INTRODUCTION

Despite being the innocent victim of a crime, Petitioner Benjamin Goldstein ("Goldstein") cannot get his property back. The issue in this case is whether medical marijuana that is lawfully possessed under California law should still be treated as contraband. Ten years ago, the California electorate declared 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" and the Legislature has recently affirmed that qualified patients "may possess" at least eight ounces of dried marijuana. In light of these pronouncements and the established mechanisms for the return of property, it would conflict with the legislative intent not to return Goldstein's medical marijuana to him. Like the Petitioner, Real Party in Interest San Francisco Police Department ("SFPD") seeks guidance from this Court how it should treat medical marijuana that is confiscated by the police. As with any other property that is lawfully possessed, medical marijuana should be returned.

I. STATE LAW MANDATES THAT GOLDSTEIN'S PROPERTY BE RETURNED TO HIM

Notwithstanding the SFPD's characterization of medical marijuana as contraband (see Opposition to Petition for Writ of Mandate, Prohibition or Other Appropriate Relief ("Opposition") at pp. 6-8), state law does not treat

it as such. After the voters declared the "right to obtain and use marijuana for medical purposes" (Health & Saf. Code § 11362.5, subd. (b)(1)(A)), the Legislature affirmed that a qualified patient "may possess" at least eight ounces of dried marijuana (Health & Saf. Code § 11362.77, subd. (a)). These declarations establish that medical marijuana is not contraband. (Cf. *People v. Lamonte* (1997) 53 Cal.App.4th 544, 552 [defining "contraband" as "goods or merchandise whose importation, exportation, or possession is forbidden"] [citation omitted].) Because the marijuana at issue is not contraband, it must be returned. (Cf. *Lamonte, supra,* 53 Cal.App.4th at p. 549 ["Continued official retention of legal property with no further criminal action pending violates the owner's due process rights"]; *Stern v. Superior Court* (1946) 76 Cal.App.2d 772, 784 [Penal Code section 1540 "does not put the burden on the citizen of suing to get the property back. It makes it the duty of the magistrate to see to its restoration by a mandatory 'must.' There is no discretion about it."].)

Indeed, the Court's analysis in *Chavez v. Superior Court* (2004) 123 Cal.App.4th 104, is consistent with this approach. Like the Court's pronouncement in *People v. Mower* (2002) 28 Cal.4th 457, that "[p]robable cause depends on all of the surrounding facts [citations], including those that reveal a person's status as a qualified patient or primary caregiver under

section 11362.5(d) [of the Act]" (*id.* at pp. 468-469) and this Court's declaration in *People v. Harris* (2006) 145 Cal.App.4th 1456, 52 Cal.Rptr.3d 577, that courts should consider the statutory framework as a whole (*Harris, supra*, 52 Cal.Rptr.3d at 581), the court declared in *Chavez* that "[b]ecause the Compassionate Use Act makes no provision for return of marijuana, we are compelled to apply the existing statutes. . . ." (*Chavez, supra*, 123 Cal.App.4th at pp.108 fn. 2 & 111.) In *Chavez, supra*, the court found that the marijuana at issue was contraband and ordered its destruction, pursuant to Health and Safety Code Section 11473.5, because Chavez admitted that it was not all for his personal medical use. (See *Chavez, supra*, 123 Cal.App.4th at pp. 109-111.) Here, by sharp contrast, Goldstein was "clearly within the amount limit for personal use within the Compassionate Use laws," as the Respondent Court found. (See Exhibits at 135 [RT (9/21/06) at 5]; cf. Health & Saf. Code § 11362.77, subd. (a) [establishing that a qualified patient "may possess" eight ounces of dried marijuana] *People v. Wright* (2006) 40 Cal.4th 81, 97 [noting that amounts provided by Health & Safety Code Section 11362.77, subdivision (a) constitute a floor, rather than a ceiling].) Because Goldstein was in lawful possession of the

marijuana at issue, Health and Safety Code Section 11473.5 does not require its destruction; rather, the existing statutes requires its return.[1]

II. FEDERAL LAW DOES NOT OVERCOME GOLDSTEIN'S RIGHT TO THE RETURN OF HIS PROPERTY

Whereas the United States Supreme Court has established that federal officials may enforce the federal prohibition on marijuana for all purposes if they elect to do this (*Gonzales v. Raich* (2005) 125 S.Ct. 2195), no court has held that federal law displaces state law with respect to medical marijuana and that these state laws are preempted. The court explained in *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, that state courts generally do not enforce federal law and that state law does not incorporate federal law, absent legislative direction that this is so. (See *id.* at pp. 1445-1447; see also

