IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, **v.** **DENNIS PERON AND BETH MOORE,** Defendants and Respondents.	A077630

San Francisco County Superior Court No. 980105
The Honorable David Garcia, Judge

APPELLANT'S OPENING BRIEF

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INTRODUCTION

The People of the State of California, *ex rel* Daniel E. Lungren as Attorney General of the State of California, appeal from an order modifying a preliminary injunction. This case of first impression involves interpretation of newly-enacted Health and Safety Code section 11362.5, and involves examination of a trial court order which authorized respondents to engage in the sale, cultivation and distribution of marijuana. The trial court decision is unsupported by the language of the statute, contrary to the intent of the voters and counter to sound public policy.

STATEMENT OF THE CASE

On August 5, 1996, the Attorney General acting on behalf of the People of the State of California filed a complaint for temporary restraining order, preliminary and permanent injunction against

defendants Dennis Peron and Beth Moore (hereinafter "respondents".)[1] (Appellant's Appendix in Lieu of Clerk's Transcript hereinafter AA 1.) The complaint sought injunctive relief pursuant to Code of Civil Procedure section 731, Health and Safety Code sections 11570 and 11571, and Civil Code sections 3479 and 3480. The factual basis underlying the complaint was respondents' conduct in maintaining premises where large amounts of marijuana were sold to numerous people. (AA 1-7.)

On August 5, 1996, Judge William Cahill heard argument on the request for a temporary restraining order. Respondents did not contest the veracity of the declarations in support of the complaint. (RT, August 5, 1996, pp. 18-19.) After hearing, Judge Cahill issued the temporary restraining order and issued an order to show cause why a preliminary injunction should not issue. (AA 127.)

The hearing on the order to show cause re: preliminary injunction occurred on October 30, 1996. (RT, October 30, 1996.) Judge David A. Garcia issued the preliminary injunction sought by appellant on November 4, 1996. (AA 175.) Judge Garcia held that respondents' conduct as alleged in the complaint and supporting documents constituted a nuisance. He ordered that respondents cease and desist the commercial operation of a "club" to distribute marijuana from the Market Street premises or any other location. (AA 175.)

On December 23, 1996, respondents filed a motion to modify the preliminary injunction. (AA 178.) The motion was argued before Judge Garcia January 8, 1997. (RT, January 8, 1997.) On January 10,

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1. The previous day the Attorney General had served a search warrant on the respondents' enterprise, the Cannabis Buyers' Club in San Francisco. (AA 54.)

1997, Judge Garcia issued an order modifying preliminary injunction. (AA 218.)

The Attorney General filed a request for writ of mandamus with this Court on February 14, 1997[2/]. On March 3, 1997, this Court denied the request for writ of mandamus "without prejudice to a proper appeal from the order modifying the preliminary injunction."

A notice of appeal was timely filed on March 7, 1997. (AA 221.)

STATEMENT OF FACTS

In November 1994, the San Francisco Police Department Narcotics Division began to investigate the illegal sale of marijuana by the Cannabis Buyers' Club in San Francisco, California. The initial investigation revealed that, in fact, large amounts of marijuana were being sold and numerous undercover purchases of marijuana were made. (AA 22-24.) The investigation proceeded. The investigation subsequently involved agents of the Federal Drug Enforcement Administration and, beginning in 1996, agents of the California Bureau of Narcotics Enforcement. (AA 28-50.) Over the course of the investigation, it became apparent that respondents Dennis Peron and Beth Moore were operating the Cannabis Buyers' Club to sell marijuana to over 10,000 "members," as well as their "guests," that the CBC was a large-scale drug trafficker in San Francisco, that marijuana sold by the CBC was in turn re-sold by local drug dealers, that bulk

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2. This Court is asked to take judicial notice of its own files. The writ request was assigned to Division 5, case number A077292.

sales were occurring, and that marijuana was being sold to minors. (AA 22-50.)

Based upon the above facts, appellant sought injunctive relief on a nuisance theory. (AA 1.) Specifically, appellant argued that pursuant to Health and Safety Code sections 11570 and 11571, injunctive relief was mandatory based upon the showing that respondents were unlawfully selling, serving, storing, keeping or giving away marijuana as alleged. (AA 12-18.) On August 5, 1996, following argument, Judge William Cahill issued a temporary restraining order, finding that the unlawful activities which were occurring at the Market Street "Club" constituted a nuisance proscribed by the Health and Safety Code. (AA 127.)

Respondents made no effort to contest the underlying facts alleged by the appellant in support of the temporary restraining order.

