

OCT 31 2005

COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE Deputy Clerk

THE CITY OF GARDEN
GROVE, a municipal corporation

Petitioner

v.

ORANGE COUNTY SUPERIOR
COURT

Respondent

FELIX KHA,

Real Party In Interest

Civil No.

Orange County Superior Court
No. GG98995

Superior Court Judge
Honorable Linda S. Marks
Department: W3
Telephone: (714) 896-7142

IMMEDIATE RELIEF REQUESTED
SEPTEMBER 1, 2005 ORDER GRANTING PETITION FOR
RETURN OF PROPERTY

VERIFIED PETITION FOR WRIT OF MANDATE, PROHIBITION,
OR OTHER APPROPRIATE RELIEF; AND MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT THEREOF

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1. INTRODUCTION

Petitioner City of Garden Grove (hereinafter "Petitioner") is caught in the middle of a conflict between state and federal law on an issue of significant public importance. California's Compassionate Use Act (CUA) exempts an individual, under limited circumstances, from prosecution in state court for possession or cultivation of medical marijuana. The federal Controlled Substances Act (CSA) does not recognize such an exception, however, and possession of marijuana, whether for medical purposes or not, is a crime under federal law. In an abuse of its discretion, a state court has ordered Petitioner to return marijuana to a person who may be deemed to lawfully possess it under state law, but not federal law. If Petitioner does not comply with the order and return the marijuana, it is subject to a contempt order in the state court. However, if Petitioner does comply with the order and return the marijuana, it will be returning illegal contraband to a defendant in violation of federal law. This is a troubling issue for Petitioner and probably other police agencies throughout the state; this is especially true given the conflicting law in this area.

In 2005, a Police Officer from the Garden Grove Police Department stopped and cited Real Party in Interest Felix Kha (hereinafter "Kha") for failing to stop for a red traffic signal in violation of Vehicle Code section 21453(a), and for having marijuana (less than an ounce) in his vehicle in violation of Vehicle Code section 23222(b). (Exhibit D) The officer seized the marijuana and issued Kha a citation. Kha initially entered not guilty pleas on both counts.

Eventually, Kha moved to withdraw his not guilty plea as to the first count (Vehicle Code section 21453(a)). Kha also requested a

return of the confiscated marijuana. (Exhibit E) Kha thereafter presented a document to the trial court entitled "Physician's Statement" authored by Phillip A. Denney, M.D. (dated June 1, 2005). In substance, Dr. Denney opined that Kha suffered from an unspecified serious medical condition that may benefit from the use of medical marijuana. The Physician's Statement also contained a signature line wherein Kha acknowledged under penalty of perjury that marijuana is illegal under federal law. (Exhibit B)

Petitioner is informed and believes that the trial court directed a Deputy District Attorney to telephone Dr. Denney to confirm the authenticity of the Physician's Statement. After Dr. Denney confirmed the contents of the subject statement and its authenticity, the People dismissed the possession charge (Vehicle Code section 23222(b)), but opposed Kha's request for the return of the marijuana.

On September 1, 2005, the trial court ordered the City to return the marijuana to Kha. The record is sparse, and it is unclear under what authority the court ordered return of the property. Petitioner presumes, however, that the court's order was based on application of California's Compassionate Use Act ("CUA"), as codified in Health and Safety Code section 11362.5, to Health and Safety Code section 11473.5 and/or Penal Code section 1538.5.

Petitioner respectfully submits that the trial court (hereinafter "Respondent") abused its discretion in ordering the return of Kha's marijuana because possession of marijuana is a criminal offense under the federal CSA. The marijuana is illegal contraband to which Kha has no right, and which he cannot "lawfully possess" within the meaning of Health and Safety Code section 11473.5. In fact,

Petitioner submits that the Respondent court had a mandatory duty to order the destruction of the marijuana pursuant to the express provisions of section 11473.5.

