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Roadside Seizures of Medical Marijuana:

Public Safety and Public Policy as Limitations upon Transporting and the Return of Lawfully Seized Medical Marijuana

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In November 2007, a California Court of Appeal issued a decision in *Garden Grove v. Superior Court*[1] that requires local police officers to return medical marijuana to a qualified patient, despite a lawful search and seizure subsequent to a moving motor vehicle violation. The effect of this ruling, in at least some instances, will be to place marijuana back into the hands of a person who is a risk to public safety while driving under the influence or is engaged in the "diversion"[2] of medical marijuana through unlawful transporting.

A qualified patient is authorized to possess and use medical marijuana that adheres to certain general quantity guidelines. While adhering to the general quantity guideline limits for which possession is allowed by law, a person could transport marijuana for his or her use and thereafter drive under the influence or, alternatively, could unlawfully divert medical marijuana for nonmedical purposes. States have the right to exercise their police powers for the benefit of public health, safety, and welfare. This article proposes a presumption limiting a qualified patient or primary caregiver's[3] right to transport medical marijuana within a motor vehicle to protect against driving under the influence, reduce unlawful diversions, and ensure compliance with medical marijuana laws.[4] This presumption, under certain circumstances, allows for a forfeiture of medical marijuana that is presumably possessed for nonmedical purposes.

In addressing the *Garden Grove* decision, this article relies upon public safety and public policy to justify the forfeiture and destruction of medical marijuana following lawful seizure from a motor vehicle. This presumption, while making an exception for the initial procurement of medical marijuana, presumes that a patient or caregiver who has direct and immediate control of a motor vehicle is transporting the medical marijuana for nonmedical use. Notably, the presumption would only apply to persons whose possession adheres to the general quantity guideline limits.[5]

The rationale for the presumption is that there is no reason that a patient or caregiver should be driving while transporting marijuana, with the exception of same-day procurement, and thus, the impermissible transporting of medical marijuana should result in forfeiture. This, in turn, prevents the marijuana from being returned to the patient or caregiver and acts as a deterrent to transporting marijuana for nonmedical purposes or in situations that can adversely affect public safety.

I. COMMON CHARACTERISTICS OF MEDICAL MARIJUANA LAWS

A. LIMITATIONS ON AMOUNTS FOR POSSESSION AND USE

Currently, there are 13 states with laws related to medical marijuana: Alaska, California, Colorado, Hawaii, Maine, Maryland, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont, and Washington.[6] The allowable limit of marijuana that may be legally possessed spans from none in Maryland[7] to 24 ounces in Oregon,[8] with Washington and New Mexico allowing a 60-day and 90-day supply,[9] respectively, as

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Footnotes

1. City of Garden Grove v. Super. Ct. of Orange Co., 157 Cal. App. 4th 355 (Cal. App. 4th Dist. 2007).
2. "Diversion" of medical marijuana, as hereafter used, means any nonmedical purpose or use but especially distribution, sharing, resale, and recreational use.
3. Further references to "patient" or "caregiver" means a "qualified patient" and "primary caregiver," respectively, within the meaning of California's medical marijuana laws. Cal. Health & Safety Code Ann. § 11362.7(d), (f) (Lexis 2008).
4. While this article considers medical marijuana laws in general, it surveys California law in particular.
5. As will be discussed, persons possessing quantities above the general quantity guideline limits are likely not in compliance with medical marijuana laws and are subject to criminal prosecution; thus, the presumption need not apply to them because their conduct is already unlawful.
6. NORML, *Working to Reform Marijuana Laws*, http://www.norml.org/index.cfm?Group_ID=3391 (updated Dec. 01, 2004).
7. Maryland merely limits penalties to a $100 fine after a successful defense of medical need. Md. Code Ann. Crim. Law § 5-601(c)(3)(ii) (Lexis 2008).
8. Or. Rev. Stat. Ann. § 475.320(1)(a) (Lexis 2007).
9. N.M. Stat. Ann. § 26-2B-3(A) (Lexis 2008); Wash. Rev. Code Ann. § 69.51A.040(3)(b) (Lexis 2008).
10. Cal. Health & Safety Code Ann. § 11362.77(a) (Lexis 2008).

determined by the state health department. Most states allow possession of between one to eight ounces of marijuana. California permits a qualified patient or primary caregiver to possess up to eight ounces under general quantity guidelines,[10] but they may possess a greater quantity, upon physician's recommendation, if their medical needs so require.[11]

B. AFFIRMATIVE DEFENSES AND PROTECTION GENERALLY

While states generally afford legal protections to qualified patients and their primary caregiver, the means by which these protections are invoked varies. Nearly every state allows the use of its statutes to be employed as an affirmative defense against prosecution.[12] Most states have mandatory registration and identification programs, though participation is voluntary in California.[13] Many states, including California, allow protection from arrest and prosecution for qualified patients and primary caregivers who are registered cardholders in compliance with state law requirements.[14] When the qualified patient or primary caregiver is neither a registered cardholder nor in full compliance, as for example when his or her possession exceeds the general quantity limit, the qualified patient or primary caregiver may invoke the statutory protections by way of an affirmative defense.[15] This is true in California since the qualified patient or primary caregiver need not be registered to avail themselves of the afforded protections.[16]

C. EXCEPTIONS FOR ENDANGERING OTHERS AND/OR USE WHILE IN A MOTOR VEHICLE

Though medical marijuana laws ("MMLs") vary in the degree of protection they afford to qualified patients and primary caregivers, most states provide exceptions to the protections granted by their MMLs. These laws prohibit qualified patients and primary caregivers from "engaging in conduct that endangers others"[17] and/or prohibit the use of marijuana while in an operated motor vehicle.[18] California also precludes protection for conduct that diverts marijuana for nonmedical uses.[19]

D. PROPERTY RIGHTS AND REQUIRED RETURNS OF MARIJUANA FOLLOWING SEIZURE

States also differ in their treatment of seized marijuana and/or paraphernalia following a situation where prosecution was not initiated or was dismissed because the possession was deemed non-criminal. Most MMLs protect marijuana and paraphernalia as property that must be returned to a qualified patient or primary caregiver who is in lawful possession. Some states, such as California, did not enact such a provision as part of its MMLs and look to other statutes[20] and decisional law for clarification of the issue. Notably, Vermont is *sui generis* in specifying that, under its medical marijuana laws, law-enforcement officers are expressly not required to return marijuana or paraphernalia following a seizure.[21]

[M]edical marijuana laws ("MMLs") vary in the degree of protection they afford to qualified patients and primary caregivers . . . .

II. EFFECT OF MEDICAL MARIJUANA LAWS ON VEHICLE SEARCHES, SEIZURES, AND ARRESTS

A. MOTOR VEHICLE SEARCHES AND SEIZURES

Generally, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."[22] In addition, probable cause will permit a warrantless search of an automobile with the scope of the search extending to "every part of the vehicle and its contents" that might contain the items actually sought.[23]

B. EFFECT OF MEDICAL MARIJUANA LAWS ON VEHICLE SEARCHES AND SEIZURES

California courts have explained the effect of California's Compassionate Use Act ("CUA") upon law-enforcement investigations. In *People v. Strasburg*, a police officer encountered Strasburg parked in his car immediately after he had smoked marijuana.[24] Strasburg notified the officer of his status as a qualified patient and produced his prescription.[25] The issue was whether the officer had probable cause to search Strasburg's car and, consequentially, whether detaining and frisking him was lawful since he was a qualified patient under the CUA.[26] The court held the CUA "does not impair reasonable police investigations and searches."[27] The court stated the CUA provides limited immunity, as opposed to a shield from investigation, and held that the officer was entitled to search and investigate to determine if Strasburg was acting lawfully because probable cause existed after the officer smelled the marijuana.[28] Strasburg's conviction was upheld because he possessed 23

11. *Id.* § 11362.77(b).
12. *Id.* § 11362.5(d); *People v. Mower*, 28 Cal. 4th 457, 474 (2002) (concluding that section 11362.5(d) grants a "defendant a limited immunity from prosecution . . . .").
13. Cal. Health & Safety Code Ann. § 11362.71(a)(1) (Lexis 2007).
14. *Id.* § 11362.71(e).
15. *Id.* § 11362.77(b); People v. Wright, 40 Cal. 4th 81, 97 (2006) (recognizing medical needs exceeding the general eight ounce quantity limit will afford a Compassionate Use Act affirmative defense).
16. Cal. Health & Safety Code Ann. § 11362.71(f) (Lexis 2007).
17. *Id.* § 11362.5(b)(2).
18. *Id.* § 11362.79(d).
19. *Id.* § 11362.5(b)(2).
20. *Id.* § 11473.5(a).
21. Vt. Stat. Ann. tit. 18 § 4474b(d) (Lexis 2007).
22. Whren v. U.S., 517 U.S. 806, 810 (1996).
23. People v. Strasburg, 148 Cal. App. 4th 1052, 1059 (Cal. App. 1st Dist. 2007).
24. *Id.* at 1055.
25. *Id.* at 1055-1056.
26. *Id* at 1058.
27. *Id.*
28. *Id.* at 1060.

