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**FILED**

**MAR 26 1998**

SHASTA COUNTY SUPERIOR-  
MUNICIPAL COURT - REDDING BRANCH  
BY CRYSTAL BATES

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8 IN THE MUNICIPAL COURT  
COUNTY OF SHASTA, STATE OF CALIFORNIA  
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11 THE PEOPLE OF THE STATE OF ) NO. 97M2529  
CALIFORNIA, )  
12 )  
Plaintiff ) RESPONSE TO MOTION FOR  
13 ) RETURN OF PROPERTY  
vs. )  
14 )  
SHAWN MATTHEW MALONE, ) Date: April 3, 1998  
15 ) Time: 10:30 a.m.  
Defendant ) Dept: 10  
16 )

17  
18 Plaintiff, The People of the State of California, respond to  
19 Defendant's Motion to Return Seized Property as follows:  
20 marijuana (approximately 3.5g).

21 The law is absolutely clear on disposition of seizures pursuant  
22 to violations of the Health and Safety Code. Unlike the Penal Code  
23 wherein the statutes are not specific, Health and Safety Code  
24 Sections 11473 and 11473.5 speak to the disposition of property in  
25 cases involving controlled substances.

26 Health and Safety Code Section 11473 involves seizures (except  
27 seizures involving vehicles or money, Health and Safety Code Section  
28 11470(e) and (f)) which . . .

1           "Shall, upon conviction of the owner or  
2           defendant, be ordered destroyed by the court  
3           in which the conviction was had."

4           The court is thereby directed by statute to dispose of the  
5           property seized in connection with the conviction.

6           Even though there is not a conviction in this case, Health and  
7           Safety Code Section 11473.5 mandates disposal of controlled  
8           substances, unless the court finds the controlled substances to be  
9           lawfully possessed. The controlled substance in this case is  
10          marijuana. There has not been a finding that it was legally  
11          possessed by the defendant. As such, the marijuana should be  
12          destroyed.

13          Essentially, this is an issue addressed analogously by the  
14          legislature in both the Penal Code and the Health and Safety Code.

15          Penal Code Section 1538.5, subdivision (e) provides that:

16                 "If a search or seizure motion is granted at a  
17                 trial, the property shall be returned upon  
18                 order of the court unless it is otherwise  
19                 subject to lawful detention." (emphasis added)

20          Penal Code Sections 1417 through 1417.6 provide for the  
21          disposition of evidence in criminal cases. Section 1417.6 provides  
22          for the destruction or sale of other disposition of evidence which  
23          are dangerous or deadly weapons, or any property which was used by  
24          a defendant in the commission of the crime of which the defendant  
25          was convicted, or which the defendant had upon his or her person at  
26          the time of the defendant's arrest.

27          Clearly the People have the right to detain any property which  
28          it is unlawful to possess, and such right exists whether the  
            property was lawfully seized or not. United States v. Jeffers

1 (1951) 342 U.S. 48; Trupino v. United States (1948) 334 U.S. 669.  
2 See also People v. Superior Court (McGraw) (1979) 100 Cal.App.3d  
3 154, supports this position.

4 The People submit that the requested item, as it was possessed  
5 constituted contraband; as defined by federal law, these items are  
6 "derivative contraband".

7 The following federal cases are instructive on the issue of  
8 derivative contraband:

9 In the case United States v. David Williams (1982) 533  
10 Fed.Supp. 488, the United States District Court in Pennsylvania  
11 wrestled with a situation where a defendant was charged with  
12 possession of firearms on federal premises. The defendant was  
13 acquitted of the charge, however, the lower court ordered that the  
14 defendant's weapon not be returned to the defendant. In this  
15 situation, the handgun in and of itself was not contraband. Clearly  
16 the defendant's use of the firearm, to wit: possession of the  
17 firearm on federal premises while not engaged in official business,  
18 created the "contraband nature" of the weapon. In the case of  
19 United States v. Bowdach (1976) 414 Fed.Supp. 1346, the court  
20 discussed the distinction between contraband per se and derivative  
21 contraband.