The hearing on the order to show cause re: preliminary injunction came before the court on October 30, 1996. Respondents argued that the conduct alleged was "privileged" under a theory of "medical necessity," but again, they did not contest the veracity of the allegations contained in the complaint and supporting declarations. (AA 135.) The court found that it did not need to reach the medical necessity use issue because:

> ". . . what the People are prepared to show and have shown in their motion, pardon me, in their request for Preliminary Injunction is that the club, in this case, went well beyond selling to individuals who may have had medical need." (RT, October 30, 1996, p. 4:10-14.)[3]

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3. The court also correctly observed that medical necessity required that he examine the issue whether marijuana had "legitimate medical uses." (RT, October 30, 1996, p.4:1-6.)

The preliminary injunction was issued on November 4, 1996. (AA 175.) As had been the findings with regard to the temporary restraining order, the court concluded that the activity was a nuisance as defined by Health and Safety Code section 11570 and that, as a nuisance, it must be abated as mandated by that code.

At the November, 1996, general election, the voters of California passed Proposition 215 (now Health and Safety Code section 11362.5) which allows patients or their primary caregivers to assert a defense to criminal charges of cultivation or possession of marijuana if they satisfy certain requirements.

On December 23, 1996, respondents filed a motion seeking to modify the preliminary injunction. (AA 178.) Respondents argued that the passage of Proposition 215 had changed the law on which the injunction was based and granted. The gravamen of the respondents' argument was that Peron was a "primary caregiver" to "thousands of individuals" and he must be freed from the restrictions imposed by the injunction to provide them with marijuana[4]. (AA 183-185, 190-193.)

The motion for modification was heard on January 8, 1997. During the hearing, the trial court stated that it interpreted section 11362.5 to permit the sale of marijuana as long as it was not for profit, and to permit the organization of "co-ops" for the non-profit sale or distribution of marijuana. (RT, January 8, 1997, p. 4:9-27, pp.5-6, p. 8:22-28.)

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4. It is of interest to observe that nowhere in the motion to modify or the declarations filed in support of the motion is there any mention of the intention to sell marijuana. (See AA 178-195.)

On January 10, 1997, the trial court issued an order modifying preliminary injunction. (AA 218.) The order, from which this appeal is taken, provides:

1) Respondents may, upon a physician's recommendation, possess or cultivate for their personal medicinal use;

2) Respondents may possess or cultivate as primary caregivers for persons with physician recommendations who designate them as primary caregivers;

3) Respondents shall maintain records showing the designation as caregivers;

4) Respondents shall maintain records showing a physician's recommendation for each person who receives marijuana;

5) Respondents shall maintain records showing monies expended.

6) Respondents shall maintain records showing monies received as reimbursement of expenditures including "overhead for their activities relating to the provision of medicinal marijuana."

In all other respects the injunction remains in effect. (AA 218-219.)

STANDARD OF REVIEW

Appellant challenges the trial court's interpretation and application of a statute. This is an issue of law, subject to *de novo* review in the Court of Appeal. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799; *Simpson v. Unemployment Ins. Comp. Appeals Bd.* (1986) 187 Cal.App.3d 342, 350.)

STATEMENT OF APPEALABILITY

This is an appeal from an order modifying a preliminary injunction. Such an order is appealable as "an order granting an injunction." (*Chico Feminist Women's Health Center v. Scully* (1989) 208 Cal.App.3d 230, 251.)

CONTENTIONS ON APPEAL

1. The trial court exceeded its jurisdiction when it determined that the sale or distribution of marijuana by defendants should no longer be enjoined as a nuisance.

A. Background, Health And Safety Code Section 11362.5.

B. The Trial Court's Order Constitutes Legislation And, As Such, Is In excess Of Its Jurisdiction.

C. The Term Primary Caregiver Was Not Intended To Include "Clubs" Which Sell Marijuana.

D. Section 11362.5 Does not permit any sale of marijuana regardless whether there is a net profit.

ARGUMENT

THE TRIAL COURT EXCEEDED IT JURISDICTION IN MODIFYING THE INJUNCTION

Distilled to its essential elements the trial court reached three conclusions necessary to support the modifications it ordered. First, the court concluded that it had to fashion a ruling that guaranteed a source of marijuana other than personal cultivation to the primary caregiver. Second, it concluded that it was "implicit" in section 11362.5 that institutions could be "primary caregivers." Third, the court concluded that section 11362.5 permitted sale of marijuana so long as the sales less costs (including "overhead") resulted in no *net* profit.

Appellant submits that each of these conclusions was erroneous as a matter of law and, therefore, the modifications that were based on these conclusions were also erroneous as a matter of law.

