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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent v. LEWIS DOWL, Defendant and Appellant	S182621	FILED WITH PERMISSION SUPREME COURT FILED FEB 2 - 2011 Frederick K. Ohlrich Clerk Deputy

Fifth Appellate District, No. F057384
Kern County Superior Court No. BF125801A
Honorable Kenneth C. Twisselman II, Judge

PETITIONER'S OPENING BRIEF ON THE MERITS

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STATEMENT OF ISSUES IN PETITION FOR REVIEW

Under California Rules of Court, rule 8.520(b)(2)(A), the Court's November 10, 2010 order specifying issues to be briefed was as follows:

"In the matter of *People v. Lewis Marcus Dowl* (S182621), review granted on July 21, 2010, the parties are ordered to limit their briefing to the following issue: whether the People, when confronted with a medical marijuana defense, must call an expert with experience distinguishing lawful, medical possession from unlawful possession to establish that defendant possessed marijuana for sale. (See Cal. Rules of Court, rule 8.516(a)(1).)"

INTRODUCTION AND OVERVIEW

Petitioner's answer to this Court's question follows the rules of substantial evidence review, as implemented in this specific type of case by *People v. Hunt* (1971) 4 Cal.3d 231 ["*Hunt*"]. In this case, the answer is yes, as it was in *Hunt* in an analogous area of lawful controlled substance possession. But it would not be so in all cases.

The answer in each case will follow a well defined set of rules:

(1) The witness's opinion is not substantial evidence when:

(a) either a lay witness, or an expert who lacks have expertise in distinguishing unlawful possession of a controlled substance (e.g., possession for trafficking) from lawful possession, gives an opinion that purports to distinguish one from the other,

(b) in a situation where the distinction would be beyond the common knowledge of everyday jurors.

(2) If the defendant raises a lawful possession defense, but everyday jurors can draw reasonable inferences from the evidence that the possession was unlawful, then no expert is required. In that event, if the People call a witness with no expertise in distinguishing lawful from unlawful possession, his or her opinion is not substantial evidence (see (1) above) – but it is also not needed for conviction.

(3) Otherwise, an expert who can distinguish the two is required. That was true in *People v. Hunt*, and is true here.

The opinion below erred in assuming that no medical marijuana expert was required here. It theorized that because a medical marijuana defense is an "affirmative defense," the prosecution has no burden of proof when the defendant raises such a defense, and therefore the prosecution doesn't have to call an expert competent in this area. While a medical marijuana defense is an "affirmative defense," it is one for which a defendant has only a burden of raising a reasonable doubt, and the prosecution has the ultimate burden of persuasion. (*People v. Mower* (2002) 28 Cal.4th 457, 479-480 ["*Mower*"].) If the defendant raises a reasonable doubt, the prosecution must produce substantial evidence to refute the defense. It must therefore call an expert competent in this area – one beyond everyday jurors' common knowledge – if there would not be substantial evidence to support conviction without such an expert.

Since Mr. Dowl's evidence raised a reasonable doubt, the prosecution had the ultimate burden of persuasion. Here as in *Hunt*, it failed to offer an expert who could distinguish lawful from unlawful possession, and there was no other substantial evidence to support a conviction. As in *Hunt*, the judgment should be reversed.

STATEMENT OF THE CASE

By information filed on December 18, 2008 (1CT 71), Mr. Dowl was charged with these offenses alleged to have occurred on November 29, 2008:

Count One:	Transportation of marijuana (Health and Safety Code, § 11360, subd. (a)), with a gang enhancement (Penal Code, § 186.22, subd. (b))
Count Two:	Possession of marijuana for sale (Health and Safety Code, § 11359), with a gang enhancement (Penal Code, § 186.22, subd. (b))
Count Three:	Active participation in a criminal street gang (Penal Code, § 186.22, subd. (a))

On February 27, 2009, the jury returned its verdicts (1CT 167-168):

Count One:	**Guilty** - Transportation of marijuana **Not True** - Gang enhancement allegation
Count Two:	**Guilty** - Possession of marijuana for sale **Not True** - Gang enhancement allegation
Count Three:	**Not Guilty** - Active participation in a criminal street gang

On March 27, 2009, Mr. Dowl was sentenced to a 3-year prison term, consisting of the middle term of 3 years on count 1, and the middle term of 2 years on count 2 stayed under Penal Code section 654. (1CT 178.)

Mr. Dowl filed a timely notice of appeal on March 27, 2009. (1CT 180.) On April 6, 2010, the Court of Appeal issued its opinion affirming the judgment. The portion of the opinion certified for publication (Part I), printed at 183 Cal.App.4th 702, is the portion that relates to the issue on review before this Court.

STATEMENT OF FACTS

Solely for purposes of this brief, Mr. Dowl accepts the statement of facts in the opinion below. (Slip op., at pp. 2-4.)

ARGUMENT

I. This Case Is Substantively Indistinguishable From *Hunt*

A. Overview

This case is substantively indistinguishable from Justice Mosk's opinion for a unanimous Court in *People v. Hunt, supra,* 4 Cal.3d 231. If this Court follows *Hunt*, then Mr. Dowl's conviction should be reversed.

While the Court of Appeal in this case purported to distinguish *Hunt*, its effort foundered, because it failed to fully grasp the reasoning of *Hunt*. It also failed to fully grasp the analysis and applicability of this Court's more recent opinion in *People v. Mower, supra,* 28 Cal.4th 457.

B. *Hunt*

In *Hunt*, the defendant was found with four 30 cc vials of methedrine, a plastic box with four capsules of pentobarbital, three tablets of amphetamine, some needles, four envelopes with syringes, and another needle in his arm. At the time, he was with a heavy methedrine user who had a book reciting narcotics transactions. Hunt's vials had pharmacy labels bearing a physician's name, the physician gave generalized testimony that didn't preclude lawful possession, and Hunt testified that he obtained the methedrine by lawful prescriptions for narcotics. Akin to the present case, the

prosecution presented an officer who had extensive training, education and experience on the subject of trafficking in controlled substances, who provided testimony on matters such as illegal use and street price of methedrine, and gave his opinion that Hunt possessed the methedrine for sale. (*Id.* at pp. 234-235.) Hunt was convicted of possession for sale. (*Id.* at p. 233.)