[1] The Attorney General claims to part company with Goldstein with respect to whether the return of Goldstein's property is mandatory (see Letter Brief of the Attorney General, dated December 14, 2006 ["attorney General Brief"]), but the disagreement seems more a matter of semantics than substance. Goldstein believes that property found by the court to be lawfully possessed must be returned, but agrees with the Attorney General that the probable cause determination is discretionary. Thus, as in *Chavez*, a person who is found to possess more marijuana than is allowed by the state's medical marijuana laws is not in lawful possession of the marijuana and is not entitled to the return of any of it. On the other hand, if a court exercising its discretion determines that there is no probable cause to believe that a qualified patient is guilty of any crime by possessing marijuana, the return of the property is mandatory. (See *Lamonte, supra*, 53 Cal.App.4th at p. 549; *Stern, supra*, 76 Cal.App.2d at p. 784; see also *Franklin v. Superior Court* (1972) 26 Cal.App.3d 884, 896 ["[t]he right to regain possession of one's property is a substantial right which may not be dependent upon the whim and caprice of a court"].)

Farmers Brothers Coffee v. Workers' Compensation Appeals Board (2005) 133 Cal.App.4th 533, 542-543 [holding that undocumented workers are entitled to workers' compensation benefits under state law and noting that state law does not incorporate federal law, absent legislative direction].) Here, not only is such direction lacking, but, to the contrary, the electorate and the Legislature have consciously elected to tread a different path. While medical marijuana may remain contraband under federal law, this has no bearing on Goldstein's right to possess it and to its return under state law. (Cf. *People v. Mower* (2002) 28 Cal.4th 457, 465 fn. 2 [noting that the federal government's blanket prohibition on marijuana for all purposes "has no bearing upon the question[s] presented, which involve[s] state law alone"].)

Nor does federal law preempt state law and require a different result. In enacting the Controlled Substances Act ("CSA"), Congress left the regulation of controlled substances to the states unless there is a "positive conflict" between the two. (21 U.S.C. § 903;[2] cf. *People v. Boultinghouse*

[2] Section 903 provides:

> No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless

(2006) 36 Cal.Rptr.3d 244, 248 (*Boultinghouse*) ["Congress has chosen to take a deferential approach to the states in the area of drug enforcement."].) Consistent with this respect for the laws of the states and our federalist system of government Congress affords immunity from liability under the CSA to "any duly authorized officer of any State, territory, political subdivision thereof . . . who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." (21 U.S.C. § 885, subd. (d).) Under Health and Safety Code Section 11362.77(a), a qualified patient "may possess" specified quantities of marijuana for personal medical use and a court "enforces" this law relating to controlled substances when it orders the return of medical marijuana. Next, there is the police officer who must carry out this order and release the property. Because the court's order has the force and effect of law (see Code of Civ. Proc. §§ 128 & 177), an officer who executes such order is enforcing a law relating to controlled substances and, under the plain language of Section 885(d), he is immune. (Cf. *State v. Kama* (Or. Ct. App.

> there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

2002) 178 Or. App. 561, 39 P.3d 866; see also *United States v. Rosenthal* (9th Cir. 2006) 454 F.3d 943, 948 [citing *Kama* with approval].)[3]

Despite this immunity, the SFPD complains that the Attorney General cannot provide it assurance that property room officers who release medical marijuana pursuant to a court order will be immune. (See Opposition at p. 6.) Aside from the fact that any such prosecution is highly improbable (cf. *Conant v McCaffrey* (9th Cir. 2002) 309 F.3d 629, 646 fn. 10 [Kozinski, J., concurring] [noting that, in most districts, "United States Attorneys bring Federal charges only if a marijuana case involves the cultivation of at least 500 plants grown indoors, 1,000 plants grown outdoors, or the possession of more than 1,000 pounds"] [quoting Tim Golden, *Doctors Are Focus of Plan*

[3] In addition to Section 885(d), the police enjoy other immunities from federal prosecution. *United States v. Lanier* (1997) 520 U.S. 259, the United States Supreme Court held that a public official performing official tasks has "qualified immunity" from suit, which includes criminal actions, unless the law was clearly established that his conduct was illegal. (See *id.* at pp. 270-271.) Similarly, in *Nardone v. United States* (1937) 302 U.S. 379, the Court established the doctrine of implied "governmental exception" to criminal statutes, which requires courts to construe statutes not expressly including government officials as excluding them. (*Id.* at p. 384; accord *United States v. Mack* (9th Cir. 1999) 164 F.3d 467, 472; see also *Regents of the University of California v. Doe* (1997) 519 U.S. 425, 429 [holding that Eleventh Amendment bars suits against state officials carrying out official responsibilities where "the state is the real, substantial party in interest"]; *Blake v. Kline* (3d Cir. 1979) 612 F.2d 718, 725 ["The primary purpose of the eleventh amendment is to assure that the federal courts do not interfere with a state's public policy and its administration of internal public affairs"] [citing *In re Ayers*, 123 U.S. 443, 505 (1887)].)