A. Background, Health And Safety Code Section 11362.5

Health and Safety Code section 11362.5 was added by the initiative process at the November 5, 1996, general election. It became effective November 6, 1996. (California Constitution, Article 2, section 10(a).) Presented to the California electors (see Constitution, Article 2, section 10(c); the term voters will be used hereinafter rather than the term electors) as Proposition 215, the "Compassionate Use Act of 1996," the stated purpose of section 11362.5 is to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes . . . ." and 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." (Health and Safety Code sections 11362.5(b)(1)(A) and (B).)

Section 11362.5(d) provides

> "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."

"Primary caregiver" is defined by the statute 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 and Safety Code, § 11362.5(e); emphasis added.)

Thus, by its own terms, section 11362.5 creates only a very narrow defense to two specific criminal laws (possession and cultivation) regarding marijuana.[5/] The law pertaining to marijuana distribution and sale is unchanged. Section 11362.5 does not change or apply to the law prohibiting the possession for sale of marijuana. (§ 11359.) The statute does not change the law prohibiting the transportation or importing into the state for sale, or the sale of marijuana. (Health and Safety Code, § 11360.) It does not change the law which prohibits the maintenance of a place for the unlawful sale, giving away or using of marijuana. (§ 11366.) Moreover, cultivation and possession of marijuana *remain illegal* under sections 11357 and 11358, subject only to the newly enacted affirmative defense.

Section 11362.5 made no amendment to the laws regulating the sales of various items insofar as labelling, packaging, purity, etc. These

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5. The proponents stated: "Proposition 215 simply gives those arrested a defense in court, *if they can prove they used marijuana with a doctor's approval.*" (Proponent's Rebuttal Argument, AA 216.)

laws are designed to insure that drugs sold and/or supplied to the population of California do no harm to that population. As will be demonstrated in subpart C of this argument, the reason these laws were not addressed by the initiative is that sale of marijuana was not contemplated as being authorized by section 11362.5.

Finally, and most important to the instant appeal, Proposition 215 did not amend Health and Safety Code sections 11570 and 11571 upon which the preliminary injunction is based.

B. The Trial Court's Order Constitutes Legislation And, As Such, Is In excess Of Its Jurisdiction

The order modifying the injunction did not vacate the court's previous finding that respondents' conduct constituted a public nuisance. There are four relevant code sections which define nuisance in the context of marijuana distribution and sales. First, Health and Safety Code section 11570 which says that any location used unlawfully for selling, storing, serving or giving away any controlled substance *shall* be enjoined, abated and prevented because it is a nuisance. Next, Health and Safety Code sections 11366 and 11366.5 which make the maintenance of such a place for the purpose of selling, storing, serving or giving away marijuana a crime. Finally, Civil Code section 3479 defines a nuisance as conduct including but not limited to the illegal sale of controlled substances.

The important common factor as to each of these statutes is that they do not condition the question whether conduct is or is not a nuisance or whether it is a profit-making or nonprofit-making activity. Giving away a controlled substance, from premises maintained for that purpose, is no different than selling it from the same premises insofar

as these sections are concerned.[6] The Legislature, which is the body of elected representatives of the people of the state, has decided that premises maintained for such purposes *shall* be enjoined, regardless whether they are nonprofit-making or profit-making efforts.

> "Where the Legislature has determined that a defined condition or activity is a nuisance, *it would be an usurpation of the legislative power for a court to arbitrarily deny enforcement merely because in its independent judgment the danger caused by the violation was not significant.* The function of the courts in such circumstances is limited to determination whether a statutory violation in fact exists, and whether the statute is constitutionally valid. " (*City of Bakersfield* v. *Miller* (1966) 64 Cal.2d 93, 100; emphasis added.)[7]

As recently as 1995 the state Legislature has spoken to the question whether, in its opinion, the sale of marijuana constitutes a nuisance. It said, in pertinent part:

> "[C]ommunities in the State of California are experiencing an increase in the street sales of marijuana . . . . *[T]he Legislature finds and determines that the sale of controlled substances constitutes a continuing nuisance* which adversely

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6. See, also, *People* v. *Peck* (1996) 52 Cal.App.4th 351, which recognizes that the transfer of marijuana from one person to another in exchange for money or goods is a "sale" regardless whether it is for profit.

