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 SUPPLEMENTAL BRIEF

CENTRAL CALIFORNIA
APPELLATE PROGRAM

GEORGE BOND
Executive Director
JOHN HARGREAVES
Staff Attorney
SBN 190257

2407 J Street, Suite 301
Sacramento, CA 95816
Tel: (916) 441-3792

Attorney for Petitioner
Lewis Dowl

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In response to this Court's order of July 11, 2012, Mr. Dowl hereby addresses the following issues:

1. Whether petitioner's failure to object at trial to Officer Williamson's testimony precludes him from asserting on appeal that, because Officer Williamson was not qualified to opine as to the purpose of petitioner's marijuana possession, his testimony does not constitute substantial evidence to support the verdict.

2. Whether the record, including the preliminary hearing transcript, shows that the trial court did not abuse its discretion in permitting respondent's expert to opine at trial that defendant possessed marijuana for purpose of sales.

ARGUMENT

I

PETITIONER IS NOT PRECLUDED FROM MAKING A SUBSTANTIAL EVIDENCE CHALLENGE TO OFFICER WILLIAMSON'S TESTIMONY ON APPEAL FOR WANT OF AN OBJECTION IN THE TRIAL COURT

Mr. Dowl is not precluded from making a substantial evidence challenge to Officer Williamson's testimony. This Court has stated that substantial evidence questions are an "obvious exception" to the waiver rule. *(People v. Butler* (2003) 31 Cal.4th 1119, 1126, citing *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17.) This principle is not limited to judgments. (*In re Javier G.* (2006) 137 Cal.App.4th 453, 464 [challenge to sufficiency of evidence to support finding of reasonable efforts]; *First Nat. Bank v. Maryland Cas. Co.* (1912) 162 Cal. 61, 72-73 [challenge to sufficiency of the evidence to support finding on which insurance liability was predicated is not forfeited by lack of objection]; *In re Brian P.* (2002) 99 Cal.App.4th 616, 623 [challenge to sufficiency of the evidence to support finding of adoptability].)

Mr. Dowl acknowledges that on the question of admissibility, a challenge to an expert witness on the ground of inadequate qualifications requires an objection, and the trial court determines the witness's

competency as a preliminary fact. (Evid. Code, § 720, subd. (a).[1]) This Court has held that a failure to challenge the qualifications of a witness to offer an opinion based on special skill, training, and experience at trial constitutes a forfeiture of the issue on appeal. (*People v. Bolin* (1998) 18 Cal.4th 297, 321; *People v. Williams* (1997) 16 Cal.4th 153, 195-195; *People v. Roberts* (1992) 2 Cal.4th 271, 298.)

Nonetheless, resolution of this case does not turn on the admissibility of the police officer's testimony. Rather, Mr. Dowl has demonstrated why the police officer's testimony does not constitute substantial evidence of intent to sell marijuana in this case–as was the result in *People v. Hunt* (1971) 4 Cal.3d 231 and *People v Chakos* (2007) 158 Cal.App.4th 357. His argument directly answers the question originally posed on review by this Court: whether the prosecution must call a medical marijuana expert when confronted with a medical marijuana defense. This question goes straight to the prosecution's burden. Mr. Dowl has explained why a medical marijuana expert should be an affirmative requirement of proof in such cases.

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[1] That subdivision provides "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, experience, training, or education must be shown before the witness may testify as an expert." (Evid. Code, § 720, subd. (a).)

In his opening and reply briefs, Mr. Dowl showed why Officer Williamson's testimony should not constitute substantial evidence, since there was an absence of significant facts "not to be expected" in connection with marijuana use for medical purposes. (Cf. *People v. Hunt*, *supra*, 4 Cal.3d at p. 238.) As in *Hunt*, the officer's opinion concerning intent to sell carried "little or no weight" because he had insufficient expertise regarding lawful possession for medical use. (*Ibid.*) There was no substantial evidence that Officer Williamson was familiar with the patterns of individuals who may lawfully possess marijuana pursuant to the Compassionate Use Act, such that he could distinguish them from unlawful possession for sale. (*People v. Chakos, supra*, 158 Cal.App.4th at pp. 368-369.) His argument, based on substantial evidence, cannot be forfeited. (See *Tahoe National Bank v. Phillips, supra*, 4 Cal.3d at p. 23, fn. 17.)

