IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

Plaintiff and Respondent,

v.

**ROGER WILLIAM MENTCH,**

Defendant and Appellant.



S148204



Sixth Appellate District, No. H028783
Santa Cruz County Superior Court No. F077429
Samuel S. Stevens, Judge

# RESPONDENT'S OPENING BRIEF ON THE MERITS

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## ISSUES

1. Whether growing and selling marijuana, counseling its use, and sporadically taking a medical marijuana user to a doctor's appointment, entitles a dealer to a "primary caregiver defense" under the Compassionate Use Act.

2. Whether the defendant's burden to raise a reasonable doubt regarding the compassionate use defense is a burden of producing evidence under Evidence Code section 110 or a burden of proof under Evidence Code section 115.

3. Whether the trial court should instruct the jury on the defendant's burden to raise a reasonable doubt and, if so, how.

## INTRODUCTION

The Compassionate Use Act of 1996 provides an affirmative defense for patients and their primary caregivers who possess or grow marijuana for the medical use of the patient. The Act defines a primary caregiver as someone who consistently has assumed responsibility for the housing, health, or safety of the patient. The first question in this case arises because appellant, a marijuana seller, claimed primary caregiver status at his jury trial. The trial court refused to instruct on that defense, finding that primary caregiver status

required more than selling or promoting marijuana consumption to medical marijuana patients. The Court of Appeal reversed, holding that appellant could be found to qualify as a primary caregiver by virtue of such conduct. Its holding is an unwarranted extension of the Compassionate Use Act, and should be reversed by this Court.

The second and third questions above, posed by this Court, relate to a defendant's burden to raise a reasonable doubt as to the compassionate use defense. As to the first question—whether the burden is one of production or proof—the answer is production. As to the second—whether the trial court should instruct on this burden—the answer is no. On proper occasions, the trial court should instruct on the burden of proof respecting the compassionate use defense. (See Evid. Code, § 502.)

## STATEMENT OF THE CASE

In April 2003, authorities learned that appellant made bank deposits exceeding $2,000, mostly in small bills smelling strongly of marijuana, totaling $10,750 over two months. (3/8/05 RT 782; 3/9/05 RT 1145-1146, 1148-1150, 1156.) After an investigation (3/8/05 RT 782, 789), a search warrant was served in June 2003 to seize marijuana from appellant's home and his money from the bank (3/8/05 RT 781; 3/9/05 RT 1048, 1119). The house contained a sizeable marijuana crop, items for cultivating and processing marijuana, 100- and 200-gram scales, books on growing marijuana, instructions on extracting hash oil from marijuana plants, pictures of indoor and outdoor marijuana crops, pictures of appellant with growing marijuana plants, a doctor's medical marijuana recommendation for appellant, four baggies of marijuana, marijuana buds, smoking papers, a bowl of hash oil, ten vials of hash oil, unused vials, eyedroppers, a bag of psilocybin mushrooms, surveillance cameras, a taser gun, two rifles, a semiautomatic handgun, $140 in cash, and checkbooks in

appellant's name from three different banks. (3/8/05 RT 778-822; 3/9/05 RT 1006-1144.) Appellant had $253 and a vial of hash oil on him. (3/8/05 RT 780-785; 3/9/05 RT 1008, 1034, 1047, 1124-1125.)

Appellant reported having a medical marijuana recommendation, using marijuana medicinally, and selling it to five other patients. (3/8/05 RT 820-821; Aug. CT 2-6.) He had been unemployed about a year and a half, and said he paid rent and bills with savings and money from marijuana sales. (Aug. CT 5.)

Appellant was charged with cultivation of marijuana, possession of marijuana for sale, manufacture of hash oil, possession of hash oil, and possession of psilocybin mushrooms, with firearm enhancements as to the marijuana and hash oil counts. (1 CT 6-8.)

At trial, appellant called Leland Besson, a medical marijuana user, who testified that he paid appellant $150 to $200 a month for one-and-a-half ounces of marijuana. (3/9/05 RT 1159-1160, 1164, 1167-1168, 1173.) Besson's live-in aide, Laura Eldridge, took him to appellant's house to buy the marijuana. (3/9/05 RT 1169-1170, 1173.) Eldridge took care of Besson by cooking and cleaning for him and driving him to the grocery store, doctors' appointments, and the pharmacy to pick up his medications. (3/9/05 RT 1169-1171.) Appellant did not take care of Besson. (3/9/05 RT 1170-1171.) Besson saw appellant only once a month when he bought marijuana from him. (3/9/05 RT 1170-1171.) Appellant also called Eldridge, who testified that she was Besson's caretaker, appellant's girlfriend, and a medical marijuana user herself. (3/9/05 RT 1175-1178, 1184-1186.) Eldridge said she paid appellant $200 to $250 a month for one ounce of marijuana, and sometimes an additional $25 for one-eighth of an ounce if she needed more. (3/9/05 RT 1181-1183, 1186.)

The trial court expressed doubt that the evidence established appellant provided caregiving services, as defined by the Compassionate Use Act, qualifying as a defense to the cultivation charge. (3/9/05 RT 1189.) Defense

counsel theorized that appellant had consistently assumed responsibility for Besson's and Eldridge's health by selling them medical marijuana every month, making appellant a primary caregiver pursuant to the terms of the Act and *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383. (3/9/05 RT 1189-1196.) After the court indicated it was unconvinced the evidence satisfied the primary caregiver requirement of the Act or *Peron* (3/9/05 RT 1193-1196), defense counsel cited *People v. Mower* (2002) 28 Cal.4th 457 as additional authority for an instruction on that concept. (3/10/05 RT 1256; 1 CT 220-222.) But the trial court responded that "simply providing marijuana, in and of itself, to these folks does not—you don't bootstrap yourself to becoming the primary caregiver because you're providing it." (3/10/05 RT 1258.) On the state of the evidence the court found warranted a compassionate use instruction on the theory appellant was a medical marijuana user, but not a primary caregiver. (3/10/05 RT 1258.)

Appellant then took the stand and testified as follows. (3/10/05 RT 1291.) In March 2002, he lost his job. (3/10/05 RT 1324-1325.) That year, he obtained a medical marijuana recommendation and began growing marijuana. (3/10/05 RT 1306-1307.) He continuously grew marijuana plants in every stage of growth and produced four harvests a year. (3/10/05 RT 1361.) He opened the Hemporium, a caregiving and consultancy business, in March 2003. (3/10/05 RT 1292-1293.) The purpose of the Hemporium was to give people safe access to medical marijuana. (3/10/05 RT 1334-1335.) His only source of income in 2003 was the Hemporium. (3/10/05 RT 1326.) At the time of his arrest, he used hash oil on a regular basis and smoked four to six marijuana cigarettes a day (approximately one-sixteenth of an ounce). (3/10/05 RT 1313-1314, 1329-1330.) He consumed one-and-a-half to two ounces of marijuana a month. (3/10/05 RT 1313-1314, 1329-1330.) He regularly sold marijuana to five other medical marijuana users, including Besson, Eldridge, and one Mike

Manstock. (3/10/05 RT 1315-1318, 1320-1321.) He counseled them about the best strains of marijuana for their ailments and the cleanest ways to use it, and "sporadically" took a "couple of them" to doctors' appointments. (3/10/05 RT 1319-1320.) He denied providing marijuana to anyone without a medical marijuana recommendation, but admitted occasionally taking extra marijuana to a cannabis club named The Third Floor and to another "unknown—unnamed place." (3/10/05 RT 1315-1317, 1322.)

