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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SHAUN ERIC WRIGHT, Defendant and Appellant.	G031061 (Super. Ct. No. O1WF2416) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed in part and reversed in part.

Maureen J. Shanahan, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela A. Ratner Sobeck and Erika Hiramatsu, Deputy Attorneys General, for Plaintiff and Respondent.

Shaun Eric Wright was charged with transporting marijuana and possessing it for sale, as well as driving with a suspended license. After pleading guilty to the latter

charge, he was convicted of the drug charges and sentenced to a year in jail. Wright contends he did not get a fair trial because the court precluded him from relying on the compassionate use defense. We agree and reverse his convictions on the drug counts. In all other respects, we affirm the judgment.

* * *

On the morning of September 20, 2001, someone informed the Huntington Beach police there was marijuana inside a black pickup truck at a certain carwash. A short time later, Officer Mark Armando stopped the truck as it was leaving the carwash. Walking up to the vehicle, Armando observed Wright in the driver's seat. He also noticed a backpack on the passenger seat and a strong odor of marijuana wafting from the truck.

After informing Wright about the tip that had come in, Armando asked him if there was marijuana in his truck. Wright said no. Armando had him step out of the truck and Sergeant Henry Cuadras patted him down and seized a baggie of marijuana from his front pocket. Armando then searched Wright's backpack. In the front pouch, he found a black bag containing six baggies of marijuana and an electronic scale. Armando found two larger baggies of marijuana inside the main compartment of the backpack. Then he searched Wright's truck and discovered about a pound of marijuana wrapped in a shirt in the back seat. All told, the officers seized approximately 19 ounces of marijuana from Wright.

Armando and Cuadras testified to their opinion Wright possessed the marijuana for sale. In reaching this opinion they relied on the presence of the scale, the quantity of marijuana involved, and the way it was packaged and concealed. The officers knew nothing about Wright's medical history or any medical authorization he had to use marijuana.

Wright testified he has used marijuana since 1991 to alleviate physical pain and emotional stress. He said his physical pain stems from various injuries he suffered

over the years, including a broken leg, a dislocated shoulder and a broken collarbone. Wright also said he experiences nausea, bloating and diarrhea after eating, which diminishes his appetite. He said smoking marijuana eases his stomach discomfort and increases his appetite.

Wright said he obtains similar relief by adding marijuana to his food. He said it takes about a pound of marijuana for him to produce eight edible ounces of the drug. That's because he extracts the seeds and stems and grinds up the remaining plant material before cooking with it. Asked why some of the marijuana found in his truck was packed in baggies, Wright said it came that way when he bought it. He said he picked it up the morning he was arrested, went to get his truck washed, and was on his way home when he was stopped.

Dr. William Eidelman, a specialist in alternative medicine, testified that Wright came to him about three months before he was arrested. Wright complained of chronic pain in his shoulders, leg and stomach. After examining him and reviewing some of his medical records, Dr. Eidelman approved the use of marijuana to relieve his pain. During the consultation, Wright told him that he prefers to eat marijuana and that a pound usually lasts him about two or three months. Dr. Eidelman testified this was a reasonable amount of consumption in light of Wright's condition.

Midway through the trial, the court held a hearing outside the presence of the jury to determine whether Wright be allowed to rely on the compassionate use defense. At the hearing, Wright described his physical ailments, and Eidelman testified he recommended marijuana to Wright to alleviate his pain. Eidelman said he did not recommend a particular dosage, because "the dose is generally . . . self-regulating." He also said, "you have to use a much larger amount when you eat [marijuana than when you smoke] it to get the same kind of effect."

Nevertheless, the trial judge ruled "that in this particular case, due to the quantity [of marijuana] involved and due to the record that's been presented to me, I do

not feel compassionate use applies to the transportation count nor the possession for sale count." The court also found the defense inapplicable to the charge of simple possession, which was alleged as a lesser included offense of possession for sale. Accordingly, the court did not allow Wright's witnesses or attorney to mention this defense to the jury, nor did the court instruct on compassionate use. However, as set out above, the court did allow Wright to present evidence that Eidelman recommended the use of marijuana to alleviate the pain associated with his various ailments. In the end, the jury convicted Wright of both transporting marijuana and possessing it for sale. (See Health & Saf. Code, §§ 11360, 11359.)

