SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ROGER WILLIAM MENTCH,

Defendant and Appellant.

S148204

SUPREME COURT
FILED

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Frederick K. Ohlrich Clerk

Deputy

Sixth Appellate District, No. H028783
Santa Cruz County Superior Court No. F077429
Samuel S. Stevens, Judge

RESPONDENT'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	1
PRIMARY CAREGIVER STATUS UNDER THE COMPASSIONATE USE ACT REQUIRES MORE THAN TRAFFICKING IN MARIJUANA TO MEDICAL MARIJUANA PATIENTS	1
A. Insufficient Evidence Supported Each of the Elements of a Primary-Caregiver Defense	2
B. The Answer to the Question of Whether a Marijuana Seller Can Legally Qualify as a Primary Caregiver Under the Compassionate Use Act Is Integral to Resolution of the Question on Review	4
C. The Decisions of Other Appellate Courts Support the Legal Conclusion That Marijuana Sellers Cannot Qualify as Primary Caregivers	6
D. The Additional Evidence Cited by Appellant for the First Time on Review Is Insufficient to Support a Primary-Caregiver Defense	7
E. Any Error in Failing to Instruct on a Primary-Caregiver Defense Was Harmless	9
CONCLUSION	11

TABLE OF AUTHORITIES

	Page
Cases	
Chapman v. California (1967) 386 U.S. 18	9
People ex rel. Lockyer v. Shamrock Foods Co. (2000) 24 Cal.4th 415	5
People ex rel. Lungren v. Peron (1997) 59 Cal.App.4th 1383	8
People v. Mower (2002) 28 Cal.4th 457	2
People v. Watson (1956) 46 Cal.2d 818	9
People v. Wright (2006) 40 Cal.4th 81	6, 7, 9
Statutes	
Health and Safety Code	
§ 11360	8
§ 11362.5, subd. (e)	2, 8

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **ROGER WILLIAM MENTCH,** Defendant and Appellant.	S148204

INTRODUCTION

In this reply brief on the merits, respondent does not respond to all of appellant's contentions raised in his answer brief on the merits, most of which are fully covered by respondent's opening brief on the merits. This reply is limited to those points where further discussion may be helpful to the Court.

ARGUMENT

PRIMARY CAREGIVER STATUS UNDER THE COMPASSIONATE USE ACT REQUIRES MORE THAN TRAFFICKING IN MARIJUANA TO MEDICAL MARIJUANA PATIENTS

In this reply brief, we limit our discussion to the first question on review as appellant agrees with our position on the last two questions on review. Also, we note that in his answer brief, appellant raises a new issue that is not fairly included in any of the questions on review. Concurrent with his merits brief, he has filed a motion asking for permission to include the new issue on review. We are filing an opposition to appellant's motion concurrently with our reply brief. Should this Court grant appellant's motion, we request the opportunity to present supplemental briefing on the issue presented by appellant.

A. Insufficient Evidence Supported Each of the Elements of a Primary-Caregiver Defense

Appellant contends that he "presented evidence on all elements of the primary caregiver defense, i.e., that (1) he consistently provided medical marijuana only to qualified patients; (2) he was designated as a primary caregiver by those qualified patients; and (3) he provided additional caregiving services." (Ans. Brief at p. 27.) We dispute appellant's characterization of the elements of a primary-caregiver defense. We further disagree that he presented sufficient evidence of each of the elements of such a defense.

"For a person to be a qualified primary caregiver, he or she must be 'designated' as such by a qualified patient, and must have 'consistently assumed responsibility' for the qualified patient's 'housing, health, or safety.'" (*People v. Mower* (2002) 28 Cal.4th 457, 475, citing Health & Saf. Code, § 11362.5, subd. (e).) As we noted in our opening brief, the compassionate use defense would be rendered meaningless if a person could qualify as a patient's primary caregiver simply by providing that patient with marijuana. Accordingly, to qualify for the defense, a person must show that he has consistently assumed responsibility for the patient's housing, health, or safety, separate and apart from the patient's use of marijuana.

