G036250

COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

THE CITY OF GARDEN GROVE, a municipal corporation, Petitioner, v. SUPERIOR COURT OF ORANGE COUNTY, Respondent, FELIX KHA, Real Party in Interest.	Civil No. G036250 (Superior Court No. 2200677)

REAL PARTY IN INTEREST'S INFORMAL OPPOSITION TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

SEEKING REVIEW OF THE ORDER OF THE

SUPERIOR COURT OF ORANGE COUNTY

THE HONORABLE LINDA S. MARKS PRESIDING

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INTRODUCTION

After seizing the medical marijuana of Real Party in Interest Felix Kha ("Kha") without probable cause to believe that he had committed any state crime, Petitioner City of Garden Grove ("Petitioner") claims that it cannot abide by an order of Respondent Court to return his medicine. In its haste to apply federal, rather than state, law, Petitioner neglected to consider a federal immunity statute (21 U.S.C. § 885(d)), which exempts its officials from the prohibitions of the federal Controlled Substances Act ("CSA"), so long as they are acting pursuant to state law. Under California law, Kha was absolutely entitled to possess the approximately eight grams of medical marijuana at issue and to its return after it was improperly seized from him pursuant to a routine traffic stop. Regardless whether Petitioner agrees with the policy choice made by the voters of California, it is bound by this law, not the law enforced by federal law enforcement. Petitioner does not dispute that Kha was entitled by California law to possess the medical marijuana at issue and this Court should affirm the order of the Respondent Court directing its return.

STATEMENT OF FACTS

Real Party in Interest Felix Kha ("Kha") is a qualified medical marijuana patient who carries with him a copy of his physician's written recommendation to

use marijuana for medical purposes. (See Exhibit B[1]) On June 10, 2005, Kha was stopped by the Garden Grove City Police for failing to make a complete stop at a red light before making a right turn. (See Exhibit E at p. 1) Pursuant to this routine traffic stop, the officers asked Kha to step out of his vehicle and they patted him down. (See Exhibit E at p. 1) Finding nothing, they requested and obtained Kha's consent to search his vehicle where they found a container labeled "Medical Cannabis," which contained approximately 8.1 grams of marijuana. (See Exhibit E at p. 1; Exhibit G) Kha, then, volunteered that he was a qualified medical marijuana patient and he handed the police a copy of his physician's recommendation. (See Exhibit E at p. 1) Nevertheless, the officers confiscated his medicine and issued him a notice to appear in court for possession of marijuana in a vehicle and for failing to stop for a red light. (See Exhibit D; Exhibit E at pp. 1-2)

To obtain an order for the return of his medicine, Kha was required to make three court appearances. Kha first appeared in court on August 25, 2005, at which time the court set the case for a pre-trial conference the following week. (Exhibit A at p. 1) Six days later, on August 31, 2005, Kha returned to court for this conference with a copy of his physician's recommendation to use marijuana

[1] All "Exhibits" refer to the Exhibits submitted by Petitioner on October 31, 2005, in its Appendix in Support of Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief.

medicinally in hand. (See Exhibit A at p. 1) After reviewing this recommendation, Respondent Court dismissed the marijuana possession charge against Kha and, after he pled guilty to the traffic violation, he requested that his marijuana be returned to him. (See Exhibit A at p. 2) Respondent Court set the hearing on Kha's motion for return of property for the following day, at which time the District Attorney made a telephone call to Kha's physician to confirm the validity of his physician's recommendation. (Exhibit A at p. 2) Still, it opposed the return of his medicine. (Exhibit A at p.2) Respondent Court, however, recognized that Kha's possession of medical marijuana was legal under state law, citing Health and Safety Code sections 11362.5 and 11362.75, and it ordered the return of his medical marijuana to him. (Exhibit C) Rather than abide by this Order, the City of Garden Grove filed the instant Petition.

ARGUMENT

I.

