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6 [REDACTED]

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
8 COUNTY OF STANISLAUS

9 PEOPLE OF THE STATE OF CALIFORNIA,

No. 1087760

10 Plaintiff,

11 vs.

12 [REDACTED],  
13 Defendants.

DEFENDANT'S INFORMAL  
REQUEST THAT THE COURT  
CONSIDER *SUA SPONTE*  
DISMISSAL OF CHARGES  
(Penal Code § 1385, and  
*People v. Konow*, (2004) 32  
Cal.4<sup>th</sup> 995)

14 \_\_\_\_\_/  
15 TO THE ABOVE-ENTITLED COURT AND TO THE DISTRICT ATTORNEY OF  
16 STANISLAUS COUNTY:

17 Defendant [REDACTED] hereby respectfully suggests  
18 that the Court consider dismissal of the charges against him in this  
19 action pursuant to the provisions of Penal Code section 1385, on the  
20 grounds that [REDACTED] is a medical marijuana patient in  
21 accordance with California's Proposition 215, and Senate Bill 420,  
22 respectively codified as Health and Safety Code §§ 11362.5 and  
23 11362.7-11362.83.

24 Dated: December \_\_, 2005.

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26 OMAR FIGUEROA  
27 Attorney for Defendant  
28 [REDACTED]

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Medicinal cannabis patient [REDACTED] is facing  
3 charges of illegal cultivation of marijuana in violation of  
4 California Health and Safety Code section 13358. In Defendant's  
5 Demurrer, which was served on the Stanislaus District Attorney on  
6 February 28, 2005, counsel submitted documents establishing that [REDACTED]  
7 [REDACTED] is a lawful medical marijuana patient and caregiver.  
8 This documentation included a copy of [REDACTED] Physician's  
9 Recommendation for medical cannabis executed by Marion P. Fry M.D..  
10 Also submitted were doctor's recommendations and Designations of  
11 [REDACTED] as primary caregiver for [REDACTED],  
12 and [REDACTED]. Additionally, a designation of [REDACTED]  
13 as primary caregiver and proof of lawful medical marijuana patient  
14 status were provided by [REDACTED], and [REDACTED], and a  
15 designation of primary caregiver was provided by patient [REDACTED]  
16 [REDACTED]. Despite [REDACTED] provision of ample discovery to  
17 raise the requisite "reasonable doubt" of medical usage, the  
18 District Attorney's Office has yet to dismiss the charges against  
19 [REDACTED].  
20 [REDACTED].

21 I.

22 A DEFENDANT MAY INFORMALLY SUGGEST  
23 THAT A MAGISTRATE EXERCISE HIS OR HER AUTHORITY TO DISMISS  
IN FURTHERANCE OF JUSTICE PURSUANT TO PENAL CODE § 1385

24 A judge or magistrate has the inherent authority to dismiss an  
25 action in furtherance of justice. California Penal Code § 1385  
26 states in pertinent part:

27 (a) The judge or magistrate may, either of  
28 his or her own motion or upon the  
application of the prosecuting attorney, and

1 in furtherance of justice, order an action  
2 to be dismissed. The reasons for the  
3 dismissal must be set forth in an order  
4 entered upon the minutes. No dismissal shall  
be made for any cause which would be ground  
of demurrer to the accusatory pleading.

5 It is true that a defendant does not have a right formally to  
6 make a motion before a magistrate to dismiss a complaint in  
7 furtherance of justice under section 1385. By its terms, section  
8 1385 provides for the magistrate to exercise his or her authority to  
9 dismiss on this basis only on "his or her own motion or upon the  
10 application of the prosecuting attorney." (§ 1385, subd. (a))

11 However, it is settled that a defendant may "informally  
12 suggest" that the magistrate consider dismissal on the magistrate's  
13 own motion. (*People v. Smith* (1975) 53 Cal.App.3d 655, 657; accord,  
14 *People v. Superior Court (Flores)* (1989) 214 Cal.App.3d 127, 137;  
15 see *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 441-442.)

