MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S PROPOSED JURY INSTRUCTIONS.

I. JORDAN CRITTLE IS ENTITLED TO AN INSTRUCTION ON THE DEFENSE OF MEDICAL NECESSITY (DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 14).

The defense of necessity is long recognized in American jurisprudence. (See, e.g., Regina v. Dudley & Stephens, 14 Q.B.D. 273 (1884)). Necessity is a defense to criminal conduct where the conduct was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense. (United States v. Bailey, 444 U.S. 394, 410 (1980)).

In Raich v. Gonzalez, on remand from the Supreme Court, the Ninth Circuit recognized a medical necessity defense to the use of marijuana for medical purposes. (500 F.3d 850, 858 (9th Cir. 2007)). To sustain a necessity defense, the defendant must show, by a preponderance of the evidence, that: (1) he was faced with a choice of evils and chose the lesser evil; (2) he acted to prevent imminent harm; (3) he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) there were no other legal alternatives to violating the law. (Id. at 859). In her civil case, Raich ostensibly satisfied each element of the defense, but was denied injunctive relief solely because necessity serves as a defense to criminal conduct—to "protect the defendant from criminal liability." (Id. at 861). Though the Ninth Circuit lacked the power to "enjoin prosecution for what remains a legally recognized harm," it found that "a necessity defense may be available in the context of a criminal prosecution." (Id.)

The Ninth Circuit established standards of analysis for each prong

in relation to the medical necessity of marijuana use. A showing that the defendant will "endure intolerable pain including severe chronic pain" without marijuana was sufficient to establish the first prong. (Id. At 859-60). The second prong was met when "all medical evidence in the record suggest[ed] that...the acute chronic pain...would immediately resume." (Id.) Raich satisfied the third prong with testimony from her licensed physician as to the causal connection "between her physical condition and her need to use marijuana." (Id.) Finally, the fourth prong is met with testimony that the defendant has tried other legal alternatives to cannabis and they "have been ineffective or result in intolerable side effects." (Id.)

While dicta from the Supreme Court in United States v. Oakland Cannabis Buyer's Cooperative, 532 U.S. 483 (2001), suggests that "it is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute," the Ninth Circuit has expressly found that "the ***Oakland Cannabis*** dicta [does not] abolish more than a century of common law necessity jurisprudence." (Raich, 500 F.3d at 858 (2007)).

Jordan Crittle intends to provide sufficient evidence during trial to establish the defense of medical necessity as outlined by the Ninth Circuit and requests that the court grant him the proposed jury instruction No. 14.

II. JORDAN CRITTLE IS ENTITLED TO AN INSTRUCTION REQUIRING THE GOVERNMENT TO PROVE THAT HE DID NOT HAVE A VALID PRESCRIPTION (DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 10).

Title 21 U.S.C. §844(a) does not proscribe all possession of controlled substances. Rather, one may legally possess a controlled substance "pursuant to a valid prescription or order, from a

practitioner, while acting in the course if his professional practice." Title 21 U.S.C. §885(a)(1) provides that the burden of going forward with respect to the evidence of an exception falls on the defense. It is questionable whether section 885 even applies to this case since section 844(a) does not use any variation of the word "exception" or "exemption," both terms being regularly used throughout the subchapter, and it is unclear whether the "valid prescription" term is an "exception" or "exemption". Nonetheless, once evidence adduced at trial raises the issue of the existence of a prescription or order, the burden then falls upon the government to prove beyond a reasonable doubt that it is invalid or inapplicable. (United States v, Black, 512 F.2d 864, 867 (9th Cir. 1975)). In Black, the court classified the "lack of authorization under the medical exception" as an "element of the crime" once the burden of going forward is met. (Id. at 871-72). Likewise, the lack of authorization pursuant to a valid prescription or order becomes an element of the offense once the burden of going forward is met.

As the Black Court indicates, "it is not 'more likely than not' that medical practitioners registered to dispense controlled substances do so illegitimately and are guilty of a criminal act." (512 F.2d at 871). Similarly, common experience dictates that most patients who possess controlled substances based on the recommendation or order of a licensed doctor do so legally. Black could not "be found guilty of violation of §841(a)(1) unless the trier of fact determines beyond a reasonable doubt that Black's conduct was not within the medical exception authorized by statute." (Id.) Nor can Mr. Crittle be found guilty unless the government proves, beyond a reasonable doubt, that his possession was not medically authorized. Essentially, once ***some***

evidence is introduced to support the existence of a prescription or order, it is the government's obligation to prove, as an element of the offense, the invalidity of the prescription or order. Jordan Crittle requests that the court grant him the proposed jury instruction No. 10.

