 [relying on Attorney General Guidelines to reject City's argument that any medical marijuana outlet it designates as a "dispensary" violates California's medical marijuana laws].)

Even more support for the view that storefront medical marijuana dispensaries are legal under state law is found in section 11362.768, which was enacted earlier this year. In 2011, the Legislature amended the MMPA by adding section 11362.768, which provides in relevant part as follows: "(f) Nothing in this section shall prohibit a city, county, or city and county from adopting ordinances or policies that further restrict the location or establishment or a medical marijuana cooperative, collective, *dispensary*, operator, establishment, or provider. . . . (g) Nothing in this section shall preempt local ordinances, adopted prior to January 1, 2011, that regulate the location or establishment of a medical marijuana cooperative, collective, *dispensary*, operator, establishment, or provider." (§ 11362.5, subd. (f), (g), italics added; see also *County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 868 ["If there was ever any doubt about the Legislature's intention to allow local governments to regulate marijuana dispensaries, and we do not believe there was, the newly enacted Health and Safety Code Section 11362.768 has made clear that local government may regulate dispensaries"].) Although the Legislature easily could have stated its view that medical marijuana dispensaries are not legal, as the trial

court essentially did here, the Legislature did not do so and, instead, expressly recognized them.

As if this were not enough, additional support for Jackson's position can be found in the law addressing cooperatives in the Corporations Code. Whereas the People contended in the proceedings below that "the law requires the qualifying individuals to first come together as [a] group, and then act as a group to grow marijuana for medical purposes" or "physical[ly] participate[] in the cultivation of the plants" to qualify as a medical marijuana collective (CT 2 at pp. 218, 221-222; see also CT 2 at p. 221 ["To claim the immunity, you must engage in the act"]), Jackson contends that, like cooperatives, collective membership is not so restricted. The reason the Legislature provides for "collectives," in addition to cooperatives, in section 11362.775 is that an entity cannot call itself a "cooperative," unless it incorporated as such under the laws of the state. (Corp. Code, § 12311, subd. (b).) Notwithstanding this technical difference, however, the law relating to cooperatives provides guidance in ascertaining the Legislature's intent in authorizing patient collectives, since the Legislature included collectives alongside cooperatives in section 11362.775. These laws, as found in Corporations Code sections 12200-12203, authorize cooperatives that do not require every member, also known as "patrons," to participate in the actual manufacture of the goods

that are distributed to its membership. Consumer cooperatives are defined by the Legislature as follows:

> Subject to any other provision of law of this state applying to the particular class of corporation or line of activity, a corporation may be formed under this part for any lawful purpose provided that it shall be organized and shall conduct its business primarily for the mutual benefit of its members as patrons of the corporation. The earnings, savings, or benefits of the corporation shall be used for the general welfare of the members or shall be proportionately and equitably distributed to some or all of its members or its patrons, *based upon their patronage (Section 12243) of the corporation, in the form of cash, property, evidences of indebtedness, capital credits, memberships, or services.*

(Corp. Code, § 12201, italics added; 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 law regarding cooperatives, therefore, envisions members making contributions other than services (or cultivation), such as money or property, in exchange for the goods distributed. (See also, e.g., http://www.daviscoop.com/members.htm [describing membership of Davis Food Co-Op based on economic contribution].) Medical marijuana patients who are too sick or, for other reasons, are unable to cultivate their own medicine rely on these collectives to sell it to them, as would be true with REI or the Davis Food Co-Op, does not render the collective or cooperatives unlawful. (Cf. RT 2 at pp. 111, 112, 124 [Amswerdam member Paul Ford, a cancer patient who suffers

from peripheral neuropathy as a result of undergoing chemotherapy, testifying prior to trial that he had attempted to cultivate marijuana for himself, but he "failed miserably" so he joined Answerdam]; [by contributing to Answerdam, "I was able to obtain medicine that I couldn't grow for myself"].)

