IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

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| BENJAMIN GOLDSTEIN,<br><br>Petitioner,<br><br>v.<br><br>SUPERIOR COURT OF THE COUNTY OF SAN FRANCISCO,<br><br>Respondent,<br><br>SAN FRANCISCO POLICE DEPARTMENT,<br><br>Real Party in Interest. | A115899<br><br>(Superior Court No. 2247329) |

**PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF**

SEEKING REVIEW OF THE ORDER OF THE

SUPERIOR COURT OF THE COUNTY OF SAN FRANCISCO

THE HONORABLE RONALD ALBERS PRESIDING

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FIRST APPELLATE DISTRICT

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**PETITION WITH MEMORANDUM OF POINTS AND AUTHORITIES**

**INTRODUCTION**

Due to the conflicting treatment of medical marijuana patients who seek the return of their property by California courts, whether a qualified patient will get his medicine back depends on the jurisdiction in which the case is filed. Whereas courts in the counties of Madera, Los Angeles, Orange, Marin, Fresno, Mendocino,

Tulare, Humboldt, Merced, Alameda, and Glenn return medical marijuana to its rightful owner, courts in Stanislaus, Contra Costa, and, in this case, San Francisco cite a lack of authority in refusing to do this. Well-established precedent, as well as the constitutional right to due process, however, demand that courts restore property seized by the police to law-abiding citizens where there is no probable cause to believe that they have committed any California crime. This is especially so where, as here, that law-abiding citizen was the innocent victim of a burglary and the police have recovered the victim's property from the thief who stole it. This case presents an issue of urgent importance to thousands of seriously ill medical marijuana patients throughout the State, including Petitioner Benjamin Goldstein, who is an AIDS patient that had his medicine stolen by an acquaintance. An extraordinary writ is needed to restore the property and due process rights of Mr. Goldstein, and others like him, which will begin to harmonize the treatment of medical marijuana patients throughout the State.

## PETITION

TO THE HONORABLE PRESIDING JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL, FIRST APPELLATE DISTRICT:

Petitioner Benjamin Goldstein [hereinafter "Goldstein" or "Petitioner"] respectfully petitions this Court for a writ of mandate, prohibition or other

appropriate relief directed to Respondent Court, and by this verified petition alleges as follows:

On September 21, 2006, after this Court denied Petitioner's first writ of mandate, filed on April 14, 2006, without prejudice to the filing in Respondent Court of a renewed motion with additional evidence that he was entitled to use marijuana for medical use under the Compassionate Use Act, Respondent Court, the Honorable Ronald Albers, Commissioner, Judge Pro Tem Presiding, denied Petitioner's Second Supplemental Motion for Return of Property. [A true and correct copy of the Second Supplemental Motion is lodged herewith in the Exhibits in Support of Petition for Writ of Mandate, Prohibition or Other Appropriate Relief, filed herewith [hereinafter "Exhibits"] at 086. A true and correct copy of Real Party in Interest's Opposition to the Motion is lodged in the Exhibits at 108. A true and correct copy of the Reply in Support of the Motion is lodged in the Exhibits at 119. A true and correct copy of the Reporter's Transcript of the September 21, 2006, Transcript is lodged in the Exhibits at 119.)

By this Petition, an order is sought from this Court vacating Respondent Court's order denying Petitioner's motion for return of property. In addition, Petitioner seeks an order mandating Respondent Court to grant Petitioner's motion for return of property and declaring that Respondent Court erred in holding that that qualified medical marijuana patients whose medicine was seized by the police

cannot avail themselves of the legal procedures available to other victims of law enforcement seizures who seek the return of their property.

Petitioner is particularly aggrieved by Respondent Court's actions, which causes irreparable damage to petitioner's due process rights and the loss of his medicine.

Petitioner has no other plain, speedy, or adequate remedy at law, since no direct appeal lies from Respondent Court's order. (See *People v. Superior Court (Chico Feminist Women's Health Center)* (1986) 187 Cal.App.3d 648, 656; *People v. Gershenhorn* (1964) 225 Cal.App.2d 122; *People v. Tuttle* (1966) 242 Cal.App.2d 883.) Numerous courts have held that a petition for an extraordinary writ is the proper vehicle to challenge the denial of a motion for return of property. (See, e.g., *Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 123; *Chavez v. Superior Court* (2004) 123 Cal.App.4th 104, 108; *People v. Superior Court (Chico Feminist Women's Health Center)*, *supra*, 187 Cal.App.3d at p.656; *Suki, Inc. v. Superior Court* (1976) 60 Cal.App.3d 616, 624; *Gershenhorn v. Superior Court* (1964) 227 Cal.App.2d 361, 366.)

