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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Calaveras)

THE PEOPLE, Plaintiff and Respondent, v. ROBERT MICHAEL GALAMBOS, JR., Defendant and Appellant.	C032873 (Super. Ct. No. F1831)

APPEAL from a judgment of the Superior Court of Calaveras County, John E. Martin, J. Affirmed.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Senior Assistant Attorney General, Stephen G. Herndon, Supervising Deputy Attorney General, Rachelle A. Newcomb, Deputy Attorney General, for Plaintiff and Respondent.

William G. Panzer for Defendant and Appellant.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part IV of the Discussion.

Proposition 215, also known as the Compassionate Use Act of 1996, grants a limited immunity from prosecution for the cultivation or possession of marijuana by either a patient or a patient's primary caretaker, "who possesses or cultivates [the] marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (Health & Saf. Code, § 11362.5, subd. (d).)[1] Defendant Robert Michael Galambos, Jr. claimed to be cultivating marijuana for himself and a cannabis buyers' cooperative for his own and others' medical use. Following a preliminary hearing, the trial court refused to extend the immunity afforded by Proposition 215 to cover defendant's cultivation of marijuana for the cooperative and disallowed his common law defense of medical necessity. A jury convicted him of marijuana cultivation (§ 11358).

This appeal requires us to decide whether the limited statutory immunity afforded under Proposition 215 is compatible with the common law defense of medical necessity or the broad construction of the proposition advocated by the defendant.

We conclude that judicial recognition of the broader and different immunity afforded by a medical necessity defense -- which would not require a physician's recommendation, would excuse crimes other than the cultivation or possession of

[1] Unless otherwise designated, all statutory references are to the Health and Safety Code.

marijuana, and would extend beyond patients and their primary caretakers -- would break faith with the California electorate in light of their adoption of the more narrow legislative exception to our criminal drug laws expressed by Proposition 215. An unexpressed, common law defense should not be engrafted onto a statutory scheme that embodies an inconsistent policy determination.

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. The voter-approved statute carefully delimits the proffered immunity to patients and their primary caregivers. (§ 11362.5, subd. (d).) Neither the language of the proposition nor its ballot materials suggest any intent to extend its protections to those who do not qualify thereunder but who purport to supply marijuana to those who do. To the contrary, 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.

We also conclude that the trial court did not abuse its discretion when it held a preliminary hearing to determine the admissibility of defendant's proposed defenses.

Finally, in the unpublished portion of our decision, we reject defendant's claims that Proposition 215 did not give him fair notice that his actions were unlawful.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Underlying Facts

A. Defendant's Marijuana Cultivation

Since 1991, defendant has been eating and smoking marijuana, which he claims effective for relieving a variety of symptoms caused from an earlier automobile accident.

In 1996, defendant began growing marijuana on his mother's property in Calaveras County to help himself and others with their health problems. Although defendant lost 80 percent of his first crop, he harvested approximately seven pounds in the fall of 1996.

In 1996, defendant became involved in fund-raising efforts for Proposition 215, which California voters approved at the November 5, 1996 General Election, thereby enacting section 11362.5, which became effective the next day.[2] After the

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[2] Section 11362.5 provides:

"(a) This section shall be known and may be cited as the Compassionate Use Act of 1996.

"(b)(1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

"(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

(CONTINUED.)

proposition passed, defendant unsuccessfully sought a recommendation for medical marijuana use from physicians in his area. He did not obtain a recommendation, however, until after his arrest in this case.

The Oakland Cannabis Buyers' Cooperative (the "Oakland Cooperative" or the "Cooperative") was one of a number of organizations that distributed marijuana for medical purposes. The club's membership was 200 in the beginning of 1997 but

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"(B) 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.

"(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

"(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

"(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

"(d) 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.

"(e) For the purposes of this section, 'primary caregiver' means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person."

increased to 1,500 by the end of 1997. The Cooperative obtained marijuana from several hundred growers.

In May 1997, defendant began a second marijuana crop. In June 1997, he contacted the Oakland Cooperative. The parties executed a certificate by which they agreed that all the marijuana that defendant grew would be designated for the Cooperative for medical use. To cover his expenses, defendant wanted -- but did not have an opportunity to discuss -- compensation for the marijuana that he would supply. This objective became moot, however, when the marijuana that defendant initially brought to the Cooperative in 1997 was rejected as too moldy.

B. Discovery of Defendant's Marijuana Cultivation

In an aerial overflight in June 1997, Calaveras County Sheriff's Deputy Eddie Ballard detected a marijuana cultivation site at a 40-acre rural property. After several visits to the site for further observation and after sighting defendant on one occasion, Ballard obtained a search warrant that he and other officers served on defendant at the site the following month, arresting him at the same time.

One of the officers, Calaveras County Sheriff's Lieutenant Brian Walker, counted 382 marijuana plants growing in two gardens, one containing smaller plants in greenhouses and the other larger plants in both the ground and in garbage sacks. At various places around the site, Walker also found six-and-one-half pounds of dried marijuana in half-pound baggies deposited

in buckets, as well as marijuana seeds in bags. Finally, Walker found in a nearby shed evidence of defendant's involvement in the marijuana cultivation. This included defendant's wallet, which contained an identification card, a business card for a "cannabis consultant," and a handwritten note calculating grams and pounds of marijuana.

II. The Legal Proceedings

Defendant was charged with marijuana cultivation (§ 11358) in count I and possession of marijuana for sale (§ 11359) in count II.

Defendant raised two affirmative defenses: the common law defense of medical necessity and the limited immunity afforded under Proposition 215.

