CONTROLLED SUBSTANCE LAW AT A GLANCE[1]

(last revised 12/30/2013)

Division 10 of the Health & Safety Code contains the "California Uniform Controlled Substances Act" (Health & Saf. Code, § 11000). Chapter 6 - "Offenses and Penalties", the focus of this article, categorizes offenses by the type of controlled substance involved and includes (1) Offenses Involving Controlled Substances Formerly Classified as Narcotics, (2) Marijuana, (3) Medical Marijuana Program, (4) Peyote, (5) Miscellaneous Offenses and Provisions, (6) Offenses Involving Controlled Substances Formerly Classified as Restricted Dangerous Drugs, (7) Precursors of Phencyclidine (PCP) and Methamphetamine, and (8) Mushrooms. There are 100 code sections in the eight articles.

Articles 1 and 6 are organized by prohibited activity. This discussion addresses Health and Safety Code sections 11350, 11351, 11351.5, 11352, 11353, 11377, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380 and 11550 criminalizing possession, possession for sale, sale, transportation, manufacturing, offenses involving minors and use.

DRUG SCHEDULES

There are the five Health and Safety Code sections categorizing controlled substances. The sections are referred to as "schedules." (Health & Saf. Code, §§ 11054–11058.) Schedule I (§11054) includes controlled substances that have a high potential for abuse, no currently accepted medical use in the United States, and lack accepted safety for use under medical supervision; Schedule II (§11055) includes controlled substances that have a high potential for abuse, have currently accepted medical use in the United States, or currently accepted medical use with severe restrictions, and abuse of the substance may lead to severe psychological or physical dependence; Schedule III (§11056) includes controlled substances with less potential for abuse than substances in Schedules I and II, that have currently accepted medical use in the United States, and abuse of the substance may lead to moderate or low physical dependence or high psychological dependence; Schedule IV (§11057) includes controlled substances with a low potential for abuse relative to Schedule III substances, that have currently accepted medical use in the United States, and abuse of the substance may lead to limited physical dependence or psychological dependence relative to Schedule III substances. Schedule V includes controlled substances that have a low potential for abuse relative to Schedule IV substances, have a currently accepted medical use in treatment in the United States, and abuse of the substance may lead to limited physical dependence or psychological dependence relative to Schedule IV substances. (2 Witkin, Cal. Crim. Law 4th (2012) Crimes--Public, § 85, p. 744.)

Following this article there are three tables. Table 1 charts selected code sections including the schedules relevant to each crime, elements of the crime, sentencing triad, applicability of Penal Code section 1170, subdivision (h), and whether registration under Health and Safety Code section 11590 is required. Table 2 lists mandatory sentencing enhancements, fees, fines and

[1] This article was drafted by CCAP staff and panel attorney Conness Thompson. CCAP wishes to thank Ms. Thompson for her extensive research on this foundation overview article. As always, counsel is encouraged to conduct their own independent research for current and applicable cases and/or statutory updates in an ever-changing body of law.

probation conditions for the crimes listed in Table 1. Table 3 shows the penalty calculation for representative base fines applicable to the crimes charted in Tables 1 and 2.

SOME ELEMENTARY APPEAL ISSUES:

I. SUFFICIENCY OF THE EVIDENCE

Standard of review:

Always check that the convictions, including enhancements, fees and fines are supported by sufficient evidence. An appellate court "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *Jackson v. Virginia* (1979) 443 U.S. 307.) A challenge to the sufficiency of the evidence applies to any element that must be proven to sustain a conviction for violation of a controlled substance code section. Two commonly challenged elements are (1) the sufficiency of evidence to prove that the defendant had knowledge of the presence of the controlled substance; (2) the sufficiency of evidence to prove that the defendant had dominion and control (possession) over the controlled substance.

Knowledge of presence

An essential element of unlawful possession of a controlled substance is knowledge of its presence. (*People v. Martin* (2001) 25 Cal.4th 1180, 1184.) Only knowing possession is prohibited. (*People v. Rubacalba* (1993) 6 Cal.4th 62, 66.) "Although the possessor's knowledge of the presence of the . . . [controlled substance] must be shown, no further showing of a subjective mental state is required." (*People v. Martin* , *supra*, 25 Cal.4th 1180, 1184–1185.) "Knowledge . . . may be inferred from all the surrounding facts and circumstances." (*People v. Flores* (1958) 162 Cal.App.2d 222, 224 [heroin found in match box under the bathtub in bathroom used by defendant wrapped in note paper from a pad of paper found in defendant's bedroom permitted the inference that the defendant had knowledge of the presence of the match box containing the narcotics under the bathtub].) It is not sufficient that the defendant had access to the place where the narcotics were found. "[P]roof of opportunity of access to a place where narcotics are found, without more, will not support a finding of unlawful possession." (*People v. Redrick* (1961) 55 Cal.2d 282, 285.) *People v. Redrick* cites the following cases where the prosecution failed to prove that the defendant had knowledge of the presence of the controlled substance:

