



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

January 19, 2012

Captain Steve Duvall
Oregon State Police
255 Capitol St. NE
4th Floor
Salem, OR 97310

Re: Opinion Request OP-2012-1

Dear Captain Duvall:

The Oregon Medical Marijuana Act authorizes the provision and possession of marijuana for medical use and requires law enforcement officers to return seized marijuana to persons who are entitled to the protections of the Act. ORS 475.304, 475.320, 475.323(2). The federal Controlled Substances Act, on the other hand, prohibits the distribution and possession of all marijuana, including marijuana that state law permits to be used for medical purposes. 21 USC § 841, 844; *United States v. Oakland Cannabis Buyers' Cooperative et al*, 532 US 483, 486, 494, 121 S Ct 1711, 149 LEd2d 722 (2001), *Gonzales v. Raich*, 545 US 1, 14, 125 S Ct 2195, 162 LEd2d 1 (2005).

In *Emerald Steel Fabricators, Inc. v. BOLI*, 348 Or 159, 230 P3d 518 (2010), the Oregon Supreme Court held that the Oregon Medical Marijuana Act is preempted by the federal Controlled Substances Act to the extent that it affirmatively authorizes medical marijuana use. An Oregon federal district court subsequently relied on *Emerald Steel* to deny claims arising from a law enforcement officer's refusal to return medical marijuana to those entitled to possess it under the Oregon Medical Marijuana Act. *Butler v. Douglas County*, Civil No. 07-6241-H (D Or August 10, 2010). In light of those recent opinions, you ask the following questions.

QUESTIONS AND SHORT ANSWERS

Question 1: Does the federal Controlled Substances Act preempt the direction in ORS 475.323(2) to Oregon state and local law enforcement officers that they must return seized marijuana in certain circumstances?

Short Answer: Based on the reasoning in *Emerald Steel*, yes. The requirement in ORS 475.323(2) to return marijuana likely is preempted by provisions of the federal Controlled Substances Act that prohibit the distribution and possession of marijuana. Because a preempted statute is "without effect," the requirement in ORS 475.323(2) to return marijuana has no legal effect. But we caution that the law in this area is evolving.

Question 2: If a state or local law enforcement officer returns medical marijuana that was lawfully possessed under the Oregon Medical Marijuana Act, does the officer who returns the marijuana or the person who receives it violate federal law?

Short Answer: Based on the reasoning in *Emerald Steel*, the officer would violate federal law by returning the marijuana and may be subject to federal criminal prosecution. The recipient of the marijuana would violate federal law by possessing marijuana and also may be subject to federal criminal prosecution.

Question 3: Based on the current case law and statutes, what would be the appropriate response by the Oregon State Police or its officers, as appropriate, when a court orders the agency or the officer to return the marijuana?

Short Answer: The agency or the officer should appeal the order and request a stay of the order pending the appeal. If no stay is granted or if the appeal is unsuccessful, the agency or officer should return the marijuana.

Question 4: Assume an individual is arrested and has a lawful amount of medical marijuana under Oregon law in his or her possession; the individual is lodged at the county jail; and the jail staff inventories and stores the individual's marijuana along with the individual's other personal possessions for safekeeping. If a jail staff member returns the marijuana to the individual upon the individual's release from custody, does the jail staff member or the individual, or both, violate federal law?

Short Answer: Based on the reasoning in *Emerald Steel*, the officer would violate federal law by returning the marijuana and may be subject to federal criminal prosecution. The recipient of the marijuana would violate federal law by possessing marijuana and also may be subject to federal criminal prosecution.

DISCUSSION

I. Relevant Statutory and Case Law

A. The Oregon Medical Marijuana Act

Oregon's Uniform Controlled Substances Act prohibits the possession or delivery of marijuana. ORS 475.864, 475.860. But the Oregon Medical Marijuana Act exempts persons engaging or assisting in the medical use of marijuana from criminal liability for possessing or delivering marijuana. ORS 475.309(1), 475.319.