Appellant testified he sold marijuana to Besson about once a month and to Eldridge about once or twice a month. (3/10/05 RT 1318-1319.) On average, they paid him $150 to $200 for an ounce-and-a-half of marijuana a month. (3/10/05 RT 1322-1323.) He considered his marijuana "high-grade" and sold it to Besson and Eldridge for less than street value. (3/10/05 RT 1323.) He denied profiting from his marijuana sales, sometimes not even recovering his costs in growing marijuana. (3/10/05 RT 1321.) He used the money to pay "bills: nutrients, utilities, part of the rent." (3/10/05 RT 1323-1324.) He spent $300 to $600 a month on electricity to run his marijuana-growing equipment and "several hundred dollars a month on nutrients." (3/10/05 RT 1311-1312, 1337-1338, 1352-1353, 1357-1358.) His marijuana-growing equipment was worth hundreds of dollars. (3/10/05 RT 1312.) Despite his claim of not profiting from marijuana sales, appellant admitted paying significant monthly expenses unrelated to his marijuana-growing venture, including: $1,600 rent; $470 car and motorcycle payments; $50 gas; $200 vehicle insurance; $400 food and entertainment; and $30 credit card payments. (3/10/05 RT 1357-1358.)

Consistent with its earlier ruling, the trial court instructed the jury on the compassionate use defense to the cultivation of marijuana charge only with respect to appellant's own medical marijuana use. (3/10/05 RT 1436-1438; CT

280.)[1] It rejected defense counsel's argument that appellant's marijuana-related counseling and marijuana sales to medical marijuana patients supported primary caregiver status as a defense to the cultivation charge. (3/11/05 RT 1546.) The court was "not satisfied that providing marijuana—providing instructions about the use of marijuana or the propagation of marijuana is sufficient to establish someone is a caregiver .... [¶] There has to be something more to a caregiver than simply providing marijuana. Otherwise, there would be no reason to have the definition of a caregiver, because anybody who would be providing

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1. The court instructed, pursuant to CALJIC No. 12.24.1, as follows:

As to Count[s] 1 through 4, the possession or cultivation or transportation of marijuana is not unlawful when the acts of the defendant are authorized by law for compassionate use. The possession or cultivation or transportation of marijuana is lawful, one, where its medical use is deemed appropriate and has been recommended or approved, orally or in writing, by a physician; two, the physician has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief; and, three, the marijuana possessed, cultivated, or transported was for the personal medical use of the patient; and, four, the quantity of marijuana possessed or cultivated, and the form in which it was possessed, were reasonably related to the patient's then current medical needs.

[¶] . . . [¶]

"Recommendation" and "approval" have different meanings.

To "recommend" something is to present it as worthy of acceptance or trial.

To "approve" something is to express a favorable opinion of it.

The word "recommendation," as used in this instruction, suggests the physician has raised the issue of marijuana use and presented it to the patient as a treatment that would benefit the patient's health by providing relief from an illness.

The word "approval," on the other, suggests the patient has raised the issue of marijuana use, and the physician has expressed a favorable opinion of marijuana use as a treatment for the patient.

To establish the defense of compassionate use, the burden is upon the defendant to raise a reasonable doubt as to guilt of the unlawful possession or cultivation or transportation of marijuana.

marijuana and related services would qualify as a caregiver; therefore, giving them a defense to the very activity that's otherwise illegal, [which it did not feel] makes any sense in terms of statutory construction, nor [did the court] think it was intended by the [P]eople or the [L]egislature." (3/11/05 RT 1547.) Appellant was convicted of marijuana cultivation, possession of marijuana for sale, and possession of psilocybin mushrooms, and the marijuana-related firearm enhancements were found true. (2 CT 299-306.)

On appeal, the Court of Appeal found prejudicial error in the trial court's refusal of a primary caregiver instruction. (Opn. at pp. 24-25.) It reasoned: "[A]ppellant, by consistently growing and supplying physician-approved or prescribed medicinal marijuana for a section 11362.5 patient, was meeting an important health need of several medical marijuana patients." (Opn. at p. 25.) Hence, the "evidence that he not only grew medical marijuana for several qualified patients, but also counseled them on the best varieties to grow and use for their ailments and accompanied them to medical appointments, albeit on a sporadic basis," mandated the jury's consideration of a primary caregiver defense. (Opn. at p. 25.) On the same basis, appellant was entitled to a "reasonable compensation defense" instruction on the charge of possession of marijuana for sale. (Opn. at pp. 26-28.) Both the cultivation and possession for sale convictions were reversed. (Opn. at pp. 28-29.)

## SUMMARY OF ARGUMENT

The Compassionate Use Act provides an affirmative defense to charges of marijuana possession and cultivation for medical marijuana patients and their primary caregivers who grow or possess marijuana for the patient's medical use. It does not legalize the sale or distribution of marijuana.

Under the Act, a primary caregiver is defined as someone "who has consistently assumed responsibility for the housing, health, or safety of [the

medical marijuana patient]." Only those legitimate actual caregivers who grow medical marijuana on behalf of their patients incidental to their general caretaking duties are entitled to a defense under the Act.

Marijuana sellers cannot be primary caregivers by their consistent sale and promotion of wares to medical marijuana patients. A contrary meaning of primary caregiver status flies in the face of the plain meaning of the Act. In effect, it would legalize cultivation, sale and distribution of medical marijuana.

Reading into the Act a new class of primary caregiver—marijuana dealers —runs afoul of the rule of construction that exceptions to general rules will not to be implied where exceptions are specified by statute. Such an interpretation of the Act also would subvert the intent of the voters, who were assured that their passage of the law would not result in the legalization of marijuana sales. Extension of the compassionate-use defense to marijuana sellers has been rejected by all other courts that have considered the issue. Such an interpretation of the Act should be rejected.

The question whether a defendant bears the burden of production or proof as to an affirmative defense depends on whether the defense negates an element of the crime or is collateral to the question of guilt. This Court has previously held that the compassionate-use defense negates an element of the crimes of possession and cultivation of marijuana. Accordingly, under both constitutional and statutory authorities, a defendant bears only a burden of production as to the defense.

A trial court should not instruct on the defendant's burden of producing evidence, an issue of law for the court which does not assist the jury in resolving the issues within its purview. Under Evidence Code section 502, a trial court has the duty to instruct in appropriate cases on the burden of proof regarding the issues in the case. The defendant's burden to produce sufficient evidence of the defense of compassionate use to sustain a finding thereon is

satisfied once the trial court rules whether the defense met the burden. Since the burden is removed when the case reaches the jury, Evidence Code section 502 requires no instruction thereon.

Nevertheless, the trial court still has a duty under section 502 to instruct on the burden of proof when the defense of compassionate use has been properly raised at trial by substantial evidence. On such occasions, it is not improper for courts to instruct that defendant is entitled to an acquittal if a reasonable doubt exists as to the compassionate use defense.

