IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. LEWIS MARCUS DOWL, Defendant and Appellant.	)	S182621

PETITIONER'S REPLY BRIEF ON THE MERITS

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Plaintiff and Respondent,	)	S182621
vs.	)	
LEWIS MARCUS DOWL,	)	
Defendant and Appellant.	)	

PETITIONER'S REPLY BRIEF ON THE MERITS

This reply brief on the merits is designed solely to respond to the Attorney General's contentions which require further discussion for proper determination of the issue on review. This brief does not respond to those issues that petitioner believes were adequately discussed in the Opening Brief on the Merits, and petitioner intends no waiver of those issues by not expressly reiterating them in this reply brief.

ARGUMENT

I

THE PROSECUTION IS REQUIRED TO CALL A WITNESS WITH EXPERTISE IN DISTINGUISHING LAWFUL, MEDICAL POSSESSION FROM UNLAWFUL POSSESSION IN ALL CASES SIMILAR TO THE *HUNT* CASE, INCLUDING THIS CASE

As explained in the Opening Brief on the Merits (AOB), when a defendant charged with possession of marijuana for sale asserts a medical defense, *in certain cases* the prosecution must call an expert witness who is able to distinguish lawful from unlawful possession. Petitioner explained that this requirement applies in cases where the distinction between possession for medical purposes and unlawful possession for sales is beyond the common knowledge of everyday jurors. (AOB 1-2, 18-19.)

Petitioner further explained how the rationale expressed in *People v. Hunt* (1971) 4 Cal.3d 231, provides insight on how to make the distinction needed for the issue in this case. The officer's testimony in *Hunt* concerning intent to sell "carried little or no weight" because he had insufficient expertise regarding the lawful possession of methedrine for legal, medicinal use. (*Id.* at p. 238.) This Court held the officer's testimony should not constitute substantial evidence "[i]n the absence of

evidence of some circumstances not to be expected in connection with a patient lawfully using the drugs as medicine." (*Ibid.*)

So too should the rationale in *Hunt* apply in identifying which cases an expert in lawful medical possession is needed. In a case without the presence of factors inconsistent with legal possession, *Hunt* requires the police officer's testimony to be deemed insufficient as a matter of law. In such cases, it necessarily follows that an expert on medical marijuana is needed to prove the unlawfulness element.

Moreover, petitioner explained that when a defendant raises the compassionate use defense by providing some evidence that he possessed the marijuana for personal use with the recommendation of a physician, the prosecution's burden to demonstrate beyond a reasonable doubt that the marijuana was possessed illegally encompasses the burden of persuasion to prove the marijuana was not legally possessed under the Compassionate Use Act. (AOB 28-30, 33-36; *People v. Mower* (2002) 28 Cal.4th 457, 479-482.)

In this case, as in *Hunt*, there was no substantial evidence from which a jury could reasonably draw inferences of possession for sales--without the need for an expert on lawful possession based on medical use. The Answer Brief on the Merits (AB) does not alter these conclusions.

A. The *Cuevas* Decision Illustrates Why An Expert Is Needed And Should Be Required In Some Cases

Respondent argues that requiring the prosecution to call a medical marijuana expert would be an "unjustified departure from the proven substantial evidence test." (AB 12.) In so arguing, Respondent relies on *People v. Cuevas* (1995) 12 Cal.4th 252, where this Court overruled *Gould's* corroboration requirement.[1] However, *Cuevas* is readily distinguishable, and in fact it supports, rather than hinders petitioner's position. As shown below, the reasoning in *Cuevas* illustrates precisely why the prosecution in some cases should be required to call a medical marijuana expert.