This Petition presents important questions of public policy and criminal justice administration, which greatly impact the constitutional and statutory rights of sick and dying persons throughout the State. Whereas many counties follow precedent mandating the return of property seized from innocent persons (see

Exhibits at 138-165[1]), Respondent Court and others have erroneously construed *Chavez v. Superior Court* (2004) 123 Cal.App.4th 104, as foreclosing any legal mechanism for the return of medical marijuana. This deprives numerous medical marijuana patients the medicine promised them by the Compassionate Use Act (Health & Safety Code § 11362.5).

Jurisdiction is proper in this Court pursuant to section 10, article VI of the California Constitution, which provides that courts of appeal "have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." While that same constitutional provision provides for original jurisdiction for such proceedings in the appellate division of the superior court "in causes subject to its jurisdiction," no statute provides for appellate jurisdiction in the superior court for nonstatutory motions for return of property where no criminal charges are filed, since Petitioner was never a "defendant." (See *People v. Superior Court (Chico Feminist Women's Health Center)*, *supra*, 187 Cal.App.3d 648, 656; *cf.* Penal Code § 1538.5(a)(1)(A) [authorizing return of property to "defendants"]; Cal. Const., Section 11, Article VI ["the appellate division of the superior court has appellate jurisdiction in cases prescribed by statute"].) Thus, in *Chavez v. Superior Court* (2004) 123 Cal.App.4th 104, the

[1] Pursuant to Evidence Code section 452, subdivision (d), Petitioner requests this Court to take judicial notice of these court orders.

Supreme Court of California directed the court of appeals to issue an order to show cause regarding the denial of a nonstatutory motion for return of property issued by the superior court. (*Ibid.* at 108 & fn.2.)

## PROCEDURAL FACTS

1. Petitioner Benjamin Goldstein ("Goldstein") is a qualified medical marijuana patient with a physician's recommendation to use marijuana to alleviate symptoms associated with AIDS, including neuropathy and nausea. (See Exhibit at 088.].)

2. On December 19, 2005, an acquaintance of Mr. Goldstein, Bradley Burke ("Burke"), stole approximately seven ounces of usable marijuana from Mr. Goldstein and he was apprehended by the San Francisco Police minutes later. Although the San Francisco Police recognize that Mr. Goldstein was lawfully in possession of the marijuana under California law, they will not return the marijuana to Mr. Goldstein. (Exhibits at 073-074 [RT (3/15/06) at 18-19].)

3. On February 3, 2006, Petitioner filed a motion for return of property, which was denied by Respondent Court on February 16, 2006, because Petitioner failed at that time to present proof of ownership of the approximately seven ounces of marijuana at issue. (Exhibits at 059 [RT (3/15/06) at 4].) Petitioner filed a renewed motion for return of property on March 1, 2006, which cured this defect. (Exhibits at 060 [RT (3/15/06) at 5].)

4. Respondent Court heard the motion for return of property on March 15, 2006. At this hearing, Real Party in Interest, the San Francisco Police Department, did not dispute that Petitioner Goldstein was a qualified patient who lawfully possess the marijuana at issue under California law. Instead, Real Party in Interest argued that the Compassionate Use Act does not provide for the return of marijuana to anyone and, to do so, would violate federal law. (Exhibits at 060-062 [RT (3/15/06) at 5-7]) Counsel for Petitioner Goldstein countered that the ordinary procedures for return of property applied to legally possessed medical marijuana, citing Penal Code sections 1536-1540 and *Gershenhorn v. Superior Court* (1964) 227 Cal.App.2d 361, and that federal law does not require a contrary result. (Exhibits at 062-065 [RT (3/15/06) at 7-10].)

5. At the conclusion of the March 15, 2006, hearing, Respondent Court found that Mr. Goldstein was in lawful possession of the marijuana that was stolen from him and noted that "it's absolutely clear that Mr. Goldstein ought to be protected by the law in terms of his possessory and legal possessory interest in property he possesses." (Exhibits at 073-074 [RT (3/15/06)at 18-19].) Nevertheless, Respondent Court denied the motion for return of property "based on the authority of *People v. Chavez* and existing law, that's including the Compassionate Use Act, that did not provide the specific remedy for return of

lawfully possessed property that was stolen...." (Exhibits at 074-075 [RT (3/15/06) at 19-20].)