Petitioner further submits that the state law on which the Respondent court presumably grounded its order is in direct conflict with, and thus preempted by, federal law. The United State Supreme Court recently upheld a commerce clause challenge to the CSA's prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes under California's CUA, and reiterated the long standing principle that federal law prevails when it is in conflict with state law. (See, Gonzales v. Raich (2005) 125 S.Ct. 2195; 162 L. Ed. 2d 1 (2005))

The CSA preempts the CUA under the Supremacy Clause of the United States Constitution. Even short of full preemption of the CUA, however, the CSA would certainly preempt any provision in state law providing for the return of marijuana seized by law enforcement, the possession or distribution of which is illegal under federal law. A writ of mandate must therefore issue directing the Respondent court to rescind its September 1, 2005 order requiring the return of the marijuana to Kha, and to enter a new order commanding Petitioner to destroy the marijuana.

2. PETITION

Petitioner alleges the following:

1. Petitioner is a public entity duly existing under the Constitution and statutes of the State of California. Petitioner (including the Garden Grove Police Department) currently possess approximately 8.1 grams of medical marijuana that belonged to Real

Party in Interest Felix Kha.

2. On Friday, June 10, 2005, an Officer from the Garden Grove Police Department stopped and cited Kha for failing to stop for a red traffic signal in violation of Vehicle Code section 21453(a), and for having less than one ounce of marijuana in his vehicle in violation of Vehicle Code section 23222(b). The Garden Grove Police Officer issued Defendant Citation No. GG98995, and ordered him to appear for Arraignment on Thursday, August 25, 2005; Defendant subsequently entered not guilty pleas on both counts, and Commissioner Kenneth I Schwartz set a pre-trial conference for August 31, 2005. (Appendix, Exhibit "A") Neither the People nor Petitioner appeared for or participated in Defendant's Arraignment.

3. On Wednesday, August 31, 2005, Defendant moved to withdraw his not guilty plea as to the first count (Vehicle Code section 21453(a)), and the Honorable Linda A. Marks imposed a sentence on that charge alone. Kha also requested a return of the confiscated marijuana. Deputy District Attorney Tate McCallister appeared on behalf of the People. Petitioner did not appear or participate in the pre-trial conference. Judge Marks did not rule on Kha's request for the return of confiscated/seized marijuana, and continued the pre-trial conference to September 1, 2005. (Appendix, Exhibit "A", p. 1)

4. On September 1, 2005, Kha returned to court at which time he presented a document entitled, "Physician's Statement," dated June 1, 2005 and authored by Phillip A. Denney, M.D. In substance, Dr. Denney opined that Kha suffered from an unspecified serious medical condition that may benefit from the use of medical cannabis. Dr. Denney's Physician's Statement also contained a

signature line wherein Kha acknowledged under penalty of perjury that cannabis is illegal under federal law. (Appendix, Exhibit "B") Deputy District Attorney Tate McCallister appeared on behalf of the People. Petitioner did not appear or participate in the continued pre-trial conference.

5. Petitioner is informed and believes that Judge Marks later directed Mr. McCallister to telephone Dr. Denney to confirm the authenticity of the Physician's Statement that Kha presented to the court. Petitioner is further informed that Mr. McCallister succeeded in reaching Dr. Denney, and that the doctor confirmed the contents of the subject statement and its authenticity. Mr. McCallister thereafter dismissed the possession charge (Vehicle Code section 23222(b)), but opposed Kha's request for the return of approximately nine grams of marijuana. (Appendix, Exhibit "A", p. 2) Judge Marks subsequently ordered the return of the marijuana pursuant to CUA, and presumably Health & Safety Code section 11473.5 [all seizures of controlled substances . . . shall be destroyed by order of the court, unless the court finds that the controlled substances . . . were lawfully possessed by the defendant] and/or Penal Code section 1536 [all property or things taken on a warrant must be retained by the officer . . . subject to the order of the court]. (Appendix, Exhibit "C")

6. Petitioner respectfully submits that Judge Marks (hereinafter "Respondent") abused her discretion in ordering the return of Kha's cannabis inasmuch as the CSA makes it a criminal offense to manufacture, distribute, or possess marijuana unless it is being used as part of a Food and Drug Administration ("FDA") pre-approved research study. Any conflict between the CUA and the

CSA must be resolved in favor of the CSA under the Supremacy Clause of the United States Constitution.