Under the Oregon Medical Marijuana Act, a person who wishes to engage in the medical use of marijuana must obtain a registry identification card. *See* ORS 475.306(1) (providing that cardholders “may engage” in the medical use of marijuana). Cardholders and their caregivers and producers may possess limited amounts of marijuana. *See* ORS 475.320 (specifying the amounts of marijuana that those persons “may possess”).

ORS 475.323(2) prohibits the harm or forfeiture of any property interest connected with the medical use of marijuana that has been seized by any state or local law enforcement officer. That provision also requires law enforcement officers to return usable medical marijuana to those from whom it was seized if the district attorney determines that those persons are protected by the Oregon Medical Marijuana Act.¹⁷

B. The Federal Controlled Substances Act

The federal Controlled Substances Act prohibits the possession and distribution of marijuana, except as part of a Food and Drug Administration (FDA) pre-approved research project. 21 USC § 844, 21 USC § 841(a). The federal law provides no exception for possession and distribution of medical marijuana that is permitted under state law. *See Gonzales v. Raich*, 545 US at 14 (sole exception for marijuana possession and distribution is as part of FDA study), *see also United States v. Oakland Cannabis Buyers' Cooperative*, 532 US at 486 (holding that there is no medical necessity exemption to the federal Act's prohibitions on marijuana manufacture and distribution). You ask whether the federal Controlled Substances Act, by prohibiting the possession and distribution of all marijuana except in FDA pre-approved studies, preempts ORS 475.323(2) to the extent that it requires law enforcement officers to return marijuana in certain circumstances.

By its terms, the federal Controlled Substances Act preempts state law only when there is a “positive conflict” between the state law and a provision of the Act “so that the two cannot consistently stand together.” 21 USC § 903.²⁷ No Oregon appellate case directly addresses whether the requirement to return medical marijuana imposed by ORS 475.323(2) is preempted by the federal Controlled Substances Act. The only Oregon case to address the apparent conflict between ORS 475.323(2) and the federal law is *State v. Kama*, 178 Or App 561, 39 P3d 866, *rev den* 334 Or 121 (2002). We first consider that case.

C. *State v. Kama*

In *Kama*, city officers refused to return medical marijuana as required by ORS 475.323(2), arguing that to do so would constitute delivery of a controlled substance in violation of the federal Controlled Substances Act.

The defendant argued that the city officers would be immune from criminal liability for delivery under section 885(d) of the federal Controlled Substances Act, which provides, in part that:

No civil or criminal liability shall be imposed by virtue of this subchapter upon any duly authorized Federal officer lawfully engaged in the enforcement of this subchapter or upon any duly authorized officer of any State, territory, political subdivision thereof, * * * who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

The court did not address whether returning the marijuana constitutes delivery under the federal act, instead holding that:

Even assuming that returning the marijuana otherwise might constitute delivery of a controlled substance, the city does not explain – and we do not understand – why police officers would not be immune from any federal criminal liability that otherwise might arise from doing so.

178 Or App at 565. In support of its holding, the court cites *U.S. v. Fuller*, 162 F3d 256 (4th Cir 1998), which held that section 885(d) confers immunity on law enforcement personnel engaged in undercover drug operations. 178 Or App at 564. That citation is the whole of the court's analysis.

There is no discussion in *Kama* as to whether the federal Controlled Substances Act preempts ORS 475.323(2). Nor did the court analyze whether immunity applies to actions taken to carry out laws that conflict with the federal Controlled Substances Act (such as the Oregon Medical Marijuana Act, in part) as well as to actions taken to enforce laws that are consistent with that Act (such as the Oregon Uniform Controlled Substances Act). But given the court's holding, it necessarily assumed that the federal immunity did extend to actions to enforce laws that conflict with the federal Controlled Substances Act. In a subsequent case, however, the federal district and circuit courts reached the opposite conclusion.

D. *United States v. Rosenthal*

1. United States District Court

One year after *Kama* was decided, the United States District Court for the Northern District of California decided *United States v. Rosenthal*, 266 F Supp 2d 1068 (ND Ca 2003), *aff'd in part, rev'd in part*, 454 P3d 943 (9th Cir 2006). That case concerned whether section 885(d) conferred immunity on a person whom the City of Oakland had assured was exempt from criminal prosecution for growing medical marijuana for distribution under California's Compassionate Use Act.

