

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

v.

PATRICK K. KELLY,

S164830

Defendant and Appellant,

SUPREME COURT  
**FILED**

In re

NOV 13 2008

PATRICK K. KELLY,

Frederick K. Ohlrich Clerk

On Habeas Corpus.

Deputy

Second Appellate District, No. B195624  
Los Angeles County Superior Court No. VA092724  
The Honorable Michael L. Schuur, Judge

**DEFENDANT'S ANSWER BRIEF ON THE MERITS**

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Defendant and Appellant,

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**ISSUES**

The grant of review in this case was limited to the following issues:

1. Does Health & Safety Code section 11362.77 violate the California Constitution by amending the Compassionate Use Act without voter approval?
2. If so, are there alternative remedies to invalidating section 11362.77 in its entirety?

## STATEMENT OF THE CASE

The Defendant accepts the Statement of the Case contained in the Opening Brief on the Merits of the Respondent.

## SUMMARY OF ARGUMENT

By inadvertently placing quantitative limits on the amount of medical cannabis a patient seeking the protection of the Compassionate Use Act may possess, Section 11362.77 of the 2003 Medical Marijuana Program violated the California constitutional prohibition of legislative amendment of an initiative measure. The primary purpose of the quantitative limits, however, to define the quantity of medical marijuana which can be possessed by persons with identification cards issued to implement immunity from arrest, is not unconstitutional. Since Section 11362.77 is only unconstitutional *as applied*, its continued use in circumstances in which it is constitutional is not in jeopardy, and no severance is necessary. The severance clause contained in Health & Safety Code section 11362.82 is not applicable to a holding that a portion of the statute is unconstitutional as applied. Even if the severance clause is deemed applicable, however, partial severance or judicial reform of the statute should be utilized.

## ARGUMENT

### 1. CALIFORNIA HEALTH AND SAFETY CODE SECTION 11362.77, WHEN APPLIED TO A DEFENDANT ASSERTING AN AFFIRMATIVE DEFENSE AT TRIAL, VIOLATES THE CALIFORNIA CONSTITUTION BY AMENDING THE COMPASSIONATE USE ACT WITHOUT VOTER APPROVAL.

The Defendant agrees with the decision of the Court of Appeal in this case, as well as the position of the Respondent, that California Health and Safety Code Section 11362.77, *when applied to a defendant asserting an affirmative defense at trial*, violates the California Constitution by amending the Compassionate Use Act without voter approval. The Compassionate Use Act [CUA] did not impose any quantitative limits on the amount of medicinal cannabis a patient or primary caregiver could possess. Calif. H. & S. Code §11362.5. The only limitation imposed by the CUA is that the quantity possessed “should be reasonably related to the patient’s current medical needs.” *People v. Trippet* (1997) 56 Cal.App.4<sup>th</sup> 1532, 1549. When the legislature enacted the Medical Marijuana Program [MMP] in 2003, the quantitative limits it created in Calif. H. & S. Code §11362.77<sup>1</sup> were applied

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<sup>1</sup> Calif. H. & S. Code §11362.77 provides:

to both “qualified patients” and to “a person holding a valid identification card.” A “qualified patient” is defined as “a person who is entitled to the protections of [the CUA], but who does not have an identification card issued pursuant to this article.” Calif. H. & S. Code §11362.7(f). A “person with an identification card” is defined as “an individual who has applied for and received a valid identification card pursuant to this article.” Calif. H. & S. Code §11362.7(c).

As applied to “qualified patients,” Section 11362.77 violates Article II, Section 10, subdivision (c) of the California Constitution, which prohibits the legislature from amending an initiative measure unless the measure itself authorizes legislative amendment. *People v. Cooper* (2002) 27 Cal.4<sup>th</sup> 38, 44. The CUA, which was enacted by an initiative measure known as Proposition 215 in 1996, does not contain any authorization for legislative amendment. Calif. H. & S. Code §11362.5.

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(a) A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per patient.

(b) If a qualified patient or primary caregiver has a doctor’s recommendation that this quantity does not meet the qualified patient’s medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient’s needs.

...

(f) A qualified patient or a person holding a valid identification card, or the designated primary caregiver of that qualified patient or person, may possess amounts of marijuana consistent with this article.

