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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. LEWIS MARCUS DOWL, Petitioner/Appellant.	No. _____ 5 Crim. F057384 (Kern County Superior Court No. BF125801A)

PETITION FOR REVIEW

After Decision by the Court of Appeal,
Fifth Appellate District
Filed April 6, 2010

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LEWIS MARCUS DOWL,	)
Petitioner/Appellant.	)

PETITION FOR REVIEW

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner, Lewis Marcus Dowl, petitions this court for review following the decision of the Court of Appeal, Fifth Appellate District, filed in that court on April 6, 2010.[1] A copy of the opinion of the Court of Appeal is attached hereto as Exhibit "A."

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[1] "Petitioner," Lewis Marcus Dowl, is hereafter referred to as "appellant."

QUESTIONS PRESENTED

1. Whether Penal Code section 4019, as amended on January 25, 2010, which increased presentence credits for certain criminal defendants who, like appellant in the present case, have no current or past convictions for violent or serious felonies, and who are not required to register as sex offenders, applies retroactively to persons such as appellant whose appeals were not final on review at the time of the amendment and, relatedly, whether prospective application of the amendment limiting it to persons who had not been sentenced at the time the amendment became effective violates the right of those persons who had been sentenced prior to the effective date of the amendment but whose appeals were not final on review at the time of the amendment to equal protection of the law under the Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution.

2. Where there is no substantial evidence that a police officer has any expertise in differentiating citizens who possess marijuana lawfully for their own consumption from those who possess it unlawfully with the intent to sell, is the opinion of that officer that a person who possesses a valid medical marijuana card possessed marijuana for the purposes of sale, sufficient to support convictions for possession of marijuana for sale and for transportation

of marijuana?

NECESSITY FOR REVIEW

As shown with more particularity below, a grant of review and resolution of these issues by this court is necessary to secure unanimity of decision and to settle important questions of law pursuant to California Rules of Court, rule 8.500 (b)(1) and under this Court's power as this state's highest court to correct errors below. (See *O'Sullivan v. Boerckel* (1999) 526 U.S. 838.)

PETITION FOR REHEARING STATEMENT

Appellant filed a petition for rehearing on April 16, 2010. The petition was denied on April 22, 2010. (See Cal. Rules of Court, rule 8.504 (b)(3).

STATEMENT OF FACTS

For purposes of this petition, other than the facts cited in the ensuing argument, the facts are adequately recited in the Court of Appeal's opinion.

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER PENAL CODE SECTION 4019, AS AMENDED ON JANUARY 25, 2010, WHICH INCREASED PRESENTENCE CREDITS FOR CERTAIN CRIMINAL DEFENDANTS WHO HAVE NO CURRENT OR PAST CONVICTIONS FOR VIOLENT OR SERIOUS FELONIES, AND WHO ARE NOT REQUIRED TO REGISTER AS SEX OFFENDERS, APPLIES RETROACTIVELY TO PERSONS WHOSE APPEALS WERE NOT FINAL ON REVIEW AT THE TIME OF THE AMENDMENT AND, RELATEDLY, WHETHER PROSPECTIVE APPLICATION OF THE AMENDMENT LIMITING IT TO PERSONS WHO HAD NOT BEEN SENTENCED AT THE TIME THE AMENDMENT BECAME EFFECTIVE VIOLATES THE RIGHT OF THOSE PERSONS WHO HAD BEEN SENTENCED PRIOR TO THE EFFECTIVE DATE OF THE AMENDMENT BUT WHOSE APPEALS WERE NOT FINAL ON REVIEW AT THE TIME OF THE AMENDMENT TO EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 7 OF THE CALIFORNIA CONSTITUTION.

A. Introduction.

Former Penal Code section 4019 provided for one day of work credit and one day of conduct credit for each six-day period of custody, resulting in a "one-for-two" award of custody credits. (Former Pen. Code, § 4019, subds. (b) & ©.) As amended effective January 25, 2010, the statute now provides for one day each of work time and conduct credit for each *four-day* period in custody, resulting in one-for-one credits. (Pen. Code, § 4019, subds. (b)(1) & (c)(1), as amend. eff. 1/25/10.) The conduct credits in this case were calculated pursuant to Penal Code section 4019, as it existed at the time of sentencing. (1

CT 175-176.) The trial court awarded appellant presentence credits for time served of 45 days plus 22 days of conduct credit. (*Ibid.*) If amended Penal Code section 4019 had been found to be applicable to appellant, he would have been entitled to 45 days of conduct credits. (Pen. Code, § 4019, subds. (b)(1) & (c)(1), as amend.)

Pursuant to a standing order issued by the court of appeal on February 11, 2010, the following issues were deemed raised in this appeal: "(1) Under amended Penal Code section 4019, appellant is entitled to recalculation of presentence work and custody credits; (2) To hold otherwise would violate equal protection principles." In conformity with its opinion in *People v. Rodriguez* (2010) 182 Cal.App.4th 535, the court of appeal "reject[ed]" any argument defendant is deemed to have made for additional custody credits." (Slip. opn. at p. 16.)

B. It Is a Violation of Equal Protection Principles Not to Apply Amended Section 4019 Retroactively.

Appellant contends that the court's decision not to apply amended section 4019 retroactively to his presentence credit calculation violates his right to equal protection of the law under the Fourteenth Amendment to the United States Constitution and article I, section 7, and article IV, section 16, of the California Constitution.