But the People moved in limine to exclude both defenses, requesting a preliminary hearing to determine whether the evidence was sufficient to present such defenses to the jury.

Over defendant's objections, the trial court granted the request for a hearing under Evidence Code section 402, subdivision (b),[3] stating that "because of the novelty of the

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[3] Evidence Code section 402 provides in relevant part:

"(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.

"(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury . . . ."

defenses in this case . . . a 402 hearing . . . is necessary to avoid the prejudicial effect upon jurors . . . of actually hearing evidence if it is going to be ultimately excluded by the court." Defense counsel proceeded by an offer of proof, seeking to demonstrate an evidentiary foundation for the defenses.

The court disallowed the common law defense of medical necessity, ruling that defendant had failed to make a sufficient showing of the elements of such a defense. But the trial court did grant defendant's request to instruct the jury on the limited immunity available under Proposition 215. Nonetheless, the court limited that defense to defendant's cultivation and possession of marijuana for his personal medical use and declined to extend the defense to the cultivation of marijuana for the Oakland Cooperative, finding that Proposition 215 did not support defendant's assertion that he was the "primary caregiver" of the Cooperative's members and thus eligible for the exemption under the proposition. The court ultimately instructed the jury on the statutory defense afforded by Proposition 215 by using CALJIC No. 12.24.1, rather than defendant's proposed instruction.

Separately, the trial court denied defendant's motion to dismiss the charges based on the Due Process Clause of the Fourteenth Amendment, which motion contended that defendant had been "deprived [of] fair notice as to what constitute[d] illegal activity" under section 11362.5. The court later refused

defendant's proposed jury instruction regarding the absence of such notice.

Ultimately, the jury convicted defendant of marijuana cultivation (§ 11358), but deadlocked on the second count of possession for sale (§ 11359). The People then filed an amended information, adding a third count of possession of more than 28.5 grams of marijuana (§ 11357, subd. (c)), to which defendant pleaded guilty in exchange for a dismissal of the deadlocked count. The court granted defendant five years' probation on terms and conditions that included nine months in the county jail.

On appeal, defendant contends that:

(1) The court erred by holding a preliminary hearing to determine the admissibility of the evidence for defendant's proposed defenses;

(2) It erred by finding that defendant failed to proffer sufficient evidence to warrant a jury instruction for his defense of medical necessity;

(3) It improperly failed to extend Proposition 215 to exempt from prosecution those who supply medicinal cannabis to patients and caretakers; and

(4) It erroneously refused to instruct the jury that the defendant must be acquitted if Proposition 215 failed to give him fair notice as to what constituted illegal conduct.

DISCUSSION

I. Evidence Code Section 402 Hearing

Defendant first argues that "[t]he trial court erred in its ruling ordering an evidentiary hearing under Evidence Code [section] 402 to review [defendant's] affirmative defenses." Defendant contends that the hearing "forc[ed] him to prematurely disclose his affirmative defenses" and that "[w]hether enough evidence ha[d] been produced . . . to merit either a necessity instruction or a medical use instruction, should only [have] be[en] addressed and assessed in the course of a trial proceeding."

In fact, defendant was not forced to prematurely disclose his affirmative defenses. Instead, at the trial readiness conference, defense counsel volunteered defendant's intention to rely on the defenses of common law necessity and Proposition 215. Thus, the only issue is whether it was error for the trial court to hold a preliminary hearing to determine whether there was sufficient evidence to allow the presentation of those previously disclosed defenses.

Evidence Code section 402 provides a procedure for the trial court to determine outside the presence of the jury whether there is sufficient evidence to sustain a finding of a preliminary fact, upon which the admission of other evidence depends. However, a "preliminary fact" is broadly defined as "a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence." (Evid. Code,

§ 400.) And "[t]he phrase 'the admissibility or inadmissibility of evidence' includes the qualification or disqualification of a person to be a witness and the existence or nonexistence of a privilege." (*Ibid.*) Accordingly, the existence of facts constituting an element of a defense literally falls within the definition of "preliminary fact" because the admissibility of the evidence comprising the entire defense depends on it.

Admittedly, determining the existence of an element of a defense, upon which depends the admission of the evidence comprising the entire defense, is not the most common use of a hearing under Evidence Code section 402. The procedure is more commonly used to determine, for instance, the existence of a privilege, the qualification of a witness, the admissibility of a confession, or the authenticity of a writing. (Evid. Code, §§ 400, 402, subd. (b), 403, subd. (a)(2), (3).) But use of such a procedure to determine the existence of a defense is not qualitatively different from its use to determine the existence of a privilege, which is specifically identified as a proper use. In one case, the hearing determines whether all of the elements of the relevant privilege can be made out before the evidence protected by the privilege is either excluded or admitted. In the other case, the hearing determines whether all of the elements of a relevant defense can be made out before the evidence of that defense is either excluded or admitted. The primary difference is that successfully making out the elements of the privilege excludes the evidence, whereas successfully

making out the elements of the defense admits it.[4] But in both cases, the admissibility of the proffered evidence depends upon the sufficiency of the evidence to sustain a finding of each element of the privilege or defense. (See Evid. Code, § 403, subd. (a)(1).) And in both cases, the purpose of the preliminary hearing is to avoid the prejudice associated with the introduction of inadmissible evidence.