An amendment is “any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form . . . . A statute which adds to or takes away from an existing statute is considered an amendment.” *Knight v. Superior Court* (2005) 128 Cal. App. 4<sup>th</sup> 14, 22. Whether an act amends existing law is determined “by an examination and comparison of its provisions with existing law. If its aim is to clarify or correct uncertainties which arose from the enforcement of the existing law, or to reach situations which were not covered by the original statute, the act is amendatory, *even though in its wording* it does not purport to amend the language of the prior act.” (Italics in original.) *Franchise Tax Bd. v. Cory* (1978) 80 Cal. App. 3d 772, 777.

The Court of Appeal in this case was clearly correct in concluding that clarifying the limits of the “reasonable” amount of medicinal cannabis a qualified patient could possess pursuant to the CUA was amendatory. *California Lab Federation v. Occupational Safety & Health Standards Bd.* (1992) 5 Cal. App. 4<sup>th</sup> 985. Unfortunately, however, the Court of Appeal neglected to address the question whether the offending amendatory statute

was facially unconstitutional, or whether it was only unconstitutional *as applied*.

As Justice Antonin Scalia of the United States Supreme Court famously observed:

Statutes are ordinarily challenged, and their constitutionality evaluated, "as applied" -- that is, the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional. The practical effect of holding a statute unconstitutional "as applied" is to prevent its future application in a similar context, but not to render it utterly inoperative. To achieve the latter result, the plaintiff must succeed in challenging the statute "on its face." Our traditional rule has been, however, that a facial challenge must be rejected unless there exists *no set of circumstances* in which the statute can constitutionally be applied. See, e. g., *United States v. Salerno* (1987) 481 U.S. 739, 745 (Bail Reform Act of 1984 not facially unconstitutional). "Courts are not," we have said, "roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 610-611."

*Ada v. Guam Soc. of Obstetricians* (1992) 506 U.S. 1011 (Scalia, J., dissenting from denial of *certiorari*).

The law regarding facial unconstitutionality is the same under the California Constitution. *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168. The plaintiff in *Pacific Legal Foundation* contended that a statute regulating labor relations between the state and its employees conflicted on its face with the merit provisions of the civil service system in the state Constitution. This Court stated that the statute's challengers bore a "heavy burden in attempting to demonstrate that [the statute] is unconstitutional on its face[,]" and that "[i]n evaluating petitioners' contentions we must bear in mind that petitioners' instant challenge pertains to the constitutionality of the statute *on its face*. To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute, or as to particular terms of employment to which employees and employer may possibly agree. Rather, petitioners must

demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." 29 Cal.3d at 180-81; see also *Tobe v. City of Santa Ana* (1995) 9 Cal.4<sup>th</sup> 1069, 1084; *Williams v. Garcetti* (1993) 5 Cal.4<sup>th</sup> 561, 577; *People v. Mitchell* (1994) 30 Cal.App. 4<sup>th</sup> 783, 802 [quoting *Williams*]; *People v. Rodriguez* (1998) 66 Cal.App. 4<sup>th</sup> 157, 166-68. Thus the general rule is that a statute must be incapable of constitutional application in any circumstance in order for it to be found facially invalid. California Health and Safety Code Section 11362.77 cannot be found facially unconstitutional, because its application to define immunity from arrest for patients holding valid identification cards is constitutional.

**2. CALIFORNIA HEALTH AND SAFETY CODE SECTION  
11362.77, WHEN APPLIED TO A PERSON HOLDING A  
VALID IDENTIFICATION CARD ASSERTING  
IMMUNITY FROM ARREST, DOES NOT VIOLATE THE  
CALIFORNIA CONSTITUTION BY AMENDING THE  
COMPASSIONATE USE ACT WITHOUT VOTER  
APPROVAL.**

The principal purpose of the MMP was to create a voluntary identification card program that would afford patients who conformed to its requirements immunity from arrest. California Health and Safety Code Section 11362.71(e) provides:

No person or designated primary caregiver in possession of a valid identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana *in an amount established pursuant to this article*, unless there is reasonable cause to believe that the information contained in the card is false or falsified, the card has been obtained by fraud, or the person is otherwise in violation of the provisions of the article. (Emphasis supplied).

Thus, the amounts established in Section 11362.77 serve the separate and completely independent purpose of defining the quantities which may be possessed by a person holding a valid identification card who asserts immunity from arrest pursuant to Section 11362.71(e). When used for this purpose, Section 11362.77 does not violate the California Constitution by amending the CUA without voter approval. The CUA does not provide for immunity from arrest at all.

