IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, Petitioner, vs. VALERIE ANN OKUN, Respondent.	)	Arizona Supreme Court CV-13-0040-PR Court of Appeals, Division One 1 CA-CV 12-0094 Yuma County Superior Court No. S1400CR2011-00539

AMICUS CURIAE BRIEF OF
THE ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
IN SUPPORT OF PETITIONER, STATE OF ARIZONA

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I. INTRODUCTION

The Arizona Prosecuting Attorneys' Advisory Council (APAAC) represents more than 800 state, county, and municipal prosecutors. APAAC's primary mission is to provide training along with a variety of other services to and on behalf of prosecutors. APAAC is the liaison for prosecutors with the legislature and the courts, advocating for prosecutorial interests before the legislature or proposing changes to this Court's procedural rules. On occasion, APAAC submits amicus curiae briefs in state or federal appellate courts on issues of significant concern. This is one of those occasions.

The Arizona Medical Marijuana Act (AMMA), A.R.S. § 36-2801 *et seq*., is a new law that dramatically alters the preexisting regulatory scheme for controlled substances in Arizona. The Court of Appeals' decision requiring the Yuma County Sheriff to return marijuana to a medical marijuana user is an additional wholesale shift in the way prosecutors and law enforcement officials enforce the controlled substances laws, putting law enforcement in the position of violating the AMMA by making an unauthorized transfer of medical marijuana and of the federal Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq.*, with no safe haven for immunity.

No published appellate decision has yet addressed whether the Supremacy Clause invalidates the AMMA and neither did the Court of Appeals address it here,

despite the reality that the question will surely recur. For these reasons, APAAC joins with the Petitioner in asking this Court to accept jurisdiction of the pending petition for review to resolve this matter of statewide importance.

II. ARGUMENT

A. The Court of Appeals erred when it interpreted A.R.S. § 13-3413(C) to require summary forfeiture only where possession is a criminal offense.

1. The Court of Appeals interpreted the language of § 34-3413(C) redundantly.

A.R.S. § 13-3413(C) provides in relevant part that marijuana "seized in connection with any violation of [Title 13, Chapter 34] or which come[s] into the possession of a law enforcement agency [is] summarily forfeited." Title 13, Chapter 34 sets forth the criminal drug offenses in Arizona. The statute on its face addresses two scenarios: "seizure" or "acquisition" from some other means (coming into possession).

In its opinion, the Court of Appeals correctly holds that the seizure portion compels summary forfeiture in drug offenses. However, the Court also extends that requirement to the acquisition portion "because the mere possession of such items constitutes a criminal offense [under Title 13, Chapter 34]." *State v. Okun*, __ Ariz. __, ¶8, __ P.3d __, ¶8 (App. 2013). Drug possession violates Chapter 34 and is thus subject to seizure and forfeiture by virtue § 13-3413(C). The Court's

extension of that logic to the acquisition portion, however, renders that phrase superfluous in violation of the rules of statutory construction.

"[W]e presume that the promulgating body did not intend to do a futile act by including a provision that is not operative or that is inert and trivial." *Patterson v. Maricopa County Sheriff's Office*, 177 Ariz. 153, 156, 865 P.2d 814, 817 (App. 1993). The rules of statutory interpretation require that courts give "each word, phrase, clause and sentence meaning so that no part of the [statute] is rendered superfluous, void, insignificant, redundant or contradictory." *Id*.

Obviously, summary forfeiture can occur outside the realm of criminal prosecution. One can imagine examples, such as where law enforcement locates and obtains marijuana that it is not connected to any person available for criminal prosecution. Or, as in this case, where one jurisdiction seized marijuana and transferred it to another jurisdiction for investigation, and no violation of Chapter 34 is charged. The marijuana nonetheless remains subject to summary forfeiture under § 13-3413(C)'s acquisition provision. As noted, to hold otherwise would render the Court of Appeals' reading of § 13-3413(C) as redundant, thereby foreclosing the applicability of summary forfeiture under the acquisition phrase. Obviously this is just the sort of fact pattern contemplated by the acquisition phrase.