The right to subject defenses to the gatekeeping procedure under Evidence Code section 402 is also demonstrated by the procedure's express reference to its use for determining the relevance of evidence. Evidence Code section 403, subdivision (a)(1), provides in relevant part that "the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: [¶] (1) The relevance of the proffered evidence depends on the existence of the preliminary fact . . . ." In this case, the relevance of the proffered defenses depends upon the existence of facts sufficient to establish the defenses' elements.

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[4] There is admittedly a more subtle difference. In the case of a privilege, the court will determine the *existence* of the preliminary fact (Evid. Code, § 405), whereas in the case of a relevant defense, the court only finds that there is *sufficient evidence to sustain a finding* of the existence of the preliminary fact (Evid. Code, § 403). But the procedure for holding preliminary hearings expressly recognizes and authorizes this distinction depending upon the right of the jury to make the ultimate finding of the existence of the preliminary fact.

However, we need not determine whether the trial court can properly exercise its discretion to subject *any* defense to a hearing under Evidence Code section 402. We conclude that at least where the defense is novel and raises questions whether there is sufficient evidence to sustain each element of the proffered defense -- as here -- such a hearing is justified so that otherwise irrelevant and confusing matter is not placed before the jury. Often novel, necessity defenses in particular risk the presentation of otherwise irrelevant and confusing evidence to the jury if the defense cannot be established. And it is the novelty of the defense that raises the prospect that the defendant might fail to establish its elements, and in such a case, that very novelty would also allow the jury to hear irrelevant evidence that would confuse the issues.

It is thus no coincidence that a preliminary hearing, or similar procedure, has often been invoked to determine the admissibility of the common law defense of necessity. (See, e.g., *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1538-1540 (*Trippet*) [upholding the trial court's ruling rejecting the medical marijuana necessity defense at an Evidence Code section 402 proceeding]; *People v. Patrick* (1981) 126 Cal.App.3d 952, 960 [trial court concluded that defendant's offer of proof for a necessity defense failed to demonstrate a sufficient emergency to justify a jury instruction]; *People v. Slack* (1989) 210 Cal.App.3d 937, 939-940 [trial court properly refused to instruct on a necessity defense based on defendant's offer of proof]; *In re Eichhorn* (1998) 69 Cal.App.4th 382, 390 [offer of

proof sufficient to present necessity defense]; see also *People v. Werber* (1971) 19 Cal.App.3d 598, 607-610 [offer of proof of defense of religious use of marijuana is a more expedient method for considering the defense than allowing evidence of defendant's use of marijuana as a religious practice and then striking the evidence as insufficient to establish the defense].)

Moreover, the California Supreme Court has recommended the use of the procedure under Evidence Code section 402 for novel matters. In *People v. Bledsoe* (1984) 36 Cal.3d 236 at page 245, footnote 6, defendant argued that the trial court erred by refusing to hold a preliminary hearing on the admissibility of evidence of rape trauma syndrome. The Supreme Court held that the admission of the evidence was nonprejudicial error, but that "in view of the novelty of the proposed evidence and the advantages a[n Evidence Code] section 402 hearing affords for providing an opportunity to make a full record on the issue . . . it might have been preferable for the court to have proceeded with such a preliminary hearing out of the jury's presence . . . ." (*Ibid.*; see also *McCleery v. City of Bakersfield* (1985) 170 Cal.App.3d 1059, 1074-1075 & fns. 11 & 12.)

Accordingly, we can see a benefit, and no prejudice, in initially determining at a preliminary hearing whether to allow evidence of a novel defense, rather than awaiting testimony at trial that might prove to be both irrelevant and confusing. In

this case, the court, the prosecutor, *and* defense counsel all agreed that the application of defendant's common law and statutory defenses to a *supplier* of marijuana to a buyers' club was novel.

Defendant nonetheless maintains that the procedure under Evidence Code section 402 violated his constitutional rights to due process and against compelled testimony by "essentially forcing a defendant into a deposition before these issues have been presented to a trier of fact." But defendant does not develop this argument with citations and analysis and thus has waived it. (*People v. Turner* (1994) 8 Cal.4th 137, 214.)

In any event, any Fifth Amendment concerns arising from the premature presentation of defendant's proposed testimony -- which issue we need not decide today -- could have been obviated by a procedure that defendant chose not to invoke: Where an offer of proof of a defendant's testimony is required, the California Supreme Court has endorsed the use of an in camera proceeding in which the court also seals the record for appellate review. This procedure prevents the premature disclosure of the defendant's evidence and thus safeguards the privilege against self-incrimination. (See *People v. Collins* (1986) 42 Cal.3d 378, 393-394; *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1320-1321 [trial court correctly allowed defendant to present relevancy theories of evidence at in camera hearing to protect against self-incrimination]; *Shleffar v. Superior Court* (1986) 178 Cal.App.3d

937, 945, fn. 8 [any possibility that the offer of proof by defendant "might violate defendant's privilege against self-incrimination can be obviated through the conducting of an in[] camera hearing"].)

We conclude that the trial court's decision to hold a preliminary hearing to determine the sufficiency of the defendant's evidence for his proposed defenses was not an abuse of discretion.

II. The Medical Necessity Defense

Defendant claims that the court's refusal to allow his common law defense of medical necessity was error.

We conclude that not only was defendant's proffered evidence insufficient to make out a medical necessity defense, but the limited immunity afforded under Proposition 215 is incompatible with a common law defense of medical necessity.

A. The Applicability of a Medical Necessity Defense

"To justify an instruction on the defense of necessity, a defendant must present evidence sufficient to establish that [he] violated the law (1) to prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under circumstances in which [he] did not substantially

contribute to the emergency. [Citations.]" (*People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135.)