22 "Defendant contends that it was unnecessary to  
23 confiscate the shotgun found in the kitchen.  
24 He suggests that after the house had been  
25 secured, the shotgun should have been returned  
26 to Mrs. Bowdach because the shotgun was not  
27 contraband or illegal per se. Defendant's  
28 argument must fail for two reasons. First,  
in this particular case, the shotgun does fall  
within the definition of contraband. An  
article may be considered contraband by its  
very nature, for example counterfeit money, a  
sawed-off shotgun or narcotic drugs. In  
addition, other articles may acquire the status

1 of contraband depending upon the circumstances  
2 under which they are received, possessed or  
3 transferred. For instance, possession of an  
4 automatic weapon is legal only if the  
5 registration requirements of Chapter 53 of  
6 Title 26 are satisfied. So, too, the status of  
7 the shotgun in question depends upon the  
8 circumstances under which it is possessed:  
9 Possession by a convicted felon constitutes a  
10 criminal offense and in the hands of a felon  
11 the shotgun becomes contraband; possession of  
12 the shotgun by a non-felon has no legal  
13 consequences. Bowdach at 1353 (cites omitted).

14 In the case of Lipscomb v. Stewart (1977) 436 Fed.Supp. 863, a  
15 federal prisoner was incarcerated on charges of mail fraud. He  
16 attempted to attain the return of certain negotiable instruments  
17 which had been seized at the time of his arrest. The District Court  
18 held that even though the property sought by the prisoner was not  
19 illegal on its face and was capable of being employed for legal  
20 purposes, the fact that such property had been employed for illegal  
21 purposes sufficed to make the property contraband and to preclude  
22 its return:

23 "... This Court recognizes that the purposes of  
24 contraband statutes such as those set out above  
25 is to impair the ability of the criminal  
26 defendant in once again committing the offense  
27 for he is charged, by either destroying or  
28 preventing the defendant from re-obtaining  
devices which were used in the commission of  
the crime. Even though the property involved  
here is not illegal on its face and was capable  
of being employed for legal purposes, the fact  
that such property was employed for illegal  
purposes is enough to make such prop-erty  
contraband. This Court would be remiss in its  
duty if it now allowed (the defendant) to  
regain control over the devices with which he  
perpetrated his crime of false pretense. The  
Court is certain that the deprivation will not  
have serious consequences to the (defendant),  
... but this Court refuses to enter into an  
order through which prior criminal conduct may

1 be perpetrated." Lipscomb at 866.

2  
3 "Derivative contraband" is an object which is not inherently  
4 unlawful, but which has been used in an unlawful manner or which is  
5 an instrumentality of a crime: Davis v. Fowler 504 Fed. Supp. 502.

6 The People acknowledge that these cases are only analogous to  
7 the situation at bar. The laws regarding the use and possession of  
8 marijuana are the subject of recent change in California.  
9 Accordingly, the existing California case law does not precisely  
10 address the issue presented here. However, given that there has not  
11 been a finding that the marijuana was legally possessed by the  
12 defendant, the marijuana is presumptively contraband which should  
13 not be returned.

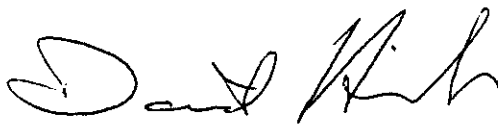
14 Accordingly, the request for return of the marijuana should be  
15 denied.

16 Dated: March 26, 1998

17 Respectfully submitted,

18 MCGREGOR W. SCOTT  
19 DISTRICT ATTORNEY

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22 By:

  
23 \_\_\_\_\_  
24 DAVID M. HIRSCH  
25 DEPUTY DISTRICT ATTORNEY  
26  
27  
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8 IN THE MUNICIPAL COURT OF THE STATE OF CALIFORNIA  
9 IN AND FOR THE COUNTY OF SHASTA  
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11 THE PEOPLE OF THE STATE ) No. 97M2529  
OF CALIFORNIA, )  
12 )  
Plaintiff ) PROOF OF SERVICE  
13 ) BY PERSONAL SERVICE  
vs. )  
14 )  
SHAWN MATTHEW MALONE, )  
15 )  
Defendant )  
16


17 I am a citizen of the United States and a resident of the  
18 county aforesaid; I am over the age of eighteen and not a party to  
the within above-entitled action; my business address is:

19 SHASTA COUNTY DISTRICT ATTORNEY  
1525 COURT STREET  
20 REDDING, CA 96001

21 On March <sup>27</sup>26, 1998, I served the within RESPONSE TO MOTION  
22 FOR RETURN OF PROERTY on the Defendant/Attorney in said action by  
personally delivering same as follows:

23 BONNIE ROSS  
ATTORNEY AT LAW  
24 REDDING, CA 96001

25 Executed on March <sup>27</sup>26, 1998, at Redding, California.  
26

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