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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CRUZ

THE PEOPLE OF THE STATE OF THE STATE OF CALIFORNIA, Plaintiff,	**NO: F12008**
vs.	**DEFENDANT'S MOTION**
ROGER MENTCH, Defendant.	**IN LIMINE #2**

Defendant respectfully submits the following *in limine* motion:

The information charges Mr. Mentch with;

Count 1: Possessing marijuana for sale in violation of Health and Safety Code section 11359.

Count 2: Cultivating marijuana in violation of Health and Safety Code section 11358.

Count 3: Transporting marijuana in violation of Health and Safety Code section 11360(a).

Count 4: Possessing concentrated cannabis in violation of Health and Safety Code section 11357(a)

Count 5: Possessing ammunition after having previously suffered a qualifying felony conviction in violation of Penal Code section 12316(b)(1)

At trial, Mr. Mentch will seek to rely on the defense that he was "primary caregiver" under Health & Safety Code sections 11362.5 and 11362.7 et seq. for several individuals and thus not guilty of Counts 1-4 under the Safe Harbor provisions of the Compassionate Use Act.

The court, counsel believes, will be asked by the prosecution to introduce a new, non-statutory "bright line" rule under which no patient who requires medical marijuana can ever lawfully obtain the drug from another person unless, and only if, the patient also has other, non-medical marijuana health, safety or housing needs that the medical marijuana caregiver provides. This is not the law; in fact it is not always the case. Needs vary. Some patients clearly require more or perhaps different housing, health or safety support than others. An extremely ill person may need constant assistance, medical or otherwise, and the responsibility for the housing, health or safety of such patients may be quite substantial. On the other hand, it is equally obvious that many qualifying medical marijuana patients—patients such as Mr. Mentch's named witnesses—may require comparatively less assistance. In some cases providing marijuana to ease pain alone is enough. The crucial point is this: whether the quantity and quality of a defendant's services meets the Compassionate Use Act's "caregiver" standard in any given case depends on the particular patient, and how the caregiver meets his or her needs. Such an issue cannot and should not be determined by a judge as a matter of law where there is substantial evidence of the defendant having provided patient care. Rather, it should be decided as a question of fact by a properly instructed jury.

Section 11362.5 came into being in 1996 with the passage of Proposition 215, the "Compassionate Use Act." As enacted, the law proposes to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes" without criminal penalty. (Cal. Health & Safety Code § 11362.5 subd.

(b)(1).) To this end, section 11362.5(d) authorizes cultivation by patients and their primary caregivers. It provides in pertinent part:

> 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.
>
> (Cal. Health & Safety Code § 11362.5 subd. (d).) The statute in turn definesa "primary caregiver" as "the individual designated by the person exempted under this act who has consistently assumed responsibility for the housing, health or safety of that person." (Cal. Health & Safety Code § 11362.5 subd. (e).)

Deriving from section 11362.5, CALCRIM 2361instruction reads in part:

> [A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate marijuana.]]

Before January 1, 2004, section 11362.5 arguably provided no defense to a charge of possession for sale or transportation of marijuana. However, the law now expressly provides that it is a defense to a charge of possession for sale that the defendant has received only "compensation for actual expenses" in assisting a patient.

A primary caregiver who receives compensation for actual expenses, including reasonable compensation incurred for services provided to an eligible qualified patient or person with an identification card to enable that person to use marijuana under this article, or for payment for out-of-pocket expenses incurred in providing those services, or both, shall not, on the sole basis of that fact, be subject to prosecution or punishment under Section 11359 or 11360. (Cal. Health & Safety Code § 11362.765 subd. (c) ("section 11362.765(c)).)

It should be noted that "compensation for actual expenses" specifically includes "reasonable compensation . . . for services provided" to an eligible medical marijuana patient. Therefore, under the terms of the statute, a primary caregiver is authorized to accept remuneration provided that it includes only actual expenses, and that any included charges for services are reasonable. (See ibid.)

In the most recent medical marijuana case to date, September 2005, the Third District Court of Appeal reversed a conviction for conspiracy to sell marijuana based on the trial court's failure to provide instructions regarding an association defense available under Health & Safety Code § 11362.7 et seq., and a good faith mistake of law regarding the Compassionate Use Act. (People v. Urziceanu, supra, 132 Cal.App.4th 747.)

Urziceanu construed what it called the "Medical Marijuana Program Act," the bill introduced (and popularly known) as SB 420, passed into law in October, 2003, and codified at Health & Safety Code sections 11362.7 et seq. (Stats. 2003, ch. 875, § 1; effective Jan. 1, 2004.) The law provides in pertinent part:

> Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570.