> "*People v. Fernandez* (1959) 172 Cal.App.2d 747, 754–755 (police found a narcotic in a suit which had been cleaned and awaited pressing in defendant's cleaning shop; other persons had access to the suit; defendant had made an unlawful sale of narcotics at the shop five days before; held, there was no evidence that defendant knew the narcotic was in the suit);

"*People v. Tabizon* (1958) 166 Cal.App.2d 271, 273 (defendant was in the room of an acquaintance with whom he had stayed overnight from time to time; a rubber container of narcotics was on top of a chest and another was in a drawer; held, there was no evidence from which guilty knowledge could be inferred);

"*People v. Barnett* (1953) 118 Cal.App.2d 336, 339 (the police gave an operator marked bills with which to buy heroin but did not keep her under surveillance; an hour and a half later she returned with heroin; the police went to defendant's apartment and found the marked bills among other bills in his wallet; defendant said he did not know where he got the marked bills; there was heroin in a hall closet near the apartment; the closet could be opened with any key or a dime; held, 'the evidence is insufficient to prove the defendant sold the heroin to the operator or that he had possession or knowledge of the presence of heroin in the closet');

"*People v. Foster* (1953) 115 Cal.App.2d 866, 868 (defendant was sitting on the right of the front seat of a car driven by A, with B sitting between them; at the sound of a siren of a police car they stopped, all three moved about, and a small package of heroin came from the right front window and fell to the street; each of the three denied that he had thrown or seen anything thrown from the car; held, to infer guilty knowledge of defendant from his testimony that he saw nothing thrown from the car 'would be to permit a conviction on the wildest sort of surmise and conjecture') (*People v. Redrick* (1961) 55 Cal.2d 282, 285–287.)

Dominion or control

The exercise of dominion and control (actual or constructive) requires more than defendant's presence at the scene where the controlled substance is located and more than the defendant's opportunity to access a location where the controlled substance is found. (*People v. Redrick*, *supra*, 55 Cal.2d 282, 285.) *People v. Redrick*, *supra*, 55 Cal.2d 282, 285-287 cites the following cases where the prosecution failed to prove dominion and control:

"*People v. Stanford* (1959) 176 Cal.App.2d 388, 391 (defendant was in the house of a narcotics dealer and probably was in the bathroom with the dealer and another man at the time the latter consummated a sale; held, there was no evidence that the narcotics were under defendant's control);

"*People v. Hancock* (1957) 156 Cal.App.2d 305, 309 (defendant, a user of narcotics, was in the room of another user who threw a narcotic out the window when the police knocked and identified themselves; defendant told the officers he saw his companion throw the object but at the trial testified that he saw nothing thrown; held, the evidence did not show that defendant had dominion over the thrown drug)."

Possession

To prove that a defendant possessed a restricted dangerous drug, the prosecution must establish four elements: (1) the defendant exercised dominion and control over the substance, (2) there

was a usable quantity of the substance, (3) the defendant had knowledge of the substance's presence, and (4) the defendant had knowledge of the substance's dangerous character. (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242.) Possession of a prohibited controlled substance may be established by proof of either actual or constructive possession. (*People v. Williams* (1971) 5 Cal.3d 211, 215.) "Constructive possession occurs when the accused maintains control or a right to control the contraband; possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another." (*Ibid.*) [T]he controlled substance does not actually have to be found on the defendant's person for the defendant to be deemed as having possessed the substance." (*People v. Hurst* (1960) 183 Cal.App.2d 379, 387.)

Possession may also be established where the defendant maintains control or the right to control the location where the controlled substance is physically located. (*People v. Showers* (1968) 68 Cal.2d 639, 643–644.) "Even if the [defendant] does not have exclusive control of the hiding place[,] possession may be imputed if he has not abandoned the narcotic and no other person has obtained possession. (*People v. Cuellar* (1952) 110 Cal.App.2d 273 [defendant buried the narcotic on a public playground covering the hiding place with leaves].)" (*People v. Showers*, *supra*, 68 Cal.2d 639, 644.) Similarly, the defendant is deemed to possess a narcotic substance where another person has actual physical possession of the drug, but holds it subject to the defendant's direction or permission and the defendant's immediate right to exercise dominion and control over the substance. (*People v. Showers*, *supra*, 68 Cal.2d 639, 644.)