6. On April 14, 2006, Goldstein filed a Petition for Writ of Mandate in this Court, which prompted the Court of Appeal to invite briefing from the Attorney General. Because Goldstein's physician checked the box on the form issued by the San Francisco Department of Public Health indicating that he "did not object" to Goldstein's use of marijuana, rather than the one stating that he affirmatively recommended it, this Court, by Order dated May 25, 2006, denied the Petition "without prejudice to the filing of a renewed motion in the Superior Court, supported by additional evidence establishing that [Goldstein's] possession of the seized marijuana for personal medical use was based on the oral or written recommendation or approval of his physician within the meaning of the Compassionate Use Act, Health and Safety Code section 11362.5 (CUA)." [A true and correct copy of the May 25, 2006, Order in *Goldstein v. Superior Court,* A113533 is attached hereto in the Exhibits at 083.]

7. On or about August 16, 2006, Goldstein filed a Second Supplemental Motion for Return of Property in Respondent Court in which he filed a declaration that his physician orally approved his use of marijuana for medical purposes. [A true and correct copy of this Motion is Lodged in the Exhibits at 086. A true and correct copy of Real Party in Interest's Opposition to the Motion for Return of

Property is lodged in the Exhibits at 108. A true and correct copy of Petitioner's Reply in Support of the Motion for Return of Property is lodged in the Exhibits at 119.]

8. On September 21, 2006, Respondent Court, the Honorable Ronald Albers Presiding, found that Goldstein was a qualified patient under the Compassionate Use Act, since "based on the additional evidence presented, that the doctor did recommend that Mr. Goldstein use it for a very specific medical reason. And for that reason, he is clearly within the requirements of Health and Safety Code Section [11362.5]." [See Exhibits at 135 [RT (9/21/06) at 5]. A true and correct copy of the September 21, 2006, Transcript is lodged in the Exhibits at 130.]

9. Despite finding that Goldstein was lawfully entitled to possess the marijuana at issue under California law, Respondent Court again denied the Second Supplemental Motion for Return of Property "for the reasons previously stated," which was that there was no clear authority for the return of medical marijuana under California law. (See Exhibits at 135 [RT (9/21/06 at 5].) Respondent Court added: "I will say once more I am extremely sympathetic to Mr. Goldstein's situation. It's almost to me unbelievable that the law could allow Mr. Goldstein to possess marijuana, it's clearly within the amount limit for personal use within the Compassionate Use laws, and to have Mr. Goldstein be a victim of a

residential robbery where the neighbor calls the police to assist Mr. Goldstein . . . and for me to be at the point I feel I am in today legally unable to order the return of, clearly, Mr. Goldstein's property where he has been the victim of this serious felony violation, but I still conclude that's the law I am stuck with." (Exhibits at 135 [RT (9/21/06) at 5].)

10. Petitioner filed the instant petition for writ of mandate, prohibition or other appropriate relief on November 20, 2006, which is timely pursuant to *People v. Superior Court (Chico Feminist Women's Health Center)*, *supra*, 187 Cal.App.3d at p.656 [citing *Popelka, Allard, McCowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496, 499]).

**GROUNDS FOR ISSUANCE OF WRIT**

Respondent Court's order denying Petitioner's motion for return of property violates the Penal Code and Petitioner's right to due process. (See *United States v. James Daniel Good Real Property* (1993) 510 U.S. 43, 48; *Modern Loan Co. v. Police Court* (1910) 12 Cal.App. 582, 585) A petition for writ of mandate/prohibition is the appropriate vehicle to challenge the denial of a motion for return of property. (See, e.g., *Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 123; *Chavez v. Superior Court* (2004) 123 Cal.App.4th 104, 108; *People v. Superior Court (Chico Feminist Women's Health Center)*, *supra*, 187 Cal.App.3d at 656; *Suki, Inc. v. Superior Court* (1976) 60 Cal.App.3d 616, 624; *Franklin v.*

*Municipal Court* (1972) 26 Cal.App.3d 884, 897; *Gershenhorn v. Superior Court* (1964) 227 Cal.App.2d 361, 366.) Because Respondent Court's order is contrary to the orders of other California courts (see Exhibits at 138-165) and frustrates the intent of the voters of California who enacted the Compassionate Use Act, this Court should adjudicate the important constitutional and statutory issues presented. (See *State of California ex rel. State Lands Commission v. Superior Court* (1995) 11 Cal.4th 50, 61; *Medina v. Superior Court* (2000) 79 Cal.App.4th 1280, 1285-86; *Tracy v. Municipal Court* (1978) 22 Cal.3d 760, 763; *In re William M.* (1970) 3 Cal.3d 16, 23; *People v. McCoy* (1992) 9 Cal.App.4th 1578, 1581 fn.3; *Orange County Air Pollution Control Dist. v. Superior Court* (1972) 27 Cal.App.3d 109, 111-12; *Jensen v. McCullough* (1928) 94 Cal.App. 382, 392.)

