Volume 44, Issue 3

Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Recent Criminal Decisions of the U.S. Supreme Court

When to Use Alcohol Monitoring as a DWI Sentencing Option

Roadside Seizures of Medical Marijuana

In Memory of Charles Whitebread

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Court Review

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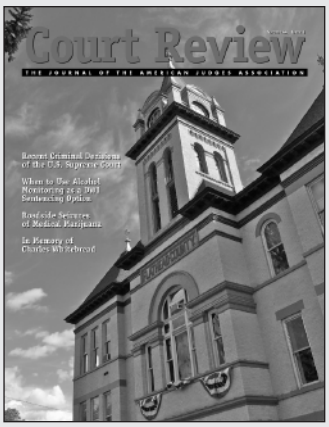
Volume 44, Issue 3 2007-2008

EDITOR'S NOTE

This issue marks a transition of significance. For much longer than I've been editor, Professor Charlie Whitebread wrote an annual review of the past Term of the United States Supreme Court. He died in September, and we are left without his help in keeping up with the latest developments. We are also left without his great friendship, which is noted in a tribute on page 88. Because our readers and members have known Professor Whitebread for so long, we also note at page 128 a full obituary you can find online.

I am quite pleased that Professor Chuck Weisselberg of Boalt Hall, the law school at the University of California, Berkeley, has agreed to provide an annual review of the Court's criminal cases. Professor Weisselberg has a wealth of experience in teaching criminal law and procedure, including 11 years on the faculty with Professor Whitebread at the USC law school before Weisselberg headed to Berkeley in 1998. Weisselberg has crafted his review in ways that you will find helpful. Not only has he reviewed all of the key Supreme Court cases, he has also reviewed what early lower-court cases exist interpreting them. And he has previewed for us the key cases being argued in this Term. If any of our readers have suggestions of how to make these reviews even more useful, please let me know.



Our second article reviews the use of a new technology to monitor those accused or convicted of drunk driving while under court supervision. The new technology is a transdermal monitor, which can detect alcohol use from the skin and sends a report electronically if a person being monitored is using alcohol. Researchers Gene Flango and Fred Cheesman report that an early study shows that these devices are quite effective in preventing recidivism during the period of monitoring. They also recommend that combining treatment with the use of a 24-hour monitor like this has significant promise for changing offender behavior.

Our third article considers the intersection of laws allowing the use of marijuana for medical purposes and drug laws. Law student Cameron Mustaghim won the American Judges Association's annual writing competition with this article. Mustaghim specifically reviews the possible reasons that a person might have marijuana for medical purposes in his or her possession while driving a vehicle. He concludes that courts should reconcile laws permitting marijuana for medical purposes with other laws prohibiting drug possession by generally presuming that a person transporting marijuana is doing so for illicit purposes unless the drugs were purchased the same day.—Steve Leben

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 127. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

Court Review is in full text on LEXIS and is indexed in the Current Law Index, the Legal Resource Index, and LegalTrac.

Letters to the Editor, intended for publication, are welcome. Please send such letters to one of *Court Review*'s editors: Judge Steve Leben, 301 S.W. 10th Ave., Suite 278, Topeka, Kansas 66612, e-mail address: sleben@ix.netcom.com; or Professor Alan Tomkins, 215 Centennial Mall South, Suite 401, PO Box 880228, Lincoln, Nebraska 68588-0228, e-mail address: atomkins@nebraska.edu. Comments and suggestions for the publication, not intended for publication, also are welcome.

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Photo credit: Mary Watkins (maryswatkinsphoto@earthlink.net). The cover photo is the Flathead County Courthouse in Kalispell, Montana. It was built in 1903.

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President's Column

Tam Schumann

In every issue of *Court Review*, some new members of the American Judges Association are introduced to the AJA through this column. Others turn here for an update. As the AJA's new president, my first column is a good time to look both backwards at recent activities and forward at the next year's work.

The AJA today has more than 2,000 members, including judges at all levels of the judiciary—-trial and appellate judges, general-jurisdiction and limited-jurisdiction trial judges, and judges in both the United States and Canada. In fact, we have 150 Canadian members, something that greatly enriches the interchange at our annual educational conferences.

In recent years, the AJA has continued its stellar efforts to improve both the judiciary and the skills of its member judges. We take great pride in the annual educational conferences, which offer several days of top-notch programming arranged by the AJA's Education Committee. I have presented and attended judicial educational programs in many states and forms but I have never found better programming than we offer at the AJA's annual educational conference. I sincerely hope you'll make plans to join us in Las Vegas September 13 to 18, 2009, and give us a try.

The past two years have brought some innovative new programming initiatives to the AJA. Two years ago, the AJA issued its first white paper: *Procedural Fairness: A Key Ingredient in Public Satisfaction*. That paper was approved by the AJA in 2007 and formed the basis for the special issue of *Court Review* you recently received. The AJA's paper was officially endorsed in July 2008 by the Conference of State Court Administrators, which consists of the top judicial administrator in each state. The California court system has begun a major program on procedural fairness, which began on its own but has benefitted from AJA's common efforts. In addition, the authors of the AJA white paper, Minnesota judge Kevin Burke, now AJA secretary, and Kansas judge Steve Leben, AJA's past president, have presented the concepts set forth in the paper to more than 1,000 judges around the country, with additional presentations in the works. The paper, the special issue of *Court Review*, and the educational presentations have helped judges to improve the skill set needed to make sure that those who come through our courts feel that they have been treated fairly.

Last year, AJA introduced its Tell It to the Judge program. Conceived by then-AJA president Eileen Olds and carried out under the direction of a committee headed by Michigan judge Libby Hines, judges in selected courtrooms in Arizona, California, Kansas, Missouri, Nevada, Ohio, and Oregon surveyed everyone who came through their courtrooms during the week of July 14. Designed as a pilot program, the one-page survey gave participating judges important feedback about the perceptions of those who came through the court about fairness and public satisfaction. Research staff at the National Center for State Courts helped with the project.

In the coming year, we plan to continue to expand the breadth of our dynamic organization. First, we will prepare a new white paper focusing on the key areas of judicial wellness and judicial stress. The paper will address current issues in the legal field and the relevance of stress to those issues. The paper will also offer suggestions to our governing bodies as to the maintaining of judicial wellness. I believe that this topic is of particular importance in these times of economic crisis. With people losing their jobs and homes, and with other financial assets in jeopardy, demands on the judiciary as a whole are bound to increase as well. An effective system of defining, recognizing, and handling stress will allow judges to more effectively deal with this increase both in our caseload and in the stress level of those who come before us.

Second, we must encourage communication within the court family. As a result, I am working to further improve lines of communication between AJA and other organizations that have common interests. This will include the National Association for Court Management, the Conference of State Court Administrators, and the National Court Reporters Association. All of us can be more effective through common efforts.

Common efforts are also the key to a successful judiciary—and to a successful AJA. Let us know of ways we can be of more help to you. And please give consideration to attending the AJA's annual educational conference in September 2009 in Las Vegas. You will leave Vegas refreshed in your commitment to being the best judge you can be and equipped with ideas that can help you to achieve this goal, which is common to us all.

Charles H. Whitebread

Steve Leben

On September 16, 2008, the American Judges Association lost its best and most loyal friend. Law professor Charles H. Whitebread died that day of lung cancer at the age of 65.

Anyone who ever attended an AJA annual conference knew Charlie Whitebread. For more than 25 years (no one I know can trace it back past that), Charlie presented a review of the past year's decisions of the United States Supreme Court at our conference—every year, without fail, no matter where we met or what date we chose for the meeting. And every year, without fail, Charlie would end his program by saying that the one thing we could be sure of was that—if we invited him back—he'd be at our next conference to tell us what happened in the year to come.

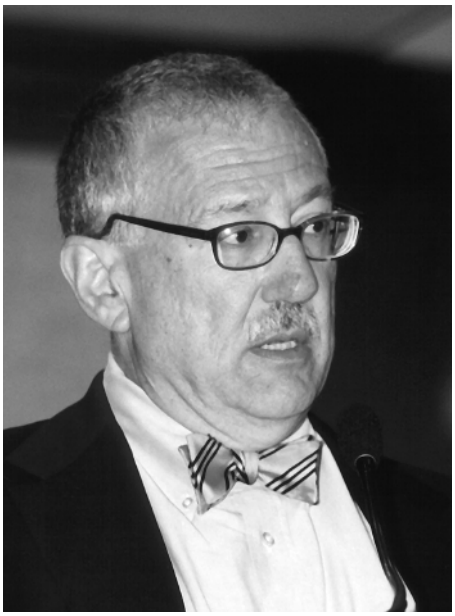
If we invited him back? Of course he knew he was our most popular speaker. He was the most popular speaker and teacher everywhere he went.

Charlie Whitebread's reviews of the Supreme Court were unlike any other. He would open with a review of the most tawdry gossip about the court he could find from press reports and other sources during the past year. Now in truth, little gossip about the Supreme Court and its justices would meet an objective standard for tawdriness. But Charlie Whitebread was one of the great storytellers of our time, and he could make just about anything seem extraordinary.

Those in the AJA who didn't attend an annual conference knew Charlie Whitebread too. In addition to his conference presentations, he provided written reviews of the past year's cases in *Court Review*, and he served on the editorial board of this journal for the past 10 years. But many of us also knew him as one of the most popular presenters in the country's leading bar-review lecture program.

When a website (The Volokh Conspiracy) posted news of Charlie's death, dozens of lawyers who had taken courses from him either in the bar review or in law school posted fond remembrances. Many of them gave anecdotes that give a glimpse at his wit.

One recalled Whitebread predicting—accurately—that a certain question



would always be on the bar exam for one of two fact patterns and that the answer would always be, "Murder." Whitebread's explanation, "Why? Because it's the bar exam!" Another quoted him: "If somebody's dead, somebody's guilty. Why? It's the bar exam!" Another: "Don't be fooled by trick questions: 'Is a lamp really a deadly weapon?' It killed him, didn't it?" These tributes came from people who had taken his courses from the early 1970s to the past year. Charlie's presentations were fun, but he also made sure you'd remember what you needed to know.

He lived life as fully as he lectured. When he came for one of our programs in Maui, though nearly 60 years old, he went parasailing for the first time. He proudly showed the photo of his large-framed body hanging in the air.

Charlie's final presentation to us, at our 2007 annual conference, was a fitting ending: he made the presentation with a member of the Court in the audience. Our keynote presenter that year was Justice Ruth Bader Ginsburg. When we sent her the schedule and she saw that Charlie Whitebread was going to speak about her work for the past year, she told us that she wanted to be there for that. And she wanted to have a chance to respond! Being very polite, though, she said she'd like to do that if it would be okay with Professor Whitebread.

Charlie enthusiastically agreed, but he did modify his presentation—even if only a bit—with a justice in the audience. He made these presentations from several legal pads, which included some pages with press clippings taped onto them (part of the tawdry gossip) and others with scrawled notes or quotes taken from a case. Charlie skipped a couple of the gossip pages that year.

But he could afford to do that because the year's cases offered so much all by themselves. The hit of the presentation was a discussion of a free-speech case you couldn't have made up if you'd tried. A high school senior had unfurled a banner across the street from his Juneau, Alaska, school that read, "Bong Hits 4 Jesus." The school principal, decidedly not amused, suspended the student. The Supreme Court upheld the restriction on the student's speech, concluding that the school had a legitimate interest in restricting speech that might encourage drug use. (Justice Ginsburg joined the dissenting opinion.)

Blandly called *Morse v. Frederick* on the Court's docket, Charlie Whitebread just kept calling it the "Bong Hits 4 Jesus" case. You can imagine how much fun he had telling us about that one.

Justice Ginsburg smiled and laughed and thoroughly enjoyed his presentation. We all did.

We will miss him.

Selected Criminal Law Cases in the Supreme Court's 2007-2008 Term, and a Look Ahead

Charles D. Weisselberg

The U.S. Supreme Court's October 2007 Term had a substantial and notable criminal docket. There were very significant Second, Sixth, and Eighth Amendment decisions as well as important rulings relating to basic habeas corpus principles and federal statutes. This article provides a selected overview of the Term with a heavy emphasis on those cases that may have the greatest impact upon the states. The article also suggests some questions left open by the Court's opinions and provides some preliminary indications of how several decisions are being received in state and federal courts. It concludes with a preview of some cases to watch in the Court's current Term.

SECOND AMENDMENT

In *District of Columbia v. Heller*,[1] possibly the most significant criminal decision of the October 2007 Term, the Court held that the Second Amendment confers an individual right to keep and bear arms. Respondent Heller, a law-enforcement officer, sought to enjoin the District of Columbia from enforcing its restrictive gun laws. The District of Columbia essentially prohibited possession of handguns. It was a crime to carry an unregistered firearm, and the registration of handguns was generally prohibited. There were additional restrictions on keeping lawfully owned firearms loaded or without a trigger lock; the law basically required lawfully owned firearms to be immediately inoperable. Heller lost in federal district court, but the D.C. Circuit reversed, finding that the Second Amendment protects an individual's right to possess firearms and that the District's laws violated that right.

The Supreme Court affirmed in a 5-4 opinion authored by Justice Scalia. The majority opinion begins with an analysis of the text and history of the Second Amendment. The amendment contains an operative clause and a prefatory clause. The Court found that the operative clause – "the right of the people to keep and bear Arms, shall not be infringed" – "guarantee[s] the individual right to possess and carry weapons in case of confrontation." The prefatory clause – "A well regulated Militia, being necessary to the security of a free State . . ." – fits with the operative clause and does not restrict the right to possess and carry weapons to members of an organized militia. So cast, the amendment protects "the inherent right of self-defense" and extends to the home, "where the need for defense of self, family, and property is most acute." The majority also found that its construction of the Second Amendment was consistent with interpretations of that provision from the period after ratification through the end of the 19th century. The justices characterized the 1939 case of *United States v. Miller*,[2] which found no protected right to transport a sawed-off shotgun, as turning on the lack of a relationship between that weapon and the types of arms that a modern militia might use, rather than on the fact that the defendants in the case were not themselves part of any organized militia. Finally, the Court's opinion makes clear that the Second Amendment does not prohibit restrictions on the possession of firearms by felons and people who are mentally ill, laws prohibiting carrying firearms in places such as schools and government buildings, statutes placing conditions and qualifications on the commercial sale of firearms, and restrictions on "dangerous and unusual weapons."

The four dissenting justices disagreed with the majority's view of the text and history of the Second Amendment and would hold that legislatures can regulate the civilian use of firearms as long as they do not interfere with the preservation of a well-regulated militia. In his dissent, Justice Breyer also questioned how courts will determine whether a particular firearm regulation is consistent with the amendment and which constitutional standard courts will use.

Going forward, one might expect challenges to registration laws that erect substantial barriers to possession of firearms as well as challenges to laws that require weapons to be kept unloaded or to have trigger locks or other devices that render weapons immediately inoperable. These, of course, were the restrictions struck down in *Heller*. We should also expect to see some testing of the question of what other restrictions are reasonable post-*Heller* and some difficult issues about whether particular types of weapons are unusual or usual, and thus within the scope of the Second Amendment's protections. In the first three months following *Heller*, courts have upheld laws prohibiting possession of firearms by felons,[3] by individuals

Footnotes

1. 128 S.Ct. 2783 (2008).
2. 307 U.S. 174 (1939).
3. *See* State v. Rosch, No. 59703-5-I, 2008 Wash. App. LEXIS 2207 (Wash. Ct. App. Sept. 8, 2008) (unpublished decision); United States v. Brunson, No. 07-4962, 2008 U.S. App. LEXIS 19456 (4th Cir. Sept. 11, 2008) (unpublished opinion); Reynolds v. Sherrod, No. 08-cv-506-JPG, 2008 U.S. Dist. LEXIS 60456 (S.D.Ill. Aug 08, 2008); United States v. Robinson, No. 07-CR-202, 2008 U.S. Dist. LEXIS 60070 (E.D. Wisc. July 23, 2008); United States v. Singletary, No. 5:08-CR-12(HL), 2008 U.S. Dist. LEXIS 61012 (M.D. Ga. Aug. 11, 2008). At least one court has rejected a claim that such a prohibition is unconstitutional when the predicate felony is not for a crime of violence. *See* United States v. Westry, No. 08-20237, 2008 WL 4225541 (E.D. Mich. Sept .9, 2008).

convicted of misdemeanor crimes involving domestic violence,[4] and by people subject to restraining orders.[5] Courts have likewise sustained restrictions on the possession of firearms in particular locations (or outside of the home)[6] and laws relating to sawed-off shotguns or unusual weapons.[7] There is also the question, which has been raised in the briefing in at least one case, whether the Second Amendment should be incorporated and applied to the states through the Fourteenth Amendment.[8]

FOURTH AMENDMENT

The Court issued only one Fourth Amendment opinion during the 2007 Term; it addressed the relevance of state law in determining the reasonableness of an arrest. The current Term has a much more substantial search-and-seizure docket, as noted at the end of this article.