In Trippett, the court recognized that the [Compassionate Use Act] might impliedly afford a defense to transporting marijuana.

ounces of marijuana.[29]

While voters approved the CUA in 1996,[30] the Medical Marijuana Program Act ("MMPA") was enacted in 2003 to "address additional issues that were not included within the [CUA] and that [needed to be resolved to promote its] fair and orderly implementation . . . ."[31] While the CUA only applied to possession and cultivation,[32] the MMPA extended patient and caregiver protections to the acts of transporting, maintaining or allowing a place to be used for marijuana related activity, and nuisance.[33] The MMPA affords immunity from arrest and prosecution,[34] as discussed above, to a qualified patient or primary caregiver who is registered, has an identification card, and is in compliance. The Supreme Court of California, in discussing the CUA as an affirmative defense, said that "immunity from arrest is exceptional and, when granted . . . is granted expressly."[35] Such is the case for a registered patient or caregiver with an identification card, but only if such persons comply with MML provisions.[36]

III. THE *GARDEN GROVE* DECISION WITHIN THE FRAMEWORK OF CALIFORNIA'S MEDICAL MARIJUANA LAWS

A. PURPOSE, SCOPE, AND LIMITATIONS OF CALIFORNIA'S MEDICAL MARIJUANA LAWS

The Supreme Court of California specifically addressed the purpose and scope of the CUA in *Ross v. RagingWire Telecomm., Inc*.[37] In *Ross*, the plaintiff, a qualified medical marijuana user, sued his employer after being terminated for failing a pre-employment drug test.[38] Ross asserted his employer needed to afford him a reasonable accommodation and his termination was wrongful as against public policy.[39] The court held Ross could not state a valid disability discrimination claim or wrongful termination claim.[40] The court reasoned that CUA was not intended to alter employment relationships.[41] Rather, the CUA's purpose is to provide seriously ill Californians with the right to obtain and use physician-recommended marijuana for medical purposes while ensuring that qualified users and their primary caregivers are not subject to criminal prosecution or criminal sanction.[42] The employee's termination was upheld since the CUA speaks exclusively to the criminal law.[43]

Finally, in addition to purpose and scope, the *Ross* court also addressed the CUA's limitations. In particular, the court explicitly rejected the assertion that the CUA created a broad right to use marijuana without hindrance or inconvenience, since the measure did not purport to change the laws affecting public intoxication, nor did the CUA "supersede legislation prohibiting persons from engaging in conduct that endangers others," the latter being expressly codified.[44]

B. MEDICAL MARIJUANA LAWS AS A DEFENSE TO CRIMINAL TRANSPORTATION

Given the manner in which the CUA and MMPA were enacted, there has been some inconsistency with respect to whether California's MMLs provide a defense to a criminal charge of transporting marijuana. The Supreme Court of California, in *People v. Wright*,[45] addressed the issue of transporting under California's MMLs, noting a conflict between the appellate court decisions in *People v. Trippet*[46] and *People v. Young*.[47]

In *Trippet*, the court recognized that the CUA might impliedly afford a defense to transporting marijuana.[48] In that case, the defendant's vehicle was stopped for not having a license plate lamp light.[49] Upon smelling marijuana, the police officer searched the car and confiscated approximately two pounds.[50] Trippet was charged with both transporting and possession.[51] The *Trippet* court held that although the CUA did not expressly provide a defense to transporting, it might impliedly provide such a defense in some situations depending upon the quantity transported and the method, timing, and distance of the transportation to determine whether the trans-

29. *Id.*
30. Cal. Health & Safety Code Ann. § 11362.5(a) (Lexis 2008).
31. People v. Urziceanu, 132 Cal. App. 4th 747, 783 (Cal. App. 3rd Dist. 2005).
32. Wright, 40 Cal. 4th at 84.
33. *Id.* at 93.
34. *Id.*
35. Mower, 28 Cal. 4th at 469.
36. Cal. Health & Safety Code Ann. § 11362.71(e) (Lexis 2007).
37. 42 Cal. 4th 920 (2008).
38. *Id.* at 924.
39. *Id.* at 925.
40. *Id.* at 924.
41. *Id.* at 928.
42. *Id.*
43. The California legislature has recently passed a bill to overturn the decision handed down by the California Supreme Court in *Ross*. On February 21, 2008, Assembly Member Leno introduced Assembly Bill 2279, which has successfully passed both houses as of August 29, 2008. The proposed law permits an employee or prospective employee to assert a cause of action against an employer who discriminates against him or her on the basis of the employee's status as a qualified patient or for taking adverse action after the employee fails a drug test. However, the proposed law is inapplicable to those employed in a "safety-sensitive position" and does not preclude the employer from taking adverse action against an employee who is impaired at work or during work hours. Legis. Counsel of Cal., *Bill Information*, http://www.leginfo.ca.gov/bilinfo.html; *search* "AB 2279", *select* "Enrolled" bill in HTML or PDF (accessed Sept. 28, 2008).
44. Ross, 42 Cal. 4th at 928-929.
45. 40 Cal. 4th at 90-92.
46. 56 Cal. App. 4th 1532 (Cal. App. 1st Dist. 1997).
47. 92 Cal. App. 4th 229 (Cal. App. 3rd Dist. 2001).
48. Trippet, 56 Cal. App. 4th at 1536.
49. *Id.*
50. *Id.*
51. *Id.* at 1547.

port reasonably related to the patient's medical needs (hereafter the "*Trippet* test").[52] The case was remanded to determine whether Trippet was a qualified patient and what amount of marijuana was authorized by her physician.[53]

However, the *Young* court expressly rejected the CUA as affording a defense to a charge of transporting.[54] In *Young*, an officer observed a car swerve on the highway.[55] Upon investigation, the officer asked Young if drugs were in the car.[56] Young admitted the presence of marijuana, but provided a physician's statement authorizing use.[57] The *Young* court held the CUA does not provide a defense to transporting marijuana as it unambiguously covers only possession and cultivation.[58] Young's conviction for transporting marijuana was affirmed.[59]

In *Wright*, the Supreme Court of California indirectly endorsed the *Trippet* test with respect to transporting cases. Defendant Wright was found to be in possession of several bags of marijuana weighing just over a pound after officers investigated a tip that his car smelled of marijuana.[60] He was charged with possession for sale, transporting, and driving on a suspended license.[61] Before trial, he pled guilty to the license charge and, at trial, defended the remaining charges upon the grounds that he was a qualified patient who preferred to ingest marijuana rather than smoke it, which was why he asserted he possessed greater than a pound.[62] Wright was convicted of possession for sale and transporting after the trial court refused a CUA defense jury instruction.[63] The issue was whether the CUA provides a defense to a charge of transporting and whether it was reversible error to refuse such an instruction.[64] While acknowledging that the *Trippet* test continues to be a useful analytical tool, the court held the transporting issue related to the CUA was moot since the newly enacted MMPA had extended protections to charges of transporting.[65] The court found that Wright would be entitled to a CUA defense,[66] as expanded by the MMPA and under the facts of his case, but his conviction was upheld. Since the jury was given the option of convicting him for the lesser included offense of possession, it had resolved, albeit implicitly but necessarily, that Wright's conduct was not for personal medical use when it convicted him for sales.[67]

In addition to addressing whether the CUA, as expanded by the MMPA, afforded a defense to transporting, the court addressed what must be proven for a defendant to invoke an affirmative defense under the CUA. In particular, the *Wright* court noted that the defendant has the burden to produce evidence that: 1) he is a qualified patient; 2) the quantity possessed was authorized pursuant to a physician's recommendation; and 3) the marijuana is for the defendant's own personal medical use.[68]

The issue before the Garden Grove court was whether policy may deny the return of marijuana . . . because returning it would result in a violation of [federal law].

C. THE *GARDEN GROVE* DECISION

As mentioned above, *Garden Grove v. Superior Court*[69] addressed the right of a qualified patient to have marijuana returned to him or her after it was lawfully seized subsequent to a valid traffic stop. In *Garden Grove*, defendant Kha was stopped for running a red light.[70] Kha consented to a vehicle search and officers recovered a pipe and 8.1 grams of marijuana that Kha claimed he obtained from a lab in Long Beach.[71] Though Kha produced a seemingly valid doctor's referral, the police seized the marijuana and cited Kha for running the red light and unlawful possession of less than an ounce of marijuana while driving.[72]

Kha subsequently "pled guilty to the traffic violation, but . . . contested the drug charge."[73] After Kha's doctor verified that Kha was authorized to use marijuana for medical reasons, the prosecutor dismissed the criminal charge, but opposed Kha's request to return the marijuana.[74] The trial court ordered that the marijuana be returned to Kha.[75] The City of Garden Grove ("the City") filed a writ of mandamus and/or prohibition "directing the trial court to vacate its order and enter a new one denying Kha's motion for a return of [the marijuana]."[76] The Attorney General of California defended the trial court's order, as *amicus curiae*.[77]

The issue before the *Garden Grove* court was whether police may deny the return of marijuana that was lawfully seized during a vehicle search because returning it would result in a violation of the federal Controlled Substances Act ("CSA").[78]

The City asserted Kha was not entitled to the protections of the CUA and MMPA because Kha 1) obtained his marijuana illegally, 2) did not have a qualifying illness, and 3) was not charged with a requisite offense covered under the CUA or MMPA since he was cited for possessing marijuana while driving in violation of the Vehicle Code.[79] The court rejected all

52. *Id.* at 1550-1551.
53. *Id.* at 1536.
54. Young, 92 Cal. App. 4th at 231.
55. *Id.* at 232.
56. *Id.*
57. *Id.*
58. *Id.* at 237.
59. *Id.* at 238.
60. Wright, 40 Cal. 4th at 85-86.
61. *Id.* at 86.
62. *Id.* at 87.
63. *Id.* at 87-89.
64. *Id.* at 90.
65. *Id.* at 92.
66. *Id.* at 98.
67. *Id.* at 98-99.
68. *Id.* at 100-101 (Baxter, J., concurring and dissenting).
69. Garden Grove, 157 Cal. App. 4th at 362.
70. *Id.* at 363.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 364.
77. *Id.*
78. *Id.* at 380.
79. *Id.* at 373.

