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13 BENJAMIN GOLDSTEIN

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO

12 BENJAMIN GOLDSTEIN,)

No. 2247329

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Petitioner,)

**NOTICE OF SECOND
SUPPLEMENTAL MOTION TO
RETURN PROPERTY;
DECLARATION;
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT THEREOF; ORDER**

v.)

16 THE PEOPLE OF THE STATE OF)
17 CALIFORNIA,)

18 Respondent.)

Date:
Time:
Place:

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TO THE CLERK OF THE ABOVE-ENTITLED COURT; THE DISTRICT ATTORNEY FOR
THE COUNTY OF SAN FRANCISCO; AND THE SAN FRANCISCO POLICE
DEPARTMENT:

PLEASE TAKE NOTICE that on the __th day of August, 2006, at 9:00 a.m., in
Department 18 of the above-entitled court, or as soon thereafter as petitioner may be heard in the
courtroom of Department 18 of the above-entitled court, petitioner name will move for an order
to return property stolen from petitioner's residence on December 19, 2005, by Bradley Burke,

1 which on that date was, in turn, seized by the San Francisco Police Department. The property
2 sought to be returned is as follows: approximately 6.9 ounces of medical marijuana.

3 This motion is made on the grounds that the property seized is being held unreasonably
4 and there is no probable cause to believe that a crime has been committed by petitioner Benjamin
5 Goldstein.
6

7 This motion is based on California Health and Safety Code § 11362.5, Penal Code §§
8 1536, 1538.5 and 1540, *Gershenhorn v. Superior Court* (1964) 227 Cal.App.2d 361, 38 Cal.Rptr.
9 576, this notice of motion, on the attached memorandum of points and authorities served and
10 filed herewith, and such supplemental memoranda of points and authorities as may hereafter be
11 filed with the court or stated at oral argument, on all papers and records on file in this action, and
12 on such oral and documentary evidence as may be presented at the hearing of the motion.
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14 Dated:

Respectfully submitted,

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18 BY:

JOSEPH D. ELFORD

Counsel for Petitioner
BENJAMIN GOLDSTEIN
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **STATEMENT OF FACTS**

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4 Petitioner Benjamin Goldstein (“Goldstein”) is a qualified medical marijuana patient who
5 uses marijuana to alleviate symptoms associated with AIDS, including neuropathy and nausea.
6 (*See* Declaration of Benjamin Goldstein, filed herewith, at ¶2.) To obtain the medicine he needs,
7 Mr. Goldstein possesses marijuana for his own personal medical use, in accordance with
8 California Health and Safety Code section 11362.5. (*See* Declaration of Benjamin Goldstein,
9 filed herewith, at ¶¶2 & 3.) On December 19, 2005, an acquaintance of Mr. Goldstein, Bradley
10 Burke, stole approximately 6.9 ounces of usable marijuana from Mr. Goldstein and he was
11 apprehended by the San Francisco Police minutes later. (*See* Declaration of Benjamin Goldstein,
12 filed herewith, at ¶3.) The San Francisco Police seized the approximately 6.9 ounces of
13 marijuana from Mr. Burke, but it will not return it to Mr. Goldstein. The marijuana is
14 deteriorating in the custody of the police.
15
16

17 Meanwhile, Mr. Goldstein has engaged in various judicial proceedings to secure the
18 return of his medicine. On February 3, 2006, Goldstein filed a motion for return of property in
19 this Court, which was denied on February 16, 2006, because Goldstein failed to present proof of
20 ownership of the marijuana. This prompted Goldstein to file a renewed motion for return of
21 property on March 1, 2006, which cured this defect. On March 15, 2006, this Court heard the
22 renewed motion for return of property and denied the motion, finding that there was no clear
23 authority for the return of medical marijuana under California law.
24

25 Goldstein, then, filed a Petition for Writ of Mandate in the First Appellate District on
26 April 14, 2006, which prompted the Court of Appeal to invite briefing from the Attorney
27 General. Despite the fact that no one disputed Goldstein’s status as a qualified medical
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1 marijuana patient in the proceedings in this Court, the Attorney General contended that there was
2 insufficient evidence of Goldstein’s status as a qualified patient in the record because Goldstein’s
3 doctor checked the box on the form issued by the San Francisco Department of Public Health
4 indicating that he “did not object” to Goldstein’s use of marijuana, rather than the one stating
5 that he recommended it. Because this statement was not written in the affirmative, the Court of
6 Appeal denied the Petition for Writ of Mandate by Order, dated May 25, 2006, “without
7 prejudice to the filing of a renewed motion in the Superior Court, supported by additional
8 evidence establishing that [Goldstein’s] possession of the seized marijuana for personal medical
9 use was based on the oral or written recommendation or approval of his physician within the
10 meaning of the Compassionate Use Act, Health and Safety Code section 11362.5 (CUA).” (May
11 25, 2006, Order, *Goldstein v. Superior Court*, A113533 [A true and correct copy of this Order is
12 attached hereto as Exhibit B].) This represents such motion.