The Respondent in *Virginia v. Moore*[9] was arrested for driving on a suspended license, a misdemeanor under Virginia law. A search incident to the arrest turned up cocaine and cash, and Moore was subsequently charged with a drug offense. He moved to suppress the evidence, pointing out that Virginia law does not generally permit an officer to arrest a defendant for driving on a suspended license. The Virginia Supreme Court ruled that the search violated the Fourth Amendment since the officer should have cited Moore instead of arresting him. The U.S. Supreme Court unanimously reversed. In an opinion by Justice Scalia, the Court found that what is reasonable under the Fourth Amendment is not determined by state-law restrictions on searches and seizures. If a state such as Virginia protects individual privacy more than the Fourth Amendment requires, a defendant must look to state law for a potential remedy rather than assert that suppression is required under the Fourth Amendment's exclusionary rule. Concurring, Justice Ginsburg emphasized that Virginia law attaches only limited consequences to a police officer's failure to follow the Commonwealth's summons-only instruction.

Moore has thus far been cited to turn aside arguments that officers who allegedly arrested suspects in violation of state law have also violated the Fourth Amendment.[10] Several federal courts have relied on *Moore* to overcome Fourth Amendment objections when state officers have arrested individuals while acting outside of the officers' respective jurisdictions.[11] A federal court of appeals extended *Moore* to a case where a search warrant was issued by a state court judge who allegedly lacked authority to authorize a search outside of his county; a split Sixth Circuit upheld the admission of evidence from the search in a federal prosecution, albeit in an unpublished opinion.[12]

Several federal courts have relied on Moore to overcome Fourth Amendment objections when state officers have arrested individuals while acting outside of [their] jurisdictions.

SIXTH AMENDMENT

This past year, the Court handed down several right-to-counsel opinions with significant implications for trial courts. The justices also tackled several important issues relating to the *Crawford v. Washington*[13] line of Confrontation Clause cases. One of the Term's *Crawford* decisions interpreted the "forfeiture by wrongdoing" doctrine. The other *Crawford* case concerned retroactivity rather than the contours of the Confrontation Clause itself.

Right to Counsel

The most notable right-to-counsel decision of the Term was

4. *See* United States v. Booker, No. CR-08-19-B-W, 2008 U.S. Dist. LEXIS 61464 (D. Me. Aug. 11, 2008); United States v. White, Crim. No. 07-361-WS, 2008 U.S. Dist. LEXIS 60115 (S.D. Ala. Aug. 6, 2008).
5. *See* United States v. Knight, Crim. No. 07-127-P-H, 2008 WL 4097410 (D. Me. Sept. 4, 2008).
6. *See* People v. Lynch, 2008 N.Y. Misc. LEXIS 4587 (N.Y. Sup. Ct. July 16, 2008) (outside home); United States v. Dorosan, Crim. No. 08-042, 2008 U.S. Dist. LEXIS 51547 (E.D. La. July 7, 2008) (post office); United States v. Hall, Crim. No. 2:08-6, 2008 U.S. Dist. LEXIS 29705 (S.D. W. Va., Apr. 10, 2008) (concealed weapon outside of the home); United States v. Walters, Crim. No. 2008-31, 2008 U.S. Dist. LEXIS 53455 (D.V.I. July 15, 2008) (within 1,000 feet of a school). For an interesting post-conviction challenge to a lengthy federal sentence (based on *Heller*), *see* Memorandum in Support of Motion for Partial Summary Judgment to Vacate Portion of Sentence Pursuant to 28 U.S.C. § 2255, in Angelos v. United States, No. 2:07-cv-936-TC (D. Utah), filed Sept. 15, 2008.
7. *See* United States v. Fincher, 538 F.3d 868 (8th Cir. 2008) (machine gun and sawed-off shotgun); Mullenix v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, No. 5:07-CV-154-D, 2008 U.S. Dist. LEXIS 51059 (E.D.N.C. July 2, 2008) (reproduction of World War II-era machine gun); United States v. Lewis, Crim. No. 2008-21, 2008 U.S. Dist. LEXIS 51652 (D.V.I. July 2, 2008) (firearm with obliterated serial number).
8. The issue has been raised in a pending case, Nordyke v. King, No. 07-15763 (9th Cir.).
9. 128 S.Ct. 1598 (2008).
10. *See* State v. Logan, No. 07-CA-56, 2008 Ohio App. LEXIS 2489 (Ohio Ct. App. June 16, 2008); United States v. Lopez, No. 07-51037, 2008 U.S. App. LEXIS 14256 (5th Cir. July 7, 2008) (unpublished decision).
11. *See* Rose v. City of Mulberry, Arkansas, 533 F.3d 678 (8th Cir. 2008); United States v. Gonzales, 535 F.3d 1174 (10th Cir. 2008); United States v. Wahl, No. 1:07cr18-SPM, 2008 U.S. Dist. LEXIS 43138 (N.D. Fla. May 30, 2008); *see also* United States v. Strasnick, No. 08-PO-224 JLA, 2008 U.S. Dist. LEXIS 45353 (D. Mass. June 10, 2008) (no Fourth Amendment violation in arrest made by federal officer, where officer had probable cause but no statutory authority to arrest); United States v. Wolf, No. CR. 07-30102-01-KES, 2008 U.S. Dist. LEXIS 62190 (D.S.D. Aug. 11, 2008) (no Fourth Amendment violation where tribal officers were allegedly not properly commissioned).
12. *See* United States v. Franklin, No. 06-6499, 2008 U.S. App. LEXIS 14080 (6th Cir. July 1, 2008) (unpublished decision).
13. 541 U.S. 36 (2004).

Rothgery is an important case on the question of when the Sixth Amendment right to counsel attaches.

Rothgery v. Gillespie County, Texas,[14] which spoke to the point at which the Sixth Amendment attaches. The Petitioner was arrested on a charge of being a felon in possession of a firearm after a background check erroneously showed a prior conviction for a felony. Officers took Rothgery before a magistrate, who made a probable-cause determination and set bail. Rothgery posted bail and was released. He had no money for counsel and made several oral and written requests for the appointment of a lawyer, which went unheeded. Rothgery was indicted almost six months later and rearrested; he could not post a higher bail amount and he was held in jail for three weeks. Counsel was eventually appointed. The lawyer obtained Rothgery's release on bail and gathered paperwork showing that Rothgery in fact had no prior felony conviction. The charges were then dismissed. Rothgery brought a federal civil rights action asserting he would not have been rearrested and jailed for three weeks had the county provided counsel within a reasonable period of time following his initial arrest and appearance in court. The district court granted summary judgment to the county, and the Fifth Circuit affirmed. In an 8-1 decision authored by Justice Souter, the Supreme Court reversed.

The majority opinion notes that the Court previously pegged commencement of the Sixth Amendment right to counsel to initiation of adversary judicial criminal proceedings, whether by way of a formal charge, preliminary hearing, indictment, information, or arraignment. The county argued that the right to counsel did not attach at the initial appearance before the magistrate, since (among other things) county prosecutors were neither present nor had yet made an affirmative decision to prosecute. The Court rejected the county's argument. The opinion notes that the overwhelming consensus is that the first formal proceeding is the point of attachment. The federal practice (including in the District of Columbia) and the practice in 43 states is to take the first step toward appointment of counsel before, at, or shortly after the initial appearance. About seven states may delay appointment until some significant time after the initial appearance; though the practice in those states is not entirely clear, the Court stated that there is no justification for the minority practice of not appointing counsel on the heels of the first appearance. Once the right to counsel has attached, an accused is at least entitled to the assistance of counsel during any "critical stage" of the proceeding. In a part of the opinion that commanded five votes, Justice Souter concluded that "counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." A concurring opinion by Justice Alito (joined by Chief Justice Roberts and Justice Scalia) argues that counsel need not be appointed at any particular time, only so far in advance of trial or any pretrial "critical stage" as to guarantee effective assistance at trial. The matter was remanded to determine whether the delay in appointing counsel prejudiced Rothgery's Sixth Amendment rights.

Rothgery is an important case on the question of when the Sixth Amendment right to counsel attaches. Although the Court left significant questions open—most notably, the justices declined to state any standard for when a delay in appointment violates the Sixth Amendment—the decision may lead a number of jurisdictions to review their practices. As one example, in July 2008, the Maryland Court of Appeals decided to bypass Maryland's intermediate appellate court and directly review the question (raised in a class action lawsuit) whether indigent defendants have a right to counsel at initial bail proceedings.[15]

Indiana v. Edwards,[16] another significant Sixth Amendment case, concerns the interplay of mental illness and the right to self-representation. Respondent Edwards was charged with attempted murder and other offenses. He was committed to a mental-health facility after being found unfit to stand trial. He was eventually found fit and was tried almost six years after his arrest. Just before trial, Edwards moved to represent himself. The judge denied the motion, and he was tried with counsel. The jury convicted Edwards of several offenses but failed to reach a verdict on the charges of attempted murder and battery. Before his retrial, Edwards again asked to represent himself because, among other things, he and his lawyer disagreed on the defense to put forward. The trial court found that Edwards was competent to stand trial with counsel but was not competent to defend himself. Represented by counsel, Edwards was tried and convicted. The Indiana appellate courts found that Edwards was denied his right of self-representation under *Faretta v. California*.[17] The U.S. Supreme Court vacated the Indiana Supreme Court's judgment in a 7-2 decision authored by Justice Breyer.

The majority opinion states that "the Constitution permits judges to take a realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." Further, "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* [*v. United States*[18]] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." The majority found room for this holding by distinguishing the Court's earlier decision in *Godinez v. Moran*,[19] which assessed competency to waive counsel under the same standard as competency to stand trial. However, Godinez sought to waive his right to counsel and plead guilty

14. 128 S.Ct. 2578 (2008).
15. *See* Richmond v. District Court, 952 A.2d 224 (Md. 2008) (granting petition for writ of certiorari on the court's own motion). Maryland is not one of the "minority" jurisdictions referenced in *Rothgery*, but the Supreme Court decision may have influenced this action by Maryland's highest court. *Richmond* is set for argument in January 2009
16. 128 S.Ct. 2379 (2008).
17. 422 U.S. 806 (1975).
18. 362 U.S. 402 (1960) (per curiam).
19. 509 U.S. 389 (1993).

whereas Edwards intended to waive counsel and proceed to trial on his own. The Court in *Edwards* said that a different standard for competency to waive counsel should apply when a defendant intends to go to trial but declined the State's request to promulgate a specific standard. Rather, the majority indicated that trial judges "will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individual circumstances of a particular defendant."

The decision drew a forceful dissent by Justice Scalia and joined by Justice Thomas. The dissenters criticized the majority for finding that "a State's view of fairness (or of other values) permits it to strip the defendant" of the right to present his or her own defense. Justice Scalia wrote that the decision to waive counsel usually harms the defendant's case, but the choice is respected because it is one that belongs to the accused. The dissenters also called the majority's holding "extraordinarily vague," noting that the Court did not state a specific standard or even accept Indiana's position that self-representation could be denied if an accused cannot communicate coherently with a court or a jury.

The Court's opinion raises a number of questions. One is the extent to which *Edwards* opens a crack in the *Faretta* doctrine. In previous cases, the Court was fairly adamant that judges could not deny a request for self-representation because an accused was unskilled in presenting a case or because the defense was likely to become a train wreck. This decision leaves room for a trial court to deny a request to waive counsel based upon an assessment of the defendant's ability to make reasoned choices with respect to which defense to present or some other aspect of the defense case, so long as such the assessment is made as part of a competency determination. And it is unclear just how much discretion has now been left to trial judges, though that discretion may be quite substantial in light of the lack of a specific competency standard and the majority's suggestion of deference to trial court determinations.[20]

Confrontation Clause/Retroactivity

The Court also significantly limited an exception to the requirement of confrontation. In *Giles v. California*,[21] the defendant was convicted of first-degree murder following a trial in which the jury was allowed to consider the decedent's prior statement to a police officer. About three weeks before she was killed, the victim reported that the defendant choked and threatened her. Her out-of-court statement was admitted because it was deemed trustworthy, and she was of course unavailable to testify. Giles's conviction was affirmed by the California appellate courts. In a 6-3 ruling, the U.S. Supreme Court vacated the decision. As the justices previously held in *Crawford v. Washington*, the Sixth Amendment's Confrontation Clause requires that a witness who has made a previous testimonial statement be present at trial for cross-examination. If the witness is unavailable, prior testimony will be introduced only if the accused had an earlier opportunity to cross-examine the declarant. The Court had previously noted two exceptions to this requirement of a previous opportunity to confront the declarant: dying declarations and "forfeiture by wrongdoing," meaning the introduction of a prior statement by a witness who was detained or kept away from the trial by the defendant. *Giles* provided the Court with the opportunity to address the contours of the "forfeiture by wrongdoing" exception.

This decision leaves room for a trial court to deny a request to waive counsel based upon an assessment of the defendant's ability to make reasoned choices . . . so long as the assessment is made as part of a competency determination.

The majority opinion, authored by Justice Scalia, concludes that the exception should only be applied "when the defendant engaged in conduct *designed* to prevent the witness from testifying." The majority drew support from the language of the exception at common law, the absence of common-law cases that admitted prior statements on a forfeiture theory where there was no conduct designed to prevent a witness from testifying, and especially the common law's exclusion of unconfronted inculpatory testimony by murder victims in the many cases in which the defendant was on trial for killing the victims but was not shown to have done so to prevent the victims from testifying. The Court vacated and remanded so that the California courts could consider the defendant's intent on remand.

Dissenting, Justice Breyer (joined by Justices Stevens and Kennedy) argued that the forfeiture-by-wrongdoing exception was (and thus still should be) much broader than held by the majority. He also asserted that because the defendant knew that killing the decedent would keep her from testifying, that knowledge would be sufficient to demonstrate the intent that law ordinarily demands. The three dissenters would establish a fairly capacious test of intent, rather than require a specific showing of motive or purpose.

Several courts have applied *Giles* in the few months since it was decided. The Missouri Supreme Court and Tennessee Court of Criminal Appeals have affirmed convictions, finding that the exception applied and noting its particular relevance in cases involving domestic violence.[22] Two courts have made clear that the standard of proof to demonstrate forfeiture is a

20. There have been only a handful of reported cases applying *Edwards* in the three months since the decision issued–not enough cases to discern any trend. However, one case to note is United States v. Duncan, No. CR-07-23-N-EJL, 2008 U.S. Dist. LEXIS 57151 (N.D. Idaho July 29, 2008) where the court applied the enhanced standard for competency to a defendant who pleaded guilty but who sought to represent himself at the penalty phase of a federal capital case. The court found that Duncan met that standard and permitted him to waive his right to counsel.
21. 128 S.Ct. 2678 (2008).
22. *See* State v. McLaughlin, No. SC88181, 2008 Mo. LEXIS 153 (Mo. Aug. 26, 2008); State v. Milan, No. W2006-02606-CCA-MR3-CD, 2008 Tenn. Crim. App. LEXIS 757 (Tenn. Ct. Crim. App. Sept. 26, 2008).

The decision is an expression of the Supreme Court's continued concern with discrimination in jury selection and an indication of the Court's willingness to review such cases.

preponderance of the evidence.[23]

Danforth v. Minnesota[24] is another *Crawford*-related case, but it addresses the power of state courts to apply a new decision retroactively on collateral review; *Danforth* does not concern the substantive reach of the Confrontation Clause. It is significant to underscore the greater available authority of the states (as opposed to federal habeas courts) to apply new rulings retroactively.

The Petitioner in *Danforth* was convicted following a trial in which the recorded statement of a six-year-old child was introduced into evidence against him. His conviction was made final before the Supreme Court decided *Crawford*. Although the Supreme Court previously determined that *Crawford* established a "new rule" that would not be retroactively applied in federal habeas corpus proceedings[25] under the principles of *Teague v. Lane*,[26] Danforth argued that the federal courts' *Teague* framework should not prevent state courts from developing more generous rules of retroactivity. In a 7-2 opinion authored by Justice Stevens, the Court agreed. *Teague*, the majority said, addressed what constitutional violations might be remedied on federal habeas corpus; it did not purport to define the scope of any new constitutional right itself. *Teague*'s general rule of nonretroactivity was also "an exercise of this Court's power to interpret the federal habeas corpus statute." For these reasons and others, the *Teague* rule limits the types of violations that will entitle someone to federal habeas corpus relief but does not affect a state court's power to grant relief for violations of new rules of constitutional law when the state is reviewing its own convictions.

EQUAL PROTECTION AND JURY SELECTION

Snyder v. Louisiana[27] is the most recent Supreme Court decision finding that a prosecutor's use of peremptory challenges violated the Fourteenth Amendment's Equal Protection Clause under the principles set forth in *Batson v. Kentucky*.[28] Five years ago, in *Miller-El v. Cockrell*,[29] the Court held that the Fifth Circuit erred in denying a certificate of appealability in a federal habeas corpus case with a *Batson* claim. When the case returned to the Court several years later in *Miller-El v. Dretke*,[30] the justices determined that the prosecution discriminated on the basis of race in the exercise of peremptory challenges. In so ruling, the Court compared the prosecution's treatment of white and nonwhite jurors. In *Snyder*, the majority again applied a comparative analysis and gave greater insight into the trial judge's role when there is a *Batson* objection.