To Fight New Drug Laws: Officials Deal with Narcotics' Medical Use, N.Y. Times, Dec. 23, 1996, at A10]), this Court has the authority to "render binding judicial decisions that rest on their interpretations of federal law" (*ASARCO, Inc. v. Kadish* (1989) 490 U.S. 605, 617). A decision in Goldstein's favor will provide the police with the assurance they need to effectuate the intent of the voters.

III. A DECISION IN GOLDSTEIN'S FAVOR WILL CONSERVE LAW ENFORCEMENT RESOURCES, AS THE VOTRES INTENDED

Lastly, the SFPD complains that a decision in Goldstein's favor will undermine the efficiency of the Department and compromise its ethics. (Opposition at p. 9.) This, however, is not the case. When the California electorate enacted the Compassionate Use Act in 1996, they declared that its purpose was 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." (Health & Saf. Code § 11362.5, subd. (b)(1).) In the years that followed, "reports from across the state . . . revealed problems and uncertainties in the act that have impeded the ability of law enforcement officers to enforce its provisions as the voters intended and, therefore, prevented qualified patients and designated primary caregivers from obtaining the protections afforded by the

act." (Senate Bill 420, Stats. 2003 c.875, § 1(a)(2).) Thus, "to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers," the Legislature established that patients "may possess" specified quantities of marijuana. (Senate Bill 420, Stats. 2003 c.875, § 1(b)(2); Health & Saf. Code § 11362.77, subd. (a).) Despite this clarification, law enforcement officers continue to seize marijuana from patients, and cite them for marijuana-related offenses, even when they have absolutely no reason to believe that the patient committed any state offense. Although charges in these cases are invariably dismissed at or before the first court appearance, the police's actions place unnecessary burdens on local courts and prosecutors. In this case, for instance, there have been three court hearings and two writs filed in an effort to get Goldstein's property back. A decision in Goldstein's favor will provide much needed guidance to law enforcement that they should not seize marijuana from qualified patients who present facially valid documentation of their status as such, and, if they do, they should return such property.[4]

[4] It bears noting that the state's largest law enforcement agency, the California Highway Patrol, has adopted precisely such policy, which it has disseminated to all of its officers. (See Petitioner's Request for Judicial Notice at 1-18, HPM 100.69, Section 7(c)(3)(e) ["If an individual claims [a medical marijuana defense] and possess . . . a written recommendation from a licensed physician, officers should use sound professional judgment to determine the validity of the person's medical claim. Based on the totality

This will focus the expenditure of law enforcement resources on conduct deemed criminal by California law, as the voters intended.

CONCLUSION

It has been ten years since the enactment of the Compassionate Use Act, but some police and courts continue to treat medical marijuana as contraband. This case provides this Court with the opportunity to provide law enforcement and trial courts with much needed guidance on how to apply California's medical marijuana laws. Both the electorate and the Legislature have declared the right of qualified patients to possess amounts of marijuana needed for personal medical use. It strains credulity to believe that the voters intended to make it lawful for qualified patients to possess medical marijuana, but for courts to hold that they cannot get it back when taken by the police. Goldstein requests that the Petition be granted.

DATED: February 9, 2007 Respectfully submitted,

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Counsel for Petitioner
BENJAMIN GOLDSTEIN

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of the circumstances present, if the officer reasonably believes the medical claim is valid, and the individual is within the state/local limits (whichever applies) *the individual is to be released and the marijuana is not to be seized.*"] [emphasis in original].)

CERTIFICATE OF WORD COUNT

I, JOSEPH D. ELFORD, declare as follows:

I am the attorney for Benjamin Goldstein in this matter. On February 9, 2007, I performed a word count of the above-enclosed brief, which revealed a total of 2,612 words.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this __ day of February in Oakland, California.

_____
JOSEPH D. ELFORD

DECLARATION OF SERVICE

I am a resident of the State of California and over the age of eighteen years. My business address is Americans for Safe Access, 1322 Webster St., Suite 402, Oakland, CA 94612. On February 9, 2007, I served the within document(s):

REPLY IS SUPPORT OF PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF

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

Executed on this __ day of November, 2006, in Oakland, California.

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