

2. *People v. Kelly (Patrick K.) (and related habeas corpus matter)*
(S164830)

In 1996, the California electorate approved Proposition 215 and adopted the Compassionate Use Act (CUA), which provides an affirmative defense to the crimes of possession and cultivation of “medical marijuana.” The CUA does not specify an amount of marijuana that a patient may possess or cultivate; it states instead that the marijuana possessed or cultivated must be for the patient’s “personal medical purposes.” (Health & Saf. Code, § 11362.5, subd. (d).) This has been construed as establishing “that the *quantity possessed* by the patient or primary caregiver, and the form and manner in which it is possessed, *should be reasonably related to the patient’s current medical needs.*” (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1549, italics added.)

Under California Constitution, article II, section 10, subdivision (c), a statute enacted by voter initiative cannot be “amended” by the Legislature unless the voter initiative expressly gives the Legislature the right to do so. Proposition 215 did not give the Legislature the right to amend the measure.

In 2003, the Legislature found that “reports from across the state have revealed problems and uncertainties in the [CUA].” (Stats. 2003, ch. 875, § 1, subd. (a)(2).) In response, it enacted the Medical Marijuana Program (MMP) (§ 11362.7 et seq.) 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.*” (Stats. 2003, ch. 875, § 1, subd. (b)(1), italics added.)

Although the MMP did not literally amend the statute that established the CUA (§ 11362.5), the MMP did add numerous new code sections that address the general subject matter covered by the CUA. At the heart of the MMP is a voluntary “identification card” scheme that, unlike the CUA, *provides protection against arrest* for marijuana possession and cultivation, and related crimes. Under the MMP, persons who suffer from a “serious medical condition” may register and receive an annually renewable identification card that, in turn, can be shown to a law enforcement officer who otherwise might arrest the program participant for possession or cultivation, or other related crimes. An officer must honor the card, and not arrest the person, unless there is reason to believe the card is fraudulent.

Section 11362.77 of the MMP — the statute at issue in this case — provides that a “qualified patient” or “primary caregiver” may “*possess no more than eight ounces of dried marijuana,*” and may, “[i]n addition, *maintain no more than six mature or 12 immature marijuana plants.*” (*Id.*, subd. (a), italics added.)

The next two subdivisions of the same section provide qualified exceptions for greater amounts. Subdivision (b) specifies that a patient may “possess an amount of marijuana consistent with the patient’s needs,” on condition that the patient “has a doctor’s recommendation that” the quantity set out in subdivision (a) is insufficient for the patient’s medical needs. Subdivision (c) specifies that cities or counties may retain or enact guidelines allowing greater quantities than those set out in subdivision (a).

Section 11362.77 does not confine its quantity limitations to those persons who voluntarily register with the program and obtain identification cards that may protect them against arrest. Instead, the section covers individuals who are *entitled*, under the CUA, to possess or cultivate any quantity of marijuana reasonably necessary for their current medical needs. Moreover, although subdivision (b) of section 11362.77 allows *possession* of a quantity “consistent with the patient’s needs” that is greater than the amount set out in subdivision (a), it affords this protection only if a physician so recommends — a qualification not found in the CUA.

The Court of Appeal held: (1) Section 11362.77 is invalid under California Constitution, article II, section 10, subdivision (c), insofar as it amends, without approval of the electorate, the CUA, adopted by the voters as Proposition 215; and (2) section 11362.77 (and, by extension, the MMP’s identification card scheme) is thereby rendered wholly unenforceable. The Supreme Court granted review to address both of these issues.