Despite that assurance, the United States charged the grower with several violations of the Controlled Substances Act. In rejecting the grower's immunity claim, the court first reasoned that "enforcement" under section 885(d) means compelling compliance with a law, rather than merely facilitating the purposes of a law. *Id.* at 1078.

Second, the court concluded that:

Rosenthal's interpretation of Section 885(d) directly contradicts the purpose of the Controlled Substances Act. As the Supreme Court has held, the Act reflects a determination that marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project). [citation omitted]. To hold that Section 885(d) applies to the cultivation of marijuana for a medical cannabis club would conflict with the stated purpose of the Controlled Substances Act. "Lawfully engaged" in "enforcing a law related to controlled substances" must mean engaged in enforcing, that is, compelling compliance with, a law related to controlled substances which is consistent – or at least not inconsistent – with the Controlled Substances Act. Section 885(d) cannot reasonably be read to cover acting pursuant to a law which itself is in conflict with the Act.

266 F Supp 2d at 1078-1079.

2. Ninth Circuit

Rosenthal appealed his convictions to the United States Court of Appeals for the Ninth Circuit, which agreed with both of the district court's grounds for denying immunity. The court first agreed that Rosenthal merely was "facilitating" not "enforcing" the law. In *dicta*, it distinguished the holding in *Kama* on the ground that, there, the officers were "enforcing a state law that *required* them to deliver the marijuana to that individual because he had a state-law right to its return." *United States v. Rosenthal*, 454 F3d 943, 948 (9th Cir 2006) (emphasis in original).

Second, the court "agree[d] with the district court's conclusion that Rosenthal's interpretation of the immunity provision contradicts the purpose of the [Controlled Substances Act,]" citing the district court's reasoning on that issue. *Id.*

Accordingly, the Ninth Circuit, like the district court, reasoned that section 885(d) did not confer immunity for enforcement of a law that contradicted the purposes of the Controlled Substances Act. The Ninth Circuit did not mention or attempt to distinguish *Kama* in making this point. It would be hard to distinguish *Kama* from *Rosenthal* in this regard as *Kama* too concerns a law that contradicts the purpose of the Controlled Substances Act.

No Oregon appellate court has reconsidered the holding in *Kama* in the light of the statements in the two *Rosenthal* decisions. But, as noted above, the court in *Kama* did not discuss whether ORS 475.323(2) is preempted by federal law. The Oregon Supreme Court recently concluded that another provision of the Oregon Medical Marijuana Act is preempted by the federal Controlled Substances Act. We turn to that case.

E. *Emerald Steel Fabricators v. BOLI*

In *Emerald Steel*, the court considered whether ORS 475.306(1), which states that registry cardholders “may engage” in the medical use of marijuana, is preempted by federal law. The court characterized the issue as one of “implied preemption.” Implied preemption exists if there is an “actual conflict” between federal and state law, either because it is “physically impossible to comply with both state and federal law,” or because the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” 348 Or at 175. The court explained that because the “physical impossibility” prong is “vanishingly narrow,” United States Supreme Court’s decisions typically have turned on the “obstacle” prong. *Id.* at 176.

The court examined United States Supreme Court cases which had concluded that a state law stood as an obstacle to the accomplishment of federal purposes when it prohibited what a federal law permitted or when the state law permitted what a federal law prohibited. *Id.* at 176-177. Applying the reasoning of those cases, the court concluded that: (1) the Controlled Substances Act imposes a blanket federal prohibition on marijuana use without regard to state permission to use marijuana for medical purposes; (2) ORS 475.306(1) “affirmatively authorized” the use of medical marijuana; (3) by permitting what federal law prohibits, ORS 475.306(1) “stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act”; (4) therefore, ORS 475.306(1) is preempted; and, (5) because a preempted law is without effect, ORS 475.306(1) is without effect to the extent that it affirmatively authorizes the medical use of marijuana. *Id.* at 176-178.