7. Through this petition, Petitioner seeks review of Respondent's order on September 1, 2005, directing the return of approximately 8.1 grams of marijuana to Kha. Respondent's order, if allowed to stand, would result in Petitioner possibly violating a federal law that specifically makes it a criminal offense to manufacture, distribute, or possess marijuana unless it is being used as part of a Food and Drug Administration ("FDA") pre-approved research study.

9. Petitioner has a beneficial interest in the issuance of a writ of mandate since it is the custodian of the confiscated cannabis, and it may be viewed as aiding and abetting the violation of the CSA by returning a Schedule I narcotic (under state and federal law) to Kha.

10. Petitioner does not have a plain, speedy or adequate remedy at law to protect itself from potentially violating the CSA other than the filing of this petition for writ of mandate. Moreover, Defendant does not have a direct appeal from Respondent's order of September 1, 2005. If Respondent's order is permitted to stand, then Petitioner could be viewed as aiding and abetting the violation of the CSA.

Wherefore, Petitioner prays for the following:

1. A peremptory writ of mandate, prohibition or other appropriate writ directing Respondent to vacate its order of September 1, 2005, and directing Respondent to deny Kha's Petition for Return of Property;


2. Alternatively, first issue an alternative writ directing

Respondent to show cause why it should not be directed to vacate its order of September 1, 2001, and upon return of the alternative writ, issue a peremptory writ as set forth in paragraph 1;

- 3) Award Petitioner its costs of suit in this proceeding; and
- 4) Grant such other relief as the Court may deem just and appropriate.

Dated: October 31, 2005

WOODRUFF, SPRADLIN & SMART
A Professional Corporation

By: 
JOHN R. SHAW
MAGDALENA LONA-WIANT
Attorneys for Petitioner CITY OF
GARDEN GROVE

3. VERIFICATION

State of California)
County of Orange) ss.

I, Magdalena Lona-Wiant, being sworn, declare as follows:

I am a member of the law firm of Woodruff, Spradlin & Smart, counsel for Petitioner City of Garden Grove ("Petitioner"). I have personally reviewed and am familiar with the records, files and proceedings which are described in and which are the subject of the present petition, and am informed and believe that the facts set forth in this petition are true and correct. Furthermore, this petition is deemed verified by the provisions of Code of Civil Procedure section 446.

I declare under the penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed this 31st day of October 2005, at Orange, California.


MAGDALENA LONA-WIANT

4. MEMORANDUM OF POINTS AND AUTHORITIES

A. Factual Background

On June 10, 2005, a City of Garden Grove peace officer stopped and cited Real Party in Interest Felix Kha (hereinafter "Kha") for violating Vehicle Code section 21453(a) by failing to stop for a red light. During the stop, approximately 8.1 grams of marijuana was found in the vehicle and Kha was also cited for violation of Vehicle Code section 23222(b), unauthorized possession of marijuana while driving a motor vehicle. Kha was issued a Promise to Appear, Citation No. GG98995, and ordered to appear for arraignment. Kha subsequently pled not guilty to both counts.

At the pre-trial conference, Kha moved to withdraw his not guilty plea as to the first count (Vehicle Code section 21453(a)), and the Honorable Linda A. Marks imposed a sentence on that charge. Kha requested a return of the confiscated/seized marijuana. Deputy District Attorney Tate McCallister appeared on behalf of the People of the State of California (hereinafter "People"). Petitioner did not appear or participate in the pre-trial conference. Judge Marks did not rule on Kha's request for the return of confiscated/seized marijuana, and continued the pre-trial conference to September 1, 2005.

On September 1, 2005, Kha returned to court and presented a document entitled, "Physician's Statement." This statement was signed by Phillip A. Denney, M.D. who certified that Kha may benefit from the use of medical cannabis for his unspecified serious medical condition. Kha had signed the Physician's Statement and acknowledged under penalty of perjury that he understood that cannabis remains illegal under federal law.