The court concluded by stating it was unable to discern any justification for the City or its police department to withhold the marijuana . . . .

of these arguments stating, respectively, 1) the CUA and MMPA afford protection without regard to the source of the marijuana, 2) mere recommendation by a physician suffices for CUA and MMPA protection, and 3) the Vehicle Code statute prohibiting the transporting of marijuana was subject to a CUA and MMPA defense since it was merely an automobile-specific prohibition upon transporting marijuana.[80]

The court then addressed the issue of whether marijuana's illegality under federal law would permit the City to prevail on its argument that state law, to the extent that it required the return of the marijuana, was preempted by federal law.[81] The court acknowledged there was not any exception to criminal possession of marijuana under federal law, but since state law enforcement officials act pursuant to state law, they cannot use federal laws as a mechanism of enforcement in state law proceedings.[82] The court further noted that when Congress enacted the federal CSA, it did not intend to occupy the entire area of law that regulates marijuana or controlled substances,[83] thus, the court held that federal supremacy principals of preemption did not permit the City to withhold and not return the marijuana.[84]

Finally, the court addressed due process considerations related to returning the marijuana.[85] California's statute on the destruction of property in the absence of a conviction essentially provides that "seizures of controlled substances, instruments, or paraphernalia. . . shall be destroyed by order of the court, unless the court finds that [they] were lawfully possessed by the defendant."[86] Despite the fact that neither the aforementioned law nor the MML provisions expressly provide for the return of the marijuana at issue, the court found that, because Kha was a qualified patient with physician authorization to possess the amount seized under state law, due process considerations of the Fourteenth Amendment required its return.[87] The court concluded by stating it was unable to discern any justification for the City or its police department to withhold the marijuana and upheld the trial court's order.[88]

Though the *Garden Grove* court did not explicitly apply the three-prong test articulated in *Wright*, it implicitly found the *Wright* test was satisfied because 1) Kha was a qualified patient (first prong) with 2) physician authorization to possess the amount seized (second prong), and 3) the marijuana was for Kha's personal medical use (third prong).[89] As will be discussed, however, public policy concerns could justify permanently withholding medical marijuana subsequent to a valid traffic stop or vehicle investigation.

IV. PUBLIC SAFETY AND PUBLIC POLICY CONSIDERATIONS TO LIMIT TRANSPORTING AND THE RETURN OF SEIZED MEDICAL MARIJUANA

Since the *Garden Grove* rule requires the return of lawfully seized medical marijuana if the court finds that possession was lawful, the prosecution must demonstrate possession was unlawful to avoid operation of the *Garden Grove* rule. With the exception of initial procurement, a patient or caregiver who transports marijuana in a motor vehicle should be closely scrutinized because such is potentially indicative of intent to use marijuana and then operate a motor vehicle or engage in unlawful diversion, both of which fall outside of MML protections.

A. PUBLIC SAFETY AS A LIMITATION UPON THE TRANSPORTING OF MEDICAL MARIJUANA

Both driving under the influence of marijuana and possessing marijuana while driving are dangers to public safety.

1. Inherent Dangers to Public Safety Resulting from Drugged Driving

California, like many other states with MMLs, has expressly declared that the CUA does not supersede legislation prohibiting persons from engaging in conduct that endangers others.[90] California law prohibits driving under the influence of alcohol and drugs,[91] and as a matter of law a person's authorized use of alcohol or a drug does not normally constitute a defense to a violation.[92] As one court noted,

> one way in which use of marijuana most clearly does affect the general public is in regard to its effect on driving . . . . [R]esearch has produced increasing evidence of significant impairment of the driving ability of persons under the influence of cannabis. Distortion of time perception, impairment of psychomotor function, and increased selectivity in attentiveness to surroundings apparently can combine to lower driver ability.[93]

These attending risks to public safety are even more problematic in instances where a patient's medical need for marijuana exceeds the general eight ounce limit because such a need for larger than usual amounts of medical marijuana necessarily means that heavier and/or more

80 *Id. at* 375-376.
81. *Id.* at 377-386.
82. *Id.* at 378-379.
83. *Id.* at 383.
84. *Id.* at 386.
85. *Id.* at 386-392.
86. *Id.* at 377-378.
87. *Id.* at 387-389.
88. *Id.* at 391.
89. *Id.* at 363.
90. Ross, 42 Cal. 4th at 929.
91. Cal. Veh. Code Ann. § 23152(a) (Lexis 2008).
92. *Id.* § 23630.
93. Ravin v. State, 537 P.2d 494, 510 (Alaska 1975).

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frequent use is required by the patient. This can equate to a greater degree of impairment, in the case of heavier use, or a continuous state of impairment, in the case of more frequent use. Both of these situations lend themselves to heightened public safety risks when the medicated patient undertakes to drive. While it is certainly true that not all qualified patients are driving under the influence, the *Trippet* and *Strasburg* cases demonstrate that some qualified patients, if even but a minority, do in fact smoke marijuana and then drive a motor vehicle.

Though laws prohibiting Driving Under the Influence ("DUI") may be sufficient if law enforcement detects impairment, studies suggest that more than half of the occurrences of driving under the influence of cannabis ("DUIC") may go undetected by the police.[94] In addition, roadside oral drug testing can be inadequate to detect current marijuana impairment and DUIC due to inaccuracies.[95] Furthermore, most marijuana drug tests measure inactive metabolites of THC, which only confirms past use and not current impairment.[96] Finally, studies have noted a greater need for intervention by policy makers to guard against the risks inherent to DUIC.[97] Accordingly, DUI laws do not adequately address the public safety risks related to DUIC.

2. Restricting the Transporting of Medical Marijuana to Ensure Public Safety

While a defendant must be a qualified patient prior to criminal prosecution in order to invoke CUA protections,[98] the general trend among the cases is that where the qualified patient possesses less than the general eight ounce quantity limit, the patient is not subject to criminal prosecution. This is consistent with the CUA's purpose of not imposing criminal liability,[99] but this alone does not necessitate a finding that transporting is in compliance with law so as to justify the return of lawfully seized marijuana after a valid traffic stop or police investigation involving a motor vehicle.

As the cases demonstrate, law enforcement is often interacting with qualified patients because of a moving motor vehicle violation. Many of these moving motor vehicle violations may in fact be the result of impaired driving, but - of course - this is not a given. Nonetheless, even to the extent that the moving violation is not actually caused by a qualified patient's impaired driving, there seems to be little reason that they should need to drive and transport marijuana beyond the time it is initially procured.

The most logical and probable reason a patient would be transporting medical marijuana with them while they are driving is because they need or want to use it. However, a qualified patient who drives while transporting marijuana, with the exception of its initial procurement, seems indicative of intent to operate a motor vehicle subsequent to using marijuana and, irrespective of whether such act actually be realized, contemplates a use of medical marijuana - conduct endangering to others - that is prohibited by the MMLs and, thus, should fall outside of the CUA's protections. Courts and the general public should be skeptical of this situation since the patient is "not sitting at home nursing an illness with the medicinal effects of marijuana[,]"[100] but, instead, is quite feasibly a threat to the safety of other motorists.

In *Chavez v. Superior Court*,[101] the court disallowed the return of marijuana in the absence of a conviction,[102] which is contrary to the *Garden Grove* outcome. In *Chavez*, the defendant was convicted of selling and transporting marijuana.[103] While awaiting the outcome of his appeal, he was again arrested for having 4.5 pounds of marijuana as well as possessing living and drying plants.[104] His first conviction was affirmed, and the prosecutor dismissed the second case.[105] Chavez sought a return of the marijuana.[106] The issue was whether Chavez, a qualified patient with physician-authorized use, could seek the return of the second seizure of marijuana, or at least the general eight

94. Hassan Khiabani *et al.*, *Relationship Between THC Concentration in Blood and Impairment in Apprehended Drivers*, Traffic Injury Prevention (June 2006), *available at* http://www.ncbi.nlm.nih.gov/pubmed/16854704?ordinalpos=3&itool=EntrezSystem2.PEnt (accessed Sept. 29, 2008).
95. M. Laloup *et al.*, *Correlation of Delta9-Tetrahydrocannabinol Concentrations Determined by LC-MS-MS in Oral Fluid and Plasma from Impaired Drivers and Evaluation of the On-Site Dräger DrugTest*, Forensic Science International (Sept. 2006), *available at* http://www.ncbi.nlm.nih.gov/pubmed/16842950?ordinalpos=1&itool=EntrezSystem2.PEnt (accessed Sept. 29, 2008) (advising against roadside oral drug testing for marijuana due to 66% accuracy rate).
96. J. Ramaekers *et al.*, *Dose Related Risk of Motor Vehicle Crashes after Cannabis Use*, Drug and Alcohol Dependence (Feb. 2004), *available at* http://www.ncbi.nlm.nih.gov/pubmed/14725950?ordinalpos=1&itool=EntrezSystem2.PEnt (accessed Sept. 29, 2008).
97. F. Alvarez *et al.*, *Cannabis and Driving: Results from a General Population Survey*, Forensic Science International (Aug. 2007), *available at* http://www.ncbi.nlm.nih.gov/pubmed/17628369?ordinalpos=3&itool=EntrezSystem2.PEnt (accessed Sept. 29, 2008) (calling for greater legislative intervention due to the frequency and common occurrence of DUIC).
98. People v. Rigo, 69 Cal. App. 4th 409, 414 (Cal. App. 1st Dist. 1999).
99. Cal Health & Safety Code Ann. § 11362.5(b)(1)(B) (Lexis 2008).
100. Strasburg, 148 Cal. App. 4th at 1060.
101. 123 Cal. App. 4th 104 (Cal. App. 4th Dist. 2004).
102. *Id.* at 110-111.
103. *Id.* at 107.
104. *Id.*
105. *Id.*
106. *Id.*

ounce quantity limit the physician recommendation authorized since there was no conviction resulting from the second arrest.[107] The *Chavez* court held that withholding and destroying the marijuana was proper because, although the case *sub judice* did not result in conviction, the amount in possession was unlawful and the law mandated destruction of unlawfully possessed marijuana.[108] The court denied the petition to return any of the marijuana.[109]

