

Supreme Court Copy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

PATRICK K. KELLY,
Defendant and Appellant,

S164830

In re

PATRICK K. KELLY,
On Habeas Corpus.

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

RESPONDENT'S OPENING BRIEF ON THE MERITS

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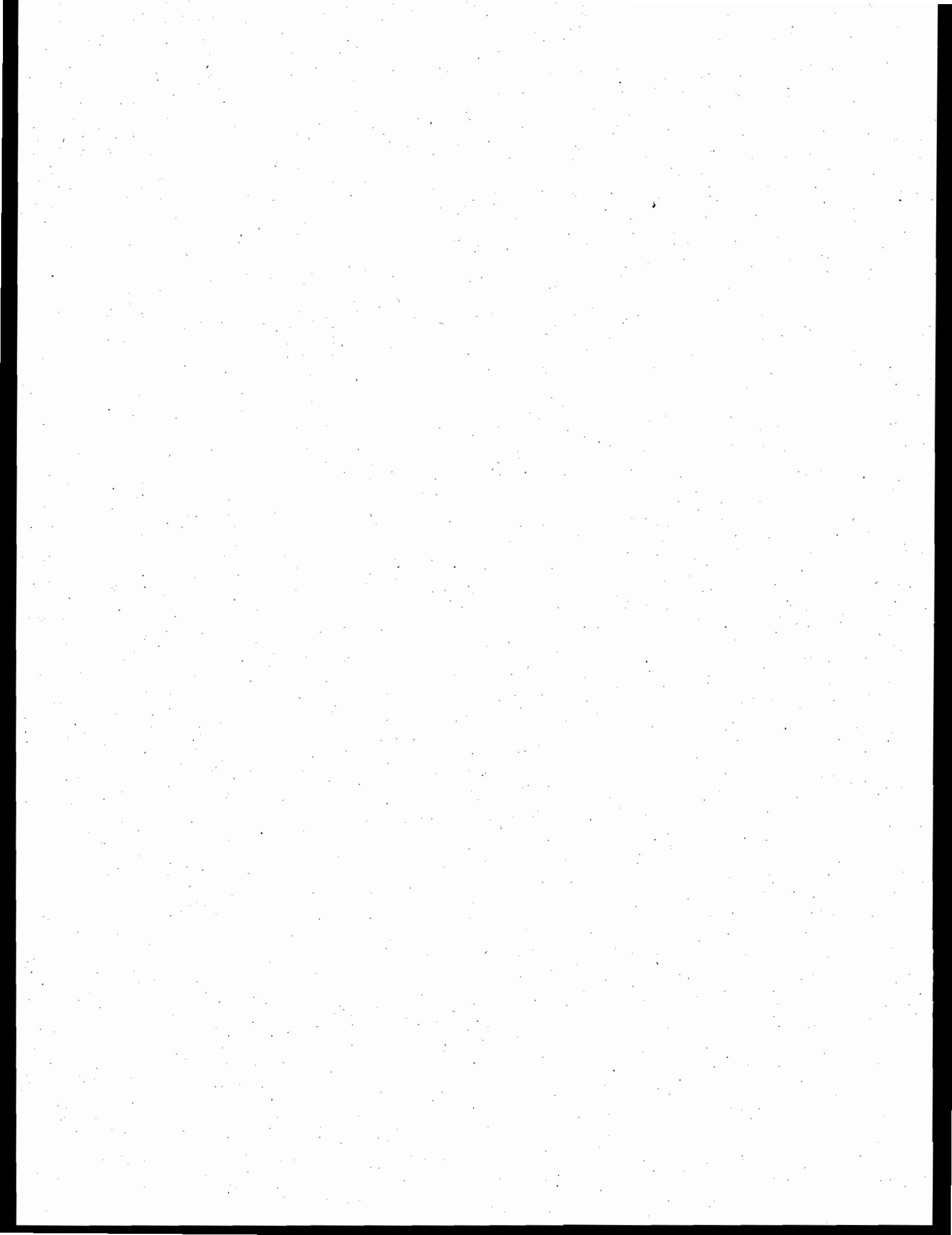
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In re

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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

Police obtained a warrant and searched appellant Patrick Kelly's home based on a tip that he was cultivating marijuana. (RT 119-121; Pet.^{1/}, Exh. A.) In appellant's backyard, they found seven marijuana plants growing in pots attached to a security system. In the house, police discovered several vacuum-

1. Considered concurrently with Kelly's appeal was a petition for writ of habeas corpus (Pet.), which the Court of Appeal denied.

sealed baggies containing a total of 12 ounces of dried marijuana. In addition, appellant had a scale and a loaded handgun in his bedroom. Also found in appellant's bedroom was a physician's recommendation that appellant use marijuana for medical purposes. A copy of the physician's recommendation was taped to appellant's garage, adjacent to where the marijuana plants were growing. (RT 121-127, 143-144, 148.)

Appellant was charged with possession of marijuana for sale (Health & Saf. Code, § 11359) and cultivation of marijuana (Health & Saf. Code, § 11358). (CT 30-32.) At trial, he presented a medical-use defense under the Compassionate Use Act (CUA; Health & Saf. Code, § 11362.5) based on his physician's general recommendation that he use marijuana and on the testimony of an expert witness opining that the marijuana and other evidence found at appellant's home was inconsistent with sale and consistent with personal medical use. (RT 71-118, 152-168, 175-187.) The trial court permitted the prosecution to elicit evidence (RT 104-106, 186-187), and to argue to the jury (RT 210-212, 216, 230-234), that Health and Safety Code section 11362.77 limited appellant's defense under the CUA by capping the amount of medical marijuana a patient may lawfully possess at eight ounces of dried marijuana and six immature or 12 mature plants unless a doctor specifically recommends more. (See Supp. CT 1-51; RT 4-32, 170-171.) The court did not instruct the jury in those terms, but instead instructed on the compassionate use defense according to CALCRIM No. 2370, which states that "[t]he amount of marijuana possessed or cultivated must be reasonably related to the patient's current medical needs." (1RT 207; CT 58.)