Petitioner is informed and believes that during the continued pre-trial conference, a Deputy District Attorney telephoned Dr. Denney and was able to confirm the authenticity of the Physician's Statement. Petitioner is further informed and believes that the People dismissed the possession charge (Vehicle Code section 23222(b)), but opposed Kha's request for the return of approximately 8.1 grams of medical cannabis. Despite the People's objection, Judge Marks ordered the return of the marijuana.

Petitioner has not returned the marijuana to Kha, asserting that under federal law, Kha's possession of the marijuana is illegal. Petitioner is now subject to a possible contempt order if it does not aid and abet a violation of the federal CSA.

B. Issue Presented

This writ raises the following issue:

1. Did Respondent error in finding that marijuana was not contraband unlawfully possessed by Kha?
2. Did Respondent abuse its discretion by ordering the return of a controlled substance to Kha which is illegal to possess under federal law?
3. Does the CSA preempt the CUA under the Supremacy Clause of the United States Constitution to the extent the CUA requires the return of contraband that cannot be legally possessed under federal law, and condones and facilitates the possession of an illegal controlled substance?

C. Writ relief is appropriate

Mandate lies to correct an abuse of trial court discretion. (RLI Insurance Company Group v. Superior Court (1996) 51 Cal. App. 4th 415, 433) An abuse of judicial discretion occurs where the lower

court's exercise of discretion "exceeds the bounds of reason, all of the circumstances for it being considered." (State Farm Mutual Auto Insurance Company v. Superior Court (1956) 47 Cal. 2d 428, 432)

This includes any clearly erroneous ruling on an issue of law:

"Where the facts are undisputed and the law establishes the right of a party to an order to the relief which the [trial] court has refused, the writ [of mandate] will lie."

(Franchise Tax Board v. Municipal Court (1975) 45 Cal. App. 3d 377, 385)

Mandate is appropriate when the petitioner has no adequate remedy at law, when the petitioner will suffer an irreparable injury in the absence of mandate, and where the petitioner is beneficially interested in issuance of the writ. (Omaha Indemnity Company v. Superior Court (1989) 209 Cal. App. 3d 1266, 1269) In addition, mandate is appropriate in cases in which the petition raises issues of widespread interest (Brant v. Superior Court (1985) 37 Cal. 3d 813, 816), or presents a significant issue of first impression. (Marron v. Superior Court (2003) 108 Cal. App. 4th 1049, 1056)

All of the foregoing factors are present in this case. The City has no other remedy at law – the issuance of a writ of mandate is the only mechanism to prevent the return of the marijuana at issue in this case. The City, which has a police department actively engaged in attempting to limit the amount of illegal drugs that circulate in the City, is beneficially interested in insuring that the marijuana is not returned to Kha and will be irreparably injured if it is. The legal issue raised by this petition – the continued validity of the California Compassionate Use Act of 1996 – has widespread interest throughout the state and is an issue of first impression.

D. The Compassionate Use Act

On November 5, 1996, California voters adopted Proposition 215, codified in Health and Safety Code section 11362.5 and otherwise known as the Compassionate Use Act of 1996 ("CUA"). (Health and Safety Code section 11362.5(a)) Health and Safety Code section 11362.5(b)(1) declares that the purposes of the CUA are: 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 (Health and Safety Code section 11362.5(b)(1)(A)); 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 (Health and Safety Code section 11362.5(b)(1)(B)); and 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 (Health and Safety Code section 11362.5(b)(1)(C)).

Health and Safety Code section 11362.5(2) provides that nothing in the CUA shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, or to condone the diversion of marijuana for non-medical purposes. Health and Safety Code section 11362.5(d) states that section 11357 (relating to the possession of marijuana) and section 11358 (relating to the cultivation of marijuana) do 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. The California Legislature recently enacted additional legislation supplementing the CUA (see Health and Safety Code sections 11362.7-11362.9). (People v. Chavez (2004) 123 Cal. App. 4th 104)

In short, the CUA grants patients who use marijuana for medicinal purposes a limited immunity from criminal prosecution which gives the patient a defense at trial, and serves as a viable basis for setting aside an indictment prior to trial. (People v. Mower (2002) 28 Cal. App. 4th 457, 470)