Furthermore, the forfeiture rule is motivated by the need for a record that is adequate for review. There is no need to apply it based on the record in this case, as the officer's expertise was fully explored and inadequate as to being qualified as an expert on the patterns of lawful marijuana use. This is in contrast to the problems resulting from a lack of an objection noted by this Court in *People v. Gonzalez* (2006) 38 Cal.4th 932. In *Gonzalez,* the defendant did not object that Sergeant Garcia's testimony was based on

unreliable material at any time before he finally moved to disqualify as an expert. In fact, before the witness testified, defense counsel told the court he would not raise the expert's qualifications as an issue. In finding Gonzalez's challenge forfeited, the Court of Appeal noted that "although the record contains some information regarding Sergeant Garcia's qualifications as an expert, it is not complete in this regard." (People v. Gonzalez, *supra* 38 Cal.4th at p. 948.)

In this case, Officer Williamson testified extensively regarding his qualifications, and was questioned about his training in use of marijuana for medical purposes. (RT 39-41; CT 25-26, 34-36.) He was even asked about his knowledge of the way medical marijuana is packaged, how much a person with a card uses per day, and whether he had ever visited a dispensary. (CT 35-39.) Thus, this Court has sufficient information about Officer Williamson's qualifications to resolve the question at hand. That question is whether the expert opinion on illegal sales which does not encompass expertise as to lawful marijuana use is "reasonable in nature, credible, and of solid value...[as] 'substantial' proof of the essentials which

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the law requires..." (*People v. Bassett* (1968) 69 Cal.2d 122, 138-139.) As in *Hunt* and *Chakos*, the officer's testimony in this case does not constitute substantial evidence.

II

THE RECORD SHOWS THAT THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE POLICE OFFICER TO OPINE AT TRIAL THAT MR. DOWL POSSESSED MARIJUANA FOR PURPOSE OF SALES

Were this case resolved on the issue of admissibility, the trial court abused its discretion in permitting the police officer to opine at trial that Mr. Dowl possessed marijuana for purpose of sales, because the officer's testimony exceeded the scope of his expertise.

A person is qualified to testify as an expert if the person has "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) The determination that a witness qualifies as an expert and the decision to admit expert testimony are within the discretion of the trial court. (*People v. Mendoza* (2000) 24 Cal.4th 130, 177.)

Significantly, "a person may be qualified as an expert on one subject and yet be unqualified to render an opinion on matters beyond the scope of that subject." (*People v. Williams* (1992) 3 Cal.App.4th 1326, 1334

[Witness's training and experience qualified him as an expert to administer the nystagmus test, but he was not qualified to opine on the observed eye movements], citing *People v. Hogan* (1982) 31 Cal.3d 815, 851-853 [A criminalist was qualified to give opinion on source of various bloodstains, but was not qualified not testify that stains were "splatters" rather than caused by contact].)

In this case, the record reflects that Officer Williamson had significant experience and training in distinguishing between marijuana possessed for personal use and possession for marijuana for sale. He made many arrests of people possessing marijuana for purpose of sales. (1 RT 40-41.) His training consisted of different factors that would be considered when somebody is running a sales operation as opposed to just using it for personal enjoyment ..." (1 RT 41.)

However, at trial, Officer Williamson did not testify about expertise in patterns of lawful marijuana use for medical purposes. He admitted never receiving 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.)

At the preliminary hearing, Officer Williamson did testify about receiving in-field training about "people possessing marijuana for medical use." (CT 34.) He testified that "I have seen marijuana purchased from a

dispensary and it was most often put in like prescription bottles with a label on it and so forth." (CT 36.) However, his experience in seeing the packaging for legal possession consisted of when he "ran into people" who actually purchased from a dispensary. (CT 36.) When asked if medical marijuana always comes in a prescription bottle with a label, he stated "I would imagine so, or in a bag with a medical label on it." (CT 36.)

The importance of distinguishing between patterns of lawful use and patterns of unlawful possession for sales was recognized by this Court in *People v. Doss* (1992) 4 Cal.4th 1585. That case involved a pharmacist who could possess drugs lawfully. The issue at trial was whether, as in this case, the drugs the pharmacist could otherwise lawfully possess were being diverted to illicit sales. However, the conviction in *Doss* was supported by the testimony of an officer who had expertise in both *legal* and *illegal* distribution of pharmaceuticals. As noted by this Court:

> He [Agent King] had particular expertise in the area of illegal distribution of *pharmaceuticals*, having served as a lead agent in nearly two dozen cases involving doctors and pharmacists. He had participated in both state and federal investigation, and had received field training from the Board of Pharmacy, the Board of Medical Quality Assurance, the DEA, and two district attorneys' offices. He was familiar with the effects of the drugs in question, their classification under state and federal law, their *legitimate* and *illegitimate* use, and their current demand on the street.