In this case the trial court instructed, in effect, that the defense's burden was to raise a reasonable doubt respecting the medical marijuana patient defense. Although it would have been preferable and sufficient to state that appellant was entitled to acquittal if a reasonable doubt existed as to that defense, the slight difference is too subtle to be constitutional error. Furthermore, the jury was clearly apprised of the prosecution's burden of proving appellant's guilt beyond a reasonable doubt, and the evidence was overwhelming that appellant cultivated marijuana for more than just his personal use. Therefore, the instruction was not prejudicial.

## ARGUMENT

### I.

### PRIMARY CAREGIVER STATUS UNDER THE COMPASSIONATE USE ACT REQUIRES MORE THAN TRAFFICKING IN MARIJUANA TO MEDICAL MARIJUANA PATIENTS

The Compassionate Use Act applies to only two classes of persons: seriously ill patients and the people who care for them. Only bona fide caregivers who grow medical marijuana on behalf of their patients as an incidental part of their general caretaking duties are entitled to protection under the Act. Such protection does not extend to those whose only connection to a medical marijuana patient is via sales and promotions of sales of marijuana. Accordingly, growing, selling, and/or counseling and promoting the use of medical marijuana, whether or not consistently undertaken, is not itself evidence of primary caregiver status under the Act.

#### A. The Plain Language of the Compassionate Use Act Of 1996 Precludes Treating Trafficking as Caregiving

On November 5, 1996, California voters passed Proposition 215, which legalized the medical use of marijuana in this state. The initiative is codified at Health and Safety Code section 11362.5 and is known as "The Compassionate Use Act of 1996." The purpose of the Act is to allow seriously ill patients to use marijuana on the recommendation of their physicians when it has been determined that such use would provide them relief. (Health & Saf. Code, § 11362.5, subd. (b)(1)(A); see also Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 215, p. 60 ["Proposition 215 will allow seriously and terminally ill patients to legally use marijuana, if, and only if, they have the approval of a licensed physician"].)

To achieve this purpose, the Act allows both patients with medical marijuana recommendations and their primary caregivers to grow and possess marijuana for the patient's medical use without the threat of criminal sanction:

> 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.

(Health & Saf. Code, § 11362.5, subd. (d).) A "primary caregiver" is defined as "the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person." (Health & Saf. Code, § 11362.5, subd. (e).) This provision is necessary to give medical marijuana patients access to a drug they cannot legally buy. (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 215, p. 60 ["Proposition 215 allows patients to cultivate their own marijuana simply because federal laws prevent the sale of marijuana, and a state initiative cannot overrule those laws"]; see also *Peron, supra,* 59 Cal.App.4th at p. 1394 ["[T]he intent of the initiative was to allow persons to cultivate and possess a sufficient amount of marijuana for their own approved medical purposes, and to allow 'primary caregiver[s]' the same authority to act on behalf of those patients too ill or bedridden to do so"].)

The Act establishes an affirmative defense to charges of possession and cultivation of marijuana rather than immunity from prosecution. (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) rebuttal to argument against Prop. 215, p. 61, italics in original ["Proposition 215 simply gives those arrested a defense in court, *if they can prove they used marijuana with a doctor's approval*"]; see also *Mower, supra,* 28 Cal.4th at pp. 474-475 [holding that compassionate use is an affirmative defense to be asserted at trial and confers no immunity from prosecution].) It does not establish a defense to charges of selling or possessing marijuana for sale. (*Chavez v. Superior Court* (2004) 123 Cal.App.4th 104,

110; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1162; *People v. Rigo* (1999) 69 Cal.App.4th 409, 415; *Peron, supra,* 59 Cal.App.4th at pp. 1390-1395.)[2/]

Given the limited scope of the compassionate use defense, marijuana trafficking—whether by growing, selling, counseling, promoting or arranging distribution—is not substantial evidence entitling persons to that defense. Individuals do not qualify as primary caregivers unless they consistently assume actual responsibility for the patients' housing, health, or safety apart from the patient's use of marijuana. Absent that condition, as the trial court correctly perceived, the compassionate use defense would be rendered meaningless. The voters did not intend "decriminalization of sales of . . . marijuana in this state." (*Peron, supra,* 59 Cal.App.4th at p. 1394; see also *Galambos, supra,* 104 Cal.App.4th at p. 1160 ["Judicial recognition of . . . broader . . . immunity . . . [that] could excuse crimes other than cultivation or possession—would break faith with the voters' adoption of a narrow legislative exception to our criminal drug prohibitions in the form of Proposition 215"].)

### B. Rules of Statutory Construction Support Interpreting Caregiver to Exclude Mere Traffickers

The Act nowhere recognizes a class of primary caregivers composed of marijuana dealers whose caretaking function consists of selling marijuana to medical marijuana patients. To recognize such an extra-statutory class of caregivers runs afoul of the doctrine of *expressio unius est exclusio alterius.* Under that rule, "'where exceptions to a general rule are specified by statute,

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2. The Legislature subsequently enacted the Medical Marijuana Program, which extended the compassionate use defense to charges of transporting, selling, and possessing marijuana for sale, when certain conditions are met. (Health & Saf. Code, §§ 11362.765, 11362.775; *People v. Wright* (2006) 40 Cal.4th 81, 92.) This Court has ruled the enactment retroactive. (*Wright, supra,* 40 Cal.4th at p. 95.)

other exceptions are not to be implied or presumed,'" absent "'a discernible and contrary legislative intent.'" (*Galambos, supra*, 104 Cal.App.4th at p. 1167, quoting *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195.)

Section 11362.5 provides a compassionate-use defense only to patients and their primary caregivers who grow or possess marijuana for the personal use of the patient. The statute makes no reference to suppliers of medical marijuana or to acts of selling marijuana. The drafters of Proposition 215 chose to strictly limit the compassionate use defense in this manner, and the voters relied on the narrow application of the defense in passing the initiative. An expansion of the defense to other groups or acts cannot be inferred. (*Galambos, supra,* 104 Cal.App.4th at p. 1167; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550.)[3/]

### C. Interpreting Primary Caregiver to Exclude Mere Traffickers Is Consistent With the Intent of the Voters

Even if there were ambiguity in the Act regarding the scope of the compassionate use defense, it would remain appropriate to consider indicia of the voters' intent, including the analysis and arguments contained in the official ballot pamphlet. (*Galambos, supra,* 104 Cal.App.4th at p. 1162; *Peron, supra,* 59 Cal.App.4th at p. 1393.) One appellate court has observed, "The statute's drafters and proponents took pains to emphasize that, except as specifically

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3. Although the Medical Marijuana Program extends the compassionate use defense to charges of transporting, selling, and possessing marijuana for sell when certain conditions are met, it does not legalize the act of selling marijuana. Rather, the enactment makes clear that it does not "authorize any individual or group to cultivate or distribute marijuana for profit." (Health & Saf. Code, § 11362.765, subd. (a).) Further, while the statutory scheme allows primary caregivers to "give away" limited amounts of marijuana to their patients and to recover "reasonable compensation" and "out-of-pocket expenses" from their patients for marijuana-related services (Health & Saf. Code, § 11362.765, subd. (c)), there is no similar provision for those who do not meet the statutory definition of a primary caregiver.

provided in the proposed statute, neither relaxation much less evisceration of the state's marijuana laws was envisioned." (*Trippet, supra,* 56 Cal.App.4th at p. 1546.)