* * *

Wright contends reversal is compelled by virtue of the court's exclusion of the compassionate use defense. We agree.

The compassionate use defense has its origins in Proposition 215, which added section 11362.5 to the Health and Safety Code.[1] That section provides:

"(a) This section shall be known and may be cited as the Compassionate Use Act of 1996.

"(b)(1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

"(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who 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.

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1 Unless noted otherwise, all further statutory references are to this code.

"(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

"(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

"(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

"(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

"(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, 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.

"(e) For the purposes of this section, 'primary caregiver' means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person."

In *People v. Trippet* (1997) 56 Cal.App.4th 1532, the defendant was charged with transporting marijuana and possessing more than 28.5 grams of the drug. The court recognized that, by its terms, the Compassionate Use Act (CUA or The Act) applies only when the defendant is charged with possessing or cultivating marijuana. (See § 11362.5, subd. (d).) However, the court determined, and the Attorney General agreed, that "practical realities dictate that there be *some* leeway in applying section 11360 [which prohibits the transportation of marijuana] in cases where a Proposition 215

defense is asserted to companion charges. The results might otherwise be absurd. For example, the voters could not have intended that a dying cancer patient's 'primary caregiver could be subject to criminal sanction for carrying otherwise legally cultivated and possessed marijuana down a hallway to a patient's room." (*People v. Trippet, supra*, 56 Cal.App.4th at p. 1550.)

With that in mind, the *Trippet* court set forth boundaries covering the lawful transportation of marijuana. It ruled, "The test should be whether the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs. If so, we conclude there should and can be an implied defense to a section 11360 charge; otherwise, there is not." (*People v. Trippet, supra,* 56 Cal.App.4th at pp. 1550-1551.) Although the defendant in *Trippet* was traveling with two pounds of marijuana in her car when she was stopped, and there was only a "remote" chance she could meet this test, the court remanded the case to allow her the opportunity to do so before the trier of fact. (*Id*. at p. 1551.)

In *Trippet*, there was also an issue as to whether the defendant had a doctor's approval to use marijuana, so the court's remand order encompassed this issue as well. (See *People v. Trippet, supra*, 56 Cal.App.4th at pp. 1548-1549.) But for our purposes, the most pertinent part of the order was that "the trier of fact will need to determine . . . whether any . . . of the marijuana appellant was transporting at the time of her arrest was, considering not only the quantity, but the method, timing and distance of the transportation, reasonably related to her then current medical needs[.]" (*Id*. at p. 1551.) This aspect of the remand order was aimed at the transportation charge, not the possession charge. (*Ibid*.)

In *People v. Young* (2001) 92 Cal.App.4th 229, the court interpreted the CUA in a more restrictive manner. The defendant in that case was found with less than five ounces of marijuana in his car during a traffic stop. And although he had medical authorization to use marijuana for his arthritis, the *Young* court determined he was not

entitled to rely on the CUA to defend the charge of transporting marijuana. The court reasoned, the act "on its face exempts only possession and cultivation from criminal sanctions for qualifying patients. [Citation.] It does not exempt transportation as defined in section 11360. '"Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language."' [Citation.]" (*Id*. at p. 237.)

The court went on to say, "We need not decide whether we agree with the *Trippet* court that incidental transportation of marijuana from the garden to a qualifying patient may implicitly fall within the safe haven created by the Compassionate Use Act. This case does not involve the movement of marijuana from a plant legally cultivated in a garden to a seriously ill cancer patient but rather the transportation of marijuana in a vehicle. That kind of transportation is not made lawful by the Compassionate Use Act." (*People v. Young, supra,* 92 Cal.App.4th at p. 237.)