7. The California Supreme Court very recently issued an opinion which stated the same premise in *People ex rel. Gallo* v. *Acuna* (1997) 14 Cal.4th 1090. The Supreme Court stated ". . . the ultimate legal authority to declare a given act or condition a public nuisance rests with the Legislature; the courts lack power to extend the definition of the wrong or to grant equitable relief against conduct not reasonably within the ambit of the statutory definition of a pubic nuisance. This lawmaking supremacy serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a 'public nuisance'." (*Id.* at p. 1107.)

affects the public health, safety and welfare . . . ." (Statutes 1995, Ch.981, § 2 (AB 1035), emphasis added.)

The trial court's order modifying the injunction in this case is an usurpation of Legislative power because it attempts to establish the concept that using premises for sales of marijuana, which sales result in no net profit due to undefined "overhead", does not constitute a nuisance. The Legislature has already spoken on this issue, and has declared that any continuing distribution of marijuana from a premises *is* a nuisance whether it is simply given away, sold at cost or sold at a profit. Under the doctrine stated in *City of Bakersfield, supra*, the trial court cannot substitute its judgment for that of the Legislature.

The only basis on which the trial court could justify its ruling would be to find that the electorate's passage of Proposition 215 was intended to overturn those code sections which declare the maintenance of premises for the purpose of distributing controlled substances to be a nuisance. To accomplish this result on the facts of this case the court would have had to have found that the voters intended to make sales legal. This the trial court did not do.

In fact, at the hearing on the motion to modify the injunction, the court made it clear that it did not accept the assertion that the passage of Proposition 215 had "amended all laws" (RT, January 8, 1997, p. 6) that prohibited furnishing of marijuana. In addressing this issue, the Trial Court said:

> "So if somebody does this and does this for profit, they are going to have big problems. They will be in violation of Health and Safety Code section 11360. They are going to be in violation of Health and Safety Code section 11359. And that's still the law."[8/] (RT January 8, 1997, p. 6:22-27.)

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8. The only impact on any laws other than providing a defense to sections 11357 and 11358 that Judge Garcia acknowledged was the very

The court's conclusion that the voters had not intended to rewrite all laws relating to controlled substances is consistent with both the plain language of the statute and with the arguments submitted to the voters in the official ballot pamphlet.

Section 11362.5(d) describes the affirmative defense available to the patient and primary caregiver. The provision states that only two sections, 11357 (possession) and 11358 (cultivation) ". . . shall not apply to a patient, or to a patient's primary caregiver . . . ." Clearly, all other sections *do apply* to patients and caregivers, including Health and Safety Code sections 11366, 11366.5 and 11570. There is nothing in the ballot pamphlet, or in Section 11362.5 that suggests that the voters intended to disturb the Legislature's judgment that maintaining premises for the purpose of selling, storing, serving or giving away marijuana is a nuisance that *shall* be enjoined. While section 11362.5 allows patients and primary caregivers to assert a defense to criminal charges or

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narrow impact on section 11360 when a true primary caregiver (a person, not a club) gave (furnished), not sold, a medicinal quantity of marijuana to a patient. (RT, January 8, 1997, p. 7:12-17) As the record reflects, the People conceded that the affirmative defense would likely apply to this one-on-one transfer in a true primary caregiver/patient situation. (RT, January 8, 1997, p. 7:18-19)

It is important to point out that the People do not now and did not at the time of the motion to modify contend that either respondent should be prevented from exercising rights as a patient or a bona fide primary caregiver to one other person. The dispute is whether a club with which respondents are involved can be a primary caregiver to unspecified numbers of persons and, in that capacity, sell a controlled substance to them. (RT, January 8, 1997, p. 3-4.)

Of course the proponents' assertion as to what they intended is of no legal impact unless it was expressed in the materials submitted to the voters. As has already been demonstrated, Proposition 215 was never represented to the voters as an amendment to "all laws" regarding marijuana.

sanctions, the statute is silent on the issue of civil penalties or sanctions for maintaining a nuisance. It is simply not reasonable to conclude that a statute that provides an affirmative defense to criminal actions implies an intention to preclude civil actions or sanctions.[9/]

The ballot arguments support the conclusion that the measure was intended only to apply to criminal actions, and not to alter the Legislature's previous declarations concerning the nuisance aspect of marijuana sales and distribution. In their rebuttal argument, the proponents of Proposition 215 stated:

> "Proposition 215 does not allow 'unlimited quantities of marijuana to be grown anywhere.' *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.*" (Emphasis added; AA 216.)

The Legislative Analyst observed that:

> "[T]he measure specifies that growing and possessing marijuana is restricted to medical uses . . . and *does not change other legal prohibitions on marijuana* . . . ." (Emphasis added; AA 187.)