E. The Controlled Substances Act

Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970 in an effort to consolidate the growing number of piecemeal drug laws and to enhance federal drug enforcement powers. (21 U.S.C. section 801 et seq.; Gonzales v. Raich, supra. 125 S. Ct. 2195; 162 L. Ed. 2d 1) This Act consists of three titles: Title I relates to the prevention and treatment of narcotic addicts; Title II (hereinafter the Controlled Substances Act or CSA) addresses drug control and enforcement as administered by the Attorney General and the federal Drug Enforcement Agency; and Title III concerns the import and export of controlled substances. Title II repealed most of the earlier anti-drug laws in favor of a comprehensive regime to combat the international and interstate traffic in illicit drugs. The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. (Gonzales v. Raich, supra at 2203)

To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. (21 U.S.C. sections 841(a)(1), 844(a); Gonzales v. Raich, supra at 2203) The CSA categorizes all controlled substances into five schedules. (21 U.S.C. section 812) The drugs are grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body. (21 U.S.C. sections 811 and 812)

Like California (see Health and Safety Code section 11054), Congress deemed marijuana to be a Schedule I controlled substance. (21 U.S.C. section 812(c); Gonzales v. Raich, supra at 2204) Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. (21 U.S.C. section 812(b)(1)) By classifying marijuana as a Schedule I drug under the CSA, Congress made it a criminal offense to manufacture, distribute, or possess marijuana except as part of a Food and Drug Administration (FDA) pre-approved research study. (21 U.S.C. sections 823(f), 841(a)(1), 844(a); Gonzales v. Raich, supra at 2204; United States v. Oakland Cannabis Buyers' Cooperative (2001) 532 U.S. 483, 490; 121 S.Ct. 1711; 149 L.Ed.2d 722 [there is no medical necessity exception to the prohibitions set forth in the CSA])

In Gonzales v. Raich, supra at 2199-2200 county deputy sheriffs and agents from the federal Drug Enforcement Agency ("DEA") appeared at the home of Angel Raich, a California resident who suffered from a variety of serious medical conditions which

)
prompted her doctor to treat her with medical cannabis. County
) officials subsequently determined that Raich's use of marijuana was
) entirely lawful under the CUA, but the DEA agents nevertheless
) seized and destroyed all six of her cannabis plants since the CSA
) specifically made it a criminal offense to manufacture, distribute, or
) possess marijuana unless it was being used for as part of an FDA-
) approved research study.

) Raich and another medical marijuana user filed suit against
) the United States Attorney General and the head of the DEA
) seeking injunctive and declaratory relief prohibiting application of the
) CSA to the extent it prevented the plaintiffs from possessing,
) obtaining, or manufacturing cannabis for their personal medical use.
) The United States Supreme Court granted review on the limited
) issue of whether the CSA's categorical prohibition of the
) manufacture and possession of marijuana as applied to the
) intrastate manufacture and possession of marijuana for medical
) purposes permitted by the CUA exceeded Congress' authority under
) the Commerce Clause. (125 S.Ct. at 2204-05)

) Following a thorough review of the CUA, the CSA, and a litany
) of commerce clause cases, the Court ultimately declared that it has
) no difficulty concluding that Congress had a rational basis for
) believing that failure to regulate the intrastate manufacture and
) possession of marijuana would leave a gaping hole in the CSA. The
) Court cited Wickard v. Filburn (1942) 317 U.S. 111, 128-129; 63
) S.Ct. 82, 87 L. Ed. 122 [where Congress enacted comprehensive
) legislation to regulate the interstate market in a fungible commodity],
) for the proposition that Congress was acting well within its authority
) to regulate commerce among the several states. (125 S. Ct. at

2208) Therefore, the Court determined that the CSA does not violate the Commerce Clause vis-à-vis the categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes.