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16 **I.**

17 **THIS COURT HAS THE POWER TO ORDER THE RETURN OF PROPERTY**
18 **THROUGH A SPECIAL PROCEEDING WHETHER OR NOT THERE IS A CRIMINAL**
19 **ACTION PENDING**

20 To ensure the prompt disposition of property seized from citizens by law enforcement,
21 the Penal Code authorizes a simple mechanism for the return of property through a “special
22 proceeding.” See Penal Code §§ 1536, 1538.5 & 1540. In the seminal case of *Gershenhorn v.*
23 *Superior Court* (1964) 227 Cal.App.2d 361, 38 Cal.Rptr. 576, the court held that one whose
24 property is being unjustly held may avail herself of the summary procedures authorized by the
25 Penal Code for the return of property, “even as to property not yet offered or received in
26 evidence. . . .” (*Ibid.* at pp. 365-66; see also *People v. Superior Court, Orange County* (1972) 28
27 Cal.App.3d 600, 608, 104 Cal.Rptr. 876 [“We conclude that the fact the trial of the criminal
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1 action had been completed did not deprive the superior court of the power to entertain the motion
2 for return of property either pursuant to section 15367 or in the exercise of its inherent power to
3 prevent the abuse of court processes”]). The *Gershenhorn* court reasoned that the alternative
4 remedies of a civil action for claim and delivery and conversion, while also available, were not
5 equal in expedition or adequacy to the prompt and simple mechanism provided by Penal Code §
6 1540. (*Ibid.* at p. 365).

8 Based on this holding and the court’s inherent power to the prevent the abuse of its
9 process, several courts have approved the use of a “special proceeding” independent of the
10 underlying criminal litigation to entertain a motion for the return of seized property. (*See*
11 *Ensoniq Corporation v. Superior Court* (1998) 65 Cal.App.4th 1537, 1547; *Avelar v. Superior*
12 *Court* (1992) 7 Cal.App.4th 1270, 1276; *People v. Superior Court, Orange County* (1972) 28
13 Cal.App.3d 600, 607; *Buker v. Superior Court* (1972) 25 Cal.App.3d 1085, 1089). Although
14 Penal Code § 1540 is only directed to property seized pursuant to a warrant, its procedures are
15 applicable to warrantless seizures as well because, to hold otherwise, would “reverse the
16 constitutional order of importance and would induce law enforcement officers to dispense with,
17 rather than to use, the orderly procedure which the Constitution clearly prescribes.”
18 (*Gershenhorn, supra*, 227 Cal.App.2d at p. 365).

22 II.

23 **MR. GOLDSTEIN IS A “QUALIFIED PATIENT,” SO THE COMPASSIONATE USE** 24 **ACT ENTITLES HIM TO POSSESS THE MEDICAL MARIJUANA AT ISSUE**

25 The Compassionate Use Act (Cal. Health & Safety Code § 11362.5) expressly “ensure[s]
26 that seriously ill Californians have the right to obtain and use marijuana for medical purposes
27 where that medical use is deemed appropriate and has been recommended by a physician. . . .”
28 (Cal. Health & Safety Code § 11362.5, subd. (b)(1).) To be entitled to the protections of the Act,

1 a person must show that he is a “qualified patient,” which means that he has obtained the
2 “written or oral recommendation or approval of a physician” to use marijuana medicinally. (Cal.
3 Health & Safety Code § 11362.5, subd. (d).) As the court explained in *People v. Jones* (2003)
4 112 Cal.App.4th 341, an “‘approval’ connotes a less formal act than a ‘recommendation.’” (*Id.*
5 at p. 347 [quoting *People v. Trippett* (1997) 56 Cal.App.4th 1532].) Whereas to “‘recommend’
6 something is ‘to present [it] as worthy of acceptance or trial,’” to “‘approve’ something is
7 [merely] to ‘express a favorable opinion of’ it.” (*Jones, supra*, 112 Cal.App.4th at p. 347
8 [quoting Merriam-Webster’s Collegiate Dict. (10th ed.2001) pp. 57 & 974.]) “[A] physician
9 could *approve* of a patient’s suggested use of marijuana without ever *recommending* its use.”
10 (*Ibid.* [Italics in original].)