Nothing in the material presented to the voters can be construed to support the conclusion that the trial court necessarily reached: that the voters intended to approve the establishment of facilities where marijuana is grown, and sold -- precisely the activities which the Legislature has already declared to constitute a public nuisance.

Further, as set forth in the argument which follows, the consequence of the trial court's erroneous construction of the term

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9. The California Supreme Court in *People ex rel. Gallo* v. *Acuna*, *supra*, recognized that conduct which is not criminal (or may not be punished as criminal) may well be a public nuisance. (*People ex rel. Gallo*, *supra*, at p. 1107.)

"primary caregiver" is that the Legislature's specific findings that facilities selling controlled substances (other than pharmacies) are *as a matter of law* nuisances are nullified. Moreover, the ruling has the affect of amending the scope of the initiative to go beyond what was intended by the voters[10/]. Each of these consequences is an act in excess of the court's jurisdiction and authority.

C. The Term Primary Caregiver Was Not Intended To Include "Clubs" Which Sell Marijuana

Section 11362.5(e) defines a primary caregiver as ". . . the *individual* . . . *who* has consistently assumed responsibility for the housing, health or safety of that person." (Emphasis added.) When interpreting an initiative, and the terms used in an initiative, the court must interpret and apply the language of the measure in a manner consistent with the probable intent of the body enacting the measure -- in this case, the voters of the State of California. When the language of an initiative does not point to a definitive resolution of a question of interpretation, "[I]t is appropriate to consider indicia of the voters' intent other than the language of the provision itself." Such indicia include the analysis and arguments contained in the official ballot pamphlet." (*Hill* v. *NCAA* (1994) 7 Cal.4th 1, 16; See, also, *Legislature of State of California v. Eu* (1991) 54 Cal.3d 492; *De Fonte* v. *Up-Right, Inc.* (1992) 2 Cal.4th 593.)

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10. California Constitution, Article II, Section 10(c) states that where, as here, an initiative statute does not permit amendment by its terms it may only be amended by another initiative submitted to and approved by the electors.

Thus, the first inquiry should be whether the language of section 11362.5 is ambiguous. It is not. Section 11362.5 is clear on its face. The voters never contemplated and never approved the concept that a primary caregiver could be anyone other than a real person "who" was the individual who (not which) had consistently provided for the needs of the patient. The term individual is not defined in the statute. However, in analyzing the same term, the appellate court in *Nelson* v. *United States Fire Insurance Company* (1968) 259 Cal.App.2d 248, 253 determined that the meaning of the word "individual" necessarily depended on the context in which it was used. (*Id.* at pp. 253-254.) In the context of this section (11362.5), then, the word "individual" as used in the measure clearly meant a person to person relationship between patient and caregiver. Subsection (b)(1)(B) speaks about "patients" and "primary caregivers" *who* obtain and use. Subsection (b)(2) refers to ". . . patient's primary caregiver, *who* possesses or cultivates." Finally, subsection (e) defines a primary giver as noted, *supra*, an "individual . . . *who* has consistently provided . . . ."

By definition "who" is a personal pronoun used to refer to and stand for a human being rather than an entity (things) of some sort. (See *Random House Dictionary Of The English Language*, Unabridged Edition 1966, p. 1630.) This is by contrast to the word "which," an impersonal pronoun, typically not employed to stand for a human being. (See *Random House*, *supra*, at p. 1626.)

Throughout the actual language of the section there is no commonly used word or phrase which would justify the conclusion that an entity rather than a real person was contemplated as a primary caregiver. The word "individual" which the trial court incorrectly

interpreted to include a "club" is clarified by the use of the personal pronoun "who." Put another way, for the court's interpretation to be correct section 11362.5(e) would have to read ". . . the individual . . . who or which has consistently assumed . . . ."

Nothing in the material presented in the ballot pamphlet can be construed to support the conclusion that the voters intended to approve the establishment of "primary caregiver" facilities where amounts of marijuana were grown or possessed for the purpose of sale or distribution to anyone; precisely the activity in which the respondents have been authorized by the trial court to engage.

The trial court erred when it concluded that implicit in the term "primary caregiver" was the concept that an institution organized predominately for the purpose of supplying or distributing marijuana through sales could carry out that role. (RT January 8, 1997, p. 4:9-27.) The ballot arguments, as well as common usage, support this conclusion.