First, the *Gould* rule (overruled in *Cuevas*) required corroboration for *all* out-of-court identifications in every single case, regardless of the identification's probative value or the existence of other evidence in the record. As this Court noted, "no jurisdiction (other than California) that admits out-of-court identifications has adopted the broad holding in *Gould*, *supra, 54 Cal.2d 621, 631,* that an out-of-court identification can *never* by

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[1] *Gould* held, in part, that "a testifying witness's out-of-court identification 'that cannot be confirmed by an identification [of the defendant] at trial is insufficient to sustain a conviction in the absence of some other evidence tending to connect the defendant with the crime.'" (*People v. Gould* (1960) 54 Cal.2d 621, 631.)

itself be sufficient to support a conviction." (*People v. Cuevas, supra*, 12 Cal.4th at p. 266, *italics in original.*)

Conversely, in this case petitioner does not argue for such a broad, inflexible requirement as the *Gould* rule. As explained in the opening brief, the prosecution should be required to call a medical marijuana expert in certain cases where there is an absence of other factors inconsistent with lawful possession. Petitioner acknowledged that the requirement would not apply in all cases. This requirement would take into account the varied circumstances that may attend a medical marijuana case–thus avoiding the inconsistent and "illogical results" warned of by respondent (AB 10-12). Clearly, petitioner's proposition is much narrower than the *Gould* corroboration requirement.[2]

Second (and perhaps most important), this Court, in overruling the *Gould* corroboration requirement, pointed to "a number of existing safeguards at both the trial and appellate levels that adequately insure the

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[2] In fact, this Court contrasted the "broad holding" of *Gould* with other jurisdictions that require corroboration of out-of-court statements only for certain cases–e.g. "Minnesota has adopted the federal rule with the additional qualification that the circumstances demonstrate the out-of-court identification to be reliable; two other states–Wisconson and Nevada–have adopted it with the qualification that the out-of-court identification be made soon after the crime; and Ohio has adopted the federal rule with both of these qualifications." *(People v. Cuevas, supra*, 12 Cal.4th at p. 267, fn. 2.)

reliability of such [out-of-court] identifications." (*People v. Cuevas, supra,* 12 Cal.4th at 272.) These safeguards were 1) cross-examination, 2) the ability of the defendant to offer evidence, and 3) the substantial evidence test. (*Id.* at 272-274.) But as shown below, none of these safeguards will adequately safeguard a defendant in the context of the issue at bar.

1. Cross-Examination Is Necessarily Ineffective In this Case

In *Cuevas*, this Court focused on the effectiveness of cross-examination of out-of-court statements, reasoning:

> Unconfirmed out-of-court identifications generally fall into one of two categories: Either the witness repudiates the out-of-court identification or the witness testifies that he or she lacks the recollection to either confirm or deny the out-of-court identification. In either situation, cross-examination can be effective in shedding light on the reliability and veracity of the out-of-court identification.
>
> This court has previously noted with respect to the first category–a witness who disowns the out-of-court identification–that the '[d]efendant retains the opportunity to question the declarant as to the circumstances surrounding the prior statement[] and to elicit from the declarant an explanation for the inconsistencies in his prior statement and his on-the-stand testimony. Through such questioning, the defendant can test the credibility of the witness' statements on the witness stand before the trier of fact.' (Citation omitted.)

(*People v. Cuevas, supra*, 12 Cal.4th at p. 273.)

This Court also referred to an observation by Judge Learned Hand, that juries are capable of determining the credibility of out-of-court

statements that are inconsistent with a witness's trial testimony by observing the witnesses's *in-court demeanor*. (*Ibid*, citing *Di Carlo v. United States* (2nd Cir. 1925) 6 F.2d 364, 368.)

However, cross-examination is ineffective in the context of the issue before this Court. When a defendant asserts a medical marijuana defense, the problem of the witness-police officer with no expertise in distinguishing lawful versus unlawful possession goes beyond the usual concerns of reliability and truthfulness. Unlike *Cuevas*, this is not a hearsay issue addressing the problems of inconsistent statements or witness recanting.

In *Hunt*, this Court noted that the police officer had expertise only in cases where the defendants, by definition, are engaged in unlawful conduct. (*People v. Hunt, supra*, 4 Cal.3d at p. 237 ["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"]).

On the other hand, when a defendant asserts a medical marijuana defense, there is a possibility of an innocent explanation for the presence of factors that normally indicate sales–for example, the large quantity, packaging, presence of a scale. Notwithstanding the holding in *People Chakos* (2007) 158 Cal.App.4th 357, that court's general observation can

hardly be disputed: that evidence which appears to be inconsistent with personal use, when considered in a different context or with the aid of additional evidence, may in fact be wholly consistent with such use. (*People v. Chakos, supra*, 158 Cal.App.4th at p. 368 [recognizing that the practical difficulties of obtaining the drug may explain the presence of an "extra supply," or use of a gram scale to make sure the proper amount is received].)

