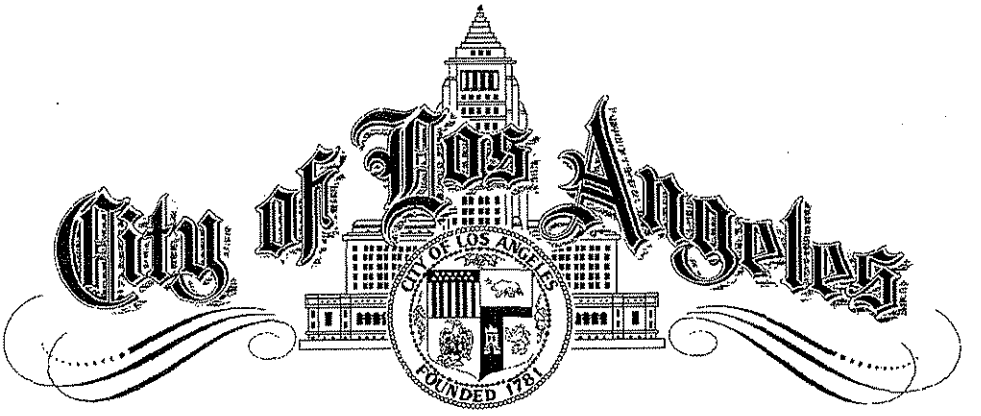

CARMEN A. TRUTANICH
City Attorney

Medical Marijuana Ordinance and Briefing Materials

[Supplemental Materials]

Transmittal to the City Council
November 16, 2009

THIS IS A NEW ITEM TO BE ADDED TO YOUR BRIEFING MATERIALS:

November 11, 2009 letter:

To the Honorable Members of the Los Angeles City Council

Re: Sales of Medical Marijuana

City Hall East
200 N. Main Street
Room 800
Los Angeles, CA 90012

(213) 978-8100 Tel
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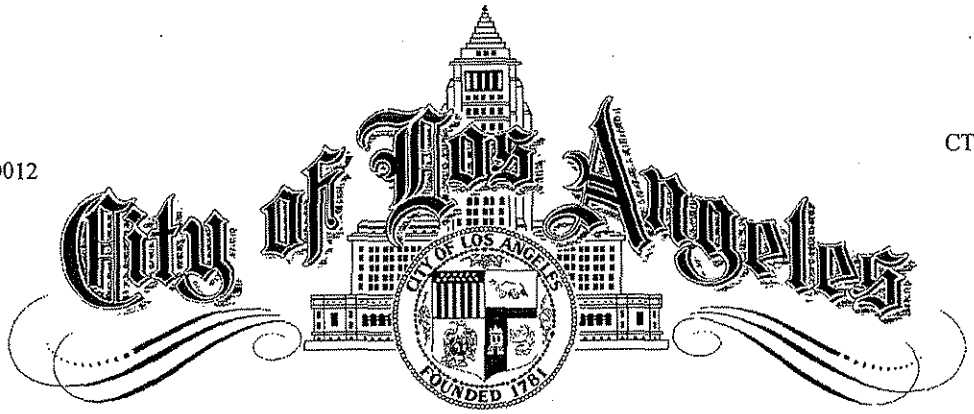

CARMEN A. TRUTANICH
City Attorney

November 11, 2009

CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION

To the Honorable Members of the
Los Angeles City Council

Re: Sales of Medical Marijuana

Dear City Council Members:

This is in response to the request for our legal opinion regarding the legality of medical marijuana sales. This Office's position that the sale of marijuana is illegal, even for medical purposes, is based upon both state and federal law. Specifically, under the federal Controlled Substances Act, marijuana remains a prohibited Schedule I drug. As such, virtually all activity related to marijuana, including cultivation, possession and sale, is illegal under federal law. Thus, the issuance of municipal regulations that authorize any sales activity raises the legal risks of aiding and abetting a violation of federal law.

In California, our marijuana laws are codified in the Health and Safety Code, which prohibits the possession for sale of marijuana (§11359) and the sale of marijuana (§11360). These prohibitions coexist alongside our Compassionate Use Act (CUA), as enacted by the passage of Proposition 215 in 1996. The CUA states: "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." Health and Safety Code Section 11362.5(d)[1]. The CUA therefore provides a narrow affirmative defense to individual patients and their primary caregivers who are charged with criminal prosecution for the possession and cultivation of medical marijuana for a patient's personal medical use. The CUA provides no affirmative defense for the conduct of selling marijuana, even for medical purposes. As noted by our state Supreme Court and numerous appellate courts, the ballot materials in support of the CUA specifically stated that it

[1] All further statutory references are to the Health and Safety Code, unless otherwise noted.

was not intended to protect "anyone who grows too much, or tries to sell it." Ballot Pamp., Gen Elec. (Nov. 5, 1996). See *People v. Mentch* (2008) 45 Cal.4th 274, 289; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1546.

There is also a long line of case law holding that the CUA does not authorize the sale or distribution of medical marijuana, even on a nonprofit basis. "In view of the statute's narrow reach, 'courts have consistently rejected attempts by advocates of medical marijuana to broaden the scope of these limited specific exceptions.'" *People v. Urziceanu* (2005) 132 Cal. App. 4th 747, 773 (*Urziceanu*). For example, our courts have found that the CUA did not create "a constitutional right to obtain marijuana" (*id.* at p. 774) and have refused to expand the scope of the CUA to allow the sale or nonprofit distribution of marijuana by medical marijuana cooperatives. (*Ibid.; Peron, supra,* at pp. 1389-1390)." *Claremont v. Kruse* (2009) 2009 Cal. App. LEXIS 1563 at p. 29. In addition, as noted by the court in the recent *Claremont* decision (published September 22, 2009), neither the CUA nor SB 420, the Medical Marijuana Program (MMP), authorizes or even mentions medical marijuana dispensaries. *Claremont, supra,* at p. 34 and p. 39. Moreover, "Case law is clear that one who merely supplies a patient with marijuana has no defense under the [CUA]." *People v. Windus* (2008) 165 Cal.App.4th 634, 644. The court in *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1152, further provided, "We also reject defendant's claim that the limited immunity afforded under Proposition 215 to patients and primary caregivers should be extended to those who supply marijuana to them."

As you may be aware, the MMP was passed by the Legislature in 2003 to "[c]larify the scope of the application of the [Compassionate Use] act" Stats. 2003, ch. 875, §1. (Sen. Bill No. 420)." (§11362.7 *et seq.*). As discussed in this Office's recent Council Report (Report No. 09-0334, Sept. 28, 2009), the MMP provided additional affirmative defenses to specified individuals based upon specified activities. However, like the CUA, the MMP did not create an affirmative defense for the sale of medical marijuana. Specifically, Section 11362.775 of the MMP provides: "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and person 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 Sections 11357, 11358, 11359, 11360, 11366, 11366.5, or 11370." Thus, the specific range of immunized conduct in this section is collectively or cooperatively cultivating marijuana for medical purposes—not collectively selling marijuana. This interpretation of Section 11362.775 is supported by the Supreme Court's analysis in *Mentch*, which sets forth the proper standard for analyzing the immunities under the structurally similar Section 11362.765.

Regarding reimbursement of costs, Section 11362.765(c) provides an affirmative defense only for a primary caregiver who receives "compensation for actual expenses," including "out-of-pocket" expenses, incurred in providing "services" to enable the qualified patient he or she cares for to use marijuana. Section 11362.765 does not apply to dispensaries or any other entities. Both the statutory definition of the term "primary caregiver" (which refers to an "individual," not an organization or entity, with particular caretaking responsibilities) and a long line of cases, culminating in *People v. Mentch*, have conclusively established that only primary caregivers may

receive reimbursement for such expenses. Furthermore, Section 11362.765 does not allow even primary caregivers to sell marijuana. Rather, the section merely allows such caregivers to be compensated for their services. Moreover, Section 11362.765(a) expressly provides that none of its provisions shall "authorize any individual or group to cultivate or distribute marijuana for profit."

Accordingly, based on the foregoing, the language of this Office's proposed ordinance does not prohibit "qualified" individuals, who join together to cultivate, under Section 11362.775, from collectively bearing the costs of that particular cultivation project. (See Report No. 09-0334, pages 7-8). To the extent that the cultivation process involves certain expenses, members of the collective may participate by contributing monetarily to meet those expenses, in addition, or as an alternative, to engaging in physical labor. See *People v. Northcutt* (2009) B20388 (unpublished). However, such "cost-sharing" cannot be achieved through the sale of marijuana, which remains prohibited conduct, with no affirmative defense, under state (or federal) law.