First, the proponents' rebuttal argument flatly states that growing too large a quantity or selling any quantity of marijuana would be at odds with the measure. Therefore, the conclusion that any "primary caregiver" could sell was simply erroneous. The voters adopted a measure which contemplated no affirmative defense to a criminal prosecution for sales regardless whether the seller was a patient or a primary caregiver. The voters were never asked to vote on the proposition that some persons could assert an affirmative defense to the unlawful act of sale. Respondents' assertion before the trial court that section 11362.5 "amended all laws" (AA 183) is simply wishful thinking.

Second, the trial court's reading of the term "primary caregiver" is at odds with the intent of the voters. In the November, 1996, election Voter Pamphlet, the Legislative Analyst stated:

> "the measure . . . allows caregivers to grow and possess marijuana for *a person* for whom the marijuana is recommended. . . ." (AA 187.)

The Legislative Analyst correctly read both the statute as well as the arguments in favor of its passage as contemplating a simple one-on-one relationship in which a person (caregiver) related directly to another person (patient). The trial court's finding that "clubs" serving thousands were implicit in the statute simply ignored the intent of the voters as well as the plain meaning of the words in the statute.

Hill directs that other statutory uses or past judicial construction of a term may be considered when interpreting the meaning of language in an initiative. (*Hill* at p. 16.) Indeed, the *Hill* court made clear the importance of prior judicial constructions not only to a court subsequently construing meaning, but also to an "adopting body" (here the voters) approving a new law using the term; it stated, in pertinent part:

> "When an initiative contains terms that have been judicially construed, ""'the presumption is almost irresistible'"" that those terms have been used "'"in the precise and technical sense"'" in which they have been used by the courts. (Citation including a reference to *In re Lance W*: ["The adopting body is presumed to be aware of existing laws and judicial construction thereof."])." (at page 23.)

Moreover, when interpreting the language of an initiative, the court must accord words their usual, ordinary and common sense meaning based on the language used and the evident purpose for which the statute was enacted. (*People v. Davis* (1996) 42 Cal.App.4th 806, 815.)

Thus, when the term "primary caregiver", or "caregiver" is examined, it becomes clear that although the concept has been used by the Legislature and the courts in many different contexts,[11] in each case, the term "caregiver" has been used in the sense that it is commonly understood: A relationship between two real persons in which hands-on care is rendered by one person to or on behalf of the other person.

To interpret the term "primary caregiver" in the manner the trial court did is to give section 11362.5 an extremely broad and expansive definition that cannot reasonably have been intended by the

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11. For example, Penal Code section 368 dealing with elder abuse defines a "caretaker" as any person who has the care, custody or control of or who stands in a position of trust with, an elder or dependent adult." Election Code section 3201 dealing with permanent absent voter prerequisites defines a "primary caregiver" as " a person who has primary responsibility for the care of" the voter. Insurance Code section 10232.8 in describing certain hospice services refers to the provision of supportive care to the "primary caregiver" and the family.

Similarly, numerous cases dealing with child custody issues discuss the caregiver concept. *In Re Krystle D.* (1994) 30 Cal.App.4th 1778 distinguishes between "multiple caregivers" and a "sole caregiver." The court in *Burchard* v. *Garay* (1986) 42 Cal.3d 531 described the mother who had raised the child for several years and provided the daily care and decision making for the child as the "primary caregiver" for the child.

In *People* v. *Heitzman* (1994)9 Cal.4th 189, an elder abuse case, the court stated "The person who abuses is usually the *caregiver* of the victim, that is, the person who officially or informally assumes responsibility for the care of the dependent person. This includes caretakers in licensed family homes or relatives: children, grandchildren, or parents of the younger dependent adult." (*Id* at p. 10.)

The consistent theme in each of these instances is that a "caregiver" is a person who renders actual physical nurturing, assistance, support, feeding and similar activities to another person.

voters, and which is not supported by the context of the statute and which is inconsistent with previous judicial interpretation.

Moreover, such an interpretation is at odds with other provisions of existing state law, and would interfere with the interests of the citizens of California. Public policy can and must be considered; as the court in *People* v. *Peck* (1996) 52 Cal.App.4th 351, observed,

> "Permitting defendant to purchase large quantities of marijuana in California would interfere substantially with the state's efforts to control trafficking in illegal drugs, by, among other things, encouraging others to cultivate or import marijuana for sale to defendant and his fellow church members." (*Id.* at p. 361.)

Clearly, the public policy articulated in *Peck* has relevance because, as section 11362.5(b)(2) states:

> "Nothing in this section shall be construed . . . to condone the diversion of marijuana for nonmedical purposes."