When confronted with typical indicia of sales, such as a scale, large quantity, and baggies, an officer with no expertise in the patterns of lawful use will inevitably opine that the marijuana was possessed for purposes of sales. For example, in this case, Officer Williamson placed high emphasis on the number of packages found containing marijuana. In fact, when asked if the number of packages was highly important to his opinion that petitioner was selling marijuana, he responded "It's a major part of it, yes." (1 RT 73.)

Unfortunately for the defendant in this situation, there is no line of questioning that can realistically uncover the inadequacy of the officer's opinion–other than probing his lack of training in medical marijuana cases. Nor is there anything for the jury to observe about the police officer's demeanor that would shed light on the inadequacy of his or her opinion on

such matters. In other words, on the medical marijuana issue there appears to be no point in testing the "truth of the words uttered under oath in court" as Judge Learned Hand observed about out-of-court statements. (See *People v. Cuevas, supra*, 12 Cal.4th at p. 273.) Rather, the problem is the officer being no more familiar than the average layperson about the patterns of lawful possession for medical use that would enable him to distinguish them from unlawful possession for sale. Cross-examination appears necessarily ineffective on this issue.

2. The "Ability Of the Defendant to Offer Other Evidence," Identified in *Cuevas*, Does Not Necessarily Follow In This Case

Cuevas identified another safeguard against convictions based on unreliable out-of court identifications. According to this Court:

> [T]he ability of the defendant to offer other evidence casting doubt on the identification, such as evidence that the identifying witness was not present at the scene of the crime, was not previously familiar with the defendant, or had a motive to implicate the defendant.

(*People v. Cuevas, supra*, 12 Cal.4th at p. 274.)

In contrast, a medical marijuana defense requires more than discrediting an identification witness. The defendant may produce his marijuana card, name the doctor who wrote the prescription, and identify the source of the marijuana. But when confronted with a police officer testifying that the marijuana was possessed for sales, it is safe to assume

that in most cases, the only evidence readily available to a defendant is his own testimony. While it is conceivable a defendant could call his own medical marijuana expert, this seems far less feasible and cost-prohibitive than subpoenaing witnesses to discredit an out-of-court statement as in *Cuevas*. Consequently, the "opportunity to present other evidence" in medical marijuana should not be considered a "safeguard"–at least, not to the degree contemplated in *Cuevas*.

In any event, as discussed in the opening brief (AOB 27), the medical marijuana defense goes directly to the "unlawfulness" element of the possession for sales offense. (*People v. Mower* (2002) 28 Cal.4th 452, 482.) Thus, once the defendant meets the burden of production, the prosecution has the burden of persuasion–i.e., of proving the defense beyond a reasonable doubt. (*Id.* at p. 484.) As a result, the possibility of the defendant offering "other evidence" cannot excuse the prosecutor from presenting a competent expert in medical marijuana on any ground related to its burden of persuasion. Not when the distinction between unlawful possession for sales and lawful possession for medical purposes is beyond the common knowledge of everyday jurors.

To the extent police are not generally qualified on how to differentiate a quantity of marijuana for medical use and a quantity of

marijuana for sales, the solution is to find an expert who is qualified–instead of reinterpreting the law to help litigants use unqualified experts. Indeed, this resolution of the problem was key to this Court's opinion in *Hunt*, *supra*, 4 Cal.3d at pp. 237-238, and was also important in *Chakos*, *supra,* 158 Cal.App.4th at pp. 268-269.

3. Unlike in *Cuevas*, the Substantial Evidence Test Is Not An Adequate Safeguard Against Wrongful Convictions In Medical Marijuana Cases

Cuevas also noted that the substantial evidence used to determine the sufficiency of the evidence supporting a conviction provides further protection against a mistaken out-of-court identification. According to this Court, under the substantial evidence standard:

> [T]he probative value of the identification and whatever other evidence there is in the record are considered together to determine whether a reasonable trier of fact could find the elements of the crime proven beyond a reasonable doubt

(*People v. Cuevas, supra*, 12 Cal.4th at p. 274.)