Allowing the sale of medical marijuana would violate existing state law, as the California Supreme Court recently reminded us. As the Court noted in *Mentch*:

> "The [CUA] is a narrow measure with narrow ends. As we acknowledged only months ago, 'the proponents' ballot arguments reveal a delicate tightrope walk designed to induce voter approval, which we would upset were we to stretch the proposition's limited immunity to cover that which its language does not.' [Citation omitted]. The Act's drafters took pains to note that 'neither relaxation much less evisceration of the state's marijuana laws was envisioned.' [Citation omitted]. [T]he Act 'is a narrowly drafted statute,' not an attempt to 'decriminalize marijuana on a wholesale basis.' [Citation omitted]. We must interpret the text with those constraints in mind." Mentch, supra, 45 Cal.4th 274 at p. 286, fn 7.

We hope that this response assists you in understanding our legal position, based upon existing state and federal law. If you have any additional questions regarding this matter, please contact me at (213) 978-8347, Special Assistant City Attorney Jane Usher, (213) 978-8354, or Deputy City Attorney Heather Aubry, (213) 978-8380.

Sincerely,

CARMEN A. TRUTANICH, City Attorney

By: _____
WILLIAM W. CARTER
Chief Deputy City Attorney

WWC:SSC:HA:AA

Prop 215 Medical Use of Marijuana. Initiative Statute.

REPLACE THE PREVIOUS COPY OF THE STATUTE WITH THIS COPY---

3rd section of the briefing packet

Medical Use of Marijuana. Initiative Statute.

Official Title and Summary prepared by the Attorney General

Text of Proposition

MEDICAL USE OF MARIJUANA. INITIATIVE STATUTE.

- Exempts patients and defined caregivers who possess or cultivate marijuana for medical treatment recommended by a physician from criminal laws which otherwise prohibit possession or cultivation of marijuana.
- Provides physicians who recommend use of marijuana for medical treatment shall not be punished or denied any right or privilege.
- Declares that measure not be construed to supersede prohibitions of conduct endangering others or to condone diversion of marijuana for non-medical purposes.
- Contains severability clause.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- Adoption of this measure would probably have no significant fiscal impact on state and local governments.

Analysis of Proposition 215

by the Legislative Analyst

BACKGROUND

Under current state law, it is a crime to grow or possess marijuana, regardless of whether the marijuana is used to ease pain or other symptoms associated with illness. Criminal penalties vary, depending on the amount of marijuana involved. It is also a crime to transport, import into the state, sell, or give away marijuana.

Licensed physicians and certain other health care providers routinely prescribe drugs for medical purposes, including relieving pain and easing symptoms accompanying illness. These drugs are dispensed by pharmacists. Both the physician and pharmacist are required to keep written records of the prescriptions.

PROPOSAL

This measure amends state law to allow persons to grow or possess marijuana for medical use when recommended by a physician. The measure provides for the use of marijuana when a physician has determined that the person's health would benefit from its use in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or "any other illness for which marijuana provides relief." The physician's recommendation may be oral or written. No prescriptions or other record-keeping is required by the measure.

The measure also allows caregivers to grow and possess marijuana for a person for whom the marijuana is recommended. The measure states that no physician shall be punished for having recommended marijuana for medical purposes. Furthermore, the measure specifies that it is not intended to overrule any law that prohibits the use of marijuana for *nonmedical* purposes.

FISCAL EFFECT

Because the measure specifies that growing and possessing marijuana is restricted to medical uses when recommended by a physician, and does not change other legal prohibitions on marijuana, this measure would probably have no significant state or local fiscal effect.

Argument in Favor of Proposition 215

Arguments on this page are the opinions of the authors and have not been checked for accuracy by any official agency.

PROPOSITION 215 HELPS TERMINALLY ILL PATIENTS

Proposition 215 will allow seriously and terminally ill patients to legally use marijuana, if, and only if, they have the approval of a licensed physician.

We are physicians and nurses who have witnessed firsthand the medical benefits of marijuana. *Yet today in California, medical use of marijuana is illegal.* Doctors cannot prescribe marijuana, and terminally ill patients must break the law to use it.

Marijuana is not a cure, but it can help cancer patients. Most have severe reactions to the disease and chemotherapy--commonly, severe nausea and vomiting. One in three patients discontinues treatment despite a 50% chance of improvement. When standard anti-nausea drugs fail, marijuana often eases patients' nausea and permits continued treatment. It can be either smoked or baked into foods.

MARIJUANA DOESN'T JUST HELP CANCER PATIENTS

University doctors and researchers have found that marijuana is also effective in: lowering internal eye pressure associated with glaucoma, slowing the onset of blindness; reducing the pain of AIDS patients, and stimulating the appetites of those suffering malnutrition because of AIDS 'wasting syndrome'; and alleviating muscle spasticity and chronic pain due to multiple sclerosis, epilepsy, and spinal cord injuries.

When one in five Americans will have cancer, and 20 million may develop glaucoma, shouldn't our government let physicians prescribe any medicine capable of relieving suffering?

The federal government stopped supplying marijuana to patients in 1991. Now it tells patients to take Marinol, a synthetic substitute for marijuana that can cost $30,000 a year and is often less reliable and less effective.

Marijuana is not magic. But often it is the only way to get relief. A Harvard University survey found that almost one-half of cancer doctors surveyed would prescribe marijuana to some of their patients if it were legal.

IF DOCTORS CAN PRESCRIBE MORPHINE, WHY NOT MARIJUANA?

Today, physicians are allowed to prescribe powerful drugs like morphine and codeine. It doesn't make sense that they cannot prescribe marijuana, too.

Proposition 215 allows physicians to recommend marijuana in writing or verbally, but if the recommendation is verbal, the doctor can be required to verify it under oath. Proposition 215 would also protect patients from criminal penalties for marijuana, but ONLY if they have a doctor's recommendation for its use.

MARIJUANA WILL STILL BE ILLEGAL FOR NON-MEDICAL USE

Proposition 215 DOES NOT permit non-medical use of marijuana. Recreational use would still be against the law. Proposition 215 does not permit anyone to drive under the influence of marijuana.

Proposition 215 allows patients to cultivate their own marijuana simply because federal laws prevent the sale of marijuana, and a state initiative cannot overrule those laws.

Proposition 215 is based on legislation passed twice by both houses of the California Legislature with support from Democrats and Republicans. Each time, the legislation was vetoed by Governor Wilson.

Polls show that a majority of Californians support Proposition 215. Please join us to relieve suffering and protect your rights. VOTE YES ON PROPOSITION 215.

RICHARD J. COHEN, M.D.
Consulting Medical Oncologist (Cancer Specialist), California-Pacific Medical Center, San Francisco

IVAN SILVERBERG, M.D.
Medical Oncologist (Cancer Specialist), San Francisco

ANNA T. BOYCE
Registered Nurse, Orange County

Rebuttal to Argument Against Proposition 215

Arguments on this page are the opinions of the authors and have not been checked for accuracy by any official agency.

SAN FRANCISCO DISTRICT ATTORNEY TERENCE HALLINAN SAYS . . .

Opponents aren't telling you that law enforcement officers are on both sides of Proposition 215. I support it because I don't want to send cancer patients to jail for using marijuana.

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.

Proposition 215 doesn't give kids the okay to use marijuana, either. Police officers can still arrest anyone for marijuana offenses. Proposition 215 simply gives those arrested a defense in court, *if they can prove they used marijuana with a doctor's approval.*

ASSEMBLYMAN JOHN VASCONCELLOS SAYS . . .

Proposition 215 is based on a bill I sponsored in the California Legislature. It passed both houses with support from both parties, but was vetoed by Governor Wilson. If it were the kind of irresponsible legislation that opponents claim it was, it would not have received such widespread support.

CANCER SURVIVOR JAMES CANTER SAYS . . .

Doctors and patients should decide what medicines are best. Ten years ago, I nearly died from testicular cancer that spread into my lungs. Chemotherapy made me sick and nauseous. The standard drugs, like Marinol, didn't help.

Marijuana blocked the nausea. As a result, I was able to continue the chemotherapy treatments. Today I've beaten the cancer, and no longer smoke marijuana. I credit marijuana as part of the treatment that saved my life.