In contrast, Proposition 215 grants a limited immunity from prosecution for the cultivation or possession of marijuana by either a patient or 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." (§ 11362.5, subd. (d); see *People v. Mower* (2002) 28 Cal.4th 457.) Judicial recognition of the broader and different immunity afforded by a medical necessity defense -- which would not require a physician's recommendation, would extend beyond a patient or caregiver, and could excuse crimes other than cultivation or possession -- would break faith with the voters' adoption of a narrow legislative exception to our criminal drug prohibitions in the form of Proposition 215.

"Under any conception of legal necessity, one principle is clear: The defense cannot succeed when the legislature itself has made a 'determination of values.' [Citation.]" (*United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 491 [149 L.Ed.2d 722, 732] (*Oakland Cannabis Buyers' Cooperative*).) Thus, in *Oakland Cannabis Buyers' Cooperative,* the United States Supreme Court rejected a medical necessity exception to the prohibitions against the manufacture and distribution of marijuana under the federal Controlled Substances Act because such a defense was at odds with the terms of the Act, even though the Act did not explicitly abrogate that

defense: "The statute expressly contemplates that many drugs 'have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people,' [citation], but it includes no exception at all for any medical use of marijuana. Unwilling to view this omission as an accident, and unable in any event to override a legislative determination manifest in a statute, we reject the . . . argument [in favor of medical necessity]. [Fn. omitted.]" (*Oakland Cannabis Buyers' Cooperative*, *supra*, 532 U.S. at p. 493 [149 L.Ed.2d at p. 733].)

Similarly, here, although Proposition 215 establishes a narrow exception to our drug laws for the medical use of marijuana, it does so only for a patient or a patient's primary caregiver, only for the crimes of possession or cultivation of marijuana, and only upon a physician's recommendation or approval. (See *People v. Rigo* (1999) 69 Cal.App.4th 409, 414 [post-arrest approval insufficient to allow application of Proposition 215].) sTo grant defendant a broader medical necessity defense would eliminate the voters' decision to limit the immunity to only certain crimes, to only a particular class of persons (patients and their primary caretakers), and to only those patients who had a physician's approval for personal medical use. Such a common law defense would, in the words of the United States Supreme Court in *Oakland Cannabis Buyers' Cooperative*, *supra*, 532 U.S. at page 484 [149 L.Ed.2d at page 732], be at odds with the voters' "'determination of values'"

and would override their legislative determination by affording a broader defense unconstrained by the various conditions and limitations that they adopted in the proposition.

Our conclusion is further bolstered by both the nature of the necessity defense, the rules of statutory construction, and the ballot arguments supporting adoption of the proposition. First, "[n]ecessity does not negate any element of the crime, but represents a public policy decision not to punish such an individual despite proof of the crime." (*People v. Heath* (1989) 207 Cal.App.3d 892, 901.) Proposition 215 represents a public policy decision. But it is one that is different and inconsistent with a medical necessity defense. The elements of the two public policies are in conflict. An unexpressed public policy should not be engrafted onto statutory language that expresses an inconsistent public policy.

Second, the language of Proposition 215, as illuminated by the application of the principle of statutory construction, *expressio unius est exclusio alterius*, precludes our expansion of the limited immunity afforded by the proposition. Under that canon of statutory construction, "where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed," absent "a discernible and contrary legislative intent." (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195; see 2A Singer, Statutes and Statutory Construction (6th ed. 2000) Intrinsic Aids § 47:23, p. 314.) Application of that rule to this case prevents our judicially

engrafting a common law defense that would undo the limitations and conditions placed by the voters on the immunity afforded under Proposition 215.

Third, that the voters believed that the narrow and conditional immunity that they adopted in Proposition 215 was not compatible with a broader exemption allowed by a medical necessity defense is further demonstrated by the ballot materials for the proposition.[5] In their ballot arguments, the initiative's proponents argued: "Proposition 215 would also protect patients from criminal penalties for marijuana, but ONLY if they have a doctor's recommendation for its use." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 215, p. 60 (hereinafter the Ballot Pamphlet).) And they argued that the proposition "only allows marijuana to be grown for a patient's personal use. Police officers can still arrest anyone who grows too much [marijuana], or tries to sell it." (*Id.*, rebuttal to argument against Prop. 215, p. 61.) Thus, voters understood that California's authorization of immunity from prosecution was dependent upon a physician's recommendation and did not imply any protections for drug sales.

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[5] To the extent that there are any ambiguities in the statutory language of the proposition so as to imply its compatibility with a common law defense, "'it is appropriate to consider indicia of the voters' intent other than the language of the provision itself. [Citation.]' [Citation.] Such indicia include the analysis and arguments contained in the official ballot pamphlet. [Citations.]" (*Legislature v. Eu* (1991) 54 Cal.3d 492, 504.)

Accordingly, we conclude that a medical necessity defense is inconsistent with the more limited statutory exception established by Proposition 215, which affords only a limited immunity to prosecution for the cultivation or possession of marijuana.[6]

B. Sufficiency of the Showing of Medical Necessity

Even if a medical necessity defense was allowable, defendant's offer of proof was insufficient to support such a defense here.

For purposes of determining whether the trial court properly refused defendant's medical-necessity instruction, we need not adopt the trial court's reasons because "'"a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." [Citation.]' [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

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[6] We are not confronted with the issue, and thus do not express any opinion, whether the medical necessity defense could be invoked under state law in the event that Proposition 215 was no longer operative.

