San Diego District Attorney

LEGAL UPDATE

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Vol. 15 June 20, 2010 No. 5
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Remember 9/11/01*: *Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*You never know when it will strike, but there comes a moment at work when you know that you just aren't going to do anything productive for the rest of the day*." (Anonymous)

IN THIS ISSUE: Page:

***Case Law*:**

CASE LAW:

Miranda*; *Equivocal Attempts to Invoke
Miranda*; *Implied Waivers

***Berghuis v. Thompkins* (Jun. 1, 2010) __ U.S. __ [__S.Ct.__; __L.Ed.2nd __; 2010 WL 2160784]**

Rule: Attempts to invoke one's *Miranda* right to silence must be clear and unequivocal to be legally effective. Implied waivers are good so long as the prosecution establishes

by a preponderance of the evidence that a *Miranda* warning was given and that the accused, while understanding his rights, made an uncoerced statement.

Facts: Samuel Morris died from multiple gunshot wounds as a result of a drive-by shooting in Southfield Michigan. Defendant Thompkins, a suspect in the shooting, fled to Ohio where he was arrested about a year later. While defendant was awaiting extradition back to Michigan, two Southfield detectives traveled to Ohio to interview him. Prior to any questioning, Detective Helgert read from a form listing the *Miranda* rights. Also included was a provision that said: "You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned." Defendant was asked to read this portion himself, which he did. But he refused to sign the form indicating that he understood his rights. So the detective verified verbally that he understood his rights. Defendant was never asked if he waived his rights. Instead, the detectives launched right into a series of questions concerning defendant's involvement in the Michigan murder. Over the next two hours and 45 minutes, defendant was silent for the most part, only answering a couple of questions, and then with no more than a short "*yeah*," "*no*," or "*I don't know*" response. However, defendant never specifically asked to remain silent or for the assistance of an attorney. Finally, defendant was asked if he believed in God and if he prayed to God. Defendant answered in the affirmative to both questions. Detective Helgert then asked defendant; "*Do you pray to God to forgive you for shooting that boy down*?" A tearful defendant answered "*Yes*," and looked away. This response was admitted into evidence when defendant was tried in Michigan state court for first degree murder and other related charges. He was subsequently convicted and sentenced to prison for life without parole. The Michigan Court of Appeal affirmed and the Michigan Supreme Court denied review. Defendant filed a writ of habeas corpus with the federal District Court, which was denied. However, the Sixth Circuit Court of Appeal reversed, finding that defendant's right to silence had been violated. According to the Court of Appeal, defendant's "persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not wish to waive his rights." The United States Supreme Court granted certiorari.

Held: The United States Supreme Court, in a split, five-to-four decision, reversed the Sixth Circuit Court of Appeal, reinstating defendant's conviction. Defendant's argument on appeal was that because he'd refused to say anything for a sufficient period of time, he had in effect invoked his right to silence. The inculpatory statements he'd made in the last 15 minutes of his interview, therefore, should have been suppressed. The majority of the Supreme Court disagreed. The Court has previously held that for an invocation of one's Fifth Amendment "*right to counsel*" to be legally effective, the suspect must do so clearly and unequivocally. An equivocal response is not a legally effective invocation and does not require that an interrogation be ended, or even that the officers seek clarification. (*Davis v. United States* (1994) 512 U.S. 452.) The Court here ruled that there's no reason why the rule for invoking one's "*right to silence*" should be any different. Both types of invocation serve the same purpose; i.e., to protect the suspect's privilege against self-incrimination. In this case, defendant never made any attempt to

invoke. Merely failing to respond to questions is not, by itself, an invocation. But it also may not be a wavier. To be valid a wavier, it must be both (1) voluntary, in the sense that it is the product of a free and voluntary choice rather than the result of intimidation, coercion, or deception, *and* (2) made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Even though the *Miranda* decision itself states that "a valid wavier will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained," subsequent cases have been more flexible. We now know that waivers can be obtained despite the lack of an express or formal statement of waiver. "The main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel." This purpose may be met even where a wavier is implied from the circumstances. Announcing a new rule, the Court specifically held that; "If the State establishes that a *Miranda* warning was given and the accused made an uncoerced statement, this showing, standing alone, is sufficient to demonstrate a valid wavier of *Miranda* rights." If, along with this, the prosecution proves that the accused understood his rights, then the resulting statements will be admissible in evidence. In this case, defendant chose not to invoke his rights. Although he was largely uncommunicative, he did occasionally respond and eventually admitted that he prayed for the victim. This is a "course of conduct" sufficient to show an intent to waive his rights. Also, there was no evidence of coercion. Neither the fact that the interrogation lasted three hours (which is not excessively long), nor the detective's reference to defendant's religious beliefs, made defendant's responses involuntary. Defendant's statements, therefore, were properly admitted into evidence against him.