KHA WAS ABSOLUTELY ENTITLED TO POSSES THE EIGHT GRAMS OF MEDICAL MARIJUANA AT ISSUE AND TO ITS RETURN WHEN IT WAS IMPROPERLY SEIZED BY THE POLICE

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

Approved by fifty-seven percent of the California electorate, 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 medical marijuana patients has been frustrated by law enforcement seizures of marijuana without probable cause. This, and other uncertainties in the implementation of the Compassionate Use Act motivated the California Legislature to enact Health and Safety Code section 11362.77(a) in 2003, which provides that a qualified patient or his primary caregiver "may possess" eight ounces of dried marijuana per patient.[2] (Cf. Senate Bill 420, Stats. 2003 c.875 [hereinafter "SB 420"] § 1(a)(2) ["reports from across the state 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"].) Under these laws, Kha had an absolute right to possess the

[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"].)

approximately eight grams of dried marijuana at issue, and Petitioner does not contend otherwise.

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

Rather than dispute Kha's entitlement to possess the marijuana at issue under state law, Petitioner contends that no California law requires the return of Kha's marijuana to him and, if it did, such law would be preempted by the federal CSA. (Petition at pp. 18-21) In making these arguments, Petitioner blithely ignores well-established state law mandating the return of property which is not the subject of a crime, as well as a federal immunity statute which renders this return of medical marijuana by state officials legal even under federal law.

Recognizing the important due process and property rights involved for victims of law enforcement seizures, the California Legislature enacted various Penal Code sections creating 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 §§ 1538.5, 1539 & 1540; 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].) In particular, Penal Code section 1538.5(a)(1)(A) authorizes the return 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; see also *Gershenhorn v. Superior Court* (1964) 227 Cal.App.2d 361, 365 [authorizing nonstatutory motion for return of property seized without warrant or probable cause where no charges are filed].) 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 1547; *People v. Superior Court, Orange County* (1972) 28 Cal.App.3d 600, 608; see also *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."].) Respondent Court properly exercised its duty to order the return of Kha's medical marijuana under this authority.

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 That He Has Violated State Law

To overcome Respondent Court's proper exercise of its mandatory duty, Petitioner contends that the Compassionate Use Act does not explicitly authorize the return of medical marijuana. (See Petition at pp. 19-20 [citing *Chavez v. Superior Court* (2004) 123 Cal.App.4th 104].) Perhaps not, but this is irrelevant, since special proceedings for the return of property were already well-established.

(See *supra*; Penal Code §§ 1538.5; *Gershenhorn v. Superior Court* (1964) 227 Cal.App.2d 361, 365.) The Compassionate Use Act did not displace such special proceedings and this Court in *Chavez, supra,* properly analyzed a claim for the return of medical marijuana under the authority cited above. (See *Chavez, supra*, 123 Cal.App.4th 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. . . ."].)

Chavez v. Superior Court, supra, involved a claim by one formerly possession of a significant quantity of marijuana -- 4.5 pounds of dried marijuana, 10 pounds of drying marijuana, and 46 marijuana plants -- that this marijuana be returned to him. (*Ibid*. at p.110.) After this Court carefully analyzed whether this amount of marijuana was for petitioner's own medical use, it found that it was not, so California law did not authorize it, or any portion of it, returned to him "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 pp. 110 & 111.) This Court did not did not foreclose the possibility of marijuana being returned to a qualified patient in all cases; indeed, had this been the holding of *Chavez,* it would have been unnecessary for this Court to scrutinize the quantity of marijuana possessed by Chavez so carefully. Such an analysis results in the opposite result in this case, since Kha was absolutely entitled

to possess the 8.1 grams of medical marijuana at issue under Health and Safety Code section 11362.77(a). The existing statutes require that his medicine be returned to him.

II.

FEDERAL LAW DOES NOT OVERCOME KHA'S STATE LAW RIGHT TO THE RETURN OF HIS PROPERTY

A. Well-Established Precedent Forbids State Courts From Applying Federal Criminal Law

Nor does federal law overcome the proper enforcement of state law in the state courts. More than 130 years of binding precedent forbids state courts from enforcing federal law. (See *People v. Kelly* (1869) 38 Cal. 145, 150.) In *People v. Kelly*, *supra,* the California Supreme Court held that "[t]he 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." (*Ibid.* at p. 150 [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. . . ." (Accord *Ponzi v. Fessenden* (1922) 258 U.S. 254, 259, 42 S.Ct. 309.)[3]

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 [citing *Kelly, supra*]) "The federal criminal law is cognizable as such only in the federal courts." (*Ibid*. at 1445 fn. 13) "California courts do not enforce the federal marijuana possession laws when defendants prosecuted for marijuana possession have a qualified immunity under section

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[3] In *Ponzi v. Fessenden, supra,* 258 U.S. at p. 259, the Supreme Court described the dual sovereignty doctrine as follows:

> We live in the jurisdiction of two sovereigns, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfill their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.