Had there been no evidence of lawful possession in *Hunt*, the officer's opinion would have been substantial evidence supporting a conviction, because the officer had experience in distinguishing unlawful simple possession from unlawful trafficking (possession for sale). (*See People v. Newman* (1971) 5 Cal.3d 48, 53.) However, he had no experience distinguishing unlawful trafficking or possession from lawful possession, and there was substantial evidence of lawful possession. That was fatal to the conviction:

> As to drugs, which may be purchased by prescription [i.e., lawfully], the officer may have experience with regard to unlawful sales but there is no reason to believe that he will have any substantial experience with the numerous citizens who lawfully purchase the drugs for their own use as medicine for illness.
>
> In the absence of evidence of some circumstance not to be expected in connection with a patient lawfully using the drugs as medicine, an officer's opinion that possession of lawfully prescribed drugs is for purposes of sale is worthy of little or no weight **and should not constitute substantial evidence sufficient to sustain the conviction**. No such special circumstances were shown here . . . .

(*Hunt*, 4 Cal.3d at pp. 237-238 [all emphasis added]; *see also People v. Newman, supra,* 5 Cal.3d at p. 53 [stating same principles, in affirming when there was no evidence of lawful possession].) Because the expert's testimony was not substantial evidence that could refute the defense of lawful possession, and because there was no substantial evidence of unlawful possession without an expert, this Court reversed Hunt's conviction for insufficiency of the evidence. (*Hunt*, 4 Cal.3d at p. 238.)

Underlying *Hunt* was a legal foundational matter – a conviction in that case would have required competent expert testimony in order to be supported by substantial evidence. Were it otherwise, Hunt's conviction would have been affirmed even though the officer's testimony was not substantial evidence. But instead, this Court reversed, which necessarily meant that adequate expert evidence was required to sustain the conviction.

The reason there was insufficient evidence in *Hunt* – lack of competent expert testimony to distinguish unlawful trafficking from lawful possession, when a defense of lawful possession was raised by substantial evidence, and there was no substantial evidence to refute that defense without an expert – is the problem here.

There was nothing in *Hunt* to suggest that jurors could themselves have distinguished the factors that characterized

unlawful possession-for-sale, from factors that characterized lawful possession. Such distinctions are generally outside of common knowledge, and nothing in *Hunt* indicated otherwise.

Consequently, a competent expert was needed. "If the matter in issue is one within the knowledge of experts *only* and not within the common knowledge of laymen, it is necessary for the plaintiff to introduce expert opinion evidence in order to establish a prima facie case." (*Miller v. Los Angeles City Flood Control Dist.* (1973) 8 Cal.3d 689, 702 [italics in original]; *Carson v. Facilities Dev't Co.* (1984) 36 Cal.3d 840, 844; *Huffman v. Lindquist* (1951) 37 Cal.2d 465, 473.) This standard applies with slight variation to a case like *Hunt* or this one, because before the prosecution has to make a prima facie case, the defense must first meet its burden of proof (production) of raising a reasonable doubt (*see People v. Mower, supra*, 28 Cal.4th at pp. 479-480), as happened in *Hunt* and Mr. Dowl's case. But once the defendant does so in such a case, the prosecution must provide competent expert evidence to overcome the affirmative defense, if there is no substantial evidence to support a conviction without it.

In short, if the question presented in this Court's issue specification order of November 10, 2010 had been posed in *Hunt*, the answer would have been: **Yes**, under the facts of a case such as

Hunt or this one, where there would have been no substantial evidence to support a conviction without competent expert testimony.

Hunt controls here. The Court of Appeal's judgment should be reversed for insufficiency of evidence under state law and the Fourteenth Amendment. (*Jackson v. Virginia* (1979) 443 U.S. 307.)

C. Expert Opinion Testimony And Substantial Evidence

Hunt is merely a routine application of long-established principles of expert evidence, such as: (1) the mere fact that someone who qualifies as an expert in an area testifies to an opinion, doesn't necessarily make that opinion substantial evidence; (2) if a witness (other than a fact witness) gives opinion testimony in an area in which he or she is not an expert, that testimony will not be substantial evidence; and (3) a witness can qualify as an expert in some areas but not be an expert in others, even if the areas are somewhat related.

The first two of those principles were applied directly in *Hunt*, by reference to an oft-cited opinion of this Court:

> In *People v. Bassett,* 69 Cal.2d 122, 141, Justice Mosk, speaking for a unanimous court, stated: "'The chief value of an expert's testimony in this field, as in all other fields, rests upon the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion . . . it does not lie in his mere expression of conclusion.' (Italics added.) [Citation.] In short, 'Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the *facts* and the validity

> of the *reasons* advanced for the conclusions' (Italics added.) [Citations.]

(*People v. Hunt, supra,* 4 Cal.3d at p. 237.)

As *Hunt* shows, when a witness (other than a fact witness) gives opinion testimony on a given matter, and the record does not show the witness has expertise with respect to that matter, then the witness's *reasoning* carries no substantial weight as evidence. Such a witness lacks the specialized knowledge to engage in reasoning that experts in the field would use, and to apply such expert reasoning to the case in the form of an opinion. As an illustration, the undersigned counsel hase opinions on a lot of things, she might qualify as an expert on a few, and she can certainly give her opinions to anyone who will listen. But that does not mean her opinions in areas for which she has no specialized knowledge would be substantial evidence in a court of law. (See also *People v. Chakos* (2007) 158 Cal.App.4th 357, 368-369 ["*Chakos*"] ["The *record* fails to show that Deputy Cormier [who qualified as an expert in determining types of unlawful possession] is any more familiar than the average layperson or the members of this court with the *patterns of lawful possession for medicinal use* that would allow him to differentiate them from unlawful possession for sale."] [italics in original].)

A witness can be an expert in some fields but not others, and the field of a witness's expertise is defined with specificity. "The competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement. In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited." (*People v. Williams* (1989) 48 Cal.3d 1112, 1136; *see also People v. Hogan* (1982) 31 Cal.3d 815, 852 ["[T]he qualifications of an expert must be related to the particular subject upon which he is giving expert testimony. Qualifications on related subject matter are insufficient."])