Note: This is a major breakthrough for those who have for so long advocated the legitimacy of implied waivers. While express waivers still remain easier to prove in court, this case will certainly quiet, to some extent, those of us (including me) who have argued for years that implied waivers generate a lot of unnecessary issues for the prosecution in the trial court. Just remember, it still requires a "*course of conduct*" on the defendant's part indicating an intent to waive. And you still have to be sure that there's evidence that the defendant understood his rights. The other important point of this case is that now, the rule on attempts to invoke one's "right to silence" is the same as the long standing rule for attempt to invoke one's "right to counsel;" i.e., it must be clear and unequivocal to be legally effective. Ambiguous invocations may be ignored. The officer is not obligated to seek clarification.

***Entry of Residence; Emergency Aid Exception*:**

Michigan v. Fisher **(Dec. 7, 2009) __ U.S. __ [130 S.Ct. 546; __ L.Ed.2nd __]**

Rule: The "Emergency Aid" exception to the search warrant requirement allows for a warrantless entry into to a residence when an officer has an objectively reasonable basis for believing that a person within the house is in need of immediate aid.

Facts: Officer Christopher Goolsby and his partner responded to a complaint of a disturbance at a particular residence in Brownstown, Michigan. A couple directed the

responding officers to defendant's house where defendant was "going crazy." In the driveway was a pickup truck with the front "smashed." The fence posts along the side of the property were damaged. Three of the house's windows were broken out with the glass on the ground. The officers found blood on the front of the pickup, on clothes in the pickup, and on one of the doors to the house. Defendant could be seen through a window, inside the house, screaming and throwing things. The back door was locked and a couch was pushed up against the front door. The officers knocked, but defendant refused to answer. They could see, however, that he had a small cut on his hand. Defendant ignored the officers' questions to him about whether he needed medical attention, demanding, in a response laced with profanity, that the officers go and get a search warrant. Officer Goolsby opened the front door part way and pushed his way in until he could see defendant pointing a rifle at him. Defendant was subsequently subdued and taken into custody. Charged in state court with assault with a dangerous weapon and possession of a firearm during the commission of a felony, the trial court ruled that Officer Goolsby had made an illegal entry, violating the Fourth Amendment. All the products of that entry, including the officer's observations of defendant pointing a rifle at him, were therefore suppressed. This ruling was upheld on appeal through the state court system. The United States Supreme Court granted certiorari.

Held: The United States Supreme Court, in a 7-to-2 decision, reversed. Noting that "the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" the Court found that the officers in this case did just that; acted reasonably under the circumstances then presented to them. While warrantless residential entries are presumptively unreasonable, "the exigencies of the situation" may provide an exception. "The need to assist persons who are seriously injured or threatened with such injury" is one such exigency. (*Brigham City v. Stuart* (2006) 547 U.S. 398.) Law enforcement officers may make a warrantless entry into a residence "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." The officers' subjective intent is irrelevant, as is the seriousness of the crime they are investigating when the exigency arises. It is also unnecessary that the officers have "ironclad proof of 'a likely serious, life-threatening' injury." It only requires that there be "an objectively reasonable basis for believing . . . (that) a person within [the house] is in need of immediate aid." Pursuant to this "emergency aid" exception to the search warrant requirement, with the officers finding a "tumultuous situation" in the house, signs of a recent injury (whether minimal or not), and violent behavior then occurring, it was reasonable for the officers to conclude that defendant's actions might have a human target (a spouse or a child), or that he would further hurt himself in the course of his rage. Under these circumstances, it was reasonable for Officer Goolsby to make a warrantless entry in order to defuse the situation before it became any worse. Defendant questioned, however, whether the officers really intended to render his aid when they entered. In response, the Court reiterated that the officers' subjective intent is irrelevant. It need only be shown that there was "an *objectively* reasonable basis for believing that medical assistance was needed," or that "persons were in danger." (Italics added) The entry of defendant's residence, therefore, was lawful.

