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Attorney for Defendant,

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN BERNARDINO

PEOPLE OF THE STATE OF CALIFORNIA, )  
 )  
 Plaintiff, )  
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 vs. )  
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 Defendant. )  
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Case No.  
  
BRIEF IN SUPPORT OF  
DEFENDANT'S  
MOTION TO DISMISS;  
  
Date:  
Time:  
Dept.:

TO: THE DISTRICT ATTORNEY OF SAN BERNARDINO COUNTY, AND TO THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that the defendant, \_\_\_\_\_, hereinafter "Defendant," by and through his counsel of record, BRUCE MARGOLIN, will submit this brief in the interest of supporting the defendant's motion to dismiss based on the defense of medicinal marijuana pursuant to California Health and Safety Code Section 11362.5 *et seq.*

Said brief is based upon this Memorandum of Points and Authorities, the documents and records before this Court, and any other evidence and argument, written or oral, to be presented at the hearing.

Dated: \_\_\_\_, at Los Angeles, California.

Respectfully submitted,

\_\_\_\_\_  
BRUCE MARGOLIN  
Attorney for Defendant,

## I.

### The Current Legal Status of Medicinal Marijuana in California

#### A.

##### **The California Health and Safety Code.**

In 1996 California voters approved Proposition 215, “The Compassionate Use Act,” with an overwhelming 65% of the vote. The proposition’s purpose was to make legal the medicinal use of marijuana for individuals that obtain a recommendation from a physician. Through the power of the vote, California citizens established that such a use is legal within the State of California.

The Compassionate Use act was subsequently codified in California Health and Safety Code Section 11362.5 *et seq.* The stated purposes of these sections are:

“To ensure that seriously ill Californian’s have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who 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.

To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

To encourage the federal and state governments to implement a plan to provide for the safe affordable distribution of marijuana to all patients who are in need of marijuana.”

Thus the California legislature enacted these sections to shield individuals who are qualified from criminal prosecution for the cultivation, possession and use marijuana for medicinal purposes.

As of January 1, 2004 enforcement took effect of SB 420, a bill enacted by the legislature establishing guidelines for the cultivation and use of medicinal marijuana. The intent of the legislature in enacting this bill was to “enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects.” (California Health and Safety Code, Division 10, Chapter 6, Article 2.5 (commencing with Section 11362.7) section 1, subsection (b)(3), added by Stats.2003, chapter, 875 (S.B.420), § 1(b)(3), 2003 Cal. Legis. Serv. Ch. 875 (WestLaw), see also *West’s Annotated California Codes*, Health and Safety sec. 11362.7, *Historical and Statutory Notes*.) Thus the legislature ensured that the use of medicinal marijuana remain insulated from prosecution and become more prevalent for people with need. These guidelines were codified in Health and Safety Code Section 11362.7 *et seq.* In pertinent part these sections state:

“**11362.765(a)** the individuals specified in subdivision (b) shall not be subject, on that sole basis, to criminal liability...

**(b)(1)** a qualified patient or a person with an identification card...

**(b)(2)** a designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medicinal purposes...

**(b)(3)** any individual who provides assistance to a qualified patient or a person with an identification card, or his or her designated primary caregiver...

**11362.77(a)** A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified patient.

- (b) If a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, the qualified patient or primary may possess an amount of marijuana consistent with the patient needs.
- (c) Counties and cities may retain or enact medical marijuana guidelines allowing qualified patients or primary caregivers to exceed the state limits set forth in subdivision (a).
- (d) Only the dried mature processed flowers of female cannabis plant or the plant conversion shall be considered when determining allowable quantities of marijuana under this section."

Therefore, the legislature set guidelines in an effort to make medicinal marijuana readily available to citizens who have the medical need, and also endorse the use of this medicine by shielding the proper individuals from criminal liability.