III. JORDAN CRITTLE IS ENTITLED TO AN INSTRUCTION ON THE DEFENSE THAT HE REASONABLY BELIEVED HE HAD A VALID PRESCRIPTION. (DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 15)

A. The "knowingly" element of section 844(a) should apply to all elements of the statute, such that Mr. Crittle must have known that he did not possess the controlled substance pursuant to a valid prescription to be found guilty.

Section 844(a) provides that a valid prescription is a complete defense to possession of a controlled substance. As above, once some evidence is introduced to support the existence of a prescription or order, the burden falls upon the government to prove its invalidity as an element of the offense. (21 U.S.C. §885(a)(1); United States v, Black, 512 F.2d 864, 867 (9th Cir. 1975)). The Supreme Court has found that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." (Flores-Figueroa v. United States, 129 S.Ct. 1886 (2009)). The Supreme Court indicates that criminal statutes should be interpreted "to include broadly applicable scienter requirements." (United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994)). In X-Citement Video, which dealt with a statute prohibiting the knowing transport of a visual depiction involving the use of a minor, the phrase "the use of a minor" was not the direct object of the verbs modified by "knowingly," but appeared in a different subsection. (Flores-Figueroa, 129 S.Ct. at 1891). Nonetheless, the Court found that the intent element, "knowingly," applied to "the use of a minor." (Id.)

The number of words, phrases or clauses between the mens rea term and the subsequent elements did not change the Court's judgment. Essentially, the "presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." (X-Citement Video, 513 U.S. at 73).

Once the burden of going forward is met, the government must prove, as an additional element of the offense, that Mr. Crittle possessed the controlled substance without a valid prescription. Effectively, the statute is read as having four elements: that Mr. Crittle possessed a controlled substance, that he knew he possessed it, that it was a controlled substance, and that he possessed it without a valid prescription. The "knowingly" term of the statute must apply to each element of the offense, including the "valid prescription" term. Therefore, a defendant cannot be held liable under section 844(a) unless the government proves that the defendant knew he possessed the controlled substance without a valid prescription. The court should follow the presumption in favor of a scienter requirement for criminal conduct; a ruling to the contrary would potentially criminalize numerous instances of otherwise innocent conduct.

B. Ignorance of an independently determined legal status, such as the validity of a prescription, is a mistake of fact which operates as a defense to the charge of simple possession.

If the court finds either that the "valid prescription" term is not an element of the offense, or that the "knowingly" term does not apply to it, it should still instruct the jury that a reasonable belief as to the validity of the prescription is a defense to the charge of simple possession. There are two categories of cases in which a mistake of law is a defense to the charge. (United States v. Fierros, 692 F.2d 1291, 1294 (9th Cir. 1982)). First, the defense is available in cases

involving instances where the defendant is "ignorant of an independently determined legal status or condition that is one of the operative facts of the crime." (Id.) In effect, the mistake of law becomes a mistake of fact. (United States v. Smith-Balthier, 424 F.3d 913, 924 (9th Cir. 2005)). For example, a defendant who reasonably believes himself a citizen of the United States and therefore reenters the country without permission of the Attorney General is entitled to an instruction in his defense against a charge of attempted reentry. (Id.) Or, as United States v. Peterson illustrates, the defendant's reasonable belief that the person from whom he buys property was legally authorized to sell it, is a defense to a charge of theft of federal property. (513 F.2d 1133 (9th Cir. 1975)). Also, if a defendant asserts reasonable grounds to believe that workers he transported were not aliens or had been legally admitted into the United States, then he is entitled to such instruction against a charge of transportation and harboring of illegal aliens. (Fierros, 692 F.2d at 1294). These illustrations "depict defendant's understanding of the ***factual*** events that formed the basis for prosecution. If the facts were as defendant supposed, he would not have the requisite culpability prescribed by the statute." (United States v. Aguilar, 883 F.2d 662, 675 (9th Cir. 1989)).

The second category of cases in which a defense may be predicated on a mistake of law involves "prosecution under complex regulatory schemes that have the potential of snaring unwitting violators." (Fierros, 692 F.2d at 1295). For example, a defendant cannot be convicted of exporting a prohibited substance absent a showing that he knew that export of the substance in question was prohibited. (United States v. Lizarraga-Lizarraga, 541 F.2d 826 (9th Cir. 1976)). In

Lizarraga-Lizarraga, the statute prohibited the export of a list of items not found in the statute itself, including several items that might be innocently imported or exported. (Id.) That the defendant reasonably believed exportation of the substance in question was permissible, operated as a defense to the charge. (Id.)

The terms under which a prescription is valid are defined by federal law. The validity of a prescription is an independently determined legal status and acts as an operative fact of the statutory defense to simple possession. Reasonable ignorance about the legal validity of the prescription constitutes a defense which negates the culpability of the criminal conduct. Just as one who buys property from another whom he reasonably believes is authorized to sell it, so too does a defendant, who reasonably believes in the validity of a prescription provided by a physician who is reasonably believed to have the authority to write such a prescription, lack the culpability proscribed by Congress.

