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 RESPONSE BRIEF

CENTRAL CALIFORNIA
APPELLATE PROGRAM

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PETITIONER'S SUPPLEMENTAL RESPONSE BRIEF

Petitioner hereby submits a supplemental response brief, as permitted by this Court's order of July 11, 2012.

I.

Under the Principles of Substantial Evidence, the Officer's Testimony Is Not Enough to Sustain the Conviction of Transportation and Possession for Sale, Notwithstanding the Lack of An Objection.

In his opening and reply briefs, Mr. Dowl explained why Officer Williamson's testimony does not constitute substantial evidence of intent to sell–as was the result in *People v. Hunt* (1971) 4 Cal.3d 231 and *People v. Chakos* (2007) 158 Cal.App.4th 357. Furthermore, in his supplemental brief, Mr. Dowl explained why he is not precluded from making a substantial evidence challenge to Officer Williamson's testimony for lack

of an objection in the trial court.

A. The Trial Record Contains Insufficient Evidence to Support the Judgment

Respondent points out that a sufficiency of evidence claim focuses on the entire record. (Respondent's supplemental answer brief [SAB], p. 2, citing *People v. Medina* (2009) 46 Cal.4th 913, 919.) Respondent emphasizes that Officer Williamson's testimony was "part of the record," and that "[p]etitioner cannot raise a sufficiency of the evidence claim that ignores a significant portion of the record." (SAB, p. 2.)

Respondent's point about focusing on the entire record illustrates an important distinction. Under substantial evidence review, a verdict may be based only on admissible evidence (under proper instructions) submitted to the jury. *(People v. Robinson* (1964) 61 Cal.2d 373, 406; *People v. Houts* (1978) 86 Cal.App.3d 1012, 1019.) Thus, the portion of the record relevant to a substantial evidence claim would be the reporter's transcript of the trial, since the trial is the event where the trier of fact (in this case, the jury) heard the evidence. As a result, the officer's testimony at the preliminary hearing should not be relevant to evaluating the substantial evidence claim on appeal.

Nonetheless, petitioner addressed every part of the record containing Officer Williamson's testimony and explained how, even considering the

preliminary hearing transcript, the record fails to show that the officer has an adequate understanding of the patterns of lawful possession of marijuana such that he could tell the difference between lawful and unlawful possession. As explained in petitioner's supplemental brief (pp. 9-10), the officer's testimony revealed that his knowledge on the subject matter was speculative. (Supplemental brief, p. 7-10.)

B. The Forfeiture Rule Does Not Apply

Respondent contends the issue was forfeited absent an objection below, however, the cases cited by respondent pertain to admissibility of evidence. (SAB, p. 4, e.g., *People v. Rodriguez* (1969) 274 Cal.App.2d 770, 776 [applying Evidence Code section 353 pertaining to the "erroneous admission of evidence"]; *People v. Raley* (1992) 2 Cal.4th 870, 892 [applying the forfeiture rule when a party fails to object to the admissibility of evidence]; *People v. Bolin* (1998) 18 Cal.4th 297, 321 [addressing whether the testimony of the witnesses was inadmissible because they were not qualified as experts on prison gangs].)

Respondent does not attempt to reconcile those cases with *People v. Hunt*, *supra*, 4 Cal.3d 231 and *People v. Chakos*, *supra*, 158 Cal.App.4th 357, which evaluated the witness's testimony through the substantial evidence test. 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. (*People v. Hunt, supra*, 4 Cal.3d at p. 238.) "Under *Hunt*, that means there was insufficient evidence to sustain the conviction." (*People v. Chakos, supra,* 158 Cal.App.4th at p. 369.)

The requirement of substantial evidence goes straight to the prosecution's burden. 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. (Opening Brief on the Merits, pp. 28-30, 33-36; Reply Brief on the Merits, p.10; *People v. Mower* (2002) 28 Cal.4th 457, 479-482.) It goes directly to the "unlawfulness" element of the possession for sales offense. (*People v. Mower, supra*, 28 Cal.4th at p. 482.)

Otherwise, an officer with little or no expertise in patterns of lawful use will inevitably opine that the marijuana was possessed for sales. (*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"].) There simply is no substitute for the

testimony of an expert trained in medical marijuana to evaluate the subtle difference between illegal possession for sales, and lawful possession for medical purposes. The prosecution's burden of proof should therefore require such a witness, and the absence of a defense objection should not relieve the prosecution from this requirement.

II.

The Trial Court Abused Its Discretion in Permitting Officer Williamson to Opine That Petitioner Possessed Marijuana for Purpose of Sales.

Petitioner demonstrated how, if this case were 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. Respondent argues that no abuse of discretion occurred, pointing to the officer's testimony at trial and at the preliminary hearing.

However, at best, the transcript of the trial shows that the officer had training differentiating between marijuana possessed for personal use and marijuana possessed for purpose of sales. (1 RT 39-41.) Although he had extensive training in marijuana for purposes of sales and had been a police officer for 10 years, he had not even been trained on the validity of medical marijuana cards. (1 RT 37, 40.)

Nor does the transcript of the preliminary hearing show that he had the necessary qualifications. Respondent points to the officer's testimony about receiving in-field training on the possession of marijuana for medical use. (1 CT 34.) Nonetheless, as previously explained, the officer's responses to questions in this area were speculative. He did not know how much marijuana a person with a medical marijuana card consumes per day,

had never been inside a dispensary, and had never previously testified in court on a medical marijuana case (1 CT 39). Under these circumstances, it cannot be concluded that he possessed qualification as an expert on the *lawful* possession of marijuana.

Respondent points to the rule that error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness clearly lacks qualification as an expert. (*People v. Farnam* (2002) 28 Cal.4th 107, 162.) However, Officer Williamson's qualifications pale in contrast to the cases cited by respondent. For example, in *People v. Farnam, supra*, 28 Cal.4th 107, this Court found that the record did not reflect that Inman, a criminalist with 10 years of experience, clearly lacked qualifications to offer opinions on blood spatters. This Court noted:

> Inman's work as a criminalist involved the examination of serological evidence, as well as crime scene reconstruction "by examining the totality of the physical evidence." He had earned a bachelor of science degree and a master's degree in criminalistics from the University of California at Berkeley, and had worked for three different law enforcement crime laboratories. He had examined evidence in 250 to 300 homicide cases and had worked on over 300 sexual assault cases. As a member of the California Association of Criminalists and the American Academy of Forensic Sciences, Inman had presented a number of technical papers to his peers.

(*People v. Farnam, supra,* 28 Cal.4th at p. 162.)

And in *People v. Bolin, supra*, 18 Cal.4th 297, this Court noted that Laskowski "was fully qualified to testify based on his educational background in biochemistry and serology and his training as a criminalist for 13 years, including attending and giving seminars in blood-spatter analysis and crime scene investigation. He had also testified as an expert witness on numerous prior occasions." (*Id.* at p. 322.)

In contrast, Officer Williamson's testimony was not based on sufficient knowledge of lawful possession of marijuana for medical use, so as to meet the threshold standard of admissibility. His testimony that the most significant factor underlying his opinion "[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) reveals the extent of his lack of training and experience in the area. In light of the other problems mentioned above, his testimony should not go to the weight of the evidence on the possession for sales issue.

Because the prosecution did not call a qualified medical marijuana expert to prove its case, in light of the asserted defense, 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: October 15, 2012.

Respectfully submitted,
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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 October 15, 2012, I served the attached

PETITIONER'S SUPPLEMENTAL RESPONSE 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.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on October 15, 2012, at Sacramento, California.

DECLARANT