1. Significant and Imminent Evil

First, "[t]here must be a showing of imminence of peril before the defense of necessity is applicable. A defendant is 'not entitled to a claim of duress or necessity unless and until he demonstrates that, given the imminence of the threat, violation of [the law] was the only reasonable alternative.' *U[nited] S[tates] v. Bailey* (1980) 444 U.S. 394, 411 [62 L.Ed.2d 575, 591, 100 S.Ct. 624]. The uniform requirement of California authority discussing the necessity defense is that the situation presented to the defendant be of an emergency nature, that there be threatened physical harm, and that there was no legal alternative course of action available." (*People v. Weber* (1984) 162 Cal.App.3d Supp. 1, 5; *People v. Heath, supra,* 207 Cal.App.3d at p. 901 [same]; *People v. Patrick*, *supra*, 126 Cal.App.3d at p. 960 ["a well-established central element [of the necessity defense] involves the emergency nature of the situation, i.e., the imminence of the greater harm which the illegal act seeks to prevent"].)[7]

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[7] "Some formulations of the necessity defense specifically include an 'imminence' requirement. [Citation.] In others, the immediacy of the danger becomes a factor in assessing the reasonableness of the actor's belief regarding the magnitude of the 'greater harm' he seeks to prevent. [Citation.]" (*People v. Patrick, supra,* 126 Cal.App.3d 952, 960, fn. 6.) Other California courts draw a distinction between an "imminent threat" as a requirement for a duress defense and a "threat in the immediate future" applicable to a necessity defense. (See, e.g., *People v. Heath, supra,* 207 Cal.App.3d at p. 901; *People v. Beach* (1987) 194 Cal.App.3d 955, 973.) In any event, there must be some immediacy.

Defendant's offer of proof fell far short of showing an imminent threat of harm. As described by defense counsel, "the significant evil is that there are persons who are suffering from a number of infirmities and/or diseases some of which are AIDS, HIV, cancer, glaucoma, anorexia, spasticity, and arthritis . . . ." But defendant's offer of proof had to address whether the patients whom he sought to supply faced an "imminent" peril, or at a minimum, a threat in the "immediate future" of physical suffering, owing to a lack of marijuana if defendant did not supply it. The defendant's offer of proof did not identify any person, or even any well-defined group, whose present lack of marijuana under the terms of Proposition 215 raised the immediate prospect of suffering if defendant did not come to their aid.

Defense counsel did argue (in addressing another element of the defense) that statistics and expert testimony would show that there is a "fatal sparsity" of marijuana in urban areas where most medical marijuana users supposedly live and where cultivation is purportedly difficult. But statistics cannot substitute for the lack of evidence that defendant and others faced an emergency situation. Such statistics fail to show immediacy, only eventuality.

2. No Reasonable Legal Alternative

The trial court held that defendant failed to offer sufficient evidence that he had no adequate legal alternative to violating the law. It noted that Proposition 215 afforded a way

to provide medical marijuana to patients under specified conditions.

Defendant claims that "it is not a reasonable legal alternative to say that [patients] can grow [marijuana] at home or [that] caregivers . . . can grow it because the statistics that we will present is they just can't do it, and . . . some of them are to[o] infirm[] to do it . . . ."

However, "'[u]nder any definition of the [duress and necessity] defenses one principle remains constant: if there was a reasonable, *legal* alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid threatened harm," the defenses will fail. [Citation.]'" (*Trippet, supra,* 56 Cal.App.4th at p. 1539, italics added, quoting *United States v. Bailey*, *supra*, 444 U.S. at p. 410.)

Defendant acknowledges that "the marijuana was intended for his own personal medical use and that of the cooperative member patients," but he failed to have a physician's approval or recommendation before his arrest; thus, he had -- but did not take advantage of -- a legal alternative for himself. As for others, he could have attempted to qualify as a primary caregiver for particular individuals that he wanted to help, but failed to qualify himself for this legal alternative. In short, defendant had legal alternatives; they were just not convenient ones for him. But the necessity defense only requires a reasonable legal alternative, not a convenient one.

3. Objectively Reasonable Belief

To support a medical necessity defense, a defendant must also have an "objectively reasonable" belief that his criminal conduct was necessary. "It is not enough that the actor believes that his behavior possibly may be conducive to ameliorating certain evils; he must believe it is 'necessary' to avoid the evils." (Model Pen. Code & Commentaries, com. to § 3.02, p. 12.)

But defendant had not even contacted the Oakland Cooperative when he began cultivating his marijuana crop in 1996 and again in May 1997. He was thus unaware whether his marijuana cultivation was necessary for the supply of marijuana for Cooperative members at the time he began it. Under these circumstances, defendant could not have an objectively reasonable belief that his yet-to-be harvested 1997 crop was genuinely necessary to prevent a significant and immediate peril to needy patients.

Hence, even if a medical necessity defense was available, defendant's offer of proof was woefully insufficient.

III. Section 11362.5 Defense

As noted, Proposition 215 affords a limited immunity from prosecution for the cultivation and possession of marijuana 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." (§ 11362.5, subd. (d).)

Defendant did not qualify as a primary caregiver under this statute. Proposition 215 defines primary caretaker 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." (§ 11362.5, subd. (e).)

Instead, defendant sought a jury instruction that marijuana could be legally provided under Proposition 215 to patients "through [the patients'] . . . cooperatives or dispensaries."