TERENCE HALLINAN
San Francisco District Attorney

JOHN VASCONCELLOS
Assemblyman, 22nd District
Author, 1995 Medical Marijuana Bill

JAMES CANTER
Cancer survivor, Santa Rosa

PEOPLE V. MENTCH (2008) 45 Cal. 4th 274

REPLACE THE PREVIOUS COPY OF THE MENTCH CASE WITH THIS COPY ---

Last section of briefing packet

4 of 17 DOCUMENTS

THE PEOPLE, Plaintiff and Respondent, v. ROGER WILLIAM MENTCH, Defendant and Appellant.

S148204

SUPREME COURT OF CALIFORNIA

45 Cal. 4th 274*; *195 P.3d 1061*; *85 Cal. Rptr. 3d 480*; *2008 Cal. LEXIS 13630

November 24, 2008, Filed

NOTICE: As modified Dec. 17, 2008.

SUBSEQUENT HISTORY: Reported at *People v. Mentch (Roger William), 2008 Cal. LEXIS 13967 (Cal., Nov. 24, 2008)*
Modified by *People v. Mentch (Roger William), 2008 Cal. LEXIS 13924 (Cal., Dec. 17, 2008)*
Motion denied by *People v. Mentch, 2009 Cal. LEXIS 1578 (Cal., Feb. 25, 2009)*

PRIOR HISTORY:
Court of Appeal Sixth Appellate District, No. H028783. Superior Court of Santa Cruz County, No. 07429, Samuel S. Stevens, Judge.
People v. Mentch, 143 Cal. App. 4th 1461, 50 Cal. Rptr. 3d 91, 2006 Cal. App. LEXIS 1623 (Cal. App. 6th Dist., 2006)

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A jury convicted defendant of cultivation and possession for sale of marijuana. Defendant had a medical marijuana recommendation. Defendant testified that he grew medical marijuana for several qualified patients, that he counseled them on its use, that he accompanied them to medical appointments on a sporadic basis, and that he occasionally grew too much and sold the excess to marijuana clubs. The trial court found the evidence insufficient to establish primary caregiver status under *Health & Saf. Code, § 11362.5, subds. (d), (e)*. The trial court gave a medical marijuana instruction regarding a qualified patient defense but omitted the optional portion of *CALJIC No. 12.24.1* relating to the primary caregiver defense. (Superior Court of Santa Cruz County, No. 07429, Samuel S. Stevens, Judge.) The Court of Appeal, Sixth Dist., No. H028783, reversed.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that primary caregiver status requires proof that a defendant (1) consistently provided caregiving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana. Defendant did not qualify because he was not a consistent caregiver, and he had no defense as to the excess amount he sold. Moreover, defendant was not entitled to immunity under *Health & Saf. Code, § 11362.765*, because he went beyond the immunized range of conduct. (Opinion by Werdegar, J., with George, C. J., Kennard, J., Baxter, J., Chin, J., Moreno, J., and Corrigan, J., concurring. Concurring opinion by Chin, J., with Corrigan, J., concurring (see p. 292).) [*275]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Statutes § 19--Construction--Initiative Measures.--Courts interpret voter initiatives using the same principles that govern construction of legislative enactments. Thus, a court begins with the text as the first and best indicator of intent. If the text is ambiguous and supports multiple interpretations, the court may then turn to extrinsic sources such as ballot summaries and arguments for insight into the voters' intent.

(2) Drugs and Narcotics § 21--Offenses--Defenses--Medical Marijuana--Primary Caregiver.--The statutory definition in *Health & Saf. Code, § 11362.5, subd. (e)*, has two parts: (1) a primary caregiver must have

been designated as such by the medicinal marijuana patient; and (2) he or she must be a person who has consistently assumed responsibility for the housing, health, or safety of the patient. It is clear from the structure of *§ 11362.5, subd. (e)*, that this latter part of the definition has additional restrictive power, or else the subdivision would have ended with the phrase "by the person exempted under this section," thereby allowing every patient to designate one person without limitation. Thus, to qualify for exemption under this subdivision, a person must satisfy both halves--the designee clause and the responsibility clause. Designation is necessary, but not sufficient.

(3) Drugs and Narcotics § 21--Offenses--Defenses--Medical Marijuana--Primary Caregiver.--A defendant asserting primary caregiver status must prove at a minimum that he or she (1) consistently provided caregiving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana.

(4) Criminal Law § 247--Trial--Instructions--Defendant's View of Case--Affirmative Defense.--A defendant has a right to have the trial court give a jury instruction on any affirmative defense for which the record contains substantial evidence--evidence sufficient for a reasonable jury to find in favor of the defendant--unless the defense is inconsistent with the defendant's theory of the case. In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt. [*276]

(5) Drugs and Narcotics § 21--Offenses--Defenses--Medical Marijuana--Primary Caregiver.--Defendant relied almost exclusively on the provision of medical marijuana to establish a primary caregiving relationship under *Health & Saf. Code, § 11362.5, subds. (d), (e)*. But the evidence must establish an assumption of responsibility independent of the provision of medical marijuana. This shortcoming was also intertwined with defendant's problems showing a consistent assumption of responsibility: what caregiving was consistent consisted only of providing marijuana, while what caregiving was independent of providing marijuana was not consistent. There was a final overarching problem with the evidence. Defendant testified to providing marijuana to five patients and also to occasionally growing too much and providing the excess to marijuana clubs. But because defendant was charged with single counts of possession and cultivation, primary caregiver status would provide a defense only if it extended to all the marijuana he possessed or cultivated.

[*Judicial Council of Cal. Criminal Jury Instructions (2008) CALCRIM No. 2375*; *Erwin et al., Cal. Criminal Defense Practice (2008) ch. 145, § 145.01*.]

(6) Criminal Law § 247--Trial--Instructions--Defendant's View of Case--Affirmative Defense.--The right to a jury resolution of all disputed factual issues is to be jealously protected. However, trial courts are still responsible for acting as gatekeepers and determining whether the evidence presented, considered in the light most favorable to the defendant, could establish an affirmative defense.

(7) Drugs and Narcotics § 21--Offenses--Defenses--Medical Marijuana--Immunities.--The Medical Marijuana Program (*Health & Saf. Code, § 11362.7 et seq.*) was passed in part to address issues not included in the Compassionate Use Act of 1996 (*Health & Saf. Code, § 11362.5*) so as to promote the fair and orderly implementation of the act and to clarify the scope of the application of the act (Stats. 2003, ch. 875, § 1). As part of its effort to clarify and smooth implementation of the act, the program immunizes from prosecution a range of conduct ancillary to the provision of medical marijuana to qualified patients (*Health & Saf. Code, § 11362.765*). While the program does convey additional immunities against cultivation and possession for sale charges to specific groups of people, it does so only for specific actions; it does not provide globally that the specified groups of people may never be [*277] charged with cultivation or possession for sale. That is, the immunities conveyed by *§ 11362.765* have three defining characteristics: (1) they each apply only to a specific group of people; (2) they each apply only to a specific range of conduct; and (3) they each apply only against a specific set of laws.

(8) Drugs and Narcotics § 21--Offenses--Defenses--Medical Marijuana--Immunities.--*Health & Saf. Code, § 11362.765, subd. (b)*, identifies both the groups of people who are to receive immunity and the sole basis, the range of their conduct, to which the immunity applies, while *§ 11362.765, subd. (a)*, identifies the statutory provisions against which the specified people and conduct are granted immunity.

COUNSEL: Lawrence A. Gibbs, under appointment by the Supreme Court, and Joseph M. Bochner, under appointment by the Court of Appeal, for Defendant and Appellant.

Drug Policy Alliance, Daniel Abrahamson, Tamar Todd and Theshia Naidoo for Marcus A. Conant, Robert J.

Melamede and Gerald F. Uelmen as Amici Curiae on behalf of Defendant and Appellant.

Joseph D. Elford for Americans for Safe Access as Amicus Curiae on behalf of Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Donald E. de Nicola, Deputy State Solicitor General, Robert R. Anderson and Dane R. Gillette, Chief Assistant Attorneys General, Gerald A. Engler, Assistant Attorney General, Moona Nandi, Laurence K. Sullivan and Michele J. Swanson, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: Opinion by Werdegar, J., with George, C. J., Kennard, Baxter, Chin, Moreno, and Corrigan, JJ., concurring. Concurring opinion by Chin, J., with Corrigan, J., concurring.