The court rejected an argument that a state law stands as an obstacle to enforcement of the federal prohibition only if it attempts to prohibit the federal government from enforcing its own laws. *Id.* The court also distinguished between state law provisions like ORS 475.306(1) that affirmatively authorize what the federal law prohibits and provisions like ORS 475.309(1) and 475.319 that merely exempt medical marijuana use, possession and manufacture from state criminal liability. The court stated that, while Congress has the power under the Supremacy Clause of the United States Constitution to preempt state laws that affirmatively authorize what Congress has prohibited, Congress lacks authority to require states to criminalize conduct that states choose not to. *Id.* at 180 (quoting *Printz v. United States*, 521 US 898, 935, 117 S Ct 235, 138 L Ed 2d 914 (1992) (“Congress cannot compel the States to enact or enforce a federal regulatory program.”). The court limited its holding accordingly: “[i]n holding that federal law does preempt [ORS 475.306(1)] * * *, we do not hold that federal law

preempts the other sections of the Oregon Medical Marijuana Act that exempt medical marijuana from criminal liability.” *Id.* at 172 n 12.³¹

F. *Willis v. Winters*

The Oregon Supreme Court decided another implied preemption case concerning medical marijuana use after *Emerald Steel*. In *Willis v. Winters*, 350 Or 299, 253 P3d 1053 (2011), *cert den* January 9, 2012 (No. 11-120) (2012 WL 33296), county sheriffs refused to issue concealed handgun licenses to persons who met all statutory conditions to obtain a license, but who admitted to medical marijuana use. Oregon’s concealed handgun licensing law does not prohibit either lawful or unlawful users of controlled substance from obtaining a license. But the sheriffs argued that, to the extent that Oregon’s concealed handgun law allowed licenses to be issued to medical marijuana users, it was preempted by a provision of the Federal Gun Control Act that prohibited unlawful users of controlled substances (which, as discussed above, include medical marijuana users) from possessing handguns. *Id.* at 302.

In deciding that issue, the court said the following about applying the analysis in *Emerald Steel*:

Rather than employing th[e] basic federal approach to obstacle preemption problems, the parties (and the Court of Appeals) have couched their arguments primarily in terms of whether ORS 166.291 “affirmatively authorizes” possession of firearms by marijuana users or merely permits marijuana users to be exempted from criminal liability under ORS 166.250(1)(a) and (b) for Unlawful Possession of a Firearm. Those arguments clearly are directed at this court’s decision in *Emerald Steel*, which held that a provision of the Oregon Medical Marijuana Act that “affirmatively authorized” the possession of marijuana for medical use was prohibited by the federal Controlled Substances Act, because it stood as an obstacle to the congressional purpose that inhered in the act – of prohibiting marijuana possession for *any* purpose. 348 Or at 178. However, *Emerald Steel* should not be construed as announcing a stand-alone rule that any state law that can be viewed as “affirmatively authorizing” what federal law prohibits is preempted. Rather, it reflects this court’s attempt to apply the federal rule and the logic of the most relevant federal cases to the particular preemption problem that was before it. And particularly where, as here, the issue of *whether* the statute contains an affirmative authorization is not straightforward, that analysis in *Emerald Steel* cannot operate as a simple stand-in for the more general federal rule.

The court stated that “obstacle preemption” (the second prong of implied preemption analysis) is decided by examining the federal law to ascertain its purposes and intended effects, examining the state statute to determine its effects, and comparing the results to determine whether the latter statute in some way obstructs the accomplishment of the objectives that have been identified with respect to the former statute. *Id.* at 309.

Applying that test, the court held that Oregon’s concealed handgun licensing statute was not preempted by the federal law. It reasoned that the relevant purpose of the federal law was to keep firearms away from all marijuana users. But Oregon’s concealed handgun licensing statute did not concern *possession* of firearms, only concealment. The court also found significant that federal officials, and even state officials, could enforce the federal prohibition on possession of a firearm by a medical marijuana user. Therefore, the court concluded that Oregon’s concealed handgun licensing law did not stand as an obstacle to the full accomplishment and exercise of the federal firearms statute’s purpose. *Id.* at 311-12.