Note: The two dissenters played the facts down a bit, saying there was very little blood and little if any reason to interfere with defendant's tirade. But I would venture a guess that if I took a poll right now of all the law enforcement officers reading this, as to how many of you would have walked away from this situation without doing something to defuse it, I would get a 100% response to the effect of; "*not me*!" The majority of the Supreme Court recognized this, noting in summary: "It does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one they encountered here. Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances. But '[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties.'(Citation)" There's nothing I can add to this obvious common sense.

***Use of Force; Tasers*:**

Bryan v. McPherson **(9th Cir. June 18, 2010) __ F.3rd __ [2010 WL 2431482]**

Rule: Use of a Taser on an irate, but unarmed person stopped for a traffic violation, absent the person posing an immediate threat to safety, resisting arrest, or attempting to escape, is unreasonable and grounds for civil liability.

Facts: Twenty-one year old Carl Bryan was having a bad day, and apparently didn't handle bad days very well. While Bryan stayed overnight with his brother in Camarillo, in Ventura County, a cousin's girlfriend accidentally took his car keys to Los Angeles. So Bryan had to get up early and, while dressed only in tennis shoes and the boxer shorts and t-shirt he'd slept in, he spent part of his morning retrieving his keys. He then headed south to his parents' home in Coronado, San Diego County. Finally on the road, while attempting to make up for lost time, Bryan was stopped by the California Highway Patrol for speeding. "This upset him greatly." Crying and moping, he found the need to remove his t-shirt to wipe his sweating face. Now stripped down to his boxer shorts and tennis shoes, he finally crossed the Coronado Bridge from the City of San Diego into Coronado at around 7:30 a.m. But Bryan wasn't home free yet. At the end of the bridge stood Coronado Police Officer Brian McPherson, watching for seatbelt violations. Noticing that Bryan was not seat-belted in (a fact Bryan blamed on being stressed out from the prior ticket), Officer McPherson stepped in front of Bryan's car, signaling him to stop. McPherson approached the passenger window and asked Bryan if he knew why he'd been stopped. An angry and frustrated Bryan merely stared straight ahead. Officer McPherson told Bryan to turn his radio down and pull over to the side. Bryan complied, but not without yelling expletives as he pounded on his steering wheel. Despite being told to stay in his car, a command Bryan claimed he didn't hear, he stepped out. At this point, Officer McPherson was confronted by a 21-year-old male, standing 15 to 25 feet away, in his boxer shorts and tennis shoes, "yelling gibberish," all the while hitting himself in his thighs. However, Bryan never verbally threatened him or attempted to run away. Officer McPherson testified that Bryan took a step towards him, which Bryan denied. The physical evidence indicates that Bryan was actually turning away from McPherson at that time. Without a verbal warning, McPherson drew his Taser X26 and

shot it at Bryan, hitting him with one of the Taser's probes in the side of his upper left arm. Immobilized, Bryan did a face plant onto the pavement, fracturing four teeth and suffering facial contusions. The Taser's probe later had to be surgically removed from his arm. Charged in state court with a violation of P.C. § 148 (interfering with a peace officer in the performance of his duties), the jury hung. The prosecution later dismissed all charges. Bryan then sued the officer for an excessive use of force. McPherson filed a motion for summary judgment (dismissal before trial), which was denied. He appealed.