The Act declares: "Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes." (Health & Saf. Code, § 11362.5, subd. (b)(2).) The Legislative Analyst underlined this point: "[T]he measure specifies that growing and possessing marijuana is restricted to medical uses when recommended by a physician, and does not change other legal prohibitions on marijuana . . . ." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) analysis of Prop. 215 by the Legislative Analyst, p. 59.) And in rebuttal to the argument by opponents that Proposition 215 would "provide new legal loopholes for drug dealers to avoid arrest and prosecution" (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument against Prop. 215, p. 61), the initiative's proponents confirmed that it "only allows marijuana to be grown for a patient's personal use. Police officers can still arrest anyone who grows too much, or tries to sell it." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) rebuttal to argument against Prop. 215, p. 61; see also *Mower, supra,* 28 Cal.4th at p. 475.) The statute and ballot materials demonstrate that voters did not intend to legalize activity beyond the possession and cultivation of marijuana by medical marijuana patients and their primary caregivers.

These materials also demonstrate that the drafters of Proposition 215 were aware of state and federal prohibitions on marijuana sales, and sought to avoid a conflict with such laws. One of the declared purposes of the statute is to "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." (Health & Saf. Code, § 11362.5, subd. (b)(1)(C).) If the statute authorized the sale or distribution of marijuana to medical marijuana

patients, there would be no need to encourage the state and federal governments to implement such a plan. (*Peron, supra,* 59 Cal.App.4th at p. 1394.) Also, as proponents of the proposition explained, "Proposition 215 allows patients to cultivate their own marijuana simply because federal laws prevent the sale of marijuana, and a state initiative cannot overrule those laws." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 215, p. 60.) This further demonstrates the statute's intent to allow only the personal cultivation of medical marijuana by patients and their primary caregivers, not the cultivation and sales by third parties. (*Galambos, supra,* 104 Cal.App.4th at p. 1168.)

The voters of this state were assured that dangerous drug-related activities would not be condoned under the Compassionate Use Act. Appellant's activities vividly demonstrate the intent of the voters would be subverted by his interpretation of the Act. Appellant grew a sizeable marijuana crop in his home and sold marijuana to several individuals and marijuana dispensaries for large sums of cash. He kept surveillance cameras and guns around his house, which he said had been burglarized, to protect himself and his property. (3/10/05 RT 1301, 1303-1305, 1349.) The voters hardly would have contemplated dangerous commercial enterprises like appellant's operation would be insulated from abatement by the Act.[4/] The Court of Appeal's expansive view of the statute in this case is "'tantamount to suggesting that the proposition's drafters and proponents were cynically trying to "put one over" on the voters and that the latter were not perceptive enough to discern as much.'" (*Galambos, supra,*

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4. The recent murders of two medical marijuana providers underscore how highly dangerous such activities are. (See Johnson, *Killing Highlights Risk of Selling Marijuana, Even Legally*, N.Y. Times (Mar. 2, 2007) p. A12 [reporting on the murder of Colorado medical marijuana provider Ken Gorman];Clark, *Pot Dispensary Owner Slain at Home*, Ukiah Daily Journal (Nov. 19, 2005) <http://www.marijuana.org/ukiahdailyjour11-19-05.htm> [as of May 1, 2007] [reporting on the murder and robbery of California medical marijuana provider Les Crane].)

104 Cal.App.4th at pp. 1168-1169, quoting *Trippet, supra,* 56 Cal.App.4th at p. 1546, fn. omitted.) As the court in *Peron* observed: "We cannot condone the perpetuation of such a deception on those voters who enacted Proposition 215, relying on its ballot arguments and legislative digest assuring them that sales of marijuana would continue to be proscribed." (*Peron, supra,* 59 Cal.App.4th at pp. 1397-1398.)

### D. The Decisions of Other Appellate Courts Support a Narrow Interpretation of Primary Caregiver

In *Mower*, this Court found that the defendant's cultivation of medical marijuana for himself and two other patients did not support a primary caregiver instruction. (*Mower, supra,* 28 Cal.4th at pp. 475-476.) There was no evidence that the defendant had been designated by the other patients as their primary caregiver, or that he had consistently assumed responsibility for their housing, health, or safety. (*Ibid.*) This Court's holding implicitly rejects the notion that cultivating marijuana for qualified patients, thereby supplying them medicine important to their health, evidences a defendant's consistent assumption of responsibility for patient health meeting the primary caregiver definition of the Compassionate Use Act.

This same notion was rejected in *People v. Frazier* (2005) 128 Cal.App.4th 807. There, the defendant admitted growing medical marijuana for himself, his wife, and his ex-sister-in-law. (*Id.* at p. 814.) The trial court instructed on the statutory definition of a primary caregiver. (*Id.* at p. 823.) The defendant was convicted of cultivation of marijuana and possession for sale. (*Id.* at p. 815.) On appeal, the defendant argued that the trial court should have instructed the jury that a primary caregiver is someone who "'consistently grows and supplies physician approved marijuana for a medical marijuana patient to serve the health needs of that patient.'" (*Id.* at p. 823.) The court rejected that contention, noting that such an instruction would "create a class of primary

caregivers that does not already exist" under the Compassionate Use Act. (*Id.* at p. 823.)

Similarly, *Galambos* declined to extend the compassionate-use defense to medical marijuana suppliers. There, the defendant asserted that he cultivated marijuana for himself and a marijuana buying cooperative for his own and others' medical use. (*Galambos, supra,* 104 Cal.App.4th at p. 1152.) The trial court refused a proposed instruction that a medical marijuana supplier is entitled to a compassionate use defense. (*Id.* at p. 1165.) On appeal, the defendant argued that the trial court erred in refusing his instruction. (*Id.* at p. 1152.) The court disagreed, noting that the intent of the Compassionate Use Act was to protect medical marijuana patients and their primary caregivers, not suppliers of medical marijuana. (*Id.* at pp. 1165-1169.) The court further observed that appellant's claimed status as a medical marijuana supplier did not qualify him as primary caregiver. (*Id.* at p. 1169, fn. 10.)

*Peron* also declined to extend the compassionate use defense in this way. The defendants in *Peron* sold marijuana to medical marijuana patients through a marijuana buying club. (*Peron, supra,* 59 Cal.App.4th at pp. 1386-1387.) As a condition of sale, patients had to designate the defendants as their primary caregivers. (*Id.* at p. 1390.) On appeal, the court held that nonprofit sales of marijuana to medical marijuana patients and their primary caregivers are not authorized by the Compassionate Use Act. (*Id.* at p. 1392.) "Recognition of such a nonprofit defense to effectively legalize marijuana sales would allow marijuana to be sold [on a nonprofit basis] . . . to 'patient[s]' who designated the marijuana seller as their 'primary caregiver.' This sort of subterfuge is certainly not what the voters approved or intended when they enacted the limited compassionate use for medical purposes which is defined by section 11362.5." (*Id.* at pp. 1392-1393.) The court elaborated:

> Respondents, thus, urge that an initiative measure, presented to the electorate as one continuing to proscribe marijuana sales, must now be

> judicially interpreted to permit such sales because those immune from prosecution for its possession or cultivation will be inhibited in acquiring it if the provider risks prosecution in selling it; and the medical use of marijuana intended by section 11362.5 will be, accordingly, frustrated. [¶] By doing so, we would initiate a decriminalization of sales of and traffic in marijuana in this state. Whether that concept has merit is not a decision for the judiciary. It is one the Legislature or the people by initiative are free to make. Proposition 215, in enacting section 11362.5, did not do so.