Petitioner requests that the accompanying memorandum of points and authorities be incorporated by reference herein.

**PRAYER**

WHEREFORE, Petitioner prays that:

1. This prayer should be deemed notice that Petitioner seeks a writ restraining Respondent Court, its officers and agents, and all persons acting by and through its orders from taking any further steps or proceedings in the above-captioned action and directing and compelling Respondent Court to vacate its order denying Petitioner's motion for return of property, and to make a new and different

order granting Petitioner's motion for return of property and declaring that medical marijuana patients may avail themselves of the same procedures for return of property available to other victims of law enforcement seizures; or that

2. An alternative writ of prohibition issue directing and requiring Respondent Court to act as set forth above, or in the alternative, to show cause before this court at a specified time and place why further proceedings against or making any other orders affecting Petitioner until further order of this Court; and that

3. An alternative writ of mandate issue directing and requiring Respondent Court to act in the manner set forth above or, in the alternative, to show cause before this Court at a specified time and place why the relief prayed for should not be granted; and that

4. Petitioner be granted such other and further relief as may be appropriate and just.

DATED: November 20, 2006 Respectfully submitted,

_____

JOSEPH D. ELFORD
Counsel for Petitioner
BENJAMIN GOLDSTEIN

## VERIFICATION

I, JOSEPH D. ELFORD, declare as follows:

I am an attorney duly licensed to practice law in the State of California and I have represented Petitioner Benjamin Goldstein throughout these proceedings.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct based upon my review of the records in this case and my investigation and interview with Petitioner. Petitioner is absent from Alameda County, which is where I maintain my office for Americans for Safe Access, so I verify the Reply on his behalf.

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

_____
JOSEPH D. ELFORD

Attorney for Petitioner
BENJAMIN GOLDSTEIN

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

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| BENJAMIN GOLDSTEIN,<br><br>Petitioner,<br><br>v.<br><br>SUPERIOR COURT OF THE COUNTY OF SAN FRANCISCO,<br><br>Respondent,<br><br>SAN FRANCISCO POLICE DEPARTMENT,<br><br>Real Party in Interest. | A_____<br><br>(Superior Court No. 2247329) |

**MEMORANDUM OF POINTS AND AUTHORITIES**

**SUMMARY OF ARGUMENT**

Notwithstanding the fact that due process and the Penal Code demand that persons whose property is seized by the police be afforded a mechanism for the prompt return of their property, Respondent Court reluctantly held that *no* such procedure is available to medical marijuana patients. In finding no such procedure available to Mr. Goldstein, Respondent Court commented that "it's almost

unbelievable that the law could allow Mr. Goldstein to possess" the marijuana at issue, "but I still conclude that's the law I am stuck with." (Exhibits at 135 [RT (9/21/06) at 5].) Just as with any other legally possessed property, however, the court not only has the authority, but the obligation to see that it is restored to its rightful owner where there is no probable cause to believe he is guilty of any crime. Both the Penal Code and due process demand the correction of this error.

## ARGUMENT

## I.

## GOLDSTEIN WAS ABSOLUTELY ENTITLED TO POSSES THE APPROXIMATELY SEVEN OUNCES OF MEDICAL MARIJUANA AT ISSUE AND TO ITS RETURN AFTER IT WAS STOLEN FROM HIM AND RECOVERED BY THE POLICE

### A. The Compassionate Use Act and SB 420 Ensure Qualified Medical Marijuana Patients the Right to Possess at Least Eight Ounces of Dried Marijuana for Their Personal Medical Use

Approved by fifty-seven percent of the California electorate in 1996, the Compassionate Use Act "ensures 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 & Safety Code § 11362.5(b)(1).) Since then, the voters' intent to protect qualified patients who cultivate marijuana has been frustrated by law enforcement seizures of the medicine of the sick and dying. Expressly motivated by "reports from across the state [that] have revealed problems and uncertainties in the [Compassionate Use