More particularly, when the Legislature increases credits that reduce a

defendant's sentence, the equal protection clauses of the California and Federal constitutions require that the new law be applied to all defendants who are presently serving a sentence, on parole, or on probation. (*In re Kapperman* (1974) 11 Cal.3d 542, 546-550; see U.S. Const., Amend. XIV; Cal. Const., art. I, § 7; art. IV, § 16.)

In *Kapperman*, the California Supreme Court considered a 1972 amendment to Penal Code section 2900.5 that credited county jail time served before prison to the prison sentence. (*Kapperman, supra*, 11 Cal.3d at 544.) The amended statute made the credit prospective only. (*Ibid.*) The defendant was delivered to the Department of Corrections before the date the statute was enacted, and his conviction was final before it went into effect. (*Id.* at 545.)

The court held that the state constitutional guarantee of equal protection under the laws required that the full benefit of the new pre-sentence credit law be applied retroactively to everyone serving a sentence on March 4, 1972, regardless of when they were in the county jail or whether their conviction was final on the day the statute took effect. (*Kapperman, supra*, 11 Cal.3d at 546-550.) Applied here, the reasoning of *Kapperman* requires that appellant be afforded the benefit of retroactive application of amended section 4019.

In *People v. Sage* (1980) 26 Cal.3d 498, this court again held that equal

protection principles require that all prisoners, regardless of the date they began serving prison terms, benefit when a new law or ruling increases credits. (*Id.* at 509, fn. 7.)[2] Before *Sage*, Penal Code section 4019's provision of credit for pre-sentence incarceration for prisoners "confined in or committed to a county jail . . . under a judgment of imprisonment" had been interpreted to limit pre-sentence credits to prisoners serving jail terms, and exclude those serving prison terms. (*Sage, supra*, 26 Cal.3d at 506.) Under this interpretation defendants convicted of misdemeanors (and therefore sentenced only to jail) received time off their sentences for pre-sentence custody, while defendants convicted of felonies (and therefore sentenced to prison) got no presentence credits. (*Id.* at 506, 507-508.)

The *Sage* court held that there was no "rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons." (*Sage, supra*, 26 Cal.3d at 506-508.) Accordingly, the Court held that section 4019 must be construed as providing pre-sentence credits to all prisoners. (*Ibid.*) Moreover, the Court held that its expansion of the previous application of section 4019 must be applied retroactively. (*Id.* 26 Cal.3d at 509, fn. 7.) It explained: "Inasmuch as the same equal protection

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Sage was superseded by statute on another issue. (See *People v. Brunner* (1983) 145 Cal.App.3d 761, 764 and fn. 1.)

concerns as those underlying this court's decision in *In re Kapperman, supra*, 11 Cal.3d 542, i.e., the avoidance of arbitrary classification of prisoners, are present in the award of jail conduct credits, our holding that such credits must be awarded, if earned, for all precommitment jail time is retroactive." (*Ibid.*)

The Court of Appeal in *People v. Doganiere* (1978) 86 Cal.App.3d 237 also held that the equal protection clause commands retroactive application of an amendment increasing credits. (*Id.* at 239, fn. 1.) It observed: "It would appear to be eminently unfair for a defendant to get 10 years for an offense committed on December 31 and another defendant to get 5 years for the identical offense committed on January 1." (*Ibid.*)

Given that there is no rational basis for distinguishing between a defendant serving time before January 25, 2010 and someone serving time on that date or later, equal protection requires that amended section 4019 be applied to appellant.

C. Review Should be Granted.

The foregoing issue has been litigated in the courts of appeal with different districts reaching different conclusions. As noted, in *People v. Rodriguez*, supra, 182 Cal.App.4th at 540, the Fifth District held the section 4019 amendment increasing conduct credits does not apply to defendants sentenced before January 25, 2010. Division two of the Fourth District agreed

with *Rodriguez* in *People v. Otubuah* (modified and published May 6, 2010, E047271) __ Cal.App.4th __ [2010 Cal.App. Lexis 622]. Other courts have reached a contrary conclusion and decided the amendment must be applied retroactively. (See, e.g., *People v. Brown* (2010) 182 Cal.App.4th 1354 [3rd Dist.], *People v. House* (2010) 183 Cal.App.4th 1049 [2nd Dist., Div. 1], *People v. Landon* (Apr. 13, 2010, A123779) ___ Cal.App.4th ____ [2010 Cal.App.Lexis 517], [1st Dist., Div. 2]; *People v. Delgado* (Apr. 29, 2010, B213271) __ Cal.App.4th __ [2010 Cal.App.Lexis 600], [2nd District, Div. 6]; *People v. Norton* (May 5, 2010, A123659) __ Cal. App.4th __ [2010 Cal.App. Lexis 612], [1st Dist., Div. 3]; and *People v. Pelayo* (May 6,2010, A123042) _ Cal.App.4th _ [2010 Cal.App. Lexis 627], [1st Dist., Div. 5].)

In view of these disparate holdings the court's decision here presents an important question of law. Review should be granted to settle the question and to secure uniformity of decision. (Cal. Rules of Ct, rule 8.500(b)(1).)

II. REVIEW SHOULD BE GRANTED TO SECURE UNIFORMITY OF DECISION AND SETTLE AN IMPORTANT QUESTION OF LAW AS TO WHETHER THE OPINION OF A POLICE OFFICER WITH NO EXPERTISE IN DIFFERENTIATING CITIZENS WHO POSSESS MARIJUANA LAWFULLY FOR THEIR OWN CONSUMPTION FROM THOSE WHO POSSESS IT UNLAWFULLY WITH THE INTENT TO SELL, MAY SERVE AS SUBSTANTIAL EVIDENCE SUFFICIENT TO SUPPORT CONVICTIONS FOR POSSESSION OF MARIJUANA FOR SALE AND FOR TRANSPORTATION OF MARIJUANA OF A PERSON WHO POSSESSES A VALID MEDICAL MARIJUANA CARD.