The trial court instructed that "[a] person is not guilty of unlawful possession or cultivation of marijuana when the acts of the defendant or a primary caregiver are authorized by the law for compassionate use," but rejected defendant's extension of the statute.[8]

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[8] The instruction given by the court, based on former CALJIC No. 12.24.1 (1998 new) (6th ed. 1996), provided: "A person is not guilty of unlawful possession or cultivation of marijuana when the acts of the defendant or a primary caregiver are authorized by the law for compassionate use. [¶] A primary caregiver means the individual designated by the person exempted who is consistently assigned the responsibility for the housing, health or safety of that person. The defendant has the burden of proving by a preponderance of evidence all of the facts necessary to establish the element[s] of this defense of namely one, a physician recommended or approved orally [or] in writing the defendant's personal use of marijuana, two, the amount of marijuana possessed or cultivated was reasonably related to the defendant's then current medical needs."

(In 1999, CALJIC No. 12.24.1 was modified "to allow the jury to determine whether the use . . . was medically appropriate." (Com. to CALJIC No. 12.24.1 (1999 rev. supp.) p. 15.))

In contrast, defendant's proposed medical use instruction stated: "The defendant is not guilty of the possession or

(CONTINUED.)

Defendant argues that "the protection afforded to patients and caregivers in [section] 11362.5 necessarily implies exceptions . . . other than those expressly enumerated in [section] 11362.5, including protection for those who *provide* medicinal cannabis to patients and/or caregivers." (Italics added.)

Various permutations of defendant's contention have been rejected in *People v. Young* (2001) 92 Cal.App.4th 229, 237 (*Young*), *Trippet, supra,* 56 Cal.App.4th at pages 1545-1551, and *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1390-1395 (*Peron*).

In *Young,* we ruled that Proposition 215 "does not provide a defense to the transportation of marijuana in the circumstances presented [t]here" since "[t]he statute on its face exempts only possession and cultivation from criminal sanctions for qualifying patients." (*Young*, *supra*, 92 Cal.App.4th at p. 237.) There, the defendant was transporting 4.74 ounces of marijuana

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cultivation of marijuana if he has established by burden of proof to a preponderance of the evidence that his possession and cultivation of marijuana was for use by seriously ill Californians who have received recommendations by a physician for use of marijuana as medicine in the treatment of cancer, anorexia, AIDS, chronic pain, spasicity [*sic*], glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. [¶] Marijuana may be provided to such users through a 'primary caregiver' who consistently assumes responsibility for the housing, health or safety of the users above-specified, *or through users' buyers' cooperatives or dispensaries*." (Italics added.)

in his car under the purported auspices of a physician's recommendation for use of cannabis. (*Id.* at p. 232.)

In *Trippet*, the Court of Appeal ruled that the "symmetry between legal principle and evidence of the voters' intent compels the conclusion that, as a general matter, Proposition 215 does not exempt the transportation of marijuana allegedly used or to be used for medical purposes from prosecution . . . ." (*Trippet*, *supra*, 56 Cal.App.4th at p. 1550.)[9]

In *Peron*, the Court of Appeal held that parties operating a commercial enterprise selling or otherwise furnishing marijuana to patients did not qualify as primary caregivers under Proposition 215 simply by obtaining from the purchaser a designation as such: "The statutory language limits the patient's access to marijuana to that which is personally cultivated by the patient or the patient's primary caregiver on behalf of the patient. If the drafters of the initiative wanted to legalize the sale of small amounts of marijuana for approved medical purposes, they could have easily done so. [Citation.]

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[9] The court in *Trippet* suggested that a section 11362.5 defense might be available to a patient or a primary caregiver who transported marijuana "reasonably related to the patient's current medical needs" (*Trippet, supra,* 56 Cal.App.4th at p. 1551), lest, for instance, a patient's primary caregiver be guilty of a crime for "carrying otherwise legally cultivated and possessed marijuana down a hallway to the patient's room" (*id.* at p. 1550). We need not reach that issue in this case since defendant admits that most of his cultivation was not done in his capacity as a caregiver or patient.

The fact that they did not, and the reasons advanced in the ballot pamphlet in support of the initiative, indicated with certainty that its drafters were aware of both state and federal law prohibiting such sales and were attempting to avoid a conflict therewith." (*Peron*, *supra*, 59 Cal.App.4th at p. 1394.)

Based on these cases and the language of the initiative and the ballot materials, we reject defendant's claim that Proposition 215 can be construed to imply an exception for furnishing marijuana to a marijuana buyers' cooperative.

First, engrafting an additional implied exception onto a statute that establishes a carefully delineated exception would run afoul of the previously noted rule of statutory construction, *expressio unius est exclusio alterius:* "Under the familiar rule of construction, *expressio unius est exclusio alterius,* where exceptions to the general rule are specified by statute, other exceptions are not to be implied or presumed," absent "a discernible and contrary legislative intent." (*Wildlife Alive v. Chickering*, *supra*, 18 Cal.3d at p. 195; accord, *Andrus v. Glover Construction Co.* (1980) 446 U.S. 608, 616-617 [64 L.Ed.2d 548, 557].) No contrary legislative intent is discernible in the language of Proposition 215, which sets forth only two classes of persons qualified for the exception: patients and their primary caregivers, not suppliers to marijuana buyers' cooperatives. As the Court of Appeal therefore concluded in *Trippet*: "We may not infer exceptions to our criminal laws when legislation spells out the chosen

exceptions with such precision and specificity. [Citations.]" (*Trippet, supra,* 56 Cal.App.4th at p. 1550; *Peron, supra,* 59 Cal.App.4th at pp. 1392, 1394.)