(*Id.* at pp. 1394-1395, fn. omitted.)

*Peron* also found that the customers' designation of the defendants as their primary caregivers was insufficient under the statute to qualify the defendants as the primary caregivers of their customers. (*Peron, supra,* 59 Cal.App.4th at pp. 1395-1398.) "[T]he designation of respondents as primary caregivers is admittedly transitory and not exclusive. On respondents' theory, the patient is admittedly free to designate on a daily basis a new primary caregiver dependent solely on whenever and from whom the patient decides to purchase the marijuana. [¶] Thus, the 'consisten[cy]' of respondents' claimed health or safety primary caregiving of each customer is, in reality, a chimerical myth." (*Id.* at p. 1397.) The court further explained that "[a] contrary holding would entitle any marijuana dealer in California to obtain a primary caregiver designation from a patient before selling marijuana, and to thereby evade prosecution for violation of [Health and Safety Code] sections 11360 [prohibiting the sale of marijuana] and 11359 [prohibiting the possession of marijuana for sale], which section 11362.5 left fully effective." (*Ibid.*)

Remarkably, the Court of Appeal in this case viewed *Peron* as authority for its holding that a person who consistently grows and sells marijuana to a medical marijuana patient qualifies as that patient's primary caregiver. The passage from *Peron* apparently relied on by the Court of Appeal reads as follows: "As we have noted, the statute defines a primary caregiver as one 'who has *consistently* assumed responsibility for the housing, health, or safety

of [the patient].' (§ 11362.5(e), italics added.) Assuming responsibility for housing, health, or safety does not preclude the caregiver from charging the patient for those services. A primary caregiver who *consistently* grows and supplies physician-approved or -prescribed medicinal marijuana for a section 11362.5 patient is serving a health need of the patient, and may seek reimbursement for such services." (*Peron, supra,* 59 Cal.App.4th at pp. 1399-1400.) *Peron*'s language, however, concerns conditions under which bona fide caregivers receive reimbursement for their marijuana-growing duties on behalf of their patients. (See also Health & Saf. Code, § 11362.765, subd. (c).) It does not discuss criteria for primary caregiver status, and clearly does not support the holding of the Court of Appeal in this case.

Finally, *People v. Urziceanu* (2005) 132 Cal.App.4th 747 held that the owner of a marijuana cooperative was not entitled to raise the compassionate-use defense to a charge of conspiring to possess marijuana for sale. (*Id.* at p. 767.) "[T]he . . . Act does not allow for collective cultivation and distribution of marijuana by someone who is a qualified patient for the benefit of other qualified patients or primary caregivers." (*Id.* at p. 769.) The court rejected the defendant's argument "that the people who collectively made up [the growing cooperative] constituted the primary caregiver for the patients and caregivers who purchased marijuana for personal medical needs," noting:

> [T]he Compassionate Use Act was drawn narrowly to apply to a patient and his or her primary caregiver. It affords a limited defense to the patient and the primary caregiver to grow and utilize marijuana under certain specified conditions. A cooperative where two people grow, stockpile, and distribute marijuana to hundreds of qualified patients or their primary caregivers, while receiving reimbursement for these expenses, does not fall within the scope of the language of the Compassionate Use Act or the cases that construe it.

(*Id.* at p. 773.)

Appellant's sales of marijuana to medical marijuana patients did not entitle him to a primary caregiver defense. To recognize such a defense would create

an enormous loophole for dealers seeking to avoid criminal sanctions for drug trafficking. Such an interpretation of the Compassionate Use Act would be both an illegitimate expansion of the compassionate use defense, and an affront to the voters of this state.

### E. The Trial Court Properly Refused to Give a Primary Caregiver Instruction in This Case

The trial court did not err in refusing to instruct on appellant's claimed status as a primary caregiver. Appellant's medical marijuana cultivation, sales, and counseling did not support a primary caregiver defense as a matter of law for the reasons discussed.

The instruction was properly refused even if such evidence legally might support that defense. "It is well settled that a defendant has a right to have the trial court . . . give a jury instruction on any affirmative defense for which the record contains substantial evidence." (*People v. Salas* (2006) 37 Cal.4th 967, 982.) In this case, no substantial evidence appears that appellant engaged consistently in the homecare practice of giving marijuana patients counseling or assistance. Instead, it shows only that he engaged *consistently in marijuana trafficking to medical marijuana patients if not also to others*. (See Health & Saf. Code, § 11362.5, subd. (e), italics added [a primary caregiver is someone "who has *consistently* assumed responsibility for the housing, health, or safety of [his patient]"].) Similarly, appellant's testimony that he "sporadically" accompanied "a couple" of his customers to doctors' appointments was insufficient to support such instruction. The trial court therefore properly concluded that appellant was not entitled to a compassionate use defense instruction based on his claimed status as a primary caregiver.[5/]

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5. The Medical Marijuana Program extends protection to "[a]ny individual who provides assistance to a qualified patient or a person with an identification card, or his or her designated primary caregiver, in administering medical marijuana to the qualified patient or person or acquiring the skills

## II.

## A DEFENDANT'S BURDEN TO RAISE A REASONABLE DOUBT REGARDING THE COMPASSIONATE USE DEFENSE IS ONE OF PRODUCING EVIDENCE UNDER EVIDENCE CODE SECTION 110

In *Mower*, this Court held that a defendant bears the burden of raising a reasonable doubt regarding the compassionate use defense. That burden is one of producing evidence under Evidence Code section 110, not one of persuasion under Evidence Code section 115.

### A. Evidence Code Sections 110 and 115

Although the phrase "burden of proof" is often used interchangeably to refer to both the burden of proof and the burden of production (1 Witkin, Cal. Evid. (4th ed. 2000), Burden, § 1, p. 155), these are separate. The burden of producing evidence "means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." (Evid. Code, § 110.) This burden is commonly referred to as the burden of going forward with the evidence, and ends once a judge has determined whether the party's evidence is sufficient to be considered by the jury. (1 Witkin, Cal. Evid. (4th ed. 2000), Burden, § 1, pp. 155-156.) The burden of proof "means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.) This burden,

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necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person." (Health & Saf. Code, § 11362.765, subd. (b)(3).) Appellant, however, did not claim he was a person within the meaning of this section, but rather that he was a primary caregiver within the meaning of the Compassionate Use Act. Nor did appellant make such a claim on appeal. Accordingly, appellant has forfeited the issue. Even so, for the same reasons above, appellant did not present substantial evidence supporting such a claim.

also known as the burden of persuasion, remains on a party throughout trial. (1 Witkin, Cal. Evid. (4th ed. 2000), Burden, § 1, pp. 155-156.)

### B. Whether a Defendant Bears the Burden of Production or the Burden of Proving an Affirmative Defense Depends on Whether the Defense Negates an Element of the Prosecution's Case or Is Collateral to the Question of Guilt

In criminal cases, the prosecution bears the burden of proof on the ultimate question of the defendant's guilt. (Pen. Code, § 1096; see also *In re Winship* (1970) 397 U.S. 358, 364 [holding that the federal Constitution protects criminal defendants against conviction except upon proof beyond a reasonable doubt].) The prosecution satisfies this burden by proving each element of the offense beyond a reasonable doubt. (*Ibid.*) This burden remains on the prosecution throughout trial and never shifts to the defendant. (*People v. Deloney* (1953) 41 Cal.2d 832, 842.)