Useable amount

To sustain a conviction for possession of a controlled substance, the prosecution must establish that defendant possessed an amount that was usable for consumption or sale. (*People v. Riley* (2010) 185 Cal.App.4th 754, 763.) The prosecution does not have to show that the quantity of drug possessed by the defendant is capable of producing a narcotic effect on the user, only that is was a usable quantity. (*People v. Mardian* (1975) 47 Cal.App.3d 16, 45, disapproved of on unrelated grounds by *People v. Anderson* (1987) 43 Cal.3d 1104.) " '[P]ossession of a minute crystalline residue or narcotic not intended for consumption or sale and useless for either of these purposes is insufficient evidence to sustain a conviction for known possession of a narcotic.' " (*People v. Leal* (1966) 64 Cal.2d 504, 510, quoting *People v. Sullivan* (1965) 234 Cal.App.2d 562, 565.) The usable amount rule "prohibits conviction only when the substance possessed simply cannot be used, such as when it is a blackened residue or a useless trace." (*People v. Rubacalba* (1993) 6 Cal.4th 62, 66.) In proving a usable quantity, the prosecution does not need to establish the purity of the substance or that there was a sufficient amount of the controlled substance to produce a narcotic effect. (*Ibid.*)

On the other hand, a trial court did not err in denying defendant's motion for judgment of acquittal pursuant to Penal Code section 1118.1, at the close of the prosecution's case-in-chief on grounds the prosecution had failed to present evidence of a useable amount. Where the prosecutor simply made a mistake and failed to present evidence that the prosecution had in its possession, the fact that the defendant moved for judgment of acquittal pursuant to section 1118.1 should not categorically prohibit the trial court from exercising the discretion granted to it under Penal Code section 1093 and 1094. Accordingly, the trial court did not abuse its

discretion in allowing the prosecution to reopen its case to present evidence that the quantity of marijuana found in the coin purse was a usable amount. (*People v. Riley* (2010) 185 Cal.App.4th 754.)

Knowledge of nature of the controlled substance

A necessary element of the offense of unlawful possession of a controlled substance is the defendant's knowledge of the nature of the drug in question. (*People v. Martin*, *supra*, 25 Cal.4th 1180, 1184.) However, "[t]he defendant need not know the chemical name or the precise chemical nature of the substance." (*People v. Garringer* (1975) 48 Cal.App.3d 827, 835.)

This element "may be established by circumstantial evidence and such reasonable inferences as may be drawn therefrom." (*People v. Juvera* (1963) 214 Cal.App.2d 569, 573.) For example, a defendant's knowledge of the nature of the substance involved "may be shown by evidence of the defendant's furtive acts and suspicious conduct indicating a consciousness of guilt, such as an attempt to flee or an attempt to hide or dispose of the contraband [citations], or by evidence showing a familiarity with the substance, such as needle marks or other physical manifestations of drug use or instances of prior drug use [citations]." (*People v. Tripp* (2007) 151 Cal.App.4th 951, 956.) A jury could reasonably infer that the defendant knew of the narcotic nature of the cocaine in question based on the fact that it was hidden in a can with a false bottom. (*People v. Rushing* (1989) 209 Cal.App.3d 618, 622, fn. 2.)

A defendant's knowledge of the nature of the controlled substance could reasonably be inferred by the fact that he tried to hide it under the car in a balloon. (*People v. Lopez* (1967) 253 Cal.App.2d 377, 379, 382.) A defendant's knowledge of the nature of the heroin found in his closet could be reasonably inferred where the defendant claimed he had never seen it before and it belonged to his roommate, yet no roommate was ever proved to have existed. (*People v. Ross* (1957) 149 Cal.App.2d 287, 289.)

Possession for sale

To prove possession with intent to sell, the prosecution must prove the defendant had actual or constructive possession with the specific intent to sell it. (*People v. Saldana* (1984) 157 Cal.App.3d 443, 454.) "These elements may be established by circumstantial evidence and any reasonable inferences drawn therefrom." (*People v. Glass* (1975) 44 Cal.App.3d 772, 774.) Possession of cocaine base for sale required that the defendant knew the controlled substance was cocaine base. ((*People v. Muhammeem* (Apr. 10, 2009, D052190) [nonpub. opn.].)[2] See also *People v. Montero* (2007) 155 Cal.App.4th 1170, 1175 (dangerous drug excluding PCP); *People v. Johnson* (1984) 158 Cal.App.3d 850 (PCP)). To convict a defendant of violating one of the code sections prohibiting the possession of a controlled substance for sale, the prosecution must prove that the defendant possessed the controlled substance in question for the purpose of selling it. (*People v. Newman* (1971) 5 Cal.3d 48, 54 disapproved of on unrelated grounds by *People v. Daniels* (1975) 14 Cal.3d 857.) The prosecution must show either that the defendant (1) intended personally to sell the controlled substance, or (2) intended for someone else to sell

[2] There are no published opinions enumerating the elements of Health and Safety Code Section 11351.5.

the controlled substance.[3] (*People v. Parra* (1999) 70 Cal.App.4th 222, 227.)