As should be self-evident, if someone who is not qualified as an expert in an area testifies on a matter that requires expert evidence, the nonexpert testimony will not be substantial evidence. (*Accord, e.g., Truman v. Vargas* (1969) 275 Cal.App.2d 976, 980-983; *Pacific Employers Ins. Co. v. Industrial Accident Comm.* (1941) 47 Cal.App.2d 494, 501-502; *People v. Chapple* (2006) 138 Cal.App.4th 540, 548-549.)[1]

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[1] The defendant's testimony cannot create substantial evidence where none otherwise exists, since mere disbelief of a defendant's testimony is not itself substantial evidence. (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1205; *Casetta v. United States Rubber Co.* (1968) 260 Cal.App.2d 792, 808.)

Consequently, even if a witness might qualify as an expert in some fields, the opinion of a witness (other than a fact witness) that is outside of those fields – and therefore, beyond the scope of his or her expertise – is not substantial evidence. And this Court has so held: "A[n] opinion extended beyond the range of the [witness's] expertise, cannot rise to a higher level than its own inadequate premises. Such reports do not constitute [substantial] evidence . . . ." (*Zemke v. Workers' Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 801 [underscoring added].) Published opinions have applied this basic principle of expert evidence in a variety of contexts. (*See, e.g., Zemke*, at p. 801; *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 583; *Cathay Mortuary v. San Francisco Planning Commission* (1989) 207 Cal.App.3d 275, 281; *cf. In re Marriage of Hewitson* (1983) 142 Cal.App.3d 874, 885-887 [if trial court's factual determination is based solely or largely on the opinion of an expert, it will not be substantial evidence unless it satisfies the criteria for admissibility; judgment reversed for lack of substantial evidence].)

These statements of law are merely outgrowths of another fundamental principle: Opinions without adequate foundation are not substantial evidence. This Court so held in the *Bassett* case upon which it relied in *Hunt* (*Bassett, supra,* 69 Cal.2d at pp. 146, 148), and the principle has been stated in numerous other cases as well.

(*See, e.g., In re Alexander L.* (2007) 149 Cal.App.4th 605, 611-612; *Stephen v. Ford Motor Co.* (2005) 134 Cal.App.4th 1363, 1371-1373; *People v. $47,050* (1993) 17 Cal.App.4th 1319, 1325; *Atiya v. DiBartolo* (1976) 63 Cal.App.3d 121, 126; *Estate of Teed* (1952) 112 Cal.App.2d 638, 646.) "The *ipse dixit* of the most profound expert proves nothing except [as] it finds support upon some adequate foundation." (*Bassett*, 69 Cal.2d at p. 146 [quoting *Estate v. Teed, supra,* 112 Cal.App.2d at p. 646]; *accord, e.g., Griffith v. County of Los Angeles* (1968) 267 Cal.App.2d 837, 847.)

Hunt's reliance on *Bassett* makes even clearer what should already be obvious: When a witness (other than a fact witness) gives an opinion in an area in which he or she is not an expert, and which is beyond the common knowledge of everyday jurors, the opinion lacks adequate foundation and is not substantial evidence. Because the opinion witness in *Hunt* was not an expert in the only area germane to the defense – namely, lawful controlled substance possession – his opinion was not substantial evidence that could support a conviction. So too here.

The above is also inherent in the definition of substantial evidence. As this Court held in *Bassett*, on which *Hunt* relied (4 Cal.3d at p. 237), the term "substantial evidence" –

> . . . . clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case.

(*Bassett, supra,* 69 Cal.2d at pp. 138-139 [quoting *Estate of Teed, supra,* 112 Cal.App.2d at p. 644]; *see also People v. Redmond* (1969) 71 Cal.2d 745, 756 ["To justify a criminal conviction, the trier of fact [must] have reasonably rejected all that undermines confidence. [Citation.] Accordingly, in determining whether the record is sufficient in this respect the appellate court can give credit only to 'substantial' evidence, i.e., evidence that reasonably inspires confidence and is of solid value."]) Opinion testimony of a witness that lacks foundation for any reason – including that the witness is not an expert in the relevant field when that field is beyond common knowledge – is not of "solid value," nor is it "substantial" proof.

Hunt applied these basic principles in the specific context of a controlled substance possession that the prosecution claimed to be unlawful, and the defendant claimed to be lawful. In *Hunt*, the evidence required to make that distinction was be beyond the common experience of the typical juror, so expert testimony was required. An opinion that a defendant possessed a controlled substance for purposes of sale as opposed to personal use – based

on matters such as quantity, packaging and the normal use of an individual – will usually require expert testimony (*People v. Hunt, supra,* 4 Cal.3d at p. 237), since the common experience of everyday jurors does not extend to distinguishing illegal drug trafficking from mere illegal drug possession. But an opinion that a defendant possessed a controlled substance for purposes of sale as opposed to *lawfully* – again, based on matters such as quantity, packaging, and the normal use of an individual – will also usually require expert testimony in that area (*Hunt*, at pp. 237-238), since the common experience of everyday jurors does not extend to distinguishing illegal drug trafficking from legal drug possession.

Without more – and there was no more in *Hunt*, as there is no more in this case – it cannot be assumed that an officer who has expertise in the different types of illegal drug possession, is necessarily an expert in distinguishing the illegal from the legal. For as discussed above, a witness can be an expert in some areas but not others, and the areas in which the witness has expertise "must be carefully distinguished and limited." (*People v. Williams, supra,* 48 Cal.3d at p. 1136.) The conclusion that the officer was not an expert in lawful possession, though he was an expert in unlawful possession, was integral to this Court's opinion in *Hunt.* Adapting

Hunt's reasoning more generally to cases such as this one, which involve lawfulness defenses to controlled substance possession:

> In [purely illegal drug] situations, the officer experienced in the narcotics field is experienced with the habits of both those who possess for their own use and those who possess for sale because both groups are engaged in unlawful conduct. [But a]s to drugs, which may be purchased [lawfully], the officer may have experience with regard to unlawful sales but there is no reason to believe that he will have any substantial experience with the . . . citizens who lawfully purchase the drugs for their own use as medicine for illness.