In *People v. Mower* (2002) 28 Cal.4<sup>th</sup> 457, 469, this Court declared:

Plainly, section 11362.5(d) does not expressly grant immunity from arrest. Neither can section 11362.5(d) reasonably be read to grant immunity from arrest by implication. As the proponents of Proposition 215 declared in their rebuttal to the argument of the measure's opponents: "Police officers can still arrest anyone for marijuana offenses." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) rebuttal to argument against Prop. 215, p. 61.) Even when law enforcement officers believe that a person who "possesses or cultivates marijuana" is a "patient" or "primary caregiver" acting on the "recommendation or approval of a physician," they may--as in this case--have reason to believe that person does not possess or cultivate the substance "for the personal medical purposes of the patient" (§11362.5(d)).

Thus, we conclude that section 11362.5(d) does not grant any immunity from arrest, and certainly no immunity that would require reversal of a conviction because of any alleged failure on the part of law enforcement officers to conduct an adequate investigation prior to arrest.

In conferring immunity from arrest for voluntary participants in the identification card program, the legislature was not changing the scope or effect of the CUA. It was creating an entirely new program of protection for medicinal marijuana patients. Thus, for this purpose, the legislature was not amending the CUA at all.

In *County of San Diego v. San Diego NORML* (2008) 165 Cal.App. 4<sup>th</sup> 798, 830, the court recently concluded that the MMP's identification card system of immunity from arrest "is a discrete set of laws designed to confer distinct protections under California law that the CUA does *not* provide without limiting the protections the CUA *does* provide." Thus, the Court concluded, the identification card provisions, along with their quantitative limitation, are not an amendment of the CUA and do not violate article II, section 10 of the California Constitution.

**3. THE SEVERANCE CLAUSE CONTAINED IN  
CALIFORNIA HEALTH AND SAFETY CODE SECTION  
11362.82 HAS NO APPLICATION TO PORTIONS OF THE  
MEDICAL MARIJUANA PROGRAM THAT ARE  
UNCONSTITUTIONAL AS APPLIED.**

Surprisingly, this Court has only addressed the effect of a severance clause upon a portion of a statute that is found to be unconstitutional as applied on one occasion. Logic would suggest that the severance clause would be irrelevant, because it is unnecessary. A ruling that a portion of the statute was unconstitutional as applied would merely prevent its application in future cases where the same circumstances were presented. The ruling would not operate to prevent application of the same portion of the statute in different circumstances that were not unconstitutional. The severance clause is presented as an issue only if a portion of a statute is found to be facially unconstitutional.

In *Walnut Creek Manor v. Fair Employment and Housing Com.* (1991) 54 Cal.3d 245, this Court addressed the constitutionality of a statute authorizing the FEHC to award actual damages, and found that allowing an executive agency to award compensatory damages violated the

constitutional separation of powers by conferring judicial power on an executive agency. Allowing an agency to order reimbursement of out-of-pocket expenditures, however, was not unconstitutional. The Court held:

Although the statutory phrase "actual damages" is indivisible, it embodies a dual concept: that of nonquantifiable compensatory damages and that of pecuniarily measurable out-of-pocket expenditures; together these two types of damages make up "actual damages" (See *Oleck, supra*, § 12, at pp. 22-23.) The statute thus is one where a single section contains language susceptible of applications, part of which -- i.e., the award of general compensatory damages -- is invalid. (See 2 Sutherland, *Statutory Construction* (4th ed. 1986) § 44.18, p. 533.) In such a case, "the statute should be upheld if, after deletion of the invalid [application], a workable statute remains." (*Ibid.*) This type of severability, Sutherland explains, is permissible in jurisdictions which permit limitation of an entire act to its valid applications. "If a court will limit an entire act to its valid applications, a fortiori it will limit a small part of the statute to its valid applications. [Fn. omitted.]" (*Id.* at p. 534.) California is such a jurisdiction. (E.g., *Welton v. City of Los Angeles* (1976) 18 Cal.3d

497, 505-506; see *San Francisco Unified School Dist. v. Johnson*

(1971) 3 Cal.3d 937, 955-956. )

The FEHC statute considered in *Walnut Creek* did have a severance clause, which provided:

If any clause, sentence, paragraph, or part of this part relating to discrimination in employment *or the application thereof to any person or circumstance*, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this part *and the application thereof to other persons or circumstances*, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered *and to the person or circumstances involved*. (Emphasis supplied).

Noting that this clause was limited to employment cases, and thus did not directly apply to the housing discrimination case before the Court, the Court nonetheless concluded the same result was compelled whether the clause

applied or not. The valid operation of the statute could continue to operate despite the invalidity of the application that was struck down.