13 Here, Mr. Goldstein has filed a declaration that his physician “told [him] that he had
14 other patients who have successfully used marijuana to treat these symptoms and he said I could
15 try it. Specifically, on March 29, 2004, Dr. Wlodarczyk suggested that I try marijuana to treat
16 my neuropathy and nausea.” (Declaration of Benjamin Goldstein, filed herewith, at ¶2.) This
17 expression of a favorable opinion of marijuana by Dr. Wlodarczyk constitutes an oral
18 recommendation, which makes Goldstein a “qualified patient.” (Cf. *Jones, supra*, 112
19 Cal.App.4th at p. 350 [holding that defendant’s testimony that his doctor told him that use of
20 marijuana for migraines “might help, go ahead” was sufficient for jury to conclude that
21 defendant had obtained his physician’s oral approval] [cited with approval in May 25, 2006,
22 Order [Exhibit B] at p. 2].)

25 As a qualified patient, Goldstein was absolutely entitled to possess the approximately
26 seven ounces of dried marijuana that was taken from him. Health and Safety Code section
27 11362.77(a) provides that a qualified patient “may possess” eight ounces of dried usable
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1 marijuana and Goldstein possessed no more than this. Mr. Goldstein, therefore, was in legal
2 possession of the marijuana under state law and, since no probable cause exists to believe that he
3 has committed a crime, he is entitled to its return. Like everyone else, medical marijuana
4 patients are entitled under California law to the return of their property. (*See Gershenhorn,*
5 *supra*, 227 Cal.App.2d at 365; *cf.* Penal Code § 1538.5(a)(1)(A) [authorizing return of property
6 seized without a warrant where the search or seizure was unreasonable]; Penal Code §
7 1538.5(a)(1)(B)(ii) & (iii) [authorizing return of property seized pursuant to warrant where
8 property is not that described in warrant or there is no probable cause]; *see also People v.*
9 *Superior Court (Lamonte)* (1997) 53 Cal.App.4th 544, 549 [due process forbids the “[c]ontinued
10 official retention of legal property with no further criminal action pending”]; *Stern v. Superior*
11 *Court* (1946) 76 Cal.App.2d 772, 784 [Penal Code section 1540 “does not put the burden on the
12 citizen of suing to get the property back. It makes it the duty of the magistrate to see to its
13 restoration by a mandatory ‘must.’ There is no discretion about it.”].)

17 CONCLUSION

18 For the foregoing reasons, this Court should grant Goldstein’s motion for return of
19 property.

20 Dated:

Respectfully submitted,

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24 BY: _____
JOSEPH D. ELFORD

25 Counsel for Petitioner
26 BENJAMIN GOLDSTEIN
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1
2 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
3 IN AND FOR THE COUNTY OF SAN FRANCISCO
4

5
6 BENJAMIN GOLDSTEIN,) No.
7)
8 Petitioner,) **[PROPOSED] ORDER**
9 v.)
10 THE PEOPLE OF THE STATE OF)
11 CALIFORNIA,)
12 Respondent.)
13)
14)

15 Good cause appearing, IT IS HEREBY ORDERED that the San Francisco Police
16 Department return to Benjamin Goldstein the approximately 6.9 ounces of usable marijuana
17 seized by it from Bradley Burke on December 19, 2005.
18

19 Dated:
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22 _____
23 JUDGE OF THE SUPERIOR COURT
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1 **CERTIFICATE OF SERVICE**

2 I am a resident of the State of California and over the age of eighteen years, and not a party to
3 this action. My business address is 1322 Webster St., Suite 402, Oakland, CA 94612. On
4 August 16, 2006, I served the within document(s):

5 **MOTION FOR RETURN OF PROPERTY; MEMORANDUM OF POINTS AND**
6 **AUTHORITIES; ORDER**

7 via hand delivery upon:

8 Ofr. John Hart
9 San Francisco Police Department
10 Office of Legal Affairs
11 850 Bryant Street
12 San Francisco, CA 94103

13 Sharon Woo
14 District Attorney
15 San Francisco County
16 880 Bryant Street, Room 325
17 San Francisco, CA 94103

18 via first-class mail upon:

19 Gerald A. Engler
20 Senior Assistant Attorney General
21 455 Golden Gate Avenue, Suite 11000
22 San Francisco, CA 94102-7004

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

25 Executed on this __ day of August, 2006, in San Francisco, California.

26 _____
27 JOSEPH D. ELFORD
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