Second, the findings and declared purposes of the proposition expressly assert that its purposes are "[t]o 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" (§ 11362.5, subd. (b)(1)(B)) and "[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana" (§ 11362.5, subd. (b)(1)(C)). This reaffirms the proposition's intent to protect patients and primary caregivers, not private suppliers. Otherwise, there would be no reason to omit any reference to private suppliers from the initiative's protections, nor any reason to encourage only the federal and state governments to implement a plan to distribute marijuana.

Third, *Trippet* and *Peron* observe that the Ballot Pamphlet for Proposition 215 confirmed the intent of the voters not to legalize any activity beyond the possession and cultivation of marijuana for personal medical use. (*Trippet, supra,* 56 Cal.App.4th at pp. 1545-1546; *Peron, supra,* 59 Cal.App.4th at pp. 1393-1395.) "If there is any claimed ambiguity in the statutory language, we may consider indicia of the voters' intent, which includes the analysis and arguments contained in

the official ballot pamphlet." (*Peron, supra,* 59 Cal.App.4th at p. 1393; accord, *Legislature v. Eu, supra,* 54 Cal.3d at p. 504.) And in this case, proponents of the measure argued in the Ballot Pamphlet that it only allows possession and cultivation for personal use, not sales: "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." (Ballot Pamp., *supra*, argument in favor of Prop. 215, p. 60.) As the court in *Peron, supra,* 59 Cal.App.4th at page 1393, footnote 6, pointed out, although this may be a misleading statement of federal law, it nonetheless illuminates the proposition's intent to only permit under limited circumstances cultivation and possession, not sales. Indeed, the ballot materials make clear that the proposition was narrowly drafted to avoid the creation of loopholes for drug dealers: In the rebuttal to the argument by opponents that Proposition 215 would "provide new legal loopholes for drug dealers to avoid arrest and prosecution" (Ballot Pamp., *supra*, argument against Prop. 215, p. 61), the initiative's proponents responded that 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." (*Id.*, rebuttal to argument against Prop. 215, p. 61.) And "in his neutral analysis of the proposition . . . , the Legislative Analyst stated that the proposed law 'does not change other legal prohibitions on marijuana . . . .' [Citation.]" (*Trippet, supra,* 56 Cal.App.4th at p. 1546; *Peron, supra,*

59 Cal.App.4th at pp. 1393-1394.) Accordingly, the ballot materials demonstrate that voters did not intend to extend the immunity to those who distribute marijuana to primary caretakers.

Defendant suggests that Proposition 215 must be interpreted to allow some "manufacture and distribution of marijuana for medicinal purposes" lest the operation of the statutory immunity be made impractical. But the ballot materials show that Proposition 215 was narrowly drafted to make it acceptable to voters and to avoid undue conflict with federal law. As a court, we must respect the compromises and choices made in the legislative and initiative process, not substitute our judgment of what would constitute a more effective measure. As noted in *Peron, supra,* 59 Cal.App.4th at pages 1394-1395, by permitting sales to further medical use of marijuana, "we would initiate a decriminalization of sales of and traffic in marijuana in this state. Whether that concept has merit is not a decision for the judiciary. It is one the Legislature or the people by initiative are free to make. Proposition 215, in enacting section 11362.5, did not do so."

Accordingly, we agree with *Trippet* and *Peron* that there is no support whatsoever for the argument that section 11362.5 impliedly authorized trafficking in marijuana for medical use -- the result that defendant seeks here. *Trippet* in fact condemned the notion that section 11362.5 opened the door for a private medical marijuana distribution system, despite the statute's

patent design to the contrary: "We . . . have no hesitation in declining appellant's rather candid invitation to interpret the statute as a sort of 'open sesame' regarding the possession, transportation and sale of marijuana in this state. [Fn. omitted.] To hold as she effectively urges would be tantamount to suggesting that the proposition's drafters and proponents were cynically trying to 'put one over' on the voters and that the latter were not perceptive enough to discern as much." (*Trippet, supra,* 56 Cal.App.4th at p. 1546.)

Hence, defendant's argument for extending the express exception created by Proposition 215 flies in the face of the precise language of the proposition, the rules of statutory construction, and the ballot arguments. The trial court did not err in refusing to give defendant's instruction.[10]

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[10] In light of the California Supreme Court's recent decision in *People v. Mower*, *supra*, 28 Cal.4th 457, the trial court, however, did err in instructing the jury pursuant to a modified version of CALJIC No. 12.24.1 that the defendant had the burden of proving by a preponderance of the evidence all of the facts necessary to establish his defense. In accordance with *Mower,* defendant's burden was merely to raise a reasonable doubt as to his guilt based on his defense. However, the error was harmless because defendant could not be deemed a primary caregiver in this case, and thus could not come under the proposition's exception for primary caregivers. Further, he could not make out an exception for cultivation as a patient: He did not have a physician's recommendation or approval until after his arrest and was growing (by his own admission) more marijuana than for his personal medical needs.

IV. Fair Notice* *[*PART IV. UNPUBLISHED.]*

Defendant's final claim is that the "confusion engendered by the passage of Proposition 215 deprives a defendant of fair notice [of what constitutes illegal conduct] as required by due process . . . ." Defendant maintains that he "believed in good faith that as a user and co-grower of part of a collective centered in Oakland, California, that his acts were legal under Prop[osition] 215 as codified under [section] 11362.5." Defendant therefore concludes that "due process required that he be afforded an instruction that comported with his good faith belief that he could lawfully grow [marijuana] for cannabis[-]dispensing clubs." Accordingly, the defendant requested, but the trial court refused to give, an instruction that asked that the jury find defendant not guilty if "relevant law" is "highly debatable" and did not give defendant "fair notice as to what constitute[d] illegal conduct so that he [might] conform his conduct to the requirements of the law." [11] This claim fails for two reasons.