11362.5." (*Ibid*. at 1447) Respondent Court appropriately followed this authority when it ordered the return of Felix Kha's medicine.[4]

B. A Federal Immunity Statute Explicitly Exempts State and Local Law Enforcement Officials From the Federal Laws Relating to Controlled Substances

Even more conspicuously absent from Petitioner's Memorandum of Points and Authorities is any discussion of 18 U.S.C section 885(d), which immunizes local officials, like members of the City of Garden Grove Police, from civil or criminal liability under the federal Controlled Substances Act ("CSA") for the implementation of state law relating to controlled substances. The federal immunity provision provides as follows: "[N]o civil or criminal liability shall be imposed by virtue of [the CSA] . . . 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 on this provision, a unanimous court of appeals in *State v. Kama* (Or. Ct. App. 2002) 178 Or. App. 561, 39 P.3d 866, rejected nearly an identical

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[4] Petitioner cites *Ross v. Ragingwire Telecommunications, Inc.* (2005) 132 Cal.App.4th 590, *petition for review granted* on December 1, 2005, for the proposition that medical marijuana remains illegal under federal law. (See Petition at pp. 16-18) This is undisputed and irrelevant, as the issue here is whether state courts should apply state or federal law. It bears noting that the Supreme Court of California has granted review of the *Ross* case.

argument as that made by Petitioner here – that, because medical marijuana remains illegal under federal law, a state court cannot order the police to return it because such order would violate federal law. (178 Or. App. at 564, 39 P.3d at 868). Analogous to this case, the trial court found in *Kama* that, under Oregon's medical marijuana laws, the defendant was entitled to possess the medical marijuana at issue and to its return after it was confiscated by the police. On appeal, the court rejected the City's argument that federal law prohibits this. Relying on the plain language of 21 U.S.C. section 885(d), the court reasoned as follows:

> In this case, there is no debate that defendant is entitled to possession of the marijuana under ORS 475.323(2). 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 564-65, 39 P.3d at 868 [citing § 885(d)].) Based on the operation of section 885(d), the appellate court affirmed the trial court's order that Kama's medical marijuana be returned. (*Ibid.*) Kha is entitled to the same treatment.

C. Federal Law Does Not Preempt California's Compassionate Use Act

Lastly, and again without considering 21 U.S.C. section 885(d), Petitioner contends that California's medical marijuana laws are preempted by federal law. (Petition at p. 21) To succeed in invalidating California law in this manner,

Petitioner carries a very weighty burden. "Courts are reluctant to infer preemption and it is the burden of the party claiming that Congress intended to preempt state law to prove it." (*Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, 548.) Where, as here, Congress has legislated in a field traditionally occupied by the states, courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230, 67 S.Ct. 1146; cf. *Medtronic v. Lohr* (1996) 518 U.S. 470, 507, 116 S.Ct. 2240 ["this Court has previously said that it would 'seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety'"] [quotation omitted]; *id.* at p. 485 [recognizing "the historic primacy of state regulation of matters of health and safety"]; see also *United States v. State of California* (1960) 281 F.2d 726, 728 ["If the state had seen fit to impose conditions upon issuance or upon transfer of property it has wholly created, that is the state's prerogative so long as it demands are not arbitrary or discriminatory. The federal government has no power to command the state in this area."]; *Ledcke v. State* (1973) 260 Ind. 382, 296 N.E.2d 412, 420 [holding that state marijuana laws are not preempted by CSA; "the regulation of drug abuse is a state concern with special local problems necessitating the use of state police power"].) "This assumption provides assurance that 'the federal-state

balance' [citation] will not be disturbed unintentionally by Congress or unnecessarily by the courts." (*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525, 97 S.Ct. 1305.)