G. *Butler v. Douglas County*

In the last case that is pertinent to your questions, *Butler v. Douglas County*, Civil No. 07-06241-H (D Or August 10, 2010), the United States District Court for the District of Oregon considered the effect of *Emerald Steel* on a sheriff’s duty to return seized medical marijuana. In that case, Oregon medical marijuana users intervened in a state criminal action against their growers asking the court to order the sheriff to return their marijuana pursuant to ORS 475.323(2). Before the state court could rule on the motion, the federal government filed criminal complaints and took over prosecution of the case in federal court. The sheriff transferred the marijuana to the federal authorities and the state criminal matter was dismissed. At the time of these events, *Emerald Steel* had not yet been decided.

The *Butler* plaintiffs challenged the marijuana transfer on one federal and one state law ground. The federal claim alleged that the sheriff, knowing that the state court would require return of the marijuana to plaintiffs, encouraged federal authorities to assume jurisdiction of the case to prevent the plaintiffs from obtaining their medical marijuana. They claimed that the sheriff violated 42 USC § 1983 by taking that action in retaliation for their filing a motion to return the marijuana. The plaintiffs’ state law claim asserted that they had a right to possess the marijuana under the Oregon Medical Marijuana Act and that the sheriff had committed conversion by transferring the marijuana to the federal government in order to avoid giving it back to them. *Butler* at 2.

The district court granted summary judgment in favor of the sheriff on both the federal and state law claims. *Id.* at 5. In denying the federal claim, the court reasoned that:

To find that by asserting every means possible to fight what defendants believed to be illegal activity *and prevent violating federal law themselves by distributing the marijuana to plaintiffs*, defendant engaged in violation of the First Amendment would be an absurd result. There can be no doubt that federal law prohibits the use of medical marijuana. In addition, although the use of medical marijuana and limited growing for others' use is permitted under the OMMA, a recent decision of the Oregon courts confirms that federal law preempts the OMMA.

Assuming that [the sheriff] did request federal assistance and that had he not, the motion for return would have been successful, *it could be argued that defendants would have violated federal law in returning the marijuana to plaintiffs*. The Ninth Circuit has indicated in dicta that the return of marijuana pursuant to OMMA would provide immunity to officers in compliance with OMMA. *See, United States v. Rosenthal*, 454 F3d 943, 948 (9th Cir. 2006) (implying that state law mandated return of marijuana to medical marijuana user by officers is entitled to immunity for prosecution under the Controlled Substances Act). *However, the Oregon Supreme Court has ruled that:*

To the extent that OMMA affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it "without effect."

Thus, opposing a motion *premised on a law that is without effect* should not constitute First Amendment retaliation even if such opposition rises to the level of seeking to remove a case from state court in order to avoid the purported consequences of a state law. * * *. *Indeed, it could be argued that defendants had a duty to take such action.*

Butler at 3-4 (citations omitted) (emphasis added). The emphasized language is not definitive. The court states that "it could be argued" that the officers: (1) would have violated federal law in returning the marijuana; and, (2) had a duty to seek to remove the case to federal court. But the clear implication of that language is that, in light of *Emerald Steel*, the requirement to return marijuana was preempted and without effect, hence returning the marijuana might violate the federal prohibition against distributing marijuana.

The court used more definitive language in concluding that finding a constitutional violation would violate public policy. The court reasoned that "federal law preempts OMMA such that it has no effect. Thus, public policy dictates that failure to return marijuana in violation of federal law is not a constitutional violation." *Butler* at 4. Here the court definitively states that returning the marijuana would violate federal law, because the state law was preempted and without effect.