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," the California Legislature enacted Senate Bill 420, Stats. 2003 c.875 ("SB 420") on September 10, 2003, to clarify its provisions. (See SB 420 § 1(a)(2).) One clarification was necessitated by the fact that local guidelines regarding the number of plants a qualified patient or primary caregiver may cultivate and possess without legal reprisal varied dramatically from one county to another. To provide a consistent threshold throughout the State, the Legislature enacted section 11362.77(a) of the Health and Safety Code, which provides that a qualified patient or primary caregiver may possess a minimum of 6 mature or 12 immature plants and, in addition, eight ounces of dried marijuana per qualified patient. (See Health & Safety Code § 11362.77(a).)[2] Under these laws, Goldstein, as a qualified patient, had an absolute right to possess the approximately seven ounces of dried

[2] Section 11362.77(a) somewhat confusingly provides: "A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature plants per qualified patient." To clarify that these figures represent floors, rather than ceilings, its authors stated this intent explicitly in a letter codified in the Historical and Statutory Notes to Cal. Health & Safety Code § 11362.7. *See* Letter from John Vasconcellos & Mark Leno to The Hon. John Burton, dated Sept. 10, 2003 [reprinted in Historical and Statutory Notes to Cal. Health & Safety Code § 11362.7] ["the guidelines in SB 420 establish permissible amounts that are intended to be the threshold, and not a ceiling"].)

marijuana at issue, and the police have stipulated to this. (See Exhibits at 134-135 [RT (9/21-06) at 4-5].)

### B. Courts Are Required By the Penal Code and Their Inherent Power to Prevent the Abuse of Their Process to Restore Property Seized By the Police to Its Rightful Owner

Because Goldstein's possession of the medical marijuana at issue was legal under California law, the superior court had a mandatory duty to order its return. In *Franklin v. Municipal Court* (1972) 26 Cal.App.3d 884, 896, the court declared: "The 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." Other courts have made clear that due process forbids the "[c]ontinued official retention of legal property with no further criminal action pending." (*People v. Superior Court (Lamonte)* (1997) 53 Cal.App.4th 544, 549; see *Modern Loan Co. v. Police Court* (1910) 12 Cal.App. 582, 585 ["One who is in possession of property under a claim of right cannot be deprived of its possession without due process of law."]).

Recognizing the important due process and property rights involved for victims of law enforcement seizures, the Legislature enacted various Penal Code sections to establish an expedient mechanism for the return of seized property through "special proceedings." (See *Avelar v. Superior Court* (1992) 7 Cal.App.4th 1270, 1276.) Penal Code sections 1538.5 and 1539 authorize the return of property to defendants and nondefendants where the property is taken

pursuant to a warrant. (See Penal Code § 1538.5(a)(1)(B)(ii) & (iii) [authorizing return to defendants of property seized pursuant to warrant where property is not that described in warrant or there is no probable cause]; Penal Code § 1539 [same for nondefendants].) In addition, defendants, but not nondefendants, may file statutory motions for return of property seized without a warrant where there is no probable cause to believe that they have committed a crime. (See Penal Code § 1538.5(a)(1)(A) [authorizing return to defendants of property seized without a warrant where the search or seizure was unreasonable]; see *Ensoniq Corporation v. Superior Court* (1998) 65 Cal.App.4th 1537, 1547.) Because any other result would "reverse the constitutional order of importance and would induce law enforcement officers to dispense with, rather than to use, the orderly procedure which the Constitution clearly prescribes" courts have permitted nondefendant victims of warrantless seizures to avail themselves of the summary procedures provided therein through nonstatutory motions. (See *Gershenhorn v. Superior Court* (1964) 227 Cal.App.2d 361, 365; cf. *Flack v. Municipal Court for the Anaheim-Fullerton Judicial District of Orange County* (1967) 66 Cal.2d 981, 985 ["To permit a summary remedy such as mandate when the police acted with an invalid warrant, but deny redress when they proceed without a warrant would penalize erroneous commission while rewarding deliberate or inept omission."].) Such result is demanded by due process, legislative intent, and the court's inherent

power to control and prevent the abuse of its process. (See *Ensoniq, supra,* 65 Cal.App.4th at p.1547; *People v. Superior Court, Orange County* (1972) 28 Cal.App.3d 600, 608; see also *People v. Superior Court (Lamonte)* (1997) 53 Cal.App.4th 544, 551 [authorizing nonstatutory motion for return of property pursuant to Penal Code § 1417.5, which provides for the release of exhibits, even when property seized was not so used].[3]) In short, once it is established that

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[3] Penal Code section 1417.5 provides:

> Except as provided in Section 1417.6, 60 days after the final determination of a criminal action or proceeding, the clerk of the court shall dispose of all exhibits introduced or filed in the case and remaining in the clerk's possession, as follows:
>
> (a) If the name and address of the person from whom the exhibit was taken is contained in the court record, the clerk shall notify the person that he or she may make application to the court for release of the exhibits within 15 days of receipt of the notification.
>
> (b) The court shall order the release of exhibits free of charge, without prejudice to the state, upon application, to the following:
>
> (1) First, the person from whom the exhibits were taken into custody, provided that the person was in lawful possession of the exhibits.
>
> (2) Second, a person establishing title to, or a right to possession of, the exhibits.
>
> (c) If the party entitled to an exhibit fails to apply for the return of the exhibit prior to the date for disposition under this section, the following procedures shall apply:

probable cause is lacking, the court *must* return seized property to its rightful owner. (See *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."]; see also *Modern Loan Co. v. Police Court* (1910) 12 Cal.App. 582, 585 ["the right of a person to his day in court must rest on something more substantial than favor or discretion"].)

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(1) Exhibits of stolen or embezzled property other than money shall be disposed of pursuant to court order as provided in Section 1417.6.

(2) Exhibits of property other than property which is stolen or embezzled or property which consists of money or currency shall, except as otherwise provided in this paragraph and in paragraph (3), be transferred to the appropriate county agency for sale to the public in the same manner provided by Article 7 (commencing with Section 25500) of Chapter 5 of Part 2 of Division 2 of Title 3 of the Government Code for the sale of surplus personal property. If the county determines that any property is needed for a public use, the property may be retained by the county and need not be sold.

(3) Exhibits of property, other than money, currency, or stolen or embezzled property, that are determined by the court to have no value at public sale shall be destroyed or otherwise disposed of pursuant to court order.

(4) Exhibits of money or currency shall be disposed of pursuant to Section 1420.

### C. *Chavez v. Superior Court* Does Not Abrogate Respondent Court's Duty to Order the Restoration of Petitioner's Property Where There Is No Probable Cause to Believe He Is Guilty of Any Crime

Nor does the Fourth Appellate District's decision in *Chavez v. Superior Court* (2004) 123 Cal.App.4th 104, compel a different result. In *Chavez v. Superior Court*, *supra*, the court found that the amount of marijuana seized from Chavez (4.5 pounds dried, 10 pounds drying, and 46 plants) was not for him alone, so the court found such possession unlawful and it denied his nonstatutory motion for return of property. (*Ibid*. at p.110; see also *ibid*. at p.109 ["Proposition 215 was approved by the voters without specificity as to the strength, quality, *or quantity* of marijuana to be used for medical purposes as long as the use is reasonably related to the patients current medical needs and was recommended or approved by a physician."] [quoting 86 Ops.Cal.Atty.Gen. 180 (2003)] [emphasis in original].) The court, however, did not foreclose the return of property to medical marijuana patients in *all* cases, but, instead, held only that a medical marijuana patient who possesses *excessive* quantities of marijuana for personal medical use is not entitled to the return of his marijuana, or any portion of it, "for the simple reason that his possession of the very large quantities of marijuana involved in this case precludes him from invoking the protection of the Compassionate Use Act." (See *ibid.* at p.110.)

Although the *Chavez* court did not say so expressly, it implicitly found that the special proceeding for return of property available to other victims of police seizures also applied to medical marijuana patients. The court agreed that a nonstatutory motion modeled after Penal Code section 1538.5 was the proper vehicle for Chavez to seek the return of his property and it expressly applied the existing statutes and analyzed whether Chavez's possession of the marijuana at issue was lawful. (*Ibid*. at pp.108 fn.2 & 111 ["Because the Compassionate Use Act makes no provision for return of marijuana, *we are compelled to apply the existing statutes*"] [emphasis added].) It would have been unnecessary for the court to scrutinize the quantity of marijuana possessed by Chavez so carefully if the return of medical marijuana was forbidden in all cases, as the Respondent Court here erroneously found. *Chavez,* thus, supports, rather than undermines, Goldstein' contention that courts must apply the existing procedures for the return of property. (See ibid. at p.111.)