The jury found appellant guilty of possession of less than 28.5 grams of marijuana (§ 11357, subd. (c)) – a lesser-included offense of possession of marijuana for sale (§ 11359) – and of cultivation of marijuana (§ 11358). (CT 61-62, 65-66.)

On appeal, appellant argued that the prosecutor should not have been permitted to present to the jury the contention that section 11362.77 limited his CUA defense. Appellant claimed that the section, passed by the Legislature as part of the Medical Marijuana Program Act (“MMP”), amounted to an unconstitutional amendment of the voter-enacted CUA, in violation of article II, section 10, subdivision (c), of the California Constitution. (AOB 13-33.) The Second District Court of Appeal agreed. The court reasoned that an initiative measure may not be amended by the Legislature, that an amendment includes “any change of the scope or effect” of an initiative and any attempt to clarify an initiative, and that the quantity limits of section 11362.77 constituted an amendment to clarify the reasonableness standard of the CUA. The court noted that “[s]ection 11362.77 imposes a numeric cap where the CUA imposed none,” that, “[i]n other words, section 11362, subdivision (a), has clarified what is a reasonable amount for a patient’s personal medical use,” and that “clarifying the limits of ‘reasonableness’ is amendatory.” As a result, the court concluded, section 11362.77 “must be severed from the MMP.” (*People v. Kelly* (2008) 77 Cal.Rptr.3d 390, 395-401.) The Court of Appeal did not consider alternative remedies to striking section 11362.77 in its entirety.

SUMMARY OF ARGUMENT

The Court of Appeal erred by beginning and ending its analysis with a finding that section 11362.77 is unconstitutional as it applies to limit the CUA’s in-court defense and by failing to consider less drastic alternative remedies to complete severance of section 11362.77.

Respondent does not contest the Court of Appeal’s conclusion that section 11362.77 is unconstitutionally amendatory insofar as it limits an in-court CUA defense. But the Court of Appeal failed to recognize that section 11362.77 has a second, constitutional application to the MMP’s identification

card program. Application of section 11362.77's limits to the identification card program is not an unconstitutional amendment of the CUA, because the identification card program is a stand-alone system offering protection against arrest that does not affect the CUA's in-court defenses.

The identification card program is the central feature of the MMP. Section 11362.77 is, in turn, the key to the operability of the identification card program's arrest immunity because it provides a needed bright line for both law enforcement and patients. By invalidating section 11362.77 in its entirety, the Court of Appeal rendered the identification card program ineffective. The Court of Appeal should have made an effort to preserve those limits in their constitutional application by considering alternatives to complete severance.

The Court of Appeal should have, for example, severed only the portions of section 11362.77 tying the possession limits to the CUA. Alternatively, without severing any particular language from the statute, the Court of Appeal could have disapproved only the unconstitutional application of section 11362.77, preserving its constitutional application to the MMP's identification card program.

Another alternative to the Court of Appeal's total invalidation of section 11362.77 is judicial reformation. Should this Court find severance inappropriate, the Court should judicially reform section 11362.77 so that its possession limits apply only to the MMP. The Legislature's preference that the identification card program be preserved rather than section 11362.77 wholly invalidated is beyond question. Reformation would give effect to that legislative preference and save the MMP's identification card program in a form that is constitutionally viable and practically workable.

ARGUMENT

TO PRESERVE THE MMP'S CONSTITUTIONAL IDENTIFICATION CARD PROGRAM, SECTION 11362.77 SHOULD BE SEVERED ONLY IN PART, OR SHOULD BE JUDICIALLY REFORMED

Section 11362.77 serves two functions: it sets a bright-line possession limit for MMP cardholders seeking to avoid arrest, and it applies as a numeric standard in the context of an in-court CUA defense. Application of section 11362.77's limits to the identification card program is constitutional because it compliments, rather than amends, the CUA. That is, it does not abrogate the CUA's in-court defenses, but establishes a free-standing and separate protection against arrest. On the other hand, application of section 11362.77's limits to the in-court CUA defense exceeds the boundaries of legislative power under article II, section 10, subdivision (c), of the California Constitution by replacing the CUA's "reasonableness" standard with specified, numeric guidelines.

By severing section 11362.77 completely from the MMP, the Court of Appeal went too far, effectively nullifying the identification card program. The Court of Appeal should have instead severed only the unconstitutional portion or application of section 11362.77. Alternatively, this Court should judicially reform the statute to conform to the Legislature's clearly expressed intent that the possession limits apply only to the identification card program.

A. Relevant Provisions Of Law

1. The Compassionate Use Act

The Compassionate Use Act was approved by California voters as Proposition 215 on the November 5, 1996, ballot. It is codified at Health and Safety Code section 11362.5. Subdivision (d) of that section provides:

Section 11357, relating to the possession of marijuana, and Section

11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

(§ 11362.5.) The first published decision to consider the CUA observed that Proposition 215 did not amount to a marijuana-law "open sesame." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1546.) Finding that the ballot arguments were "simply inconsistent with the proposition that either the patient or the primary caregiver may accumulate indefinite quantities of the drug," the Court of Appeal in *Trippet* concluded that "the quantity possessed by the patient or the primary caregiver, and the form and manner in which it is possessed, should be reasonably related to the patient's current medical needs." (*Id.* at p. 1549.) That interpretation of the CUA has since been followed. (See, e.g., *People v. Frazier* (2005) 128 Cal.App.4th 807, 824-825; CALCRIM No. 2370.)

In *People v. Mower* (2002) 28 Cal.4th 457, this Court explained that the CUA provides "limited immunity" against liability for possession or cultivation of marijuana by establishing a right to raise an affirmative medical-use defense in court. The CUA, this Court also held, does not provide immunity from arrest. (*Id.* at pp. 467-476.)