In reaching this conclusion, *Young* relied on *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383 and *People v. Rigo* (1999) 69 Cal.App.4th 409. However, in *Peron* the issue was whether the CUA authorized the operators of a cannabis club to "*sell and furnish* marijuana to patients or their primary caretakers." (*Peron, supra*, 59 Cal.App.4th at p. 1391, italics added, fn. omitted.) And *Rigo* considered whether the defendant was entitled to rely on the CUA to defend against charges of cultivating marijuana even though he did not obtain medical authorization to use marijuana until after he was arrested. (*People v. Rigo, supra*, 69 Cal.App.4th at pp. 411-412.) Neither case dealt with the issue before the court in *Young*, i.e., whether the CUA can be used as a defense in transportation cases.

More troubling to us, however, is the sheer breadth of *Young*'s holding, which strictly precludes application of the CUA in all cases involving the transportation of marijuana in a vehicle. We fully appreciate the CUA was not intended to

decriminalize drug trafficking, but not every instance of marijuana transportation in a vehicle constitutes trafficking. Just as a patient or caretaker may have to walk a few steps to obtain medically authorized marijuana (to borrow the example given in *Trippet*), so too may they have to drive or use some other mode of transportation to get it. After all, not everyone who needs marijuana for medical reasons can cultivate it in the backyard. By failing to allow for the possibility that the transportation of marijuana in a vehicle may, in some instances, be reasonably related to a patient's medical needs, we believe the holding in *Young* too narrowly constricts the CUA's intended purpose of ensuring that qualified Californians have the right to both use *and* obtain marijuana when it is medically authorized. (See § 11362.5, subd. (b)(1)(A).) We do not believe the CUA should, as a matter of law, be unavailable as a defense in all cases involving the transportation of marijuana in a vehicle.

Nor, of course, should the CUA be used "as a sort of 'open sesame' regarding the possession, transportation and sale of marijuana in this state." (*People v. Trippet, supra*, 56 Cal.App.4th at p. 1546, fn. omitted.) To ensure that it does not, The Act should be interpreted as allowing a defense in transportation cases only in the limited circumstances set forth in *Trippet*. That is, when "the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs." (*Id*. at pp. 1550-1551; see also CALJIC No. 12.24.1.)

Interestingly enough, the Attorney General does not take issue with this approach, at least not directly. He does cite *Young*, *Peron* and *Rigo*, but he urges affirmance based on the language of *Trippet*. Specifically, he maintains the compassionate use defense was inapt in this case because the "manner in which the one pound, three ounces of marijuana was packaged, coupled with the electronic scale and the fact [Wright] had just left a car wash, not to mention the dubious nature of Dr. Eidelman's marijuana 'recommendation,' did not support the contention that the quantity

of marijuana in [Wright's] possession at the time was reasonably related to his alleged medical needs. (*People v. Trippet, supra*, 56 Cal.App.4th at p. 1551.)"

But that's a jury call. Decisions about the relative merits of a defense are reserved to triers of fact, and a party who chooses a jury as his trier of fact is entitled to *their* decision.

The defendant does have the burden of proof when it comes to establishing the compassionate use defense. (*People v. Mower* (2002) 28 Cal.4th 457, 481.) However, to prevail at trial he need only raise a reasonable doubt. (*Ibid*.) And so long as he presents the trial court with sufficient evidence to satisfy this standard, then "the defense should go to the jury to decide. Only if the defendant fails to produce sufficient evidence to raise a reasonable doubt about the existence of [the challenged elements of the defense] is the trial court justified in keeping the matter from the jury." (*People v. Jones* (2003) 112 Cal.App.4th 341, 350.)

At issue in *Jones* was whether the defendant had presented sufficient evidence of doctor approval to allow him to put on a compassionate use defense to the charge of cultivating marijuana. Although the defendant testified his doctor had approved the use of marijuana, the doctor's testimony was equivocal on the issue. In fact, he said he had no specific recollection of approving defendant's marijuana use. On this record, the trial court did not believe there was sufficient evidence to permit the defendant to rely on the CUA. However, the *Jones* court disagreed. It found:

"That Dr. Morgan did not admit to having approved of defendant's marijuana use is of no matter. His testimony was equivocal enough on the point that the jury could have believed him and still found he gave his verbal approval of defendant's marijuana use, as defendant claimed. In any event, even if Dr. Morgan had adamantly denied approving defendant's marijuana use, it would not have mattered for purposes of the [Evidence Code] section 402 hearing. Because the [CUA] defense was ultimately a question for the jury, it was not for the trial court to decide whether Dr. Morgan was

more credible than defendant. The trial court's role was simply to decide whether there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt as to whether Dr. Morgan approved defendant's marijuana use. Defendant's testimony constituted such evidence. Thus, defendant should have been allowed to present his [CUA] defense to the jury . . . ." (*People v. Jones, supra*, 112 Cal.App.4th at pp. 350-351.)