A. Introduction.

Appellant was convicted of possession of marijuana for sale in violation of Health and Safety Code section 11359 and transportation of marijuana in violation of Health and Safety Code section 11360, subdivision (a). (1 CT 87-90,160-168.) The case against appellant on the possession charge was entirely dependent on the purported expert-opinion testimony of Officer Williamson that appellant possessed the marijuana found on his person and in his car for the purposes of sale. Appellant argued that under *People v. Hunt* (1971) 4 Cal.3d 231 and *People v. Chakos* (2007) 158 Cal.App.4th 357, Williamson was not qualified to offer an opinion as to whether a person, such as appellant, with a valid medical marijuana card possessed marijuana for sale. Accordingly, there was insufficient evidence to support the possession for sale conviction. That being so, the transportation conviction was likewise

unsupported by substantial evidence. (See Health and Safety Code section 11362.765, subdivision (b)(1).)

B. The Court's Rejection of *Chakos* Is Based on an Unjustified Extension of the Reasoning in *People v. Mower.*[3]

In *People v. Chakos, supra,* 158 Cal.App.4th 357, the court was faced with the same issue present here: whether the evidence was sufficient to support a conviction for possession of marijuana for sale. (*Id.* at 363.) There, as here, the sole evidence of possession for sale was the arresting officer's opinion. (*Id.* at 361.) The court, relying on *People v. Hunt, supra,* 4 Cal.3d at 237-238, found the evidence insufficient and reversed, stating, "Nowhere in this record do we find any substantial evidence that the arresting officer had any expertise in differentiating citizens who possess marijuana lawfully for their own consumption, as distinct from possessing unlawfully with intent to sell." (*Id.* at 360.) Since the facts and evidence here do not differ in any meaningful respect from those in *Chakos,* had *Chakos* been applied here, appellant would have been entitled to reversal of his convictions.

However, the court of appeal here disagreed with the conclusion in *Chakos.* (Slip. opn. at pp. 4-10.) Relying on *People v. Mower, supra,* 28 Cal.4th 457, it stated:

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3 *People v. Mower* (2002) 28 Cal.4th 457.

> [T]he *Chakos* court did not address the fact the Compassionate Use Act provides an *affirmative defense* to the cultivation and possession of marijuana, which is otherwise illegal (*People v. Mower* (2002) 28 Cal.4th 457, 464 (*Mower*); *People v. Kelly* (2010) 47 Cal.4th 1008, 1013), and thus we see an important basis for distinguishing *Hunt*, which did not involve an affirmative defense. In *Mower* the California Supreme Court applied "the so-called rule of convenience and necessity" to determine that the burden of proof as to the facts underlying the compassionate use defense should be allocated to the *defendant*. (*Mower,* at p. 477.)

(Slip opn. at p. 8, emphasis in original.)

After extensively citing *Mower*, the court here found the *Chakos* holding was "inconsistent with the nature of the affirmative defense under the Compassionate Use Act." (Slip opn. at p. 9.) It explained:

> 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 articulate 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. (CALJIC No. 12.24.1; see also *People v. Wright* (2006) 40 Cal.4th 81, 88, 92, fn. 7 [discussing application of compassionate use defense to crime of transportation of marijuana].) 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.)

Based on this reasoning, the court declined to follow *Chakos* and rejected appellant's argument for reversal. (Slip opn. at p. 10.)

Appellant submits that *Chakos* remains good law and that the court's decision here was erroneous.

The opinion here correctly observes that *Mower* "allocate[d] to the defendant the burden of proving the facts underlying ... [the Compassionate Use] defense." (Slip opn. at p. 9; *People v. Mower* (2002) 28 Cal.4th 457, 477.) Those facts are: (1) the defendant is a patient or primary caregiver; (2) the defendant possessed or cultivated the marijuana in question for the personal medical purposes of a patient, and (3) the defendant did so on the recommendation or approval of a physician. (*Ibid.*) However, *Mower* did not assign to a defendant the burden of disproving the charge that he possessed the marijuana for sale or for another illegal purpose.

The court's decision here purports to extend *Mower* by holding that a defendant in possession of marijuana must not only prove the three foundational facts but must also prove that he did not possess the marijuana for sale. From that premise, it is opined that an ordinary expert in the unlawful use of marijuana, who has no expertise in differentiating citizens who possess marijuana lawfully for their own consumption from those who possess it unlawfully with the intent to sell, is competent to offer an opinion that an

amount possessed by a person with a valid medical marijuana card was possessed for sale rather than for a lawful use. (Slip opn. at pp.9-10.)

Such an interpretation of *Mower* and of the Compassionate Use Act violates the due process requirement that the burden is on the prosecution to prove beyond a reasonable doubt every element of the offense. (*In re Winship* (1970) 397 U.S. 358, 361; see *Jackson v. Virginia* (1979) 443 U.S. 307, 316 ["*Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be ... [convicted] except upon sufficient proof - - defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."]; see also U.S. Const., amends. V, XIV; see Cal. Const., art. I, §§ 7, 15.) Under the holding here, the burden was placed on appellant to prove not only the foundational facts qualifying him or her to assert the Compassionate Use Act as a defense but also to disprove a fact that is was the prosecution's burden to establish: that the marijuana was possessed for sale. By thus shifting the burden of proof to appellant, the opinion here ran afoul of the due process requirement the prosecution prove every element of the offense beyond a reasonable doubt. The result was a violation of appellant's due process rights.