During jury selection in *Snyder*, 36 prospective jurors survived challenges for cause. Five of the 36 were black. All five were eliminated by the prosecution through the use of peremptory challenges. When Snyder's case reached the Supreme Court, the justices focused on the prosecution's explanation for two of the challenges. *Batson* sets forth a three-step process to adjudicate a claim that a peremptory challenge was based on race-purposeful discrimination: First, a party must make a prima facie showing that the challenge was based on race. Second, if that showing has been made, the party that exercised the peremptory challenge must offer a race-neutral reason for challenging the juror. Third, in light of the parties' submissions, the trial court must decide whether the objecting party has shown purposeful discrimination. *Snyder*, like *Miller-El II*, addressed *Batson*'s third step.

In a 7-2 decision authored by Justice Alito, the Court found that the prosecution's reasons for striking a juror were not shown to be race-neutral. The prosecution offered two reasons for challenging a black juror. According to the prosecutor, the juror looked very nervous. In addition, he was a student teacher who might miss classes, and the prosecution expressed concerns about whether the juror might come back with a lesser verdict due to a need to get home quickly. The trial judge denied defense counsel's *Batson* objection, saying only that "I'm going to allow the challenge." The trial court did not make any findings about whether the juror in fact appeared nervous or whether the prosecutor was credible. Further, the case was tried in one week, and it seemed clear that this juror would be able to attend at least a weeklong trial. And applying a comparative analysis, it appeared that the prosecution did not express similar concerns with respect to white jurors who had time constraints that were at least as serious as those of the black juror. The judgment was reversed despite the dissenting opinion of Justices Scalia and Thomas, who criticized the majority for second-guessing the fact-based decisions of the Louisiana courts.

There are a few points to note. The decision is an expression of the Supreme Court's continued concern with discrimination in jury selection and an indication of the Court's willingness to review such cases. The majority opinion also provides a second recent example of comparative juror analysis in assessing the credibility of a prosecutor's race-neutral explanations. And the decision underscores the importance of a trial judge's on-the-record findings about the credibility of the prosecution's explanations. In the absence of anything in the record showing that the trial judge believed the prosecution's assertion that the challenged juror was nervous, the Supreme Court refused to presume that the judge found the offered race-neutral explanation to be credible.

23. *See* United States v. Taylor, No. 1:04-CR-160, 2008 U.S. Dist. LEXIS 68122 (E.D. Tenn. Sept. 5, 2008) (finding no forfeiture under a preponderance-of-evidence standard); *Milan*, *supra* note 22 (noting the standard, and affirming a finding of forfeiture).
24. 128 S.Ct. 1029 (2008).
25. Whorton v. Bockting, 549 U.S. 406 (2007).
26. 489 U.S. 288 (1989).
27. 128 S.Ct. 1203 (2008).
28. 476 U.S. 79 (1986).
29. 537 U.S. 322 (2003).
30. 545 U.S. 231 (2005).

CAPITAL PUNISHMENT

Kennedy v. Louisiana[31] was the third case in the last half-dozen years to hold that a capital sentence could not be imposed on certain offenders or for certain offenses. In *Atkins v. Virginia*[32] and *Roper v. Simmons*,[33] the justices ruled that the execution of mentally retarded persons and juveniles violated the Eighth and Fourteenth Amendments. In *Kennedy*, a 5-4 decision, the majority ruled that a death sentence for someone who raped, but did not kill, a child and who did not intend to assist another in killing the child also violates these amendments.

The majority opinion, written by Justice Kennedy, follows the general approach of *Atkins* and *Roper* to gauge whether there is a national consensus against capital punishment for the crime of child rape. In assessing whether a death sentence for the crime is excessive or cruel and unusual, the justices looked for objective indicia of societal standards and then analyzed whether the sentence was disproportionate. The majority determined that of the 37 jurisdictions (six states plus the federal government) that have the death penalty, only six jurisdictions authorize that sanction for rape of a child. "The evidence of a national consensus with respect to the death penalty for child rapists . . . shows divided opinion but, on balance, an opinion against it." Further, Louisiana is the only state since 1964 to have sentenced an individual to death for the crime of child rape. No individual has been executed for the rape of either an adult or child since 1964, nor has anyone been executed for any non-homicide offense since 1963. The majority also turned aside the claim that jurisdictions may not have decided to authorize the death penalty for child rape because states may have misinterpreted an earlier ruling (which prohibited the death penalty for adult rape) as applying to child victims as well. Then the justices applied their own judgment and determined that in light of the legitimate purposes of punishment, "the death penalty is not a proportional punishment for rape of a child." In an opinion written by Justice Alito, four justices dissented, taking issue with virtually every aspect of the majority opinion.

After the Court issued its ruling in June 2008, the State sought rehearing. As it turns out, the majority was not correct to assert categorically that the federal government does not authorize the death penalty for the crime of child rape. The military death penalty for rape has been in place for more than a century. The rehearing petition was denied, though Justices Thomas and Alito would have granted the petition. A statement by the five majority justices argues that "authorization of the death penalty in the military sphere does not indicate that the penalty is constitutional in the civilian context."[34] Justices Scalia and the Chief Justice concurred in the denial of rehearing, though they asserted that the new evidence destroys the majority's claim that it was discerning a national consensus and not just giving effect to the majority justices' own preferences.[35]

Baze v. Rees[36] was a much-watched challenge to the administration of Kentucky's lethal injection protocol; indeed, the case led to a de facto moratorium on executions in the United States from the day after *certiorari* was granted until the decision issued.

The Chief Justice's opinion focuses upon whether particular procedures pose a substantial risk of serious harm, which must be an objectively intolerable risk of harm.

The federal government and 35 of the 36 death-penalty states either require or permit execution by means of lethal injection. At least 30 states, including Kentucky, use the same combination of drugs in their lethal-injection protocols. The first drug, sodium thiopental, is a barbiturate sedative that induces unconsciousness. The second drug, pancuronium bromide, is a paralytic agent. The third drug is potassium chloride, which induces cardiac arrest. Although it was conceded that if the three-drug combination was properly administered there would be a humane death, the Petitioners argued that there was a significant risk that Kentucky's procedures would not be properly followed. In particular, the Petitioners alleged that the first drug (the barbiturate) is critical and must be provided in sufficient quantity to prevent severe pain and conscious suffocation when the other chemicals are administered. As part of their argument, the Petitioners noted that veterinarians are prohibited from using the second drug (the paralytic agent) in euthanizing animals in the overwhelming majority of states. By a 7-2 vote, but one which failed to produce a majority opinion, the Court found that Kentucky's administration of its lethal-injection protocol does not contravene the Eighth Amendment. It is difficult to derive a clear rule from the separate opinions in this case. Perhaps the easiest way to understand the outcome is to compare the three main substantive opinions, and then review the separate opinions of Justices Alito, Stevens, and Breyer.

The judgment of the Court was announced by Chief Justice Roberts in an opinion joined by Justices Kennedy and Alito. The Chief Justice's opinion focuses upon whether particular procedures pose a substantial risk of serious harm, which must be an objectively intolerable risk of harm. The Chief Justice rejected the claim that simply because an execution method might result in pain, either by accident or because of an inescapable consequence of death, there is the sort of objectively intolerable risk of harm that amounts to cruel and unusual punishment in violation of the Eighth Amendment. Nor could the petitioners prevail simply by showing that there is an alternative procedure, such as a single-drug protocol (barbiturates only) that may be preferred. As the Chief Justice put it, an alternative protocol "must effectively address 'a substan-

31. 128 S.Ct. 2641 (2008).
32. 536 U.S. 304 (2002).
33. 543 U.S. 551 (2005).
34. Kennedy v. Louisiana, No. 07-343, 2008 U.S. LEXIS 5449 (Oct. 1, 2008) (Order denying rehearing, and Statement of Justice Kennedy respecting the denial of rehearing).
35. Kennedy v. Louisiana, No. 07-343, 2008 U.S. LEXIS 5448 (Oct. 1, 2008) (Statement of Justice Scalia respecting the denial of rehearing).
36. 128 S.Ct. 1520 (2008).

[D]espite the Court's failure to promulgage a single standard, seven justices found that the administration of Kentucky's execution protocol did not violate the Eighth Amendment on the record in this case.

tial risk of serious harm.'" The alternative procedure "must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such alternative in the face of these documented advantages, without a legitimate penological justification . . . , then a State's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment." Applying this test, the Chief Justice found on this record that the Petitioners had not shown that the risk of an inadequate dose of the first drug, as it is administered in Kentucky, is substantial.

Justices Thomas and Scalia concurred but rejected the Chief Justice's formulation. As set forth in Justice Thomas's concurrence, the two rejected "as both unprecedented and unworkable" any standard that might require courts to weigh the relative advantages and disadvantages of different methods of execution or lethal-injection protocols. In their view, "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain." Thus, any comparative analysis "should be limited to whether the challenged method inherently inflicts significantly more pain than traditional modes of execution such as hanging and the firing squad." Justice Thomas also argued that "today's decision is sure to engender more litigation."

Justice Ginsburg, joined by Justice Souter, dissented. They agreed with the Petitioners and the plurality "that the degree of risk, magnitude of pain, and availability of alternatives must be considered." However, they disagreed with the Chief Justice's opinion with respect to the extent to which the "substantial risk" test "sets a fixed threshold for the first factor." Applying this more flexible test, the dissenters would remand to consider whether the failure to include additional safeguards to confirm that the inmate is unconscious after injection of the barbiturate, in combination with other elements of Kentucky's protocol, creates an unacceptable and readily avoidable risk of inflicting severe and unnecessary pain.

Justice Breyer concurred. He agreed with Justice Ginsburg as to how a court should review this type of Eighth Amendment claim. However, he could not find in the record or in the literature sufficient evidence to establish that Kentucky's execution protocol poses the type of significant and unnecessary risk of inflicting severe pain that the Petitioners asserted. Justice Stevens concurred, finding no Eighth Amendment violation on this record under the test set forth in either the Chief Justice's opinion or Justice Ginsburg's dissent. He used this as an occasion, however, to announce his general view that the death penalty in the United States is now patently excessive and cruel and unusual punishment in violation of the Eighth Amendment. But being bound by precedent, he joined the Court's judgment. Justice Scalia wrote separately to respond to Justice Stevens. Justice Alito wrote his own concurrence to respond to the suggestion by Justice Thomas that the case would result in greater litigation.

From the various opinions, there were three votes for the test set forth in Chief Justice Roberts's opinion, three votes for the dissent's more flexible test, and two votes for a test that essentially compares modern protocols to the methods of executions conducted throughout history. Ordinarily, when five justices do not agree on the rationale for a decision, the views of the members who decide the case on the narrowest grounds represent the holding of the Court. There is an argument that *Baze* contains no controlling opinion since it is difficult to characterize any of the concurring opinions as providing a fifth vote on a narrower ground than contained in the Chief Justice's opinion. Nevertheless, despite the Court's failure to promulgate a single standard, seven justices found that the administration of Kentucky's execution protocol did not violate the Eighth Amendment on the record in this case.

In the immediate wake of the decision in *Baze*, the de facto moratorium has lifted in a number of jurisdictions with executions taking place by lethal injection in at least Florida, Georgia, Mississippi, Oklahoma, South Carolina, Texas, and Virginia. But because *Baze* reviewed only the specific record of Kentucky's procedures, litigation has continued as judges apply *Baze* to evidence of the administration of lethal-injection protocols in other states.[37] Most courts seem to treat Chief Justice Roberts's plurality opinion as controlling.[38] Courts have tended to dispose of lethal-injection challenges by comparing their jurisdiction's protocol with the evidence discussed in *Baze* about the administration of Kentucky's protocol.[39]

FEDERAL CRIMINAL STATUTES AND SENTENCING

The last Term produced important rulings interpreting federal criminal statutes and affecting federal sentencing. The article summarizes a few of the statutory decisions, particularly those that relate to the interplay of federal and state offenses (*Logan* and *Burgess*) or apply to common add-ons for use of weapons or explosives (*Watson* and *Ressam*). The Court's sen-

37. For an online repository of a number of judicial orders relating to lethal injection, pre- and post-dating *Baze*, see: www.lethalinjection.org.

38. *See*, *e.g.*, Bennett v. State, N0. 2006-DR-01516-SCT, 2008 Miss. LEXIS 417 (Miss. Aug. 28, 2008); Emmett v. Johnson, 532 F.3d 291(4th Cir. 2008); Jackson v. Houk, No. 3:07CV0400, 2008 U.S. Dist. LEXIS 36061 (N.D. Ohio May 1, 2008); Nooner v. Norris, No. 5:06CV00110, 2008 U.S. Dist. LEXIS 60136 (E.D. Ark. Aug. 5, 2008); *but see* Henyard v. State, Nos. SC08-222, SC08-1544, SC08-1653, 2008 Fla. LEXIS 1609 (Fla. Sept. 10, 2008) (addressing the various opinions in *Baze* and noting that the holding that Kentucky's protocol did not amount to cruel and unusual punishment was the only part of the plurality opinion upon which the majority agreed).

39. *See*, *e.g.*, State v. Bethel, No. 07AP-810, 2008 Ohio App. LEXIS 2322 (Ohio Ct. App. June 5, 2008); Ex parte Chi, 256 S.W.3d 702 (Tex. Ct. Crim. App. 2008); *Emmett*, *supra* note 38; *see also* Moeller v. Weber, Civ. 04-4200, 2008 U.S. Dist. LEXIS 36190 (D.S.D. May 2, 2008) (ordering discovery to determine whether South Dakota's lethal-injection protocol is similar to Kentucky's).

tencing decisions are significant for both state and federal prosecutions, as the Court has continued to enunciate principles that apply in construing structured sentencing schemes.

Federal Statutes

The Petitioner in *Logan v. United States*[40] was convicted of being a felon in possession of a firearm. Under the Federal Armed Career Criminal Act of 1984 (ACCA), he was given an enhanced sentence on the basis of three misdemeanor battery convictions from Wisconsin. The ACCA contains an exemption provision, providing that a prior conviction may be disregarded if it "has been expunged, or set aside," or if the defendant "has been pardoned or has had civil rights restored." Logan argued that because he never lost his civil rights as a result of the three misdemeanor convictions, they fell within the exemption provision and his federal sentence was improperly enhanced.

The Court unanimously rejected the argument in an opinion written by Justice Ginsburg. Relying upon the plain language, history, and context of the statute, the Court found that never having rights taken away was not the same as having them affirmatively restored. While the ACCA defers to a state's decision to relieve an offender from the disabling effects of a conviction, Congress did not mean to exempt instances where the offender did not lose civil rights in the first place. Thus, if a state intends to allow an individual to avoid the ACCA consequences of certain convictions, it must act affirmatively to do so.

In *Burgess v. United States*,[41] the Court resolved a conflict in the way that prior state convictions might be used to enhance a federal drug sentence. Some federal drug offenses carry mandatory minimum penalties. A 10-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A) is doubled to 20 years if a defendant has previously been convicted of a "felony drug offense." The Petitioner in *Burgess* had a prior conviction in South Carolina for possessing cocaine. The State classified the offense as a misdemeanor although it carried a maximum sentence of two years' imprisonment. Burgess claimed that the State's characterization must control, relying upon 21 U.S.C. § 802(13), which says that a "felony" is any "offense classified by applicable Federal or State law as a felony." The government countered that the controlling definition was the term "felony drug offense," described in 21 U.S.C. § 802(44) as an offense involving drugs that is "punishable by imprisonment for more than one year under the law of the United States or of a State or foreign country." The district court and court of appeals agreed with the government. The Supreme Court affirmed.

The Court unanimously ruled that the definition set forth in § 802(44) alone controls. In an opinion by Justice Ginsburg, the justices point to a number of statutory features, including that "felony drug offense" is a term of art within the statute and the specific definition should control. The Court also determined that the rule of lenity would not apply since there was no ambiguity to resolve. The specific statutory definition set forth in § 802(44) is coherent, complete, and exclusive.

Watson v. United States[42] addressed the question of whether a person who trades drugs to obtain a gun "uses" a firearm "during and in relation to . . . [a] drug trafficking crime" as prohibited by 18 U.S.C. § 924 (c) (1) (A). The Petitioner in *Watson* told a government informant that he wanted to acquire a gun. The informant suggested he could pay in narcotics. Watson met with the informant and an undercover law enforcement agent. He provided the drugs in exchange for a semiautomatic pistol. Watson was indicted for a drug offense and for "using" the pistol during and in relation to that crime. He entered a conditional plea, reserving the right to challenge the factual basis for his conviction. The court of appeals affirmed. The Supreme Court unanimously reversed.

In *Burgess v. United States*, the Court resolved a conflict in the way that prior state convictions might be used to enhance a federal drug sentence.