However, due to the objective similarities between lawful possession for medical use and possession for sales, a conviction supported by testimony from an officer with no expertise in medical marijuana could be upheld based on the "reasonable trier of fact" standard. The typical indicia of sales, such as a scale, large quantity of baggies, etc., will always be deemed to support a possession for sales conviction under the deferential

standard that reviews the evidence in the light most favorable to the prosecution. Considering the problems described above of ineffective cross-examination and limited opportunity for a defendant to present other evidence, the substantial evidence rule should not be deemed an adequate safeguard against wrongful convictions of possession for sales in medical marijuana cases.

Petitioner acknowledges that "where a witness has disclosed sufficient knowledge, the question of the degree of knowledge goes more to the weight of the evidence than its admissibility." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 38.) However, an officer who is unfamiliar about the patterns of lawful possession is not in a position to help the jury distinguish between lawful possession from unlawful possession for sale. His testimony is not based on sufficient knowledge so as to meet the threshold standard of admissibility. (Cf. *Brown v. Colm* (1974) 11 Cal.3d 639, 645 [The determinative issue in each case must be based on whether the witness has sufficient skill or experience in the field so that his testimony would likely assist the jury for truth].) Falling short of this standard, his testimony cannot go the weight of evidence on the possession for sales issue.

The inevitable conclusion is that requiring the prosecution to call a medical marijuana expert in some cases is "overwhelmingly useful and

efficacious" (*Cuevas,* 12 Cal.4th at p. 264), to the extent that showing is a prerequisite in this case. Contrary to respondent's assertion, requiring the prosecution call a medical marijuana expert has nothing to do with the prosecutor's discretion to prove its case "as it sees fit." (AB 8-10.) It goes directly to the burden the prosecutor must overcome to prove its case. (*People v. Mower, supra*, 28 Cal.App.4th at pp. 482.) There is no viable substitute for the testimony of an expert trained in medical marijuana–to evaluate the fine line in these cases between illegal possession for sales, and lawful possession for medical purposes.

B. The Evidence Presented At Trial Was Not Sufficient to Sustain Petitioner's Convictions For Transporting Marijuana and Possessing Marijuana for Sale

Respondent argues that the evidence on the record was sufficient to sustain the convictions for transporting marijuana and possessing marijuana for sale. (AB 24-29.) Ironically, respondent makes repeated references to Officer Williamson's opinion testimony throughout its argument.

Respondent emphasizes that Officer Williamson had significant experience and training in distinguishing between marijuana possessed for personal use and possession for marijuana for sale. (AB 24-25.) However, that was the crux of the problem in this case. As this Court observed in *Hunt*, the police officer's expertise lies in cases where the defendants, by

definition, are engaged in unlawful conduct. (*People v. Hunt*, *supra*, 4 Cal.3d at p. 237.) As was true in *Hunt,* so it was in this case.

Officer Williamson testified he had made "many, many arrests of people in possession of marijuana, several arrests for people possessing marijuana for the purpose of sales." (1 RT 40-41) His training "[c]onsisted of different factors that would be taken into consideration when somebody is running a sales operation as opposed to just using it for personal enjoyment ..." (1 RT 41.) Yet, he did not testify about expertise in patterns of lawful marijuana use for medical purposes. In fact, Williamson admitted that he never had any training in identifying whether a medical marijuana card is valid, and was not able to do so in the instant case. (1 RT 37, 39.)

Thus, Williamson's opinion (that the marijuana was possessed and transported in the car for sale) must be viewed in the context of his lack of training in medical marijuana. The stated basis for his opinion was that petitioner possessed 10 bags, each containing three grams of marijuana in the driver's map compartment of the vehicle. Each bag was worth approximately $5, but could go up to $10 per bag if it were "extremely good" marijuana. Also, he found three bags in the back seat, each containing about six grams of marijuana. He further noted that the bags of

equal size were kept in different places that he "knew through his training and experience to be for quick reference." (1 RT 47.)