Every other case in which this Court has considered the applicability of a severance clause has presented a situation in which the questioned portion of the statute was found facially unconstitutional. It is interesting to note, however, that all of the cases involved broader severance clauses than Calif. H. & S. Code §11362.82, which *included* unconstitutionality based upon applicability. Section 11362.82 by its terms applies if “any section, subdivision, sentence, clause, phrase, or portion of this article is for any reason held invalid or unconstitutional . . . .” The severance clause does not even address situations where an *application* of the statute to a particular person or situation is held invalid or unconstitutional. Nor does the statute call for an evaluation of whether remaining portions of the statute can be given effect without the invalid portion, but simply declares the remaining portion shall not be affected by the holding of unconstitutionality of the portion. The severance clause considered in *Calfarm Insurance v.*

*Deukmejian* (1989) 48 Cal.3d 805, 821, on the other hand, provided:

If any provision of this act *or the application thereof to any person or circumstances* is held invalid, that invalidity shall not affect other provisions or applications of the act which can be given effect without

the invalid portion *or application*, and to that end the provisions of this act are severable. (Emphasis supplied).

This Court in *Calfarm* determined the offending provision was facially invalid under the due process clause of the state and federal constitution, but concluded it was severable.

Similarly, the severance clause in Proposition 21, the initiative measure before the Court in *Santa Barbara School Dist. v. Superior Court* (1975) 13 Cal.3d 315, 331, provided:

If any provision of this act *or the application thereof to any person or circumstances* is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision *or application*, and to this end the provisions of this act are severable. (Emphasis supplied).

This Court concluded that the offending provisions of the initiative, which were facially unconstitutional, were severable from the remainder of the measure.

Similarly, the severance clause in *Leaming v. Municipal Court* (1974) 12 Cal.3d 813, 817, provided:

If any provision of this act *or the application thereof to any person or circumstances* is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision *or application*, and to this end the provisions of this act are severable. (Emphasis supplied).

This Court in *Leaming* concluded that the facial unconstitutionality of the recidivist penalty for indecent exposure as cruel and unusual punishment did not affect the validity of the penalty for the underlying offense of indecent exposure itself.

The ordinance construed in *Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, which prohibited off-site billboards, contained a severance clause which was not quoted in the opinion. In any event, the ordinance had previously been held to be *facially* unconstitutional by the U.S. Supreme Court, and this Court declined to reformulate it to apply only to commercial billboards.

This Court need only hold that the severance clause in this case, Section 11362.82, has no application to a portion of the statute in question that is found to be unconstitutional as applied. Severance need only be addressed if a portion of the statute is declared facially unconstitutional. If

the offending portion can continue to be applied in other circumstances in a constitutional manner, it may be so applied.

If a severance clause *by its terms* addresses a holding that the application of the statute to a person or circumstance is unconstitutional, a court may have to address whether a determination that a portion of a statute is unconstitutional as applied requires a determination that the statute of which it is a part is rendered unconstitutional as a whole. It is hard to imagine a setting in which a court would invalidate an entire enactment because a portion is unconstitutional as applied. In any event, this Court has never done so. Although it has frequently been presented with severance clauses that refer to holdings that a portion of a statute is unconstitutional as applied, in every such case except *Walnut Creek* the defect in the statute involved facial unconstitutionality.

Here, we have a severance clause that does *not* include a holding that the *application* of portion of a statute is unconstitutional, and a holding that a portion of the statute in question is unconstitutional *as applied*. It should lead to the conclusion that severance need not be addressed. The statute, including the offending provision, can continue to be applied to other circumstances in which it is not unconstitutional whether the severance clause is applied or not.

**4. CALIFORNIA HEALTH AND SAFETY CODE SECTION  
11362.77 SHOULD BE PARTIALLY SEVERED OR  
JUDICIALLY REFORMED TO COMPLY WITH  
LEGISLATIVE INTENT.**

In the event this Court concludes that the severance clause contained in Calif. H. & S. Code §11362.82 requires severance of the application of the statute that has been deemed unconstitutional, traditional principles of severance can be applied to mechanically sever the offending language, leaving the remainder intact to be applied to cases in which a claim of immunity from arrest is being asserted. In this regard, the Defendant is in complete agreement with the Opening Brief of the Respondent Attorney General, pp. 15-21.

In the event this Court concludes that mechanical severance is not possible, the Court should exercise its discretionary power to reform the statute. In this regard, the Defendant is also in complete agreement with the Opening Brief of the Respondent Attorney General, pp. 23-30.