(*Hunt*, at pp. 237-238 [quoted in *People v. Chakos, supra,* 158 Cal.App.4th at p. 364]; *see also Chakos*, at pp. 367-369.)

In Mr. Dowl's case, the prosecution expert – like the one in *Hunt* (*see id.* at p. 234) – recited qualifications in distinguishing possession of marijuana for personal use from possession for sale (1RT 41:4-17), but offered no qualifications related to lawful marijuana possession. (*See also* 1RT 39:15-41:3 [the rest of Officer Williamson's stated qualifications].) Consequently, as in *Hunt*, his opinions were not substantial evidence. (*See Hunt*, at pp. 237-238.)

D. Other Types Of Cases Where – Unlike *Hunt* And Mr. Dowl's Case – Expert Evidence Might Not Be Required

This is not to say that in every case where a medical marijuana defense is raised, the prosecution needs an expert in lawful marijuana possession to secure an affirmable conviction.

In some cases, there may be other substantial evidence from which a jury could reasonably infer that a defendant's possession is unlawful rather than lawful. If the issue is sufficiency of evidence, the ultimate question is always whether there is substantial evidence to support the conviction, in light of the whole record and construing the evidence most favorably to the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 575-578.) If there is substantial evidence to support the conviction even without an expert in the field relevant to the defendant's defense, then the conviction will be affirmed. That is also true in cases where a medical marijuana defense is raised.

For example, in *People v. Frazier* (2005) 128 Cal.App.4th 807, there was evidence of a large-scale growing operation, and evidence that the defendant had a number of firearms and had threatened a neighbor with one. In addition, the defendant had a prior conviction for armed robbery. He and his wife had medical marijuana recommendations, but there was evidence impeaching his wife's testimony. The marijuana grow had indicia of a professional operation (to which an expert on marijuana grows could competently testify), and the jury could reasonably have concluded the amount of marijuana being grown far exceeded whatever was being used for medicinal purposes. There was ample substantial evidence to

support the conviction, without need for an expert to distinguish lawful medicinal possession from unlawful sales possession.

Similarly in *People v. Wright* (2006) 40 Cal.4th 81, the defendant twice denied to officers that there was marijuana in his truck. A search yielded a one-pound bag of marijuana concealed in a compartment behind a seat, and two one-ounce baggies, six smaller baggies, and an unexplained electronic scale in a backpack with the baggies. Experts gave opinions of possession for sale based on quantity, the manner in which the marijuana was packaged and concealed, and the scale in the backpack with the baggies. The defendant presented evidence from his physician, said he bought the marijuana the morning he was arrested, and explained the large quantity by evidence that he preferred to eat marijuana. The jury could reasonably have disbelieved much of the defendant's testimony including his stated gustatory preference, credited the prosecution experts based on the combination of quantity and common-sense factors such as a concealed storage compartment and the unexplained scale in the backpack with the baggies, construed the false denials as consciousness of guilt, and drawn reasonable inferences of possession for sale. There was substantial evidence without need for an expert who could distinguish lawful medicinal possession from unlawful sales possession.

What, then, is the practical distinction between cases such as *Hunt* and this case, and cases such as *Frazier* and *Wright*?

Hunt pointed to the answer, when it said: "In the absence of evidence of some circumstances not to be expected in connection with a patient lawfully using the drugs as medicine, an officer's opinion that possession of lawfully prescribed drugs is for purposes of sale is worthy of little or no weight and should not constitute substantial evidence sufficient to sustain the conviction." (*Id.*, 4 Cal.3d at p. 238 [underscoring added].)

In *Frazier* and *Wright*, there was "evidence of some circumstances not to be expected in connection with a patient lawfully using the drugs as medicine," including circumstances from which jurors could draw inferences without need for an expert on lawful possession. But there were no such circumstances in *Hunt*, as there are none in Mr. Dowl's case.

E. *Chakos*

While the above should be sufficient, Mr. Dowl should also comment on *People v. Chakos, supra,* 158 Cal.App.4th 357, in case part of the reason for this Court's grant of review was a perceived conflict between this case and *Chakos*.

Mr. Dowl concludes that the legal reasoning of *Chakos* is a proper legal application of *Hunt* to a medical marijuana case. He

need not take a position on whether *Chakos* reached the right dispositional result – he assumes it did, but that would be a case-specific matter of evaluating the substantiality of evidence of that particular case, which is irrelevant to this one because substantiality of evidence "must be decided upon a case-to-case basis." (*Spackman v. Good* (1966) 245 Cal.App.2d 518, 533; *accord, e.g., Gerhardt v. Fresno Medical Group* (1963) 217 Cal.App.2d 353, 361.)

Rather, the *Chakos* opinion is useful to Mr. Dowl because it correctly stated the legal principles of *Hunt* as they apply to a case with a medical marijuana defense. It also showed many of the weaknesses of the People's efforts to refute *Hunt* in this type of case. As the *Chakos* court observed: "Both in its brief and at oral argument the Attorney General has had a difficult time distinguishing *Hunt* from the case before us." (*Chakos*, 158 Cal.App.4th at p. 365.)

Defendant Chakos had a certificate from his doctor for lawful marijuana consumption, as Mr. Dowl did here. Chakos had a total of six ounces of marijuana in his possession; here, Mr. Dowl had about one-third of that, a little over two ounces. However, "Chakos was prosecuted and subsequently convicted for possessing his marijuana *for sale* based on the opinion testimony of the arresting officer, even though that officer had only the most tenuous knowledge of the

patterns of *lawful* possession of marijuana under state law." (*Id.*, 158 Cal.App.4th at p. 359 [italics in original].)