2. The Medical Marijuana Program Act

In 2003, the Legislature passed the Medical Marijuana Program Act, adding 20 new sections to the Health and Safety Code effective January 1, 2004. (See §§ 11362.7-11362.83.) One of the purposes of the MMP was to "[c]larify the scope of the application of the [CUA] and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and

provide needed guidance to law enforcement officers.” (*People v. Wright* (2004) 40 Cal.4th 81, 93, second alteration added, quoting Stats. 2003, ch. 875, § 1, subd. (b)(1).)

The heart of the MMP is a voluntary program under which medical marijuana patients and primary caregivers may apply for an identification card to protect them against arrest for violations of state marijuana laws. (See §§ 11362.71-11362.76, 11362.78, 11362.81.)^{2/} The identification card program serves the important function of shielding legitimate medical marijuana users from government intrusion and, at the same time, aiding law enforcement officers in identifying those legitimate medical marijuana users.

The MMP’s arrest-immunity provision is expressly conditioned on quantity limits. (§ 11362.71, subd. (e).) Those limits are found in section 11362.77:

(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

2. The MMP also, for example, recognized for the first time in California a limited right of patients and caregivers to collectively or cooperatively cultivate marijuana for medical purposes. (§ 11362.775.) In addition, the MMP granted protection against criminal liability for several offenses not covered by the CUA, such as the transportation or processing of marijuana by medical marijuana patients and primary caregivers, and their assistants. (§ 11362.765.) Those provisions are not at issue here.

card, or the designated primary caregiver of that qualified patient or person, may possess amounts of marijuana consistent with this article. (§ 11362.77, subs. (a), (b), (f).)^{3/} The limits are vital to the functioning of the identification card program because they offer peace officers a uniform enforcement standard and patients predictable protection against arrest. Without the limits, there would be little incentive for patients to volunteer for the program.

Even without volunteering for the identification card program, medical marijuana patients remain fully entitled to an in-court defense under the CUA. The MMP makes this unambiguously clear, stating that the program is for “qualified patients who . . . voluntarily apply” and that “[i]t shall not be necessary for a person to obtain an identification card in order to claim the protections of Section 11362.5.” (§ 11362.71, subs. (a)(1), (f).)

3. Article II, Section 10, Of The California Constitution

Under article II, section 10, subdivision (c), of the California Constitution, the Legislature is prohibited from amending an initiative measure, unless the initiative measure itself authorizes legislative amendment. (*People v. Cooper* (2002) 27 Cal.4th 38, 44.) Proposition 215 did not contain any such authorization.

Legislation is unconstitutionally amendatory under article II, section 10, subdivision (c), if it is “designed to change an existing initiative statute by adding or taking from it some particular provision.” (*People v. Cooper, supra*, 27 Cal.4th at p. 44; *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1484-1485.) “An ‘amendment’ is any change of

3. The MMP allows counties and cities to enact guidelines permitting qualified patients and primary caregivers to exceed these limits. (§ 11362.77, subd. (c).) Los Angeles County does not have such local guidelines.

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.4th 14, 22; see also *Franchise Tax Bd. v. Cory* (1978) 80 Cal.App.3d 772, 776.) “The purpose of California’s constitutional limitation on the Legislature’s power to amend initiative statutes is to protect the people’s initiative powers by precluding the Legislature from undoing what the people have done, without the electorate’s consent.” (*Proposition 103 Enforcement Project v. Quackenbush, supra*, 64 Cal.App.4th at p. 1484, quotation marks and citation omitted.)

The Legislature, however, is not prohibited from enacting laws addressing the general subject matter of an initiative. The Legislature may amend existing law “in ways that do not conflict with the provisions of the initiative measure.” (*Mobilepark W. Homeowners Ass’n v. Escondido Mobilepark W.* (1995) 35 Cal.App.4th 32, 41, analyzing *DeVita v. County of Napa* (1995) 9 Cal.4th 763.) Legislation addressed to a “related but distinct area” is permissible (*Mobilepark W. Homeowners Ass’n v. Escondido Mobilepark W., supra*, 35 Cal.App.4th at p. 43, citing *California Chiropractic Assn. v. Board of Administration* (1974) 40 Cal.App.3d 701, 704; see also *Knight v. Superior Court, supra*, 128 Cal.App.4th 14, 22-25), as is legislation relating to matters that the initiative “does not specifically authorize or prohibit” (*People v. Cooper, supra*, 27 Cal.4th at p. 47).

B. Section 11362.77 Is Constitutional In Part And Unconstitutional In Part

Application of section 11362.77 to the MMP's identification card program is constitutional. The Court of Appeal, however, focused only on section 11362.77's application to the in-court medical-use defense established by the CUA, which is unconstitutionally amendatory under article II, section 10, subdivision (c), of the California Constitution. The Court of Appeal's failure to recognize both applications caused it to invoke the wrong remedy. The Court of Appeal's decision to invalidate section 11362.77 in its entirety was unnecessary, and the consequent nullification of the identification card program was unwarranted.

1. As Applied To The MMP's Identification Card Program, Section 11362.77 Does Not Unconstitutionally Amend The CUA

Section 11362.77 should be construed as constitutional to the extent possible. (See *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 231, fn. 9 ["It is a cornerstone of constitutional adjudication that courts interpret statutes, wherever possible, so as to preserve their constitutionality."]; *California Housing Finance Agency v. Patitucci* (1978) 22 Cal.3d 171, 175 ["a strong presumption of constitutionality supports the Legislature's acts."] Application of section 11362.77 to the MMP's identification card program is constitutional under article II, section 10, because the program is a separate, stand-alone system from the CUA.

The MMP makes clear that medical marijuana identification cards protect against arrest only: "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" (§ 11362.71, subd. (e).) The MMP also makes clear that this arrest protection is separate

from the in-court defenses established by the CUA, which are fully retained by medical marijuana users irrespective of participation in the identification card program: “It shall not be necessary for a person to obtain an identification card in order to claim the protections of Section 11362.5.” (§ 11362.71, subds. (f); see also Stats. 2003, ch. 875, § 1, subd. (d)(2) [“the identification system established pursuant to this act must be wholly voluntary, and a patient entitled to the protections of Section 11362.5 of the Health and Safety Code need not possess an identification card in order to claim the protections afforded by that section.”].)