Finally, the court holds that “the [state law] conversion claim fails as well as Sheriff Brown thus did not have authority to turn over the marijuana.” *Id.* Given that ORS 475.323(2) and *Kama* required the officers to return the marijuana, the court must necessarily have concluded that the provision’s requirement to return marijuana was “without effect,” because it was preempted by federal law.⁴⁷

II. Questions and Answers

A. Preemption

You first ask if the requirement to return marijuana imposed by ORS 475.323(2) is preempted by the federal Controlled Substances Act. Applying the reasoning and holdings of *Emerald Steel*, *Willis*, and *Butler*, we conclude that the requirement to return marijuana in ORS 475.323(2) likely is preempted. As discussed, the relevant purpose and intended effect of the federal Controlled Substances Act is to prohibit the possession, distribution and use of marijuana for any purpose except as part of a FDA pre-approved research project.

Returning marijuana to users would constitute distribution of a controlled substance under the Controlled Substances Act. *See* 21 USC § 841(a)(1) (prohibiting distribution of controlled substances), 21 USC § 802(11) (defining “distribute” to mean “to deliver (other than by administering or dispensing) a controlled substance or a listed chemical”), 21 USC § 802(8) (defining “delivery” to mean “the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship.”).

Applying the analysis in *Emerald Steel* and *Willis*, the requirement to return the marijuana obstructs the accomplishment of the Controlled Substances Act’s purpose and intended effect to prohibit the distribution and possession of all marijuana outside of FDA-approved studies. ORS 475.323(2) is distinguishable from the provision that the court found to be preempted in *Emerald Steel* in that it does *more* than affirmatively authorize what the federal act prohibit – it *requires* it. Moreover, unlike in *Willis*, the Oregon provision directly requires what the federal law prohibits. Therefore, the requirement to return marijuana in ORS 475.323(2) appears to be preempted and without effect. The federal district court in *Butler* apparently reached the same conclusion in holding that the sheriff had no authority to return the marijuana.

The immunity provided to officers by section 885(d) does not change the conclusion. We doubt that Congress intended that provision to have any bearing on the extent to which the Controlled Substances Act preempts *the underlying law being enforced*. In other words, the purpose of the immunity provision was not to allow states to enact laws authorizing the distribution and possession of marijuana for medical use as long as law enforcement officers are the distributors. The purpose of the immunity provision simply is to shield law enforcement officers who are lawfully engaged in enforcing a controlled substances law from civil or criminal liability for doing so. The

immunity provision would not, for example, prohibit the federal government from seeking to enjoin law officer conduct.

The fact that ORS 475.323(2) does not prevent federal officers from enforcing federal law is not dispositive either. In *Emerald Steel*, the court rejected the argument that a state law is preempted only if it prevents federal enforcement of the federal law. It is true that the court in *Willis* considered that factor in its preemption analysis, but it did so only after concluding that the Oregon law did not authorize what federal law prohibited.

We caution only that this remains an evolving area of the law.

B. Exposure to federal criminal prosecution

You next ask two related questions, the first of which is whether the person to whom the marijuana is returned pursuant to ORS 475.323(2) violates federal law and is subject to criminal prosecution by federal authorities. As discussed above, the possession of marijuana, even for medical use permitted by state law, is a violation of the federal law. Unless and until possession of medical marijuana is made lawful under federal law, those who possess it are subject to criminal prosecution by federal authorities.

Your second question is whether officers would violate federal law and be subject to federal criminal prosecution for returning the marijuana. As discussed above, ORS 475.323(2)'s requirement to return medical marijuana likely is preempted and unenforceable. Therefore, immunity under section 885(d) would be unavailable because the return would not constitute enforcement of any valid law. *See Butler v. Douglas County* at 4 (concluding that officers had no "authority" to return the marijuana), *Emerald Steel*, 348 Or at 186 (holding that ORS 475.306(1) was preempted and without effect and "was not enforceable" thus "no enforceable state law" had authorized the marijuana use that happened at the time of the events in issue in that case). Consequently, officers could be subject to federal prosecution.^{5f}

C. Appropriate response to court-ordered return

In light of the above conclusions, you ask what the appropriate response would be if the trial court ordered a state law enforcement officer to return marijuana pursuant to ORS 475.323(2). Such an order could be appealed immediately under ORS 19.205(5) as an order in a special statutory proceeding. *State v. Ehrensing*, 232 Or App 511, 516, 223 P3d 1060 (2009) (so stating). The state should appeal the order to seek resolution by the Oregon appellate courts of the issues discussed above that have been raised following *Emerald Steel* and *Butler*. At that time, it also would be prudent to apprise federal authorities of the matter and, particularly, of the pending challenge to the court's order.