OPINION BY: Werdegar

OPINION

[***483] [**1063] **WERDEGAR, J.**--The Compassionate Use Act of 1996 (Act; *Health & Saf. Code, § 11362.5*, added by voter initiative, Prop. 215, Gen. Elec. (Nov. 5, 1996)) provides partial immunity for the possession and cultivation of marijuana to two groups of people: qualified medical marijuana patients and their primary caregivers. We consider here who may qualify as a primary caregiver. We hold that a defendant whose caregiving consisted principally of [*278] supplying marijuana and instructing on its use, and who otherwise only sporadically took some patients to medical appointments, cannot qualify as a primary caregiver under the Act and was not entitled to an instruction on the primary caregiver affirmative defense. We further conclude that nothing in the Legislature's subsequent 2003 Medical Marijuana Program (*Health & Saf. Code, § 11362.7 et seq.*) alters this conclusion or offers any additional defense on this record. Accordingly, we reverse the Court of Appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In 2003, Roger William Mentch was arrested and charged with the cultivation of marijuana (*Health & Saf. Code, § 11358*) [1] [**1064] and its possession for sale (*§ 11359*). [2]

1 All further unlabeled statutory references are to the Health and Safety Code.

2 Mentch was also charged with manufacturing and possessing concentrated cannabis (also known as hash oil) (*§§ 11357, subd. (a), 11379.6, subd. (a)*), possessing psilocybin mushrooms (*§ 11377, subd. (a)*), and firearm enhancements for the marijuana and hash oil counts (*Pen. Code, § 12022, subd. (a)(1)*), but these additional counts have no bearing on the issues in this appeal, and we do not address them further.

Prosecution Evidence

Heidi Roth, a teller at Monterey Bay Bank, testified that she became familiar with Mentch over the period of February to April 2003. Mentch came to the bank on several occasions and made large deposits of cash in small bills, each deposit totaling over $ 2,000. Roth noticed that some of the money Mentch deposited smelled so strongly of marijuana that the smell filled the bank, and the bank had to remove the money from circulation. The total amount Mentch deposited with the bank over a two-month period was $ 10,750. On April 15, 2003, Roth filed a suspicious activity report with the Santa Cruz County [***484] Sheriff's Office, relating the questionable nature of Mentch's deposits.

After further investigation, the sheriff's office obtained a warrant to search Mentch's house for marijuana. On June 6, 2003, Mark Yanez, a narcotics investigator, and four deputies went to Mentch's house to serve the warrant. When Mentch opened the door, Yanez told him they had a warrant to search his house for marijuana. Mentch told Yanez that he had a medical recommendation for marijuana. A search of Mentch's person turned up $ 253 in cash and a small vial of hash oil, or concentrated cannabis. Yanez advised Mentch of his rights and interviewed him in a police vehicle parked outside Mentch's residence. [*279]

Mentch told Yanez he had a medical marijuana recommendation for colitis, dysphoria, and depression, and that he smoked about four marijuana cigarettes, totaling approximately one-sixteenth of an ounce, per day for medicinal purposes. When Yanez asked Mentch if he sold marijuana, Mentch responded that he sold it to five medical marijuana users.

A search of Mentch's residence revealed several elaborate marijuana growing setups. In various rooms of the house, the deputies found 82 marijuana plants in the flowering or budding stage, 57 "clone" marijuana plants, 48 marijuana plants in the growing or vegetative stage, and three "mother" plants, which Yanez opined were likely the female plants from which clippings were taken to make the clone plants. Considering the evidence seized from Mentch's bank and residence, as well as his statement to Yanez, Yanez opined that while Mentch may have personally consumed some of the marijuana he grew, his operation was primarily a for-profit commercial venture.

Defense Evidence

Leland Besson testified that he had known Mentch for two years. In June 2003, Besson was on disability and had a medical marijuana recommendation for a bad back, neck, and joints. At the time, he was smoking approximately two to three grams of marijuana a day. For about one year before Mentch was arrested, Besson purchased his marijuana exclusively from Mentch, who knew about Besson's medical marijuana recommendation. Mentch supplied medical marijuana through his business, the Hemporium. Besson gave Mentch $ 150 to $ 200 in cash every month for one and one-half ounces of marijuana, the amount Besson usually consumed in a month.

Laura Eldridge testified she had known Mentch for about three years. In June 2003, she was working as a caretaker for Besson, cooking and cleaning for him, driving him to the grocery store, and driving him to medical appointments and to pick up his medications. Eldridge also drove Besson to Mentch's house to get him his marijuana. The only time Besson saw Mentch was when Eldridge took him to Mentch's house to get marijuana.

At the time, Eldridge herself had a medical marijuana recommendation for migraine headaches and post-traumatic stress disorder. She was smoking about five or six marijuana cigarettes a day and consuming about one [**1065] ounce of marijuana a month. Eldridge obtained marijuana exclusively from Mentch for approximately one and one-half years before his arrest. Mentch provided the marijuana through his medical marijuana business, the Hemporium. Eldridge obtained the marijuana from Mentch every month, paying him $ 200 to $ 250 [*280] in cash for one ounce and $ 25 in cash for one-eighth of an ounce if she needed more.

[***485] Eldridge was at Mentch's house getting her daughter ready for school on the morning of Mentch's arrest. At the time, she and Mentch were not living together but were seeing each other romantically, and Eldridge had stayed over at Mentch's house the night before the search warrant was served.

Mentch took the stand in his own defense. In 2002, he obtained a medical marijuana recommendation and began growing marijuana. He learned how to grow marijuana from reading books, searching the Internet, and talking to people. He kept marijuana plants in all three stages of growth so that he was in a constant cycle of marijuana production, which produced a yield of four harvests a year. Mentch's medical marijuana recommendation was still current on the day the police searched his home. At that time, he smoked four to six marijuana cigarettes a day (approximately one-sixteenth of an ounce) and consumed between one and one-half to two ounces of marijuana a month.

Mentch opened the Hemporium, a caregiving and consultancy business, in March 2003. The purpose of the Hemporium was to give people safe access to medical marijuana. Mentch regularly provided marijuana to five other individuals, including Besson, Eldridge, and a man named Mike Manstock. Sometimes he did not charge them. All five individuals had valid medical marijuana recommendations. Mentch did not provide marijuana to anyone who did not have a medical marijuana recommendation. Occasionally, he took any extra marijuana he had to two different cannabis clubs, The Third Floor and another unnamed place. Although a majority of the marijuana plants in Mentch's home belonged to him, some belonged to Manstock. In addition, Mentch let Besson and Eldridge grow one or two plants.

Mentch provided marijuana to Besson about once every month and to Eldridge about once or twice every month. On average, they each gave him $ 150 to $ 200 for an ounce and a half of marijuana a month. Mentch considered his marijuana "high-grade" and provided it to Besson and Eldridge for less than street value. He used the money they paid him to pay for "nutrients, utilities, part of the rent." Mentch did not profit from his sales of marijuana, and sometimes he did not even recover his costs of growing it. Mentch counseled his patients/customers about the best strains of marijuana to grow for their ailments and the cleanest way to use the marijuana. He took a "couple of them" to medical appointments on a "sporadic" basis.

Although Mentch asked all five patients to come to court and testify on his behalf, only Besson and Eldridge showed up. He did not subpoena the others [*281] because one of them was out of state, another did not want to be involved because his father was an attorney, and the third did not want to testify.

The Primary Caregiver Defense

Before trial, the prosecutor filed a motion in limine to exclude any references by counsel during voir dire, testimony, or closing argument to Mentch's being a "primary caregiver" for Eldridge or Besson. [3] The prosecutor asserted that Eldridge and Besson could testify to any care Mentch had provided them, but argued that the ultimate determination whether Mentch was a primary caregiver rested with the jury. The trial court granted the motion.

> 3 The Act extends limited immunity from state prosecution for cultivation or possession to both qualified patients and their designated "primary caregiver[s]." (*§ 11362.5, subd. (d).*)

[***486] After Eldridge and Besson testified, the court concluded the evidence was insufficient to show

that Mentch had provided primary caregiver services. Mentch argued in a brief to the court that a person could qualify as a patient's primary caregiver whenever he or she consistently assumed responsibility for a patient's health by providing medical marijuana upon a doctor's recommendation or [**1066] approval. The trial court rejected the argument.