The evidence appellant cites in his answer brief is insufficient to support such a defense. First, appellant's provision of marijuana to medical marijuana patients, whether or not undertaken on a consistent basis, was insufficient evidence of caregiving under the statute as a matter of law. Moreover, we dispute appellant's assertion that the evidence showed that he provided marijuana *only* to qualified patients. Rather, appellant himself admitted that he took leftover marijuana to two different marijuana dispensaries—one called "The Third Floor," and the other an "unknown -- unnamed place." (3/10/05 RT 1322.) There was no evidence that the dispensaries sold the marijuana only to

qualified patients. Thus, the evidence showed that appellant engaged in the sale of marijuana to medical marijuana patients as well as *to others*. Such evidence is not sufficient to support a primary-caregiver defense. If it were, then marijuana dealers could circumvent the drug laws by selling to at least one medical marijuana patient. This cannot be the consequence intended by voters when enacting the statute.

Second, there was no evidence before the jury that any of appellant's customers had designated him as their primary caregiver. Although appellant tried to admit evidence that Besson and Eldridge designated him as their primary caregiver *after* he was arrested, the trial court excluded such evidence as irrelevant to the question of whether such designation existed at the time of his arrest. (3/9/05 RT 1194; 3/10/05 RT 1260-1261.) Accordingly, there was no evidence in the record to support this element of the defense.

Third, there is no evidence that appellant supplied caregiving services to qualified patients unrelated to his sales of marijuana. Appellant's advice to his customers about the best strains of his product for their ailments and cleanest ways to use it was merely an offshoot of his sales activity. As such, it was insufficient evidence of caregiving as a matter of law. Moreover, because appellant did not testify as to the frequency of such discussions, there was insufficient evidence supporting the consistency element. As for appellant's attendance at doctors' appointments, appellant himself admitted that his attendance was only sporadic. (3/10/05 RT 1320.) Thus, such evidence also failed to satisfy the consistency element. Finally, as discussed more thoroughly below in Section D, there was no evidence that appellant consistently provided for the housing of Eldridge at the time of his arrest. In sum, there was insufficient evidence of the elements of a primary-caregiver defense.

B. The Answer to the Question of Whether a Marijuana Seller Can Legally Qualify as a Primary Caregiver Under the Compassionate Use Act Is Integral to Resolution of the Question on Review

In our opening brief, we demonstrated how the plain language of the Compassionate Use Act (CUA), the rules of statutory construction, the intent of the voters, and the decisions of other appellate courts support the conclusion that a marijuana seller cannot legally qualify as a primary caregiver within the meaning of the CUA. In response, appellant contends that our discussion of whether a marijuana seller can legally qualify as a primary caregiver is irrelevant to the question on review: whether growing and selling marijuana, counseling its use, and sporadically taking a medical marijuana user to a doctor's appointment, entitles a dealer to a primary caregiver defense under the CUA. (Ans. Brief at pp. 1-3, 17-18.) As we made clear in our opening brief, however, the answer to this legal question is integral to resolution of the question on review. (See Cal. Rules of Court, rule 8.516(a) [noting that the parties' briefs must be limited to the issues on review "and any issues fairly included in them"].) Moreover, we have made it clear from the outset that this issue was critical to resolution of the question on review. (See Petn. for Rev. at pp. 7-12.)

During trial, petitioner relied primarily on evidence that he sold marijuana to medical-marijuana patients as a basis for a primary-caregiver instruction. (3/9/05 RT 1189-1196.) The trial court refused the instruction, finding that a marijuana provider did not meet the statutory definition of a primary caregiver. (3/10/05 RT 1258; 3/11/05 RT 1546-1547.) The Court of Appeal came to a contrary conclusion, determining that "appellant, by consistently growing and supplying physician-approved or prescribed medicinal marijuana for a section 11362.5 patient, was meeting an important health need of several medical marijuana patients," and thus met the legal definition of a primary caregiver

under the CUA. (Opn. at p. 25.) Thus, in the court's view, the "evidence that [appellant] not only grew medical marijuana for several qualified patients, but also counseled them on the best varieties to grow and use for their ailments and accompanied them to medical appointments, albeit on a sporadic basis," was sufficient evidence for a primary-caregiver instruction. (Opn. at p. 25.)

Based on the foregoing, it is apparent that the question of whether a marijuana seller can legally qualify as a primary caregiver played a pivotal role in the decisions of both courts below. Because appellant relied mainly on his sales of marijuana to medical-marijuana patients to support his primary-caregiver defense, each court had to first decide whether such evidence could legally support such a defense, before addressing the factual sufficiency of such evidence. As demonstrated by the courts' conflicting decisions, resolution of the sufficiency-of-the-evidence issue hinged on the answer to the statutory-interpretation question. The trial court's legal determination that a marijuana seller could not claim primary-caregiver status led it to conclude that insufficient evidence supported a primary-caregiver instruction. The Court of Appeal's opposite legal conclusion, on the other hand, led it to consider appellant's sales of marijuana as one of three pieces of evidence supporting a primary-caregiver instruction. Accordingly, the legal question of whether a seller meets the definition of a primary caregiver is fairly included in the question on review.

