

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

State of Arizona,	)	
Plaintiff - Appellant,	)	No. 1 CA-CV 12-0094
	)	
v.	)	Case No. S1400CR2011-00539
	)	Superior Court of the State of Arizona,
Valerie Ann Okun,	)	In and For the County of Yuma
Defendant - Appellee.	)	
_____	)	

PETITION FOR REVIEW

Jon R. Smith  
Yuma County Attorney

Edward P. Feheley #018772  
Theresa W. Fox #025048  
Deputy County Attorneys  
Office of the Yuma County Attorney  
250 West Second Street, Suite G  
Yuma, Arizona 85364  
[YCAAttyCivil@YumaCountyAZ.gov](mailto:YCAAttyCivil@YumaCountyAZ.gov)

Attorneys for Appellant

**A. ISSUES DECIDED BY THE COURT OF APPEALS THAT THE PETITIONER WISHES TO PRESENT FOR REVIEW.**

1. Under the Arizona Medical Marijuana Act, A.R.S. § 36-2801, et seq., law enforcement authorities must return marijuana seized from a “qualifying patient” who possesses an allowable amount of the drug.
2. An allowable amount of marijuana seized from a qualifying patient is not subject to summary forfeiture pursuant to A.R.S. § 13-3413(C).
3. A court order requiring a Sheriff to return marijuana seized from a qualifying patient pursuant to the Arizona Medical Marijuana Act does not subject the Sheriff to prosecution under the federal Controlled Substances Act, 21 U.S.C. § 841(a)(1).

**B. ISSUES PRESENTED TO, BUT NOT DECIDED BY, THE COURT OF APPEALS AND WHICH APPELLANT BELIEVES MAY NEED TO BE DECIDED IF REVIEW IS GRANTED.**

1. The possession and delivery of marijuana is prohibited by federal law, and all judges in every state are bound by the laws of the United States, therefore the trial court’s order requiring the Sheriff to deliver marijuana to Okun violates the trial court’s obligation to follow federal law.

**C. FACTS MATERIAL TO THE ISSUES PRESENTED**

In November 2010, Arizona voters passed Proposition 203, Arizona Medical Marijuana Act, codified in Title 36, Chapter 28.1, A.R.S. §§ 36-2801, et seq.

On January 28, 2011, Valerie Okun (Okun) was stopped and searched by U.S. Border Patrol Agents at a U.S. Border Patrol checkpoint within Yuma County. (R. 29, p. 1.) During a search of the vehicle marijuana was found. (Id.) Okun claimed that all the marijuana belonged to her. (Id.) Pursuant to protocol, the investigation and evidence were turned over to the Yuma County Narcotic Task Force.<sup>1</sup> (YCNTF) (R. 22, p. 2 ll. 17-19.) Okun was charged with state felonies. (R. 1) Upon production of California medical marijuana documentation, the State dismissed the case on or about May 19, 2011. (R. 12.) The State signed a property disposition form notifying the YCNTF that they may make immediate disposition of all property as they deemed proper. (R. 21, Exhibit A)

On August 15, 2011, Okun filed a Motion to Return the Defendant's Property. (R. 13.) On August 16, 2011, the State filed a Response taking no position on Defendant's motion. (R. 14.) The trial court signed an order releasing Okun's property on August 17, 2011. (R. 15.) The Yuma County Sheriff was not mentioned in that order, nor was he a party to the litigation involved in the order. Referencing that Order, Okun's attorney sent a letter to the Sheriff on August 19, 2011, asking for release of said property. The Sheriff responded on the same date, indicating that he would not return the marijuana, that the property had been

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<sup>1</sup> The YCNTF is composed of the U.S. Drug Enforcement Administration, the U.S. Border Patrol, the Arizona Department of Public Safety, the National Guard, the City of Somerton Police Department, and the Yuma County Sheriff. See [www.ycntf.org](http://www.ycntf.org).

scheduled for delivery that same date to the U.S. Drug Enforcement Agency for destruction (R. 21, Exhibit C), and that he would hold off on delivery for destruction until a final court decision was received. (R. 21, Exhibit D.)

On January 26, 2012, after further proceedings on the issue of whether the Sheriff could be ordered to return marijuana, the trial court issued an order specifically directing the Sheriff to turn over the marijuana to Okun. (R. 29.)

The Sheriff appealed that order.

The Court of Appeals affirmed the trial court's order.

Appellant petitions review.

#### **D. REASONS THE PETITION SHOULD BE GRANTED**

The United States Constitution, Article VI, clause 2, provides that:

This Constitution, and **the Laws of the United States** which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, **shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby**, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [Emphasis added.]

The Court of Appeals ignored the singularly important issue presented—that the trial court's order requiring the Sheriff to deliver marijuana to Okun violates the trial court's Constitutional obligation to follow federal law. Ignoring its Constitutional mandate, the Court of Appeals proceeded to issue three unwarranted holdings.

Their first holding—that under the Arizona Medical Marijuana Act, A.R.S. § 36-2801, et seq., law enforcement authorities must return marijuana seized from a “qualifying patient” who possesses an allowable amount of the drug—is arrived at by implying a very controversial duty into the Arizona Medical Marijuana Act that was not expressly provided for by the voters. This additional duty is not like those expressly stated in the Arizona Medical Marijuana Act, such as issuing identification cards, no state criminal prosecution, etc. This additional court implied duty requires law enforcement to distribute marijuana, an act prohibited by the Controlled Substance Act, 21 U.S.C. § 801, et seq.

Their second holding—that an allowable amount of marijuana seized from a qualifying patient is not subject to summary forfeiture pursuant to A.R.S. § 13-3413(C)—again implies another unexpressed provision into the Arizona Medical Marijuana Act: the nullification of an existing statutory method of dealing with contraband drugs. The Arizona Medical Marijuana Act explicitly prohibits the forfeiture of non-contraband item such as cars, growing lights, cash, etc., but is silent as to the actual contraband. This holding will require a full administrative process for dealing with any small quantities of marijuana coming into possession of law enforcement.

Their third holding—that a court order requiring a Sheriff to return marijuana seized from a qualifying patient pursuant to the Arizona Medical

Marijuana Act does not subject the Sheriff to prosecution under the federal Controlled Substances Act, 21 U.S.C. § 841(a)(1)—involves interpreting a federal statute in a manner without federal precedent.<sup>2</sup> The need for the Court of Appeals’ interpretation of this federal statute occurs because the Court of Appeals is ordering the Sheriff to violate the Controlled Substance Act, 21 U.S.C. § 801, et seq.

**E. ATTACHMENT:**

The Court of Appeals’ Decision is attached to this Petition for Review.

Dated this 7<sup>th</sup> day of February, 2013.

/s/ Edward P. Feheley  
Edward P. Feheley  
Deputy County Attorney  
Attorney for Appellant

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<sup>2</sup> Take note that *State v. Kama*, 39 P.3d 866 (Or. App. 2002), cited by the Court of Appeals, is no longer good law given Oregon Supreme Court’s holding in *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518, 536 (2010) that “to the extent that ORS 475.306(1) authorizes the use of medical marijuana, the Controlled Substances Act preempts that subsection.”