The state should also ask for a stay of judgment pending the appeal. *See* ORS 19.330 (appeal does not automatically stay judgment, appellant must seek a stay).

If the trial court denies the stay request, the state should consider seeking a stay in the Court of Appeals. ORS 19.350. A stay would allow officers to avoid potential violation of the federal Controlled Substances Act pending resolution of the preemption issue. A stay would also likely be necessary to ensure that the appellate court does not consider the issue moot. Specifically, in *Ehrensing*, the court refused to review a pretrial order directing an officer to return marijuana on the ground that the issue was moot, because the state conceded that it would be unable to retrieve the marijuana that it had returned. 232 Or App at 518. For obvious reasons, it is unlikely that the state would be able to retrieve marijuana once it has been returned. Staying the order is likely necessary to obtain appellate review of the issue.

In the unlikely event that a stay is not granted – or if the appeal is unsuccessful – the officers would have to comply with the order or risk a contempt action. ORS 1.240(2) (judicial officers have power to compel obedience to lawful court orders); ORS 1.250 (judicial officers may punish for contempt to effectuate powers granted by ORS 1.240).

D. Return when marijuana taken for safekeeping

Your final question is whether the same conclusions apply when a cardholder who is arrested and jailed for an unrelated crime possesses a lawful amount of medical marijuana and the officer takes possession of the marijuana for “safekeeping.” We conclude that the result is the same, but the analysis is more complicated.

We are not aware of any statute that expressly authorizes officers to take property into custody upon a person’s admittance to a correctional facility, although at least one statute assumes the existence of that authority. *See* ORS 133.455 (which requires that a receipt for items taken be given to a person in custody when their possessions are taken for “safekeeping”). This authority on the state level comes from administrative rules.

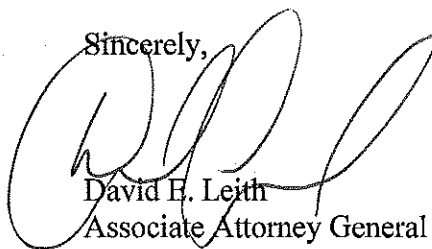
We cannot speak to local policies, but Department of Correction rules authorize a person who is going to be admitted to a correctional facility to possess only a very limited number of items, and those do not include medical marijuana. OAR 291-117-0090.⁶⁷ The Department must package “unauthorized” property and mail it at the inmate’s expense to a person designated by the inmate to receive it. OAR 291-117-0140(1)(a). If the inmate cannot afford to pay for shipping, arrangements can be made for a person designated by the inmate to pick up the items. *Id.*

Mailing or giving marijuana to a designated third party would constitute delivery under federal law. It also might constitute delivery under Oregon law and subject persons receiving the marijuana to prosecution for possession if those persons themselves are not entitled to the protections of the Oregon Medical Marijuana Act.⁷¹ *See State v. Fries*, 344 Or 541, 185 P3d 453 (2008) (upholding defendant’s conviction for unlawful possession of marijuana for helping a friend, who had a medical marijuana card, move marijuana plants to a new residence).

To the extent that the rule would require officers to deliver marijuana in violation of the federal Controlled Substances Act, the provision is preempted. Also, as this rule is not a law relating to controlled substances, carrying out the duties it specifies would not appear to constitute enforcement of a law relating to controlled substances that would provide a basis for immunity under section 885(d).

If, upon a person's release from custody, he or she files a motion to return the marijuana under ORS 475.323(2), the previous analysis in this opinion would apply.