Indeed, Williamson considered the packaging to be a major part of the evaluation of this case. (1 RT 73.) However, because Williamson's expertise was limited to the context of most, if not all defendants being an unlawful possessor (i.e., in such cases the only issue being whether the substance was *illegally* possessed for personal use or *illegally* possessed for sales) (Cf. *People v. Hunt, supra*, 4 Cal.3d at p. 237), Williamson necessarily evaluated the evidence in the context of a usual case, where such factors such as multiple baggies are usually indicative of possession for sales.

Without expertise in medical marijuana, Williamson was unable to evaluate these factors in the context of a medical marijuana defense. Consequently, petitioner's explanation–in particular, that he broke the marijuana up into smaller baggies according to his daily doses (1 RT 164)–was not properly factored into Williamson's opinion, if at all. Williamson's opinion cannot constitute substantial evidence under these circumstances. "[T]he 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 drugs for

their own use as medicine for illness." (*People v. Hunt, supra*, 4 Cal.3d at pp. 237-238.)

Respondent points to the disparity between the amount petitioner claimed he used per day (two smaller baggies), and the amount located by the officers. The officers found 10 such baggies, and three additional baggies–each containing 6.5 grams of marijuana (1 RT 25-26, 44), along with a bag containing 17.2 grams in his pants pocket (1 RT 41, 44)). According to respondent, these amounts discredited appellant's medical marijuana defense. (AB 27.) However, there is nothing peculiar about keeping a supply that lasts several days–just as a patient of prescribed medication might store enough pills to last for a specific increment of time (e.g. 30 days, 90 days etc.).

Nor do any of the other facts identified by respondent change the result. Respondent points to the belt buckle that read "CA$H ONLY," the fact petitioner was on probation for previously selling marijuana, and a WD-40 can that had been used to store marijuana. At trial, petitioner offered an explanation for the WD-40 can, stating that one purpose for it was to hide the marijuana from his kids. (1 RT 164.) But most significantly, these circumstances were part of the "totality of facts" that Williamson considered in forming his opinion. (1 RT 66.) He testified that

the belt buckle was "one of the first things that caught my attention" (1 RT 48), but offered no foundation or reasoning for his theory that the belt buckle was common to drug dealers and uncommon for everyone else.

The facts in this case should not be deemed so probative of sales that no medical marijuana expert was required. Not only are the facts in this case far from the hypothetical described by respondent (AB 11), the facts appear even less suggestive of sales than in *Chakos*, supra, 158 Cal.App.4th 357 ($781 in cash, a gram scale, 99 plastic bags, and a surveillance system). Under these circumstances, the evidence in this case should have been evaluated in the proper context by a medical marijuana expert.

Petitioner's convictions for possession and transportation for sales should be reversed.

CONCLUSION

Petitioner respectfully requests that the Court of Appeal's opinion be reversed.

Dated: June 10, 2011.

Respectfully submitted,

CENTRAL CALIFORNIA
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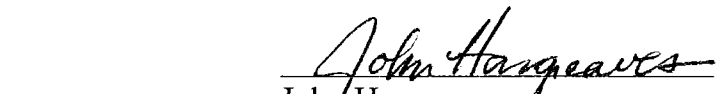
Executive Director



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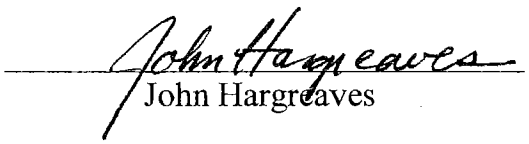
CERTIFICATE OF WORD COUNT

Pursuant to rule 8.204(c) of the California Rules of Court, I, John Hargreaves, appointed counsel for Lewis Marcus Dowl, hereby certify that I prepared the foregoing PETITIONER'S REPLY BRIEF ON THE MERITS on behalf of my client, and that the word count for this brief is **3646**, excluding tables. I certify that I prepared this document in WordPerfect, and that this is the word count generated for this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



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DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, 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 June 10, 2011, I served the attached

PETITIONER'S REPLY BRIEF ON THE MERITS

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