2. The plain language of the AMMA immunizes medical marijuana only from forfeiture pursuant to Title 13, Chapter 39.

The AMMA specifically excludes forfeitures pursuant to Title 13, Chapter 39. A.R.S. § 36-2811(G). Nonetheless, the Court relies on A.R.S. § 36-2811(B)(1), which precludes penalizing medical marijuana users. Consistent with the rules of statutory construction, the more relevant and specific AMMA provision is applicable. *State v. Hansen*, 215 Ariz. 287, 289, 160 P.3d 166, 168 (2007) (internal citations omitted) (courts must apply "fundamental principles of statutory construction … the best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction.") The language of § 36-2811(G) is clear; medical marijuana users are exempted <u>only</u> from forfeitures pursuant to Chapter 39.

As the Court itself noted, a more specific statute must govern over a more general provision. *Okun*, __ Ariz. at ¶9, __ P.3d at ¶9. The AMMA could have excluded summary forfeiture under Chapter 34, but does not. Accordingly, because the AMMA does not prohibit summary forfeiture under provisions in Title 13, Chapter 34, which includes cases where law enforcement seizes or acquires marijuana, the Court of Appeals erred.

The Court's reliance on the non-penalty provision in the AMMA is inapposite. There is nothing about the disposition of the marijuana that comes into the possession of law enforcement that constitutes a penalty. The penalty would

have come with the criminal conviction. As there was no conviction, there is no penalty imposed, by law or otherwise. Forfeitures, civil or summary, are remedial rather than punitive. See, e.g., *United States v. Ursery*, 116 S.Ct. 2135 (1996), "civil forfeitures generally... do not constitute 'punishment' for purposes of the Double Jeopardy Clause." See also, ARS §13-3310(A), which is entitled Forfeiture: "[i]n addition to any other *remedies*…."

B. The AMMA does not permit law enforcement officers to dispense medical marijuana.

The AMMA is not a broad decriminalization of the controlled substance marijuana. Rather, it is a narrowly drawn, tightly regulated scheme to enable the medical use of this otherwise dangerous drug.

> "Medical use" means the acquisition, possession, cultivation, manufacture, use, administration, delivery, transfer or transportation of marijuana or paraphernalia relating to the administration of marijuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the patient's debilitating medical condition. ARS § 13-2801. 9.

In all other ways, under federal and state law, marijuana remains contraband. Therefore, it is imperative that the AMMA be as specifically implemented as possible.

The Court of Appeals' decision supports the order of the Trial Court, which contravenes the AMMA. Transfer of medical marijuana is specified as between specific persons identified in the AMMA; it does not provide for any transfer

between law enforcement and a cardholder as ordered in this case. Thus, the order violates the AMMA.

Moreover, the Department of Health Services' (DHS) administrative rules implementing the AMMA pursuant to its specific grant of authority in the AMMA itself set forth a regulatory scheme by which certain people are specifically exempted from criminal penalties for possession, transfer, and cultivation of marijuana. Ariz. Admin. Code R9-17-101 *et seq*. Only licensed dispensaries are permitted to transfer marijuana to registered medical marijuana users. To become a licensed dispensary, an entity must follow a specific procedure and rules. Ariz. Admin. Code R9-17-301 – R9-17-303. Dispensaries abide by a strict set of inventory control measures, including accepting marijuana only from qualifying patients, designated caregivers, and other dispensaries and acquiring the drug only from the dispensary's own cultivation site, another dispensary or its cultivation site, a qualifying patient authorized by DHS to cultivate marijuana, or a qualified caregiver authorized by DHS to cultivate marijuana. Ariz. Admin. Code R9-17-310(A)(2)(c), R9-17-316(B). A dispensary authorized to provide marijuana to a registered patient must ensure that the person is qualified to receive the drug and "verify the amount of medical marijuana the qualifying patient or designated caregiver is requesting would not cause the qualifying patient to exceed the limit on obtaining no more than two and one-half ounces of medical marijuana during

any 14-calendar-day period." Ariz. Admin. Code R9-17-314. The court order directing the Sheriff to return Okun's marijuana makes no provision for ensuring that the Sheriff is acting as a licensed dispensing agent or that Okun is qualified to receive the marijuana she is requesting.

Not only is the Yuma County Sheriff not a licensed medical marijuana dispensary or agent, but neither is it a caregiver or patient, the only other parties authorized to transfer medical marijuana under the AMMA. Thus, the Court's order itself violates the state law, which is designed to carefully manage transfer of this drug.

C. The Court of Appeals erroneously held that the Yuma County Sheriff is immune from federal prosecution under the Controlled Substances Act.