The *Chavez* decision demonstrates that the court will deny the return of marijuana, even in the absence of a conviction, when the patient's possession does not comply with the CUA. The reasoning of the *Chavez* court should be equally applicable to automobile transporting situations where a patient's possession should be rendered unlawful because his or her actual or intended use of the marijuana falls outside of MML protections. In this instance, however, the laws permitting the transportation of marijuana, as construed by the *Garden Grove* court, are allowing the unfettered transportation of marijuana by a qualified patient merely because his or her possession is below the general quantity guideline limit,[110] the effect of which is to tacitly endorse conduct that endangers others and creates a risk to public safety. Like *Chavez*, where the qualified patient's intended or actual use of marijuana is outside the realm of MML protections, his possession should be viewed as unlawful and, subsequent to seizure, should permit forfeiture and destruction. If possession is found unlawful, medical marijuana may be destroyed, even in the absence of a conviction.[111]

The *Garden Grove* court distinguished *Chavez* merely by finding Kha was in lawful possession while Chavez was not.[112] When read together, these cases indicate that the factor that is determinative of whether seized marijuana will be returned to a qualified patient is whether the quantity possessed complies with the general quantity limit so as to let the court find that the qualified patient was or was not in lawful possession, which in turn does or does not justify its return. Notably, however, *Garden Grove* is a motor vehicle case while *Chavez* is not. A *per se* rule requiring the return of medical marijuana, solely because possession was below the general quantity limit, ignores the importance of public policy concerns, namely maintaining roadway safety and preventing diversions.

The court's role in construing statutes is to "ascertain the intent of the legislature so as to effectuate the purpose of the law [and, b]ecause the statutory language is generally the most reliable indicator of that intent, [courts] look first to the words [of the statutes while] giving them their usual and ordinary meaning."[113] However, the *Garden Grove* rule of required return of medical marijuana certainly implicates, and perhaps arguably expressly authorizes, actions that are inconsistent with the CUA's prohibitions on conduct that endangers others.

A per se rule requiring the return of medical marijuana . . . ignores the importance of public policy concerns, namely maintaining roadway safety and preventing diversions.

Clearly, the state has the authority, on matters of public health or safety, to exert control over individuals when their activities "begin[] to infringe on the rights and welfare of others," and the state need not limit the exercise of its police power to only those activities with a "present and immediate impact on public welfare" before it can take action.[114] It is in the exercise of those police powers that public safety should not only justify restrictions upon the transporting of medical marijuana but also justify its forfeiture following seizure from a motor vehicle.

B. PUBLIC POLICY AS A LIMITATION UPON THE TRANSPORTING OF MEDICAL MARIJUANA

In addition to failing to accord adequate consideration to public safety risks, the *Garden Grove* rule requiring the return of marijuana to a qualified patient when the amount is below the general quantity limit has significant potential to allow the unlawful diversion of marijuana for nonmedical uses because it fails to provide a disincentive for transportation-related CUA abuses.

In *People v. Chakos*,[115] a sheriff requested a marked police car to stop the defendant's car.[116] Chakos gave consent to a search of his car, and the police recovered seven grams of marijuana, $781 in cash, and a physician's referral authorizing marijuana use.[117] His apartment was also searched, and police recovered about 6 ounces of marijuana in several different containers and a digital scale.[118] A closed circuit camera was also present to allow observations of persons coming to the apartment.[119] Chakos was arrested for possession for sale and convicted based upon the arresting officer's expert opinion testimony.[120] The issue on appeal was whether the officer's testimony was legally sufficient to sustain the conviction.[121] The

107. *Id.* at 108.
108. *Id.* at 109-111.
109. *Id.* at 111.
110. Garden Grove, 157 Cal. App. 4th at 375-376.
111. Cal. Health & Safety Code Ann. § 11473.5(a) (Lexis 2007); *Chavez*, 123 Cal. App. 4th at 111 (concluding that "the *Compassionate Use Act* does not contemplate the return of illegally possessed drugs").
112. Garden Grove, 157 Cal. App. 4th at 387-389.
113. Wright, 40 Cal. 4th at 92.
114. Ravin, 537 P.2d at 509.
115. 158 Cal. App. 4th 357 (Cal. App. 4th Dist. 2007).
116. *Id.* at 360.
117. *Id.*
118. *Id.* at 360 -361.
119. *Id.* at 361.
120. *Id.*
121. *Id.* at 363.

Subjecting marijuana to forfeiture following lawful seizure from a motor vehicle furthers this policy by removing incentives to abuse the [Compassionate Use Act].

court, applying *People v. Hunt*,[122] held the officer lacked qualification as an expert witness because of his lack of knowledge and experience with unlawful uses of lawfully possessed substances.[123] Since the officer lacked expert knowledge to differentiate patterns of lawful use and unlawful possession for sale, the conviction was reversed.

The *Chakos* fact pattern demonstrates a highly suspicious situation where the defendant might have been involved in unlawful drug activity. However, the *Garden Grove* rule requiring the return of lawfully seized marijuana merely because the patient or caregiver possesses less than the general eight ounce quantity limit has the effect of thwarting the CUA's purposes by tacitly sanctioning the unlawful diversion of marijuana in contravention to the CUA's prohibitions.[124]

The *Garden Grove* rule permits a patient or caregiver to use a motor vehicle for drug distribution activity, raise the CUA as a defense, and, if successful, have the marijuana returned to him or her when possession remains below the general eight ounce quantity limit. Motor vehicles are often essential to the illegal transportation and distribution of drugs. The *Strasburg* court observed that the defendant, had his possession been below the general eight ounce quantity limit, could have invoked the CUA as a defense.[125] Hence, the *Garden Grove* rule is unsound, as a matter of public policy, for it not only fails to provide a disincentive to refrain from diversion-related activities, but - in fact - promotes abuses of the CUA by returning unlawfully possessed marijuana to the criminal who successfully avoids a conviction merely because possession is below the general eight ounce quantity limit.

In sum, the public policy of preventing unlawful diversion warrants a limitation upon the transportation of medical marijuana. Subjecting marijuana to forfeiture following lawful seizure from a motor vehicle furthers this policy by removing incentives to abuse the CUA.

V. A PROPOSAL FOR A LEGAL PRESUMPTION

Public safety and policy implications should have weighed more heavily into the *Garden Grove* decision. As a matter of precedent, other courts within California, and perhaps other states, may concur with the *Garden Grove* rule. In such situations, the prosecution should consider asserting that transporting the marijuana was unlawful because, under the circumstances, possession is indicative of a use that is an endangerment to public safety or diversion-related activities.

In the absence of the courts accepting such an argument, or a case accepted by the Supreme Court of California on appeal, corrective measures rest in the hands of the legislature. To this end, legislation creating a legal presumption that presumes medical marijuana is being transported for nonmedical use, with an exception for the day it is initially procured, is the best method of addressing safety and policy concerns while affording qualified patients reasonable medical freedoms the CUA and other states' MMLs are intended to provide.

A. A LEGAL PRESUMPTION TO EFFECTUATE PUBLIC SAFETY AND PUBLIC POLICY CONCERNS

"A presumption is an assumption of fact that the law requires to be made from another fact or facts found or . . . established in the action."[126] California recognizes two types of rebuttable presumptions, those affecting the burden of producing evidence, and those affecting the burden of proof[127] (i.e., persuasion).[128] A presumption that affects the burden of proof is intended to "implement some public policy, other than to facilitate the determination of the particular action,"[129] and "impose[s] upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."[130]

1. Rationale and Considerations Respecting the Presumption

A limitation upon the transporting of medical marijuana to implement public safety and public policy concerns should strike a balance between furthering the policy objectives while avoiding any significant erosion to the CUA's legal protections.

The rationale underlying the presumption is ensuring public safety upon the roadways and preventing the diversion of medical marijuana for nonmedical purposes, including illegal use in addition to illegal sale. These objectives are furthered by limiting the transporting of medical marijuana within motor vehicles, with the exception of initial procurement, to further policy objectives because the unnecessary transporting of marijuana indicates unlawful use, namely, conduct that endangers others through a willingness to drive after use or, alternatively, diversion for nonmedical purposes. Permitting forfeiture, as a civil penalty, prevents the return of medical marijuana that is presumed to be transported for an impermissible nonmedical purpose and imposes a consequence for nonessential transporting.