In an opinion by Justice Souter, the Court determined that someone who provides drugs to obtain a weapon does not "use" the weapon. Though the justices previously decided in *Smith v. United States*[43] that trading a weapon to receive drugs is the "use" of that weapon, the converse is not true. Under the Court's precedents, "use" requires active employment of a firearm. Focusing on the plain language of the statute and its context, the justices found that a person who gives drugs to receive a weapon does not actively employ or use the gun. Justice Ginsburg concurred to urge the Court to overrule *Smith*. She also wryly noted that "at least when the subject is guns," "[i]t is better to receive than to give."

Ressam v. United States[44] involved an interesting (though less common) offense and a direct link to the "war on terror." Ahmed Ressam came to the United States with explosives, planning to detonate them at the Los Angeles International Airport. He was arrested entering the country and made false statements on a customs declaration. He was convicted in federal court of a number of criminal offenses, including carrying explosives "during the commission of any [federal] felony" in violation of 18 U.S.C. § 844(h)(2). The government's theory was that Ressam had carried explosives during the commission of the felony of making false statements on a customs declaration. The court of appeals reversed his conviction on the § 844(h)(2) count, finding that the carrying of the explosives had to be in relation to the commission of the other felony, and that no such relationship was shown here. Attorney General Michael Mukasey personally argued on behalf of the government in the Supreme Court, which reversed by a vote of 8-1.

The Court's opinion, authored by Justice Stevens, provides that the plain language of the statute requires reversal. The term "during" denotes a temporal link to the other felony, but the statute contains no other qualification. The statute merely

40. 128 S.Ct. 475 (2007).
41. 128 S.Ct. 1572 (2008).
42. 128 S.Ct. 579 (2007).
43. 508 U.S. 223 (1993).
44. 128 S.Ct. 1858 (2008).

Two cases decided on the same day . . . dealt with some of the impact of making the Federal Guidelines advisory. If judges are no longer strictly bound by the Guidelines, what force do they carry?

requires that an explosive be carried contemporaneously with the commission of another felony not that it be in relation to or somehow further the commission of that felony. Although the Court was concerned during oral argument that a broad construction of the statute could lead to absurd results or give extraordinary leverage to prosecutors, the majority opinion does not address those concerns. They are reflected in the dissenting opinion of Justice Breyer, who argues that because the term "explosives" includes such commonplace materials as gasoline or fertilizer, and the category of federal felony offenses is so broad, the Court's construction may lead to strange results. From the context of the statute, he would find a requirement that the explosives be carried in relation to the other felony.

Federal Sentencing

The Court has been extraordinarily active over the last decade in reviewing the constitutionality of federal and state sentencing schemes. Some of the most important decisions in recent years include *Blakely v. Washington*[45] and *Cunningham v. California*,[46] where the justices found that sentences imposed under Washington's guidelines and California's determinate-sentencing law violate the Sixth Amendment right to trial by jury, and *United States v. Booker*,[47] where the Court essentially saved the United States Sentencing Guidelines by rendering them "effectively advisory." Two cases decided on the same day last Term dealt with some of the impact of making the Federal Guidelines advisory. If judges are no longer strictly bound by the Guidelines, what force do they carry? Must judges respect all policy determinations that are reflected in Guidelines ranges? And how do courts of appeals review sentencing decisions that substantially depart from applicable Guidelines ranges?

In *Kimbrough v. United States*,[48] the Petitioner was convicted of serious federal drug and weapons offenses. The drug crimes involved crack as well as powder cocaine; for over 20 years, federal crack-cocaine offenses have carried higher Guidelines and statutory sentences than offenses related to powder cocaine. The statutory minimum for Kimbrough's offenses was 15 years, though his guideline range was 228-270 months (19 to 22 1/2 years). The guideline range for an equivalent amount of powder cocaine would have been 97-106 months. Taking into account the much criticized distinction between crack- and powder-cocaine sentences, the district court sentenced Kimbrough to the statutory minimum of 15 years. The court of appeals vacated the sentence, but the Supreme Court reversed.

In a 7-2 decision authored by Justice Ginsburg, the Court noted that sentencing judges may vary from Guidelines ranges based upon policy considerations, including disagreement with a policy of imposing much higher sentences in crack-cocaine cases. The majority specifically rejected the government's argument that federal courts are required by Congress to respect the 100:1 ratio of amounts of powder to crack cocaine that lead to equivalent Guidelines ranges. While courts must still give "respectful consideration" to the Guidelines, they are freed from this ratio and the mandatory strictures of the Guidelines. District courts should follow the instruction in *Booker* that sentences must be imposed that are sufficient but not greater than necessary to accomplish the various goals of sentencing described in federal statutes. Justices Thomas and Alito dissented. Justice Thomas continues to disagree with the remedial holding in *Booker*. Justice Alito would require sentencing judges to give significant weight to the policy decisions in the Guidelines (including, as here, various ratios), and would thus remand for reconsideration.

Gall v. United States[49] addressed a somewhat different problem: how to review the reasonableness of a federal sentence that is substantially below the applicable Guidelines range. The Petitioner in *Gall* joined a drug conspiracy but withdrew on his own and stopped selling drugs of any kind. Gall was arrested for conspiracy several years later, after he graduated from college and found a job. He pleaded guilty. The applicable Guidelines range was 30-37 months, but the judge sentenced him to three years' probation, which the district court reasoned was sufficient but not greater than necessary to serve the statutory purposes of sentencing. The court of appeals reversed. The Supreme Court reversed the court of appeals.

In a 7-2 decision and an opinion by Justice Stevens, the majority found that the sentence was reasonable. While a previous ruling of the Supreme Court had determined that in the ordinary case a reviewing court may presume that a sentence within the Guidelines is reasonable, all sentences are reviewed under a deferential abuse-of-discretion standard. Though the extent of the difference between a particular sentence and the recommended Guidelines range is relevant, the Court rejected a rule that would require extraordinary circumstances or some specific showing to justify a sentence that is outside of the Guidelines or even outside of the Guidelines range by a particular degree.[50] The Supreme Court reversed the court of appeals because its analysis appeared to resemble *de novo* review. The circuit failed to give due deference to the sentencing court's reasoned decision that the statutory factors, on the whole, justified the sentence. As in *Kimbrough*, Justices Thomas and Alito dissented.

45. 542 U.S. 296 (2004).
46. 549 U.S. 270 (2007).
47. 543 U.S. 220 (2005).
48. 128 S.Ct. 558 (2007).
49. 128 S.Ct. 586 (2007).
50. Though *Gall* has not been discussed much in state appellate courts, for an interesting debate about the use of *Gall* as guidance, *see* People v. Smith, 754 N.W.2d 284 (Mich. 2008).

FEDERAL HABEAS CORPUS

Boumediene v. Bush[51] was one of the blockbusters of the Term. Although the ruling directly concerns detainees at Guantánamo Bay, whose cases are pending before a limited number of courts, the decision should be of interest to a wide audience. *Boumediene* is now the leading case on the Suspension Clause,[52] the scope of common-law habeas corpus, and what procedures might provide an adequate substitute for habeas corpus.

In previous rulings, the Court determined that the privilege of habeas corpus extends to detainees at Guantánamo Bay. Further, the Detainee Treatment Act of 2005 (DTA) did not remove then pending habeas corpus cases from the federal courts. In response, Congress passed the Military Commissions Act of 2006 (MCA). In *Boumediene*, a 5-4 majority found, in an opinion by Justice Kennedy, that the MCA was intended to strip pending cases from the federal courts. However, because the Act did not purport to be a formal suspension of the writ, the detainees could still challenge the legality of their confinement. The question then became whether the MCA could avoid a Suspension Clause challenge because Congress has provided adequate substitute procedures for habeas corpus.

To answer this question, the majority set out some basic principles of common-law habeas corpus. The privilege of habeas corpus "entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." A habeas corpus court must have the power to order the conditional release of someone who is unlawfully detained, although release need not be the exclusive remedy and is not the appropriate remedy in every case in which the writ is granted. The majority opinion also notes that "where relief is sought from a sentence that resulted from the judgment of a court of record, as is the case in most federal habeas cases, there is considerable deference owed to the court that ordered confinement." Of course, the criminal conviction "in the usual course occurs after judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence." But where a person is detained by executive order rather than after trial and conviction in a court, "the need for collateral review is most pressing." The Court then reviewed the few previous cases finding that statutory procedures were adequate substitutes for the writ, such as the decision upholding 28 U.S.C. § 2255–the motion procedure that allows federal prisoners to challenge their convictions and sentences, and a case upholding restrictions on successive petitions under the Antiterrorism and Effective Death Penalty Act, which were found not to amount to a substantial departure from common-law habeas corpus.

The majority ruled that under these principles, and by contrast with these prior cases, the procedures afforded to detainees at Guantánamo Bay are not an adequate substitute for habeas corpus. To begin with, the administrative forum for contesting detention–the Combatant Status Review Tribunal (CSRT)–constrains a detainee's ability to rebut the factual basis for the claim that the person is an enemy combatant. There is a limited means to find or present evidence, and the detainee does not have the assistance of counsel. There is a risk inherent in any process that is closed and accusatorial, said the Court, and the risk is too significant to ignore given that the consequences of error may be detention for the duration of hostilities that could last a generation or more. In addition, the DTA affords only limited judicial review of the administrative determination. Because a reviewing court is essentially limited to the question of whether the CSRT followed appropriate and lawful standards and procedures, it cannot consider newly discovered evidence that could not have been part of the administrative record, and that evidence might be critical to a detainee's argument that he is not an enemy combatant.

To answer this question, the majority set out some basic principles of common-law habeas corpus.

In light of the CSRT process, the majority concluded that the detainees' access to the courts under the statutory review provisions of the DTA is not an adequate substitute for the writ of habeas corpus. Thus, the MCA–which would strip federal courts of the power to consider habeas petitions by these detainees–effects an unconstitutional suspension of the writ.

Four justices dissented. The dissenting opinion by Chief Justice Roberts takes on, among other points, the majority's finding that the CSRT and DTA procedures are not adequate substitutes for the writ of habeas corpus.

Though *Boumediene* directly applies to a limited number of individuals, it should stand as a cornerstone case on the meaning of the Suspension Clause, the scope of common-law habeas corpus, and on which procedures may be an adequate substitute for habeas corpus.

In *Allen v. Siebert*,[53] a much less momentous case (but one still worthy of comment), the Court granted the State's petition for a writ of certiorari and summarily reversed the court of appeals. The case is notable for its explanation of how a state's dismissal of a post-conviction petition may impact the timeliness of a subsequent federal habeas corpus petition.

Siebert filed his state post-conviction petition after the expiration of a state statute of limitations, and it was dismissed as untimely. The Antiterrorism and Effective Death Penalty Act of 1996 contains a one-year statute of limitations that is tolled while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."[54] Siebert filed a federal habeas corpus petition, which the district court dismissed as untimely. The federal court of appeals disagreed, finding that Siebert's state petition was "properly filed" because the time bar was not jurisdictional and the state courts had discretion whether to enforce it. In so ruling, the circuit distinguished a prior case from the Court in which a petition was not found to be "properly filed"

51. 128 S.Ct. 2229 (2008).
52. U.S. Const., art. I, § 9, cl. 2.
53. 128 S.Ct. 2 (2007) (per curiam).
54. 28 U.S.C. § 2244(d)(2).

where the state's time bar was jurisdictional.[55] Reversing, the Supreme Court said, in a per curiam opinion, that whether a time limit "is jurisdictional, an affirmative defense, or something in between," it is a condition to filing. Justices Stevens and Ginsburg dissented and would have adopted the distinction found by the court of appeals.

A LOOK AHEAD

An early look at the Supreme Court's October 2008 Term shows that the Fourth and Sixth Amendments are back on the menu, along with issues relating to qualified immunity for officers and prosecutors, and a matter of particular importance to capital defendants. Though these cases are significant, there do not yet seem to be the same sort of blockbusters that marked the October 2007 Term's criminal docket.

As of the opening of the October 2008 Term, the Court has granted review in four search-and-seizure cases: *Herring v. United States*,[56] which asks if evidence must be suppressed under the Fourth Amendment where officers conduct an arrest and search incident to an arrest in reliance upon credible but erroneous information provided by another officer; *Arizona v. Gant*,[57] which concerns whether officers must demonstrate a threat to their safety or a need to preserve evidence to justify a warrantless vehicular search incident to arrest after the vehicle's recent occupants have been arrested and secured; *Arizona v. Johnson*,[58] which addresses whether an officer who stops a car for a minor traffic infraction may pat-down a passenger if the officer has an articulable basis to believe that the passenger is armed and dangerous but the officer has no reason to believe that the passenger is committing a criminal offense; and *Pearson v. Callahan*,[59] which asks, among other things, whether a "consent once removed" exception to the Fourth Amendment warrant requirement authorizes police to enter a home without a warrant after an informant buys drugs inside.

Pearson may also provide a vehicle for a significant qualified immunity ruling. The justices directed the parties to brief and argue whether the qualified immunity decision in *Saucier v. Katz*[60] should be overruled. A second case involving qualified immunity is *Van De Kamp v. Goldstein*,[61] which asks whether the doctrine shields the decisions of supervisors who direct policy and oversee training with respect to prosecutors' constitutional duty to disclose exculpatory evidence.

The Court has agreed to hear two Sixth Amendment right-to-counsel cases. *Kansas v. Ventris*[62] asks whether the prosecution may impeach a defendant with statements obtained without a knowing and voluntary waiver of the Sixth Amendment right to counsel. In *Montejo v. Louisiana*,[63] the justices will decide if, after the Sixth Amendment has attached, a defendant who asks for counsel and is appointed a lawyer must take an affirmative step to "accept" the appointment to receive the protections of the amendment and preclude police-initiated interrogation without counsel.

Other provisions of the Sixth Amendment are also before the Court. *Vermont v. Brillon*[64] asks whether trial delays relating to the appointment and representation of counsel may be attributable to the state and deny a defendant a speedy trial. A *Crawford* case is on the docket. *Melendez-Diaz v. Massachusetts*[65] concerns whether a state forensic analyst's laboratory report, prepared for use in a criminal case, is "testimonial" evidence that is subject to the requirements of the Confrontation Clause. In *Rivera v. Illinois*,[66] the Court will take up the question whether the erroneous denial of a defendant's peremptory challenge requires automatic reversal of a conviction. And the justices have granted review in another *Apprendi/Blakely* case. In *Oregon v. Ice*,[67] they will decide whether the Sixth Amendment requires that facts necessary for the imposition of consecutive sentences, other than facts relating to prior convictions, must be found by the jury or admitted by the defendant.

An important case for capital defendants is *Harbison v. Bell*.[68] Typically, state clemency proceedings are at the end of the road; they come after a death sentence has been affirmed by the state courts and after the defendant has lost his or her federal habeas corpus petition. *Harbison* will decide whether the statute that provides federal funds for counsel who represent state capital defendants in federal habeas corpus proceedings includes funding for counsel to continue their representation and pursue State clemency proceedings.

All-in-all, the October 2008 Term promises a bevy of important criminal law and procedure decisions, even if it lacks some of the fireworks provided by last year's headliners.

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55. Pace v. DiGuglielmo, 544 U.S. 408 (2005).
56. No. 07-513.
57. No. 07-542.
58. No. 07-1122.
59. No. 07-751.
60. 533 U.S. 194 (2001).
61. No. 07-854.
62. No. 07-1356.
63. No. 07-1529.
64. No. 08-88.
65. No. 07-591.
66. No. 07-9995.
67. No. 07-901.
68. No. 07-8521.

When Should Judges Use Alcohol Monitoring as a Sentencing Option in DWI Cases?

Victor E. Flango and Fred Cheesman

Traditional sentencing sanctions have not been particularly effective against people caught driving while impaired (DWI) and less so against repeat offenders. Technology has provided judges with some new sentencing options, including various forms of electronic home monitoring. This article takes an initial step toward evaluating the effectiveness of alcohol monitoring as a sentencing option in DWI cases with the goal of eventually determining which types of offenders, if any, would benefit most from alcohol monitoring. The constant monitoring of alcohol consumption is thought to aid rehabilitation by providing a deterrent to drinking and a positive reinforcement to sobriety. It permits offenders to remain employed, to fulfill family obligations, and to remain in treatment.

Judges may be less familiar with transdermal methods that monitor alcohol through the skin than with blood, breath, or urine testing.[1] There are two transdermal measuring devices—the Wrist Transdermal Alcohol Sensor (WrisTAS) by Giner, Inc., and the Secure Continuous Remote Alcohol Monitor (SCRAM) bracelet by Alcohol Monitoring Systems, Inc. The former device, though clinically tested, is not yet commercially available perhaps because it is not yet sufficiently water or tamper resistant.[2]

This article reports on the results of a preliminary study using SCRAM—a passive system that provides 24-hour monitoring of alcohol consumption.[3] SCRAM, which became commercially available in 2003, is attached to the ankle and detects alcohol from continuous samples of vaporous or insensible perspiration (sweat) collected from the air above the skin and transmits that data via the web.[4] Anti-circumvention features include a tamper clip, an obstruction sensor, a temperature sensor, and communication monitoring to ensure that the bracelet is functioning normally and transmitting information on the designated offender.