F. Marijuana Remains Illegal Contraband Under Federal Law

In a recent civil action, Ross v. Raging Telecommunications, Inc. (2005) 132 Cal. App. 4th 590, 600-604, the court considered whether, despite the enactment of the CUA, marijuana remains illegal. The court answered in the affirmative. The plaintiff in Ross challenged his employer's decision to terminate him when he failed a drug test. The plaintiff argued that it was not illegal in California to use medical marijuana, and contended he should have been accommodated under FEHA because his use of marijuana was medically prescribed. The court concluded that although a person could not be criminally prosecuted for using medical cannabis in California, it remained illegal under federal statutes and an employer was not obligated under FEHA to accommodate an illegal activity:

"Relying primarily on the Compassionate Use Act, plaintiff argues that because possessing and using marijuana for medicinal purposes is not illegal under California law, defendant was prohibited from discharging him based on his use of marijuana with a physician's approval. In plaintiff's view, because his use of marijuana is necessary to alleviate the pain caused by his disability, defendant was required by FEHA to permit him to use the drug as a reasonable

accommodation. (Citing Gov. Code, § 12940.) It follows, he claims, that firing him for legally using marijuana for medicinal purposes violates FEHA. We disagree.

The Compassionate Use Act provides that certain criminal statutes prohibiting the possession and cultivation of marijuana (Health & Safety Code, §§ 11357, 11358) shall not apply to a patient, or to the 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." (§11362.5, subdivision (d).) . . .

Accordingly, the Compassionate Use Act grants patients who use marijuana for medicinal purposes "a limited immunity from [criminal] prosecution, which not only allows a defense at trial, but also permits a motion to set aside an indictment or information prior to trial." (People v. Mower, *supra*, 28 Cal.4th at p. 470, 122 Cal.Rptr.2d 326, 49 P.3d 1067.)

However, while the possession, cultivation, and use of marijuana for medicinal purposes under conditions specified in the Compassionate Use Act do not violate California's criminal laws, such conduct is illegal under the federal Controlled Substances Act." (Citations omitted)

Citing United States v. Oakland Cannabis, *supra*, 532 U.S. 483, 121 S.Ct. 1711, 149 L.Ed.2d 722, the court noted that:

"Even if a patient is seriously ill, there is no medical necessity defense to the federal prohibition against manufacturing and distributing marijuana, and "nothing

... suggests that a distinction should be drawn between the prohibitions on manufacturing and distributing and the other prohibitions in the Controlled Substances Act."

The Ross court rejected the plaintiff's claim that he was somehow exempt from federal criminal statutes merely because he lives in California. The court stated:

"Simply because state law does not prohibit plaintiff's conduct does not mean that federal law may not do so."

The Ross court refused to compel an employer to permit employees to use a drug that is illegal under federal law. Hence, under the federal statute marijuana remains contraband and although persons cannot be prosecuted if their activities fall within the limited state immunity, nothing requires the state to return illegal federal contraband to the defendant. Therefore Petitioner respectfully submit that Respondent erred in finding that marijuana is not an illegal controlled substance which could be returned by the state to Kha's possession.

The California Legislature has not removed medicinal marijuana from its definition of controlled substances, when it could have easily done so. Instead, the California statutes provide that the prohibition against possession and cultivation do not apply to medical marijuana. Under Health and Safety Code section 11473.5(a) all seizures of a controlled substance must be forfeited or destroyed by order of the court unless the substance is lawfully possessed. Since marijuana cannot be lawfully possessed under federal law, the marijuana seized from Kha must be forfeited and/or destroyed.

**G. It Is An Abuse Of Discretion To Order The Return Of
Illegal Contraband**

California Health and Safety Code section 11473.5(a) provides,

“All seizures of controlled substances, instruments, or paraphernalia used for unlawfully using or administering a controlled substance which are in possession of any city, county, or state official as found property, or as the result of a case in which no trial was had or which has been disposed of by way of dismissal or otherwise than by way of conviction, shall be destroyed by order of the court, unless the court finds that the controlled substances, instruments, or paraphernalia were lawfully possessed by the defendant. (Emphasis added).”