(Cal. Health & Safety Code § 11362.775.) Urziceanu explains:

> In the Medical Marijuana Program Act, the Legislature sought to: "(1)

> Clarify the scope of the application of the [Compassionate Use Act] 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. [¶] (2) Promote uniform and consistent application of the [Compassionate Use Act] among the counties within the state. [¶] (3) Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." The Medical Marijuana Program Act further evidenced "the intent of the Legislature to address additional issues that were not included within the [Compassionate Use Act], and that must be resolved in order to promote the fair and orderly implementation of the act."

(People v. Urziceanu, supra, 132 Cal.App.4th at 785 [quoting Stats. 2003, ch. 875, § 1(c), p. 2.) Referring specifically to section 11362.765, the court observed the broad range of previously criminal behavior now permissible under the Medical Marijuana Program Act:

> [T]his section extends the protections of the Compassionate Use Act to the additional crimes related to marijuana: possession for sale (§ 11359), transportation or furnishing marijuana (§ 11360), maintaining a location for unlawfully selling, giving away, or using controlled substances (§ 11366), managing a location for the storage or distribution of any controlled substance for sale (§ 11366.5), and the provisions declaring a building used for selling, storing, manufacturing, and distributing a controlled substance to be a nuisance (§ 11570).

(Ibid.) In the new law, the court in Urziceanu saw "a dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers." (Ibid. [emphasis added].)

People v. Frasier (2005) 128 Cal.App.4th 807 is not to the contrary. In that case, the jury was instructed only in the language of the Compassionate Use Act. The defendant claimed he was growing medical marijuana only for himself, his wife, stepson, and ex-sister-in-law, each of whom had medical

recommendations to use marijuana. The jury however, had before it evidence that the defendant grew very large quantities of marijuana and sold it for large sums of money, including in the Bay Area for $3,000 to $4,000 a pound. (*Id.* at p. 813.) The defendant testified, rather incredibly, that he used two *ounces* of marijuana *each week.* (*Id.* at p. 814.) The defendant's stepson had told detectives the defendant sold marijuana, although under oath he said he didn't know. (*Ibid.*) Defendant's caretaker testified that he saw defendant exchange marijuana for money and heard the defendant admit he sold marijuana. (*Id*. at p. 813.) Instructed only on the Compassionate Use Act, the jury rejected the proffered defense that the defendant had supplied marijuana only to himself, his wife, stepson, and ex-sister-in-law; the jury convicted him of cultivating marijuana and possessing it for sale. (*Id.* at pp. 815, 827.) On appeal, the court concluded that the trial court erroneously failed to retroactively apply the current law, the Medical Marijuana Program, to the case. (*Id*. at p. 825.) However, the court concluded, it was evident the jury had concluded the defendant's medical marijuana defense was a ruse for pure and simple cultivation for sale of marijuana for recreational, not medicinal, purposes. (*Id*. at p. 827 ["Defendant, however, cannot avoid the fact that the jury rejected his defense"].) Because the jury concluded he "did not raise even a reasonable doubt" that this was a medical marijuana operation, he was not entitled to a new trial with instruction under the new law. (*Ibid* .)

In contrast, in the present case, all the evidence, including the quantities of marijuana seized, the documents seized, and all interviews by the deputies, indicates that Mr. Mentch only supplied marijuana to legitimate medicinal marijuana users. All of Mr. Mentch's clients contacted by Deputy Ramirez were legitimate, qualified medical marijuana users. (12/12/05 RT 71.) There is no evidence, unlike that in *Frasier*, that Mr. Mentch has ever sold marijuana to

anyone who was not a legitimate medicinal user, or that any of the marijuana he possessed was to be sold to non-medical users.

Under California law, a defendant is entitled to an instruction on his theory of the case when it is supported by substantial evidence. (People v. Flannel (1979) 25 Cal.3d 668, 684-85.) Doubts as to the sufficiency of the evidence must be resolved in favor of the defendant. (Ibid.) Even when the evidence in support of the instruction is "incredible," the court must proceed on the hypothesis that it is entirely true. (People v. Burnham (1986) 176 Cal.App.3d 1134, 1143.) In effect, where substantial evidence exists, no matter how believable, the question is always one for the jury.

Defendant here is entitled to the defense and appropriate jury instructions. Even if one concedes, for the sake of argument, that Mr. Mentch and his witnesses word on these matters are "incredible," the testimony will nevertheless be substantial, and any questions regarding its believability should be resolved by the trier of fact with an appropriate instruction from the court. (See Burnham, supra, 176 Cal.App.3d at p. 1143.) The refusal to provide such a necessary defense and instruction would be error and reversible per se..

Dated: _____

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Benjamin Rice, Attorney for Roger Mentch