122. 4 Cal. 3d 231 (1971) (the *Hunt* court reversed the defendant's conviction of possessing methedrine for purpose of sale on the basis that the narcotics officer's expert opinion was insufficient to sustain the conviction since the defendant had a legal prescription and the officer did not have sufficient expertise with lawful use of the drug).
123. Chakos, 158 Cal. App. 4th at 363.
124. Cal. Health & Safety Code Ann. § 11362.5(b)(2) (Lexis 2008).
125. Strasburg, 148 Cal. App. 4th at 1060.
126. Cal. Evid. Code Ann. § 600(a) (Lexis 2008).
127. *Id.* § 601.
128. *Id.* § 115.
129. *Id.* § 605.
130. *Id.* § 606.

2. The Proposed Presumption

This proposed presumption would implement the public policies of 1) ensuring motorist safety upon roadways and 2) deterring the unlawful diversion of medical marijuana through transporting. The proposed presumption would shift the burden of proof to the qualified patient or primary caregiver who seeks to avoid the presumption's effect and would provide:

> Any qualified patient or primary caregiver who, while having a motor vehicle under his or her direct and immediate control, is found to possess medical marijuana after a valid traffic stop or police investigation involving a motor vehicle, is presumed to possess the medical marijuana for nonmedical purposes. This presumption shall not apply to any qualified patient or primary caregiver who demonstrates that the medical marijuana in his or her possession was obtained within the same calendar day on which the traffic stop or police investigation involving the motor vehicle occurred, nor shall this presumption apply to any criminal proceeding or action, or any civil suit where the qualified patient or primary caregiver is a defendant or real party in interest.

The presumption, by presuming possession is for a nonmedical purpose, permits law enforcement to achieve its goal of effectuating forfeiture to deal with the unique and problematic issues surrounding medical marijuana in the context of motor vehicles while preserving state policy of not subjecting qualified patients or primary caregivers to criminal penalty. Since transporting is presumed to be for a nonmedical purpose and outside of the CUA and MMPA protections, forfeiture is permitted under California law.[131]

a. Direct and Immediate Control of a Motor Vehicle

In order for the presumption to apply, the patient or caregiver must be in possession of medical marijuana while having a motor vehicle under his or her direct and immediate control. The conjunctive "direct and immediate control" element requires a sufficient nexus between the patient or caregiver and the motor vehicle for the presumption to apply.

i. Immediate Control

The "immediate control" requirement ensures there is a spatial proximity between the patient or caregiver and the motor vehicle. Mere investigation regarding medical marijuana within a motor vehicle that the patient or caregiver owns will not trigger application of the presumption. Rather, the immediate control requirement ensures that, for the presumption to apply, the patient or caregiver must be within or so close by the vehicle to render his or her control of the vehicle immediate.

ii. Direct Control

The presumption affords a reasonable means of transporting marijuana by a driving patient or caregiver on the day of initial procurement.

The "direct control" requirement limits the presumption's applicability even further by ensuring the limitation upon transporting marijuana is confined to a patient or caregiver who is or will be driving. The patient or caregiver need not be actually driving but must have direct control. As such, the presumption would not apply to a patient or caregiver who is merely a passenger within a vehicle because he or she is not in direct control of the vehicle; thus, the presumption and the limitation upon transporting are inapplicable. However, if the patient or caregiver is not driving but has direct control over the vehicle, where - for example - circumstances indicate the patient or caregiver is driving or will be driving because he or she is or will be the vehicle's sole occupant, the presumption and the limitation upon transporting would apply.

Essentially, the "direct and immediate control" requirement is broad enough to limit transporting in those situations where the patient or caregiver is or will be driving, while not limiting situations where the patient or caregiver is merely transporting medical marijuana as a non-driving passenger. However, as will be discussed, merely avoiding the application of the presumption, as a non-driving passenger, does not mean that an individual will succeed in his or her attempt to transport marijuana for nonmedical purposes.

b. Exception for Same-Day Procurement

The presumption affords a reasonable means of transporting marijuana by a driving patient or caregiver on the day of initial procurement. This must be so since, in the absence of allowing at least some opportunity for transporting marijuana, a patient or caregiver would have no means of otherwise getting it home to make use of it. The courts have rejected the notion that patients should have a broad right to use or transport marijuana without hindrance or inconvenience.[132] By precluding the presumption's operation upon an affirmative showing that the marijuana was procured on the day of a valid traffic stop or police investigation involving their motor vehicle, the patient or caregiver is afforded a window of reasonable time to transport the marijuana home without subjecting it to forfeiture subsequent to seizure by law enforcement. This presumption merely curtails the unrestrained transportation of marijuana to that reasonably necessary to ensure transportation is limited to medical uses while dissuading conduct that endangers others or is an unlawful diversion.

131. Cal. Health & Safety Code Ann. § 11473.5(a) (Lexis 2007).

132. Ross, 42 Cal. 4th at 928; Trippet, 56 Cal. App. 4th at 1547 n.8.

[M]ost motor vehicle cases involving medical marijuana have been situations where the driver was the sole occupant of the vehicle.

c. No Criminal Liability or Civil Liability in Suits Based upon In Personam Jurisdiction

The final exception to the presumption's applicability ensures that it is broad enough to permit the forfeiture of medical marijuana that is transported unnecessarily while avoiding the imposition of criminal or civil liability upon the patient or caregiver.

i. No Criminal Liability or Sanction

Notably, the CUA, as expanded by the MMPA, precludes criminal liability for marijuana-related offenses, including transporting marijuana, solely on the basis of the qualified patient or primary caregiver's status.[133]

The proposed presumption is intended to allow city and county prosecutors the ability to invoke the presumption to cause a forfeiture of medical marijuana that was being transported at sometime other than the day it was initially procured, presumably for a nonmedical purpose. Hypothetically, the prosecutor could, by invoking the presumption, first assert possession was unlawful and then conceivably pursue criminal charges predicated upon the presumed fact that possession was for an unlawful nonmedical purpose.

However, the presumption, by way of its exception, is inapplicable to a criminal proceeding or action. Thus, the preclusion of the presumption's operation in any criminal proceeding ensures that the prosecutor may not piggyback a marijuana-related conviction upon the presumption's effect that the qualified patient or primary caregiver is not in lawful possession. Put another way, the presumption's exception - in accordance with the CUA's guarantees - prevents the prosecutor from backdooring a criminal charge or conviction after invoking the presumption of nonmedical use. In those instances where possession is presumed unlawful because the patient or caregiver is unable to affirmatively show same-day procurement, the marijuana is subject to forfeiture and destruction, but the patient or caregiver avoids any criminal liability on the basis of transporting a quantity below the general eight ounce limit because the presumption has no effect in any criminal prosecution. This ensures, in accordance with the CUA and MMPA, that the qualified patient or primary caregiver is not subject to criminal liability or sanction on the sole basis of their status as a patient or caregiver.

ii. No Liability in Civil Suits Based upon *In Personam* Jurisdiction

Finally, the presumption is inapplicable to a civil suit where a patient or caregiver is a defendant or real party in interest. This ensures that if a patient or caregiver is sued in relation to a car accident, or is a real party in interest with respect to a claim against their insurance carrier, the presumption is inapplicable and the suing plaintiff must bear the usual burdens of production and persuasion with respect to causation in the civil suit. This prevents a plaintiff from conceivably initiating a civil suit, after a motor vehicle investigation and/or citation stemming from an auto accident involving the patient or caregiver, and asserting the presumption of nonmedical use as a basis of liability with respect to causation in the auto accident. In effect, the presumption allows a forfeiture of the marijuana without shifting usual burdens of proof in a civil suit based upon *in personam* jurisdiction, which might be initiated after an auto accident involving a qualified patient or primary caregiver where his or her fault may be at issue.

iii. Presumption Does Apply to In Rem Proceedings

Notably, the presumption should not be inapplicable to all civil proceedings *per se* and this is why only *in personam* civil actions are excluded. "A forfeiture proceeding is a civil in rem action in which property is considered the defendant, on the fiction that the property is the guilty party."[134] Because hearings or proceedings related to the disposition of marijuana will be required, the presumption's applicability is preserved for those hearings or proceedings in which the court's jurisdiction is *in rem* with respect to the marijuana that is to be forfeited under the presumption of nonmedical use.

3. Evading the Presumption's Applicability Will Not Result in Escaping Scrutiny

The proposed presumption creates a bright-line test for transporting marijuana and presumes possession is for nonmedical use under certain circumstances and therefore unlawful. Though a person could attempt to bypass an invocation of the presumption by transporting marijuana as a non-driving passenger in possession, merely avoiding application of the presumption does not necessarily mean that an individual will always succeed in his or her attempt to violate MMLs.

First, it is noteworthy to mention that most motor vehicle cases involving medical marijuana have been situations where the driver was the sole occupant of the vehicle.[135] This may even be more likely where there is deliberate intent to circumvent drug laws under cover of medical marijuana's statutory protections since, presumably,

133. Cal. Health & Safety Code Ann. § 11362.765(a) (Lexis 2007).
134. People v. Super. *Ct. of L.A. Co.*, 103 Cal. App. 4th 409, 418 (Cal. App. 2nd Dist. 2002).
135. Such were the circumstances in *Chakos, Garden Grove*, *Trippet, Wright,* and *Young*, all of which involved a driver who had direct and immediate control of the motor vehicle. Notably, *Strasburg* is a case involving more than one occupant in the vehicle, but Strasburg would still be covered by the proposed presumption since he had direct and immediate control of the vehicle.

the criminal will want to go undetected. However, with the exception of same-day procurement, lawful transport under the proposed presumption would require the assistance of another person to drive the patient or caregiver who would be the non-driving passenger in possession.