Neither the language of Proposition 215, nor the ballot materials submitted to voters, can be construed to prohibit the Legislature from passing laws on the general subject of, or even regulating, medical marijuana. (Health & Saf. Code, § 11362.5; see <http://vote96.sos.ca.gov/Vote96/html/BP/215.htm> [Proposition 215 ballot materials]; *Knight v. Superior Court*, *supra*, 128 Cal.App.4th 14, 18 [relying on text of proposition and ballot materials in finding legislation non-amendatory in part on ground that initiative did not evince intent to repeal existing law or limit Legislature’s authority with respect to existing law].) To the contrary, the codified portion of Proposition 215 states that one of the purposes of the initiative was “[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).) The MMP’s arrest-protection provisions are consistent with this mandate. They merely address the general subject matter of Proposition 215 – medical marijuana – and they leave the CUA itself intact. In other words, they do not “undo” what the voters enacted through Proposition 215. (See *Proposition 103 Enforcement Project v. Quackenbush*, *supra*, 64 Cal.App.4th at p. 1484.) They therefore do not amount to an unconstitutional amendment of the CUA. (See *Mobilepark W. Homeowners Ass’n v. Escondido*

Mobilepark W., *supra*, 35 Cal.App.4th at pp. 41, 43.)

The Fourth District Court of Appeal recently affirmed the constitutionality of the MMP against a challenge under article II, section 10, finding that “the MMP’s identification card system 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.” (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 830, original emphasis.) The *County of San Diego* court found the MMP non-amendatory because “the MMP’s identification card [system] is a part of a separate legislative scheme providing separate protections for persons engaged in the medical marijuana programs, and the MMP carefully declared that the protections provided by the CUA were preserved without the necessity of complying with the identification card provisions.” (*Id.* at p. 831.)⁴

Section 11362.77 of the Health and Safety Code is thus constitutional insofar as it operates as part of the MMP’s identification card program. (§§ 11362.71, subd. (e), 11362.77, subd. (f).)

2. To The Extent The MMP Limits An In-Court CUA Defense, It Is Unconstitutionally Amendatory

Even measured against the presumption that section 11362.77 should be construed as constitutional to the extent possible, it does not appear that application of that section’s quantity limits to an in-court CUA defense satisfies the standard of article II, section 10.

The CUA affords a defense in court to charges of marijuana possession or cultivation to “patients” and “primary caregivers.” (§ 11362.5,

4. The court in *County of San Diego* acknowledged that it was considering only the constitutionality of the identification card program, and not the quantity limits as applied to CUA defenses. (*County of San Diego v. San Diego NORML*, *supra*, 165 Cal.App.4th at p. 830, fn. 17.)

subd. (d).) For purposes of the CUA, these two categories of people are permitted to possess an amount of marijuana that is “reasonably related to the patient’s current medical needs.” (*People v. Trippet*, *supra*, 56 Cal.App.4th at p. 1549.)

The quantity limits of section 11362.77, in addition to applying to MMP cardholders, also apply to “qualified patients” and “primary caregivers.” (§ 11362.77, subs. (a), (f).) The term “qualified patient” is defined elsewhere in the MMP as “a person who is entitled to the protections of Section 11362.5, but who does not have an identification card issued pursuant to this article.” (§ 11362.7, subd. (f).) The term “primary caregiver” is defined as an “individual, designated by a qualified patient or by a person with an identification card, who has consistently assumed responsibility for the housing, health, or safety of that patient or person.” (*Id.* at subd. (d).) CUA patients thus fall within the MMP’s definition of “qualified patient” expressly, and primary caregivers are defined identically in both statutes. (§ 11362.5, subs. (d), (e).)

There does not appear to be anything ambiguous about the carefully defined terms used in section 11362.77, and therefore the plain language governs. (See *Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [principal task in construing statute is to ascertain intent of lawmakers; if statutory language is unambiguous, then plain meaning governs]; see also *City of Sacramento v. Public Employees’ Retirement System* (1994) 22 Cal.App.4th 786, 795 [if statutory language is not ambiguous, not even the most reliable document of legislative history may have the force of law]; *Planned Parenthood Affiliates v. Swoap* (1985) 173 Cal.App.3d 1187, 1193 [indicia of legislative intent cannot be used to nullify the language of a statute as in fact enacted].)

As to patients and caregivers asserting a CUA defense, then, the plain language of the MMP replaces *Trippet’s* “reasonableness” test with specific,

numeric possession limits. As the Court of Appeal noted, such a legislative alteration of the applicable quantity standard is impermissibly amendatory. (*People v. Kelly, supra*, 77 Cal.Rptr.3d at p. 398-399, citing *California Lab. Federation v. Occupational Safety & Health Stds. Bd.* (1992) 5 Cal.App.4th 985, 993-996 [imposition of numeric “cap” on attorney’s fee awards in place of pre-existing “reasonableness” limitation was impermissibly amendatory under California Constitution, article IV, section 9]; see also *People v. Phomphakdy* (2008) 165 Cal.App.4th 857, 863-866 [finding application of section 11362.77 to in-court CUA defense unconstitutional].)

Accordingly, application of section 11362.77 to limit the in-court defense of patients and primary caregivers under the CUA is impermissible under article II, section 10, subdivision (c), of the California Constitution.