On issues that are collateral to the question of guilt, the burden of proof may properly be placed on the defendant. (*Mower, supra,* 28 Cal.4th at p. 480.) Thus, a defendant must prove some affirmative defenses by a preponderance of the evidence. (*Ibid.*) "Such defenses are collateral to the defendant's guilt or innocence *because they are collateral to any element of the crime in question.*" (*Ibid.*) There is thus no constitutional impediment to placing the burden of proving these defenses on the defendant.

Under state law, however, the burden of proving affirmative defenses that relate directly to guilt may not be placed on the defendant. (*Mower, supra,* 28 Cal.4th at p. 479; *People v. Tewksbury* (1976) 15 Cal.3d 953, 963.) Evidence Code section 500 provides: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." One exception to this rule is set forth in the comment to section 500, which provides that when a criminal defendant has the burden of proving "a fact essential to negate his

guilt," he is not required to "persuade the trier of fact as to the existence of such fact." (Evid. Code, § 500, Law Revision Commission Comments.) Rather, "he is merely required to raise a reasonable doubt in the mind of the trier of fact as to his guilt." (Evid. Code, § 500, Law Revision Commission Comments.)

Similarly, Evidence Code section 501 provides, "Insofar as any statute . . . assigns the burden of proof in a criminal action, such statute is subject to Penal Code section 1096." Section 501 applies not only to statutes that specifically allocate the burden of proof to the defendant, but also to statutes that have been construed to allocate the burden of proof to the defense. (Evid. Code, § 501, Law Revision Commission Comments.) It "is intended to make . . . clear that the statutory allocations of the burden of proof . . . are subject to Penal Code section 1096, which requires that a criminal defendant be proved guilty beyond a reasonable doubt, i.e., that the statutory allocations do not . . . require the defendant to persuade the trier of fact of his innocence. . . . [W]here a statute allocates the burden of proof to the defendant on any . . . issue relating to the defendant's guilt, the defendant's burden, as under existing law, is merely to raise a reasonable doubt as to his guilt." (Evid. Code, § 501, Law Revision Commission Comments.)

The foregoing makes clear with respect to defenses that negate an element of the crime at issue that the defendant is required to produce sufficient evidence of his defense to raise a reasonable doubt as to his guilt, while the burden of proving guilt remains on the prosecution. (See Evid. Code, § 550, Law Revision Commission Comments ["[D]uring the course of the trial, the burden [of producing evidence] may shift from one party to another, irrespective of the incidence of the burden of proof"].) In other words, the defendant does not have to prove the ultimate facts, but he must come forward with the evidence of his defense. (*Mower, supra,* 28 Cal.4th at p. 479; *Tewksbury, supra,* 15 Cal.3d at p. 963.) The trial court then decides whether

such evidence is sufficient to instruct the jury on the asserted defense, at which point the defendant's burden ends. (*Salas, supra,* 37 Cal.4th at p. 635; *People v. Loggins* (1972) 23 Cal.App.3d 597, 603.)

While many cases speak loosely of the "burden of proof" the defendant bears with regard to such a defense, this labeling is inaccurate. The burden is rather one of production. (See Evid. Code, § 110, Comment—Assembly Committee on Judiciary [noting that the practical effect of the distinction between the burden of proof and production is discussed in the "Comments to Division 5 (commencing with Section 500), especially in the Comments to Sections 500 and 550"].)

This description of the burden was made clear in decisions addressing the defendant's burden regarding mitigation of the charge of murder. This burden is set forth in Penal Code section 189.5, subdivision (a) (formerly Penal Code section 1105): "Upon a trial for murder, the commission of the homicide by the defendant being proved, the *burden of proving* circumstances of mitigation, or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." (Italics added.) Early cases, seizing on the above-italicized language, viewed this statute as placing on the defendant the burden of proving mitigating circumstances by a preponderance of the evidence. (*People v. Cornett* (1948) 33 Cal.2d 33, 42.) Later cases, however, rejected this view and recognized the statute as a procedure "that imposes on the defendant only a duty of going forward with the evidence of mitigating circumstances" sufficient to raise a reasonable doubt as to his guilt. (*Ibid.*) It thus places a burden of production on the defendant rather than a burden of proof as to the facts underlying his defense. (*Id.* at pp. 42-43; *Deloney, supra,* 41 Cal.2d at p. 841.) This is so because the mitigating circumstances go directly to an element of murder, i.e.,

whether the defendant harbored malice. (*People v. Banks* (1976) 67 Cal.App.3d 379, 383-384; *Loggins, supra,* 23 Cal.App.3d at pp. 600-601.) Accordingly, because the burden of proof on the ultimate issue of the defendant's guilt remains on the prosecution throughout trial and can never be shifted to the defendant, the defendant can only be assigned a burden of production with regard to any mitigating circumstances. (*Deloney, supra,* 41 Cal.2d at p. 841.)

The second question in this case thus turns on whether the primary caregiver defense negates an element of the prosecution's case or is collateral to guilt. If the defense goes directly to guilt, defendant is required to produce evidence of the defense sufficient to raise a reasonable doubt. If the defense is collateral to guilt, defendant might have to prove the defense by a preponderance of the evidence.

### C. A Defendant Bears the Burden of Production With Regard to the Compassionate Use Defense

In *Mower,* this Court examined whether the People or the defendant bore the burden of proof as to the compassionate-use defense. (*Mower, supra,* 28 Cal.4th at pp. 476-478.) After concluding that the facts underlying such a defense fell peculiarly within the defendant's knowledge, the Court held that the defendant bore the "burden of proof" as to those facts. (*Id.* at pp. 477-478.) The Court proceeded to determine the standard for meeting the defendant's burden. (*Id.* at pp. 478-483.) After finding the defense negated the unlawfulness element of possession or cultivation of marijuana, the Court held that the defendant's burden was merely to raise a reasonable doubt as to his guilt. (*Ibid.*)

*Mower* described the defendant's burden as one of "proof" within the meaning of section 115. (*Mower, supra,* 28 Cal.4th at pp. 482-483 ["as Evidence Code section 115 provides, a defendant can 'prove' the facts

underlying a given defense . . . merely by 'rais[ing] a reasonable doubt'"].) But its holding that the defense negates an element of the prosecution's case supports the conclusion that the defendant's burden is one of production within the meaning of section 110. The Court's holding that the defendant's burden is merely to raise a reasonable doubt as to his guilt further supports this conclusion. Finally, the Court's reliance on Evidence Code section 501 and the comments to that section in reaching its decision provides additional support for the conclusion that the defendant's burden is one of production of evidence. (See *id.* at pp. 478-479.)