In the first place, immunity presumes a crime. Thus, by its mere application of the immunity analysis, the Court of Appeals tacitly admits that its order to return marijuana is a violation of federal law; otherwise its discussion of the topic would be wholly unnecessary. It would seem that ordering a law enforcement official to commit a crime should be *prima facie* cause to avoid this discussion altogether as obviously impossible, even without addressing federal preemption.

Instead, the Court of Appeals gave short shrift to the state's argument that requiring the Sheriff to return Okun's marijuana would render him vulnerable to federal prosecution, despite the fact that, indeed, there is no immunity for law enforcement when it comes to marijuana.

1. Unlike the Court of Appeals, federal courts narrowly interpret the CSA's immunity provision.

The federal immunity provision cited by the Court of Appeals--Title 21, section 885(d), United States Code--is not broadly interpreted by federal courts.

Immunity is provided for bona fide undercover drug operations insofar as the ultimate objective of catching drug traffickers and removing drugs from the streets further the purposes of the CSA. Immunity is not conferred on local officials engaging in behavior contrary to the CSA when that official does not have clear state law authority to do so, even where the official subjectively, but erroneously, believes he is conducting CSA enforcement. See, e.g., *U.S. v. Wright*, 634 F.3d 770 (5th Cir. 2011) and *U.S. v. Fuller*, 162 F.3d 256 (4th Cir. 1998) (rejecting a defense based upon executive authority, where a mayor subjectively believed he had authority to conduct undercover drug operation).

In *Wright*, the Fifth Circuit Court of Appeals held that section 885(d) does not confer blanket immunity on a sheriff's deputy who was not specifically authorized by state law to procure controlled substances outside his official statutory duties. 634 F.3d at 772. The immunity provision "require[s] the application of a state's laws to determine state official's status and legality of his actions." *Id.* at 776. Because the deputy was not specifically authorized under state law to conduct undercover drug operations, he was not entitled to a jury instruction on the immunity provision. *Id.* at 777.

In *Fuller*, the Fourth Circuit Court of Appeals reviewed state law and found nothing supporting his claim that he had the authority to conduct drug operations, but had it been a legitimate belief, at best it was a mistake of law, which is not a defense to a charge under the CSA. *Id*. Thus, even a mistake of law will have disastrous consequences for state law enforcement officials.

These cases illustrate the narrow interpretation of federal immunity. Likewise, the facts in this case would not meet the immunity test: Okun was stopped and her marijuana seized at a Border Patrol checkpoint on a trip from California to Arizona. It is axiomatic that the distribution of marijuana by law enforcement officials whose jurisdiction includes an interstate and an international border would greatly undermine the express purposes of the CSA. Thus, the Court of Appeals was clearly erroneous when it proclaimed that the Yuma County Sheriff has no personal stake in enforcement of the CSA or AMMA and that the Sheriff would be immune from federal prosecution.

2. The Court of Appeals erred in finding that federal prosecution of the Sheriff is 'unlikely' when federal prosecutors have expressly stated that state employees are not immune from prosecution when acting in accordance with state medical marijuana laws.

The U.S. Attorney for the District of Arizona has made it clear that "state employees who conduct activities authorized by the AMMA are not immune from liability under the CSA." Ariz. Op. Atty. Gen. No. I12-001, *citing* Letter of Acting U.S. Attorney Ann Birmingham Scheel to Governor Janice K. Brewer (Feb. 16,

2012). The U.S. Attorneys for the Eastern and Western Districts of Washington have similarly warned their governor that the CSA does not immunize law enforcement officials acting in accordance with state medical marijuana laws. Letter of U.S. Attorney Jenny A. Durkan and U.S. Attorney Michael C. Ormsby to Governor Christine Gregoire (Apr. 14, 2011), *cited in Pack v. Superior Court*, 132 Cal. Rptr. 633, 650 n.27 (Cal. App. 2011), *superseded on other grounds by Pack v. S.C.*, 268 P.3d 1063 (2012). Federal immunity is not as cut-and-dried as the Court of Appeals makes it seem.

The consequences of an erroneous decision have significant impacts for law enforcement officials throughout this state. Therefore, this Court should grant review, take the U.S. Attorneys at their word, and confirm that state law enforcement officials are not immune from federal prosecution for distributing forfeited marijuana to medical marijuana users.