Intent to sell a prohibited controlled substance may be established by circumstantial evidence. (*People v. Harris* (2000) 83 Cal.App.4th 371, 374.) For example, a police officer experienced in the sale of controlled substances, may give his or her opinion that the substance in question was possessed for sale based on factors such as the quantity involved, packaging, or what constitutes the normal amount for personal use. (*People v. Newman*, *supra*, 5 Cal.3d 48, 53 disapproved of on unrelated grounds by *People v. Daniels* (1975) 14 Cal.3d 857.) Similarly, evidence that the defendant possessed a quantity of heroin in excess of what might reasonably be used for personal consumption, possessed balloons of the type used for packaging heroin for sale, and had people at his house whose arms had needle marks typical of those found on heroin addicts was sufficient to establish defendant's possession of heroin for sale. (*People v. Velasquez* (1970) 3 Cal.App.3d 776, 787.)

Transporting

On October 3, 2013, a bill to amend Health and Safety Code sections 11352 and 11379 was enacted and effective January 1, 2014, provides that violation of the two statutes requires that the drugs being transported are transported for sale. Both statutes add the following two subdivisions:

(C) FOR PURPOSES OF THIS SECTION, "TRANSPORTS" MEANS TO TRANSPORT FOR SALE.
(D) THIS SECTION DOES NOT PRECLUDE OR LIMIT THE PROSECUTION OF AN INDIVIDUAL FOR AIDING AND ABETTING THE COMMISSION OF, OR CONSPIRING TO COMMIT, ANY ACT PROHIBITED BY THIS SECTION."

The changes do not appear to affect the other acts prohibited by the statutes - importing, furnishing, administering or giving away or attempts at those acts. As this article is being written, we expect to have briefing available to challenge a conviction under the old code sections where that conviction is not yet final. A link to the briefing will be provided when it is

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[3] As an aside, *In re Christopher B.* (1990) 219 Cal.App.3d 455, a 4DCA case, was interpreted by *People v. Parra*, from another 4DCA division, as holding "that in order to be convicted of a violation of Health and Safety Code section 11351, defendant needs to possess the controlled substance with the specific intent to sell it himself." (*People v. Parra* (1999) 70 Cal.App.4th 222, 226.) Subsequent unpublished opinions from the 4DCA determined that the *Parra* court misinterpreted *In re Christopher B.* (See e.g. *People v. Thurmond* (Nov. 5, 2004, D043193) [nonpub. opn.] [noting its holding in *In re Christopher B.* was misinterpreted by other courts to mean that a defendant must intend to sell the controlled substance himself and instead agreeing with the holdings in *People v. Consuegra* (1994) 26 Cal.App.4th 1726 and *People v. Parra* (1999) 70 Cal.App.4th 222 that the element of intent to sell may be satisfied where the defendant knows the contraband will be sold by someone else down the distribution chain]; see also *People v. Lopez* (June 2, 2006, D046705) [nonpub. opn.]; *People v. Avila* (July 21, 2005, D043939) [nonpub. opn.].)

available.

Case law before the January 1, 2014 amendments to Health and Safety Code sections 11352 and 11379:

Health and Safety Code sections 11352, 11379, and 11379.5 proscribe a variety of activities related to controlled substances, including transporting for sale, importing into California, selling, furnishing, administering, giving away; or offering to transport, import into California, sell, furnish, administer, or give away; or attempting to import into California or transport.[4] The prosecution must prove that the defendant carried or conveyed a usable quantity of the controlled substance with knowledge of its presence and of its narcotic or dangerous character. Possession is not an essential element of the offense of transporting a controlled substance, as one may transport a controlled substance without possessing it. (See *People v. Rogers* (1971) 5 Cal.3d 129, 134 [possession of a controlled substance is not included within definition of transportation of a controlled substance; thus, one can aid and abet the transportation of controlled substances without possessing them, such as when the controlled substance is in the possession of a passenger].)

"Transporting a controlled substance . . . occurs when a person moves contraband from one place to another." (*People v. Arndt* (1999) 76 Cal.App.4th 387, 398.) "The legislative purpose behind [prohibiting the transportation of controlled substances] is effectuated by discouraging '*any* illicit transportation of controlled substances' to another location, even if the distance is insignificant." (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 684, emphasis in the original.) The applicable code sections "make[] no attempt to quantify the distance that must be traversed." (*People v. Emmal* (1998) 68 Cal.App.4th 1313, 1315–1316.) Nor have the courts "required that the length of travel exceed 'minimal movement.'" (*Id.* at p. 1316, quoting the defendant's quantitative assertion.) "The crux of the crime of transporting is movement of the contraband from one place to another." (*People v. Kilborn* (1970) 7 Cal.App.3d 998, 1002–1003.) "The term 'transport' includes moving illegal drugs from one place to another, even by bicycle." (*People v. LaCross* (2001) 91 Cal.App.4th 182, 185.) It also "encompasses moving controlled substances from one place to another by walking." (*People v. Ormiston*, *supra*, 105 Cal.App.4th 676, 685.) Before January 1, 2014, the offense of illegal transportation included transportation of contraband for personal use. (*People v. Cortez* (1985) 166 Cal.App.3d 994, 998.)