Appellant insists that juries, not the courts, should "decide the issue of whether a defendant qualifies as a primary caregiver." (Ans. Brief at p. 3.) Appellant, however, confuses the jury's duty of making factual findings with the courts' traditional gatekeeping function of resolving legal questions. Questions of statutory construction are matters of law properly decided by the courts. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) Once a trial court has decided that the evidence presented in support of

a defense is both legally and factually sufficient to be submitted to the jury, then it becomes the jury's duty to decide whether such evidence in fact fits the elements of the defense. When such evidence is legally defective, however, the defendant is not entitled to have his defense heard by the jury.

Appellant insists that the Court evaluate the factual sufficiency of his evidence without reference to its legal relevance. If appellant's argument were followed to its logical conclusion, courts would be required to instruct on a defense no matter how legally irrelevant the supporting evidence, so long as there was enough of it. This is not and cannot be the case. Otherwise, the courts' traditional gatekeeping function would be rendered meaningless.

C. The Decisions of Other Appellate Courts Support the Legal Conclusion That Marijuana Sellers Cannot Qualify as Primary Caregivers

As we demonstrated in our opening brief, all other appellate courts that have considered the issue presented in this case have supported our interpretation of a primary caregiver. Appellant attempts to distinguish those decisions by arguing that they do not address "a set of facts remotely similar to those presented in this case"; namely, the provision of medical marijuana in addition to other caregiving services. (Ans. Brief at p. 27.) However, the point of the decisions cited in our opening brief is that sales of marijuana do not constitute caregiving services. Accordingly, such evidence must be disregarded when evaluating the sufficiency of the evidence to support a primary-caregiver defense. In this case, the only other evidence appellant presented in support of his defense was his marijuana-related counseling and occasional presence at doctors' appointments. As we pointed out in our opening brief, such evidence did not support a primary-caregiver instruction.

Appellant analogizes his case to *People v. Wright* (2006) 40 Cal.4th 81. In *Wright*, the question on review was whether the CUA provided a defense to a

charge of transporting marijuana. (*Id.* at pp. 84-85.) While the case was pending, the Legislature enacted the Medical Marijuana Program (MMP), which extended the compassionate use defense to the crime of transportation of marijuana. (*Id.* at p. 85.) The Court found that because the MMP applied retroactively to cases pending at the time of its enactment, it applied to the case before it, and rendered the question on review moot. (*Id.* at pp. 85, 92, 98.) The Court went on to find that the defendant presented sufficient evidence to support an instruction on the transportation defense, but that the failure to instruct on the defense was harmless. (*Id.* at pp. 96, 98-99.) Appellant asserts that the evidence he presented in support of his defense in this case was far more substantial than the evidence presented by the defendant in *Wright*, which this Court found sufficient to support a transportation defense. (Ans. Brief at p. 32.)

Appellant's analogy to *Wright* is an imperfect one. The question in *Wright* did not concern the scope of the definition of a primary caregiver as in this case. Nor did it concern an analogous question of statutory interpretation. As noted above, the sufficiency of appellant's evidence is inextricably tied to the legal question of whether sales of marijuana constitute caregiving services within the meaning of the CUA. Because *Wright* does not provide an answer to this legal question, it is not persuasive authority on the sufficiency of appellant's evidence in this case.

D. The Additional Evidence Cited by Appellant for the First Time on Review Is Insufficient to Support a Primary-Caregiver Defense

Appellant attempts to bolster his sufficiency-of-the-evidence argument by citing two additional pieces of evidence—evidence that he had been designated as the primary caregiver of two of his customers, and evidence that he provided housing for one of those customers. (Ans. Brief at pp. 28-30.) We disagree as

to the significance of such evidence.

First, appellant contends that the trial court prevented him from presenting evidence that Besson and Eldridge designated him as their primary caregiver. (Ans. Brief at p. 28.) Appellant contends that if such evidence been presented to the jury, it would have been sufficient to support a primary-caregiver instruction. (Ans. Brief at pp. 28-29.) However, as the trial court observed, Besson and Eldridge did not designate appellant as their primary caregiver until after he had already been arrested by the police. (3/9/05 RT 1194.) The trial court properly determined that such evidence did not prove that appellant had been designated as a primary caregiver before his arrest. (3/9/05 RT 1194; 3/10/05 RT 1260-1261.)