Held: The Ninth Circuit Court of Appeal reversed. Despite finding that the force used was excessive under the circumstances as alleged by Bryan (Note that the Court, in this circumstance, must assume as true the facts as alleged by the plaintiff, Carl Bryan.), Officer McPherson was entitled to qualified immunity from civil liability. In discussing the reasonableness of the force used, the Court first noted that the instrument used, a "Taser X26," is a weapon that uses compressed nitrogen to propel a pair of "probes" (i.e., aluminum darts tipped with stainless steel barbs connected to the X26 by insulated wires) at its target. Shot at a person at a rate of 160 feet per second, it delivers a 1,200 volt electrical charge into the person it strikes, even through up to two inches of clothing. The electrical impulse instantly overrides the target's central nervous system, paralyzing the muscles throughout the body, rendering him limp and helpless. The Tasered person experiences excruciating pain that radiates throughout his body. The Taser, per the Court, is a form of non-lethal force, constituting an "intermediate or medium, thought not insignificant, quantum of force." The general rule is that any use of this (or any) force must be no greater than is necessary under the circumstances. Also, the need for its use must be balanced with the governmental interest involved under the circumstances. Specifically, in determining the governmental interest involved, the Court must consider (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officer or others, and (3) whether that suspect is actively resisting arrest or attempting to evade arrest by flight, plus (4) any other exigent circumstances present at the time. (1) The crime in this case was a seatbelt violation, or an infraction; a relatively insignificant offense. (2) The threat to the officer was, in the Court's opinion, relatively insignificant. The Court recognized that police officers are forced to make split-second decisions while usually being unaware of whether the confronted person might be a real danger to them. But in this case, it was apparent that plaintiff was certainly unarmed (standing there in his boxer shorts). He never made any movement toward the officer (although Officer McPherson contested this issue), with the physical evidence tending to corroborate Plaintiff, showing that he was apparently turning away from the officer while at a distance of some 15 to 25 feet. (3) While agitated and obviously out of control, Bryan never resisted arrest nor made any attempt to flee. In fact, except for getting out of the car after being ordered not to, Bryan obeyed all the officer's commands. In responding to Officer McPherson's argument that plaintiff appeared to have some sort of mental issues, the Court found this all the more reason to minimize the force used. The Court was also critical of Officer's McPherson's failure to warn Bryan, which would have been possible under the circumstances. It also noted that other officers were en route to assist, and that absent an immediate necessity, McPherson could have waited. Under these circumstances, the Court agreed with Bryan that the force used was clearly excessive. However, because the law on the use of Tasers is still in its development

stage, a officer could have reasonably believed that the use of a Taser was lawful under these circumstances. Therefore, the trial court erred in finding that the officer was not entitled to qualified immunity.

Note: The Court initially found that Officer McPherson was *not* entitled to qualified immunity (see 590 F.3rd 767.), but changed its mind and republished its decision as briefed here. This change of opinion was motivated by the fact that there is no U.S. Supreme Court decision evaluating the use of Tasers. Also, other case law has noted that "(t)he Taser is a relatively new instrument of force, and case law related to the Taser is developing." (See *Brown v. City of Golden Valley* (8th Cir. 2009) 574 F.3rd 491, 498.) So the officer just barely ducked a bullet on this one. Interestingly enough, while briefing this case, there happened to be an article in my local newspaper (*The Rapid City Journal*; May 22, 2010) about a South Dakota sheriff's deputy who, during training on the use of the Taser, volunteered his own body as a target. As a result, the officer suffered broken bones in the upper part of both his arms, dislocating his shoulders, and fracturing his shoulder sockets. These injuries were the result of "muscles convulsing the bones." There was also a recent article in the San Diego Union (June 14, 2010) about an illegal alien being "Tased" at the border by the Border Patrol, contributing to his eventual death via a heart attack. (The hypertension and methamphetamine influence didn't help). So we're not talking about some minor amount of force here. I know that when this case was first publicized, a lot of you were incensed by the fact that the Court dared to be critical of an officer using his Taser when, "*in the old days*" (i.e., before Tasers), Bryan might possibly have been shot with a firearm. But there was also a time (the "*really old days*") when a lone officer would have physically subdued Bryan using no more than the control methods I know are still being taught in the police academy. Although I'm not comfortable criticizing Officer McPherson in this case because (1) I wasn't there, and (2) the Ninth Circuit is famous for distorting the facts just to make a point, I would suggest that in your anger you don't lose sight of the Court's point: While you certainly have the right to defend yourself with appropriate force, having access to a non-lethal weapon (Taser, pepper spray, night stick, etc.) doesn't mean it's always okay to use it.

***Tracking Devices on Vehicles*:**

United States v. Pienda-Moreno **(9th Cir. Jan. 11, 2010) 591 F.3rd 1212**

Rule: The warrantless attaching of electronic tracking devices to the undercarriage of a vehicle while the vehicle is parked in a private driveway within the curtilage of a suspect's home, but where there are no obstructions preventing the public from entering the driveway and which is exposed from the street, is legal.