First, as a threshold matter, the judge could have refused this instruction because it improperly called for the jury to

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[11] Defendant's proposed instruction stated: "Due Process requires that a person be given fair notice as to what constitutes illegal conduct so that he may conform his conduct to the requirements of the law. If you find that the relevant law, as it existed at the time the offense was committed is highly debatable, the defendant -- actually or imputedly -- lacks the requisite intent to violate it, and you must find him not guilty. [Citations omitted.]"

decide whether Proposition 215 violated defendant's right to due process -- a question of law. Evidence Code section 310, subdivision (a), provides that "[a]ll questions of law (including but not limited to questions concerning the construction of statutes . . .) are to be decided by the court." (See *People v. Vallerga* (1977) 67 Cal.App.3d 847, 870; *People v. Kaufman* (1920) 49 Cal.App. 570, 572 ["The constitutionality and construction of a statute are matters of law"].) An instruction that requires the jury to pass on the validity of a statute in the guise of a determination of guilt is erroneous and properly refused. (See *People v. Plywood Mfrs. of Cal.* (1955) 137 Cal.App.2d Supp. 859, 878 [in upholding the refusal to instruct the jury that defendant must be found not guilty if evidence raises reasonable doubt that the smog statute "'fails to lay down any certain standard of guilt'" as to the opacity of the prohibited smoke discharge, the court found that what "would be under investigation, under the instruction, would not be the defendant's guilt, but the validity of legislative action"].)

Second, putting aside defendant's request for an instruction, defendant's claim that Proposition 215 is unconstitutionally vague fails.

"'Due process requires fair notice of what conduct is prohibited. A statute must be definite enough to provide a standard of conduct for citizens and guidance for the police to avoid arbitrary and discriminatory enforcement. [Citations.]

"Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." [Citation.] [¶] . . . A statute is not vague if . . . any reasonable and practical construction can be given to its language. Reasonable certainty is all that is required. [Citations.]'" (*People v. Hodges* (1999) 70 Cal.App.4th 1348, 1354, quoting *People v. Townsend* (1998) 62 Cal.App.4th 1390, 1400-1401.) "'If an accused can reasonably understand by the terms of the statute that his conduct is prohibited, the statute is not vague [citation]. In determining the sufficiency of the notice, a statute must of necessity be examined in the light of the conduct with which the defendant is charged [citation].'" (*People v. Martin* (1989) 211 Cal.App.3d 699, 705.)

We conclude that the language of the statute affords more than reasonable certainty as to what conduct is prohibited. (*People v. Hodges*, *supra*, 70 Cal.App.4th at p. 1354.) Indeed, the breadth of the criminal prohibitions against marijuana were well known. The enactment of Proposition 215 created a limited immunity from prosecution for the cultivation and possession of marijuana by patients and caretakers under specified conditions. (§ 11362.5, subd. (d).) The conclusion is inescapable: No other marijuana-related offenses are exempted from criminal sanction, and the requisite conditions specified in the statute must be satisfied to invoke the immunity from prosecution

afforded for those offenses that are identified in the statute -- cultivation and possession.[12]

Beyond that, if we look to the legislative history to assess the notice afforded by section 11362.5, the Ballot Pamphlet for Proposition 215 unequivocally informed voters that the initiative only permitted limited cultivation for personal medical use and did not allow marijuana sales. (*Trippet, supra,* 56 Cal.App.4th at pp. 1545-1546; *Peron, supra,* 59 Cal.App.4th at pp. 1393-1395.) Moreover, as the People point out: "Since [defendant] claimed a strong interest in the initiative and even involvement in fund-raising to pass the initiative, it is disingenuous to argue that he was unaware of the arguments in favor and against it."

Lacking support for a vagueness challenge in the language of section 11362.5, defendant relies on the ruling of a San Francisco Superior Court trial judge that a marijuana buyers' club could be a designated as a "primary caregiver," authorized by section 11362.5 to possess and cultivate marijuana for

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[12] Defendant concedes as much in his brief: "It is clear that . . . [section] 11362.5 expressly provides an exception for patients and caregivers to [sections] 11357 and 11358. It is equally clear that [section] 11362.5 does not expressly provide such an exception to those who provide medical cannabis to those patients and/or caregivers."

medical users.[13] Defendant claims that he "acted in good faith reliance on this order by the trial judge, and in so doing believed that growing marijuana for cooperatives engaged in distribution for medical use was legal under . . . [section] 11362.5."

But defendant does not claim to own or manage a cooperative. He claimed to be *supplying* a cooperative. Neither the superior court ruling nor the text of the initiative gave notice that defendant, as a supplier, could qualify as a primary caregiver or a patient (for which he did not have the requisite recommendation from a physician) under the initiative. We also agree with the People that defendant's claim in this regard is undermined by the lack of any testimony at trial that defendant was even aware of the judge's order in the San Francisco case. *[END OF PART IV.]*

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[13] Defendant acknowledges that this order was vacated in *Peron, supra,* 59 Cal.App.4th at page 1400, but argues that at the time of his arrest the issue was not settled.

DISPOSITION

The judgment is affirmed. ***(CERTIFIED FOR PARTIAL PUBLICATION.)***

KOLKEY, J.

We concur:

BLEASE, Acting P.J.

HULL, J.