Sales of large quantities through "clubs" will, as *Peck* points out, serve as an incentive to commercial growers and sellers who will sell to all who wish to buy for whatever purpose. In other words, *Peck* states the reality that widespread, large scale cultivation and sale of controlled substances will not be limited to a small market of buyers who could properly assert an affirmative defense. In effect, the result will be that the trial court ruling will encourage the violation of the terms of section 11362.5 itself, because it will encourage diversion for nonmedical purposes by encouraging growth and sales of marijuana to meet the demands of "clubs" which do not limit sales. Certainly, this is not what the voters envisioned. Indeed, it is the factual history of this case that, as Judge Garcia observed at the hearing on the preliminary injunction (RT, October 30, 1996, p.4:10-14) the "club" had become the very sort of illegal drug distribution facility that Health and Safety Code section

11570 mandates "shall" be enjoined as a nuisance. Appellant respectfully submits that Judge Garcia's refusal to consider respondents' publicly stated intention to violate section 11362.5 was error. (AA 204-206; RT, January 8, 1997.) Simply put, it had been shown that at the time of the injunction that respondents were selling to whomever wished to buy, matching sales to demand unchecked by the limits of medical necessity.

Third, the initiative language itself makes it clear that private parties such as respondents are not to provide the solution to the issue of the source for the patient population or significant segments ("thousands"; AA 190-197.) of that population. Instead, it provides:

> "To encourage the *federal and state governments* to implement a plan to provide for safe and affordable distribution of marijuana to *all patients* in medical need of marijuana." (11362.5(b) (1) (c), emphasis added.)

In the interim the solution envisioned by the voters was not that "clubs" would exist to grow, sell and distribute marijuana (conduct already determined by the Legislature to constitute a public nuisance), rather it was that individual persons would cultivate their own small quantity, or if unable to do so, a bona fide caregiver such as a spouse, relative or significant other would do so on his/her behalf.

This conclusion is further supported by the fact that none of the statutes which protect the public from impure drugs were amended (or even addressed) by Proposition 215. (See Health and Safety Code, § 109875, et seq., the Sherman Food, Drug & Cosmetic Laws.)

As one example of how it is clear that sale of marijuana by "clubs" was not contemplated by the voters and cannot be harmonized with the laws of which section 11362.5 is a part, one needs to look no further than Health & Safety Code sections 111345-111355 (labelling),

111465 (packaging), 111425-111445 (manufacture/misbranding), and 111615-111655 (licensing). Simply put, the only way to harmonize these sections and section 11362.5 given the absence of any evidence of voter intention to repeal or modify the Sherman Act is the construction advocated by appellant; that is, one person growing his or her own marijuana or growing a medicinal amount to give to the person as to whom he or she is acting (one-on-one) as a caregiver.

One other example from the Sherman Act provisions is, again, helpful in demonstrating that sales were not contemplated. Section 111470 provides that any drug (see section 109925(b)):

> ". . . shall be sold only upon a written prescription of a practitioner licensed by law to prescribe the drug . . . ." (an oral prescription must be reduced "promptly" to writing.)

Because section 111470 includes marijuana (see section 111350) and because the voters did not amend or otherwise address this provision, it is clear that there was no intention to permit sales because there is no prescription protection[12/]. Again, the only way to harmonize this section and Section 11362.5 is to recognize that there can be no sale of marijuana by a "club" trying to hide its drug selling enterprise behind the narrow concept of primary caregiving.

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12. This conclusion is further bolstered by the Proponents' Argument in favor of proposition 215 which, correctly, told the voters: "Doctors cannot prescribe marijuana . . . ." (AA 215.) The proposition did not seek to change that prohibition, therefore, there was no intention to change section 111470.

D. Section 11362.5 Does Not Permit Any Sale Of Marijuana Regardless Whether There Is A Net Profit

The trial court found that section 11362.5 implicitly permits respondents to sell marijuana to patients who have designated them as a primary caregiver as long as there is no net profit involved in the transaction.

As stated above, by its specific terms, section 11362.5 addresses only cultivation and possession of marijuana. (Health and Safety Code sections 11357 and 11358.) It does not in any way purport to permit the *sale* of marijuana, whether for profit or not.

The information provided to the voters in the California Ballot Pamphlet illustrates this point. As an example, the Analysis by the Legislative Analyst repeatedly informed the voters that the proposed measure dealt only with growing and possession of marijuana. The Analysis states, in pertinent part:

> "Under current state law, it is a crime to grow or possess marijuana . . . . It is also a crime to transport, into the state, sell, or give away marijuana . . . . This measure amends state law to allow persons to grow or possess marijuana for medical use . . . . The measure also allows caregivers to grow and possess marijuana for a person for whom the marijuana is recommended . . . . Because the measure specifies that growing and possessing marijuana is restricted to medical uses, and does not change other legal prohibitions on marijuana, this measure would probably have no significant state or local fiscal effect." (AA 187.)