Facts: A Drug Enforcement Administration (DEA) special agent noted a group of men purchasing a large quantity of fertilizer from Home Depot. The agent recognized the fertilizer as a type frequently used in growing marijuana. The men drove off in defendant's Jeep Grand Cherokee. An investigation lead to information that defendant and his associates were also purchasing irrigation equipment and deer repellant at several other stores, often using defendant's Jeep. After determining where defendant lived, a

four-month investigation ensured during which various types of mobile tracking devices were used, attaching them to defendant's Jeep. Each device was about the size of a bar of soap and had a magnet affixed to its side allowing it to be attached to the underside of a car. These devices were used on seven different occasions, being attached to defendant's car four times while the car was parked on the street in front of his house, once while the car was in a public parking lot, and twice while parked in his own driveway within the curtilage of his residence (a trailer). The driveway to defendant's trailer was not enclosed by a gate or other type of obstruction, and was visible from the street. There were no "No Trespass" signs. Eventually, one of the tracking devices indicated that defendant was just leaving a suspected marijuana grow site. His car was stopped. A consensual search of his car and his trailer led to the recovery, along with other evidence, of two large garbage bags of marijuana. Charged in federal court with various marijuana-related counts, his motion to suppress was denied. Defendant pled guilty and appealed.

Held: The Ninth Circuit Court of Appeal affirmed. On appeal, defendant first argued that that using an electronic tracking device, attached to his Jeep and monitoring his movements, was itself a violation of his Fourth Amendment, violating his reasonable expectation of privacy. The Court disagreed, first striking down defendant's argument that the Fourth Amendment was violated by attaching a tracking device to the undercarriage of his Jeep while it was parked on the street in front of his house, or while in public parking lot. It has previously been held that one's expectation of privacy is not violated by attaching an electronic tracking device to the outside of a car while that car is located at any location *outside* the curtilage of his home. (*United States v. McIver* (9th Cir. 1999) 186 F.3rd 1119.) The Court then extended the rule of *McIver* to the circumstances of this case; i.e., when the defendant's car is parked *within* the curtilage of his home, at least when the vehicle is in an area that is *not* gated off or otherwise enclosed, there are no "No Trespassing" signs or other barriers to someone entering the area, and which is exposed to view from the street. In fact, it was noted that a person who intends to walk to the front door of defendant's trailer would have to go through the driveway to get there. Under these circumstances, with defendant's vehicle being at best in only a "semi-private" location, there was no expectation of privacy that would prevent the officers from approaching the Jeep and attaching a tracking device to its exterior. The Court also rejected defendant's other arguments, ruling as follows: (1) Attaching the tracking device to the vehicle during the early morning (e.g., 4:00 or 5:00 a.m.) hours does not increase defendant's privacy expectations. The timing of the officers' actions is immaterial. (2) The fact that tracking devices are not generally used by the public does not make its warrantless use by law enforcement illegal. (3) The United States Supreme Court, in *Kyllo v. United States* (2001) 533 U.S. 27 (necessitating the use of a search warrant when using a "thermal imaging device" on a private residence) did not modify the legal analysis applicable to the use of such technological devices. Defendant's motion to suppress, therefore, was properly denied by the trial court.

Note: This case itself is no surprise, but is still important in allowing the warrantless attachment of tracking devices to the outside of a vehicle even when the car is parked in the suspect's own driveway within the curtilage of (i.e., close to) his home. But note the exceptions that are still applicable. The location of the car must be somewhere to which

the public has access. If the driveway is somehow enclosed, gated off, or even out of view from the street, then a warrant will be needed. A simple "No Trespassing" sign might be enough to increase the suspect's expectation of privacy to the degree where a search warrant is needed. Also, if the idea is to wire the tracking device into the vehicle's electrical system, then a warrant is likely needed. And there's still valid case law saying that if the tracking device is taken into the house, even if by the suspect, it must be turned off absent a warrant authorizing its use within the home. (*United States v. Karo* (1984) 468 U.S. 705.) Arguably, this would include when the defendant parks his car in the garage after the device has been attached.

***Medical Marijuana*; *H&S § 11362.77 & Statutory Possession Limits*:**

People v. Kelly **(Jan. 21, 2010) 47 Cal.4th 1008**

Rule: In so far as it seeks to provide specific numerical limits to the amount of marijuana a qualified patient may possess, H&S § 11362.77(a) is unconstitutional. Rather, the limits inferred by H&S § 11362.5, i.e., that amount that is reasonably related to the patient's current medical needs, is controlling.

