Filed 1/22/10

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>DARYL LAWRENCE MORET, Jr. ,<br>Defendant and Appellant. | A123591<br><br>(Solano County<br>Super. Ct. No. FCR257706)<br><br>**ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]** |

THE COURT:

It is ordered that the published opinion filed herein on December 28, 2009, be modified as follows:

1. On page 33 of the Dissenting Opinion of Kline, P.J., at the end of the first full sentence in part V, ending with the words ". . . appellant's right to use marijuana is protected by the CUA," add as footnote 10 the following footnote, which will not require renumbering as there are no subsequent footnotes:

> [10] Because Justice Haerle speaks only for himself on this issue and his interpretation of section 11362.795 is therefore not authoritative, it is appropriate to explain why the portions of his opinion and mine addressing this statute were not excluded from the opinions certified for publication. First, though section 11362.795 was enacted seven years ago, it has never previously been interpreted in a published opinion. The statute has, however, been interpreted and applied in a significant number of unpublished and therefore noncitable opinions. (Cal. Rules of Court, rule 8.1115.) Because published opinions construing the statute do not exist, and the unpublished opinions that do are easily obtained by interested lawyers and judges, the unpublished opinions may influence the strategy of counsel and the decisions of trial and perhaps even appellate courts. The existence for a long period of time of an underground body of law on the meaning of section 11362.795 (to which some members of this panel have admittedly contributed) is injudicious. Second, the Rules of Court justify publication of an opinion where it

> "[i]s accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law" (rule 8.1105(c)(9)), and this is particularly the case where, as here, the opinion invokes a rule of law previously overlooked in published opinions. (See rule 8.1105(c)(8).) Though Justice Haerle's interpretation of section 11362.795 and mine have no precedential value, we publicize the exegetical problem, identify and advance conflicting views, and thereby underscore the need for and hopefully facilitate an authoritative judicial resolution.

There is no change in the judgment.

Appellant petitions for rehearing in part on the ground that Government Code section 68081 compels us to grant rehearing because the parties were never afforded an opportunity to brief the application to this case of Health and Safety Code section 11362.795. We do not agree. Government Code section 68081 applies only where a decision is "*based upon* an issue which was not proposed or briefed by any party on appeal." (Italics added.) The majority opinion in this case is "based upon" appellant's waiver of any claimed right to use marijuana for medicinal purposes while on probation, not upon Health and Safety Code section 11362.795. (See *Plumas County Dept. of Child Support Services v. Rodriguez* (2008) 161 Cal.App.4th 1021, 1029, fn. 1.) With respect to Health and Safety Code section 11362.795, the majority opinion expresses the view of only one member of the panel. Accordingly, the petition for rehearing is denied.

Dated: _____

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Kline, P.J.

Trial Court: Superior Court of Solano County

Trial Judge: Hon. Peter B. Foor

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| Attorney for Appellant | Robert L.S. Angres |
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