

Supreme Court Copy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

PATRICK K. KELLY,
Defendant and Appellant.

In re

PATRICK K. KELLY,
On Habeas Corpus.

S164830

SUPREME COURT
FILED

DEC 2 2008

Frederick K. Orrick Clerk

Deputy

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

REPLY BRIEF ON THE MERITS

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

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy State Solicitor General

KRISTOFER JORSTAD
Deputy Attorney General

MICHAEL R. JOHNSEN
Deputy Attorney General
State Bar No. 210740

300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2268
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov

Attorneys for Respondent

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ARGUMENT

THE PARTIES AGREE THAT THE COURT OF APPEAL SHOULD HAVE MORE NARROWLY TAILORED ITS REMEDY TO PRESERVE THE MMP'S IDENTIFICATION CARD PROGRAM

In the opening brief, respondent argued that the Court of Appeal went too far by severing Health and Safety Code section 11362.77 entirely from the Medical Marijuana Program Act (MMP), which effectively nullified its central feature: the identification card program. In the answer brief, appellant agrees.

More specifically, respondent argued that, as applied to the MMP's identification card program, the marijuana possession limits of section 11362.77 did not amend the Compassionate Use Act (CUA) in violation of Article II, section 10, subdivision (c), of the California Constitution, because the identification card program is a separate stand-alone system from the CUA. That is, nothing about the MMP's identification card program – which is simply a protection against arrest – alters, or even impacts, the limited in-court

immunity established by the CUA. Respondent acknowledged, however, that, as applied to the CUA's in-court medical-use defense, the possession limits of section 11362.77 amounted to an unconstitutional amendment of the CUA because they replaced the CUA's reasonableness standard with specific, numeric guidelines. In this respect, Respondent acknowledged that error had occurred at appellant's trial inasmuch as the possession limits were applied to his in-court CUA defense.

Respondent, however, suggested several alternative remedies for the constitutional problem short of the Court of Appeal's complete severance of section 11362.77. First, respondent suggested that certain language in section 11362.77 could be mechanically severed so as to excise the application of the possession limits to an in-court CUA defense, leaving intact the constitutional application of the possession limits to the identification card program. Second, respondent suggested that the Court could disapprove the unconstitutional application of section 11362.77, permitting only the constitutional use of 11362.77 in the context of the identification program, while leaving the language of the statute intact. Third, respondent suggested that the Court could judicially reform the statute to conform with the Legislature's manifest intent that the possession limits apply only to the identification card program.

In the answer brief, appellant agrees with respondent that section 11362.77 is constitutional as applied to the identification card system but unconstitutional as applied to an in-court CUA defense. (AB 3-11.) Appellant suggests that, irrespective of the severance clause applicable to section 11362.77, the Court should disapprove the unconstitutional application of the statute, leaving the courts and law enforcement free to apply the possession limits in the context of the identification card program. It appears to respondent that this is simply a different way of reaching the same result as that discussed in the "application severance" portion of respondent's opening brief. (ROB 21-

23.) Indeed, the parties rely on the same authority for both arguments. (AB at 12 and ROB at 21, citing *Walnut Creek Manor v. Fair Employment and Housing Com.* (1991) 54 Cal.3d 245.) With respect to the alternative remedies of mechanical severance and judicial reformation, appellant “is in complete agreement with the Opening Brief of the Respondent Attorney General.” (AB 19-22.)

It appears, therefore, that the parties agree that the Court of Appeal should not have completely severed section 11362.77 from the MMP but should have invoked a narrower remedy so as to preserve the MMP’s identification card program.

CONCLUSION

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

Dated: December 2, 2008

Respectfully submitted,

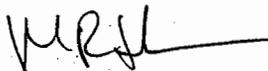
EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy State Solicitor General

KRISTOFER JORSTAD
Deputy Attorney General



MICHAEL R. JOHNSEN
Deputy Attorney General

Attorneys for Respondent

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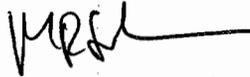
CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a
13 point Times New Roman font and contains 615 words.

Dated: December 2, 2008

Respectfully submitted,

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

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

MICHAEL R. JOHNSEN
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Patrick K. Kelly**

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 **December 2, 2008**, I served the attached **REPLY 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:

Gerald Francis Uelmen (2 copies)
Professor of Law
Santa Clara University School of Law
Santa Clara, CA 94043

Hon. Michael L. Schuur, Judge
Los Angeles County Superior Court
Southeast District - Norwalk Courthouse
12720 Norwalk Blvd., Dept. M
Norwalk, CA 90650-3188

Brandon Wong
Deputy District Attorney
L.A. County District Attorney's Office
12720 Norwalk Blvd., Rm. 201
Norwalk, CA 90650

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 **December 2, 2008**, at Los Angeles, California.

E.Obeso
Declarant



Signature