C. The Court Of Appeal Should Have Severed Only The Unconstitutional Portions Of The MMP, So As To Preserve Its Central Feature: The Identification Card Program

The MMP was enacted because “reports from across the state have revealed problems and uncertainties in the [Compassionate Use Act] that have impeded the ability of law enforcement officers to enforce its provisions as the voters intended and, therefore, have prevented qualified patients and designated caregivers from obtaining the protections afforded by the act.” (Stats. 2003, ch. 875, § 1, subd. (a)(2).) In passing the MMP, the Legislature expressly found that the identification card program would further the goal of providing “needed guidance” to law enforcement officers and protecting patients and primary caregivers from unnecessary arrest. (*Id.* at subds. (b)(1), (d).) It is this guidance and protection that is at stake here. It should be preserved by severing only the unconstitutional portion or application of section 11362.77.

1. The Court Of Appeal's Disposition Was Correct; Its Remedy Was Not

Preliminarily, respondent notes that in this case the jury was not instructed on the CUA in unconstitutional terms. The trial court read to the jury CALCRIM No. 2370, which correctly stated that appellant was entitled to possess an amount of marijuana that was reasonably related to his current medical needs. (RT 207; CT 58.) The trial court also, however, allowed the prosecutor to elicit evidence (RT 104-106, 186-187) and argue to the jury (RT 210-212, 216, 230-234) that appellant's CUA defense was limited by section 11362.77. (See Supp. CT 1-51; RT 4-32, 170-171.) Although a prosecutor's misstatement of the law to the jury in contravention of the trial court's accurate instructions does not invariably require reversal, the People do not contest in this case the Court of Appeal's determination that the prosecutor's reliance on section 11362.77 at trial requires reversal of appellant's conviction. (See *People v. Kelly, supra*, 77 Cal.Rptr.3d at pp. 400-401.)

2. The Unconstitutional Portions Of Section 11362.77 May Be Mechanically Severed

The Legislature's intent that the MMP be saved through severance of as little of the act as necessary to preserve its constitutionality is clear. Moreover, section 11362.77 is amenable to mechanical severance, leaving a functioning, and constitutional, identification card program.

The MMP includes a severability clause:

If any section, subdivision, sentence, clause, phrase, or portion of this article is for any reason held invalid or unconstitutional by any court of competent jurisdiction, that portion shall be deemed a separate, distinct, and independent provision, and that holding shall not affect the validity of the remaining portion thereof.

(§ 11362.82.)

“Although not conclusive, a severability clause normally calls for sustaining the valid part of the enactment, especially when the invalid part is mechanically severable. Such a clause plus the ability to mechanically sever the invalid part while normally allowing severability, does not conclusively dictate it. The final determination depends on whether the remainder is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute. The cases prescribe three criteria for severability: the invalid provision must be grammatically, functionally, and volitionally separable.” (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821, alterations and citations omitted.)

An invalid provision is grammatically separable “where the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words.” (*Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 330-331, italics omitted.) An invalid provision is functionally separable if it is not necessary to the operation and purpose of the enactment. (*Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 613; *Legislature v. Eu* (1991) 54 Cal.3d 492, 535.) Finally, an invalid provision is volitionally separable if it “would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute.” (*Calfarm Ins. Co. v. Deukmejian, supra*, 48 Cal.3d at p. 821.)

All of these criteria are met here. Addressing them in reverse order, it is first plain that the Legislature would have enacted only the constitutional portion of section 11362.77 had it foreseen its partial invalidity. The very core of the MMP is the identification card program. (See §§ 11362.71-11362.76, 11362.78, 11362.81.) And without possession limits, medical marijuana patients have little incentive to volunteer for the cardholder program and law

enforcement has no clear guidance in identifying legitimate medical marijuana users. Since the MMP's identification card system could not function without section 11362.77's limits, it is virtually certain that the Legislature would have wished to preserve those limits to the extent possible.

Indeed, it is clear that the Legislature did not even intend the unconstitutional application of section 11362.77. In passing the MMP, the Legislature acknowledged that it was without authority to amend the CUA and that it had taken pains to avoid unconstitutionality in that respect. (See Historical and Statutory Notes, 40 pt. 1 West's Ann. Health & Saf. Code (2007 ed.) foll. § 11362.7, p. 366.) The analysis of the MMP prepared by the Senate Rules Committee, moreover, confirms in the starkest terms that the possession limits in section 11362.77 were intended to apply only to the identification card program:

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 Sections 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 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 Senate Bill 420 (2003-2004 Reg. Sess.) as amended September 9, 2003, at p. 6, emphasis added.)

Further, after the MMP was enacted, the Legislature, recognizing that interpretational challenges to section 11362.77 had arisen, passed Senate Bill

1494 as a “clean-up” measure. That bill eliminated any doubt that the quantity limits of section 11362.77 applied only to shield cardholders from arrest and that medical marijuana patients in general were entitled to possess quantities consistent with their medical needs. (See Sen. Bill 1494 (2003-2004 Reg. Sess.) § 1; see also *California Employment Stabilization Comm’n v. Payne* (1947) 31 Cal.2d 210, 213-214 [“[A] subsequent expression of the Legislature as to the intent of the prior statute, although not binding on the court, may properly be used in determining the effect of a prior act.”].) Although the Governor subsequently vetoed the bill, his veto did not take into account possible unconstitutionality. (See Governor’s veto message to Sen. on Sen. Bill 1494 (2003-2004 Reg. Sess.) Sen. Daily J. (July 20, 2004) pp. 4676-4677 [citing law enforcement difficulty in absence of possession limits]). Like the Legislature, the Governor, having expressed a desire to retain all of section 11362.77’s possession limits, surely would have preserved them to the extent possible had he recognized their partial unconstitutionality.

It is also clear that the unconstitutional portion of section 11362.77 – its application to the CUA defense – is functionally separable. That portion is not necessary to the operation and purpose of the identification card program. Again, the identification card program is a separate, stand-alone scheme that, although existing alongside and in harmony with the CUA, does not, and was not intended to, impact the in-court limited immunity established by the CUA.