Pursuant to this provision, Respondent had a mandatory duty to order the destruction of the marijuana seized from Kha if that marijuana was not “lawfully possessed” by Kha. Irrespective of the provisions of the State’s Compassionate Use Act, Kha could not and cannot lawfully possess marijuana under federal law – it is a violation of the federal Controlled Substances Act. Therefore, Respondent abused its discretion by failing to order Kha’s marijuana destroyed and by instead ordering it returned to him.

In addition, it is worth noting that section 11473.5 does not require the return of property. Neither does the Compassionate Use Act require the return of seized medical marijuana. In Chavez v. Superior Court, supra, 123 Cal. App. 4th 104, 111, the court stated:

“We conclude the Compassionate Use Act does not contemplate the return of illegally possessed drugs. Although the Compassionate Use Act makes clear it

was the intent of California voters "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes . . ." (§11362.5, subd. (b)(1)(A)). noticeably absent from the statute is a provision which requires, or authorizes, the court to return confiscated marijuana.)

In fact, no specific provision of law requires the return of the marijuana seized from Kha. Because its possession is illegal under federal law, the marijuana is contraband, and Kha has no right to its return. (Aday v. Municipal Court (1963) 210 Cal. App. 2d 229, 235 ["It should be noted, however, that if any of the property seized other than the named books was contraband, petitioners are not entitled to its return."] citing Steele v. United States, (1925) 267 U.S. 498, 503, 505, 45 S.Ct. 414, 69 L.Ed. 757; United States v. Old Dominion Warehouse, Inc. (2nd Cir. 1926) 10 F.2d 736, 737-738)

To the extent it can be asserted that any provision of California law requires the return of cannabis illegally possessed under the federal law, that provision directly conflicts with the provisions of the federal Controlled Substances Act and is therefore preempted by virtue of the Supremacy Clause.

H. The CSA Preempts the CUA To The Extent The CUA Condone And Facilitates The Possession Of Federal Contraband

Under the Supremacy Clause of the United States Constitution, the laws of the United States are "the supreme law of the land . . . anything in the Constitution or laws of any state to the contrary notwithstanding." (United States Constitution, Article 6, Clause 2) Issues of federal preemption arising under the

Supremacy Clause typically start with the assumption that the historic police powers of the states are not to be superseded by a federal law unless that is the clear and manifest purpose of Congress. (Gonzales v. Raich, supra, [the Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail])

Federal preemption occurs when: (1) Congress enacts a statute that explicitly preempts state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field. (Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed. 407) When Congress adopts a statute that provides a reliable indication of congressional intent regarding preemption, the scope of federal preemption is determined by the statute. (Id. at 517)

Here, the CSA is a comprehensive statutory scheme that has declared that there is no medical benefit to marijuana and therefore made it a criminal offense to manufacture, distribute, or possess marijuana unless it was being used for as part of an FDA-approved research study. (21 U.S.C. sections 823(f), 841(a)(1), 844(a)) To the extent the CUA condones and facilitates the possession of federal contraband, it is in direct conflict with the CSA, and therefore preempted by federal law. (See, United States v. City of Pittsburg (9th Cir. 1981) 661 F.2d 783, "Local law will be found to be preempted by federal law whenever the 'challenged state statute' stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.")

I. **Conclusion**

For all the foregoing reasons, Petitioner respectfully requests the court to issue a petition for writ of mandate, or other appropriate relief, directing the Respondent trial court to set aside its order of September 1, 2005, and enter a new order denying Defendant Petition for Return of Property.

Dated: October 31, 2005

WOODRUFF, SPRADLIN & SMART
A Professional Corporation

By: 
MAGDALENA LONA-WIANT
Attorneys for Petitioner
CITY OF GARDEN GROVE

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 14(c)(1).)

The text of this brief consists of 5,233 words as counted by the Microsoft Word 2002 word processing program used to generate the brief.

Dated: October 31, 2005

WOODRUFF, SPRADLIN & SMART
A Professional Corporation

By: 
MAGDALENA LONA-WIANT
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**PROOF OF SERVICE
(By Personal Service)**

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am over the age of 18 and I am not a party to the within action. I am employed by First Legal Support Services, 301 Civic Center Drive West, Santa Ana, CA 92701.