During the subsequent discussion of jury instructions after the close of evidence, Mentch requested the standard jury instruction for affirmative defenses under the Act (*CALJIC No. 12.24.1*) on the theory that he was both a qualified patient entitled to cultivate marijuana for himself and a primary caregiver entitled to cultivate marijuana and possess it for sale to others. The trial court agreed to give the instruction insofar as it articulated a qualified patient defense but, consistent with its prior rulings, omitted the optional portion of the instruction relating to the primary caregiver defense. [4]

> 4 At the time of trial, *CALJIC No. 12.24.1* provided: "The [possession] [or] [cultivation] [or] [transportation] of marijuana is not unlawful when the acts of [defendant] [*a primary caregiver*] are authorized by law for compassionate use. The [possession] [or] [cultivation] [or] [transportation] of marijuana is lawful (1) where its medical use is deemed appropriate and has been recommended or approved, orally or in writing, by a physician; (2) the physician 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; [and] (3) the marijuana [possessed] [cultivated] [transported] was for the personal medical use of [the patient] [ ] [.] [; and (4) the quantity of marijuana [[possessed] [or] [cultivated], and the form in which it was possessed were reasonably related to the [patient's] [ ] then current medical needs [.]] [transported, and the method, timing and distance of the transportation were reasonably related to the [patient's] [ ] then current medical needs.] [¶] [*A 'primary caregiver' is an individual designated by [the person exempted]* [(*name*)] *who has consistently assumed responsibility for the housing, health, or safety of that person.*] [¶] ['Recommendation' and 'approval' have different meanings. To 'recommend' something is to present it as worthy of acceptance or trial. To 'approve' something is to express a favorable opinion of it. The word 'recommendation,' as used in this instruction, suggests the physician has raised the issue of marijuana use and presented it to the patient as a treatment that would benefit the patient's health by providing relief from an illness. The word 'approval,' on the other, suggests the patient has raised the issue of marijuana use, and the physician has expressed a favorable opinion of marijuana use as a treatment for the patient.] [¶] To establish the defense of compassionate use, the burden is upon the defendant to raise a reasonable doubt as to guilt of the unlawful [possession] [or] [cultivation] [or] [transportation] of marijuana." (*CALJIC No. 12.24.1* (2004 rev.) (7th ed. 2003), italics added.) The italicized portions, governing the primary caregiver defense, were in dispute, and the trial court omitted them from its instructions.

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The Jury's Verdict and Subsequent Proceedings

So instructed, the jury convicted Mentch of both cultivation and possession for sale. (*§§ 11358, 11359.*) The trial court suspended imposition of sentence and imposed three years' probation.

The Court of Appeal reversed Mentch's convictions. It concluded: "Where, as here, [Mentch] presented evidence that he not only grew medical marijuana for several qualified patients, but also counseled them on the best varieties to grow and use for their ailments and accompanied them to medical appointments, albeit on a sporadic basis, there was enough evidence to present to the jury." Because there was sufficient evidence to support an instruction on the primary caregiver defense, the trial court erred by redacting all references to it in *CALJIC No. 12.24.1.* (See [***487] *People v. Michaels (2002) 28 Cal.4th 486, 529 [122 Cal. Rptr. 2d 285, 49 P.3d 1032]* [defendant has a right to have the trial court give a jury instruction on any affirmative defense for which the record contains substantial evidence].)

We granted review to address the meaning of "primary caregiver" under the Act.

DISCUSSION

I. *The Primary Caregiver Defense*

A. *The Meaning of "Primary Caregiver"*

(1) We interpret voter initiatives using the same principles that govern construction of legislative enactments. (*Professional Engineers in California Government v. Kempton (2007) 40 Cal.4th 1016, 1037 [56 Cal. Rptr. 3d 814, 155 P.3d 226].*) Thus, we begin with the text as the first and best indicator of intent. (*Ibid.*; *Elsner v. Uveges (2004) 34 Cal.4th 915, 927 [22 Cal. Rptr. 3d 530, 102 P.3d 915].*) If the text is ambiguous and supports multiple interpretations, we may then turn to

[**1067] extrinsic sources such as ballot summaries and arguments for insight into the voters' intent. (*Professional Engineers, at* [*283] *p. 1037*; *Legislature v. Eu (1991) 54 Cal.3d 492, 504 [286 Cal. Rptr. 283, 816 P.2d 1309]*; *Legislature v. Deukmejian (1983) 34 Cal.3d 658, 673, fn. 14 [194 Cal. Rptr. 781, 669 P.2d 17]*.)

Section 11362.5, subdivision (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." In turn, *section 11362.5, subdivision (e)* defines "primary caregiver" 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."

(2) This statutory definition has two parts: (1) a primary caregiver must have been designated as such by the medicinal marijuana patient; and (2) he or she must be a person "who has consistently assumed responsibility for the housing, health, or safety of" the patient. It is clear from the structure of *subdivision (e) of section 11362.5* that this latter part of the definition has additional restrictive power, or else the subdivision would have ended with the phrase "by the person exempted under this section," thereby allowing every patient to designate one person without limitation. Thus, to qualify for exemption under this subdivision, a person must satisfy both halves--the "designee" clause and the "responsibility" clause. (See *People v. Mower (2002) 28 Cal.4th 457, 475 [122 Cal. Rptr. 2d 326, 49 P.3d 1067]* ["For a person to be a qualified primary caregiver, he or she must be 'designated' as such by a qualified patient, *and* must have 'consistently assumed responsibility' for the qualified patient's 'housing, health, or safety.' " (Italics added.)].) Designation is necessary, but not sufficient. (*People v. Urziceanu (2005) 132 Cal.App.4th 747, 773 [33 Cal. Rptr. 3d 859]*; *People ex rel. Lungren v. Peron (1997) 59 Cal.App.4th 1383, 1397 [70 Cal. Rptr. 2d 20]*.)

(3) Three aspects of the structure of the responsibility clause are noteworthy. From these aspects, as we shall explain, we conclude a defendant asserting primary caregiver status must prove at a minimum that he or she (1) consistently provided caregiving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana.

[***488] First, the text requires that the primary caregiver have "consistently" assumed responsibility for the patient's care. "Consistently" suggests an ongoing relationship marked by regular and repeated actions over time. In *People ex rel. Lungren v. Peron, supra, 59 Cal.App.4th 1383*, for example, the many customers of a marijuana club, the Cannabis Buyers' Club, [*284] executed pro forma designations of the club as their primary caregiver. The Court of Appeal correctly rejected the assertion that the buyers' club could qualify as a primary caregiver in these circumstances: "A person purchasing marijuana for medicinal purposes cannot simply designate seriatim, and on an ad hoc basis, drug dealers on street corners and sales centers such as the Cannabis Buyers' Club as the patient's 'primary caregiver.' The primary caregiver the patient designates must be one 'who has *consistently* assumed responsibility for the housing, health, or safety of [the patient].'" (*Id. at p. 1396.*) One must consistently--"with persistent uniformity" (3 Oxford English Dict. (2d ed. 1989) p. 773) or "in a persistent or even manner" (Webster's 3d New Internat. Dict. (2002) p. 484)--have assumed responsibility for a patient's housing, health, or safety, or some combination of the three.

Second, the definition of a primary caregiver is written using a past participle--"has consistently assumed." (*§ 11362.5, subd. (e)*.) This reinforces the inference arising from the use of the word "consistently" that primary caregiver status requires an existing, established relationship. In some situations, the formation of a bona fide caregiving relationship and the onset of assistance in taking medical marijuana may be contemporaneous, as with a cancer patient entering chemotherapy who has a recommendation for [**1068] medical marijuana use and has a live-in or home-visit nurse to assist with all aspects of his or her health care, including marijuana consumption. (See *§ 11362.7, subd. (d)(1)* [primary caregiver may include employees of hospice or home health agency].) Even in this scenario, however, the caregiving relationship will arise at or before the onset of assistance in the administration of marijuana. What is not permitted is for an individual to establish an after-the-fact caregiving relationship in an effort to thereby immunize from prosecution previous cultivation or possession for sale. (Cf. *People v. Rigo (1999) 69 Cal.App.4th 409, 412-415 [81 Cal. Rptr. 2d 624]* [doctor may not give postarrest recommendation to bless prior use].)[5]

5 In holding that the assumption of primary caregiver responsibilities cannot apply retroactively to immunize prior cultivation or possession of marijuana, we do not suggest it would not apply prospectively. Defendants who show they satisfied all other prerequisites for primary caregiver status for a given patient at some point after the onset of providing marijuana may avail themselves of the defense going forward, even if they remain subject to prosecution for actions taken prior to assumption of a primary caregiver role.