Standard of Prejudice

There is no need to establish prejudice when the issue is sufficiency of the evidence to prove an element of the crime. Retrial is barred when a conviction is reversed for insufficient evidence. (*Burks v. United States* (1978) 437 U.S. 1, 18 [57 L. Ed. 2d 1, 98 S. Ct. 2141]; *People v. Pierce* (1979) 24 Cal. 3d 199, 209 - 210.)

II. LESSER INCLUDED OFFENSES

"In California, a single act or course of conduct by a defendant can lead to [multiple] convictions [stemming from the charged offenses]." (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) "But a judicially created exception to this rule prohibits multiple convictions based on necessarily included offenses." (*Ibid.*) "Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117.) The lesser included offense analysis that uses the statutory elements is referred to as the "elements test;" using the facts alleged in the accusatory pleading is called the "accusatory pleading test." (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) "[O]nly a statutorily lesser included offense is subject to the bar against multiple convictions in the same proceeding." (*People v. Scheidt* (1991) 231 Cal.App.3d 162, 165–166.) "If the evidence supports the verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the lesser offense must be reversed." (*People v. Moran* (1970) 1 Cal.3d 755, 763.)

On appeal, lesser included offenses potentially give rise to two different issues: (1) Whether a defendant was improperly convicted of both a lesser included and greater offense; (2) Whether the trial court failed to instruct the jury on a qualifying lesser included offense.

A. Conviction of Both Greater and Lesser Included Offenses

Simple possession of a controlled substance (Health & Saf. Code, §§ 11350, 11377) is a lesser included offense of possessing for sale (Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5) (*People v. Oldham* (2000) 81 Cal.App.4th 1, 16.)

Depending on the facts of a particular case, simple possession (Health & Saf. Code, §§ 11350, 11377) and possession for sale (Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5) may or may not be lesser included offenses of transporting (Health & Saf. Code, § 11352, 11379, 11379.5.) "Although possession is commonly a circumstance tending to prove transportation, it is not an essential element of that offense and one may 'transport' marijuana or other drugs even though they are in the exclusive possession of another." (*People v. Rogers* (1971) 5 Cal.3d 129, 134.) Therefore, under the elements test, possession of a controlled substance is never a lesser included offense of transportation of a controlled substance. (*Ibid*.)

In *People v. Kilborn* (1970) 7 Cal.App.3d 998 the defendant was convicted by jury of possession, possession for sale, and transportation. On appeal, defendant asserted that his conviction for possession was improper as it was a lesser included offense either of the conviction for possessing for sale or transportation. (*Id.* at p. 1003.) The reviewing court agreed, noting that a defendant "cannot be convicted of both the greater and the lesser included offense." (*Ibid.*) The court reversed the conviction for the lesser offence of possession . (*Ibid.*)]

In *People v. Watterson* (1991) 234 Cal.App.3d 942, 947 appellant argued she was unlawfully convicted of both possession for sale (§11352) and transporting (§11352) because possession was a necessarily included offense of and incidental to transporting the drugs. The court

affirmed both convictions finding that under the elements test, because possession was not a necessary element of transportation, possession for sale was not a necessarily included lesser offense of transportation.

There is a split of authority regarding lesser included offenses for the offense of selling a controlled substance. The split is related to whether simple possession and possession with the intent to sell are lesser included offenses of selling. This split is discussed below. The weight of the more recent DCA opinions (the majority of which are unpublished) finds that simple possession (Health & Saf. Code, §§ 11350, 11377) and possession for sale (Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5) are *not* lesser included offenses of selling (Health & Saf. Code, §§ 11352, 11379, 11379.5).

In *People v. Rosales* (1964) 226 Cal.App.2d 588, 2d District, div.4, the court held that possession is a lesser included offense of selling. "To determine whether an offense is necessarily included in the offense charged the test is whether the offense charged cannot be committed without committing it." (*People v. Rosales* (1964) 226 Cal.App.2d 588, 591.) "No sale of narcotics is possible without possession, actual or constructive. [Citation.] Since every sale includes possession, the crime of illegal possession of narcotics is therefore a necessarily included offense in the offense of sale of narcotics." (*Id.* at p. 592.)