16 The California Supreme Court recently held in *People v. Konow*,  
17 (2004) 32 Cal.4<sup>th</sup> 995, that it is appropriate for a court to exercise  
18 its Penal Code 1385 authority to dismiss charges in a medical  
19 marijuana case. In *Konow*, several co-defendants were held to answer  
20 to charges of Health and Safety code § 11360—Sale of Marijuana.  
21 Despite the fact that Proposition 215 did not explicitly exempt  
22 medical cannabis patients and caregivers from being charged with §  
23 11360, the Supreme Court ruled that it was within the court's  
24 discretion to dismiss charges in such an instance.  
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1 subject, on that sole basis, to criminal liability under Section  
2 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570.”

3 Thus, Health and Safety code § 11362.765 prevents [REDACTED]  
4 [REDACTED]'s lawful medical marijuana related activities from being  
5 prosecuted under Health and Safety code § 11358, as in the instant  
6 case.

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8 III.

9 IN *MOWER*, THE CALIFORNIA SUPREME COURT HELD THAT  
10 MEDICAL MARIJUANA DEFENSES CAN BE RAISED IN  
11 PRE-TRIAL PROCEEDINGS, AND SECOND, THAT THE BURDEN OF  
12 PROOF IS MERELY TO RAISE A REASONABLE DOUBT THAT  
13 THE ACTIVITIES IN QUESTION WERE RELATED TO MEDICAL USE

14 At issue in the seminal California Supreme Court opinion of  
15 *People v. Mower* (2002) 28 Cal.4th 457 was whether evidence of a  
16 defendant's status as a qualified patient could be raised prior to  
17 trial. Answering affirmatively, Our Supreme Court reasoned that  
18 because the "grant of limited immunity from prosecution in section  
19 11362.5(d) operates by decriminalizing conduct that otherwise would  
20 be criminal," a defendant may move under Penal Code section 995 to  
21 set aside an indictment or information on the ground that he or she  
22 was indicted or committed "'without reasonable or probable cause to  
23 believe' that he or she was guilty of possession or cultivation of  
24 marijuana in view of his or her status as a qualified patient." *Id.*  
25 at 473.

26 The Supreme Court left open the question of whether the issue  
27 could be raised by way of demurrer, motion to dismiss, or invitation  
28 to the Court to exercise its power to dismiss pursuant to Penal Code  
§ 1385. "[W]e need not, and do not, reach the question whether a  
motion to set aside an indictment or information under Penal Code

1 section 995 is the sole mechanism for raising the issue." *Id.* at  
2 474.n.6.

3 With regard to the requisite burden of proof, the *Mower* Court  
4 concluded that "as to the facts underlying the defense provided by  
5 section 11362.5(d), defendant is required merely to raise a  
6 reasonable doubt." *Id.* at 481. The Supreme Court analyzed the  
7 quantum of proof for analogous factual situations:

8 Most similar is the defense of possession of a  
9 dangerous or restricted drug with a physician's  
10 prescription, against a charge of unlawful possession  
11 of such a drug. For that defense, a defendant need  
raise only a reasonable doubt as to his or her  
possession of the drug in question with a physician's  
prescription.

12 28 Cal.4<sup>th</sup> at 481. The Court concluded that medical marijuana  
13 patients should have the same burden as patients who use  
14 prescription drugs. "As a result of the enactment of section  
15 11362.5(d), the possession and cultivation of marijuana is no more  
16 criminal -- so long as its conditions are satisfied -- than the  
17 possession and acquisition of any prescription drug with a  
18 physician's prescription." *Id.* at 482. Therefore, [REDACTED]  
19 need raise only a reasonable doubt as to having the requisite  
20 "written or oral recommendation or approval or recommendation of a  
21 physician" in order to establish a defense under the Compassionate  
22 Use Act. See, Health & Safety Code § 11362.5(d). Defendant's  
23 possession and cultivation of medical marijuana cannot be more  
24 criminal than the possession and acquisition of any prescription  
25 drug with a physician's prescription, to paraphrase the *Mower* Court.  
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27 In this case, [REDACTED] has more than raised a reasonable  
28 doubt that he had the required "written or oral recommendation or  
approval or recommendation of a physician" on or about the date

1 alleged in the complaint. Furthermore, [REDACTED] provided  
2 documentation which shows that he was the designated caregiver for  
3 several qualified patients, and that he thus was in compliance with  
4 Health and Safety code §§ 11362.5 and 11362.7–11362.83. Defendant  
5 has raised the requisite reasonable doubt that his activities were  
6 lawful pursuant to California law. Therefore, he humbly requests  
7 that this Honorable Court exercise its Penal Code § 1385 powers to  
8 dismiss the charges against him.