Finally, grammatical separation is also possible here. That is, the invalid parts of the statute can be separated by paragraph, sentence, clause, phrase, or single words. The portions of section 11362.77, subdivisions (a) and (f), referencing qualified patients and primary caregivers could be stricken out, so that subdivision (a) reflected simply the “raw” quantity limits, while subdivision (f) applied those limits to cardholders. In addition, subdivisions (a), (b) and (c), could be altered by striking the word “qualified” in all of its

appearances. This would uncouple those subdivisions from the particular definition of "qualified patient" in section 11362.7, subdivision (f), that excludes cardholders. The statute would read as follows:

(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 qualified 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.

(c) Counties and cities may retain or enact medical marijuana guidelines allowing ~~qualified~~ patients or primary caregivers to exceed the state limits set forth in subdivision (a).

(d) Only the dried mature processed flowers of female cannabis plant or the plant conversion shall be considered when determining allowable quantities of marijuana under this section.

(e) The Attorney General may recommend modifications to the possession or cultivation limits set forth in this section. These recommendations, if any, shall be made to the Legislature no later than December 1, 2005, and may be made only after public comment and consultation with interested organizations, including, but not limited to, patients, health care professionals, researchers, law enforcement, and local governments. Any recommended modification shall be consistent with the intent of this article and shall be based on currently available scientific research.

(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.~~

(§ 11362.77.)

The result is functional. Read as a whole, the revised subdivisions within section 11362.77 would harmonize, making clear under subdivision (f) that cardholders would have to stay within the bare limits set out in subdivision (a) in order to be protected from arrest pursuant to section 11362.71, subdivision (e). The term “patient or primary caregiver” in subdivision (b) would be understood to refer to only those patients and primary caregivers who possess identification cards. Identification card holders under the MMP must, of course, necessarily be patients or primary caregivers. (See § 11362.71.) And, under this construction, subdivision (b) would have no independent application based on its plain language, but would have to be read as operating upon the basic principle under subdivisions (a) and (f) that only cardholders seeking to avoid arrest under the MMP are subject to the specified quantity limits.

To the extent the language of section 11362.77, in light of these excisions, might give rise to some ambiguity, the legislative intent would control. (See *Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 272 [where ambiguity exists on face of statute, it will be given “construction that comports most closely with the apparent intent of the Legislature”].) As explained, the legislative intent that section 11362.77 apply only to cardholders could hardly be more clear. (See Historical and Statutory Notes, 40 pt. 1 West’s Ann. Health & Saf. Code (2007 ed.) foll. § 11362.7, p. 366; Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Senate Bill 420 (2003-2004 Reg. Sess.) as amended September 9, 2003, at p. 6, emphasis added; Sen. Bill 1494 (2003-2004 Reg. Sess.) § 1.)

Accordingly, following the mandate of section 11362.82, only those

portions of section 11362.77 tying the possession limits to the in-court CUA defense should be excised. The result would leave a workable and constitutional statute applying those limits only to the MMP's identification card program.

3. The Unconstitutional Application Of Section 11362.77 May Be Disapproved Without Mechanical Severance

Another way to preserve the MMP's identification card program in a workable state would be to disapprove only the unconstitutional *application* of section 11362.77. This Court has held that, if a statute "is one where a single section contains language susceptible of applications, part of which . . . is invalid[,] the statute should be upheld if, after deletion of the invalid application, a workable statute remains." (*Walnut Creek Manor v. Fair Employment and Housing Com.* (1991) 54 Cal.3d 245, 266, quotation marks and citations omitted.) This principle of "application severability" requires a court to determine "not the validity of particular parts of the statute, but the validity of its application to particular persons under particular circumstances." (7 Witkin, Summary 10th, *Constitutional Law*, § 107, p. 211.)

In *Walnut Creek Manor*, this Court observed that the term "actual damages," as used in section 12987 of the California Fair Employment and Housing Act, embodied two concepts: non-quantifiable compensatory damages and quantifiable out-of-pocket expenditures. The Court determined that the award of the former was unconstitutional, while the award of the latter was permissible. (*Walnut Creek Manor v. Fair Employment and Housing Com.*, *supra*, 54 Cal.3d at pp. 251-266.) Rather than striking the term entirely from the statute, however, the Court disapproved only the invalid application, stating:

[T]he valid application of the damages provision is complete in itself, and the Legislature, we have no doubt, would have authorized the

commission to award only restitutive damages had it foreseen the invalidity of the provision for the award of unlimited compensatory damages.

We therefore hold that section 12987 is valid insofar as it authorizes the commission to award quantifiable out-of-pocket restitutive damages and is invalid under the judicial powers clause insofar as it authorizes the award of nonquantifiable general compensatory damages for emotional distress and other intangible injury.

(*Id.* at p. 267.)

Section 11362.77 similarly has two applications, one constitutional and one unconstitutional. Although the two applications are not expressed in a single indivisible phrase, as in *Walnut Creek Manor*, the principles of application severability are equally pertinent here, if the Court were to find that the unconstitutional application cannot be mechanically extricated from section 11362.77. The statute is one in which “a single section contains language susceptible of applications, part of which . . . is invalid,” and therefore it “should be upheld if, after deletion of the invalid *application*, a workable statute remains.” (*Walnut Creek Manor v. Fair Employment and Housing Com.*, *supra*, 54 Cal.3d at p. 266, quotation marks and citations omitted, emphasis added.)

Section 11362.82 does not include specific application severability language (see, e.g., 7 Witkin, Summary 10th, *Constitutional Law*, § 107, p. 211), but that does not foreclose the remedy in this case. In *Walnut Creek Manor* itself, the Court noted that although other portions of the act in question were covered by an application severability clause, the unconstitutional portion of the act was not covered by that clause. Nonetheless, the Court stated, “we take this not as an implied expression of legislative intent to exclude the

housing provisions, but merely as an oversight,” and proceeded to employ principles of application severability to save the constitutional application of the statute. Given the clear expression of legislative intent here, the Legislature’s failure to specifically include application severability language in section 11362.82 cannot be said to reflect a preference to exclude that remedy. There can be no doubt that the Legislature would have preferred to salvage the identification card program through application severability rather than not at all.

