

1 Bonnie Margaret Ross [SBN 178591]
2 1580 Chestnut Street
3 Redding, CA 96001
4 (530) 242-1728

5 Attorney for Defendant
6 Shawn Malone

FILED

MAR 17 1998

CLERK OF THE SUPERIOR/MUNI COURT
BY: BRENDA RUSS
Deputy Clerk

7 MUNICIPAL COURT OF THE STATE OF CALIFORNIA
8 FOR THE COUNTY OF SHASTA

9 PEOPLE OF THE STATE)
10 OF CALIFORNIA,)
11 Plaintiff,)

12 v.)

13 SHAWN MALONE,)
14 Defendant.)
-----)

No. 97M 2529

NOTICE OF MOTION AND
MOTION FOR RETURN OF
ILLEGALLY SEIZED PROPERTY

Date: April 3, 1998
Time: 10:30 a.m.
Dept: 10

15 TO: THE CLERK OF THE ABOVE COURT AND TO THE DISTRICT ATTORNEY
16 OF SHASTA COUNTY AND/OR HIS REPRESENTATIVE:

17 PLEASE TAKE NOTICE that on the above date and time or as soon
18 thereafter as may be heard in the above-entitled court, the Defendant
19 Shawn Malone will move the court for an order commanding the District
20 Attorney of Shasta County and the Redding Police Department to return
property seized from his home on March 7, 1997 by members of the


1 Redding Police Department. The property sought to be returned is 3.5
2 grams of marijuana in a clear plastic bag.

3 This motion will be made on the ground that the property is
4 neither evidence in any case currently pending against the defendant
5 nor contraband.

6 This motion will be based on the attached memorandum of points
7 and authorities, the attached declaration of counsel, the court file in
8 this case, and all the evidence to be presented at the hearing on this
9 motion.

10 Dated: March 16, 1998

11 Respectfully submitted,

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13 Bonnie Margaret Ross
14 Attorney for Defendant
15 Shawn Malone
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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

Mr. Malone was arrested for possession of marijuana after a search of his home on March 7, 1997. He was charged by complaint filed April 9, 1997 with violating Health and Safety Code section 11357(b), possession of less than an ounce of marijuana.

He plead not guilty and filed a motion to dismiss under Health and Safety Code section 11362.5 (Prop 215) on June 12, 1997. The Honorable Wilson Curle conducted an evidentiary hearing regarding Mr. Malone's motion to dismiss on July 11, 1997. At the hearing, Frank Fisher, M.D., testified that he had examined Mr. Malone on numerous occasions during the past year. (Reporter's Transcript of Proceedings, July 11, 1997, hereinafter "RT," at p. 5.) Dr. Fisher stated that Mr. Malone had "chronic, intractable pain as a result of the injury of one of the disks between the bones of his lower spine." (RT 5.) Dr. Fisher testified that he was aware that Mr. Malone used marijuana for his medical condition. (RT 6.) Dr. Fisher approved Mr. Malone's use of marijuana. (RT 7.) After

1 hearing argument on the motion, Judge Curle dismissed the case
2 pursuant to Health and Safety Code section 11362.5. (RT 20.)

3 The prosecution appealed and the Appellate Department of the
4 Superior Court reversed and remanded on the basis that the new Health
5 and Safety Code section provided only an affirmative defense at trial,
6 and did not authorize dismissals prior to trial.

7 The matter was set for trial on March 24, 1998. At settlement
8 conference on March 9, 1998, the District Attorney moved to dismiss
9 the case and the court ordered the dismissal.

10 I. THE DEFENDANT HAS A RIGHT TO HAVE THIS COURT ORDER
11 THE AUTHORITIES TO RETURN HIS PROPERTY WHICH IS NOT
12 CONTRABAND, WEAPONS OR EVIDENCE OF CRIME

13 There is no authority for the police or any other
14 governmental agency to retain possession of property which is not
15 contraband, stolen property or evidence (see People v. Superior Court
16 (McGraw) (1979) 100 Cal.App.3d 154, 160; Penal Code Section 1411
17 (stolen property); Buker v. Superior Court (1972) 25 Cal.App.3d 1085
(money)).