In the current case, the opinion testimony of the officer-expert was at least as uninformed on *lawful* medical marijuana possession as the officer-experts in *Hunt* and *Chakos*. Here, Officer Williamson offered no testimony at all to indicate that he was an expert on lawful possession. He even admitted he had no training in identifying whether a medical marijuana card was valid (1RT 37:13-15), further demonstrating his lack of expertise in the area of lawful possession of medical marijuana.[2] And while his recitations of his qualifications

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[2] Officer Williamson seemed to place unusual emphasis on the fact that Mr. Dowl was wearing a belt buckle that said "Cash Only," which Officer Williamson construed as meaning that Mr. Dowl was a drug dealer who didn't accept credit. (1RT 49:12-50:9.) Since Officer Williamson wasn't an expert in lawful marijuana possession, his belt buckle theory still isn't substantial evidence. It also comes across facially as mere conjecture, since Officer Williamson stated no foundation or reasoning for his theory that "Cash Only" belt buckles were common to drug dealers and uncommon to everyone else. As discussed above, opinions without stated foundation or reasoning are not substantial evidence. (*See People v. Bassett, supra,* 69 Cal.2d at pp. 146, 148; *ante*, p. 12.)

Officer Williamson's belt buckle theory may also have been based at least in part on inadvertent culture bias. A Google search shows this buckle can be obtained from a variety of web vendors, including Amazon. One such vendor is "Hip Hop Closet," which appears to be a typical purveyor of apparel and accessories geared toward African-Americans, that won a 2008 national competition for "Best Hip Hop Gear Site" by the cable music channel VH-1. (http://www.vh1.com/shows/events/hip_hop_honors/_2008/sites_win

(continued...)

as an expert (1RT 39:19-41:17) made clear he could distinguish unlawful simple possession from unlawful possession-for-sale, they included nothing about the characteristics of lawful marijuana possession under state law. (*Compare Hunt*, 4 Cal.3d at p. 238; *Chakos*, 158 Cal.App.4th at pp. 367-369.)

Chakos's holding was succinct: "Following *Hunt*, we must reverse the conviction. Nowhere in this record do we find any substantial evidence that the arresting officer had any expertise in differentiating citizens who posses marijuana lawfully for their own consumption, as distinct from possessing unlawfully with intent to sell. (See *Hunt, supra,* 4 Cal.3d at pp. 237-238.)" (*Chakos*, at p. 360.) The passages in *Hunt* on which *Chakos* relied reached precisely the same conclusion, for the analogous defense of lawful possession of methedrine (there, by prescription). Those passages were quoted earlier in this brief. (*Ante*, p. 16, quoting *Hunt*, at pp. 237-238; *see Chakos*, at p. 364 [quoting *Hunt*].)

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[2](...continued)
ners.jhtml) Similarly, an E-Bay webpage has this belt buckle listed among a large number of buckles with money-related themes, all identified as "Hip Hop" belt buckles. (http://shop.ebay.com/sis.html?_nkw=CASH+ONLY+Dollars+Sign+Money+HIP+HOP+Buckle+FREE+BELT) The undersigned counsel also tried Google to search for any suggestion that this belt buckle could be linked to drug or narcotic sales, but found none, and she couldn't find any references to this belt buckle at all on LEXIS.

The Court's opinion in *Chakos* carefully utilized *Hunt* as its basis. Particularly *à propos* here is *Chakos*'s conclusion:

> One might posit . . . that individuals who may lawfully possess marijuana under state law for medicinal purposes will have patterns of purchase and holding that will reflect the practical difficulties in obtaining the drug. . . . [which would] also explain why a patient entitled to possess it under state law might want to keep an extra supply on hand *within* the legal amount, since supplies would not be reliable.
>
> Now, are these speculations to be rejected because contradicted by the expert's testimony on the record? No – and *that* is the point: The *record* fails to show that [the arresting officer] is any more familiar than the average layperson or the members of this court with the *patterns of unlawful possession for medicinal use* that would allow him to differentiate them from unlawful possession for sale.
>
> In other words, [the arresting officer] was unqualified to render an *expert* opinion in this case. Under *Hunt*, that means there was insufficient evidence to sustain the conviction. (See *Hunt, supra,* 4 Cal.3d at p. 238.)

(*Chakos, supra,* 158 Cal.App.4th at pp. 368-369 [italics in original].) This is merely an application of *Hunt* to a medical marijuana case, and the same legal rationale would apply here.

Ultimately, however, Mr. Dowl need not rely on *Chakos*. He relies on *Hunt*, which alone suffices for reversal, as well as on the principles of substantial evidence and expert opinion testimony discussed earlier in this Part.

II. The Opinion Below Misunderstood *Hunt* And *Mower*

A. *Hunt* Involved An Affirmative Defense Of Lawful Possession Substantively Indistinguishable From Mr. Dowl's

The Court of Appeal below rejected Mr. Dowl's *Hunt*-based argument on the ground that Mr. Dowl's case involves an affirmative defense, whereas the Court of Appeal believed *Hunt* did not. (Slip opn., at p. 8 ["...and thus we see an important basis for distinguishing *Hunt*, which did not involve an affirmative defense.") From there, the Court of Appeal concluded that the prosecution should not have any burden of proof as to affirmative defenses. As a result, it tried to distinguish away *Hunt*, and repudiated the application of *Hunt* to medical marijuana defenses found in *People v. Chakos*:

> We find the holding of *Chakos* to be inconsistent with the nature of the affirmative defense under the Compassionate Use Act. By essentially requiring the prosecution's narcotics expert to also qualify as medical marijuana expert in order to opine that marijuana in a defendant's possession is possessed for sales, *Chakos* improperly reallocates the burden of proof on the compassionate use defense to the prosecution contrary to the principles articulated by the Supreme Court in *Mower*. Under *Chakos*, it would be exceedingly difficult and inconvenient for a prosecutor to prove what is "reasonably related" to a defendant's medical needs. [Citations.] To our knowledge, police are not generally qualified to assess how much marijuana is needed for a specific medical condition or trained in how to differentiate a quantity of marijuana for medical use and a quantity of marijuana for sales.

(Slip opn. at pp. 9-10.)

The Court of Appeal plainly erred, because *Hunt* did involve an affirmative defense – the same kind as in *Mower* and this case, in which the defendant only had a burden of raising a reasonable doubt. Because the Court of Appeal's reasoning is fundamentally premised on that basic error, the rest of its analysis fails as well.