A more recent decision of this Court supports this interpretation of the defendant's burden. In *People v. Salas, supra,* 37 Cal.4th 967, defendants were convicted of selling unregistered securities. (*Id.* at p. 974.) On appeal, the Court held that the defendants' good faith belief that the securities were registered was a defense to the charges against them. (*Id.* at p. 981 .) The Court further found that because the facts underlying that defense were peculiarly within the defendants' knowledge, they had the burden of raising the defense. (*Id.* at p. 982.) Because the defense negated an element of the crime, however, the defendants merely had to raise a reasonable doubt as to their guilt. (*Id.* at p. 981.) *Salas* likened the defendants' burden in that case to the defendant's burden in *Mower*, which it described as one of production. (*Id.* at pp. 981-982 ["[W]e held in *Mower* that the defendant had the *burden of producing evidence* to show that marijuana was grown for personal medicinal purposes"].)

It might be argued that, in *People v. Frazier, supra,* 128 Cal.App.4th 807, the court came to a contrary conclusion regarding the burden described in *Mower*. There, the defendant argued that his only burden with respect to the compassionate-use defense was one of production, not proof. (*Frazier, supra,* 128 Cal.App.4th at p. 816.) The defendant analogized his burden to that of a defendant in a murder trial, whose burden under section 189.5 is only to

produce evidence of self-defense. (*Id.* at p. 818.) But the Court of Appeal explained that "section [189.5] applies only to murder cases and arises out of the unique presumption of malice inherent in some killings." (*Id.* at p. 820.) The court concluded that because "[t]here is no similar presumption of an element of the crimes of the possession of or cultivation of marijuana inherent in the establishment of the prosecution's case," the compassionate use defense "shares only a passing similarity to section [189.5]." (*Ibid.*)

As previously argued, whether a defendant bears the burden of proof or production as to a defense depends on whether the defense negates an element of a crime, not on whether the prosecution's evidence gives rise to a presumption of an element. Such presumptions trigger the defendant's burden to come forward with evidence to negate an element of the prosecution's case. For instance, section 189.5 informs the defendant in a murder case that he must come forward with mitigating evidence when the prosecution's evidence gives rise to a presumption of malice. (Evid. Code, § 550, Law Revision Commission Comments ["[I]f the party with the initial burden of producing evidence establishes a fact giving rise to a presumption, the burden of producing evidence will shift to the other party, whether or not the presumption is one that affects the burden of proof"].) Similarly, once the prosecution has presented evidence that reasonably permits a finding that the defendant illegally possessed or cultivated marijuana, the defendant must come forward with substantial evidence of compassionate use that would support a reasonable doubt by the factfinder on that issue. (See Evid. Code, § 550, Law Revision Commission Comments ["[A] party may introduce evidence of such overwhelming probative force that no person could reasonably disbelieve it in the absence of countervailing evidence, in which case the burden of producing evidence would shift to the opposing party to produce some evidence"].) *Frazier's* distinction of the burden of raising self-defense in a murder case from

the burden of raising the compassionate-use defense in a marijuana case is therefore unavailing.

Nevertheless, *Frazier* did no more than countenance an instruction that required the defendant, not to prove a compassionate-use defense by a preponderance of the evidence, but to "raise a reasonable doubt." Although an instruction phrased like the one approved in *Frazier* is not the best way to present the question to the jury (see Argument III, post), it differs fundamentally from an instruction that places an unconstitutional burden of proof on the defense.

In sum, because the compassionate use defense negates an element of the crimes of unlawful possession or cultivation of marijuana, the defendant is only required to produce sufficient evidence of the defense to raise a reasonable doubt as to his guilt. Accordingly, the defendant's burden to raise the compassionate use defense is one of production rather than proof.

## III.

## IT IS PREFERABLE THAT A TRIAL COURT NOT INSTRUCT THAT IT IS THE DEFENDANT'S BURDEN TO RAISE THE DEFENSE OF COMPASSIONATE USE; RATHER, IT SHOULD INSTRUCT THAT THE DEFENDANT IS ENTITLED TO ACQUITTAL IF A REASONABLE DOUBT EXISTS AS TO THE COMPASSIONATE USE DEFENSE

### A. The CALJIC and CALCRIM Instructions on Compassionate Use, Both Purporting to Rely on *Mower*, Take Contradictory Positions on Which Party Bears the Burden of Proof on the Defense

In *Mower*, the Court examined whether the 1999 version of CALJIC No. 12.24.1 properly stated the defendant's burden with respect to the compassionate use defense. (*Mower, supra,* 28 Cal.4th at pp. 483-484.) At the time, the instruction stated that the defendant had the burden of proving the defense by a preponderance of the evidence. (*Ibid.*) The Court found the

instruction erroneous because the defendant's burden was merely to raise a reasonable doubt. (*Ibid.*) The Court suggested that an instruction on this lesser burden would be proper: "Had the jury properly been instructed that defendant was required merely to raise a reasonable doubt about his purposes instead of proving such purposes by a preponderance of the evidence, it might have found him not guilty." (*Id.* at pp. 484-485.)

CALJIC No. 12.24.1 was subsequently revised to comply with the Court's decision in *Mower*. (See Comment to CALJIC No. 12.24.1 ["In *People v. Mower* . . . the court held that the defendant had the burden of raising a reasonable doubt that his actions were unlawful"].) The revised part of the instruction was given in this case as follows: "To establish the defense of compassionate use, the burden is upon the defendant to raise a reasonable doubt as to guilt of the unlawful possession or cultivation or transportation of marijuana." (3/10/05 RT 1436-1438; CT 280.)

In 2005, the Judicial Council of California adopted CALCRIM. (CALCRIM Preface, Fall 2006 Edition.) CALCRIM 2360-2377 sets forth the elements of the crimes of transportation, cultivation, and possession of marijuana, and the related defense of compassionate use. Unlike the CALJIC instruction, which speaks of the burden on the defendant to raise a reasonable doubt with regard to the defense, the CALCRIM instructions place the burden on the prosecution to prove "beyond a reasonable doubt that the defendant was not authorized to possess or cultivate marijuana for medical purposes." (CALCRIM 2360-2377.) The instructions cite *Mower* as authority for this burden of proof.

### B. A Trial Court Need Not Instruct on the Defendant's Burden of Production Regarding the Compassionate Use Defense

To determine which, if either, of these instructions is correct, we begin with Evidence Code section 502: "The court on all proper occasions shall instruct

the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt." By its express terms, section 502 applies only to the burden of proof and not the burden of production. In its description of one of the burdens the trial court must instruct on, however, it uses language associated with a burden of production, i.e., "raise a reasonable doubt." (See also Evid. Code, § 115 ["The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact"].) There is thus ambiguity as to whether section 502 requires a trial court to instruct on a criminal defendant's burden to produce sufficient evidence to raise a reasonable doubt as to his guilt.

Some courts have held erroneous such instruction on the defendant's burden. In *People v. Loggins*, *supra*, 23 Cal.App.3d 597, the court examined whether an instruction on the defendant's burden of producing evidence of self-defense to a charge of murder was proper. (*Id.* at p. 599.) During trial, the jury was instructed with former CALJIC No. 5.15, which stated the burden as to self-defense as follows: "[T]he burden is on the defendant to raise a reasonable doubt as to his guilt of the charge of murder." (*Id.* at p. 599, fn. 1.) On appeal, the court found such instruction improper, noting that the defendant's burden "play[ed] no part in the jury deliberations" because the burden had already been discharged by the time the court instructed the jury. (*Id.* at p. 603.) The court concluded that "the standard instruction on proof of guilt beyond a reasonable doubt supplies a sufficient criterion for the jury's guidance." (*Id.* at p. 604.)