C. Review Should Be Granted.

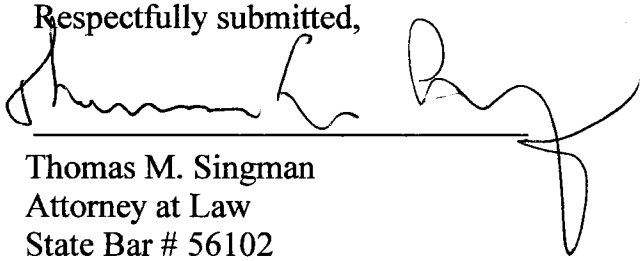
It is evident from the foregoing discussion. That the opinion here is at odds with the holding in *Chakos* and raises an important question about how *Mower* should be interpreted. Accordingly review should be granted to settle the question and to secure uniformity of decision. (Cal. Rules of Ct, rule 8.500(b)(1).)

CONCLUSION

For the foregoing reasons, this Court should grant review.

Dated: May 10, 2010

Respectfully submitted,



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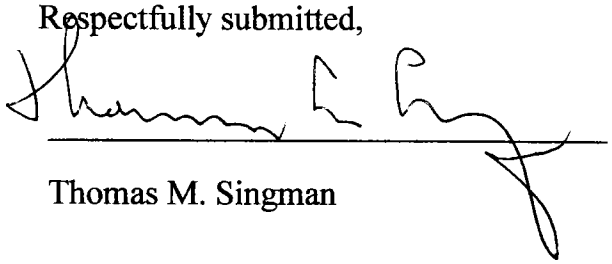
WORD COUNT CERTIFICATE

I, Thomas M. Singman, hereby certify that the word count for this petition for review is 3,080, which does not include the cover, tables or this certificate, and that this is the word count WordPerfect X4 generated for this document.

Dated: May 10, 2010

Respectfully submitted,



Thomas M. Singman

EXHIBIT A

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LEWIS MARCUS DOWL, Defendant and Appellant.	F057384 (Super. Ct. No. BF125801A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Thomas M. Singman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, David A. Rhodes, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II and III.

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Rejecting a compassionate use defense, a jury convicted defendant Lewis Marcus Dowl of transportation of marijuana (Health & Saf. Code,[1] § 11360, subd. (a); count 1) and possession of marijuana for sale (§ 11359; count 2); however, the jury returned not true findings on the associated gang enhancements (Pen. Code, § 186.22, subd. (b)(1)), and found defendant not guilty of participation in a criminal street gang (Pen. Code, § 186.22, subd. (a); count 3). The trial court sentenced defendant to prison for a total of three years. On appeal, defendant contends: (1) insufficient evidence supports his convictions of transportation of marijuana and possession of marijuana for sale; and (2) the trial court abused its discretion and violated his constitutional rights when it refused to bifurcate trial of the gang allegations. We reject defendant's contentions and affirm the judgment.

We publish the part of the opinion that holds a police officer need not qualify as a medical marijuana expert in order to render an opinion that marijuana being possessed is possessed for sales in cases where the defendant raises an affirmative defense under California's Compassionate Use Act of 1996 (hereafter the Compassionate Use Act). (§ 11362.5.)

FACTS

On November 29, 2008, two police officers stopped defendant for playing loud music in his car. When Officer Jason Williamson approached defendant's window, defendant gave the officer his driver's license and medical marijuana identification card and told him there was marijuana in the car.

A search of defendant and his car revealed the presence of 66.7 grams (just over two ounces) of marijuana. A single bag, containing 17.2 grams of marijuana, was found

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1 All further statutory references are to the Health and Safety Code unless otherwise indicated.

in defendant's pocket. Ten individual baggies, each containing 3 grams of marijuana, were found in the driver's door, and three individual baggies, each containing 6.5 grams of marijuana, were found lying on the backseat. A WD-40 can, with a hidden compartment containing marijuana residue, was also found in the car. However, no devices for ingesting marijuana were found in defendant's car.

Officer Williamson testified, in his expert opinion, that the marijuana found in defendant's possession was possessed for purposes of sale. Although the 17.2-gram bag of marijuana found in defendant's pocket "may or may not be for [defendant's] personal use[,]" the location and packaging of the other 13 baggies was consistent with "curb service" sales of illegal drugs. Depending on the quality of the marijuana, the 3-gram baggies found in defendant's car could sell on the street for between $5 and $10 each, and the 6.5-gram baggies, could sell for approximately double that. Officer Williamson's opinion the marijuana was possessed for sale was unaffected by defendant's possession of a medical marijuana identification card "[b]ecause of the totality of the circumstances of what [the officer] saw."

The prosecution also presented the testimony of a gang expert, who opined that defendant was an active member of the Bloods criminal street gang and that the crimes in this case were gang-related. Additional relevant facts are included below in our discussion of the bifurcation issue.

The defense

Defendant testified on his own behalf and presented medical records to show he sustained a shoulder injury from a hit-and-run car accident in May 2007. The injury caused him to suffer chronic, throbbing pain. As a result, defendant obtained a medical marijuana identification card from the Bakersfield Health Department in July 2008, after being evaluated by a physician. The identification card was valid at the time of his arrest. Defendant also had a written recommendation from his physician.

Defendant explained that medical marijuana helped to numb the pain caused by his shoulder injury and also helped him with sleep problems he had suffered for a long time. He usually consumed his marijuana by smoking it in cigars. When the police stopped him, he was carrying a "splitter" on his keychain, which is a cylindrical object used to split cigars.