To begin with, one could also observe that if police are "not generally qualified . . . in how to differentiate a quantity of marijuana for medical use and a quantity of marijuana for sales" (slip op. at p. 10), the solution would be to find an expert who is qualified, instead of reinterpreting the law to help litigants use unqualified experts. (*See, e.g., People v. Leahy* (1994) 8 Cal.4th 587, 608-609; *People v. Chapple, supra,* 138 Cal.App.4th at pp. 547-549; *People v. McChristian* (1966) 245 Cal.App.2d 891, 896-897 [opinions holding that officer was not qualified to give expert testimony in various areas].) This resolution of the problem was central to this Court's opinion in *Hunt* (*see id.*, 4 Cal.3d at pp. 237-238), and was also important to the opinion in *Chakos* (158 Cal.App.4th at pp. 368-369).

That aside, the Court of Appeal's theory that *Hunt* "did not involve an affirmative defense" (slip op. at p. 8) is plainly erroneous.

In *Hunt*, the defendant was charged with and convicted of possession of methedrine for sale. His defense, based largely on his own testimony, was that he did not possess the methedrine illegally

because he had purchased it lawfully by prescription. (*Id.* at p. 235.) This was the type of "affirmative defense" that goes to an element of the offense – specifically, it "negate[s] the 'unlawful' element involved in the [charged offense of unlawful] possession . . . ." (*People v. Frazier, supra,* 128 Cal.App.4th at pp. 817-818 [citing *People v. Mower, supra,* 28 Cal.4th at p. 480].)

Because the affirmative defense of lawfulness in *Hunt* went to an element of the charged offense, it required the defendant to shoulder only the burden of raising a reasonable doubt as to that element. (*People v. Montalvo* (1971) 4 Cal.3d 328, 333, fn. 3; *see Mower*, at pp. 479-480 & fn. 7.) This is the same type of affirmative defense of lawfulness that was at issue in *Mower.* (*See People v. Frazier, supra,* 128 Cal.App.4th at pp. 817-818; *Mower*, 28 Cal.4th at pp. 479-480, 481.) And this Court reached the same result in *Mower:* "Applying the foregoing principles, we conclude that, as to the facts underlying the [affirmative medical marijuana] defense provided by section 11362.5, defendant is required merely to raise a reasonable doubt." (*Mower*, at p. 481 [citing, e.g., *People v. Montalvo, supra,* 4 Cal.3d at p. 333, fn. 3]. The affirmative defense in *Mower*, the type that negated the unlawfulness element of the offense charged in the information, was the same affirmative defense

as the one raised in *People v. Chakos* and in this case. (*See Chakos, supra,* 158 Cal.App.4th at p. 359.)

As *Mower* makes clear, this is very different from the type of affirmative defense that is collateral to the charged offense – i.e., one that admits all of the elements of the offense – but is nonetheless recognized by statute or judicial authority as a defense to prosecution for public policy reasons. (*See Mower*, at pp. 480-481 & fn. 8.) For affirmative defenses of that nature – such as entrapment or insanity – the ultimate burden of persuasion may properly be placed on the defendant. (*Ibid.*) But as *Hunt* and *Mower* make clear, a lawfulness defense to a charge of unlawful controlled substance possession is not collateral; it goes directly to the essential element of unlawfulness. It therefore requires the defendant only to raise a reasonable doubt. (*See Mower*, at pp. 479-480 & fn. 7.)

There is no question that *Hunt* (defense of lawful possession by physician prescription), and *Mower* and the current case (defense of lawful possession by physician recommendation) involved the same type of affirmative defense for which a defendant need only raise a reasonable doubt. In *Mower*, this Court "pointed out that [one of] the most closely aligned affirmative defenses to the compassionate use defense [is] possession of a dangerous drug with a prescription . . . ." (*People v. Frazier, supra,* 128 Cal.App.4th at p.

818 [citing *Mower*, 28 Cal.4th at p. 480]; *see also Mower*, at p. 481 ["Most similar [to a medical marijuana defense] is the defense of possession of a dangerous or restricted drug with a physician's prescription . . . ," which was the defense in *Hunt*].)

By this alone, the Court of Appeal erred in attempting to distinguish *Hunt* from this case. *Hunt*'s analysis applies here.

B. Contrary To The Opinion Below, The "Affirmative Defense" Status Of A Medical Marijuana Defense Does Not Distinguish This Case From *Hunt* On Burden Of Proof Grounds

1. *Mower* Makes Clear That A Medical Marijuana "Affirmative Defense" Requires That A Defendant Carry Only An Initial Burden Of Raising A Reasonable Doubt, Not The Ultimate Burden Of Persuasion

The Court of Appeal's opinion here appears to be based on the assumption that a medical marijuana defense requires that the defendant shoulder the burden of *persuasion*, akin to an entrapment or insanity defense. The assumption is erroneous.

The opinion below rejected Mr. Dowl's argument on the premise that "it would be exceedingly difficult and inconvenient for a prosecutor to prove what is 'reasonably related' to a defendant's medical needs." (Slip op., at p. 9.) Because this premise was based on a theory of what the prosecution should *not* have to prove for a medical marijuana defense, it was necessarily based on a theory of what the defendant *should* have to prove. Moreover, the Court of

Appeal's opinion doesn't make sense if it is read to conclude that the prosecution has the ultimate burden of persuasion to refute a medical marijuana defense raised by substantial evidence.

In concluding that a defendant who raises a medical marijuana defense has the ultimate burden of persuasion, the Court of Appeal again erred. Though a medical marijuana defense is commonly called an "affirmative defense" (*e.g., People v. Kelly* (2010) 47 Cal.4th 1008, 1013), it only requires the defendant to carry an initial burden of *production* by raising a reasonable doubt. (*Mower*, 28 Cal.4th at pp. 479-480.) If the defendant meets that burden of production, he is not also required to carry the ultimate burden of *persuasion*, which is always on the prosecution. (*Ibid.*) This was also true in *Hunt*, where the defendant similarly had the burden of production requiring him to raise a reasonable doubt of unlawfulness (*see People v. Frazier, supra,* 128 Cal.App.4th at pp. 817-818), and the prosecution never overcame that defense evidence with substantial evidence of its own. (*See Hunt*, 4 Cal.3d at p. 238.)