### D. Due Process Requires That Goldstein's Legally Possessed Property Be Returned to Him

Furthermore, a long line of precedent setting forth the dictates of due process confirms that Goldstein' legally possessed property must be returned to him. At a minimum, due process requires notice and an opportunity to be heard by an impartial decisionmaker when a property interest is at stake. "The confiscation and destruction of property without a hearing, proceeding or other forum to determine

whether the property was dangerous, illegal to possess or otherwise excepted from return to the owner is an unconstitutional deprivation of property without due process of law." (*People v. Superior Court (Lamonte)* (1997) 53 Cal.App.4th 544, 551 [citation omitted]; see *United States v. James Daniel Good Real Property* (1993) 510 U.S. 43, 48 ["Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property."]; *Randone v. Appellate Department* (1971) 5 Cal.3d 536, 541 ["due process requires at a minimum, that an individual be given a meaningful opportunity to be heard prior to being subjected by force of law to a significant deprivation"]; *Meacham v. Bear Valley Irrigation Co.* (1904) 145 Cal. 606, 608 ["The guaranty of the Constitution that he shall not be deprived of his property without due process of law gives him the right to be heard in its defense against any claim that may be made against him for its possession"]; *Havemeyer v. Superior Court* (1890) 87 Cal. 267 [holding that property cannot be taken from the party in possession without a hearing]; *Ieck v. Anderson* (1881) 57 Cal. 251, 252-53 [statute providing for the seizure, sale, and forfeiture of apparatus employed in illegal fishing without judicial hearing found unconstitutional; "Such an enactment cannot be harmonized with those constitutional guarantees which are supposed to secure every one within the state his rights of liberty and property."]; *People v. Bonanza Printing Co.* (1969) 271 Cal.App.2d Supp. 871, 874 ["Due process of law

entitles the claimant of seized property to an early court hearing to determine whether the articles were subject to seizure."]; see also *DiCesare v. Stuart*, 12 F.3d 973, 978 (10th Cir. 1993) [warrantless seizure of horses violated Fourth Amendment rights; procedural due process rights were violated when horses were disposed of without a hearing]. "If the contraband nature of seized property is in doubt, there should be an appropriate procedure for making that determination." (*People v. Superior Court (McGraw)* (1979) 100 Cal.App.3d 154, 159.) Respondent Court violated these established due process principles when it held that Petitioner had no judicial mechanism to regain his medicine. (See *Franklin v. Municipal Court* (1972) 26 Cal.App.3d 884, 896 [noting that the right to regain possession of one's property is a substantial right]; *People v. Superior Court (Lamonte)* (1997) 53 Cal.App.4th 544, 549 ["Continued official retention of legal property with no further criminal action pending violates the owner's due process rights."]; *Modern Loan Co. v. Police Court* (1910) 12 Cal.App. 582, 585 ["One who is in possession of property under a claim of right cannot be deprived of its possession without due process of law."].)

### E. Federal Law Does Not Overcome Goldstein's State Law Right to the Return of His Property

And federal law does not compel a different result. More than 130 years of binding precedent forbids state courts from enforcing federal law. In *People v. Kelly* (1869) 38 Cal. 145, 150, the Supreme Court of California held: "The State

tribunals have no power to punish crimes against the laws of the United States *as such*. The same act may, in some instances, be an offense against the laws of both, and it is only an offense against the State laws that it can be punished by the State, in any event." [emphasis in original] To like effect, Penal Code section 777 provides: "Every person is liable to punishment by the laws of this State, for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States. . . ."

Thus, in *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, the court applied the well-established precedent of *Kelly* to a medical marijuana case and held that a state court could not punish a qualified medical marijuana patient on probation for using marijuana simply because this violated his probation condition that he comply with all state *and federal* laws. The court reasoned: "The California courts long ago recognized that state courts do not enforce the federal criminal statutes." (*Ibid*. at 1445.) "The federal criminal law is cognizable as such only in the federal courts." (*Ibid*. at 1445 n.13.) "California courts do not enforce the federal marijuana possession laws when defendants prosecuted for marijuana possession have a qualified immunity under section 11362.5." (*Ibid*. at 1447.)