Third, from these two aspects of the text, as well as logic, we draw a further inference: a primary caregiver must establish he or she satisfies the responsibility clause based on evidence independent of the administration of medical marijuana. Under the Act, a primary caregiver relationship is a necessary antecedent, a predicate for being permitted under state law to possess or cultivate medical marijuana. The possession or cultivation of marijuana for medical purposes cannot serve as the basis for making lawful [*285] the possession or cultivation of marijuana for medical purposes; to conclude otherwise would rest the primary caregiver defense on an entirely circular footing.

We thus agree with the Court of Appeal in *People v. Frazier (2005) 128 Cal.App.4th 807, 823 [27 Cal. Rptr. 3d 336]*, which rejected the argument that "a 'primary caregiver' is a person who 'consistently grows and supplies physician approved marijuana for a medical marijuana patient to serve the health needs of that patient' ... ." The *Frazier* court concluded that, while *if* one were already qualified as a primary caregiver one could consistently grow and supply medical marijuana to a patient, the consistent [***489] growth and supply of medical marijuana would not by itself place one in the class of primary caregivers. (*Ibid.*; see also *People v. Windus (2008) 165 Cal.App.4th 634, 644 [81 Cal. Rptr. 3d 227]* ["Case law is clear that one who merely supplies a patient with marijuana has no defense under the [Act]."].) [6]

> 6 Mentch directs us to the Attorney General's Act guidelines concerning medical marijuana (see *§ 11362.81, subd. (d)*) as supporting a contrary definition of "primary caregiver," but in fact the guidelines are wholly consistent with case law and the statutory text and afford Mentch no support. The guidelines note: "Although a 'primary caregiver who consistently grows and supplies ... medicinal marijuana for a *section 11362.5* patient is serving a health need of the patient,' someone who merely maintains a source of marijuana does not automatically become the party 'who has consistently assumed responsibility for the housing, health, or safety' of that purchaser." (Cal. Atty. Gen., Guidelines for the Security and Nondiversion of Marijuana Grown for Medical Use (Aug. 2008) pt. II.B., p. 4.) They do not suggest provision of medical marijuana is alone sufficient to qualify one as a primary caregiver, but recognize instead that the provision of marijuana may be one part of caregiving for an ailing patient.

The trial court accurately assessed the law when, in denying Mentch's request for a primary caregiver instruction, it explained: "I'm satisfied that simply providing marijuana, in and of itself to these folks does not--you don't bootstrap yourself to becoming the primary caregiver because you're providing [marijuana]" and "you have to be a caregiver *before* you can provide the marijuana." (Italics added.) Later, in denying Mentch's motion for a judgment of acquittal (*Pen. Code, § 1118.1*), the trial court reiterated the point: "There has to be something more to be a caregiver than simply providing marijuana. Otherwise, there would be no reason to have the definition of a caregiver, because anybody who would be providing marijuana and related services would qualify as a caregiver[,] therefore giving them a defense to the very activity that's otherwise illegal, and I don't think that makes any sense in terms of statutory construction, nor do I think it was intended by the people or the Legislature."

Mentch himself highlights the dog-chasing-its-tail absurdity of allowing the administration of medical marijuana to patients to form the basis for authorizing the administration of medical marijuana to patients in his attempts to [*286] distinguish this case from *People ex rel. Lungren v. Peron, supra, 59 Cal.App.4th 1383*, and *People v. Urziceanu, supra, 132 Cal.App.4th 747*. *Peron* and *Urziceanu*, he argues, involved only casual or occasional [**1069] provision of medical marijuana; here, in contrast, he "consistently" provided medical marijuana, "consistently" allowed his patients to cultivate medical marijuana at his house, and was his five patients' "exclusive source" for medical marijuana. The essence of this argument is that the occasional provision of marijuana to someone is illegal, but the frequent provision of marijuana to that same person may be lawful. The vice in the approach of the cooperatives at issue in *Peron* and *Urziceanu* therefore evidently was not that they provided marijuana to their customers; it was that they did not do it enough.

Nothing in the text or in the supporting ballot arguments suggests this is what the voters intended. The words the statute uses--housing, health, safety--imply a caretaking relationship directed at the core survival needs of a seriously ill patient, not just one single pharmaceutical need. The ballot arguments in support suggest a patient is generally personally responsible for noncommercially supplying his or her own marijuana: ?Proposition [***490] 215 allows patients to cultivate their own marijuana simply because federal laws prevent the sale of marijuana, and a state initiative cannot overrule those laws." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 215, p. 60.) But as the focus is on the "seriously and terminally ill" (*ibid.*), logically the Act must offer some alternative for those unable to act in their own behalf; accordingly, the Act allows "'primary caregiver[s]' the same authority to act on behalf of those too ill or bedridden to do so" (*People ex rel. Lungren v. Peron, supra, 59 Cal.App.4th at p. 1394*). To exercise

that authority, however, one must be a "primary"--principal, lead, central--"caregiver"--one responsible for rendering assistance in the provision of daily life necessities--for a qualifying seriously or terminally ill patient. [7]

> 7 The Act is a narrow measure with narrow ends. As we acknowledged only months ago, "'the proponents' ballot arguments reveal a delicate tightrope walk designed to induce voter approval, which we would upset were we to stretch the proposition's limited immunity to cover that which its language does not.' " (*Ross v. RagingWire Telecommunications, Inc. (2008) 42 Cal.4th 920, 930 [70 Cal. Rptr. 3d 382, 174 P.3d 200]*, quoting *People v. Galambos (2002) 104 Cal.App.4th 1147, 1152 [128 Cal. Rptr. 2d 844].*) The Act's drafters took pains to note that "neither relaxation much less evisceration of the state's marijuana laws was envisioned." (*People v. Trippet (1997) 56 Cal.App.4th 1532, 1546 [66 Cal. Rptr. 2d 559]*; see also *People v. Urziceanu, supra, 132 Cal.App.4th at pp. 772-773* [the Act "is a narrowly drafted statute," not an attempt to "decriminalize marijuana on a wholesale basis"].) We must interpret the text with those constraints in mind.

We note in passing that some other states in adopting their own medical marijuana compassionate use acts have adopted substantially different and manifestly broader language in defining their primary caregiver exceptions. In New Mexico, for example, a primary caregiver is "a resident of New Mexico [*287] who is at least eighteen years of age and who has been designated by the patient's practitioner as being necessary to take responsibility for managing the well-being of a qualified patient with respect to the medical use of cannabis." (*N.M. Stat. § 26-2B-3, par. F*; see also *Vt. Stat. Ann. tit. 18, § 4472,subd. (6)* [registered caregiver must be 21 years old, must have no drug convictions, and must have "agreed to undertake responsibility for managing the well-being of a registered patient with respect to the use of marijuana for symptom relief"].) Had the drafters of the Act intended the broad understanding of "primary caregiver" that Mentch urges, they might well have been expected to select similar language. They did not. [8]

> 8 More generally, we note that in the 12 states to have adopted compassionate use acts, all such states' acts include a primary caregiver exception or its equivalent, and virtually all include some mechanism for limiting primary caregiver status so the exception does not swallow the rule. Most rely on either mandatory state registries (*Alaska Stat. § 17.37.010, subds. (a), (q)* [Alaska]; *Mont. Code Ann. § 50-46-201* [Montana]; *N.M. Stat. § 26-2B-4, par. D* [New Mexico]) or confine each caregiver to a set number of patients (*Wn. Rev. Code § 69.51A.010 (1)(d)* [Washington]) or both (*Haw. Rev. Stat. § 329-123, subd. (c)* [Hawaii]; *R.I. Gen. Laws §§ 21-28.6-3, subd. (6), 21-28.6-4, subd. (c)* [Rhode Island]; *Vt. Stat. Ann. tit. 18, § 4474, subds. (a), (c)* [Vermont]).
>
> A minority (Colorado, Nevada, and Oregon) have instead adopted California's approach of limiting the caregiver exception by using a higher standard for the nature of the relationship and responsibility assumed. (See *Colo. Const., art. XVIII, § 14, subd. (1)(f)* [must have "significant responsibility for managing the well-being of a patient who has a debilitating medical condition"]; *Nev. Rev. Stat. § 453A.080, subsec. 1(b)* [must have "significant responsibility for managing the well-being of a person diagnosed with a chronic or debilitating medical condition"]; *Or. Rev. Stat. § 475.302, subsec. (5)* [must have "significant responsibility for managing the well-being of a person who has been diagnosed with a debilitating medical condition"].)