In our case, the primary issue was not whether Wright had medical approval to use marijuana, but whether the circumstances surrounding his transportation of the drug indicated he possessed it to address his medical needs. Officer Armando and Sergeant Cuadras interpreted the circumstances as being indicative of possession for sale. But they admitted not knowing anything about Wright's medical condition, and Wright's medical condition was at the heart of his defense. Wright presented evidence he suffers from a variety of ailments for which he is authorized to use marijuana. And although he had over a pound of marijuana with him, he explained he needs relatively large quantities of the drug because he prefers to eat, rather than smoke, it. He said a pound of marijuana lasts him only a couple of months, and Dr. Eidelman confirmed this rate of consumption was commensurate with his medical condition. While 19 ounces is surely a considerable amount of marijuana for a person to have in his possession, we must remember that "Proposition 215 was approved by the voters without specificity as to the strength, quality, *or quantity* of marijuana to be used for medical purposes as long as the use is reasonably related to the patient's current medical needs and was recommended or approved by a physician. [Citations.]" (86 Ops.Cal.Att.Gen. 180 (2003), italics added [hashish and concentrated cannabis may be used for medical purposes under the CUA].)

Moreover, the defendant need not prove he is seriously ill to invoke the CUA. "[T]he question of whether the medical use of marijuana is appropriate for a patient's illness is a determination to be made by a physician. A physician's determination on this medical issue is not to be second-guessed by jurors who might not

deem the patient's condition to be sufficiently 'serious.'" (*People v. Spark* (Aug. 2, 2004, F042331) __ Cal.App.4th __, __.)

As for the manner in which the marijuana was packaged, Wright testified he bought it that way on the morning he was arrested. He said he then stopped off at the carwash and was on his way home when the police pulled him over. Wright was never asked about the scale that was found in his truck. However, the testimony revealed that the presence of a scale in drug cases is indicative, but not determinative, of the intent issue. As Officer Armando admitted, even people who possess for personal use sometimes bring a scale with them when they are buying marijuana to ensure they "don't get ripped off."

Taken as a whole, it is safe to say the evidence was reasonably susceptible of different interpretations. While a rational trier of fact could certainly find that Wright possessed the marijuana in his truck for monetary, not medical, reasons, Wright presented sufficient evidence to support a contrary conclusion if believed. Wright's defense was essentially that he was carrying his own marijuana, the analgesic use of which had been approved by a medical doctor, a defense *Trippet* correctly endorses. The amount of marijuana, the scales found in his car and the packaging of the marijuana diminish his chances of success with that defense, but California law — as many a chagrined trial judge will attest — does not bar defenses on the basis they are unlikely to succeed. Worse defenses than this have been advanced, and *much* worse defenses have succeeded. The court should have allowed him to rely on the CUA as a defense to the charge of transporting marijuana.

For much the same reason, the court should also have permitted Wright to rely on the CUA as a defense to the charge of possessing marijuana. Even though that offense was alleged as a lesser included offense of possession for sale, there was, as explained above, sufficient evidence to allow a reasonable juror to find Wright's possession lawful. That — not the prosecution's decision to charge Wright with

possession for sale — is the determinative factor in deciding whether Wright was entitled to rely on the CUA as part of his defense. Were we to hold otherwise, we would empower any local prosecutor to veto the electorate's decision on Proposition 215, merely by charging possession for sale rather than possession. This cannot have been the intent of the voters.