Mower is so clear that Mr. Dowl doesn't know why the Court of Appeal would conclude a defendant had the burden of persuasion for this defense. The Court of Appeal cited CALJIC No. 12.24.1 for its proposition (*see* slip op., at pp. 4-5 & fn. 2) – yet the version of CALJIC No. 12.24.1 that was current at the time of Mr. Dowl's trial,

which the opinion below quoted, correctly limited the defendant's burden to raising a reasonable doubt. (*See* slip op. at p. 5, fn. 2.)[3]

Here, Mr. Dowl easily met his burden of production by his own testimony – and in fact, the question on which review was granted would only arise when the defendant carries his or her initial burden of production by substantial evidence raising a reasonable doubt of unlawfulness. As in *Hunt*, Mr. Dowl never had the ultimate burden of persuasion on the question of whether he possessed marijuana unlawfully or lawfully. Nor would any other defendant in this situation.

2. Historical Confusion In The Phrase "Burden Of Proof" That May Have Contributed To The Confusion And Error In The Opinion Below

The Court of Appeal's error in this case – and for that matter, the same Court of Appeal's error in *Mower* – may have stemmed in part from confusion over the term "burden of proof." Such confusion may be understandable, because the phrase has been used for very different requirements in California statutory law, California caselaw, and statutory and caselaw in many other jurisdictions over the years.

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[3] The pre-*Mower* (1999) version of CALJIC No. 12.24.1 did say the defendant bore a burden of proof by a preponderance of evidence – i.e., a burden of persuasion. (*See Mower*, at p. 464.) But that pre-*Mower* version was long out of date at the time of Mr. Dowl's trial, and it wasn't the version quoted in the opinion below.

The U.S. Supreme Court has stated the problem – "burden of proof" historically has been an ambiguous term with dual meanings:

> The term "burden of proof" is one of the "slipperiest member[s] of the family of legal terms." 2 J. Strong, McCormick on Evidence § 342, p. 433 (5th ed. 1999) . . . . Part of the confusion surrounding the term arises from the fact that historically, the concept encompassed two distinct burdens: the "burden of persuasion," i.e., which party loses if the evidence is closely balanced, and the "burden of production," i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding.

(*Schaffer v. Weast* (2005) 546 U.S. 49, 56 [underscoring added].)

Similarly:

> For many years the term "burden of proof" was ambiguous because the term was used to describe two distinct concepts. Burden of proof was frequently used to refer to what we now call the burden of persuasion -- the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose. But it was also used to refer to what we now call the burden of production -- a party's obligation to come forward with evidence to support its claim. See J. Thayer, Evidence at the Common Law 355-384 (1898) (detailing various uses of the term "burden of proof" among 19th-century English and American courts). . . . The ambiguity confounded the treatise writers, who despaired over 'the lamentable ambiguity of phrase and confusion of terminology under which our law has so long suffered.'" [4 J. Wigmore, Wigmore on Evidence (1905), § 2485], at 3521-3522.

(*Director v. Greenwich Colleries* (1994) 512 U.S. 267, 272-273 [underscoring added].)

Unfortunately, the language of the 1965 Evidence Code perpetuated this "lamentable ambiguity" (to use Wigmore's words).

Specifically, Evidence Code section 115 defines "burden of proof" in terms of *both* the burden of production ("...may require a party to raise a reasonable doubt...") *and* the burden of persuasion ("...that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.") Evidence Code section 502 echoes section 115's multiplicitous definition, in stating the requirements for jury instructions on "burden of proof" – it can be either a burden of production (raising a reasonable doubt), or a burden of persuasion (establishing a fact by a preponderance, clear and convincing proof, or proof beyond a reasonable doubt). And as if re-echoing the statutory ambiguity, the concept of a "defense" (or synonymously, "affirmative defense") – can be used to refer either to a defendant having the initial burden of production (*see, e.g., People v. Mower, supra,* 28 Cal.4th at pp. 479-480 & fn. 7 [citing cases and examples]; *People v. Neidinger* (2006) 40 Cal.4th 67, 72, 79), or the ultimate burden of persuasion (*see, e.g., People v. Hernandez* (2000) 22 Cal.4th 512, 522 [insanity]; *People v. Moran* (1970) 1 Cal.3d 755, 760-761 [entrapment]; *People v. Lee* (2005) 131 Cal.App.4th 1413, 1429-1430 [most necessity defenses]), depending on whether the "defense" goes to an element of the offense (burden of production – *Mower, Neidinger, et al.*) or is collateral to and

assumes the commission of all such elements (burden of persuasion – *Hernandez*, *Moran*, *et al.*). Perhaps that makes it more understandable why the Court of Appeal opinion appears to have fallen prey to this very type of confusion in the term "burden of proof."

In this brief, Mr. Dowl has at times utilized the terminology in the underscored passages from the U.S. Supreme Court opinions quoted above, since he believes that helps to resolve the ambiguity and avoid its consequent confusion:

"Burden of persuasion" – The prosecution's ultimate burden of proving all elements of a charged crime beyond a reasonable doubt.

"Burden of production" – The defendant's burden of producing evidence sufficient to raise a reasonable doubt in support of defenses such as those described in *Mower*, at pp. 479-480 & fn. 7, including the affirmative defenses in *Hunt* and Mr. Dowl's case.

But under whatever label, the Court of Appeal erred in concluding that the defendant in a medical marijuana case had any burden of persuasion at all.

3. Recapitulation; Resolving The Court Of Appeal's Apparent Terminology Confusion

In *Mower*, this Court "conclude[d] that, as to the facts underlying the [medical marijuana] defense provided by [Health and Safety Code] section 11362.5(d), defendant is required merely to

raise a reasonable doubt." (*Mower*, at p. 481.) But once the defendant has done so, the prosecution has the burden of persuasion – i.e., of disproving the defense beyond a reasonable doubt – and the defendant cannot be made to shoulder the burden of proving the defense by a preponderance of the evidence. (*Id.* at p. 484.) This is because a medical marijuana defense goes directly to an element of the charged offense, the "unlawfulness" element:

> [T]he defense provided by [Health and Safety Code] section 11362.5(d) relates to the defendant's guilt or innocence, *because it relates to an element of the crime of possession or cultivation of marijuana*. Thus, this defense negates the element of the *possession* or *cultivation* of marijuana *to the extent that the element requires that such possession or cultivation be unlawful*."