Taken together, these authorities envision medical marijuana dispensing collectives that include among its members persons who are tasked with purchasing and selling marijuana to the collective's membership through storefront dispensaries. (See also CT 2 at p. 298 [citing Attorney General Guidelines].) This was the role the trial court found Mr. Jackson assumed with Answerdam. (See RT 2 at pp. 67, 212.) Under the Attorney General Guidelines, which have been found properly to interpret California law (*People v. Mentch* (2008) 45 Cal.4th 274, 285, fn. 6; *Hochanadel, supra* 176 Cal.App.4th at p. 997), Mr. Jackson should have been allowed a medical marijuana collective defense to the charges against him, regardless whether only a small proportion of the collective's members cultivated Answerdam's marijuana.

Nor does the California Supreme Court's decision in *People v. Mentch, supra*, in any way alter any of this precedent or reasoning. The court in *Mentch, supra,* did not address the operative provision of the MMPA at issue here, section 11362.775, but, rather, it addressed the very distinct issues (1) whether one can qualify as a primary caregiver under the

CUA solely by providing marijuana to a qualified patient and (2) whether one who provides marijuana can qualify for protection under section 11362.765, subd. (a) for assisting in the administration of medical marijuana. (Cf. *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 680 ["An opinion is not authority for propositions not considered"].) Jackson does not contend either proposition. Instead, the issue here is the proper application of section 11362.775, which has correctly been interpreted by the Court of Appeal in *Urziceanu, supra,* and the Attorney General as allowing for medical marijuana collectives that distribute marijuana to their patient-members. *Mentch, supra,* not only does not undermine these authorities, but it cites *Urziceanu, supra*, with approval (see *Mentch, supra*, 45 Cal.4th at pp. 283, 285, 289) and states that the Attorney General Guidelines "are wholly consistent with case law and the statutory text. . . ." (*id.* at p. 285 fn. 6). The trial court here erred in precluding a defense recognized by these authorities based on a legally unsupported belief that section 11362.775 requires some unidentified percentage of the collective's membership to participate in the cultivation of marijuana or have the specific intent to do so. The trial court erred in precluding Jackson's medical marijuana collective defense.

///

///

///

D. The Rule of Lenity Mandates the Adoption of Defendant's Reasonable Interpretation of Section 11362.775 as Providing a Defense to Dispensers of Marijuana Through Medical Marijuana Collectives, Even if a "Quorum" of the Members Do Not Actively Participate in the Cultivation of the Marijuana

At the barest minimum, Jackson's interpretation of section 11362.775 is reasonable, so the rule of lenity mandates its adoption in this criminal case. (See, e.g., *United States v. Bass* (1971) 404 U.S. 336, 347-50 [92 S.Ct. 515, 30 L.Ed.2d 488] ["where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant"]; *People v. Ralph* (1944) 24 Cal.2d 575, 581 [a criminal defendant is entitled to "the benefit of every reasonable doubt, whether it arises out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute"], quoting *Ex parte Rosenheim* (1890) 83 Cal. 388, 391]; accord *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 312; see also *United States v. Wiltberger* (1820) 5 Wheat 76, 95, 5 L.Ed. 37 ["The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself"].) Under the rule of lenity, when "the language of a penal law is reasonably susceptible of two interpretations, courts are to construe the law 'as favorably to criminal defendants as reasonably permitted by the statutory language and circumstances of the application of the particular law at issue.'" (*People v. Robles* (2000) 23 Cal.4th 1106, 1115, quoting *People v. Gardeley* (1996) 14 Cal.4th 605, 622; *People v.*

Overstreet (1986) 42 Cal.3d 891, 896.) "This rule 'protects the individual against arbitrary discretion by officials and judges and guards against judicial usurpation of the legislative function which would result from enforcement of penalties when the legislative branch did not clearly prescribe them.'" (*Robles, supra,* 23 Cal.4th at p. 1115, quoting *People v. Overstreet, supra,* 42 Cal.2d at p. 896.)

Here, Mr. Jackson's interpretation of section 11362.775 as providing a defense to a member of a medical marijuana collective, even when most of its membership does not have the specific intent to cultivate marijuana, was shared by the Court of Appeal in *Urziceanu, supra,* and the Attorney General, see *ante* at page 26, which demonstrates its reasonableness. This interpretation promotes the purpose of the statute to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats. 2003, ch. 875 (S.B. 420), § 1, subd. (b)(3).) In short, Jackson's interpretation is reasonable.