In *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1523–1524, 4th Dist., div. 3, the court held that possession is not an element of selling. "Relying on dicta in *People v. Mitchell* (1975) 53 Cal.App.3d 21, 24, [" 'Possession' offenses are normally included offenses within the offense of sale of amphetamines"], [defendant] first asserts the trial court erred when it failed to instruct sua sponte on simple possession. [Citations.]) But, as the *Mitchell* opinion itself illustrates, simple possession of a controlled substance cannot be a necessarily lesser included offense of selling or offering to sell - although it could be a lesser related offense [citation] - because the former crime contains elements a sales offense does not: knowing possession of a usable quantity. [Citation.] A conviction for selling controlled substances does not require proof of possession at all, much less possession of a usable quantity. [Citations.]"

In *People v. Boykins* (July 21, 2008, B199035) [nonpub. opn.] the court held that possession and possession with intent to sell are not lesser included offenses of selling. "Prompted by an inquiry from the court, [defendant's] counsel requested instructions on simple possession and possession with intent to sell as lesser included offenses of selling, transporting or offering to sell a controlled substance, the crime with which [defendant] was charged. The court's refusal to give the instructions was proper. [¶] . . . Simple possession and possession with intent to sell,. . ., are not lesser included offenses of the crime of selling or offering to sell a controlled substance, at least when that crime is charged using only the statutory language, as here, because [defendant] could have offered the cocaine for sale or sold it to [the officer] without ever possessing it. [Citation ["[A] conviction for the greater offense of selling the cocaine (count one) does not require, as one of its statutory elements, the lesser offense of possessing the cocaine for sale (count two); possession is not an essential element of the sale offense. For example, one can broker a sale of a controlled substance that is within the exclusive possession of another."]; see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [possession of controlled substance "cannot be a necessarily lesser included offense of selling or offering to sell ... because

the former crime contains elements a sales offense does not: knowing possession of a usable quantity"].)"

Standard of Review

"Under California law, a lesser offense is necessarily included in a greater offense if … the statutory elements of the greater offense … include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Pearson* (1986) 42 Cal.3d 351, 355; *see also People v. Birks* (1998) 19 Cal.4th 108, 117. Imposing a sentence on a lesser included offense is an unauthorized sentence. (*People v. Kilborn*, *supra*, 7 Cal.App.3d 998, 1003) An unauthorized sentence presents a question of law. (*People v. Welch* (1993) 5 Cal.4th 228, 235.) An appellate court reviews questions of law de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 894.)

B. Failure to Instruct Sua Sponte on Lesser Included Offense

"A defendant may be convicted of an uncharged crime if, but only if, the uncharged crime is necessarily included in the charged crime." (*People v. Reed*, *supra*, 38 Cal.4th 1224, 1227; Pen. Code, §1159.) "The accusatory pleading test arose to ensure that defendants receive notice before they can be convicted of an uncharged crime." (*Id.* at p. 1229.) "[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "Even if defense counsel objects, or in the absence of a request, the trial court must instruct the jury on all lesser included offenses 'when the evidence raises a question as to whether all of the elements of the charged offenses were present,' but not when there is no evidence the offense was less than that charged. [Citations.]" (*People v. Saldana* (1984) 157 Cal.App.3d 443, 453–454.**)**

In *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 the court held that possession and possession for sale are lesser included offenses of selling. "Both possession for sale, and simple possession, are lesser included offenses of the sale of cocaine under the facts of this case. [Citations.] The record reflects without contradiction that appellant arrived at the rest stop with a kilo of cocaine in his automobile. The evidence in support of the sales allegation, while not insufficient, was subject to interpretation because the jury could have concluded that appellant never took possession of the money such that the sale was never completed. The jury could have discounted the actual completion of a sale and instead found that appellant either possessed the cocaine for purposes of sale or, given the contradictory evidence of any prior discussion of price, that appellant simply possessed the narcotics. Thus, the trial court's failure to give, sua sponte, instructions on the lesser included offenses constitutes error."

In *People v. Magana* (1990) 218 Cal.App.3d 951, 954–955 the defendant argued on appeal that his conviction for simple possession of heroin and cocaine should be reversed because simple possession is a lesser included offense of possession for sale. The convictions for both possession and possession for sale were based on the same contraband. The Attorney General argued that reversal was not necessary because the conviction for simple possession "could have been based on possession of some of the contraband while conviction of possession for sale could have been based on the possession of the remaining drugs." The reviewing court noted that

while the Attorney General's argument was theoretically true, "a serious defect in the People's argument is that the jury was never alerted to the possibility of such a subtle division of the contraband. Consequently we can only presume the convictions for possession for sale and the conviction for simple possession were based on the same evidence." The defendant's conviction for simple possession was reversed.

There are no published cases discussing either controlled substances formerly classified as narcotics or as restricted dangerous drugs and a trial court's sua sponte failure to instruct on a lesser included offense. However, the unpublished case discussed below exemplifies the hurdle of showing prejudice as a result of a failure to instruct.