Facts: Defendant suffered from a variety of ailments including hepatitis C, ruptured disks in his back, a fused neck, nausea, fatigue, cirrhosis, loss of appetite and depression. After years of attempting traditional medical treatments, he finally decided to give marijuana a shot. He visited a doctor who, after reviewing his medical records and hearing his tales of woe, provided him with a written recommendation for marijuana. No particular dosage was recommended. Defendant, therefore, started growing the stuff in his backyard, processing his own marijuana that he smoked, vaporized, and baked into brownies. He later testified that as time went by, he found that he was needing more and more marijuana to stem his ills. Defendant *did not* seek to register under the "Medical Marijuana Program" (i.e., "MMP;" H&S §§ 11362.7 et seq.) nor obtain an "annually renewable identification card" (H&S § 11362.7(g)). Eventually, in October, 2005, an informant ratted defendant off to the Los Angeles County Sheriff's Department. Deputy Sheriff Michael Bartman investigated the allegations and determined that defendant was indeed growing marijuana in his backyard. A search warrant was obtained and, when executed, seven potted marijuana plants and "additional" plants were recovered from his yard, along 12 usable ounces of dried marijuana packaged in seven vacuum sealed plastic bags. A scale and a loaded firearm were also seized. During the search, defendant's medical authorization to use marijuana was also found. Despite the fact that no other indicia of sales were found, defendant was charged in state court with possession of marijuana for purposes of sale and cultivation. At trial, it was noted that the "MMP," at H&S § 11362.77(a), provides that a "qualified patient" or primary caregiver may possess no more than eight ounces of dried marijuana, and may maintain no more than six mature or 12 immature marijuana plants. It was also noted that section 11362.77(b) allows for a qualified patient to possess more than these limits when "consistent with the patient's needs," on condition that the patient have a doctor's recommendation stating that the statutory limits are insufficient for the patient's needs. Defendant had no such recommendation. With the jury rejecting defendant's argument that he possessed the

marijuana for medical purposes, he was convicted of possessing more than an ounce of marijuana, as a lesser included offense of the possession-for-sale charge, and cultivation of marijuana. He appealed. The Second District Court of Appeal reversed defendant's conviction, finding that the section 11362.77 of the MMP, insofar as it limits the amount of medical marijuana that a qualified patient may possess, constituted an illegal attempt by the Legislature to amend an initiative; i.e., Proposition 215, the so-called "Compassionate Use Act" ("CUA;" H&S § 11362.5), which had been passed by popular vote of the electorate in 1996. The Appellate Court further ruled that section 11362.77 must be struck in its entirety. The state appealed.

Held: The California Supreme Court affirmed in part and reversed in part. As for the lower Appellate Court's determination that section 11362.77 of the MMP was an illegal amendment to Proposition 215, the Court agreed. Per article II, section 10, subdivision (c), of the California Constitution, (t)he Legislature . . . may not amend or repeal an initiative statute by another statute . . . unless the initiative statute permits amendment or repeal without their (i.e., the voting public's) approval." An "amendment" is defined as including a legislative act that changes an existing initiative statute by taking away from it, and thus "burdening the defense." A new legislative enactment that merely addresses the general subject matter of a prior initiative statute is not prohibited. The CUA, also known as Proposition 215, an initiative passed by the voters in 1996 and which first set out California's medical marijuana provisions, did not contain any specific limits on the amount of marijuana that may be lawfully possessed for medical purposes. Rather, through case law, it has been determined that it allows for a patient or the patient's primary caregiver to possess an amount that is "reasonably related to the patient's current medical needs." However the later legislatively-passed MMP, effective Janunary1, 2004, attempted to amend the CUA from an amount of marijuana that was related to the patient's needs to a specific number of plants and a specific number of ounces. Doing this is an illegal amendment in violation of article II, section 10, subdivision (c). Therefore, to the extent that section 11362.77 "burdens the defense" by changing the amount of marijuana that may be possessed from that which is "reasonably related to the patient's current medical needs" to a specific statutory amount absent a doctor's authorization, 11362.77 is unconstitutional and unenforceable. However, the Supreme Court reversed the Appellate Court's determination that the entire section 11362.77 must be severed from the MMP. To the extent it is still enforceable (i.e., without the statutory limits), the section is still good.

Note: The Supreme Court goes on for pages describing the history of the initiative process and why it is in California's Constitution that the Legislature isn't allowed to negate or even alter an initiative without another public vote, unless the initiative itself says that it can. Given the tenor of California's current Legislature, this, in my humble opinion, is a good thing. The Court also noted how beneficial specific limits on the amount of marijuana would be both for the pot-smoking medical patients and law enforcement, rather than having to guess, on a case-by-case basis, what is "reasonably related to the patient's current medical needs." But such an improvement to the statutes will have to be done by another initiative; i.e., a vote of the public and not the Legislature.