A workable statute would obviously remain after disapproval of the invalid application here. (See *Walnut Creek Manor v. Fair Employment and Housing Com.*, *supra*, 54 Cal.3d at p. 266.) The identification card program is the centerpiece of the MMP, while possession limits on the CUA defense are merely a discrete, unintended effect of the legislation. The latter application should be invalidated in order to save the former.

D. In The Alternative, Health And Safety Code Section 11362.77 Should Be Judicially Reformed To Apply Only To Cardholders

To the extent the Court concludes that the unconstitutional portions of section 11362.77 are not amenable to severance, it should judicially reform the statute to salvage the MMP’s identification card program in an effective way.

“Under established decisions of this [C]ourt and the United States Supreme Court, a reviewing court may, in appropriate circumstances, and consistently with the separation of powers doctrine, reform a statute to conform to constitutional requirements in lieu of simply declaring it unconstitutional and unenforceable.” (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 615; see *id.* at pp. 627-653 [broadly surveying federal and California state cases applying reformation].) Judicial reformation of a statute is appropriate where

a court “can conclude with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred such a reformed version of the statute to invalidation of the statute.” (*Ibid.*; accord *People v. Sandoval* (2007) 41 Cal.4th 825, 849.) The objective of this remedial test is to give deference to the Legislature. (See *People v. Sandoval, supra*, 41 Cal.4th at p. 849 [“When considering whether a statute should be judicially reformed to preserve its constitutionality, ‘[t]he guiding principle is consistency with the Legislature’s intent’”].)

“[I]n all cases, reformation should be tested objectively against the [foregoing] standard.” (*Kopp v. Fair Pol. Practices Com., supra*, 11 Cal.4th at p. 663.) That standard prevents “‘judicial policymaking’ in the guise of statutory reformation, and thereby avoid[s] encroaching on the legislative function in violation of the separation of powers doctrine.” (*Id.* at p. 661.) As the *Kopp* Court explained:

[C]ourts may legitimately employ the power to reform in order to effectuate policy judgments clearly articulated by the Legislature or electorate, when invalidating a statute would be far more destructive of the electorate’s will. And, “of course . . . ultimate authority to recast or scrap the law in question remains with the political branches [and, as in this case, the electorate].”

(*Id.* at p. 661, quoting Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation* (1979) 23 Clev. St. L.Rev. 301, 324.) The *Kopp* Court also observed that, “[i]n practical effect,” the difference between placing a saving construction on statutory language, thereby constricting the reach of a statute, and simply disregarding statutory language and substituting it with reformed language is “a difference of degree, not kind.” (*Kopp v. Fair Pol. Practices Com., supra*, 11 Cal.4th at p. 646.)

Applying these principles, this Court in *Kopp* found that certain provisions of Proposition 73, a campaign reform measure that a federal court had held unconstitutional, could not be reformed to meet constitutional requirements. (*Id.* at p. 614.) Specifically, this Court determined that sections of the initiative pertaining to an “intercandidate” ban, which had been invalidated on First Amendment grounds, would remain unenforceable “whether or not we reform the latter two sections.” (*Id.* at p. 615.) As to those latter sections – regulating contributions to individual candidates, political committees, or parties – the Court determined that reformation was impermissible because it would not “closely effectuate policy judgments clearly expressed by the electorate” as it would alter the amount of funding that the electorate “planned” in the proposition. (*Id.* at pp. 615-616, 662-670.)

Kopp’s express recognition of this Court’s role in reforming statutes was foreshadowed by *People v. Roder* (1983) 33 Cal.3d 491. In *Roder*, the Court held that the provisions of Penal Code section 496, setting forth a presumption of guilty knowledge applicable to secondhand dealers, was an unconstitutional mandatory presumption. (*Id.* at p. 504.) To save the statute’s constitutionality and prevent it from being invalidated in its entirety, the Court construed the statute as setting forth a legislatively prescribed permissive inference. (*Id.* at p. 507.) Acknowledging that the interpretation required “some creative statutory construction,” the *Roder* Court nonetheless found the transformation of the statutory presumption from a mandatory one to a permissive one reasonable and feasible. (*Id.* at pp. 505-506.) The Court explained that preserving Penal Code section 496 in a restrained form still enabled trial courts to inform juries of an inference that the Legislature had concluded could be reasonably drawn from proof of the basic facts, and that the permissive inference served an important substantive function in regulating the conduct addressed in the section. (*Id.* at pp. 506-507.)

This Court's decision in *In re Howard N.* (2005) 35 Cal.4th 117 also reflects the principle that a statute may be judicially reformed to preserve its constitutionality. (*Id.* at p. 132, citing generally to *Kopp, supra*, 11 Cal.4th at pp. 615, 641-661.) In *Howard N.*, the Court concluded that the juvenile extended detention scheme under Welfare and Institutions Code section 1800, et seq., could not satisfy due process requirements without a provision mandating a finding regarding a juvenile's "serious difficulty in controlling dangerous behavior." (*Id.* at p. 132.) Although such a provision was not an explicit part of the statute, the Court nonetheless reformed the statute to add it, on the ground that doing so "does not appear inconsistent with legislative intent" and "do[es] no violence to the words of the statute; rather, the words are susceptible of that interpretation." (*Id.* at p. 133.) In making the statutory change, the Court found that "construing the statutory scheme to avoid constitutional infirmity demonstrates greater deference to the Legislature than simply invalidating, as the Court of Appeal did, the legislative scheme." (*Ibid.*)

The same is true here. Reformation of section 11362.77 would preserve the MMP's identification card program with the clarity of its possession and cultivation limits, in accord with what the Legislature intended. That would amount to greater deference to the Legislature than simply invalidating section 11362.77 in whole based on an unintended application of the section, as the Court of Appeal did.

Again, the Legislative intent with respect to section 11362.77 is abundantly clear. In enacting the MMP, the Legislature stated, "The limits set forth in Section 11362.77(a) only serve to provide immunity from arrest for patients taking part in the voluntary ID 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 Senate Bill 420 (2003-2004 Reg.