Defendant denied that he was selling marijuana. The marijuana found in his possession was from a medical marijuana dispensary in Los Angeles. Defendant went to Los Angeles because there were no dispensaries in Bakersfield. When he purchased the marijuana from the dispensary, he was required to present his identification card. The marijuana cost him $200, and was packaged in a single bag.

After purchasing the marijuana, defendant divided it into separate baggies. When asked why he did this, defendant explained: "I package them in the dosage that I take on a daily basis and for it to fit in certain areas[,]" including the WD-40 can, which he would use to carry his dosages when we went to work. When asked to explain the presence of multiple baggies of marijuana in the driver's door and the three baggies in the backseat, defendant testified: "I was in a rush, and I just threw them in the car."

DISCUSSION

I. Sufficiency of the Evidence

Defendant contends the evidence is insufficient to support his conviction of either possession of marijuana for sale or transportation of marijuana because, although Officer Williamson was undisputedly qualified as an expert on unlawful marijuana sales, the record lacks "substantial evidence that the arresting officer had any expertise in differentiating citizens who possess marijuana lawfully for their own consumption, as distinct from possessing unlawfully with intent to sell. [Citation.]" (*People v. Chakos* (2007) 158 Cal.App.4th 357, 360 (*Chakos*), citing *People v. Hunt* (1971) 4 Cal.3d 231, 237-238 (*Hunt*).) For reasons discussed below, we respectfully disagree with the conclusion of the court of appeal in *Chakos*, and conclude Officer Williamson was not

required to additionally qualify as a medical marijuana expert in order to render a valid opinion that the marijuana found in defendant's possession was possessed for sales simply because defendant presented some evidence raising a compassionate use defense.[2]

On appeal, we review the entire record to determine whether it contains evidence that is reasonable, credible and of solid value on the basis of which any rational trier of fact could have found appellant guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We view the evidence in the light most favorable to the judgment and presume in support of the judgment every fact the trier could reasonably deduce and infer from the evidence. (*Ibid.*)

Transportation of marijuana is committed "'by carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character.' [Citation.] ... [Citation.] 'The crux of the crime of transporting is movement of the contraband from one place to another.' [Citation.] The term 'transports' as used in the statute is 'commonly understood and of a plain, nontechnical meaning.' [Citation.]" (*People v. LaCross* (2001) 91 Cal.App.4th 182, 185; *People v. Emmal* (1998) 68

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[2] The trial court instructed the jury with CALJIC No. 12.24.1 on the compassionate use defense as follows: "The possession or transportation of marijuana is not unlawful when the acts of defendant are authorized by law for compassionate use. The possession or transportation of marijuana is lawful (1) where its medical use is deemed appropriate and has been recommended or approved, orally or in writing, by a physician; (2) the physician has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief; (3) the marijuana possessed or transported was for the personal medical use of the patient; and (4) the quantity of marijuana possessed or transported and the form in which it was possessed or transported were reasonably related to the patient's then current medical needs, not exceeding eight ounces of dried marijuana per qualified patient. [¶] To establish the defense of compassionate use, the burden is upon the defendant to raise a reasonable doubt as to guilt of the unlawful possession or transportation of marijuana."

Cal.App.4th 1313, 1318 ["to satisfy the element of 'transportation' ..., the evidence need only show that the vehicle was moved while under the defendant's control"].)

"The essential elements of unlawful possession of [marijuana] are 'dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character. Each of these elements may be established circumstantially.' [Citations.]" (*People v. Martin* (2001) 25 Cal.4th 1180, 1184.)

"In cases involving possession of marijuana or heroin, experienced officers may give their opinion that the narcotics are held for purposes of sale based upon such matters as the quantity, packaging and normal use of an individual; on the basis of such testimony convictions of possession for purpose of sale have been upheld. [Citations.]" (*People v. Newman* (1971) 5 Cal.3d 48, 53 (*Newman*), disapproved on another point in *People v. Daniels* (1975) 14 Cal. 3d 857, 862.) "[A]s to drugs which may be purchased by prescription, [however,] an officer's opinion that possession of lawfully prescribed drugs is for purposes of sale is worthy of little or no weight in the absence of evidence of some circumstances not to be expected in connection with a patient lawfully using the drugs as medicine. [Citation.]" (*Newman*, *supra*, at p. 53, citing *Hunt*, *supra*, 4 Cal.3d at pp. 237-238.)

In *Hunt*, *supra*, 4 Cal.3d 231, the California Supreme Court found the expert testimony of a police officer insufficient to support a conviction of possession for sale of restricted dangerous drugs in violation of section 11911. The officer found Hunt in a bedroom injecting himself with methedrine. At Hunt's feet was a travel case containing three full and one partially full 30 cubic centimeter vials of methedrine, each of which was labeled with a pharmacy label listing Hunt's name and a physician's name. The case also contained disposable syringes and needles. (4 Cal.3d at pp. 233-234.) The parties stipulated that Hunt obtained all of the methedrine in his possession pursuant to a prescription, and Hunt's physician testified he had prescribed methedrine to Hunt. (*Id.* at

pp. 234-235 & fn. 2.) The officer testified that users of methedrine use up to eight cubic centimeters per day. Based upon the quantity of methedrine Hunt possessed, its value for illegal street sales, and the quantity normally used by an individual, the officer opined that Hunt possessed the methedrine for sale. (*Id.* at pp. 234-235.) Hunt testified that he used about nine cubic centimeters of methedrine per day, and the vials seized from him constituted his personal supply for about one week. (*Id.* at p. 235.)