As the trial court further noted, a patient's designation of a person as his or her primary caregiver does not alone establish primary-caregiver status within the meaning of the CUA. (3/9/05 RT 1194; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1395-1398.) To qualify as a primary caregiver under the Act, a person must not only be designated as such, but must show that he has consistently assumed responsibility for the housing, health, or safety of the person. (Health & Saf. Code, § 11362.5, subd. (e).) As *Peron* noted, "[a] contrary holding would entitle any marijuana dealer in California to obtain a primary caregiver designation before selling marijuana, and to thereby evade prosecution for violation of [Health and Safety Code] sections 11360 [prohibiting the sale of marijuana] and 11359 [prohibiting the possession of marijuana for sale], which section 11362.5 [the Compassionate Use Act] left fully effective." (*Peron, supra,* 59 Cal.App.4th at p. 1397.)

Second, appellant contends that he was "housing one of the qualified patients, Laura Eldridge," at the time he was arrested. (Ans. Brief at p. 30.) Appellant asserts, "Although Eldridge had previously lived with Besson and provided for his care, she had terminated that caregiving role and moved in with

appellant before the search." (Ans. Brief at p. 30.) Appellant offers no citation to the record to support this remarkable assertion, which he raises for the first time on review.

Our own review of the record reveals the following: Besson testified that at the time of appellant's arrest in June 2003, Eldridge lived with him and took care of him. (5 RT 1173.) Eldridge testified that she did not live with appellant prior to his arrest. (5 RT 1183.) She began dating him approximately one week before he was arrested. (5 RT 1183.) The day before his arrest, she confiscated mushrooms from her son at her home and brought them over to appellant's house for safekeeping. (5 RT 1181.) She and her daughter stayed the night at appellant's house. (5 RT 1183.) The next morning, she was getting her daughter ready for school when the police arrived. (5 RT 1178.) The police told her to take her daughter to school and go home afterward; they told her not return to appellant's house until noon. (5 RT 1180.) Based on this record, there is no support for appellant's claim that he was consistently providing for Eldridge's housing at the time of his arrest.

E. Any Error in Failing to Instruct on a Primary-Caregiver Defense Was Harmless

Appellant contends that if this Court finds error in failing to instruct on the primary-caregiver defense, it should find the error prejudicial. (Ans. Brief at pp. 33-38.) We disagree.

This Court has not yet decided whether the *Chapman*[1/] or *Watson*[2/] standard of harmless-error review applies to a claim of instructional error under the CUA. (*Wright, supra*, 40 Cal.4th at p. 98.) We submit that the Court again need not decide this question because any error in failing to instruct on a

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1. *Chapman v. California* (1967) 386 U.S. 18.

2. *People v. Watson* (1956) 46 Cal.2d 818.

primary-caregiver defense in this case was harmless under either standard.

The evidence in this case showed that appellant was cultivating far more marijuana than he was ingesting or selling to other medical-marijuana patients. Indeed, he admitted that he occasionally took the extra marijuana he was growing to marijuana dispensaries. In addition, the evidence showed that he deposited large sums of money into his bank account that could not be accounted for by his sales of marijuana to medical-marijuana patients alone. Further, despite being unemployed, appellant managed not only to pay the significant costs of his marijuana-growing business, but also to pay for his substantial monthly expenses unrelated to his marijuana-growing venture. Considering the relatively modest income appellant claimed to be making from his sales of medical marijuana, his claim that he was not profiting from sales of marijuana to any other sources was simply incredible. In sum, the evidence showed that appellant was not simply cultivating marijuana for himself and a few other patients, but that he was a commercial grower profiting handsomely from his sales of marijuana to other sources. Based on such evidence, the jury would have rejected appellant's compassionate use defense and convicted him on the same counts.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of the trial court be affirmed.

Dated: August 31, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 2882 words.

Dated: August 31, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
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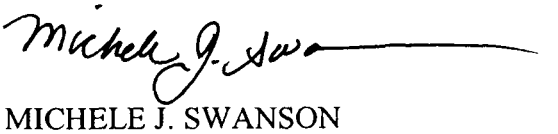

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Mentch**

No.: **S148204**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On September 4, 2007, I served the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 4, 2007, at San Francisco, California.

D. Desuyo
Declarant

Signature