As the court in *Trippet* rightfully recognized, "practical realities dictate that there be *some* leeway in applying section 11360 in cases where a Proposition 215 defense is asserted to companion charges." (*People v. Trippet, supra*, 56 Cal.App.4th at p. 1550.) The court did not specify what those companion charges must be. However, even assuming they must be either possession or cultivation of marijuana — the two offenses specifically mentioned in the CUA — that requirement was satisfied here because Wright was charged with possession of marijuana as a lesser included offense of possession for sale. In other words, this case fits within the narrow class of transportation cases in which the CUA may be proffered as a defense.

All of which brings us to the issue of prejudice. We recognize Wright was allowed to present evidence he possessed the marijuana found in his truck for medicinal purposes. However, Wright was not allowed to elicit any evidence regarding the CUA in particular, nor was he allowed to mention The Act in closing argument. This effectively prevented him from tailoring his case to The Act's requirements. Moreover, the jury was never informed that Wright's possession and transportation of marijuana could be considered lawful under the CUA. Thus, even if Wright had been allowed to develop his compassionate use defense during the trial, it would only have gotten him so far. "Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal." (*United States v. Escobar De Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202.)

The lack of full and proper instructions not only deprived Wright of a viable defense, it also appears to have confounded the jurors. Indeed, after they had heard all the evidence and been instructed on the law, they weren't even sure of the charges Wright was facing. In a note to the judge, they asked, "Is the charge 'Possession of' AND 'Possession for sale' + 'transportation for sale' or has the 'possession of' charge already been addressed – (pleaded to or tried) . . . ." The jury also wanted to know, "Is marijuana for medicinal purposes acceptable w/ the law?" and "Can a doctor legally prescribe marijuana?"

The court did not provide the jury with answers to any of these questions. Instead, it decided to let counsel address them in closing argument. Knowing the court's feelings on these issues, and knowing there would be no instructions to back him up, defense counsel steered clear of them. The prosecutor, on the other hand, made it a point to say that medical authorization to use marijuana was not a defense to *any* of the charges, including simple possession.

It is beyond dispute that medical authorization can provide a defense to the charge of possessing marijuana under the circumstances delineated in the CUA. It can also provide a defense to the charge of transporting marijuana when there is reasonable doubt as to whether the transportation was reasonably related to the defendant's medical needs. And it can provide a clearly relevant alternative explanation for possession where the charge is possession for sale. Unfortunately, the jury was never instructed of this. Rather, it was effectively told the evidence regarding Wright's medical authorization was wholly irrelevant to the case.

On these facts, it would be folly to read too much into the jury's decision to convict Wright of possession for sale. It certainly does not overcome the court's erroneous decision to prevent Wright from relying on the CUA. In determining that the CUA was, as a matter of law, inapplicable to this case we believe the trial court prejudicially infringed Wright's constitutional entitlement to present a defense. (Cf.

People v. Tilehkooh (2003) 113 Cal.App.4th 1433 [finding due process violation in trial court's refusal to allow defendant to rely on CUA as a defense to probation violation allegation].) The court should have given Wright his day in court and allowed him to tender his CUA defense to the jury. Because it did not, we are compelled to reverse Wright's convictions on the drug counts.[2]

DISPOSITION

The judgment of conviction is reversed as to Count 1, possession of marijuana for sale, and Count 2, transportation of marijuana. The judgment is affirmed as to Count 3, driving with a suspended license.

BEDSWORTH, J.

I CONCUR:

MOORE, J.

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2 In light of this holding, we need not consider Wright's remaining challenges to these convictions.

SILLS, P. J., concurring and dissenting:

I would affirm as to all three counts. If we were empowered to rewrite a statute, the majority's position might be most persuasive. Unfortunately, that is not our role. We must look to the language of the proposition as passed by the electorate, and accept it as it is phrased unless it is ambiguous or internally inconsistent. The Compassionate Use Act of 1996 (CUA) is neither ambiguous nor internally inconsistent. It states, in quite straightforward language, that it applies to a person charged with simple possession or cultivation of marijuana as found in Health and Safety Code sections 11357 or 11358; no other charge is exempted from prosecution. (Health & Saf. Code, § 11362.5, subd. (d); see *People v. Young* (2001) 92 Cal.App.4th 229, 237 ["The Compassionate Use Act . . . exempts *only* possession and cultivation from criminal sanctions for qualifying patients." (Emphasis added.)].)