At the request of Alcohol Monitoring Systems, the National Center for State Courts (NCSC) conducted a preliminary examination of the SCRAM bracelet to determine its effectiveness in reducing recidivism while it was worn and *after it was removed.* One purpose of the study was to determine the key influences on the effectiveness of the SCRAM bracelet so that a more extensive, experimental study could be designed. Another purpose was to develop hypotheses with regard to the types of offenders on whom the SCRAM bracelet is most likely to be effective so that judges can determine which offenders would most benefit from the use of SCRAM. Alcohol Monitoring Systems recommends its use for repeat "hard-core" offenders.[5]

This preliminary study was dependent upon available data so it was not possible to explore all of the implications of the SCRAM bracelet. In particular, we lacked information on the treatment options used by offenders *while* the SCRAM bracelet was being worn.[6] Consequently, this can only be presented as preliminary findings until a more extensive, experimental study can be conducted. Nevertheless, there are some key lessons that judges may take from this early research.

THE CONTEXT FOR ALCOHOL MONITORING

Before presenting the key findings from our research, let us put alcohol monitoring in context of other sentencing options. The most prevalent sanctions imposed against people con-

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Footnotes

1. As are most people, *see* J. S. Hawthorne and M. H. Wojcik, "Transdermal Alcohol Measurement: A Review of the Literature," *Canadian Society of Forensic Science Journal* 39 (2006): 65.
2. R. Robertson, W. Vanlaar, and H. Simpson, *Continuous Transdermal Alcohol Monitoring: A Primer for Criminal Justice Professionals* (Ottawa: Traffic Injury Research Foundation, October 2006), p. 14.
3. See www.alcoholmonitoring.com.
4. Robertson, Vanlaar, and Simpson, *op. cit.,* 2.
5. "Hard-core" drunk drivers are defined as "those who drive with a high blood alcohol concentration of .15 or above, who do so repeatedly, as demonstrated by having more than one drunk-driving arrest, and who are highly resistant to changing their behavior despite previous sanctions, treatment or education." The National Association of State Judicial Educators and the Century Council, *Hardcore Drunk Driving Judicial Guide* (2004), p. 4
6. The SCRAM service provider, Rehabilitation Support Services of North Carolina, provided data on the treatment group, all offenders that used SCRAM after conviction (i.e., as a condition of their sentence) during the sampling period (N=114). Vantage Point Services, a private firm, was hired to (1) provide criminal-history data on the sample of SCRAM users and to (2) randomly select and provide similar data for a pool of 3,000 DWI offenders that did not use SCRAM, using North Carolina's Statewide Criminal Information System.

victed of driving while impaired are incarceration, community service, fines, and license suspension.[7] These sanctions have been an effective deterrent for many types of crimes but appear to be less effective for DWI offenders.

Incarceration involves some form of correctional supervision. Many states have adopted mandatory jail sentences for misdemeanor DWI and prison sentences for felony DWI. Incarceration, however, is expensive. Although many participants in a NHTSA survey expressed a fear of jail, many said jail alone would not change their behavior.[8] Only slight evidence exists that jail sentences reduce recidivism.[9] Incarceration, however, can also be an opportunity to place offenders into residential treatment programs, such as special DWI facilities or weekend intervention programs.[10]

Fines have not been well evaluated for their impact on recidivism. They may be effective deterrents if set high enough, but many fines are not collected or can be paid in small increments over a long period of time and, thus, do not place a substantial financial burden on the offender.[11]

Respondents to the American Judges Association's survey suggested that suspended sentences and community service were the least effective sanctions against DWI. A majority of people with revoked or suspended licenses drove anyway, according to the NHTSA survey mentioned above, but tried to be more careful so they wouldn't be detected.[12] Similarly, an extensive study in Louisiana, using both self-reports and crash data, did not find evidence of reduced recidivism for offenders sentenced to community-service programs.[13]

The effectiveness of probation in preventing DWI recidivism depends, in large part, on the conditions imposed and the level of supervision associated with the probation. Variations include basic supervision probation (monthly visits), unsupervised probation, and individualized restrictions. Intensive supervision probation provides offenders with more contact with probation officers and participation in education and therapeutic programs in the community.[14] Under intensive supervision, offenders retain their freedom but are subject to requirements such as curfews, electronic monitoring, drug testing, daily contacts, and mandatory community service.[15]

Electronic monitoring is as effective as incarceration, and less expensive.[16] Courts use electronically monitored home detention to limit the nighttime and recreational driving of DWI offenders and use other devices to electronically monitor breath alcohol concentration.[17] For example, in a DUI Intensive Supervision Program in Multnomah County Circuit Court, Judge Dorothy Baker uses an electronic monitoring and a telephone-based remote-alcohol-testing device in conjunc-

7. See the "Introduction" in W. Brunson and P. Knighten (eds.) *Strategies for Addressing the DWI Offender: 10 Promising Sentencing Practices* (Washington, DC: National Highway Traffic Safety Administration, 2004) p.7.
8. C. Wiliszowski *et al.* "Determine Reasons for Repeat Drinking and Driving," DOT HS 808 401 May 1996 cited in "Introduction," footnote 1.
9. J. L. Nichols and H. L. Ross, "The Effectiveness of Legal Sanctions in Dealing with Drinking Drivers." U.S. Public Health Service, *Report to the Surgeon General* (Surgeon General's Workshop on Drunk Driving: Background Papers, 1989), p. 101.
10. For a description of these types of special programs, see National Highway Traffic Safety Administration and the National Institute on Alcohol Abuse and Alcoholism, *A Guide to Sentencing DWI Offenders,* 2nd ed. (Washington, DC: National Highway Traffic Safety Administration, 2005), cited hereafter as *A Guide to Sentencing DWI Offenders.*
11. R. Voas and D. A. Fisher, "Court Procedures for Handling Intoxicated Drivers," *Alcohol Research and Health* (Winter 2001) p. 4.
12. Wiliszowski, *loc.cit.*
13. J. L. Nichols and H. L. Ross, "The Effectiveness of Legal Sanctions in Dealing with Drinking Drivers," U.S. Public Health Service, *Report to the Surgeon General* (Surgeon General's Workshop on Drunk Driving: Background Papers, 1989), p. 102.
14. Thomson lists six ways in which supervision is intensive: 1) it is extensive with multiple, weekly face-to face contacts, 2) it is focused on specific behavior regulations governing curfews, drug use, travel, employment and community service, 3) it is ubiquitous with offenders frequently subjected to random drug tests and unannounced curfew checks, 4) it is graduated with offenders proceeding through phases, 5) it is enforced with penalties for noncompliance and new arrests, and 6) it is coordinated. D. Thomson, *Intensive Probation Supervision in Illinois* (Chicago: Center for Research in Law and Justice, 1985).
15. J.M. Byrne, A. J. Lurigio, and C. Baird, *The Effectiveness of the New Intensive Supervision Programs*, *RESEARCH IN CORRECTIONS series* (September 1989), p. 8.
16. Mike Haddon, Gary Franchina, and Ron Gordon, *DUI Best Sentencing Practices Guidebook* (Salt Lake City: Utah Sentencing Commission), VI-4. See also A. K. Schmidt, "Electronic Monitoring of Offenders Increases," *NIJ Reports* (Washington, D.C.: National Institute of Justice, 1989) pp 2-5. Peggy Conway, editor of the *Journal of Offender Monitoring,* estimates 130,000 monitoring units are deployed daily in the United States, quoted in Robert S. Gable and Kirkland R. Gable, "The Practical Limitations and Positive Potential of Electronic Monitoring," *Corrections Compendium* (September/October, 2007).
17. Robert B. Voas "Technological Developments Open New Opportunities to Reduce the Recidivism of Convicted Drinking Drivers," in *FrontLines: Linking Alcohol Services Research and Practice.* (Washington, D.C.: NIAAA, September 2004), p. 6.

Electronic monitoring is as effective as incarceration, and less expensive.

tion with drug testing, intensive probation, or court-based tracking, but the distinguishing features of this program are the requirements that offenders submit to polygraph tests and sell all vehicles they own. [18]

STUDY DESIGN

The conclusions in this study are based on a comparison of offenders who wore the SCRAM ankle bracelet in North Carolina over the past two years. How did the characteristics of SCRAM wearers compare to the pool of nearly 3,000 offenders (2,985 to be precise) who did not wear the SCRAM ankle bracelet?

- **Age:** Those sentenced to the SCRAM ankle bracelet were almost three years younger on the average than other offenders.
- **Race:** Those sentenced to wear the SCRAM ankle bracelet were more likely to be white and less likely to be Hispanic than other offenders.
- **Sex:** Those sentenced to wear the SCRAM anklet were predominantly male, and the female population was about equal proportionally to the pool of offenders (11.4% and 13.5%, respectively).
- **County:** Almost all of those sentenced to the SCRAM ankle bracelet were from Mecklenburg and Gaston counties, but the offenders in the pool were primarily from Mecklenburg, Wake, and Buncombe counties.
- **Recidivism:** After the ankle braclet was removed, the recidivism rate of the 114 SCRAM wearers was 17.5% compared to a rate of 26.9% for the offenders as a whole. This difference is significant in that it could occur by chance less than three times in a hundred. SCRAM wearers tended to recidivate sooner than other offenders, 221 days versus 275 days, respectively, but that difference was not statistically significant.

Two caveats are necessary here:

(1) This recidivism figure is an *overall* rate and does not take into account differences in characteristics of SCRAM wearers versus the general offender population, such as age and race.

(2) Although recidivism is perhaps the best measure of success available, it is flawed because it depends not only upon the offender driving while impaired but also being *caught* driving while impaired. That at least partially depends upon the levels of enforcement in each community. It is not only possible, but likely, that many people drive impaired numerous times before they are apprehended. One survey estimated that the number of times a person drives drunk before being arrested is 300.[19]

To overcome, the first of these difficulties, 114 SCRAM wearers were matched more closely with a subsample of the entire pool of 2,985 offenders. This matching led to a comparison group of 261 people who were similar to SCRAM wearers in:

- age (33.6 years old versus 32.8 years old for the SCRAM sample);
- race (37.5% nonwhite versus 27.2%);
- sex (13.4% female versus 11.4%); and
- county where conviction took place.

Even after matching on these characteristics, however, there were some differences between the SCRAM users and the comparison group:

- number of prior DWI offences (1.5 versus 1.1 for SCRAM group);
- prior offenses in general (6.1 versus 7.5); and
- number of charges (1.5 versus 1.2).

It appears as if judges are selecting the more serious, repeat offenders as candidates for the SCRAM ankle bracelet. Comparing those offenders sentenced to wear SCRAM bracelets with this matched set of offenders leads to the preliminary conclusions listed below.

RESULTS FROM THE PRELIMINARY EVALUATION OF SCRAM

SCRAM WORKS BEST WITH REPEAT OFFENDERS

Comparing the SCRAM ankle bracelet wearers to the matched comparison set diminishes the difference in recidivism rates to the point where the differences are not statistically significant. The recidivism rate *for any crime* for the SCRAM wearers was 17.5% compared to 20.3% for the matched group. If the comparison is restricted to only the more "hard-core" offenders, the differences are more pronounced. When only offenders with at least two prior offences are considered, the differences in recidivism between SCRAM wearers at 15.7% and the matched set at 28.6% were much greater.

When considering prior DWI offence recidivism only, the differences were 2.6% for SCRAM wearers versus 4.6% for the comparison group. The tendency for SCRAM wearers to recidivate sooner than other offenders continued with the matched group (221 days versus 296 days respectively).

18. State of Oregon, Office of Alcohol and Drug Abuse Program, *DUII Program Operations Guide,* 1995, as cited in S.C. Lapham, J.C. deBaca, J. Lapidus, and G. P. McMillan, "Randomized Sanctions to Reduce Re-Offense Among Repeat Impaired-Driving Offenders," 102 *Addiction* (2007) 1619.
19. R. B. Voas and J. M. Hause, "Deterring the Drinking Driver: The Stockton Experience," *Accident Analysis and Prevention* 19 (1987): 81-90.

After statistically controlling for multiple differences between the SCRAM wearers and other offenders,[20] SCRAM users have a lower probability of recidivism than the matched set until a long time after their arrest (1,240 days or 3.4 years), when they become more likely to recidivate than their comparison group.[21]

SCRAM IS EFFECTIVE WHEN WORN

People are very unlikely to recidivate while wearing a SCRAM anklet. In our sample of 114 people wearing the SCRAM bracelet, only two committed a new offense while wearing the anklet. This result is consistent with the findings of the effectiveness of Minnesota's Remote Electronic Alcohol Monitoring (REAM) program, which found that very few arrests for new DWI offenses occurred while participants were enrolled in the program.[22] In that respect, the SCRAM ankle bracelet may be analogous to ignition interlock devices. Recidivism rates for ignition interlocks decreased between 50% and 95% while on the automobile, but once it is removed, "recidivism rates gradually increase to match the rates of those who never had an ignition interlock."[23]

SCRAM NEEDS TO BE WORN AT LEAST 90 DAYS

A key factor in determining the effectiveness of the SCRAM ankle bracelet is the length of time it is worn. The ankle bracelet should be worn at least 90 days although that is the very minimum amount of time needed to remain sober while on a treatment program for alcohol and/or drug addiction.[24] Offenders who wore the SCRAM bracelet at least 90 days and who had at least two prior DWI convictions had a lower probability of re-offending than other DWI offenders.

In comparison to the matched set, offenders who wore the SCRAM anklet for more than 90 days recidivated at half the rate of offenders who wore the ankle bracelet for less than 90 days (10% versus 20%). The recidivism rate of SCRAM users that wore the anklet for less than 90 days was nearly identical to the rate of offenders who did not wear a SCRAM bracelet. Research indicates that 90 days may be the minimum threshold to have treatment take effect. For addictions in general, six to twelve months of treatment may be necessary to achieve sobriety.[25]

SCRAM SHOULD BE USED IN COMBINATION WITH TREATMENT

The ever increasing cost of incarceration and the lack of success of traditional . . . sanctions have caused courts to explore other alternatives.

The treatment model focuses on protecting public safety by attacking directly the root cause of DWI: alcohol and substance abuse. There is little in the literature about alcohol-monitoring devices, or electronic monitoring devices in general, to suggest that monitoring in and of itself will have a long-term influence on offender behavior. SCRAM, as well as other monitoring devices, should be used in conjunction with treatment for alcohol and drug addiction to keep offenders sober long enough for treatment to have an impact. Compliance with treatment is verified by frequent testing for alcohol and drug abuse, close community supervision, and frequent court hearings. Incentives are most effective if they occur shortly after progress is made. Positive monitoring can be used to "document and reinforce small behavioral improvements while they are occurring in the offender's usual social environment."[26]

SUMMARY

The ever increasing cost of incarceration and the lack of success of traditional sentencing sanctions have caused courts to explore other alternatives. The growth in DWI courts[27] has resulted in extending the length and increasing the intensity of offender monitoring to allow time for that treatment to work. DWI courts are expensive to operate in part because of the cost of monitoring, which is why alcohol-monitoring solutions are promising. SCRAM is a particularly promising alternative because it not only deters recidivism while in operation but, when used in combination with treatment, also allows for the possibility of changing offender behavior.

The American Correctional Associations', *Standards for Electronic Monitoring Programs* suggests an individualized plan should be completed for each offender before a personal mon-

20. The multivariate technique employed here is a survival-analysis technique known as "Cox regression."
21. As one caveat, it must be noted that data from the SCRAM group was available for 3,000 days post-arrest and from the comparison group only 1,500 days post-arrest, so it is not possible to determine what happened to recidivism of the comparison after 1,500 days, whereas it is possible to determine that recidivism for the SCRAM group stabilized after 1,240 days.
22. Minnesota Department of Corrections, "Remote Electronic Alcohol Monitoring 2004 Report," as quoted in Judge Michael Barrasse, "Promising Sentencing Practice No. 6: Electronic Monitoring and SCRAM," in W. Brunson and P. Knighten (eds.) *Strategies for Addressing the DWI Offender: 10 Promising Sentencing Practices* (Washington, DC: National Highway Traffic Safety Administration, 2004), p. 38.
23. J. Mejeur, "Ignition Interlocks: Turn the Key and Blow," *State Legislatures* (December 2007), 16-21 at 21.
24. For purposes of comparison, it is interesting to note that the Utah Sentencing Commission notes that suspensions must last at least three months to be effective in reducing recidivism and ideally should last between 12 and 18 months with respect to another intervention or license suspensions. Mike Haddon, Gary Franchina, and Ron Gordon, DUI Best Sentencing Practices Guidebook (Salt Lake City: Utah Sentencing Commission), chapter 3.
25. D. Marlowe, D. DeMatteo, and D. Festinger, "A Sober Assessment of Drug Courts," 16 *Federal Sentencing Reporter* (2003) 1-5.
26. Robert S. Gable and Kirkland R. Gable, "The Practical Limitations and Positive Potential of Electronic Monitoring," *Corrections Compendium* (September/October, 2007), p. 40.
27. V. E. Flango and C.R. Flango, "What's Happening with DWI Courts?" in C. Flango, C. Campbell and N. Kauder (eds.), *Future Trends in State Courts, 2006* (Williamsburg, VA: National Center for State Courts).

itoring device is installed.[28] Other professional guidelines suggest a risk assessment.[29] A comparable set of criteria may be a good idea for judges as well.