The Supreme Court found the officer's opinion carried little or no weight because he had insufficient expertise regarding the lawful possession of methedrine for medical use:

> "As to drugs, which may be purchased by prescription, 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 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. No such special circumstances were shown here as to the methedrine in the blue and white travel case. [¶] The officer stated that his opinion that the methedrine was held for sale was based on 'the quantity involved, the over-all street value, the normal use by an individual.' Under his own testimony, the use by an individual could be up to 8 ccs. a day. The quantity in the blue and white travel case was less than 120 ccs. and could have been as little as a two-week supply. The street value seems immaterial. The fact that medicine purchased lawfully at reasonable prices may demand a much greater price in the illegal market furnishes no reason to suppose that a possession of a two-week supply of the drug pursuant to prescription is held for profit rather than use." (*Hunt*, *supra*, 4 Cal.3d at pp. 237-238.)

In *Chakos*, police stopped Chakos's car and found a plastic bag containing seven grams (a little less than one-quarter ounce) of marijuana, a physician's "medical slip" for marijuana use, and $781 in cash. (*Chakos*, *supra*, 158 Cal.App.4th at p. 360.) During a search of Chakos's home, officers found a little less than six ounces of marijuana, stored in "irregular amounts" "in different storage devices"; a gram scale; a closed circuit

camera trained on the entrance; and 99 empty plastic bags described by the police officer expert witness as "'phlebotomy bags.'" (Chakos was a phlebotomist.) (*Id.* at pp. 360-361 & fn. 2.) The police officer expert had extensive narcotics training and experience, including training regarding growing, selling, and packaging marijuana. But he had no prior experience, and apparently no training, with respect to medical marijuana. (*Id.* at pp. 361-362.) The officer opined that Chakos possessed all of the marijuana for the purpose of sale. As the basis for his opinion, the officer cited the money and the quantity of marijuana found in the car, which was consistent with the amount a dealer would sell to a user. Other factors were the surveillance system, scale, and packaging material found at Chakos's residence. (*Ibid.*)

The *Chakos* court found no basis for distinguishing *Hunt*. It concluded that "expertise in distinguishing lawful patterns of possession from unlawful patterns of holding for sale" was necessary (*Chakos*, *supra*, 158 Cal.App.4th at p. 367), and the police officer expert was no "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." (*Id.* at pp. 368-369.) Accordingly, the court found the expert was "unqualified to render an *expert* opinion in this case," and concluded that the evidence was insufficient to support Chakos's conviction of possessing marijuana for the purpose of sale. (*Id.* at p. 369.)

In its discussion, the *Chakos* court did not address the fact the Compassionate Use Act provides an *affirmative defense* to the cultivation and possession of marijuana, which is otherwise illegal (*People v. Mower* (2002) 28 Cal.4th 457, 464 (*Mower*); *People v. Kelly* (2010) 47 Cal.4th 1008, 1013), and thus we see an important basis for distinguishing *Hunt*, which did not involve an affirmative defense. In *Mower* the California Supreme Court applied "the so-called rule of convenience and necessity" to determine that the burden of proof as to the facts underlying the compassionate use defense should be allocated to the *defendant*. (*Mower*, at p. 477.) The court explained:

"The rule of convenience and necessity declares that, unless it is 'unduly harsh or unfair,' the 'burden of proving an exonerating fact may be imposed on a defendant if its existence is "peculiarly" within his personal knowledge and proof of its nonexistence by the prosecution would be relatively difficult or inconvenient.' [Citations.] ... [Citations.]

"Application of the rule of convenience and necessity supports the conclusion that section 11362.5(d) [the Compassionate Use Act] should be interpreted to allocate to the defendant the burden of proof as to the facts underlying the defense provided by the statute.

"First, it would not be unduly harsh or unfair to allocate to the defendant the burden of proving the facts underlying this defense. These facts are that he or she was a 'patient' or 'primary caregiver,' that he or she 'possesse[d]' or 'cultivate[d]' the 'marijuana' in question 'for the personal medical purposes of [a] patient,' and that he or she did so on the 'recommendation or approval of a physician' [citation]. The existence of these facts is peculiarly within a defendant's personal knowledge, and proof of their nonexistence by the prosecution would be relatively difficult or inconvenient.

"Second, section 11362.5(d) constitutes an exception to sections 11357 and 11358, which make it a crime to possess and cultivate marijuana, because section 11362.5(d) provides that sections 11357 and 11358 '*shall not apply* to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician' [citation]." (*Mower*, *supra*, 28 Cal.4th at p. 477.)

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 articulate 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. (CALJIC No. 12.24.1; see also *People v. Wright* (2006) 40 Cal.4th 81, 88, 92, fn. 7 [discussing application of

compassionate use defense to crime of transportation of marijuana].) 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.

For the forgoing reasons, we decline to follow *Chakos*, and conclude that the presence of the marijuana in defendant's car, combined with Officer Williamson's expert opinion that the circumstances of defendant's possession were consistent with unlawful sales, constituted substantial evidence supporting defendant's convictions for transporting and possessing marijuana for sales.

II. Failure to Bifurcate the Gang Allegations

Defendant contends the court abused its discretion and violated his constitutional rights to due process and a fair jury trial when it refused to bifurcate trial of the gang allegations. We disagree.