In another case, the trial court instructed the jury that the defendant bore the burden of proof on self-defense to a charge of homicide. (*People v. Banks*, *supra*, 67 Cal.App.3d at p. 383.) As in *Loggins*, the appellate court concluded

that the instruction impermissibly shifted the prosecution's burden of proof on the issue of guilt to the defendant. (*Id.* at pp. 383-384.) Contrary to *Loggins*, however, the court concluded that the standard jury instruction on the prosecution's burden of proof was not enough for the jury's guidance on the issue of self-defense. (*Id.* at p. 384.) The court held that when a defendant properly raises the issue of self-defense in a homicide case, the jury must be instructed that the prosecution has the burden of proving the absence of self-defense beyond a reasonable doubt. (*Ibid.*)

The defendant's burden to raise the compassionate-use defense in a marijuana case is similar to the defendant's burden to raise self-defense in a homicide case. In both cases, the defendant bears the burden of producing enough evidence to satisfy the trial court that the jury should be instructed on the defense. In determining whether the evidence is sufficient, the trial court decides whether "'there [i]s evidence which, if believed by the jury, [i]s sufficient to raise a reasonable doubt" as to the defendant's guilt. (*Salas, supra,* 37 Cal.4th at p. 635.) Once the trial court has ruled on the evidence, the defendant's burden of production ends. There is thus no reason to instruct the jury on the defendant's burden of production in either case.

There is an additional reason why such instruction need not be given. As noted above, the comments to Evidence Code sections 500 and 501 make it clear that a defendant is not required to persuade the jury of his innocence on an issue going to the issue of guilt. An instruction on the defendant's burden of production may run risks that are best avoided.

### C. It Is Sufficient for a Trial Court to Instruct That the Defendant Is Entitled to Acquittal if a Reasonable Doubt Exists Regarding the Compassionate Use Defense

Even though a trial court should not instruct on the defendant's burden of production with regard to the compassionate use defense, it still has a duty

under Evidence Code section 502 to instruct on the burden of proof regarding the defense. Once the defendant has produced evidence sufficient to raise the compassionate use defense, the jury must be convinced beyond a reasonable doubt that the defendant was not authorized to possess or grow marijuana for medical use. (See *People v. Pineiro* (1982) 129 Cal.App.3d 915, 920 ["When the issue of self-defense is properly presented in a homicide case, the prosecution must prove the absence of the justification beyond a reasonable doubt"].)

It thus appears that the new CALCRIM instructions appropriately identify the prosecution as bearing the burden of proof with respect to the compassionate-use defense. Accordingly, a trial court may instruct in the language of CALCRIM when the defendant has raised sufficient evidence to warrant such instruction. But we find no requirement that the instruction be phrased in terms of disproving a negative (i.e., to prove "beyond a reasonable doubt that the defendant was not authorized to possess or cultivate marijuana for medical purposes"). Since the jury already is made aware of the prosecution's burden of proving guilt beyond a reasonable doubt (see CALCRIM 220 ["Reasonable Doubt"]), as well as its burden of proving the unlawfulness of the defendant's conduct (see CALCRIM 2360-2377), it is redundant to instruct on the prosecution's burden with regard to the compassionate-use defense. (See CALCRIM 2360-2377; see also *Loggins, supra,* 23 Cal.App.3d at p. 604 [concluding that "the standard instruction on proof of guilt beyond a reasonable doubt supplies a sufficient criterion for the jury's guidance" when instructing on an affirmative defense that negates an element of the prosecution's case].) It is sufficient to instruct that the defendant is entitled to acquittal if a reasonable doubt exists whether he was authorized to possess or grow marijuana for medical use. (See Pen. Code, § 1096 ["A defendant in a criminal action is presumed to be innocent until the contrary is

proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to acquittal . . ."].) Such instruction would be both legally accurate and more understandable to the average juror, which is one of the stated purposes of CALCRIM. (CALCRIM Preface, Fall 2006 Edition.)

### D. The Trial Court's Instruction in this Case was not Prejudicial Error

In this case, the trial court instructed the jury on the compassionate-use defense based on appellant's claimed status as a medical marijuana patient. (3/10/05 RT 1436-1438; CT 280.) The court gave the standard CALJIC instruction in effect at the time, which placed the burden on appellant to establish the defense by raising a reasonable doubt as to his guilt. (3/10/05 RT 1436-1438; CT 280.) Such an instruction, even if not preferred, did not improperly place upon appellant any unconstitutional burden to prove his defense. In any event, although the instruction did not place the burden on the prosecution to disprove compassionate use beyond a reasonable doubt, any error was not prejudicial under either *Chapman v. California* (1967) 386 U.S. 18, or *People v. Watson* (1956) 46 Cal.2d 818. (*Loggins, supra,* 23 Cal.App.3d at p. 605.)

Differences in instructions about (1) the defendant's burden to raise evidence that creates reasonable doubt or (2) the prosecution's burden to disprove evidence beyond a reasonable doubt are mainly of interest to courts. But such differences are too refined to base prejudicial error on them. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has

taken place at the trial likely to prevail over technical hairsplitting." *(Boyde v. California* (1990) 494 U.S. 370, 380-381.)

Beyond a reasonable doubt it makes no difference which formulation the trial court reads. The jury knows the prosecution has the burden of proving guilt in either event. Here, both the trial court and defense counsel made clear to the jury that the prosecution's burden was to prove appellant's guilt beyond a reasonable doubt. (See 3/10/05 RT 1422-1423 [court's instruction that "each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt"]; 3/10/05 RT 1429 [instructing that a defendant is presumed innocent until the contrary is proved, "and in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty"]; 3/10/05 RT 1429 [instructing on the prosecution's burden to prove the defendant guilty beyond a reasonable doubt]; 3/11/05 RT 1505-1506, 1508, 1521, 1525, 1527-1528, 1532 [defense counsel commenting on prosecution's burden of proof and reminding jurors not to shift burden of proof to defense].)

Finally, the evidence at trial overwhelmingly showed that appellant was not growing marijuana merely for his own personal use as a medical marijuana patient. Rather, he admitted growing marijuana for himself, five other individuals, and at least two marijuana dispensaries. Moreover, the large size of his crop belied any claim of personal cultivation. Given the undisputed evidence of appellant's illegal cultivation, the instruction on burden of proof could not have prejudiced him.

## CONCLUSION

Accordingly, respondent respectfully requests that the judgment of the trial court be affirmed.

Dated: May 10, 2007

Respectfully submitted,

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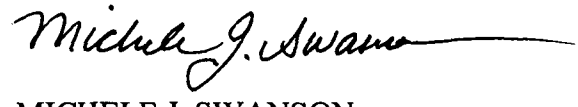

MICHELE J. SWANSON
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Attorneys for Respondent

## 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 10540 words.

Dated: May 10, 2007

Respectfully submitted,

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

Michele J. Swanson

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## DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Mentch**

No.: **S148204**

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 or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On May 10, 2007, 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 United States Mail at San Francisco, California, addressed as follows:

Lawrence A. Gibbs
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The Honorable Bob Lee
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Santa Cruz County District Attorney's Office
County Government Center
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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 May 10, 2007, at San Francisco, California.

S. Agustin
Declarant

S. Agustin
Signature

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