(*Id.* at p. 482 [italics in original].)

The opinion below used the term "burden of proof" to refer to a burden of persuasion on the defendant. By contrast, this Court used it in *Mower* – and implicitly in *Hunt*, which involved the same type of defense – to refer to a defendant having the burden of producing substantial evidence to raise a reasonable doubt, but no more.

The difference appears to be a significant factor in the Court of Appeal's errors in this case. The Court of Appeal concluded that the prosecution needed no expert who could distinguish lawful from unlawful possession, based on its theory that the prosecution had no burden of persuasion. (*See* slip op. at pp. 8-10.) But the

prosecution did have a burden of persuasion once the defendant met his burden of production, as he did in both *Hunt* and this case. So the Court of Appeal's theory of "burden of proof" was not a proper basis for distinguishing this case from *Hunt*.

The Court of Appeal's invocation of the "rule of convenience and necessity" (slip op. at pp. 8-9) also does not support its burden of proof theory. Although the "rule of convenience and necessity" applies to a medical marijuana defense (*Mower*, at pp. 476-477), and although *Mower* utilized this rule to support its conclusion that "the defendant [has] the burden of proof as to the facts underlying the defense" (*id.* at p. 477), *Mower* held that neither point was dispositive on "the weight of the burden of proof." (*Id.* at p. 478 [underscoring added]; *see also* 4 J. Wigmore, *supra*, § 2486 at pp. 3524-3526 [rule of convenience and necessity "furnishes no working rule" and "merely takes its place among other considerations of fairness and experience as one to be kept in mind," and "there is not and cannot be any one general solvent for all cases"].) In other words, the rule did not shift the burden of persuasion to the defendant.

As *Mower* held: "Although the People rightly claim that the rule of convenience and necessity is 'consistent' with requiring the defendant to prove the underlying facts by a preponderance of the evidence [citations], the rule is just as consistent with requiring the

defendant merely to raise a reasonable doubt [citations]." (*Id.* at p. 478.) As shown herein, *Mower* thus limited the defense's burden.

When a defendant has only a burden of raising a reasonable doubt, that burden can be – and often is – discharged by his or her own testimony. Substantial evidence suffices to meet the burden of production for a defense that requires raising a reasonable doubt (*People v. Williams* (1992) 4 Cal.4th 354, 361; *People v. Mentch* (2008) 45 Cal.4th 274, 288), and a defendant's testimony supporting the defense is almost always substantial evidence. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944; *People v. Melton* (1988) 44 Cal.3d 713, 746). "The threshold [for raising a reasonable doubt] is not high; it does not include a predetermination by the court of the credibility of witnesses and what evidence it believes or disbelieves." (*People v. Cole* (2007) 156 Cal.App.4th 452, 484.)

Here, Mr. Dowl certainly raised a reasonable doubt as to whether his possession was for medical use as opposed to sales – he testified it was. (*Accord, e.g., People v. Tufunga, supra,* 21 Cal.4th at p. 944 [defendant's testimony was substantial evidence to support defense that went to an element].) While this alone was substantial evidence to raise a reasonable doubt, Mr. Dowl also produced a doctor's recommendation for medical marijuana, and

explained why the primary facts cited by Officer Williamson were part of his possession for medical use rather than possession for sales.

Once Mr. Dowl provided substantial evidence that raised a reasonable doubt – i.e., met his "burden of proof" (burden of production) – the prosecution then had the "burden of proof" (burden of persuasion) of every element beyond a reasonable doubt, which included the "unlawfulness" element addressed by the medical marijuana defense. The Court of Appeal erred in concluding that the prosecution could be excused from presenting a competent expert in medical marijuana on any ground related to burden of proof.

CONCLUSION

This Court's *Hunt* opinion directly controls this case. In both *Hunt* and this case, the prosecution did not present an expert in the only field relevant to the defense, distinguishing lawful controlled substance possession from unlawful possession. This was a matter beyond the common knowledge of everyday jurors, so only an expert in that field could give an opinion that would be substantial evidence. In both cases, the prosecution offered an expert on unlawful controlled substance possession, but that witness could not provide substantial evidence on *lawful* possession because he was not an expert in that area; just because the witness was an expert in other areas, did not make him an expert in this one. And there was no other substantial evidence to refute the lawful possession defense.

As the judgment of conviction was reversed on these grounds in *Hunt*, so should the judgment be reversed as to Mr. Dowl.

Respectfully submitted this 25th day of January, 2011.

CENTRAL CALIFORNIA
APPELLATE PROGRAM
GEORGE BOND, Executive Director

S. MICHELLE MAY, Staff Attorney
Counsel for Lewis Dowl
Under Appointment by the Supreme Court

CERTIFICATION OF WORD COUNT

As counsel for the appellant, I certify under Rule 8.520(c), California Rules of Court, that this brief contains 8,496 words according to the word count of the computer program used to prepare the brief.

I declare under penalty of perjury of the laws of the State of California that the above is true and correct, and that this document was executed on the date below.

Respectfully submitted this 25th day of January, 2011.

CENTRAL CALIFORNIA
APPELLATE PROGRAM
GEORGE BOND, Executive Director

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Under Appointment by the Supreme Court

DECLARATION OF SERVICE BY MAIL

I, S. MICHELLE MAY, declare as follows:

I am an active member of the State Bar of California, over the age of 18 years and not a party to the within action. My business address is 2407 J Street, Suite 301, Sacramento CA 95816. On January 25, 2011, I caused to be served the foregoing **PETITIONER'S OPENING BRIEF ON THE MERITS** in No. S182621, by directing in the ordinary course of business that a true copy be placed in an envelope addressed to the persons named below at the address set out immediately below each name, and said envelopes sealed and deposited in the United States Mail, with postage thereon fully prepaid:

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A copy was also sent to the petitioner, Lewis Dowl.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed this 25th day of January, 2011.

S. MICHELLE MAY