People v. Watson (July 26, 2010, H033346) [nonpub. opn.] "[D]efendant contends, and the Attorney General concedes, that the trial court erred in failing to instruct the jury sua sponte on how to proceed if it was convinced beyond a reasonable doubt that defendant possessed cocaine base, but entertained a reasonable doubt about convicting him for the greater [offense of possession for sale], as opposed to the lesser included, drug offense . . . We agree that the trial court erred in failing to give the referenced instruction . . . [¶] . . . [however] we reject defendant's claim that the error was one of federal constitutional magnitude, requiring application of the standard announced in *Chapman v. California* (1967) 386 U.S. 18. It is settled that 'in a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses ... supported by the evidence must be reviewed for prejudice exclusively under *Watson.*' [Citations.] . . . [¶] . . . [¶] . . . Here, it is not reasonably probable that defendant would have been convicted of simple possession rather than possession for sale had the error not occurred. Our examination of the entire cause finds no evidence suggesting defendant possessed the crack cocaine for personal use. As the defense emphasized during closing argument, the evidence showed defendant "didn't have any drug habit" . . . [¶] . . . Evidence that defendant possessed the crack cocaine for sale, on the other hand, was substantial."

Standard of Review

"We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense. A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, that is, evidence that a reasonable jury could find persuasive, which, if accepted, would absolve [the] defendant from guilt of the greater offense but not the lesser." (*People v. Licas* (2007) 41 Cal.4th 362, 366, internal quotation marks and citations omitted; *People v. Waidla* (2000) 22 Cal.4th 690, 733.)

Standard of Prejudice

"[I]n a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under *Watson.* A conviction of the charged offense may be reversed in consequence of this form of error only if, "after an examination of the entire cause, including the evidence" (Cal. Const., art. VI, § 13), it appears "reasonably probable" the defendant would have obtained a more favorable outcome had the error not occurred ([*People v.*] *Watson* (1956) 46 Cal.2d 818, 836)." (*People v. Breverman* , *supra*, 19 Cal.4th 142, 178.)

PROPOSITION 36 (Pen. Code, § 1210 et seq.), PENAL CODE SECTION 1000 (DEFERRED ENTRY OF JUDGMENT) AND DRUG COURT

California has three drug diversion programs that provide alternatives to incarceration: Proposition 36[5], Penal Code section 1000 [Deferred Entry of Judgment], and Drug Court. All three allow qualified defendants to participate in a drug treatment program in lieu of incarceration.

Proposition 36

"In November 2000, the voters of California passed Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, codified at [Penal Code] sections 1210, 1210.1, and 3063.1."[6] (*People v. Goldberg* (2003) 105 Cal.App.4th 1202, 1206.) "The purpose of [Prop 36 was] '[t]o divert from incarceration into community-based substance abuse treatment programs non-violent defendants, probationers and parolees charged with simple drug possession or drug use offenses.' (Prop.36, § 3.)" (*People v. Davis* (2003) 104 Cal.App.4th 1443, 1448.)

"Proposition 36 requires the court to grant probation and drug treatment to any defendant convicted of a nonviolent drug possession offense and prohibits incarceration as a condition of probation. (§ 1210.1, subd. (a).)" (*People v. Esparza* (2003) 107 Cal.App.4th 691, 693.) "When a defendant is eligible for Proposition 36 treatment, it is mandatory unless he is disqualified by other statutory factors, including refusing drug treatment. (§ 1210.1, subd. (b)(4).)" (*Id.* at p. 699.) "Drug treatment services may not exceed 12 months or no more than 18 months for follow-up care. (§ 1210.1, subd. (c)(3).)" (*Id.* at p. 696.) "Significantly, qualifying drug programs may not be located in a prison or jail facility. (§ 1210, subd. (b).)" (*Ibid.*) "Placement of eligible defendants in Proposition 36 programs is not a discretionary sentencing choice made by the trial judge." (*Id.* at p. 699.)

"If the defendant completes such drug treatment and complies with the other conditions of probation, 'the conviction on which the probation was based shall be set aside and the court shall dismiss the indictment, complaint, or information against the defendant.' (§ 1210.1, subd. (e).)" (*People v. Parodi* (2011) 198 Cal.App.4th 1179, 1183.)

Penal Code section 1210.1,"[s]ubdivision (b)[,] sets forth five exceptions to eligibility for otherwise eligible defendants, which can be summarized as: 1) conviction of prior strike offenses within five years; 2) convictions in the same proceeding for a non drug misdemeanor or for any

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[5] Sometimes referred to as "old Prop 36" to distinguish it from the recent Proposition 36 that amended the Three Strikes Law, this proposition refers to the voter-passed initiative called the Substance Abuse and Crime Prevention Act of 2000. (*People v. Goldberg* (2003) 105 Cal.App.4th 1202, 1206.)