Sess.) as amended September 9, 2003, at p. 6.) And, after potential constitutional problems were perceived, the Legislature attempted to pass Senate Bill 1494, which would have made more explicit that the quantity limits of section 11362.77 applied only to shield cardholders from arrest.^{5/}

Senate Bill 1494 was vetoed by the Governor. In a written statement accompanying the veto, the Governor explained that the “reasonable and established quantity guidelines” set forth in section 11362.77 had resolved uncertainty regarding “voters’ intent with respect to how much marijuana a patient may possess for medical use” under Proposition 215. Because removal of those guidelines made it “more difficult for law enforcement officers to determine when a person was in possession of marijuana for medicinal purposes pursuant to Proposition 215,” he declined to sign the measure. (Governor’s veto message to Sen. on Sen. Bill 1494 (2003-2004 Reg. Sess.) Sen. Daily J. (July 20, 2004) pp. 4676-4677.) The governor’s statement did not acknowledge the constitutional concern underlying the Legislature’s attempt to amend section 11362.77, and it also reflects a misunderstanding of the legislation, stating that “Senate Bill 1494 removes the limitation on the amount of marijuana a qualified patient, *person with an identification card*, or primary caregiver can possess.” (*Ibid.*, emphasis added.)

The Governor’s veto statement supports reformation of section 11362.77. (Cf. *People v. Tanner* (1979) 24 Cal.3d 514, 520 [Governor’s comments in signing bill pertinent to legislative intent].) It is plain that the Governor exercised his veto power because he was in favor of imposing

5. In pertinent part, the new section 11362.77 would have read, “A person with an identification card or a primary caregiver with an identification card shall not be subject to arrest for possessing eight ounces or less of dried marijuana per person with an identification card, and maintaining six or fewer mature or 12 or fewer immature marijuana plants per person with an identification card.” (Sen. Bill No. 1494 (2003-2004 Reg. Sess.).)

quantity limits on the possession of medical marijuana in order to assist law enforcement. It is also plain that the Governor did not recognize the constitutional problem in imposing quantity limits on the CUA defense or appreciate that Senate Bill 1494 preserved those limits as applied to the MMP's identification card program. The only reasonable inference to be drawn is that, had the Governor recognized the constitutional problem, he would have supported preserving section 11362.77's quantity limits to the extent they could be saved; that is, insofar as they applied to the identification card program.

Accordingly, the legislative preference as to how section 11362.77 should be brought into constitutional compliance has been clearly expressed. There is therefore little danger of judicial policy-making here. Section 11362.77 should be reformed because the Legislature would have preferred reformation to invalidation of the statute, and because it is possible to reform the statute in a manner that closely effectuates the policy judgments clearly articulated by the Legislature. (See *Kopp v. Fair Pol. Practices Com.*, *supra*, 11 Cal.4th at p. 615.)

Reformation of section 11362.77 in line with legislative intent could be accomplished simply by replacing the term "qualified patient or primary caregiver" with the term "person holding a valid identification card," replacing the term "qualified patient" with the term "patient," and striking subdivision (f). As reformed, the statute would read:

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

(b) If a ~~qualified patient or primary caregiver~~ *person holding a*

valid identification card has a doctor's recommendation that this quantity does not meet the ~~qualified~~ patient's medical needs, the ~~qualified patient or primary caregiver~~ *person holding a valid identification card* may possess an amount of marijuana consistent with the patient's needs.

(c) Counties and cities may retain or enact medical marijuana guidelines allowing ~~qualified patients or primary caregivers~~ *persons holding a valid identification card* to exceed the state limits set forth in subdivision (a).

(d) Only the dried mature processed flowers of female cannabis plant or the plant conversion shall be considered when determining allowable quantities of marijuana under this section.

(e) The Attorney General may recommend modifications to the possession or cultivation limits set forth in this section. These recommendations, if any, shall be made to the Legislature no later than December 1, 2005, and may be made only after public comment and consultation with interested organizations, including, but not limited to, patients, health care professionals, researchers, law enforcement, and local governments. Any recommended modification shall be consistent with the intent of this article and shall be based on currently available scientific research.

Read in conjunction with section 11362.71, subdivision (e), specifying that cardholders are not subject to arrest for possession of marijuana "in an amount established pursuant to this article," and section 11362.71, subdivision (f), specifying that "[i]t shall not be necessary for a person to obtain an identification card in order to claim the protections of Section 11362.5," the reformed statute would unambiguously restrict application of the MMP's quantity limits to the identification card program. Thus restricted, section

11362.77 would be rendered constitutional.

Accordingly, because the Legislature's preference is so clear, and because constitutional reformation could be accomplished with little alteration of the statute, as an alternative to severance this Court should reform section 11362.77 to avoid the Court of Appeal's drastic remedy of total invalidation of the statute, and to preserve the identification card program so explicitly intended by the Legislature.

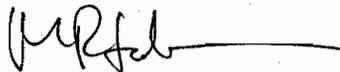
CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeal's reversal of appellant's conviction, but should disapprove the Court of Appeal's remedy striking Health and Safety Code section 11362.77 from the MMP. Instead, the Court should sever only the unconstitutional portion of section 11362.77 or judicially reform the statute so as to avoid unconstitutionality and at the same time preserve the MMP's constitutional identification card program.

Dated: October 14, 2008

Respectfully submitted,

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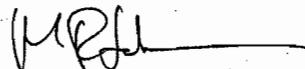
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S OPENING BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 8,348 words.

Dated: October 14, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

A handwritten signature in black ink, appearing to read "MRJ", followed by a horizontal line extending to the right.

MICHAEL R. JOHNSEN
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Patrick K. Kelly**
Case No.: **S164830**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age and older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 14, 2008, I served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 14, 2008, at Los Angeles, California.

K. Amioka
Declarant

K. Amioka
Signature