In its attempt to meet its burden, Petitioner contends that the Compassionate Use Act is preempted by federal law because the CSA prohibits the possession of marijuana even for medical use, so state law stands as a barrier to the accomplishment of the objectives of Congress. (See Petition at p. 21) Congress, however, in enacting the CSA stated that its purpose was the protection of the health and welfare of the American people, not the eradication of all Schedule I drugs. (See 21 U.S.C. § 801(1) ["Congress makes the following findings and declarations: (1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people. (2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people."].) And Congress added an anti-preemption provision to the CSA, which provides as follows:

> 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 there is a positive conflict

> between that provision of this subchapter and that State law so that the two cannot consistently stand together.

(21 U.S.C. § 903) As further explained below, California's medical marijuana laws can work side-by-side with federal law to achieve the health and safety objectives of Congress.

When it enacted the CSA in 1970, Congress preliminarily classified marijuana as a Schedule I drug based, in part, on the recommendation of the Assistant Secretary of HEW "that marihuana be retained within schedule I at least until the completion of certain studies now underway." *Raich v. Ashcroft* (2005) 125 S.Ct. 2195, 2204 [quoting legislative history of the CSA].) Although the federal government has found the emerging science unconvincing and continues to maintain marijuana in Schedule I, the CSA provides for the periodic updating of schedules and authorizes the Attorney General to transfer substances between schedules after consultation with the Department of Health and Human Services (*ibid.* at p. 2204 [citing 21 U.S.C. § 811].). The medical marijuana experiment in California will assist the federal government make an informed decision and advance the health and general welfare of the American people. Such experimentation is precisely what our federalist system of government was designed to protect. (See *New State Ice Co. v. Liebmann* (1932) 285 U.S. 262, 311 [Brandeis, J., dissenting] ["It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and

try novel social and economic experiments without risk to the rest of the country."]; cf. *Connecticut Light & Power Co. v. Federal Power Commission* (1945) 324 U.S. 515, 530 (1945) ["the 'insulated chambers of the states' are still laboratories where many lessons in regulation may be learned by trial and error on a small scale without involving a whole national industry in every experiment."]; *Boyle v. Anderson* (8th Cir. 1995) 68 F.3d 1093, 1109 [noting important role of "state's effort to serve as a 'laboratory of democracy' in the realm of health care].)

It, thus, comes as no surprise that there is a history of state experimentation in the field of health care, even when the federal government did not fully agree with the state policy. In 1905, for instance, the Supreme Court upheld the constitutionality of a compulsory smallpox vaccination law passed by the State of Massachusetts at a time when there was a raging debate over the efficacy of such vaccinations. (See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) ["The safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect. They are matters that do not ordinarily concern the national government."].) Similarly, in the 1960s and 70s, the FDA did not prevent several states from distributing the hotly disputed cancer drug laetrile intrastate, despite a federal ban on interstate sales. (See *Shumake v. Travelers Ins. Co*. (Mich. Ct. App. 1985) 383 N.W.2d 259, 265.) Numerous other cases have confirmed that states are free to choose between competing approaches when the

medical data is uncertain. (*See Kansas v. Hendricks* (1997) 521 U.S. 346, 360 fn.3 [holding that disagreements among medical professionals "do not tie the State's hands in setting the bounds of . . . laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude."]; *Collins v. Texas* (1912) 223 U.S. 288, 297-298 (Holmes, J.) (declaring the "right of the state to adopt a policy even upon medical matters concerning which there is difference of opinion and dispute"]; cf. *Hurley v. Lederle Laboratories* (5th Cir. 1988) 863 F.2d 1173, 1176 fn. 2 [citing 14 federal district court and 3 state court decisions involving vaccines, all rejecting preemption].)

D. The Tenth Amendment to the United States Constitution Prevents the Federal Government From Requiring State Officials to Enforce Federal Law

If the federal government had sought to preempt California law in this area, which it has not, it could not constitutionally do so in the manner urged by Petitioner. Under the Tenth Amendment, the federal government may not "commandeer" state officials to enforce federal law.[5] (See *Printz v. United States* (1997) 521 U.S. 898, 930-31; *Conant v McCaffrey* (9th Cir. 2002) 309 F.3d 629, 646-47 [Kozinski, J., concurring]; see also S.B. 420, Section 1(e) (Sept. 11, 2003) [noting that California's Compassionate Use Act was enacted "pursuant to the