Shaun Eric Wright faced charges of transportation of marijuana and possession of marijuana for sale as found in Health and Safety Code sections 11359 and 11360. Neither charge fell within the CUA's express provisions. The trial court properly barred his invocation of the defense because he could not meet the most basic qualification: His charges fell outside the purview of the proposition.

The majority, invoking language from *People v. Trippet* (1997) 56 Cal.App.4th 1532 at page 1551, concludes the CUA provides an *implied* defense to a transportation charge when it accompanies a charge of simple possession. The *Trippet* court had extrapolated that the CUA exemption *may* be appropriate to a transportation count, but only if the jury found Trippet was exempted from the companion charge of simple possession of the same marijuana. The court concluded the defense *should* be applied to the transportation charge if the purpose of the transportation was to effect the medicinal ingestion of that same supply of marijuana as charged in the simple possession. (*Id.* at pp. 1550-1551.)

It is noteworthy that Trippet never had the opportunity at trial to argue the defense even as to the simple possession count because the proposition was passed only

after the judgment in the *Trippet* case was rendered. The opinion remanded the case for retrial to provide Trippet that opportunity. Neither basis the *Trippet* court used to carve out the implied defense is present in the case at bar.

Until the Legislature or the electorate decides the *Trippet* derivation is appropriate, and then codifies it, we are constrained by the actual language of the proposition to bar the invocation of the CUA by defendants facing charges other than simple possession or cultivation of marijuana. (See *People v. Young, supra,* 92 Cal.App.4th at p. 237.) The sole direction from the Supreme Court on the issue is found in *People v. Mower* (2002) 28 Cal.4th 457 at pages 470-471, and again at pages 474-475, where, in addressing a different issue, it was stated that the CUA permits "a defendant [] to avoid 'criminal prosecution or sanction' [citation] when charged with *possession or cultivation of marijuana in violation of section 11357 or 11358* . . . ." (Italics added.) Wright faced neither of these charges. He faced possession for sale of marijuana and the transportation of that marijuana. He did not qualify for the CUA defense.

In the alternative, he argues that the jury was instructed that it could find him guilty of the lesser included offense of simple possession of marijuana. Because the CUA applied to that lesser offense, he argues that the court had to instruct the jury as to the CUA defense even though he faced only non-qualifying charges. However, the CUA's relevance would arise only after a jury *rejected* the charge of possession for sale and then *found* he was guilty of simple possession, not before. The jury never made such a finding here. To the contrary, it convicted him of the possession for sales count, indubitably due to the compelling evidence of sales, to wit: a stash of pot far larger than necessary to supply an illicit pharmacy, along with all the typical sales paraphernalia.

For instance, this was not one, large bag of marijuana, as one would expect to find if it was for a single individual's personal use. No, it was found in nine different portions: Two very large baggies, each containing 30.6 grams of marijuana, seven small baggies in approximately equal amounts and a large "brick" of it wrapped in a shirt which weighed about a pound. Six of the small baggies were located in a black bag along with an electronic scale. The brick was found in the truck's back seat; the large baggies

were found in Wright's backpack but not in the same section with the scales and the small baggies of marijuana. It is particularly noteworthy that Wright was carrying a single small baggie of marijuana in his pocket, separate from all the other parcels, as if that were his personal property as distinct from the large supply available for distribution.

The jury had the opportunity to find that this marijuana was possessed for any purpose *other than sales*, such as for Wright's personal medical reasons. Had the jurors believed Wright and Eidelman, they would have found him guilty of simple possession, even though no instruction was given about the CUA. They did not. They found the prosecution had proved the element of sales beyond a reasonable doubt. Thus, the trial court's failure to instruct as to a possible defense to the *lesser included* offense—not the charge itself—is harmless error, at best. (See *People v. Turner* (1990) 50 Cal.3d 668, 690 [instructional error as to defense harmless beyond a reasonable doubt when jury already rejected defense theory under other, correct instructions].) The majority's strained efforts to distinguish the holding in *Young* are an indication it should be followed.

SILLS, P. J.