Moreover, many counties and cities have utilized the power enunciated in 11362.577(c) to set guidelines allowing higher amounts of medicinal marijuana than the statutory minimums. For example, the District Attorney's Office of Kern County has stated that a qualified medicinal user may have up to 49 plants or two pounds of marijuana per patient. (Please see attached letter from the District Attorney's Office of Kern County.) Sonoma County DA's guidelines permit 3 pounds of marijuana for possession per valid patient, or a maximum area of 100 ft. cultivation area with 99 plants or fewer. However, even in Sonoma, patients can have more processed marijuana or marijuana plants if the patient obtains a doctor's recommendation endorsing greater need. Thus, the amount of marijuana a patient may legally possess or cultivate, fluctuates relative to the county guidelines, and most importantly, the patient's individual medical need.

## B.

### **Recent Jurisprudence on The Compassionate Use Defense.**

In 2002, the California Supreme Court decided the landmark case of *The People v. Mower*, (2002) 28 Cal.4th 457. In *Mower*, a person that was cultivating and using marijuana for medicinal purposes, was found guilty of possession and cultivation of marijuana. Mr. Mower was an individual "who suffered from diabetes and all of its complications" (*Id.* at 465.) However, despite this well documented fact, Mr. Mower was charged by information with the crimes of possession and cultivation in violation of the penal code. The Supreme Court ruled that the medicinal marijuana, Compassionate use defense "operates, in the manner...[that] renders *noncriminal* certain conduct that would otherwise be criminal." (*Id.* at 472) Therefore, the *Mower* court held that at trial, "as to the facts underlying the defense provided by 11362.5(d) defendant is required merely to raise reasonable doubt" that he or she is cultivating or using marijuana for medicinal purposes and that he or she is qualified for medicinal use. (*Id.* at 481). Therefore, in order for an individual to be found guilty for marijuana possession, cultivation, and use, the prosecution must prove that, beyond a reasonable doubt, that individual was not doing so for valid, personal, medicinal purposes.

Moreover, the *Mower* court held that the Compassionate use defense could appropriately be raised at the preliminary hearing, indictment or information setting. The court reasoned that such a defense must be acceptable in such a setting "because, if successful, it would obviate any need for trial." (*Id.* at 473). The court further stated that "in the absence of reasonable or

probable cause to believe that a defendant is guilty of possession or cultivation of marijuana, **in view of his or her status as a qualified patient or primary giver**, the grand jury or magistrate, should not indict or commit the defendant in the first place, but instead should bring the prosecution to an end at that point.” (*Id.*, emphasis added) Thus, the Compassionate use defense has also been endorsed by the Supreme Court of California.

In addition, in *People v. Jones*, (2003) 4 Cal.Rptr.3d 916, the court reiterated the standard that a defendant raising the medicinal marijuana defense is required “merely to raise a reasonable doubt” regarding the existence of such a defense. (*Id.* at 349.) In *Jones* the trial court prevented the defendant from raising the Compassionate use defense because the court found that the evidence of the doctor’s approval was insufficient. The trial court held a pre-trial hearing on the issue in which the defendant claimed he had verbal approval from his physician. The physician, who was under the impression that he may be prosecuted for approving of the defendant’s use, gave “equivocal” testimony regarding the approval. (*Id.* at 347.) Thus the trial court excluded the defense. However, the appellate court overruled this decision, holding that verbal approval from a doctor is sufficient under the Health and Safety Codes. The court further held that the trial court erred in excluding the defense in light of the low requirement of raising reasonable doubt. Therefore, the Compassionate use defense is a valid defense that precludes a guilty verdict when the defendant establishes, by a reasonable doubt, that he or she cultivates, possesses, or uses marijuana for personal, medicinal purposes pursuant to valid doctor approval or recommendation.

#### IV.

#### CONCLUSION

Based on the foregoing, the defendant respectfully requests that all the evidence obtained as a result of the unlawful search of his residence be suppressed pursuant to section 1538.5 of the California Penal Code.

Dated this \_\_\_ of June, 2005

Respectfully submitted,

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BRUCE MARGOLIN  
Attorney for Defendant,