Furthermore, the Controlled Substances Act (CSA) is a "lengthy and detailed statute" creating a complex and intricate web of regulation. (Gonzalez v. Raich, 545 U.S. 1, 24 (2005)). One section of the CSA lists dozens of narcotics in five different schedules and other sections regulate and prohibit possession, manufacture and distribution. The definitions of "valid prescription," "physician," and other terms of the CSA are found in a separate statute. Understanding the legal basis for the classification of prescriptions is beyond the common knowledge of the average layperson. The "valid prescription" term is the subject of a complex regulatory scheme which certainly has the potential to snare unwitting violators. Absent a defense of reasonable belief, the regulatory scheme could potentially criminalize

innocent behavior. For example, if a person possesses a prescription drug which, unknown to them, is invalid because of some defect in the prescribing document, or the physician's license, or any other matter beyond the possessor's knowledge or control, he could be criminally liable under section 844(a). Since the regulation of prescription drugs is such a complex regulatory scheme, that a person reasonably believed in the validity of his prescription should operate as a defense to the charge.

C. Mr. Crittle's reasonably mistaken belief about the underlying facts which render a prescription valid operates as a defense to criminal possession of marijuana.

Courts have found that when a defendant reasonably believes that his conduct is lawful, he ought not be held criminally liable. In United States v. Barker, 546 F.2d 940 (D.C. Cir. 1976), the Court of Appeals held that the trial court should have allowed the defendants to present "proof of reasonable, though mistaken, belief that their actions were duly authorized" by a public authority, such as the CIA or FBI. In Barker, the court found that two men, relying on a White House official who they believed could authorize breaking in to a psychiatrist's office, were entitled to a defense of good faith, reasonable reliance on apparent authority. Even though the defendants could not establish a pure public authority defense, that they acted on a good faith reliance upon the apparent authority of another to authorize their actions acted as a defense to the charge. Ninth Circuit Model Jury Instruction 6.10, on Public Authority, echoes this language, providing that if a defendant has a "reasonable belief that [he] is acting as an authorized government agent...then [he] may not be convicted of violating the criminal statute, because the requisite criminal intent is lacking."

In Liparota v. United States, 471 U.S. 419 (1985), a food stamp misuse prosecution, the Supreme Court found that if the defendant did not know that his actions were in violation of the law, he could not be criminally liable. Also, in Staples v. United States, the Court held that the defendant must have known that the thing possessed, in that case a machinegun, "had the characteristics that brought it within the statutory" proscription. 511 U.S. 600, 602. Each of these examples touches on the core principle that "an honest mistake of fact negatives criminal intent, when a defendant's acts would be lawful if the facts were as he supposed them to be." (Barker, 546 F.2d at 946).

Following the common reasoning that a defendant should not be criminally liable if he reasonably believes that his conduct is legal, the "valid prescription" defense of 21 U.S.C. §844 should apply to those defendants who reasonably believe that they hold prescriptions which are legally valid under federal, as well as state law. Possession of a gun without knowledge that it bears characteristics that make it illegal, commission of a burglary under the reasonable belief that the conduct was authorized by a public authority, reasonable belief of citizenship when entering the United States, reasonable belief that property purchased was legally sold: each example demonstrates the general proposition at the heart of the criminal law—that a person lacking criminal intent should not be held to criminal penalty. If a defendant possesses a controlled substance pursuant to a good faith belief that his physician was authorized to issue the prescription and that it was valid, then he should be free from criminal liability.

If a person reasonably believes he possesses a valid prescription, but is still subject to prosecution because of some technical invalidity in the prescription, potentially limitless instances of

innocent conduct may become criminally punishable. Such a reading of the statute would place the burden on patients to know the legal requirements of prescriptions, the legal qualifications of doctors, and any other information which may influence the validity of their prescription. This kind of information is usually beyond the ability of non-doctors to comprehend, or even have access to. To compel such a heavy burden on the average patient would discourage people from seeking medical aid through prescription drugs—a result which Congress certainly did not intend under the CSA.

Mistaken belief in the validity of a prescription is an honest mistake of fact which negates criminal intent, since the defendant's acts would be lawful if the facts were as he supposed them to be—that he was legally authorized, pursuant to a prescription or order from a licensed physician, to possess the substance. Jordan Crittle intends to provide sufficient evidence during trial to establish that he believed he had a valid prescription for possession of marijuana, by virtue of California law and the representations of his physician, and that his belief was reasonable. He requests that the court grant him the proposed jury instruction No. 15.

Dated: August 10, 2009

Respectfully submitted,

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