18 Absent a contrary showing, the defendant is presumed to
19 own the property which he possessed when he was arrested and
20 which was taken from him. (Evid. Code § 637 ("things which a person

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Because Mr. Malone possessed the marijuana at issue upon the recommendation and approval of a physician, it was not contraband. Mr. Malone's medicine should therefore be returned to him.

Dated: March 16, 1998

Respectfully submitted,

~~Bonnie Margaret Ross~~
Bonnie Margaret Ross
Attorney for Shawn Malone

1 Bonnie Margaret Ross [SBN 178591]
2 1580 Chestnut Street
3 Redding, CA 96001
4 (530) 242-1728

5 Attorney for Defendant
6 Shawn Malone

7 MUNICIPAL COURT OF THE STATE OF CALIFORNIA

8 FOR THE COUNTY OF SHASTA

9 PEOPLE OF THE STATE)
10 OF CALIFORNIA,)
11 Plaintiff,)
12)
13)
14 v.)
15)
16)
17 SHAWN MALONE,)
18)
19 Defendant.)
20 _____)

No. 97M 2529

DECLARATION OF COUNSEL

I, Bonnie Margaret Ross, declare:

1. I am an attorney at law, licensed to practice before all courts in the State of California, and appointed counsel for the defendant.

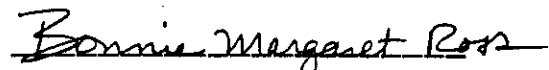
2. I have made an informal request of the Deputy District Attorney for the return of Mr. Malone's property. The response to that

1 request was that under the "policy" of the District Attorney's office, a
2 motion for the return of the marijuana would have to be made.

3 3. Mr. Malone possessed the marijuana at issue upon the
4 recommendation and approval of a physician, in compliance with Health
5 and Safety Code section 11362.5. A true and correct copy of the
6 physician's authorization is attached as Exhibit A to this motion.

7 I declare under penalty of perjury that the foregoing is true
8 and correct except as to those matters stated on information and
9 belief, and as to those matters, I believe them to be true.

10 Executed on March 16, 1998, at Redding, California.

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12 Bonnie Margaret Ross
13 Attorney for Shawn Malone
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MUNICIPAL COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SHASTA

PEOPLE OF THE STATE)
OF CALIFORNIA,)
)
Plaintiff,)
)
)
v.)
)
)
SHAWN MALONE,)
)
Defendant.)
-----)

No. 97M 2529
ORDER FOR RETURN OF
PROPERTY

TO THE REDDING POLICE DEPARTMENT:

It is hereby ordered that the following items seized on March 7,
1997, by members of the Redding Police Department be returned
forthwith to the defendant:

3.5 grams of marijuana in a clear plastic bag.

Dated: _____

Judge of the Municipal Court

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EXHIBIT A

1 PROOF OF SERVICE

2 I am a citizen of the United States and employed at Shasta
3 County, California; I am over the age of eighteen years and not a party
4 to the within action. My business and mailing address is 1580 Chestnut
5 Street, Redding, CA 96001. On this date I served:

6 Notice of Motion and Motion for Return of Property

7 _____ by placing a true copy in a sealed envelope, with fully prepaid
8 postage upon the envelope, in the United States Post Office mail box in
9 Redding, CA, addressed as set forth below.

10 _____ by personally delivering a true copy to the person and at the
11 address set forth below.

12 _____ by facsimile machine pursuant to Rule 2005, at the facsimile
13 number shown below. The facsimile machine I used complied with Rule
14 2003(3) and no error was reported by the machine. Pursuant to Rule
15 2005(a), I caused the machine to print a transmission record, a copy of
16 which is attached to the original of the declaration.

17 David Hirsch
18 Shasta County District Attorney's Office
19 1525 Court Street
20 Redding, CA 96001

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

Executed on Mar 17 1998, at Redding, Shasta
County, California.

Bonnie M. Ross