Second, because deliberate attempts to violate MMLs will require the assistance of a driver to accompany the non-driving passenger in possession, there is a greater likelihood of detecting unlawful transporting. Specifically, the complicity involved in the criminal enterprise, by increasing the number of participants, gives rise to a greater likelihood of detection.

Law enforcement encountering a driver with a non-driving passenger in possession can undertake heightened scrutiny of their activities incidental to a vehicle stop or motor vehicle investigation. Inquiry can be made into the surrounding circumstances of the possession, including: where the driver and passenger are coming from, where they are going to, and for what purposes. Where circumstances warrant, law enforcement can undertake immediate separation of the driver and passenger for isolated questioning to assess the truthfulness and consistencies, or lack thereof, regarding their activities. If there appears no discernable reason for transporting the marijuana, the absence - for example - of a planned out of town trip or overnight stay away from home, this will alert law enforcement of the possibility that transporting is for unlawful nonmedical use.

Third, as a consequence and at the very minimum, law enforcement is alerted to potential criminal activity that can be further investigated by undercover officers. Alternatively, though the conduct falls outside of the scope of the presumption, where law enforcement concludes that the driver and passenger are engaged in unlawful transporting for nonmedical uses such as diversion for sale, the non-driving passenger in possession is still subject to the usual rules of law where they can be arrested, upon probable cause that a violation is occurring or has occurred, and required to assert the CUA as their affirmative defense.[136] Finally, for the most severe and egregious situations where the evidence and circumstances demonstrate a strong inference of illegal activity, the police can arrest the driver and the non-driving passenger in possession so the prosecutor may pursue conspiracy charges, which also serves as a deterrent and punishment for individuals who would agree to be a driver in the transporting of marijuana for nonmedical uses.[137]

In sum, the proposed statutory presumption, while permitting a driver to transport on the same-day of procurement, deters the transporting of medical marijuana for nonmedical purposes as a means of ensuring public safety and addressing public policy concerns. This is accomplished by allowing the forfeiture and destruction of marijuana that was lawfully seized from a driver subsequent to a valid traffic stop or police investigation involving the patient or caregiver's motor vehicle, which - as a practical matter - is when it is most likely to be encountered by law enforcement. A patient or caregiver could avoid operation of the presumption by not transporting marijuana after the day it is initially procured. If transporting medical marijuana is required after the day it is initially procured, the patient could simply get someone to drive them. The presumption affords a limited yet reasonable allowance for transporting upon an affirmative showing of same-day procurement.

A patient or caregiver could avoid operation of the presumption by not transporting marijuana after the day it is initially procured.

B. THE PRESUMPTION AND FORFEITURE ARE CONGRUENT WITH CALIFORNIA LAW

The presumption and any resulting forfeitures, which reverse the operation of the *Garden Grove* rule in the motor vehicle context, are consistent with many facets of California law.[138]

1. Requiring Proof of Lawful Transport is in Accord with Affirmative Defenses

The presumption imposes upon the qualified patient or caregiver the burden of production and persuasion that the marijuana was being transported in accordance with the presumption's exception for same-day procurement.[139] This burden upon the patient or caregiver parallels the burden of invoking the CUA as an affirmative defense to a prosecution. Since the burden of showing lawful transport does nothing more than allocate to the qualified patient or primary caregiver a burden similar to that imposed if he or she were seeking protections of the CUA,

136. While identification cardholders are immune from arrest when possession is under the general quantity limit, a law-enforcement officer is not required to accept the identification card as valid if he or she "has reasonable cause to believe that the information contained in the card is false or fraudulent, *or the card is being used fraudulently*." Cal. Health & Safety Code Ann. § 11362.78 (Lexis 2007) (emphasis added). Thus, attempting to divert marijuana may still result in arrest.

137. Notably, neither the CUA nor the MMPA afford exemption from criminal conspiracy, thus, a qualified patient or primary caregiver - even if registered under the MMPA identification program - would not be immune from arrest on such a charge, but such arrests would of course need to be sustainable with probable cause.

138. Such a legal presumption could likely work in all motor vehicle scenarios with respect to those states having MMLs or decisional case law that mandates the return of medical marijuana.

139. Of course a person could refute the underlying fact from which the presumed fact of "nonmedical use" ensues, but the underlying fact—a valid traffic stop or police investigation involving a motor vehicle—is not likely to be a disputed issue in the majority of circumstances and, therefore, does not warrant discussion more than casual mentioning.

Requiring proof of same-day procurement, as a practical matter, also requires proof of the source of the marijuana.

the burden-shifting approach is consistent with the affirmative defense approach taken by the MML statutes.

In addition, the presumption creates a bright-line test for establishing lawful transport of medical marijuana. The *Garden Grove* court did not apply or even acknowledge the *Trippet* test in assessing the lawfulness of Kha's transportation of medical marijuana, despite the fact that the Supreme Court of California indirectly endorsed it when the *Wright* case went up on appeal from the same court issuing the *Garden Grove* decision.[140] In any event, the presumption provides a clearly defined standard that readily allows for a determination of when marijuana should be seized and for its subsequent disposition without adhering to a rigid rule of required return as found in the *Garden Grove* decision, or a potentially ambiguous factors test as found in the *Trippet* test.

Finally, by shifting the burden of proof upon the patient or caregiver to show that transport is lawful, the People and the State avoid the problems embodied within the *Hunt* decision. In particular, when the People carry the burden of showing that an otherwise lawfully possessed drug, in this case medical marijuana, is being possessed unlawfully, as when the patient or caregiver is unlawfully transporting marijuana for nonmedical uses, there arises a problematic situation that the officer's testimony may suffer from the infirmity of insufficiency if the court finds that his or her knowledge or experience is lacking with respect to the illegal uses of legal drugs, namely medical marijuana.[141] In this regard, by placing the burden of proof upon the patient or caregiver, any problem regarding the expert qualifications of a testifying officer are altogether avoided.

2. Proof of Lawful Transport Deters Unlawful Profiteering on Medical Marijuana

Only Alaska has imposed a restriction upon when medical marijuana may be transported, but Alaska's statute, unlike the proposed presumption, provides no means - aside from the driver's own assertions - that will allow law enforcement a way to discern whether the transporting of medical marijuana is "necessary" or is prohibited because it is unnecessary. In particular, Alaska law provides:

> A patient, primary caregiver, or alternate caregiver may not engage in the medical use of marijuana in plain view of, or in a place open to, the general public; this paragraph does not prohibit a patient or primary caregiver from possessing marijuana in a place open to the general public if the possession is limited to that necessary to transport the marijuana directly to the patient or primary caregiver or directly to a place where the patient or primary caregiver may lawfully possess or use the marijuana[.][142]

However, in contrast, the proposed presumption implements this "necessity of transporting" limitation for the sake of public safety and policy, while additionally curtailing illegal diversions and drug profiteering.

In *Urziceanu*, the defendant admitted at trial that he "would sometimes buy marijuana on the black market by the pound to supply the [qualified patients]."[143] The *Urziceanu* case demonstrates that persons who supply marijuana to qualified patients or primary caregivers may be acting in an illegal manner. Worse, there may be instances where there is no colorable compliance with MMLs and suppliers are - in fact - drug dealers who are unlawfully profiteering on the sale of marijuana to patients and caregivers.

Requiring proof of same-day procurement, as a practical matter, also requires proof of the source of the marijuana. Empty assertions of same-day procurement are unlikely to carry the patient's burden of proof without also demonstrating or documenting where the marijuana was obtained. While the *Garden Grove* court was correct that, under the CUA and MMPA, the source of the marijuana need not be shown to invoke MML protections,[144] requiring proof of same-day procurement: 1) encourages the user to purchase medical marijuana from legitimate dispensaries or cooperatives; 2) favors record-keeping of medical marijuana-related transactions; 3) requires disclosure of the source and time of procurement of the seized medical marijuana; and 4) deters profiteering on the unlawful drug dealing in marijuana since patients and caregivers will have an incentive to purchase their marijuana from authorized sources to ensure its return in the event of a seizure.

A patient seeking to prove same-day procurement has a few options. First, the patient can obtain medical marijuana from an authorized source thereby enabling him to prove same-day procurement if and when necessary. Second, the patient could provide evidence of procurement from an unauthorized source, which would allow law enforcement to discover illegal drug dealing in marijuana. Third, the patient may fail or can refuse to prove same-day procurement of the marijuana, thereby subjecting it to forfeiture.

Furthermore, forfeiture of marijuana that is obtained from a drug dealer is wholly consistent with the purposes of the forfeiture statutes. "[C]ivil forfeiture is intended to

140. Wright, 40 Cal. 4th at 92.
141. Chakos, 158 Cal. App. 4th at 359-360 (finding officer's testimony insufficient to sustain conviction for the sale of medical marijuana).
142. Alaska Stat. § 17.37.040(a)(2)(C) (Lexis 2008).
143. Urziceanu, 132 Cal. App. 4th at 764.
144. Garden Grove, 157 Cal. App. 4th at 374.