D. The Court of Appeals erroneously held that the sheriff is immune from state prosecution under a theory of judicial immunity.

Relying on two cases that are not applicable to this case, in a footnote, the Court of Appeals stated that the court order requiring the Sheriff to return the marijuana will not open the Sheriff to state prosecution for transferring marijuana. *Okun*, __ Ariz. at ¶14, fn. 3, __ P.3d at at ¶14, fn. 3.

Neither *Acevedo v. Pima County Adult Prob. Dep't*, 142 Ariz. 319, 321-22, 690 P.2d 38, 40-41 (1984), nor *Adams v. State*, 185 Ariz. 440, 444, 916 P.2d 1156,

1160 (App. 1995) are relevant as they are tort cases in which government employees sought immunity from civil damages, not criminal prosecution. In *Acevedo*, an adult probation officer sought judicial immunity for negligently supervising a convicted felon placed on probation. 142 Ariz. at 321, 690 P.2d at 40. The Arizona Supreme Court held that judicial immunity is extended to other court officials who "perform functions 'intimately related to,' or which amount to 'an integral part of the judicial process.'" *Id.*, citing *Ashbrook v. Hoffman*, 617 F.2d 474, 476 (7th Cir.1980), and *Robichaud v. Ronan*, 351 F.2d 533, 536, (9th Cir.1965). However, that immunity does not exist except for the direct connection with the court. *Id*. Although judicial immunity can be extended to court clerks, court-appointed psychologists, probation officers, the doctrine does not immunize those court officers when their activities are administrative in function. *Id*. at 322, 690 P.2d at 41.

Acevado is inapplicable as the Sheriff is not an extension of the court; rather it is in the executive branch. In addition, the return of property is an ancillary administrative function, not a core function for law enforcement officers. See A.R.S. § 11-441.

In *Adams*, the Court of Appeals considered judicial immunity for a DES caseworker who placed two children in an abusive home based on a judicial order requiring all adoption caseworkers to follow the juvenile court's guidelines. 185

Ariz. 440, 442, 916 P.2d 1156, 1158. Unlike the probation officer in *Acevedo*, DES caseworkers are executive branch employees who are not appointed or approved by the court. *Adams*, 185 Ariz. at 445, fn. 5, 916 P.2d at 1161, fn. 5. Consequently, they are not entitled to judicial immunity even if acting in accordance with a general judicial directive. *Id*. Like the adoption caseworker, the Sheriff is a member of the executive branch for whom judicial immunity is not designed.

Oddly, in support of its conclusion, the *Okun* court quoted the children/appellants who argued that "non-judicial personnel are entitled to immunity when carrying out court directives." *Okun*, __ Ariz. at ¶14, fn. 3, __ P.3d at ¶14, fn. 3, quoting Adams, 185 Ariz. at 444, 916 P.2d at 1160.

More importantly, however, both of these cases stand for the proposition that certain government employees may claim judicial immunity <u>from civil suit</u>. Neither of these cases holds that a law enforcement official is subject to absolutel immunity <u>from criminal prosecution</u> for following a court order to act in contravention to state criminal law. APAAC is not aware of any Arizona case extending judicial or executive immunity in this fashion. Thus, the Court of Appeals erred when it summarily disregarded the state's valid concern that the court's illegal order would require the Sheriff to violate A.R.S. § 13-3405(A)(4).

…

…

III. CONCLUSION

APAAC respectfully urges this Court to accept jurisdiction of the State's Petition for Special Action and grant relief. Requiring state law enforcement officials to commit a criminal act and distribute marijuana, whether or not it was legally possessed, is not permitted under the law.

RESPECTFULLY SUBMITTED this __ day of March, 2013.

By: _____

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CERTIFICATE OF SERVICE

The original and seven copies of APAAC's *Amicus Curiae* Brief were delivered to for filing with the Clerk of the Arizona Court of Appeals on March __, 2013. A conformed copy of APAAC's *Amicus Curiae* Brief was served on:

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CERTIFICATE OF COMPLIANCE

Under Rule 6(c) and Rule 23(c) of the Arizona Rules of Civil Appellate Procedure, I certify that the attached Brief uses proportionately spaced type of 14 points or more, is double-spaced using a roman font, and contains less than 10,500 words.

DATED this __ day of March, 2013.

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