Either course would implement the clear intention of the legislature. In drafting the Medical Marijuana Program, the intent to have the quantitative

limits applied only to voluntary participants in the identification card program seeking immunity from arrest was clearly stated:

Nothing in this Act shall amend or change Proposition 215, nor prevent patients from providing a defense under Proposition 215 for their possession or cultivation of amounts of marijuana exceeding the limits in this article, whether or not they qualify for the exceptions in Section 11362.77(b) or (c). The limits set forth in Section 11362.77(a) only serve to provide immunity from arrest for patients taking part in the voluntary ID card program, they do not change Section 11362.5 (Proposition 215), which limits a patient's possession or cultivation of marijuana to that needed for 'personal medical purposes.'

Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 420 (2003–2004 Reg. Sess.) as amended Sept. 9, 2003, pp. 6–7.)

It appears that the inclusion of all “qualified patients” in the quantitative limitations was an inadvertent drafting error. In 2004, Senator John Vasconcellos, who authored the MMP, authored and introduced Senate Bill No. 1494 (2003–2004 Reg. Sess.). Senate Bill No. 1494 would have

amended section 11362.77 by, among other things, deleting quantitative limits for qualified patients, and limited them to persons with an identification card.

In introducing Senate Bill No. 1494, Senator Vasconcellos acknowledged the drafting error when he said:

[Senate Bill No. 1494] is a clean-up bill ... intended to correct a drafting error in my medical marijuana bill signed into law last year. ... [The MMP's] language may be problematic because it states that all qualified patients (with or without identification cards) are subject to guidelines provided in [the] statute. Despite intent language in our bill stating that the program is intended to be voluntary, many advocates argued that it amends the initiative by making the guidelines mandatory—therefore making it unconstitutional. In order to avoid any legal challenges, it is important to make a distinction between “qualified patient” (which applies to all patients) and “persons with identification cards”.

(Assem. Com. on Pub. Safety, com. on Sen. Bill No. 1494 (2003–2004 Reg. Sess.) as amended Mar. 22, 2004, p. 3; see also Sen. Health & Human Services Com., Analysis of Sen. Bill No. 1494 (2003–2004 Reg. Sess.) as amended Mar. 22, 2004, p. 3 [the change effected by the MMP “could be

viewed as an unlawful amendment to Proposition 215, an initiative that did not provide a mechanism for amendments”].)

Although S.B. 1494 was enacted by the legislature, Governor Schwarzenegger vetoed the bill, citing a concern that the bill removed “[r]easonable and established quantity guidelines.” (Governor Arnold Schwarzenegger, letter to the Members of the Cal. State Sen. re Sen. Bill No. 1494, July 19, 2004.) There can be little doubt that, despite the unconstitutionality of applying the quantitative guidelines to all qualified patients, the application of these quantity guidelines to voluntary participants in the identification card system established by the MMP would fully accord with both the legislative intent and the intent of the Governor.

## CONCLUSION

For the foregoing reasons, this Court should affirm the reversal of Respondent's conviction, and hold that while California Health and Safety Code Section 11362.77 is unconstitutional as applied to qualified patients asserting an affirmative defense under the CUA, the statute can continue to be applied to define quantitative limits for patients with valid identification cards claiming immunity from arrest.

Dated: November 10, 2008

Respectfully Submitted,



GERALD F. UELMEN

Attorney for Defendant

### **CERTIFICATE OF COMPLIANCE**

I certify that the attached DEFENDANT'S ANSWER BRIEF ON THE MERITS uses a 14-point Times New Roman font and contains 3,934 words.

Dated: November 10, 2008

Respectfully submitted,



GERALD F. UELMEN

Attorney for Defendant

**DECLARATION OF SERVICE BY U.S. MAIL**

**People v. Patrick K. Kelly, No. S164830**

I, Gerald F. Uelmen, declare that I am a member of the State Bar of California, I am 18 years of age, and I am not a party to this matter. On November 12, 2008, I served the attached DEFENDANT'S ANSWER BRIEF ON THE MERITS by placing a true copy thereof enclosed in a sealed envelope with the postage thereon fully prepaid in the United State Mail at San Jose, California, addressed as follows:

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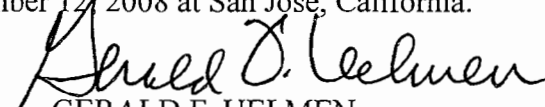
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I declare under penalty of perjury under the laws of California the foregoing is true and correct, and that this declaration was executed on November 12, 2008 at San Jose, California.

  
GERALD F. UELMEN