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Forfeiture results for transporting that risks an endangerment to the safety of others and, thus, falls outside the [Compassionate Use Act's] protections . . . .

be remedial by removing the tools and profits from those engaged in the illicit drug trade,"[145] with law enforcement being the principal objective.[146] While a patient or caregiver may be authorized to obtain and use medical marijuana, marijuana that was illegally sold by and procured from a drug dealer should not lose its status as an illegal transaction merely because the patient or caregiver is authorized to possess it. To the contrary, "[a]ll controlled substances which have been manufactured, distributed, dispensed, *or acquired* in violation of [the Uniform Controlled Substances Act]" are subject to forfeiture.[147]

Ultimately, forfeiture aids in bifurcating lawful medical marijuana acquisitions from unlawful drug sales thereby curtailing the profiteering upon illegal marijuana sales made to qualified patients and their primary caregivers.

3. Forfeiture Does Not Subject a Patient or Caregiver to Criminal Liability

As already noted, the CUA precludes criminal liability of a qualified patient or primary caregiver solely on the basis of their status,[148] but forfeitures are not criminal sanctions.

In *People v. Shanndoah*,[149] the people appealed a trial court order dismissing criminal drug charges against the defendant.[150] The trial court dismissed the criminal charges because the state had previously initiated forfeiture proceedings with respect to drug-related money.[151] The trial court found that the forfeiture was punitive in relation to the drug offenses; thus, double jeopardy had attached and required dismissal of the criminal charges.[152] The issue before the *Shanndoah* court was whether the monetary forfeiture was a criminal sanction that required dismissal of subsequent criminal charges that also related to the drug offenses that gave rise to the forfeiture in the first instance.[153] The court held that forfeitures under the Health and Safety Code are civil in nature.[154] The court reasoned that "forfeiture prescribed by the Health and Safety Code is in rem—that is, it is an action against the property itself [and is] distinct from a criminal proceeding which is in personam."[155] The trial court's dismissal of the criminal charges was reversed.[156]

Because forfeitures of property under the Health and Safety Code provisions are deemed civil sanctions, forfeitures do not violate the CUA's prohibitions on criminal liability. Accordingly, the forfeiture of medical marijuana exacts a *civil* penalty that is directly proportional to the amount of marijuana unlawfully transported.

Furthermore, even if construed as a criminal sanction, which it is not, the CUA only prohibits liability for criminal transportation on the sole basis of a person's status as a qualified patient or primary caregiver.[157] Forfeiture, however, only comes into play after medical marijuana is seized subsequent to a valid traffic stop or a police investigation involving the motor vehicle, both of which are based upon probable cause. Thus, forfeiture is not based solely on a patient or caregiver's status but is the consequential result of a seizure stemming from a moving violation or a police investigation involving the patient or caregiver's motor vehicle.

4. Forfeiture Implements Important Policies Without Overburdening Patients' Rights

In the context of seizures of medical marijuana from motor vehicles, a presumption that causes forfeiture strikes a balance between implementing policies without overburdening patient rights or needs.

Forfeiture, subsequent to a valid traffic stop or police investigation involving a motor vehicle, occurs when the patient or caregiver fails to demonstrate to the court that transporting occurred on the day of initial procurement. Forfeiture results for transporting that risks an endangerment to the safety of others and, thus, falls outside of the CUA's protections while avoiding significant inconvenience or hindrance to the qualified patient who may still obtain and use marijuana in accordance with the CUA's contemplated purposes and protections. In the end, endangering conduct and diversion are both unprotected under the CUA and MMPA, therefore, forfeiture is justified if the patient or caregiver cannot demonstrate same-day procurement.

Alternative means, in lieu of a legal presumption that allows for forfeiture, are inadequate for implementing policy concerns. The law could limit how marijuana is transported. For example, the transporting of medical marijuana might be confined to the trunk of the vehicle or in a locked container, the later being the case in Vermont,[158] but these restrictions are ineffective because, while they may prevent the use of marijuana while driving, they have no effect upon driving subsequent to use or upon preventing diversion.

Alternatively, the general quantity limits could be

145. Cal. Health & Safety Code Ann. § 11469(j) (Lexis 2007).
146. *Id.* § 11469(a).
147. *Id.* § 11470(a) (emphasis added); *Id.* § 11475.
148. *Id.* § 11362.765(a).
149. 49 Cal. App. 4th at 1187 (Cal. App. 1st Dist. 1996).
150. *Id.* at 1189.
151. *Id.*
152. *Id.* at 1190.
153. *Id.*
154. *Id.* at 1192.
155. *Id.* at 1191.
156. *Id.* at 1193.
157. Cal. Health & Safety Code Ann. § 11362.765(a), (b)(1)-(2) (Lexis 2007).
158. Vt. Stat. Ann. tit. 18, § 4474c(d) (Lexis 2007).

reduced, but this may have the effect of not allowing a sufficient quantity of marijuana to treat the illnesses of law-abiding patients who are not abusing MMLs. In addition, a reduction to the general quantity limits unduly burdens legitimate patients' rights by restricting possession in situations beyond the motor vehicle context and without a direct correlation to the public safety and policy concerns involving motor vehicles. In this regard, the presumption is tailored to implement policies related to specific concerns involving the transporting of medical marijuana within motor vehicles without overburdening the rights of patients who are otherwise in compliance with MMLs.

In sum, forfeiture allows local law enforcement and the state the ability to ensure patients and caregivers are not abusing MMLs through endangering conduct or diversions while the patient or caregiver's legitimate need to transport marijuana remains intact.

C. THE PRESUMPTION IS LIKELY TO SURVIVE CONSTITUTIONAL CHALLENGES

To the extent that the proposed statutory presumption is subjected to constitutional challenge, it is likely to be upheld. The most probable constitutional challenges, if any, are likely to be an alleged unconstitutional amendment to the CUA or a denial of due process.

1. The Issue of Unconstitutional Amendments to the CUA

Since the *Garden Grove* decision, there have been cases addressing the issue of whether the legislatively enacted MMPA was an unconstitutional amendment to the CUA.[159]

In *Co. of San Diego v. San Diego NORML*,[160] San Diego and San Bernardino counties (collectively "Counties") contested the MMPA's requirement that they implement and administer the identification card system related to qualified patients and primary caregivers.[161] The issue was whether the MMPA was preempted by the federal CSA on the grounds of conflict preemption and obstacle preemption[162] and whether the MMPA's mandate requiring implementation of an identification card system was an unconstitutional amendment to the CUA.[163] The court held the Counties' standing was limited to challenging only those MMPA provisions requiring implementation of the ID card program[164] and that both conflict preemption and obstacle preemption were unfounded.[165] The court also held that the MMPA did not amend the CUA.[166] The court reasoned that the CSA is silent on issuance of ID cards, thus, there could be no positive conflict.[167] Furthermore, issuance of ID cards was not a "significant" obstacle to CSA objectives; thus, obstacle preemption was inapplicable.[168] As to the amendment issue, the court reasoned the MMPA did not add to the CUA as it was a separate legislative scheme, CUA protections remained intact, and the ID card system did not impact the CUA's protections.[169] The judgment was affirmed.[170]

The most probable constitutional challenges, if any, are likely to be an alleged unconstitutional amendment to the [Compassionate Use Act] or a denial of due process.

Conversely, in *People v. Kelly*,[171] which was decided before *San Diego NORML*, the court struck down a MMPA provision as an unconstitutional amendment.[172] In *Kelly*, the defendant was a qualified patient who was convicted for the sale and cultivation of marijuana subsequent to police seizure of 12 ounces of marijuana in addition to living plants.[173] The issue was whether the MMPA's general eight ounce limitation upon the possession of medical marijuana, as a legislative enactment, unconstitutionally amended the CUA thereby rendering it prejudicial error for the prosecutor to argue that the defendant could be convicted for possessing more than eight ounces without a special physician's prescription.[174] The court held that the general quantity limits within the MMPA were an unconstitutional amendment to the CUA; thus, the prosecutor's argument in support of the defendant's conviction was improper.[175] The court reasoned that the only limitation imposed upon possession of medical marijuana under the CUA was that possession be reasonably related to the patient's medical needs, and because the MMPA added general quantity limitations upon possession, it modified the CUA and was an unconstitutional amendment.[176] The court struck down the general quantity limitations con-

159. *See generally* Co. of San Diego v. San Diego NORML, 165 Cal. App. 4th 798 (Cal. App. 4th Dist. 2008); People v. Kelly, 163 Cal. App. 4th 124 (Cal. App. 2nd Dist. 2008), *superseded by grant of review*, 2008 Cal. LEXIS 9776 (Lexis 2008); People v. Phomphakdy, 165 Cal. App. 4th 857 (Cal. App. 3rd Dist. 2008).
160. 165 Cal. App. 4th at 798.
161. *Id.* at 808.
162. *Id.* at 809.
163. *Id.* at 829.
164. *Id.* at 818.
165. *Id.* at 826-827.
166. *Id.* at 831.
167. *Id.* at 825.
168. *Id.* at 827.
169. *Id.* at 831.
170. *Id.* at 832.
171. Kelly, 163 Cal. App. 4th 124, *superseded by grant of review*, 2008 Cal. LEXIS 9776.
172. Another case, Phomphakdy, 165 Cal. App. 4th at 862-866, relied upon the *Kelly* decision and reached the same result by essentially adopting its reasoning and same line of cases for support. To avoid redundancy, discussion will be limited to *Kelly*.
173. Kelly, 163 Cal. App. 4th at 128-129, *superseded by grant of review*, 2008 Cal. LEXIS 9776.
174. *Id.* at 130.
175. *Id.*
176. *Id.* at 133-134.