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10 IV.  
11 MEDICAL MARIJUANA CAREGIVERS, OR PATIENT COLLECTIVES  
12 CAN LAWFULLY OBTAIN REIMBURSEMENT  
13 FOR PROVIDING MEDICAL MARIJUANA

14 In the case of *People v. Urziceanu* (2005) 132 Cal. App. 4th  
15 747, the Third Appellate District Court recently held that Senate  
16 Bill 420 (codified as Health and Safety code §§ 11362.7–11362.83)  
17 allows medical marijuana patients to associate together in  
18 collectives for the purpose of obtaining medical marijuana. The  
19 Court also held that caregivers or collective members may be  
20 reimbursed for providing medical cannabis.

21 The *Urziceanu* Court held that:

22 Under section 11362.765, subdivision (c), "A  
23 primary caregiver who receives compensation  
24 for actual expenses, including reasonable  
25 compensation incurred for services provided  
26 to an eligible qualified patient or person  
27 with an identification card to enable that  
28 person to use marijuana under this article,  
or for payment for out-of-pocket expenses  
incurred in providing those services, or  
both, shall not, on the sole basis of that  
fact, be subject to prosecution or  
punishment under Section 11359 or 11360."  
This section thus allows a primary caregiver  
to receive compensation for actual expenses

1 and reasonable compensation for services  
2 rendered to an eligible qualified patient,  
3 i.e., conduct that would constitute sale  
4 under other circumstances.

5 *People v. Urziceanu* (2005) 132 Cal. App. 4th 747, at 784-785.

6 The Court further held that Senate Bill 420:

7 represents a dramatic change in the  
8 prohibitions on the use, distribution, and  
9 cultivation of marijuana for persons who are  
10 qualified patients or primary caregivers and  
11 fits the defense defendant attempted to  
12 present at trial. Its specific itemization  
13 of the marijuana sales law indicates it  
14 contemplates the formation and operation of  
15 medicinal marijuana cooperatives that would  
16 receive reimbursement for marijuana and the  
17 services provided in conjunction with the  
18 provision of that marijuana.

19 *People v. Urziceanu* (2005) 132 Cal. App. 4th 747, at 785.

20 Thus, it is clear that Senate Bill 420 provides medical marijuana  
21 patients and caregivers the right to engage in collective  
22 arrangements in order to obtain medical marijuana. Furthermore,  
23 Senate Bill 420 provides a defense to charges of marijuana sales  
24 under Health and Safety code §§ 11359 and 11360, and thus clearly  
25 anticipates allowing reimbursement for the provision of medical  
26 marijuana.

27 In this case, [REDACTED] has been charged with alleged  
28 Health and Safety code § 11358 violations due to his collective  
29 medical marijuana related activities. It is clear from the  
30 *Urziceanu* case that these types of arrangements are legal under  
31 California's Senate Bill 420. Furthermore, if sales and  
32 distribution of medical marijuana are legal under Senate Bill 420  
33 and the holding in *Urziceanu*, then [REDACTED]'s mere cultivation  
34 is well within the ambit of California's Medical Marijuana laws.

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CONCLUSION

Pursuant to the spirit and letter of Proposition 215, Senate Bill 420, and the California Supreme Court's related decisions in *People v. Mower* (2002) 28 Cal.4<sup>th</sup> 457 and *People v. Konow*, (2004) 32 Cal.4<sup>th</sup> 995, and the Third Appellate District's decision in *People v. Urziceanu* (2005) 132 Cal. App. 4th 747, defendant respectfully requests that the Court exercise its authority to determine whether a *sua sponte* dismissal pursuant to Penal Code section 1385 is appropriate under the circumstances of this particular action.

Dated: December \_\_, 2005.

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OMAR FIGUEROA  
Attorney for Defendant