[**1070] [***491] We have no doubt our interpretation of the statute will pose no obstacle for those bona fide primary caregivers whose ministrations to their patients the Act was actually intended to shield from prosecution. The spouse or domestic partner caring for his or her ailing companion, the child caring for his or her ailing parent, the hospice nurse caring for his or her ailing patient--each can point to the many ways in which they, medical marijuana aside, attend to and assume responsibility for the core survival needs of their dependents. The Act allows them, insofar as state criminal law is concerned, to add the provision of marijuana, where medically recommended or approved, as one more arrow in their caregiving quiver. It simply does not provide similar protection where the provision of marijuana is itself the substance of the relationship.

B. *Sufficiency of the Evidence to Support an Instruction on the Primary Caregiver Affirmative Defense*

We turn to the merits of Mentch's request for a primary caregiver instruction in light of the evidence he adduced and the evidence he sought to adduce. [*288]

(4) "It is well settled that a defendant has a right to have the trial court ... give a jury instruction on any affirmative defense for which the record contains substantial evidence [citation]--evidence sufficient for a reasonable jury to find in favor of the defendant [citation]--unless the defense is inconsistent with the defendant's theory of the case [citation]. In determining whether the evidence is sufficient to warrant a jury instruction, the

trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt ... .' [Citations.]" (*People v. Salas (2006) 37 Cal.4th 967, 982-983 [38 Cal. Rptr. 3d 624, 127 P.3d 40]*; see also *People v. Michaels, supra, 28 Cal.4th at p. 529.*) On appeal, we likewise ask only whether the requested instruction was supported by substantial evidence--evidence that, if believed by a rational jury, would have raised a reasonable doubt as to whether Mentch was a primary caregiver and thus innocent of unlawful possession or cultivation.

Mentch relies on three strands of evidence: his alleged provision of shelter to one patient, his taking of other patients to medical appointments, and his ongoing provision of both marijuana and marijuana advice and counseling to all his patients. Even crediting this evidence, as we must for purposes of deciding whether he was entitled to an instruction, we discern a series of interrelated shortcomings. Some of Mentch's caregiving was independent of providing marijuana, but was not provided at or before the time he began providing marijuana. Some of it may have been at or before the time he began providing marijuana, but was not consistent. And some of it was consistent, but was not independent of providing marijuana. But none of the evidence demonstrated satisfaction of *each* of the three aspects of the responsibility clause we have identified; none of it was sufficient to raise a reasonable doubt as to whether Mentch had provided his patients consistent caregiving, independent of providing them marijuana, at or before the time he began providing them marijuana.

[***492] First, Mentch argues Eldridge moved in shortly before the June 6, 2003, search. Unfortunately for Mentch's argument, the record directly contradicts this assertion. Eldridge testified she lived elsewhere at the time, and Mentch did not testify to the contrary. Even if the record supported it, however, the argument would not address the lack of any evidence of a primary caregiving relationship during the preceding year and a half during which Mentch was, by his own admission, selling Eldridge marijuana; it would not retroactively bless Mentch's prior cultivation of marijuana and sale of marijuana to her.

[**1071] Second, Mentch testified he took "a couple" patients to medical appointments "sporadically." A sporadic assumption of responsibility is the antithesis of a consistent assumption of responsibility; it cannot satisfy the responsibility clause. [*289]

(5) Third, Mentch otherwise relied almost exclusively on the provision of medical marijuana to establish a primary caregiving relationship. But the evidence must establish an assumption of responsibility independent of the provision of medical marijuana. This shortcoming is also intertwined with Mentch's problems showing a consistent assumption of responsibility: what "caregiving" was consistent consisted only of providing marijuana, while what caregiving was independent of providing marijuana was not consistent.

There is a final overarching problem with the evidence. Mentch testified to providing marijuana to five patients and also to occasionally growing too much and providing the excess to marijuana clubs. But where, as here, Mentch was charged with single counts of possession and cultivation, primary caregiver status would provide Mentch a defense only if it extended to all the marijuana he possessed or cultivated. Consider, for example, a defendant who testified that he (1) grew marijuana, (2) gave half to his critically ill daughter, a qualified patient for whom he was the designated primary caregiver and by whom he was reimbursed for growing expenses, and (3) sold the other half on the street. However much the primary caregiver defense might protect his actions toward his daughter, it would have no bearing on his case because a portion of his distribution of marijuana for money would be unprotected from state prosecution. Similarly, Mentch's testimony that he "sporadically" took "a couple" of the five patients to medical appointments, and his assertion (unsupported by the record) that he provided Eldridge shelter, would, even if believed, do nothing to insulate from prosecution his cultivation of and sale of marijuana to those for whom he did not provide shelter or nonmarijuana-based health care. (See *People v. Urziceanu, supra, 132 Cal.App.4th at p. 773* [rejecting primary caregiver defense because the defendant failed to adduce evidence he was "the primary caregiver for *all* of the patients who patronized his cooperative" (italics added)].) Nor would it protect him from prosecution for cultivating marijuana and providing it to cannabis clubs. (See *People v. Galambos, supra, 104 Cal.App.4th at pp. 1165-1167* [the primary caregiver defense does not extend to supplying marijuana to a cooperative]; *People v. Trippet, supra, 56 Cal.App.4th at p. 1546* [noting with approval a ballot pamphlet argument that the Act was not intended to protect "'anyone who grows too much, or tries to sell it' "]; Ballot Pamp., Gen. Elec. (Nov. 5, 1996) rebuttal to argument against Prop. 215, p. 61.) [9]

9 Mentch's primary caregiver defense depended on the jury crediting his own testimony on the scope of his cultivation and distribution of marijuana. This is not a case where, on the record presented, a rational jury could credit some evidence that supported a primary caregiver defense and disbelieve other evidence that suggested marijuana cultivation or possession above and beyond that immunized from state prosecution by the

Act. Nor is it a case where a defendant was charged with multiple counts and a rational jury could conclude the Act provided a complete defense to some counts but not others.

[*290]

[***493] **(6)** The Court of Appeal appropriately recognized that the right to a jury resolution of all disputed factual issues is to be jealously protected. However, trial courts are still responsible for acting as gatekeepers and determining whether the evidence presented, considered in the light most favorable to the defendant, could establish an affirmative defense--here, whether it could give rise to a reasonable doubt as to the existence of an established, legally cognizable primary caregiving relationship. The trial court properly fulfilled its role here in declining to give a primary caregiver instruction on this record.

II. *Defenses Under the Medical Marijuana Program*

Before us, Mentch contends in the alternative that the 2003 enactment of the Medical Marijuana Program (Program; *§ 11362.7 et seq.*) provides a defense to cultivation and [**1072] possession for sale charges for those who give assistance to patients and primary caregivers in (1) administering medical marijuana, and (2) acquiring the skills necessary to cultivate or administer medical marijuana (*§ 11362.765, subds. (a), (b)(3)*). Accordingly, he argues the trial court breached its duty to give sua sponte instructions on any affirmative defense supported by the evidence. (See *People v. Salas, supra, 37 Cal.4th at p. 982.*) As Mentch misinterprets the scope and effect of the Program, we conclude the trial court committed no error in failing to instruct on any defense arising from it.

(7) The Program was passed in part to address issues not included in the Act, so as to promote the fair and orderly implementation of the Act and to "[c]larify the scope of the application of the [A]ct." (Stats. 2003, ch. 875, § 1; see *People v. Wright (2006) 40 Cal.4th 81, 93 [51 Cal. Rptr. 3d 80, 146 P.3d 531].*) As part of its effort to clarify and smooth implementation of the Act, the Program immunizes from prosecution a range of conduct ancillary to the provision of medical marijuana to qualified patients. (*§ 11362.765.*)

(8) Having closely analyzed the text of *section 11362.765*, however, we conclude it does not do what Mentch says it does. While the Program does convey additional immunities against cultivation and possession for sale charges to specific groups of people, it does so only for specific actions; it does not provide globally that the specified groups of people may never be charged with cultivation or possession for sale. That is, the immunities conveyed by *section 11362.765* have three defining characteristics: (1) they each apply only to a specific group of people; (2) they each apply only to a specific range of conduct; and (3) they each apply only against a specific set of laws. Subdivision (a) provides in relevant part: "Subject to the requirements of this article, the individuals specified in subdivision (b) shall not be [*291] subject, *on that sole basis*, to criminal liability under [enumerated sections of the Health and Safety Code]." (*§ 11362.765, subd. (a)*, italics added.) Thus, *subdivision (b)* identifies both the groups of people who are to receive immunity and the "sole basis," the range of their conduct, to which the immunity applies, while *subdivision (a)* identifies the statutory provisions against which the specified people and conduct are granted immunity.