Currently, the Kelly case is under review before the California Supreme Court . . . .

tained in the MMPA[177] and reversed the conviction.[178]

Currently, the *Kelly* case is under review before the California Supreme Court with the issues limited to whether the general quantity limits unconstitutionally amend the CUA and if there were alternatives to invalidation.[179] As the *Kelly* appellate court noted, "Legislative acts, such as the MMP, are entitled to a strong presumption of constitutionality[,]"[180] but the appellate court's opinion is devoid of any attempt to interpret the general quantity limits with the CUA so that the two may peaceably coexist. Since "[a]n interpretation which gives effect is preferred to one which makes void[,]"[181] the court was obligated to attempt to reconcile the laws before severing the purportedly offending law.

Though *Kelly* could be overturned on the basis of failing to adhere to the maxims of jurisprudence, the reasoning of the *San Diego NORML* court that the MMPA did not amend the CUA is equally applicable to the general quantity limitations provision. The general quantity limitations at issue in *Kelly*, like the ID card system at issue in *San Diego NORML*, did not add to the CUA as the MMPA is a separate legislative scheme. Further, the CUA protections remain intact, and the general quantity limitation does not impact the CUA's protections, as will be explained.

The *Kelly* court relied on *Cal. Lab. Fed'n. v. Occupational Safety & Health Stand. Bd.*[182] for the proposition that the general quantity limitations in the MMPA amounted to an amendment of the CUA, but *Cal. Lab.* is distinguishable. If the MMPA imposed an absolute cap upon quantity limits, as did the Budget Act with respect to the attorney fees at issue in *Cal. Lab.*,[183] then the MMPA's general quantity limit would be amendatory. However, the MMPA did not impose an absolute limit upon the amount of marijuana that may be possessed since a patient or caregiver, with a doctor's recommendation, "may possess an amount of marijuana [that is] consistent with the patient's needs."[184] Accordingly, the general quantity limits specified in the MMPA, as distinguished from the absolute cap limit imposed on attorney fees in *Cal. Lab.*, are more akin to a general guideline as to what a reasonable quantity shall be for the treatment of illnesses. Since the general quantity limit guideline - when read as a whole with other provisions in the MMPA - does not place any absolute limit upon the amount of marijuana that a patient may possess or grow, the MMPA's general quantity limit guideline does not impact the CUA's protections since those protections remain intact. Specifically, patients may possess and grow an amount of marijuana that is reasonably necessary for their condition, even when that amount exceeds the general quantity limit guideline.

While a physician's recommendation is required for marijuana in excess of the general quantity limit,[185] a physician's recommendation is also needed for medical marijuana below the general quantity limit.[186] Thus, the requirement of a physician recommendation designating a specific amount of medical marijuana that is needed for a patient's condition, which exceeds the general quantity limits, is no more onerous than the requirement that they seek a recommendation to become a qualified patient in the first instance. Accordingly, the MMPA's general quantity limit neither withdraws protections nor adds obstacles to a patient's right to obtain sufficient quantities of marijuana for his or her illness; thus, the MMPA did not amend the CUA.

Finally, "[i]nterpretation must be reasonable,"[187] and the law disfavors constructions that lead to absurd results. However, severing the general quantity limit from the MMPA severely impairs an important objective of the CUA and MMPA by removing the only measurable standard by which lawful conduct can be ascertained. The net effect for non-cardholding qualified patients and primary caregivers, who are not immune from arrest, is that the judge or jury must decide whether the amount of marijuana they possessed was reasonable for their medical condition, after arrest and prosecution. Because people will differ in their own beliefs as to what is reasonable, severing the general quantity limit brings uncertainty to the law. Thus, patients and caregivers may be placed in the compromising position that a conviction may ultimately result if, despite their legitimate need, the amount of marijuana they possess is found to be unreasonable. Additionally, the effect upon cardholding patients is that they, in the absence of evidence of criminal conduct, may possess excessively large quantities of marijuana while enjoying immunity from arrest and prosecution. When factoring in the current lack of restrictions upon transporting and the *Garden Grove* rule of required return, we are left with a potentially disastrous set of laws that seem to favor illegal drug trafficking. Severing the general quantity limit from the MMPA leads to unreasonable and absurd results.

2. The Presumption Within the Framework of an Amendment to the CUA

The proposed presumption's limitation upon transporting is incapable of amending the CUA. Since the MMPA was a legislative enactment that extended protection from

177. *Id. at* 136.
178. *Id.* at 138.
179. Kelly, 2008 Cal. LEXIS 9776 (Lexis 2008).
180. Kelly, 163 Cal. App. 4th at 132, *superseded by grant of review*, 2008 Cal. LEXIS 9776.
181. Cal. Civ. Code Ann. § 3541 (Lexis 2008).
182. 5 Cal. App. 4th 985 (Cal. App. 1st Dist. 1992).
183. *Id.* at 991-992.
184. Cal. Health & Safety. Code Ann. § 11362.77(b) (Lexis 2008).
185. *Id.*
186. *Id.* § 11362.5(b)(1)(A).
187. Cal. Civ. Code Ann. § 3542 (Lexis 2007).

criminal prosecution to the crime of transporting,[188] which was a punishable offense under the CUA standing in isolation,[189] any limitation upon the unfettered right to transport medical marijuana is merely a limitation upon a legislatively granted immunity and cannot be an abrogation of a right granted by voter initiative under the CUA. Indeed, under the CUA, no such right existed. As such, the proposed presumption's limitation upon transporting cannot be an amendment to the CUA because the CUA afforded no right of qualified immunity from prosecution for transporting.

3. The Presumption Affords Due Process of Law

The *Garden Grove* court, relying on *People v. Lamonte*,[190] found that the police could not retain Kha's medical marijuana without running afoul of the due process clause of the Fourteenth Amendment.[191] The presumption, however, satisfies the due process standards articulated in *Lamonte*.

In *Lamonte*, the defendant was arrested after trying to use fabricated credit cards in a restaurant.[192] The police recovered many items from the defendant's car including numerous credit cards, false identification cards, laminating equipment, various telephone and computer equipment, and a shotgun.[193] Lamonte negotiated a guilty plea to the charges of felon in possession of a firearm and burglary and then sought return of all property, except the weapons.[194] The motion was opposed by the state.[195] The issue was whether the state could withhold property on the basis that the property items were instrumentalities of crime.[196] The court held that the defendant's property was not contraband and must be returned to him.[197] The court reasoned that only contraband was excepted from return and merely using a lawful item in the commission of a crime does not make it contraband.[198] The court directed the property to be returned.

"Contraband is goods or merchandise whose importation, exportation, or possession is forbidden."[199] Since the presumption presumes that possession of marijuana within a vehicle is for nonmedical use and unlawful, the reasoning of the *Lamonte* court would permit forfeiture subsequent to a lawful seizure. The marijuana that is presumed for nonmedical use is unlawful contraband and, as the *Lamonte* court noted that contraband does not need to be returned,[200] the marijuana seized - applying *Lamonte* - would not need to be returned.

Second, as the *Lamonte* court appropriately noted, "[t]he 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."[201] However, the presumption affords the patient or caregiver an opportunity, through judicial process, to assert that the presumption is inapplicable because the marijuana was procured on the same day in which the traffic stop or motor vehicle investigation occurred. Thus, because the patient or caregiver would be afforded a hearing to determine the legal or illegal character of the seized marijuana, the operation of the presumption satisfies due process of law.

Ultimately, the presumption's operation, with respect to qualified patients and primary caregivers who transport marijuana in motor vehicles, is likely to be upheld as constitutional because it does not amend the CUA, nor does it offend due process of law.

CONCLUSION

Medical marijuana laws are intended to afford suffering or ill patients a means of relief that conventional prescription medications are unable to provide. However, there are well-documented abuses of medical marijuana laws by persons who would attempt to subvert their intended purposes while invoking the protections the statutes afford. In this regard, the non-essential transporting of marijuana by a qualified patient or primary caregiver who is driving should be viewed as conduct that indicates an intent to use or possess marijuana in a way that is not contemplated under MMLs - namely engaging in conduct that endangers others and/or unlawful diversions for nonmedical use - and, thus, should be viewed as outside MML protections. In those states adhering to a rule requiring the return of lawfully seized medical marijuana, a legal presumption that effectuates a forfeiture of marijuana that is legally seized subsequent to a valid traffic stop or motor vehicle investigation may be a viable means of implementing public safety and public policy concerns related to highway safety and drug enforcement efforts.

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188. Wright, 40 Cal. 4th at 92.
189. Cal. Health & Safety Code Ann. § 11362.5(d) (Lexis 2008); Young, 92 Cal. App. 4th at 237.
190. 53 Cal. App. 4th 544 (Cal. App. 4th Dist. 1997).
191. Garden Grove, 157 Cal. App. 4th at 386-387.
192. Lamonte, 53 Cal. App. 4th at 546.
193. *Id.* at 546-547.
194. *Id.* at 547.
195. *Id.*
196. *Id.* at 552.
197. *Id.* at 553.
198. *Id.* at 552-553.
199. *Id.* at 552.
200. *Id.* (*citing* Aday v. Super. Ct. of Alameda Co., 55 Cal. 2d 789, 800 (1961), which found that obscene books that were contraband should not to be returned).
201. *Id.* at 551.