To develop such a plan, judges need to know which candidates are best for each sentencing alternative. This study attempted to examine the offenders who would most benefit from the use of a SCRAM ankle bracelet. Although based upon a decent sample size, this preliminary study was conducted in only one location and did not have the luxury of using random assignment of offenders to SCRAM to produce definitive conclusions. Much more work is needed to determine the types of treatment options best used in conjunction with the SCRAM bracelet to reduce recidivism or at least to increase the time until the next offense.

Nevertheless, this preliminary study was able to produce the findings discussed above. Key among these findings are: 1) The SCRAM ankle bracelet is most effective when used with hard-core offenders who had at least two prior DWI convictions; 2) SCRAM is effective when worn; 3) SCRAM sentences are not be recommended for periods of less than 90 days; indeed, the ankle bracelet may need to be worn for six months or a year to be most effective.

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28. American Correctional Association, *Standards for Electronic Monitoring Programs* (Laurel, MD: American Correctional Association) 1995.

29. See, e.g., A. H. Crowe *Offender Supervision with Electronic Technology: A User's Guide* (Lexington, KY: American Probation and Parole Association, 2002).

Roadside Seizures of Medical Marijuana:

Public Safety and Public Policy as Limitations upon Transporting and the Return of Lawfully Seized Medical Marijuana

Cameron Mostaghim

In November 2007, a California Court of Appeal issued a decision in *Garden Grove v. Superior Court*[1] that requires local police officers to return medical marijuana to a qualified patient, despite a lawful search and seizure subsequent to a moving motor vehicle violation. The effect of this ruling, in at least some instances, will be to place marijuana back into the hands of a person who is a risk to public safety while driving under the influence or is engaged in the "diversion"[2] of medical marijuana through unlawful transporting.

A qualified patient is authorized to possess and use medical marijuana that adheres to certain general quantity guidelines. While adhering to the general quantity guideline limits for which possession is allowed by law, a person could transport marijuana for his or her use and thereafter drive under the influence or, alternatively, could unlawfully divert medical marijuana for nonmedical purposes. States have the right to exercise their police powers for the benefit of public health, safety, and welfare. This article proposes a presumption limiting a qualified patient or primary caregiver's[3] right to transport medical marijuana within a motor vehicle to protect against driving under the influence, reduce unlawful diversions, and ensure compliance with medical marijuana laws.[4] This presumption, under certain circumstances, allows for a forfeiture of medical marijuana that is presumably possessed for nonmedical purposes.

In addressing the *Garden Grove* decision, this article relies upon public safety and public policy to justify the forfeiture and destruction of medical marijuana following lawful seizure from a motor vehicle. This presumption, while making an exception for the initial procurement of medical marijuana, presumes that a patient or caregiver who has direct and immediate control of a motor vehicle is transporting the medical marijuana for nonmedical use. Notably, the presumption would only apply to persons whose possession adheres to the general quantity guideline limits.[5]

The rationale for the presumption is that there is no reason that a patient or caregiver should be driving while transporting marijuana, with the exception of same-day procurement, and thus, the impermissible transporting of medical marijuana should result in forfeiture. This, in turn, prevents the marijuana from being returned to the patient or caregiver and acts as a deterrent to transporting marijuana for nonmedical purposes or in situations that can adversely affect public safety.

I. COMMON CHARACTERISTICS OF MEDICAL MARIJUANA LAWS

A. LIMITATIONS ON AMOUNTS FOR POSSESSION AND USE

Currently, there are 13 states with laws related to medical marijuana: Alaska, California, Colorado, Hawaii, Maine, Maryland, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont, and Washington.[6] The allowable limit of marijuana that may be legally possessed spans from none in Maryland[7] to 24 ounces in Oregon,[8] with Washington and New Mexico allowing a 60-day and 90-day supply,[9] respectively, as

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Footnotes

1. City of Garden Grove v. Super. Ct. of Orange Co., 157 Cal. App. 4th 355 (Cal. App. 4th Dist. 2007).
2. "Diversion" of medical marijuana, as hereafter used, means any nonmedical purpose or use but especially distribution, sharing, resale, and recreational use.
3. Further references to "patient" or "caregiver" means a "qualified patient" and "primary caregiver," respectively, within the meaning of California's medical marijuana laws. Cal. Health & Safety Code Ann. § 11362.7(d), (f) (Lexis 2008).
4. While this article considers medical marijuana laws in general, it surveys California law in particular.
5. As will be discussed, persons possessing quantities above the general quantity guideline limits are likely not in compliance with medical marijuana laws and are subject to criminal prosecution; thus, the presumption need not apply to them because their conduct is already unlawful.
6. NORML, *Working to Reform Marijuana Laws*, http://www.norml.org/index.cfm?Group_ID=3391 (updated Dec. 01, 2004).
7. Maryland merely limits penalties to a $100 fine after a successful defense of medical need. Md. Code Ann. Crim. Law § 5-601(c)(3)(ii) (Lexis 2008).
8. Or. Rev. Stat. Ann. § 475.320(1)(a) (Lexis 2007).
9. N.M. Stat. Ann. § 26-2B-3(A) (Lexis 2008); Wash. Rev. Code Ann. § 69.51A.040(3)(b) (Lexis 2008).
10. Cal. Health & Safety Code Ann. § 11362.77(a) (Lexis 2008).

determined by the state health department. Most states allow possession of between one to eight ounces of marijuana. California permits a qualified patient or primary caregiver to possess up to eight ounces under general quantity guidelines,[10] but they may possess a greater quantity, upon physician's recommendation, if their medical needs so require.[11]

B. AFFIRMATIVE DEFENSES AND PROTECTION GENERALLY

While states generally afford legal protections to qualified patients and their primary caregiver, the means by which these protections are invoked varies. Nearly every state allows the use of its statutes to be employed as an affirmative defense against prosecution.[12] Most states have mandatory registration and identification programs, though participation is voluntary in California.[13] Many states, including California, allow protection from arrest and prosecution for qualified patients and primary caregivers who are registered cardholders in compliance with state law requirements.[14] When the qualified patient or primary caregiver is neither a registered cardholder nor in full compliance, as for example when his or her possession exceeds the general quantity limit, the qualified patient or primary caregiver may invoke the statutory protections by way of an affirmative defense.[15] This is true in California since the qualified patient or primary caregiver need not be registered to avail themselves of the afforded protections.[16]

C. EXCEPTIONS FOR ENDANGERING OTHERS AND/OR USE WHILE IN A MOTOR VEHICLE

Though medical marijuana laws ("MMLs") vary in the degree of protection they afford to qualified patients and primary caregivers, most states provide exceptions to the protections granted by their MMLs. These laws prohibit qualified patients and primary caregivers from "engaging in conduct that endangers others"[17] and/or prohibit the use of marijuana while in an operated motor vehicle.[18] California also precludes protection for conduct that diverts marijuana for nonmedical uses.[19]

D. PROPERTY RIGHTS AND REQUIRED RETURNS OF MARIJUANA FOLLOWING SEIZURE

States also differ in their treatment of seized marijuana and/or paraphernalia following a situation where prosecution was not initiated or was dismissed because the possession was deemed non-criminal. Most MMLs protect marijuana and paraphernalia as property that must be returned to a qualified patient or primary caregiver who is in lawful possession. Some states, such as California, did not enact such a provision as part of its MMLs and look to other statutes[20] and decisional law for clarification of the issue. Notably, Vermont is *sui generis* in specifying that, under its medical marijuana laws, law-enforcement officers are expressly not required to return marijuana or paraphernalia following a seizure.[21]

[M]edical marijuana laws ("MMLs") vary in the degree of protection they afford to qualified patients and primary caregivers . . . .

II. EFFECT OF MEDICAL MARIJUANA LAWS ON VEHICLE SEARCHES, SEIZURES, AND ARRESTS

A. MOTOR VEHICLE SEARCHES AND SEIZURES

Generally, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."[22] In addition, probable cause will permit a warrantless search of an automobile with the scope of the search extending to "every part of the vehicle and its contents" that might contain the items actually sought.[23]

B. EFFECT OF MEDICAL MARIJUANA LAWS ON VEHICLE SEARCHES AND SEIZURES

California courts have explained the effect of California's Compassionate Use Act ("CUA") upon law-enforcement investigations. In *People v. Strasburg*, a police officer encountered Strasburg parked in his car immediately after he had smoked marijuana.[24] Strasburg notified the officer of his status as a qualified patient and produced his prescription.[25] The issue was whether the officer had probable cause to search Strasburg's car and, consequentially, whether detaining and frisking him was lawful since he was a qualified patient under the CUA.[26] The court held the CUA "does not impair reasonable police investigations and searches."[27] The court stated the CUA provides limited immunity, as opposed to a shield from investigation, and held that the officer was entitled to search and investigate to determine if Strasburg was acting lawfully because probable cause existed after the officer smelled the marijuana.[28] Strasburg's conviction was upheld because he possessed 23

11. *Id.* § 11362.77(b).
12. *Id.* § 11362.5(d); *People v. Mower*, 28 Cal. 4th 457, 474 (2002) (concluding that section 11362.5(d) grants a "defendant a limited immunity from prosecution . . . .").
13. Cal. Health & Safety Code Ann. § 11362.71(a)(1) (Lexis 2007).
14. *Id.* § 11362.71(e).
15. *Id.* § 11362.77(b); People v. Wright, 40 Cal. 4th 81, 97 (2006) (recognizing medical needs exceeding the general eight ounce quantity limit will afford a Compassionate Use Act affirmative defense).
16. Cal. Health & Safety Code Ann. § 11362.71(f) (Lexis 2007).
17. *Id.* § 11362.5(b)(2).
18. *Id.* § 11362.79(d).
19. *Id.* § 11362.5(b)(2).
20. *Id.* § 11473.5(a).
21. Vt. Stat. Ann. tit. 18 § 4474b(d) (Lexis 2007).
22. Whren v. U.S., 517 U.S. 806, 810 (1996).
23. People v. Strasburg, 148 Cal. App. 4th 1052, 1059 (Cal. App. 1st Dist. 2007).
24. *Id.* at 1055.
25. *Id.* at 1055-1056.
26. *Id* at 1058.
27. *Id.*
28. *Id.* at 1060.

In Trippett, the court recognized that the [Compassionate Use Act] might impliedly afford a defense to transporting marijuana.

ounces of marijuana.[29]

While voters approved the CUA in 1996,[30] the Medical Marijuana Program Act ("MMPA") was enacted in 2003 to "address additional issues that were not included within the [CUA] and that [needed to be resolved to promote its] fair and orderly implementation . . . ."[31] While the CUA only applied to possession and cultivation,[32] the MMPA extended patient and caregiver protections to the acts of transporting, maintaining or allowing a place to be used for marijuana related activity, and nuisance.[33] The MMPA affords immunity from arrest and prosecution,[34] as discussed above, to a qualified patient or primary caregiver who is registered, has an identification card, and is in compliance. The Supreme Court of California, in discussing the CUA as an affirmative defense, said that "immunity from arrest is exceptional and, when granted . . . is granted expressly."[35] Such is the case for a registered patient or caregiver with an identification card, but only if such persons comply with MML provisions.[36]

III. THE *GARDEN GROVE* DECISION WITHIN THE FRAMEWORK OF CALIFORNIA'S MEDICAL MARIJUANA LAWS

A. PURPOSE, SCOPE, AND LIMITATIONS OF CALIFORNIA'S MEDICAL MARIJUANA LAWS

The Supreme Court of California specifically addressed the purpose and scope of the CUA in *Ross v. RagingWire Telecomm., Inc*.[37] In *Ross*, the plaintiff, a qualified medical marijuana user, sued his employer after being terminated for failing a pre-employment drug test.[38] Ross asserted his employer needed to afford him a reasonable accommodation and his termination was wrongful as against public policy.[39] The court held Ross could not state a valid disability discrimination claim or wrongful termination claim.[40] The court reasoned that CUA was not intended to alter employment relationships.[41] Rather, the CUA's purpose is to provide seriously ill Californians with the right to obtain and use physician-recommended marijuana for medical purposes while ensuring that qualified users and their primary caregivers are not subject to criminal prosecution or criminal sanction.[42] The employee's termination was upheld since the CUA speaks exclusively to the criminal law.[43]

Finally, in addition to purpose and scope, the *Ross* court also addressed the CUA's limitations. In particular, the court explicitly rejected the assertion that the CUA created a broad right to use marijuana without hindrance or inconvenience, since the measure did not purport to change the laws affecting public intoxication, nor did the CUA "supersede legislation prohibiting persons from engaging in conduct that endangers others," the latter being expressly codified.[44]

B. MEDICAL MARIJUANA LAWS AS A DEFENSE TO CRIMINAL TRANSPORTATION

Given the manner in which the CUA and MMPA were enacted, there has been some inconsistency with respect to whether California's MMLs provide a defense to a criminal charge of transporting marijuana. The Supreme Court of California, in *People v. Wright*,[45] addressed the issue of transporting under California's MMLs, noting a conflict between the appellate court decisions in *People v. Trippet*[46] and *People v. Young*.[47]

In *Trippet*, the court recognized that the CUA might impliedly afford a defense to transporting marijuana.[48] In that case, the defendant's vehicle was stopped for not having a license plate lamp light.[49] Upon smelling marijuana, the police officer searched the car and confiscated approximately two pounds.[50] Trippet was charged with both transporting and possession.[51] The *Trippet* court held that although the CUA did not expressly provide a defense to transporting, it might impliedly provide such a defense in some situations depending upon the quantity transported and the method, timing, and distance of the transportation to determine whether the trans-

29. *Id.*
30. Cal. Health & Safety Code Ann. § 11362.5(a) (Lexis 2008).
31. People v. Urziceanu, 132 Cal. App. 4th 747, 783 (Cal. App. 3rd Dist. 2005).
32. Wright, 40 Cal. 4th at 84.
33. *Id.* at 93.
34. *Id.*
35. Mower, 28 Cal. 4th at 469.
36. Cal. Health & Safety Code Ann. § 11362.71(e) (Lexis 2007).
37. 42 Cal. 4th 920 (2008).
38. *Id.* at 924.
39. *Id.* at 925.
40. *Id.* at 924.
41. *Id.* at 928.
42. *Id.*
43. The California legislature has recently passed a bill to overturn the decision handed down by the California Supreme Court in *Ross*. On February 21, 2008, Assembly Member Leno introduced Assembly Bill 2279, which has successfully passed both houses as of August 29, 2008. The proposed law permits an employee or prospective employee to assert a cause of action against an employer who discriminates against him or her on the basis of the employee's status as a qualified patient or for taking adverse action after the employee fails a drug test. However, the proposed law is inapplicable to those employed in a "safety-sensitive position" and does not preclude the employer from taking adverse action against an employee who is impaired at work or during work hours. Legis. Counsel of Cal., *Bill Information*, http://www.leginfo.ca.gov/bilinfo.html; *search* "AB 2279", *select* "Enrolled" bill in HTML or PDF (accessed Sept. 28, 2008).
44. Ross, 42 Cal. 4th at 928-929.
45. 40 Cal. 4th at 90-92.
46. 56 Cal. App. 4th 1532 (Cal. App. 1st Dist. 1997).
47. 92 Cal. App. 4th 229 (Cal. App. 3rd Dist. 2001).
48. Trippet, 56 Cal. App. 4th at 1536.
49. *Id.*
50. *Id.*
51. *Id.* at 1547.

port reasonably related to the patient's medical needs (hereafter the "*Trippet* test").[52] The case was remanded to determine whether Trippet was a qualified patient and what amount of marijuana was authorized by her physician.[53]

However, the *Young* court expressly rejected the CUA as affording a defense to a charge of transporting.[54] In *Young*, an officer observed a car swerve on the highway.[55] Upon investigation, the officer asked Young if drugs were in the car.[56] Young admitted the presence of marijuana, but provided a physician's statement authorizing use.[57] The *Young* court held the CUA does not provide a defense to transporting marijuana as it unambiguously covers only possession and cultivation.[58] Young's conviction for transporting marijuana was affirmed.[59]

In *Wright*, the Supreme Court of California indirectly endorsed the *Trippet* test with respect to transporting cases. Defendant Wright was found to be in possession of several bags of marijuana weighing just over a pound after officers investigated a tip that his car smelled of marijuana.[60] He was charged with possession for sale, transporting, and driving on a suspended license.[61] Before trial, he pled guilty to the license charge and, at trial, defended the remaining charges upon the grounds that he was a qualified patient who preferred to ingest marijuana rather than smoke it, which was why he asserted he possessed greater than a pound.[62] Wright was convicted of possession for sale and transporting after the trial court refused a CUA defense jury instruction.[63] The issue was whether the CUA provides a defense to a charge of transporting and whether it was reversible error to refuse such an instruction.[64] While acknowledging that the *Trippet* test continues to be a useful analytical tool, the court held the transporting issue related to the CUA was moot since the newly enacted MMPA had extended protections to charges of transporting.[65] The court found that Wright would be entitled to a CUA defense,[66] as expanded by the MMPA and under the facts of his case, but his conviction was upheld. Since the jury was given the option of convicting him for the lesser included offense of possession, it had resolved, albeit implicitly but necessarily, that Wright's conduct was not for personal medical use when it convicted him for sales.[67]

In addition to addressing whether the CUA, as expanded by the MMPA, afforded a defense to transporting, the court addressed what must be proven for a defendant to invoke an affirmative defense under the CUA. In particular, the *Wright* court noted that the defendant has the burden to produce evidence that: 1) he is a qualified patient; 2) the quantity possessed was authorized pursuant to a physician's recommendation; and 3) the marijuana is for the defendant's own personal medical use.[68]

The issue before the Garden Grove court was whether policy may deny the return of marijuana . . . because returning it would result in a violation of [federal law].