The proponents' Rebuttal to the Argument Against Proposition 215 likewise assured the voters that the measure did not purport to authorize the sale of marijuana, stating

> "Proposition 215 does not allow 'unlimited quantities of marijuana to be grown anywhere.' 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." (AA 216.)

Nothing in the Ballot Pamphlet stated or even suggested to the voters that the measure would in any way permit the sale of marijuana. On the contrary, the voters were given assurances by the materials in the ballot pamphlet that the measure was strictly limited to the small scale (personal) cultivation and possession of marijuana and did not condone or encourage sale or larger than personal scale cultivation. Thus, it is clear that the voters of California had no intent to approve the sale of marijuana or cultivation of marijuana for sale, but limited their endorsement of the measure to the cultivation and possession of small amounts of marijuana for a patient's personal medical purposes.

The trial court acknowledged that possession of marijuana for sale (Health and Safety Code, § 11359) and transportation, sale or furnishing marijuana (§ 11360) remained illegal (RT January 8, 1997, p. 6:22-27), but inexplicably made a legal distinction between whether the sale of marijuana is for profit or not.[13] This distinction does not withstand scrutiny.

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13. At the hearing on the motion to modify, the trial court used the term "non-profit" without qualification or reference to overhead costs. However, the Order (AA 218-219) stated, in pertinent part:

> "Defendants shall maintain records showing monies expended and received as reimbursement of expenditures *including overhead for their activities relating to the provision of medicinal marijuana.*" (Emphasis added.)

This language would, arguably, permit the payment of a salary to persons such as respondents Peron and Moore, and others, as part of overhead. In other words, respondents would be permitted to earn a livelihood by selling marijuana.

The term "sale" in the context of narcotics transactions has been interpreted by the California Supreme court as a "transfer to another for a price." (*People* v. *Daniels* (1975) 14 Cal.3d 857, 861.) It has also been stated that a "sale" of narcotics includes transfers for other than money. (*People* v. *Lazenby* (1992) 6 Cal.App.4th 1842, 1845.) In fact, the very distinction that the trial court made here was just rejected by the Court of Appeal in *People* v. *Peck* (1996) 52 Cal.App.4th 351.

The essential facts of the *Peck* case pertinent to this case are as follows: Mr. Peck was a member of a church which professed to use marijuana as a sacrament. To benefit from the more attractive prices of marijuana in California, the Wisconsinite church members pooled funds to enable Mr. Peck to purchase a large amount of marijuana in San Diego. He was arrested while transporting forty pounds of marijuana. In his defense to charges of possession for sale, Mr. Peck asserted that he intended only to give away the marijuana, although church members were "free and welcomed to put some money in" towards the cost of the marijuana and they did so from time to time. (*Ibid.*, p. 357.) The court rejected the suggested distinction and concluded that the transfer of marijuana from one person to another in this fashion was "a transfer of possession of such a drug to another for cash" and constituted a sale, and observed that a "sale" of drugs includes transfers other than for money. (*Ibid.*)

Thus, the court in *Peck* recognized that even where an individual may be able to assert an affirmative defense to criminal charges of *possession* of marijuana (in that case based on his religious beliefs), the same limited defense does not extend to the sale or possession for sale of marijuana.

The trial court in this case simply failed to limit the affirmative defense to possession and cultivation. To paraphrase Shakespeare, a sale by any other name is still a sale, and, as *Peck* illustrates, the fact that there may be no profit is of no moment.

CONCLUSION

For the reasons stated above, appellant respectfully requests that this Court set aside the trial court's order modifying the injunction except to the extent that each respondent may exercise the rights granted to him or her as a patient or may act as the primary caregiver to one other person if he or she otherwise qualifies as a primary caregiver for that person.

Dated: April 7, 1997.

Respectfully submitted,

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DECLARATION OF SERVICE

Case Name: People v. Peron, et al.

Case No.: A077630

I declare:

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550.

On April 8, 1997, I served the attached

APPELLANT'S OPENING BRIEF

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

(2 Copies)
David J. Nick
294 Page Street
San Francisco, CA 94102

Honorable Terrence Hallinan
San Francisco County District Attorney
880 Bryant Street, Rm. 322
San Francisco, CA 94103

San Francisco County Superior Court
Hall of Justice
850 Bryant Street
San Francisco, CA 94103

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on April 8, 1997, at Sacramento, California.

Signature