Sincerely,



David E. Leith
Associate Attorney General and
Chief General Counsel
General Counsel Division

DEL:smg/3127904

¹¹ ORS 475.323(2) provides in full:

(2) Any property interest possessed, owned or used in connection with the medical use of marijuana or acts incidental to the medical use of marijuana that has been seized by state or local law enforcement officers may not be harmed, neglected, injured or destroyed while in the possession of any law enforcement agency. A law enforcement agency has no responsibility to maintain live marijuana plants lawfully seized. No such property interest may be forfeited under any provision of law providing for the forfeiture of property other than as a sentence imposed after conviction of a criminal offense. Usable marijuana and paraphernalia used to administer marijuana that was seized by any law enforcement office shall be returned immediately upon a determination by the district attorney in whose county the property was seized, or the district attorney's designee, that the person from whom the marijuana or paraphernalia used to administer marijuana was seized is entitled to the protections contained in ORS 475.300 to 475.346. The determination may be evidenced, for example, by a decision not to prosecute, the dismissal of charges or acquittal.

²¹ 21 USC § 903 provides:

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

³¹ Two justices dissented and would adopt a narrower test that finds preemption only if a state law directly affects the federal government's enforcement of its laws. *Id.* at 198 (Walters dissenting). A California Appellate Court used a similar test to conclude that an order to return medical marijuana to a qualified user under California law was not preempted by the Controlled Substances Act. *See City of Garden Grove v. Kha*, 68 Cal Rptr 3d 656, 676-678, 157 Cal App 4th 355 (2007) (holding that an order to

return marijuana to a person who lawfully could possess the drug under California law did not violate federal supremacy principles as it neither expressly exempted medical marijuana from prosecution under federal law nor would constitute a real or meaningful threat to the federal enforcement effort). But another California Appellate Court recently agreed with the majority's reasoning in *Emerald Steel* in holding that a City of Long Beach ordinance that provided for the issuance of permits to medical marijuana collectives was preempted by the federal Controlled Substances Act. *Pack v. Superior Court of Los Angeles County*, ___ Cal Rptr 3rd ___, 2011 WL4553155 (Cal App 2d District), 11 Cal Daily Op Serv, 12, 643 (October 4, 2011) ("The[Emerald] court concluded that the law was preempted by the federal CSA, under obstacle preemption, to the extent that it authorized the use of medical marijuana rather than merely decriminalizing its use under state law. * * *. We agree with that analysis").

^{4l} The plaintiffs appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. On November 3, 2011, the Ninth Circuit issued a memorandum opinion (which specifies that the "disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3"). *Butler v. Douglas County*, Case Number 10-35802, D.C. No. 6:07-cv-06241-HO (November 3, 2011). The opinion did not address dismissal of the state law conversion claim, but only dismissal of the 1983 claim. The court affirmed summary judgment on that claim on the basis of qualified immunity, reasoning that "[w]hile Brown was certainly on notice that he was legally required to return Appellants' medical marijuana, it cannot be said that he had fair warning that encouraging federal prosecution to thwart that end violated Appellants' First Amendment rights." *Id.* at 3. While that language appears to contradict the district court's conclusion that Brown was not legally required to return the marijuana, the language is *dicta* and there is no analysis or discussion of that issue; the case is decided, instead, on a different ground.

^{5l} As a practical matter, federal authorities have focused their resources only on prosecutions of the commercial cultivation, sale and distribution of marijuana for medical purposes. They have shown little enthusiasm for using federal resources to prosecute individuals simply for possessing marijuana for their medical use. There is no reason to believe that federal authorities would be more eager to prosecute law enforcement officials for returning marijuana to medical users. But we stress that, our analysis is confined to the legal issue whether prosecution is authorized under the federal Controlled Substances Act, not whether federal authorities are in fact likely to pursue such prosecutions.

^{6l} Our advice is limited to the duties and obligations of state officers. Local officers should seek the advice of their counsel to determine their legal obligations.

^{7l} Mail carriers would be exempt from criminal liable for possession of a controlled substance under the Oregon Controlled Substances Act, because common or contract carriers and their employees may "lawfully possess controlled substances" if possession occurs "in the usual course of business or employment." ORS 475.125(3)(b).