C. THE *GARDEN GROVE* DECISION

As mentioned above, *Garden Grove v. Superior Court*[69] addressed the right of a qualified patient to have marijuana returned to him or her after it was lawfully seized subsequent to a valid traffic stop. In *Garden Grove*, defendant Kha was stopped for running a red light.[70] Kha consented to a vehicle search and officers recovered a pipe and 8.1 grams of marijuana that Kha claimed he obtained from a lab in Long Beach.[71] Though Kha produced a seemingly valid doctor's referral, the police seized the marijuana and cited Kha for running the red light and unlawful possession of less than an ounce of marijuana while driving.[72]

Kha subsequently "pled guilty to the traffic violation, but . . . contested the drug charge."[73] After Kha's doctor verified that Kha was authorized to use marijuana for medical reasons, the prosecutor dismissed the criminal charge, but opposed Kha's request to return the marijuana.[74] The trial court ordered that the marijuana be returned to Kha.[75] The City of Garden Grove ("the City") filed a writ of mandamus and/or prohibition "directing the trial court to vacate its order and enter a new one denying Kha's motion for a return of [the marijuana]."[76] The Attorney General of California defended the trial court's order, as *amicus curiae*.[77]

The issue before the *Garden Grove* court was whether police may deny the return of marijuana that was lawfully seized during a vehicle search because returning it would result in a violation of the federal Controlled Substances Act ("CSA").[78]

The City asserted Kha was not entitled to the protections of the CUA and MMPA because Kha 1) obtained his marijuana illegally, 2) did not have a qualifying illness, and 3) was not charged with a requisite offense covered under the CUA or MMPA since he was cited for possessing marijuana while driving in violation of the Vehicle Code.[79] The court rejected all

52. *Id.* at 1550-1551.
53. *Id.* at 1536.
54. Young, 92 Cal. App. 4th at 231.
55. *Id.* at 232.
56. *Id.*
57. *Id.*
58. *Id.* at 237.
59. *Id.* at 238.
60. Wright, 40 Cal. 4th at 85-86.
61. *Id.* at 86.
62. *Id.* at 87.
63. *Id.* at 87-89.
64. *Id.* at 90.
65. *Id.* at 92.
66. *Id.* at 98.
67. *Id.* at 98-99.
68. *Id.* at 100-101 (Baxter, J., concurring and dissenting).
69. Garden Grove, 157 Cal. App. 4th at 362.
70. *Id.* at 363.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 364.
77. *Id.*
78. *Id.* at 380.
79. *Id.* at 373.

The court concluded by stating it was unable to discern any justification for the City or its police department to withhold the marijuana . . . .

of these arguments stating, respectively, 1) the CUA and MMPA afford protection without regard to the source of the marijuana, 2) mere recommendation by a physician suffices for CUA and MMPA protection, and 3) the Vehicle Code statute prohibiting the transporting of marijuana was subject to a CUA and MMPA defense since it was merely an automobile-specific prohibition upon transporting marijuana.[80]

The court then addressed the issue of whether marijuana's illegality under federal law would permit the City to prevail on its argument that state law, to the extent that it required the return of the marijuana, was preempted by federal law.[81] The court acknowledged there was not any exception to criminal possession of marijuana under federal law, but since state law enforcement officials act pursuant to state law, they cannot use federal laws as a mechanism of enforcement in state law proceedings.[82] The court further noted that when Congress enacted the federal CSA, it did not intend to occupy the entire area of law that regulates marijuana or controlled substances,[83] thus, the court held that federal supremacy principals of preemption did not permit the City to withhold and not return the marijuana.[84]

Finally, the court addressed due process considerations related to returning the marijuana.[85] California's statute on the destruction of property in the absence of a conviction essentially provides that "seizures of controlled substances, instruments, or paraphernalia. . . shall be destroyed by order of the court, unless the court finds that [they] were lawfully possessed by the defendant."[86] Despite the fact that neither the aforementioned law nor the MML provisions expressly provide for the return of the marijuana at issue, the court found that, because Kha was a qualified patient with physician authorization to possess the amount seized under state law, due process considerations of the Fourteenth Amendment required its return.[87] The court concluded by stating it was unable to discern any justification for the City or its police department to withhold the marijuana and upheld the trial court's order.[88]

Though the *Garden Grove* court did not explicitly apply the three-prong test articulated in *Wright*, it implicitly found the *Wright* test was satisfied because 1) Kha was a qualified patient (first prong) with 2) physician authorization to possess the amount seized (second prong), and 3) the marijuana was for Kha's personal medical use (third prong).[89] As will be discussed, however, public policy concerns could justify permanently withholding medical marijuana subsequent to a valid traffic stop or vehicle investigation.

IV. PUBLIC SAFETY AND PUBLIC POLICY CONSIDERATIONS TO LIMIT TRANSPORTING AND THE RETURN OF SEIZED MEDICAL MARIJUANA

Since the *Garden Grove* rule requires the return of lawfully seized medical marijuana if the court finds that possession was lawful, the prosecution must demonstrate possession was unlawful to avoid operation of the *Garden Grove* rule. With the exception of initial procurement, a patient or caregiver who transports marijuana in a motor vehicle should be closely scrutinized because such is potentially indicative of intent to use marijuana and then operate a motor vehicle or engage in unlawful diversion, both of which fall outside of MML protections.

A. PUBLIC SAFETY AS A LIMITATION UPON THE TRANSPORTING OF MEDICAL MARIJUANA

Both driving under the influence of marijuana and possessing marijuana while driving are dangers to public safety.

1. Inherent Dangers to Public Safety Resulting from Drugged Driving

California, like many other states with MMLs, has expressly declared that the CUA does not supersede legislation prohibiting persons from engaging in conduct that endangers others.[90] California law prohibits driving under the influence of alcohol and drugs,[91] and as a matter of law a person's authorized use of alcohol or a drug does not normally constitute a defense to a violation.[92] As one court noted,

> one way in which use of marijuana most clearly does affect the general public is in regard to its effect on driving . . . . [R]esearch has produced increasing evidence of significant impairment of the driving ability of persons under the influence of cannabis. Distortion of time perception, impairment of psychomotor function, and increased selectivity in attentiveness to surroundings apparently can combine to lower driver ability.[93]

These attending risks to public safety are even more problematic in instances where a patient's medical need for marijuana exceeds the general eight ounce limit because such a need for larger than usual amounts of medical marijuana necessarily means that heavier and/or more

80 *Id. at* 375-376.
81. *Id.* at 377-386.
82. *Id.* at 378-379.
83. *Id.* at 383.
84. *Id.* at 386.
85. *Id.* at 386-392.
86. *Id.* at 377-378.
87. *Id.* at 387-389.
88. *Id.* at 391.
89. *Id.* at 363.
90. Ross, 42 Cal. 4th at 929.
91. Cal. Veh. Code Ann. § 23152(a) (Lexis 2008).
92. *Id.* § 23630.
93. Ravin v. State, 537 P.2d 494, 510 (Alaska 1975).

The most logical and probable reason a patient would be transporting medical marijuana with them while they are driving is because they need or want to use it.

frequent use is required by the patient. This can equate to a greater degree of impairment, in the case of heavier use, or a continuous state of impairment, in the case of more frequent use. Both of these situations lend themselves to heightened public safety risks when the medicated patient undertakes to drive. While it is certainly true that not all qualified patients are driving under the influence, the *Trippet* and *Strasburg* cases demonstrate that some qualified patients, if even but a minority, do in fact smoke marijuana and then drive a motor vehicle.

Though laws prohibiting Driving Under the Influence ("DUI") may be sufficient if law enforcement detects impairment, studies suggest that more than half of the occurrences of driving under the influence of cannabis ("DUIC") may go undetected by the police.[94] In addition, roadside oral drug testing can be inadequate to detect current marijuana impairment and DUIC due to inaccuracies.[95] Furthermore, most marijuana drug tests measure inactive metabolites of THC, which only confirms past use and not current impairment.[96] Finally, studies have noted a greater need for intervention by policy makers to guard against the risks inherent to DUIC.[97] Accordingly, DUI laws do not adequately address the public safety risks related to DUIC.

2. Restricting the Transporting of Medical Marijuana to Ensure Public Safety

While a defendant must be a qualified patient prior to criminal prosecution in order to invoke CUA protections,[98] the general trend among the cases is that where the qualified patient possesses less than the general eight ounce quantity limit, the patient is not subject to criminal prosecution. This is consistent with the CUA's purpose of not imposing criminal liability,[99] but this alone does not necessitate a finding that transporting is in compliance with law so as to justify the return of lawfully seized marijuana after a valid traffic stop or police investigation involving a motor vehicle.

As the cases demonstrate, law enforcement is often interacting with qualified patients because of a moving motor vehicle violation. Many of these moving motor vehicle violations may in fact be the result of impaired driving, but - of course - this is not a given. Nonetheless, even to the extent that the moving violation is not actually caused by a qualified patient's impaired driving, there seems to be little reason that they should need to drive and transport marijuana beyond the time it is initially procured.

The most logical and probable reason a patient would be transporting medical marijuana with them while they are driving is because they need or want to use it. However, a qualified patient who drives while transporting marijuana, with the exception of its initial procurement, seems indicative of intent to operate a motor vehicle subsequent to using marijuana and, irrespective of whether such act actually be realized, contemplates a use of medical marijuana - conduct endangering to others - that is prohibited by the MMLs and, thus, should fall outside of the CUA's protections. Courts and the general public should be skeptical of this situation since the patient is "not sitting at home nursing an illness with the medicinal effects of marijuana[,]"[100] but, instead, is quite feasibly a threat to the safety of other motorists.

In *Chavez v. Superior Court*,[101] the court disallowed the return of marijuana in the absence of a conviction,[102] which is contrary to the *Garden Grove* outcome. In *Chavez*, the defendant was convicted of selling and transporting marijuana.[103] While awaiting the outcome of his appeal, he was again arrested for having 4.5 pounds of marijuana as well as possessing living and drying plants.[104] His first conviction was affirmed, and the prosecutor dismissed the second case.[105] Chavez sought a return of the marijuana.[106] The issue was whether Chavez, a qualified patient with physician-authorized use, could seek the return of the second seizure of marijuana, or at least the general eight

94. Hassan Khiabani *et al.*, *Relationship Between THC Concentration in Blood and Impairment in Apprehended Drivers*, Traffic Injury Prevention (June 2006), *available at* http://www.ncbi.nlm.nih.gov/pubmed/16854704?ordinalpos=3&itool=EntrezSystem2.PEnt (accessed Sept. 29, 2008).
95. M. Laloup *et al.*, *Correlation of Delta9-Tetrahydrocannabinol Concentrations Determined by LC-MS-MS in Oral Fluid and Plasma from Impaired Drivers and Evaluation of the On-Site Dräger DrugTest*, Forensic Science International (Sept. 2006), *available at* http://www.ncbi.nlm.nih.gov/pubmed/16842950?ordinalpos=1&itool=EntrezSystem2.PEnt (accessed Sept. 29, 2008) (advising against roadside oral drug testing for marijuana due to 66% accuracy rate).
96. J. Ramaekers *et al.*, *Dose Related Risk of Motor Vehicle Crashes after Cannabis Use*, Drug and Alcohol Dependence (Feb. 2004), *available at* http://www.ncbi.nlm.nih.gov/pubmed/14725950?ordinalpos=1&itool=EntrezSystem2.PEnt (accessed Sept. 29, 2008).
97. F. Alvarez *et al.*, *Cannabis and Driving: Results from a General Population Survey*, Forensic Science International (Aug. 2007), *available at* http://www.ncbi.nlm.nih.gov/pubmed/17628369?ordinalpos=3&itool=EntrezSystem2.PEnt (accessed Sept. 29, 2008) (calling for greater legislative intervention due to the frequency and common occurrence of DUIC).
98. People v. Rigo, 69 Cal. App. 4th 409, 414 (Cal. App. 1st Dist. 1999).
99. Cal Health & Safety Code Ann. § 11362.5(b)(1)(B) (Lexis 2008).
100. Strasburg, 148 Cal. App. 4th at 1060.
101. 123 Cal. App. 4th 104 (Cal. App. 4th Dist. 2004).
102. *Id.* at 110-111.
103. *Id.* at 107.
104. *Id.*
105. *Id.*
106. *Id.*

ounce quantity limit the physician recommendation authorized since there was no conviction resulting from the second arrest.[107] The *Chavez* court held that withholding and destroying the marijuana was proper because, although the case *sub judice* did not result in conviction, the amount in possession was unlawful and the law mandated destruction of unlawfully possessed marijuana.[108] The court denied the petition to return any of the marijuana.[109]

The *Chavez* decision demonstrates that the court will deny the return of marijuana, even in the absence of a conviction, when the patient's possession does not comply with the CUA. The reasoning of the *Chavez* court should be equally applicable to automobile transporting situations where a patient's possession should be rendered unlawful because his or her actual or intended use of the marijuana falls outside of MML protections. In this instance, however, the laws permitting the transportation of marijuana, as construed by the *Garden Grove* court, are allowing the unfettered transportation of marijuana by a qualified patient merely because his or her possession is below the general quantity guideline limit,[110] the effect of which is to tacitly endorse conduct that endangers others and creates a risk to public safety. Like *Chavez*, where the qualified patient's intended or actual use of marijuana is outside the realm of MML protections, his possession should be viewed as unlawful and, subsequent to seizure, should permit forfeiture and destruction. If possession is found unlawful, medical marijuana may be destroyed, even in the absence of a conviction.[111]

The *Garden Grove* court distinguished *Chavez* merely by finding Kha was in lawful possession while Chavez was not.[112] When read together, these cases indicate that the factor that is determinative of whether seized marijuana will be returned to a qualified patient is whether the quantity possessed complies with the general quantity limit so as to let the court find that the qualified patient was or was not in lawful possession, which in turn does or does not justify its return. Notably, however, *Garden Grove* is a motor vehicle case while *Chavez* is not. A *per se* rule requiring the return of medical marijuana, solely because possession was below the general quantity limit, ignores the importance of public policy concerns, namely maintaining roadway safety and preventing diversions.

The court's role in construing statutes is to "ascertain the intent of the legislature so as to effectuate the purpose of the law [and, b]ecause the statutory language is generally the most reliable indicator of that intent, [courts] look first to the words [of the statutes while] giving them their usual and ordinary meaning."[113] However, the *Garden Grove* rule of required return of medical marijuana certainly implicates, and perhaps arguably expressly authorizes, actions that are inconsistent with the CUA's prohibitions on conduct that endangers others.

A per se rule requiring the return of medical marijuana . . . ignores the importance of public policy concerns, namely maintaining roadway safety and preventing diversions.

Clearly, the state has the authority, on matters of public health or safety, to exert control over individuals when their activities "begin[] to infringe on the rights and welfare of others," and the state need not limit the exercise of its police power to only those activities with a "present and immediate impact on public welfare" before it can take action.[114] It is in the exercise of those police powers that public safety should not only justify restrictions upon the transporting of medical marijuana but also justify its forfeiture following seizure from a motor vehicle.

B. PUBLIC POLICY AS A LIMITATION UPON THE TRANSPORTING OF MEDICAL MARIJUANA

In addition to failing to accord adequate consideration to public safety risks, the *Garden Grove* rule requiring the return of marijuana to a qualified patient when the amount is below the general quantity limit has significant potential to allow the unlawful diversion of marijuana for nonmedical uses because it fails to provide a disincentive for transportation-related CUA abuses.

In *People v. Chakos*,[115] a sheriff requested a marked police car to stop the defendant's car.[116] Chakos gave consent to a search of his car, and the police recovered seven grams of marijuana, $781 in cash, and a physician's referral authorizing marijuana use.[117] His apartment was also searched, and police recovered about 6 ounces of marijuana in several different containers and a digital scale.[118] A closed circuit camera was also present to allow observations of persons coming to the apartment.[119] Chakos was arrested for possession for sale and convicted based upon the arresting officer's expert opinion testimony.[120] The issue on appeal was whether the officer's testimony was legally sufficient to sustain the conviction.[121] The

107. *Id.* at 108.
108. *Id.* at 109-111.
109. *Id.* at 111.
110. Garden Grove, 157 Cal. App. 4th at 375-376.
111. Cal. Health & Safety Code Ann. § 11473.5(a) (Lexis 2007); *Chavez*, 123 Cal. App. 4th at 111 (concluding that "the *Compassionate Use Act* does not contemplate the return of illegally possessed drugs").
112. Garden Grove, 157 Cal. App. 4th at 387-389.
113. Wright, 40 Cal. 4th at 92.
114. Ravin, 537 P.2d at 509.
115. 158 Cal. App. 4th 357 (Cal. App. 4th Dist. 2007).
116. *Id.* at 360.
117. *Id.*
118. *Id.* at 360 -361.
119. *Id.* at 361.
120. *Id.*
121. *Id.* at 363.