People v. Doss, supra, 4 Cal.App.4th at p. 1595, emphasis added.)

Significantly, expertise in the illegal distribution of pharmaceuticals necessarily implies an expertise in the legal distribution as well. As noted by *Chakos,* "in the context of typical pharmaceuticals, it is impossible to imagine an expert who knows about their 'illegal distribution' without necessarily also knowing about their *legal* distribution." (*People v. Chakos*, *supra*, 158 Cal.App.4th at p. 367, emphasis in original.)

In contrast, it is apparent from the record that Officer Williamson's knowledge about the patterns of lawful marijuana possession was limited. He was far from being qualified to tell the jury that the marijuana was possessed for purposes of sales rather than lawful medical use. He testified that the most significant factor "[w]as the manner in which the marijuana was packaged and he [Mr. Dowl] was on probation for possession of (sic) sales of marijuana." (CT 41.) Yet, he possessed minimal knowledge about the types of packaging used in lawful marijuana possession. Unlike expertise in the unlawful distribution of pharmaceuticals (the expert in *Doss*), Officer Williamson's expertise in the unlawful possession of marijuana does not necessary imply expertise in the *lawful* possession of marijuana.

Officer Williamson's testimony about having run into people who

purchase from a dispensary, and response to the question about whether marijuana purchased legally always comes in a labeled prescription bottle, (CT 36 ["I would imagine so..."]), reveal that his knowledge on the subject matter is speculative. This is not substantial evidence that he was able to tell the difference between lawful and unlawful possession. In fact, he admitted not knowing how much marijuana a person with a medical marijuana card consumes per day. (CT 38-39.) He had never been inside a dispensary. (CT 39.) Nor had he ever testified in court on a medical marijuana case. (CT 39.)

Under these circumstances, allowing Officer Williamson to opine about Mr. Dowl's intent in possessing the marijuana amounted to an abuse of discretion. The record fails to show that the officer has an adequate understanding of the patterns of lawful possession of marijuana, such that he could distinguish them from unlawful possession for sale.

Were this case resolved on the issue of the admissibility, it could not be concluded that Officer Williamson's testimony was harmless. As explained in the reply brief on the merits, there was nothing peculiar about the disparity between the amount or marijuana Mr. Dowl claimed he used per day and the amount located by the officers. "[I]ndividuals 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." (*People v. Chakos*, 158 Cal.App.4th at p. 368.) Those practical difficulties include keeping an extra supply on hand since supplies may not be reliable. (*Ibid.*)

Nor would any other facts change the result--such as Mr. Dowl's belt buckle, the fact he was on probation for previously selling marijuana, and the WD-40 can that had been used to store marijuana. As previously explained, the evidence raises speculative inferences, at best. The facts are less suggestive of sales than *Chakos, supra*, 158 Cal.App.4th 357 ($781 in cash, a gram sale, 99 plastic bags, and a surveillance system).

It is clear that the prosecution should have called a qualified medical marijuana expert to prove its case. As it did not, Mr. Dowl'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: August 30, 2012.

Respectfully submitted,

CENTRAL CALIFORNIA
APPELLATE PROGRAM
GEORGE BOND
Executive Director

John Hargreaves

John Hargreaves
Staff Attorney
SBN 190257

2407 J Street, Suite 301
Sacramento, CA 95816
(916) 441-3792

Attorney for Petitioner
Lewis Dowl

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 August 30, 2012, I served the attached

PETITIONER'S SUPPLEMENTAL BRIEF

by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

Office of the Attorney General
P. O. Box 944255
Sacramento, CA 94244-2550

Kern County District Attorney
1215 Truxtun Avenue
Bakersfield, CA 93301

Lewis Dowl
3401 Wible Road, #57
Bakersfield, CA 93309

Honorable Lisa Green
Kern County District Attorney
1215 Truxtun Avenue
Bakersfield, CA 93301

Kern County Superior Court
1415 Truxtun Avenue
Bakersfield, CA 93301

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 30, 2012, at Sacramento, California.

DECLARANT