Lest there be any question that the Legislature did not "clearly prescribe" the conduct for which Mr. Jackson was convicted, the trial court admitted that "[t]he scope of Health and Safety Code section 11362.775 is an issue which has not been definitely addressed by any Court of Appeal or the California Supreme Court." (RT 2 at p. 204.) And it stated: "We'll wait and see what the appellate court says. . . . Certainly this is not a frivolous issue. It's a key issue not only in this case but as a matter of

California law. I think everyone recognized from the outset that we need appellate court decisions that ultimately define what the language in 11362.775 means when it defines or describes associating for the purpose of collectively, or cooperatively cultivating marijuana." (RT Augment 2 at p. 28.)

For his part, the prosecutor admitted that "we didn't go into exactly what you need to punch your ticket to say 'I'm involved in collectively, cooperatively cultivating marijuana.'" (RT 12/15/10 at p. 1414.) "Both parties in the case at bar have an interest in the pre-trial determination of 'the elements' of this defense." (CT Augment 2 at p. 217.) Just as, in the People's words, "[t]he jury should not have to guess as to what 'associate . . . in order collectively or cooperative[ly] to cultivate marijuana for medical purposes' means" (CT 2 at p. 246), neither should a defendant. Stated best by one of the jurors in the first trial, who were instructed in the language of the statute, "if you're gonna hold somebody to a law you have to define that law. . . ." (CT 2 at p. 351.)

Indeed, the jurors in the first trial held a press conference wherein they stated repeatedly that they found the law vague. (See CT 2 at p. 349 ["just for the lack of definition of that state law was really the key]; CT 2 at p. 350 ["we felt the law was vague"]; CT 2 at p. 351 ["The law is very vague"].) This sentiment was repeated by the San Diego County Grand Jury, which not only identified the law's ambiguities, but also identified the

overzealousness of local enforcement in enforcing the laws in light of these ambiguities. The San Diego County Grand Jury stated as follows: "The 2009/2010 San Diego County Grand Jury received more complaints on the subject of medical marijuana than on any other subject. The common thread of these complaints is the lack of clear and uniform guidelines under which qualified medical marijuana patients can obtain marijuana. The threat of reprisals against these patients and their suppliers by law enforcement agents was also a common concern." (CT 2 at p. 250.) "In particular, advocates have claimed that law enforcement agencies in San Diego County have been overly aggressive in raiding collectives which are attempting to comply with the Attorney General's Guidelines." (CT 2 at pp. 255, 256.) "[P]atients and operators of legally operating collectives are requesting guidelines from law enforcement so that patients may have safe access to medical marijuana and so that operators will not be subject to search warrants and arrests." (CT 2 at p. 259.) While this vagueness has since been considerably ameliorated by the issuance of the Attorney General Guidelines, these Guidelines did not exist at the time of Jackson's alleged offense.

Under these circumstances, it cannot be said that the Legislature has "clearly prescribed" the conduct for which Mr. Jackson was convicted. The rule of lenity mandates the adoption of defendant's interpretation of the

statute as allowing a medical marijuana collective defense to the charges against him, the denial of which by the trial court requires reversal.

E. The Erroneous Exclusion of Jackson's Defense Requires Reversal

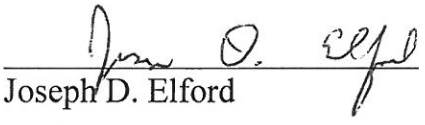
That the exclusion of Jackson's defense by the trial court was prejudicial and requires reversal, if found erroneous, was explicitly recognized by the trial court: "[I]t is an issue which if the appellate court determines I was wrong, I cannot imagine them saying that the preventing of the defense was erroneous but does not require reversal." (RT Augment 2 at pp. 28-29.) "I've recognized that [the ability of defendant to present a defense under the MMPA] was the most important ruling in the case because it determined the nature of the trial. I was either right or wrong. We'll wait and see what the appellate court says." (RT Augment 2 at p. 28; see also RT 2 at p. 191.)

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

DATED: November 21, 2011

Respectfully Submitted,



Joseph D. Elford

Attorney 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 Opening Brief, which revealed a total of 11,051 words.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of November, 2011, 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 November 21, 2011, I served the within document(s):

APPELLANT'S OPENING 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 21st day of November, 2011, in Oakland, California.

Joseph D. Elford