

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

v.

PATRICK K. KELLY,

Defendant and Appellant.

In re

PATRICK K. KELLY

on Habeas Corpus.

No. S164830

(Court of Appeal
Nos. B195624, B201234)

SUPREME COURT
FILED

JUL 15 2008

Frederick K. Ohlrich Clerk
Deputy

After a Published Decision of the Court of Appeal for the
Second Appellate District, Filed May 22, 2008

APPELLANT'S ANSWER

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Appeal Under CAP-LA's
Assisted-Case Program

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On July 1, 2008, respondent filed a petition asking this Court to review the constitutionality of Health and Safety Code section 11362.77. Pursuant to California Rules of Court, rule 8.500(a)(2), appellant Patrick K. Kelly files this answer to show that the issue on which respondent seeks review does not fall within the criteria for granting it. If this Court grants review, appellant asks that the denial of his petition for writ of habeas corpus be reviewed as well.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the limits for possessing and cultivating marijuana set forth by the Legislature in Health and Safety Code section 11362.77, a provision of the Medical Marijuana Program, violate article II, section 10, of the California Constitution as an amendment to Proposition 215, an initiative known as the Compassionate Use Act.
2. If this Court grants review, whether trial counsel's assistance was ineffective for failing to move to suppress the evidence found in appellant's home and backyard.

FACTS AND PROCEDURE

The factual and procedural summary, found in the Court of Appeal's opinion in *People v. Kelly* (May 22, 2008, B201234, B195624) 163 Cal.App.4th 124, 77 Cal.Rptr.3d 390, is adequate for purposes of this answer. (*Id.*, at pp. 393-394.)

ARGUMENT

I.

REVIEW SHOULD NOT BE GRANTED BECAUSE THERE IS NO CONTROVERSY FOR THIS COURT TO DECIDE

A. *Kelly* Does Not Present This Court with an Important Question of Law to Settle.

California Rules of Court, rule 8.500(b)(1), provides that this Court may order review of a decision of the Court of Appeal “[w]hen necessary to settle an important question of law.” There is no need for this Court to review *People v. Kelly*, *supra*, 77 Cal.Rptr.3d at p. 390 because its finding that Health and Safety Code¹ section 11362.77 is unconstitutional was clearly reasoned from unassailable Supreme Court precedent. *Kelly* is in compliance with this Court’s decisions, leaving no question for this Court to decide.

¹All statutory references are to the Health and Safety Code.

B. Health and Safety Code Section 11362.77 Is Not Ambiguous.

The Legislature cannot amend an initiative, such as Proposition 215, where it prohibits amendment. (Cal. Const., art. II, § 10, subd. (c).) Consistent with this Court's analysis in *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, the Court of Appeal considered whether section 11362.77 impermissibly amended Proposition 215 and concluded incontrovertibly that it did so. (*People v. Kelly, supra*, 77 Cal.Rptr. at p. 398 ["It clearly does."].) It declared section 11362.77 unconstitutional. (*Id.*, at p. 400.)

This Court in *Amwest* has already rejected respondent's search for ambiguity as irrelevant in determining the constitutionality of a legislative enactment touching on the subject matter of an initiative. (*Amwest Surety Ins. Co. v. Wilson, supra*, 11 Cal.4th at p., 1260.) Respondent has once again attempted to introduce ambiguity here, where there is none, to subject section 11362.77 to interpretation, where none is called for.

This Court should not grant review here because the decision below was based on this Court's authority, which was correctly and logically applied. The Court of Appeal could not have arrived at any other result.

C. This Court Should Not Depublish *Kelly* Because the Legislature Has Not Yet Enacted Constitutional Limitations for the Medical Marijuana Program.

Section 11362.77 has been wielded as a sword to prosecute, whereas it was intended by the Legislature to be raised as a shield to protect those participating in the MMP from arrest. Unless *Kelly* remains California law until the Legislature reconsiders section 11362.77, there is no guarantee that qualified patients will no longer be impermissibly prosecuted under it. Expedience, as respondent contends, does not permit this Court to displace the Legislature in setting public policy. *Kelly* should not be depublished.

II.

IF THIS COURT GRANTS REVIEW, IT SHOULD REVIEW AS WELL THE COURT OF APPEAL'S FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS THE EVIDENCE FOUND IN APPELLANT'S HOME AND BACKYARD

If this Court grants review, it should also review the denial of appellant's claim of ineffective assistance of counsel. Appellant argued below that trial counsel was ineffective for failing to make a motion to suppress evidence, contending that there was insufficient evidence of probable cause to support the search warrant. This failure violated appellant's Sixth Amendment right to the effective assistance of counsel.

The Court of Appeal denied appellant's petition, resting its finding on one fact, namely, that Deputy Bartman "saw several marijuana plants growing in defendant's backyard," thereby failing to guarantee appellant's Fourth Amendment right against unreasonable searches and seizures. (Slip opn., at p. 16.) The Court of Appeal's one fact does not make "a totality

of the circumstances,” nor does the one fact support a fair probability since the enactment of the Compassionate Use Act in 1996 that evidence of a crime would be found in appellant’s home or backyard. (*Illinois v. Gates* (1982) 462 U.S. 213, 238 [affidavit shows probable cause if under totality of circumstances fair probability evidence of a crime will be found in particular place].)

Had trial counsel moved to suppress the evidence, putting all the relevant facts before the court, it is reasonably probable that the court would have granted the motion, excluded the evidence, and relieved appellant of the burden of defending himself in a criminal prosecution.

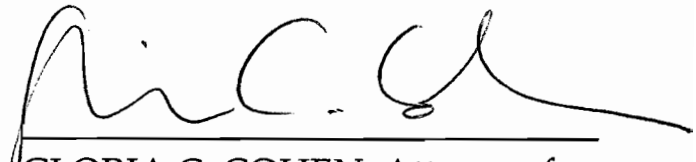
Trial counsel’s assistance was ineffective. If this Court grants review, it should find that trial counsel’s performance violated appellant’s Sixth Amendment rights.

CONCLUSION

For the foregoing reasons, appellant respectfully requests that review be denied and that *Kelly* not be depublished. If review is granted, appellant respectfully requests that this Court review the denial of his claim of ineffective assistance of counsel.

DATED: 7.14.08

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'G. C. Cohen', written over a horizontal line.

GLORIA C. COHEN, Attorney for
Appellant PATRICK K. KELLY

WORD-COUNT CERTIFICATION

As required by California Rules of Court, rule 8.60(b)(1), I
certify that this answer contains 1,038 words, as counted by
Microsoft Word version Office XP.

DATED: 7.14.08



GLORIA C. COHEN

CERTIFICATE OF SERVICE BY MAIL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

People v. Kelly, S164830

I declare that I am employed in the City of Oakland, County of Alameda, State of California. I am over the age of eighteen years and not a party to the within cause. My business address is P.O. Box 12302, Oakland, CA 94604-2312. On July 14, 2008, I served the within APPELLANT'S ANSWER on the interested parties in said cause, by placing a true copy thereof in a sealed envelope with postage there-on fully prepaid in the United States mail at Oakland, California, addressed as follows:

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Patrick K. Kelly

I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland, California, this 14th day of July 2008.


GLORIA C. COHEN