Consistent with this precedent, various federal immunity provisions exempt state and local law enforcement from federal civil or criminal liability for applying the laws of this State. Aside from the fact that governmental officials enjoy an

implied "governmental exception" to penal statutes not expressly including them (see *Nardone v. United States* (1937) 302 U.S. 379, 384, 58 S.Ct. 275, 277; *United States v. Mack* (9th Cir. 1999) 164 F.3d 467, 472), section 885(d) of the federal Controlled Substances Act (21 U.S.C. § 801 *et seq.*) expressly provides that "no civil or criminal liability shall be imposed by virtue of this subchapter . . . upon any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." (21 U.S.C. § 885(d).) Based upon this provision, a unanimous court of appeals in *State v. Kama* (Or. Ct. App. 2002) 178 Or. App. 561, 39 P.3d 866, found no merit to the Portland Police's contention that its officers would be committing a federal crime in returning medical marijuana petitioner was legally entitled to possess under Oregon's Medical Marijuana Act (ORS 475.300). (See 178 Or. App. at p.563 & 565, 39 P.3d at p.867); cf. 21 U.S.C. § 841(a) [prohibiting delivery of controlled substance by "any person"]). The court reasoned: "Even assuming that returning the marijuana otherwise might constitute delivery of a controlled substance, the city does not explain--and we do not understand--why police officers would not be immune from any federal criminal liability that otherwise might arise from doing so [under § 885(d)]." (178 Or. App. at pp.564-65, 39 P.3d at p.868 [citing § 885(d)]; cf. *United States v.*

*Rosenthal* (9th Cir. 2006) 454 F.3d 943, 948 [citing *Kama, supra,* with approval]).) The same is true here. Federal law does not stand as an obstacle to the proper enforcement of state law.

## II.

## WRIT RELIEF IS ESSENTIAL TO RESOLVE AN ISSUE OF URGENT STATEWIDE IMPORTANCE AND TO ENSURE THE CONTINUED AVAILABILITY OF MEDICAL MARIJUANA FOR SICK AND DYING PERSONS, AS PROMOSED BY THE COMPASSIONATE USE ACT

Although courts in many other California jurisdictions apply the existing statutes and return medical marijuana to its rightful owner where there is no probable cause to believe that the qualified patient has committed any crime under State law (see Exhibits at 138-165), the San Francisco Superior Court consistently refuses to do this. Because no direct appeal will lie from such a denial of a motion for return of property (see *People v. Superior Court (Chico Feminist Women's Health Center)* (1986) 187 Cal.App.3d 648, 656; *People v. Gershenhorn* (1964) 225 Cal.App.2d 122; *People v. Tuttle* (1966) 242 Cal.App.2d 883), a petition for a writ of mandamus is the appropriate vehicle to challenge this policy. (See, e.g., *Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113, 123; *Chavez v. Superior Court* (2004) 123 Cal.App.4th 104, 108; *People v. Superior Court (Chico Feminist Women's Health Center)*, *supra*, 187 Cal.App.3d at 656; *Suki, Inc. v. Superior Court* (1976) 60 Cal.App.3d 616, 624; *Franklin v. Municipal Court* (1972) 26

Cal.App.3d 884, 896; *Gershenhorn v. Superior Court* (1964) 227 Cal.App.2d 361, 366.)

In direct conflict with Respondent Court's order, the Compassionate Use Act was designed 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 & Safety Code § 11362.5(b)(1).) This right will be effectively nullified if courts refuse to provide an expedient mechanism for the return of medical marijuana seized by the police. Because this case strikes at the core of basic property rights and constitutional due process over which the lower courts are split, this Court should exercise its discretion to adjudicate the instant Petition. (See *Orange County Air Pollution Control Dist. v. Superior Court* (1972) 27 Cal.App.3d 109, 111-12; *Jensen v. McCullough* (1928) 94 Cal.App. 382, 392; cf. *Green v. Layton* (1975) 14 Cal.3d 922, 925 ["If a matter is of general public interest and is likely to recur in the future, a resolution of the issue is appropriate."].)

## CONCLUSION

The voters of California passed a law rendering the possession of marijuana legal for medical purposes, but the courts do not always enforce this. After Petitioner Goldstein was the innocent victim of the theft of his medicine, which was later confiscated by the police, Respondent Court should have ordered the

medicine returned to him, but it failed to do so. An extraordinary writ is needed to restore property and due process rights to medical marijuana patients. Like other innocent victims, qualified patients should be allowed to avail themselves of the established procedures for the return of their property.

DATED: November 20, 2006 Respectfully submitted,

_____

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Counsel for Petitioner
BENJAMIN GOLDSTEIN

## CERTIFICATE OF WORD COUNT

I, JOSEPH D. ELFORD, declare as follows:

I am the attorney for Benjamin Goldstein in this matter. On November 20, 2006, I performed a word count of the above-enclosed brief, which revealed a total of 6,642 words.

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

Executed this __ day of November 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 November 20, 2006, I served the within document(s):

**PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF**

Via first-class mail to:

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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.

_____
JOSEPH D. ELFORD