A. Background

Prior to trial, defendant filed a motion to bifurcate the special gang allegations from the underlying offenses. During the hearing on the motion, defendant expanded its scope to include not only the gang enhancements associated with counts 1 and 2, but also the substantive gang offense charged in count 3. In support of the bifurcation motion, defendant argued generally that the introduction of gang evidence would be "unduly prejudicial[.]" He asserted the issue at trial would be whether "he was possessing this for sale" and urged that this issue "should be tried cleanly and without all that prejudicial gang stuff." In opposition, the prosecutor pointed out that the gang allegations and drug offenses were "interrelated" because defendant had been charged with transporting and possessing the marijuana for sale "in furtherance of or in benefit of the gang."

In denying defendant's motion, the trial court made the following observations:

> "I have read and considered, as I said, the written points in support of--the points and authorities in support of the written motion and considered the

oral arguments of counsel. [¶] And the Court does recognize that there is the potential for prejudice if the jury hears allegations of criminal street gang membership or association. However, the cases that counsel have cited that talk about this prejudice with regard to criminal street gangs--I am looking [as one example] at [*People v. Perez* (1981) 114 Cal.App.3d 470], a 1981 case .... [¶] ... [¶] [T]he Court is going to make the observation that *the Court considers the subject of the prejudicial effect of gang membership or criminal street gang association in light of today's world as opposed to the world that existed when some of the prior appellate decisions were rendered.* [¶] And it has been my experience, trying cases involving allegations of criminal street gang association or membership, that the jury panels are increasingly sophisticated with regard to understanding that there are stereotypes involving criminal street gangs, understanding that just because people live in an area where criminal street gangs operate does not directly lead to a finding that that person is a criminal street gang member; that there are family connections that people associate with each other because they are related or neighbors rather than motivated to be associated with and taking part and actively involved in the activities of the criminal street gang. [¶] So I do think that the potential for prejudice in Kern County has lessened in the past several years in terms of potential jurors being more informed to not have this type of evidence be as inflammatory as it was in years prior. [¶] And I have considered the factors to be considered in deciding whether to bifurcate. Considering all those factors, I do not find that the admission of evidence related to criminal street gangs is going to be prejudicial to the point that it would require bifurcation. I do not find that the evidence of these allegations is unusually likely to inflame the jury against the defendant. And I do find that the evidence relating to criminal street gangs is cross-admissible as to all three counts. And the motion to bifurcate is denied." (Italics added.)

At trial, the parties stipulated that the Bloods was an ongoing criminal street gang within the meaning of the gang enhancement statute. The prosecution presented the testimony of gang expert Officer Scott Drewry. Officer Drewry opined that defendant was an active member of the Bloods and that the possession and transportation of the marijuana in this case was "done in the furtherance or association of the Bloods criminal street gang." Officer Drewry explained that "narcotics sales" was the gang's "primary money-making activity."

Officer Drewry based his opinion that defendant was an active member of the Bloods gang on a number of factors. At the time of his arrest, defendant was wearing a cap with the letter "B" on it, and he had on his right forearm a tattoo of the number "23." Officer Drewry explained that the tattoo represented the 23d letter of the alphabet (or "W"), which signified his association with the "Warlord Bloods." Officer Drewry also noted that officers had found pictures on defendant's cell phone, depicting defendant making gang-related hand signs.

Officer Drewry reviewed four police reports from the Bakersfield Police Department detailing police contacts with defendant. In February 2005, defendant was found in possession of a loaded .357-caliber handgun. He resisted arrest and was subsequently booked for possessing a weapon and resisting arrest. In August 2006, defendant was arrested for a curfew violation, when he was in the company of another Bloods gang member. In September 2007, defendant was stopped for a vehicle code violation and was found in the company of two other Bloods gang members. All three were subsequently arrested for possessing marijuana for sales. The fourth police report Officer Drewry reviewed was the one generated in the current case. In addition to the police reports, Officer Drewry reviewed jail booking information which showed that on a number of occasions defendant claimed to be a Bloods gang member and asked to be separated from Crips gang members.

As noted above, the jury acquitted defendant of the substantive gang offense and returned not true findings on the gang enhancements.

B. Analysis

We review the denial of a motion to bifurcate the trial of a gang enhancement from the trial of the associated offense for abuse of discretion. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 (*Hernandez*).) *Hernandez* held the legal basis for bifurcation of a prior conviction allegation also permits bifurcation of a gang allegation. (*Id.* at p. 1049.) However, "the criminal street gang enhancement is attached to the

charged offense and is, by definition, inextricably intertwined with that offense. So less need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation." (*Id.* at p. 1048.)

Hernandez noted gang evidence may be relevant to "identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*Hernandez*, *supra*, 33 Cal.4th at p. 1049.) "To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary." (*Id.* at pp. 1049-1050.) However, "[e]ven if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself—for example, if some of it might be excluded under Evidence Code section 352 as unduly prejudicial when no gang enhancement is charged —a court may still deny bifurcation." (*Id.* at p. 1050.)

Noting the benefits of unitary trials, *Hernandez* explained a "trial court's discretion to deny bifurcation of a charged gang enhancement is ... broader than its discretion to admit gang evidence when the gang enhancement is not charged." (*Hernandez*, *supra*, 33 Cal.4th at p. 1050.) Bifurcation is required only where a defendant can "'clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' [Citation.]" (*Id.* at p. 1051.)