On October 31, 2005, I served the foregoing document(s) described as **VERIFIED PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by personally delivering true copies thereof to the following: [SEE ATTACHED]

I delivered such envelope(s) by hand to the offices of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 31, 2005, at Orange, California.

FIRST LEGAL SUPPORT SERVICES

Cesar Rosales
Print Name of Signator


Signature

PEOPLE OF THE STATE OF CALIFORNIA V. FELIX KHA

OCSC, WEST JUSTICE CENTER

CASE NO.: GG98995

THE CITY OF GARDEN GROVE v. ORANGE COUNTY SUPERIOR COURT

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE

ATTACHED SERVICE LIST

Honorable Linda S. Marks Department W1 Superior Court of the State of California County of Orange, West Justice Center 8141 13th Street Westminster, CA 92863-7593	Respondent Orange County Superior Court
Felix Kha 8911 McClure Avenue Westminster, CA 92683-4664 (VIA PERSONAL SERVICE AND VIA OVERNIGHT SERVICE)	Real Party in Interest in Pro Per

1 PROOF OF SERVICE

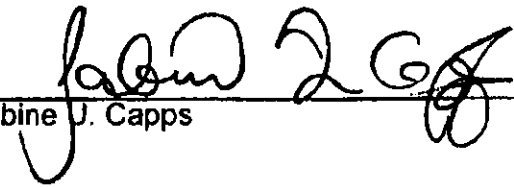
2 STATE OF CALIFORNIA, COUNTY OF ORANGE

3 I am over the age of 18 and not a party to the within action; I am employed by
4 WOODRUFF, SPRADLIN & SMART in the County of Orange at 701 South Parker Street,
Suite 8000, Orange, California, 92868-4760.

5 On October 31, 2005, I served the foregoing document(s) described as VERIFIED
6 PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE
RELIEF; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
7 THEREOF by placing true copies thereof enclosed in sealed envelope(s), as follows:

- 8 (BY MAIL) I placed said envelope(s) for collection and mailing, following
ordinary business practices, at the business offices of WOODRUFF,
9 SPRADLIN & SMART, and addressed as shown on the attached service list,
for deposit in the United States Postal Service. I am readily familiar with the
10 practice of WOODRUFF, SPRADLIN & SMART for collection and processing
correspondence for mailing with the United States Postal Service, and said
11 envelope(s) will be deposited with the United States Postal Service on said
date in the ordinary course of business.
- 12 (BY FACSIMILE) I caused the above-referenced document to be transmitted
to the interested parties via facsimile transmission to the fax number(s) as
13 stated on the attached service list.
- 14 (BY OVERNIGHT DELIVERY) I placed said documents in envelope(s) for
collection following ordinary business practices, at the business offices of
15 WOODRUFF, SPRADLIN & SMART, and addressed as shown on the
attached service list, for collection and delivery to a courier authorized by
16 OVERNITE EXPRESS to receive said documents, with delivery fees provided
for. I am readily familiar with the practices of WOODRUFF, SPRADLIN &
17 SMART for collection and processing of documents for overnight delivery,
and said envelope(s) will be deposited for receipt by OVERNITE EXPRESS
18 on said date in the ordinary course of business.
- 19 (PERSONAL SERVICE) I delivered such envelope(s) by hand to the offices
of the addressee(s).
- 20 (STATE) I declare that I am employed in the office of a member of the Bar of
21 this Court at whose direction the service was made. I declare under penalty
of perjury under the laws of the State of California that the above is true and
22 correct.
- 23 (FEDERAL) I declare that I am employed in the office of a member of the Bar
of this Court at whose direction the service was made. I declare under
24 penalty of perjury under the laws of the United States of America that the
above is true and correct.

25 Executed on October 31, 2005 at Orange, California.

26
27
28

Sabine J. Capps

PEOPLE OF THE STATE OF CALIFORNIA V. FELIX KHA

OCSC, WEST JUSTICE CENTER

CASE NO.: GG98995

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<p><u>COURTESY COPY TO:</u> District Attorney's Office West Justice Center 8141 13th Street Westminster, CA 92863 (VIA OVERNIGHT SERVICE)</p>	