[5] The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

powers reserved to the State of California and its people under the Tenth Amendment to the United States Constitution"].) Thus, in *Conant v. McCaffrey, supra*, Judge Kozinski found that the federal government's threatened punishment of California doctors for recommending medical marijuana to their patients violates the Tenth Amendment, since state courts would be required to enforce federal drug policy if there were no doctors willing to recommend marijuana to their patients. (*Conant v McCaffrey*, *supra,* 309 F.3d at pp. 646-47 [Kozinski, J., concurring].) Directly requiring state courts and officials to become servants of this federal drug policy, as Petitioner urges here, would be an even a greater affront to the Tenth Amendment. (Cf. *Hayden v. Keane* (S.D.N.Y. 2001) 154 F.Supp.2d 610, 615 [noting that federal agency's attempt to nullify bail decisions of state court by issuing parole violation warrant on eve of bail hearing would undermine state autonomy and violate principles of federalism].) This Court, however, need not reach this constitutional question, since 21 U.S.C. section 885(d) expressly exempts state and local officials who are lawfully engaged in the enforcement of the Compassionate Use Act from the reach of the federal drug laws. (Cf. *United States v. Oakland Cannabis Buyers' Coop.* (2001) 532 U.S. 483, 502, 121 S.Ct. 1711 [Stevens, J. concurring] ["courts [must], whenever possible, ... avoid or minimize conflict between federal and state law, particularly in situations in which

the citizens of a state have chosen to serve as a laboratory in the trial of novel social and economic experiments without risk to the rest of the country"].)

III.

THIS CASE PRESENTS ISSUES OF URGENT STATEWIDE IMPORTANCE AND JUDICIAL RESOLUTION OF THESE ISSUES IS NECESSARY TO ENSURE THE CONTINUED AVAILABILITY OF MEDICAL MARIJUANA FOR SERIOUSLY ILL PERSONS, AS PROMOSED BY THE COMPASSIONATE USE ACT

The parties, however, do agree on one thing -- this case presents issues of urgent statewide importance. Whereas 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 has been degraded by arbitrary law enforcement seizures of marijuana from qualified patients. In 2003, the California Legislature recognized flaws in the implementation of the Compassionate Use Act (see SB 420, section 1(a)(2)), but the legislation it passed did not fully solve the problem. Law enforcement is confused about which law to follow and medical marijuana patients are paying the price. This Court should restore the will of the California voters who enacted the Compassionate Use Act by denying the instant Petition in a public manner. (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

For the foregoing reasons, this Court should deny the instant Petition.[6]

DATED: January 7, 2006 Respectfully submitted,

_____
JOSEPH D. ELFORD
Counsel for Real Party in Interest
FELIX KHA

[6] The instant Petition does not request the destruction of the medical marijuana at issue in its prayer for relief, but, instead, seeks an order directing Respondent Court to set aside its September 1, 2005, order and denying Kha's Petition for the Return of Property. (See Petition at pp. 6-7) Even if this Court were to issue such order, Kha requests that it not, in addition, order the destruction of his property.

CERTIFICATE OF WORD COUNT

The text of this brief consists of 4,629 words as counted by the word processing program used to generate the brief.

DATED: January 7, 2006 Respectfully submitted,

_____

JOSEPH D. ELFORD
Counsel for Real Party in Interest
FELIX KHA

DECLARATION OF SERVICE

I am a resident of the State of California and over the age of eighteen years. My business address is 1322 Webster St., Oakland, CA 94612. On January 7, 2006, I served the within document(s):

REAL PARTY IN INTEREST'S INFORMAL OPPOSITION TO PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

Via overnight mail to:

Court of Appeal
Fourth Appellate District, Division Three
925 N. Spurgeon Street
Santa Ana, CA 92701-6777

Via first-class mail to:

John R. Shaw
Magdalena Lona-Wiant
Woodruff, Spradlin & Smart
701 South Parker Street, Suite 8000
Orange, CA 92868-4760

Office of the District Attorney
West Justice Center
8141 13th Street
Westminster, CA 92863

The Honorable Linda S. Marks
Department W3
Orange County Superior Court
West Justice Center
8141 13th Street
Westminster, CA 92863-7593

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 January, 2006, in San Francisco, California.

_____
JOSEPH D. ELFORD