The propriety of the trial court's ruling is judged by the record as it existed when the bifurcation motion was made. (*People v. Catlin* (2001) 26 Cal.4th 81, 110 [severance of counts].) On the record before us, we cannot say the trial court abused its broad discretion in denying the motion to bifurcate the gang allegations. Although the jury ultimately rejected the prosecution's gang theory, Officer Drewry testified at the preliminary hearing to his opinion that defendant was "an active gang" member and, assuming hypothetically the circumstances of this case, "that person ... was involved in narcotics activity for the furtherance of the Bloods criminal street gang," noting, as he did

at trial, "marijuana and drug sales are one of the primary money-making activities of the Blood criminal street gang." Thus, contrary to defendant's assertions, it appears much of the gang evidence would have been admissible on the issues of motive and intent in separate trials. (*Hernandez*, *supra*, 33 Cal.4th at pp. 1049-1050.) Moreover, defendant did not cite to any specific evidence, either in his moving papers or his argument at the hearing, to support his burden of establishing a substantial danger of prejudice requiring separate trials of the drug counts and gang allegations.

We also reject defendant's assertion that the trial court "abused its discretion ... by relying on its subjective perception and opinion regarding the potential for prejudice to a criminal defendant from admission of gang evidence rather than being guided by established case law." Defendant's argument is based on the trial court's observation that it was considering "the subject of the prejudicial effect of gang membership or criminal street gang association in light of today's world as opposed to the world that existed when some of the prior appellate decisions were rendered." We note the court was speaking in general terms, and since defendant did not offer any specific evidence for the court to consider, we are not willing to find that the court abused its discretion and ignored the law based on its observations about how jurors' perceptions about gangs had changed in the nearly 30 decades since the earliest cases cited by defendant. In any event, the court took pains to point out it had "considered the factors to be considered in deciding whether to bifurcate." The language used by the court in its concluding comments reflect it was well aware of the applicable legal principles and properly applied them here to deny defendant's bifurcation motion.

Finally, any error in failing to bifurcate trial of the gang allegations was not prejudicial under any harmless error standard of review. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Contrary to defendant's argument, the evidence presented against him with regard to the drug offenses was overwhelming. Despite having a medical marijuana identification card, the

validity of which was not challenged by the prosecution, defendant failed to offer any plausible explanation why his medical condition made it necessary for him to drive around with 13 separate baggies filled with exact portions of marijuana in the driver's door and backseat of his car. Although defendant claimed he divided the marijuana into separate dosages for his personal use, he provided no explanation as to why he was transporting all these personal dosages *at the same time* in his car. On cross-examination, he claimed he used two 3-gram baggies per day, one in the morning, and one at night. It does not take an expert to note the considerable discrepancy in defendant's claimed daily use and the amount he was carrying at the time of his arrest. By defendant's own admission, he was carrying over a week's supply of marijuana in his car but gave no reason for doing so. Although defendant testified he had purchased the marijuana in Los Angeles, he did not claim he was returning from Los Angeles at the time of the traffic stop. In addition, defendant's claim that he just hurriedly threw the baggies of marijuana into his car is contradicted by the circumstance that the baggies reflected some degree of organization, as only 3-gram baggies were found in the driver's side door, and 6.5-gram baggies were found the backseat.

The lack of prejudice is further evidenced by the jury's finding that the gang enhancements were not true and its acquittal of defendant on the substantive gang count. To the extent the gang evidence exposed the jury to information that defendant had previously been arrested for possession of marijuana for sales, the jury would have learned of this information in any event because defendant chose to testify. Defendant disclosed in his own testimony that he entered a plea to the crime of possession of marijuana for sales and discussed the circumstances of the crime, claiming he was innocent but felt pressured to take the rap for someone else. The jury was also duly instructed that the fact of defendant's prior conviction "may be considered by you only for the purpose of determining the believability of that witness." (CALJIC No. 2.23) In

light of all these circumstances, we find unconvincing defendant's argument that he was prejudiced by the court's failure to bifurcate the trial of the gang allegations.

III. Penal Code Section 4019 Amendments

Pursuant to a standing order of this court issued on February 11, 2010, the issue of the applicability of the January 25, 2010, amendments to Penal Code section 4019 (Stats. 2009-2010, 3d Ex. Sess, ch. 28, § 50) is deemed raised without further briefing by the parties. The amendments to Penal Code section 4019 affected the calculation of custody credits. In our published opinion in *People v. Rodriguez* 182 Cal.App.4th 535, we held the January 25, 2010, amendments to Penal Code section 4019 applied prospectively only to those persons who had not been sentenced at the time the amendments went into effect. (*Rodriguez*, at pp. 539-540, 544-545.) We also rejected the contention that prospective application of the amendments violated equal protection. (*Id.* at pp. 546-547.) We thus reject any argument defendant is deemed to have made for additional custody credits.

DISPOSITION

The judgment is affirmed.

HILL, J.

WE CONCUR:

LEVY, Acting P.J.

CORNELL, J.

DECLARATION OF SERVICE BY MAIL

I, Thomas M. Singman, declare that I am over 18 years of age and not a party to the within cause; my business address is P.O. Box 6237, Albany, CA 94706-0237. On May 11, 2010, I served a true copy of the attached PETITION FOR REVIEW on each of the following, by placing same in an envelope addressed as follows:

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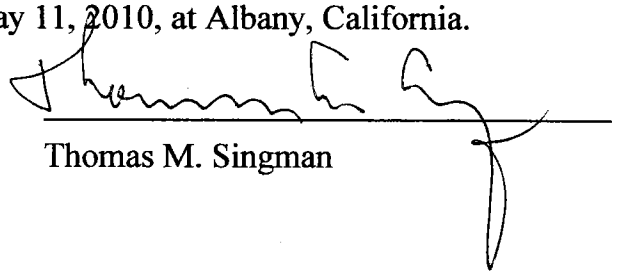
Each said envelope was then sealed and deposited in the United States mail at Albany, California, in the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed on May 11, 2010, at Albany, California.



Thomas M. Singman