[***494] For example, *subdivision (b)(1)* grants immunity to a "qualified patient or a person with [a Program] identification card" who "transports or processes marijuana for his or her own personal medical use." (*§ 11362.765, subd. (b)(1).*) As we explained in *People v. Wright, supra, 40 Cal.4th 81*, this means a specified group--qualified patients and Program identification card holders--may not be prosecuted under particular state laws for specific conduct--transportation or processing for personal use--that otherwise might have been criminal. (*Id. at p. 94*; see *id. at p. 92* [recognizing that the Program supersedes statement in *People v. Young (2001) 92 Cal.App.4th 229, 237 [111 Cal. Rptr. 2d 726]*, that the Act does not immunize marijuana transportation].)

The same is true of *subdivision (b)(2) of section 11362.765*, which likewise extends to a specific group--primary caregivers--state immunity for particular conduct--transportation, processing, administration, delivery, or donation--that might otherwise fall afoul of state law. (See *People v. Trippet, supra, 56 Cal.App.4th at p. 1550* [acknowledging that the plain language of the Act, if literally applied, might fail to protect primary caregivers transporting marijuana down a hallway to their patients].) [10]

10 *Section 11362.765, subdivision (b)(2)* incorporates the quantitative limits of *section 11362.77* in defining the scope of the immunity it provides. The constitutionality of those limits is not before us here, and we express no opinion on them. (See *People v. Kelly, review granted Aug. 13, 2008, S164830.*)

Finally, as relevant here, *subdivision (b)(3) of section 11362.765* grants immunity to a specific group of individuals--those who assist in administering medical marijuana or acquiring the skills necessary to cultivate it--for specific conduct, namely, assistance in the administration of, or teaching how to cultivate, [**1073] medical marijuana. [11] This immunity is significant; in its

absence, those who assist patients or primary caregivers in learning how to cultivate marijuana might themselves be open to prosecution for cultivation. (*§ 11358.*)

> 11 *Section 11362.765, subdivision (b)(3)* extends the statutory immunities of *subdivision (a)* of that section to "[a]ny individual who provides assistance to a qualified patient or a person with [a Program] identification card, or his or her designated primary caregiver, in administering medical marijuana to the qualified patient or person or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person."

[*292]

Here, this means Mentch, to the extent he assisted in administering, or advised or counseled in the administration or cultivation of, medical marijuana, could not be charged with cultivation or possession for sale "on that sole basis." (*§ 11362.765, subd. (a).*) It does not mean Mentch could not be charged with cultivation or possession for sale on *any* basis; to the extent he went beyond the immunized range of conduct, i.e., administration, advice, and counseling, he would, once again, subject himself to the full force of the criminal law. As it is undisputed Mentch did much more than administer, advise, and counsel, the Program provides him no defense, and the trial court did not err in failing to instruct on it. [12]

> 12 In our grant of review, we asked the parties to brief whether a defendant's burden to raise a reasonable doubt regarding the compassionate use defense (see *People v. Mower, supra, 28 Cal.4th at p. 477*) is a burden of production under *Evidence Code section 110* or a burden of persuasion under *Evidence Code section 115*. We also asked the parties to address whether the trial court should instruct the jury on a defendant's burden and, if so, how. (Compare *CALJIC No. 12.24.1* (2004 rev.) (7th ed. 2003) with *CALCRIM No. 2370* (2008).) Because Mentch has failed to show he was entitled to a primary caregiver instruction, error--if any--in describing Mentch's burden in this case would have been harmless, so we need not and do not resolve these issues.

[***495] **DISPOSITION**

For the foregoing reasons, we reverse the Court of Appeal's judgment.

George, C. J., Kennard, J., Baxter, J., Chin, J., Moreno, J., and Corrigan, J., concurred.

CONCUR BY: CHIN

CONCUR

CHIN, J., Concurring.--I entirely agree with, and have signed, the majority opinion. I write separately to underscore the importance of an issue that we asked the parties to brief but that, due to our holding on the merits of the compassionate use defense, we do not have to decide in this case.

In *People v. Mower (2002) 28 Cal.4th 457 [122 Cal. Rptr. 2d 326, 49 P.3d 1067]*, we held that the defendant has the burden to raise a reasonable doubt regarding the compassionate use defense. As the majority opinion notes, the trial court instructed the jury on the compassionate use defense by modifying the standard CALJIC instruction. The instruction included this statement: " 'To establish the defense of compassionate use, the burden is upon the defendant to raise a reasonable doubt as to guilt ... .' " (*CALJIC No. 12.24.1* (2004 rev.) (7th ed. 2003), quoted in maj. opn., *ante*, at pp. 281-282, fn. 4.) The standard CALCRIM instruction, by contrast, does not place any burden whatever on the defendant. Instead, it states, "The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not [*293] met this burden, you must find the defendant not guilty of this crime." (Judicial Council of Cal., Crim. Jury Instns. (2008) *CALCRIM No. 2363.*)

Aware of the difference between the two standard instructions, and concerned about whether the trial court properly instructed the jury in this case, we directed the parties "to brief the additional question whether the defendant's burden to raise a reasonable doubt regarding the compassionate use defense (see *People v. Mower[, supra,] 28 Cal.4th 457*) is a burden of producing evidence under *Evidence Code section 110* or a burden of proof under *Evidence Code section 115*. (See, e.g., *Evid. Code, §§ 500, 501, 502, 550*, and the [**1074] Law Revision Commission Comments thereto; see also *Pen. Code, § 189.5* and cases interpreting it, including *People v. Deloney (1953) 41 Cal.2d 832, 841-842 [264 P.2d 532]*, *People v. Cornett (1948) 33 Cal.2d 33, 42 [198 P.2d 877]*, and *People v. Loggins (1972) 23 Cal.App.3d 597 [100 Cal. Rptr. 528]*; and *People v. Frazier (2005) 128 Cal.App.4th 807, 816-822 [27 Cal. Rptr. 3d 336].*) In this regard, the parties should also discuss whether the trial court should instruct the jury on the defendant's burden to raise a reasonable doubt and, if so, how. (Compare *CALJIC No. 12.24.1* (2005 Revision) with ... *CALCRIM No. 2363.*)"

The parties have briefed the question and agree on the answer. They agree that the defendant's burden is only to produce evidence under *Evidence Code section*

110, and that once the trial court finds the defendant has presented sufficient evidence to warrant an instruction on the defense, the defendant has fully satisfied this burden; accordingly, the court should not instruct the jury on any defense burden. (While generally agreeing that the [***496] standard CALCRIM instruction is correct in this regard, the Attorney General does suggest one modification of that instruction.)

If the parties' answer to our question is correct, *CALJIC No. 12.24.1* misinstructs the jury. The Attorney General argues that any error in this case was harmless beyond a reasonable doubt for two reasons: (1) error in requiring defendant to raise a reasonable doubt as to a defense is inherently harmless in light of the instructions as a whole, which make clear to the jury that the prosecution has the overall burden of proof beyond a reasonable doubt; and (2) defendant simply did not establish the compassionate use defense. The majority concludes that any error in this regard was harmless because defendant "has failed to show he was entitled to a primary caregiver instruction ... ." (Maj. opn., *ante*, at p. 292, fn. 11.) I agree and thus further agree that we need not now decide the question regarding the nature of defendant's burden to raise a reasonable doubt. (*Ibid.*) [*294]

Nevertheless, the question remains important. As the Attorney General notes in arguing that a defendant's burden is only to produce evidence under *Evidence Code section 110*, and that the court should not instruct the jury on this burden, "An instruction on the defendant's burden of production may run risks that are best avoided." Accordingly, the question needs to be resolved, preferably sooner rather than later. In the meantime, trial courts might well be advised to be cautious before instructing on any defense burden.

Corrigan, J., concurred.