[6] Division 10.8 of the Health and Safety Code, commencing with section 11999.4, additionally established the Substance Abuse Treatment Trust Fund, pursuant to Proposition 36. (*People v. Davis* (2003) 104 Cal.App.4th 1443, 1446.)

felony; 3) firearm involvement; 4) refusal of drug treatment; and 5) two prior failures in Proposition 36 treatment programs and proof of unamenability to drug treatment. (§ 1210.1, subd. (b).)" (*People v. Esparza*, *supra*, 107 Cal.App.4th 691, 696.)

Penal Code section 1000

Penal Code section 1000, also referred to as diversion and deferred entry of judgment program, "provides that certain first-time drug offenders who meet specified conditions may, with the approval of the district attorney, bypass the normal criminal process and enter a drug treatment program." (*Terry v. Superior Court* (1999) 73 Cal.App.4th 661, 663–664.) "If diversion is successfully completed, the charges are dismissed and the defendant is spared 'the stigma of a criminal record.' [Citations.]" (*People v. Ormiston*, *supra*, 105 Cal.App.4th 676, 690.) "The legal effect of diversion is thus not the release of the defendant, but instead the suspension of criminal proceedings while the diversion program continues." (*Ibid.*)

Pursuant to Penal Code section 1000, subdivision (a), to qualify for diversion, the defendant must be charged with violating a controlled substance code section related to personal use of a controlled substance. The two qualifying code sections relevant to this article are Health and Safety Code section 11350 (possession/narcotic) and 11377 (possession/dangerous). (Pen. Code, § 1000, subd. (a).) If a defendant is charged with one of these of these offenses, all of the following must be true in order for the defendant to qualify for diversion: (1) The defendant has no conviction for any offense involving controlled substances prior to the alleged commission of the charged offense (2) The offense charged did not involve a crime of violence or threatened violence; (3) There is no evidence of a violation relating to narcotics or restricted dangerous drugs other than a violation of the sections listed in this subdivision; (4) The defendant's record does not indicate that probation or parole has ever been revoked without thereafter being completed; (5) The defendant's record does not indicate that he or she has successfully completed or been terminated from diversion or deferred entry of judgment pursuant to this chapter within five years prior to the alleged commission of the charged offense; (6) The defendant has no prior felony conviction within five years prior to the alleged commission of the charged offense." (Pen. Code, § 1000, subd. (a).)

The assessment of eligibility for diversion is made by the district attorney. (*People v. Sturiale* (2000) 82 Cal.App.4th 1308, 1313; Pen. Code, § 1000, subd. (b).) If a defendant is found eligible for diversion, the trial court sets a hearing for deferred entry of judgment. (Pen. Code, § 1000, subd. (b).) Following the deferred entry of judgment, the court grants a referral to a qualifying drug treatment program. (Pen. Code, § 1000, subd. (c).) As part of the defendant's diversion, he or she may be subject to random drug testing. (Pen. Code, § 1000, subd. (e).) If a defendant is found to be ineligible for diversion, his or her sole remedy is a post-conviction appeal. (Pen. Code, § 1000, subd. (b).)

Drug Court

"Drug Courts are specially designed court calendars that provide an alternative to traditional criminal justice prosecution for non violent drug-related offenses. These courts combine close

judicial oversight and monitoring with probation supervision and substance abuse treatment services."

"Adult drug courts provide access to treatment for substance-abusing offenders in criminal, dependency, and family courts while minimizing the use of incarceration. They provide a structure for linking supervision and treatment with ongoing judicial oversight and team management." (*What is Drug Court?* http://www.courts.ca.gov/5979.htm [as of June 18, 2013].)

Pending/Recent California/United States Supreme Court Issues

Always check the recent and pending issues in both the California and United States Supreme Courts. CCAP maintains a directory of such cases at: http://www.capcentral.org/high_court/index.asp. In addition to CCAP's resource, the California Supreme Court maintains a list of pending issues, which can be found at: http://www.courts.ca.gov/13648.htm. For information on cases pending in the United States Supreme Court, that website directs viewers to the American Bar Association's webpage for its publication "Preview," which is subtitled "Comprehensive Coverage of the U.S. Supreme Court." The link is: http://www.americanbar.org/publications/preview_home/alphabetical.html. Unfortunately, this site is organized by case, not issue, but there is a wealth of information including questions presented, merit briefs, and amicus briefs. Each case also includes a "source" link, which directs the viewer to the U.S. Supreme Court's docket for that case.

Other Resources

"Felony Sentencing After Realignment" Article

While not dealing particularly with controlled substance offenses, the "Felony Sentencing After Realignment" article by retired judge Richard Couzens and Justice Tricia Bigelow has useful information on how Realignment affected certain nonviolent felonies, including a number of Health and Safety Code sections related to controlled substances. Appendix I in the article details which felonies are now punishable in county jail versus state prison. This article is available at: http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf or though CCAP's website.

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