Subjecting marijuana to forfeiture following lawful seizure from a motor vehicle furthers this policy by removing incentives to abuse the [Compassionate Use Act].

court, applying *People v. Hunt*,[122] held the officer lacked qualification as an expert witness because of his lack of knowledge and experience with unlawful uses of lawfully possessed substances.[123] Since the officer lacked expert knowledge to differentiate patterns of lawful use and unlawful possession for sale, the conviction was reversed.

The *Chakos* fact pattern demonstrates a highly suspicious situation where the defendant might have been involved in unlawful drug activity. However, the *Garden Grove* rule requiring the return of lawfully seized marijuana merely because the patient or caregiver possesses less than the general eight ounce quantity limit has the effect of thwarting the CUA's purposes by tacitly sanctioning the unlawful diversion of marijuana in contravention to the CUA's prohibitions.[124]

The *Garden Grove* rule permits a patient or caregiver to use a motor vehicle for drug distribution activity, raise the CUA as a defense, and, if successful, have the marijuana returned to him or her when possession remains below the general eight ounce quantity limit. Motor vehicles are often essential to the illegal transportation and distribution of drugs. The *Strasburg* court observed that the defendant, had his possession been below the general eight ounce quantity limit, could have invoked the CUA as a defense.[125] Hence, the *Garden Grove* rule is unsound, as a matter of public policy, for it not only fails to provide a disincentive to refrain from diversion-related activities, but - in fact - promotes abuses of the CUA by returning unlawfully possessed marijuana to the criminal who successfully avoids a conviction merely because possession is below the general eight ounce quantity limit.

In sum, the public policy of preventing unlawful diversion warrants a limitation upon the transportation of medical marijuana. Subjecting marijuana to forfeiture following lawful seizure from a motor vehicle furthers this policy by removing incentives to abuse the CUA.

V. A PROPOSAL FOR A LEGAL PRESUMPTION

Public safety and policy implications should have weighed more heavily into the *Garden Grove* decision. As a matter of precedent, other courts within California, and perhaps other states, may concur with the *Garden Grove* rule. In such situations, the prosecution should consider asserting that transporting the marijuana was unlawful because, under the circumstances, possession is indicative of a use that is an endangerment to public safety or diversion-related activities.

In the absence of the courts accepting such an argument, or a case accepted by the Supreme Court of California on appeal, corrective measures rest in the hands of the legislature. To this end, legislation creating a legal presumption that presumes medical marijuana is being transported for nonmedical use, with an exception for the day it is initially procured, is the best method of addressing safety and policy concerns while affording qualified patients reasonable medical freedoms the CUA and other states' MMLs are intended to provide.

A. A LEGAL PRESUMPTION TO EFFECTUATE PUBLIC SAFETY AND PUBLIC POLICY CONCERNS

"A presumption is an assumption of fact that the law requires to be made from another fact or facts found or . . . established in the action."[126] California recognizes two types of rebuttable presumptions, those affecting the burden of producing evidence, and those affecting the burden of proof[127] (i.e., persuasion).[128] A presumption that affects the burden of proof is intended to "implement some public policy, other than to facilitate the determination of the particular action,"[129] and "impose[s] upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."[130]

1. Rationale and Considerations Respecting the Presumption

A limitation upon the transporting of medical marijuana to implement public safety and public policy concerns should strike a balance between furthering the policy objectives while avoiding any significant erosion to the CUA's legal protections.

The rationale underlying the presumption is ensuring public safety upon the roadways and preventing the diversion of medical marijuana for nonmedical purposes, including illegal use in addition to illegal sale. These objectives are furthered by limiting the transporting of medical marijuana within motor vehicles, with the exception of initial procurement, to further policy objectives because the unnecessary transporting of marijuana indicates unlawful use, namely, conduct that endangers others through a willingness to drive after use or, alternatively, diversion for nonmedical purposes. Permitting forfeiture, as a civil penalty, prevents the return of medical marijuana that is presumed to be transported for an impermissible nonmedical purpose and imposes a consequence for nonessential transporting.

122. 4 Cal. 3d 231 (1971) (the *Hunt* court reversed the defendant's conviction of possessing methedrine for purpose of sale on the basis that the narcotics officer's expert opinion was insufficient to sustain the conviction since the defendant had a legal prescription and the officer did not have sufficient expertise with lawful use of the drug).
123. Chakos, 158 Cal. App. 4th at 363.
124. Cal. Health & Safety Code Ann. § 11362.5(b)(2) (Lexis 2008).
125. Strasburg, 148 Cal. App. 4th at 1060.
126. Cal. Evid. Code Ann. § 600(a) (Lexis 2008).
127. *Id.* § 601.
128. *Id.* § 115.
129. *Id.* § 605.
130. *Id.* § 606.

2. The Proposed Presumption

This proposed presumption would implement the public policies of 1) ensuring motorist safety upon roadways and 2) deterring the unlawful diversion of medical marijuana through transporting. The proposed presumption would shift the burden of proof to the qualified patient or primary caregiver who seeks to avoid the presumption's effect and would provide:

> Any qualified patient or primary caregiver who, while having a motor vehicle under his or her direct and immediate control, is found to possess medical marijuana after a valid traffic stop or police investigation involving a motor vehicle, is presumed to possess the medical marijuana for nonmedical purposes. This presumption shall not apply to any qualified patient or primary caregiver who demonstrates that the medical marijuana in his or her possession was obtained within the same calendar day on which the traffic stop or police investigation involving the motor vehicle occurred, nor shall this presumption apply to any criminal proceeding or action, or any civil suit where the qualified patient or primary caregiver is a defendant or real party in interest.

The presumption, by presuming possession is for a nonmedical purpose, permits law enforcement to achieve its goal of effectuating forfeiture to deal with the unique and problematic issues surrounding medical marijuana in the context of motor vehicles while preserving state policy of not subjecting qualified patients or primary caregivers to criminal penalty. Since transporting is presumed to be for a nonmedical purpose and outside of the CUA and MMPA protections, forfeiture is permitted under California law.[131]

a. Direct and Immediate Control of a Motor Vehicle

In order for the presumption to apply, the patient or caregiver must be in possession of medical marijuana while having a motor vehicle under his or her direct and immediate control. The conjunctive "direct and immediate control" element requires a sufficient nexus between the patient or caregiver and the motor vehicle for the presumption to apply.

i. Immediate Control

The "immediate control" requirement ensures there is a spatial proximity between the patient or caregiver and the motor vehicle. Mere investigation regarding medical marijuana within a motor vehicle that the patient or caregiver owns will not trigger application of the presumption. Rather, the immediate control requirement ensures that, for the presumption to apply, the patient or caregiver must be within or so close by the vehicle to render his or her control of the vehicle immediate.

ii. Direct Control

The presumption affords a reasonable means of transporting marijuana by a driving patient or caregiver on the day of initial procurement.

The "direct control" requirement limits the presumption's applicability even further by ensuring the limitation upon transporting marijuana is confined to a patient or caregiver who is or will be driving. The patient or caregiver need not be actually driving but must have direct control. As such, the presumption would not apply to a patient or caregiver who is merely a passenger within a vehicle because he or she is not in direct control of the vehicle; thus, the presumption and the limitation upon transporting are inapplicable. However, if the patient or caregiver is not driving but has direct control over the vehicle, where - for example - circumstances indicate the patient or caregiver is driving or will be driving because he or she is or will be the vehicle's sole occupant, the presumption and the limitation upon transporting would apply.

Essentially, the "direct and immediate control" requirement is broad enough to limit transporting in those situations where the patient or caregiver is or will be driving, while not limiting situations where the patient or caregiver is merely transporting medical marijuana as a non-driving passenger. However, as will be discussed, merely avoiding the application of the presumption, as a non-driving passenger, does not mean that an individual will succeed in his or her attempt to transport marijuana for nonmedical purposes.

b. Exception for Same-Day Procurement

The presumption affords a reasonable means of transporting marijuana by a driving patient or caregiver on the day of initial procurement. This must be so since, in the absence of allowing at least some opportunity for transporting marijuana, a patient or caregiver would have no means of otherwise getting it home to make use of it. The courts have rejected the notion that patients should have a broad right to use or transport marijuana without hindrance or inconvenience.[132] By precluding the presumption's operation upon an affirmative showing that the marijuana was procured on the day of a valid traffic stop or police investigation involving their motor vehicle, the patient or caregiver is afforded a window of reasonable time to transport the marijuana home without subjecting it to forfeiture subsequent to seizure by law enforcement. This presumption merely curtails the unrestrained transportation of marijuana to that reasonably necessary to ensure transportation is limited to medical uses while dissuading conduct that endangers others or is an unlawful diversion.

131. Cal. Health & Safety Code Ann. § 11473.5(a) (Lexis 2007).

132. Ross, 42 Cal. 4th at 928; Trippet, 56 Cal. App. 4th at 1547 n.8.

[M]ost motor vehicle cases involving medical marijuana have been situations where the driver was the sole occupant of the vehicle.

c. No Criminal Liability or Civil Liability in Suits Based upon In Personam Jurisdiction

The final exception to the presumption's applicability ensures that it is broad enough to permit the forfeiture of medical marijuana that is transported unnecessarily while avoiding the imposition of criminal or civil liability upon the patient or caregiver.

i. No Criminal Liability or Sanction

Notably, the CUA, as expanded by the MMPA, precludes criminal liability for marijuana-related offenses, including transporting marijuana, solely on the basis of the qualified patient or primary caregiver's status.[133]

The proposed presumption is intended to allow city and county prosecutors the ability to invoke the presumption to cause a forfeiture of medical marijuana that was being transported at sometime other than the day it was initially procured, presumably for a nonmedical purpose. Hypothetically, the prosecutor could, by invoking the presumption, first assert possession was unlawful and then conceivably pursue criminal charges predicated upon the presumed fact that possession was for an unlawful nonmedical purpose.

However, the presumption, by way of its exception, is inapplicable to a criminal proceeding or action. Thus, the preclusion of the presumption's operation in any criminal proceeding ensures that the prosecutor may not piggyback a marijuana-related conviction upon the presumption's effect that the qualified patient or primary caregiver is not in lawful possession. Put another way, the presumption's exception - in accordance with the CUA's guarantees - prevents the prosecutor from backdooring a criminal charge or conviction after invoking the presumption of nonmedical use. In those instances where possession is presumed unlawful because the patient or caregiver is unable to affirmatively show same-day procurement, the marijuana is subject to forfeiture and destruction, but the patient or caregiver avoids any criminal liability on the basis of transporting a quantity below the general eight ounce limit because the presumption has no effect in any criminal prosecution. This ensures, in accordance with the CUA and MMPA, that the qualified patient or primary caregiver is not subject to criminal liability or sanction on the sole basis of their status as a patient or caregiver.

ii. No Liability in Civil Suits Based upon *In Personam* Jurisdiction

Finally, the presumption is inapplicable to a civil suit where a patient or caregiver is a defendant or real party in interest. This ensures that if a patient or caregiver is sued in relation to a car accident, or is a real party in interest with respect to a claim against their insurance carrier, the presumption is inapplicable and the suing plaintiff must bear the usual burdens of production and persuasion with respect to causation in the civil suit. This prevents a plaintiff from conceivably initiating a civil suit, after a motor vehicle investigation and/or citation stemming from an auto accident involving the patient or caregiver, and asserting the presumption of nonmedical use as a basis of liability with respect to causation in the auto accident. In effect, the presumption allows a forfeiture of the marijuana without shifting usual burdens of proof in a civil suit based upon *in personam* jurisdiction, which might be initiated after an auto accident involving a qualified patient or primary caregiver where his or her fault may be at issue.

iii. Presumption Does Apply to In Rem Proceedings

Notably, the presumption should not be inapplicable to all civil proceedings *per se* and this is why only *in personam* civil actions are excluded. "A forfeiture proceeding is a civil in rem action in which property is considered the defendant, on the fiction that the property is the guilty party."[134] Because hearings or proceedings related to the disposition of marijuana will be required, the presumption's applicability is preserved for those hearings or proceedings in which the court's jurisdiction is *in rem* with respect to the marijuana that is to be forfeited under the presumption of nonmedical use.

3. Evading the Presumption's Applicability Will Not Result in Escaping Scrutiny

The proposed presumption creates a bright-line test for transporting marijuana and presumes possession is for nonmedical use under certain circumstances and therefore unlawful. Though a person could attempt to bypass an invocation of the presumption by transporting marijuana as a non-driving passenger in possession, merely avoiding application of the presumption does not necessarily mean that an individual will always succeed in his or her attempt to violate MMLs.

First, it is noteworthy to mention that most motor vehicle cases involving medical marijuana have been situations where the driver was the sole occupant of the vehicle.[135] This may even be more likely where there is deliberate intent to circumvent drug laws under cover of medical marijuana's statutory protections since, presumably,

133. Cal. Health & Safety Code Ann. § 11362.765(a) (Lexis 2007).
134. People v. Super. *Ct. of L.A. Co.*, 103 Cal. App. 4th 409, 418 (Cal. App. 2nd Dist. 2002).
135. Such were the circumstances in *Chakos, Garden Grove*, *Trippet, Wright,* and *Young*, all of which involved a driver who had direct and immediate control of the motor vehicle. Notably, *Strasburg* is a case involving more than one occupant in the vehicle, but Strasburg would still be covered by the proposed presumption since he had direct and immediate control of the vehicle.

the criminal will want to go undetected. However, with the exception of same-day procurement, lawful transport under the proposed presumption would require the assistance of another person to drive the patient or caregiver who would be the non-driving passenger in possession.

Second, because deliberate attempts to violate MMLs will require the assistance of a driver to accompany the non-driving passenger in possession, there is a greater likelihood of detecting unlawful transporting. Specifically, the complicity involved in the criminal enterprise, by increasing the number of participants, gives rise to a greater likelihood of detection.

Law enforcement encountering a driver with a non-driving passenger in possession can undertake heightened scrutiny of their activities incidental to a vehicle stop or motor vehicle investigation. Inquiry can be made into the surrounding circumstances of the possession, including: where the driver and passenger are coming from, where they are going to, and for what purposes. Where circumstances warrant, law enforcement can undertake immediate separation of the driver and passenger for isolated questioning to assess the truthfulness and consistencies, or lack thereof, regarding their activities. If there appears no discernable reason for transporting the marijuana, the absence - for example - of a planned out of town trip or overnight stay away from home, this will alert law enforcement of the possibility that transporting is for unlawful nonmedical use.

Third, as a consequence and at the very minimum, law enforcement is alerted to potential criminal activity that can be further investigated by undercover officers. Alternatively, though the conduct falls outside of the scope of the presumption, where law enforcement concludes that the driver and passenger are engaged in unlawful transporting for nonmedical uses such as diversion for sale, the non-driving passenger in possession is still subject to the usual rules of law where they can be arrested, upon probable cause that a violation is occurring or has occurred, and required to assert the CUA as their affirmative defense.[136] Finally, for the most severe and egregious situations where the evidence and circumstances demonstrate a strong inference of illegal activity, the police can arrest the driver and the non-driving passenger in possession so the prosecutor may pursue conspiracy charges, which also serves as a deterrent and punishment for individuals who would agree to be a driver in the transporting of marijuana for nonmedical uses.[137]

In sum, the proposed statutory presumption, while permitting a driver to transport on the same-day of procurement, deters the transporting of medical marijuana for nonmedical purposes as a means of ensuring public safety and addressing public policy concerns. This is accomplished by allowing the forfeiture and destruction of marijuana that was lawfully seized from a driver subsequent to a valid traffic stop or police investigation involving the patient or caregiver's motor vehicle, which - as a practical matter - is when it is most likely to be encountered by law enforcement. A patient or caregiver could avoid operation of the presumption by not transporting marijuana after the day it is initially procured. If transporting medical marijuana is required after the day it is initially procured, the patient could simply get someone to drive them. The presumption affords a limited yet reasonable allowance for transporting upon an affirmative showing of same-day procurement.

A patient or caregiver could avoid operation of the presumption by not transporting marijuana after the day it is initially procured.

B. THE PRESUMPTION AND FORFEITURE ARE CONGRUENT WITH CALIFORNIA LAW

The presumption and any resulting forfeitures, which reverse the operation of the *Garden Grove* rule in the motor vehicle context, are consistent with many facets of California law.[138]

1. Requiring Proof of Lawful Transport is in Accord with Affirmative Defenses

The presumption imposes upon the qualified patient or caregiver the burden of production and persuasion that the marijuana was being transported in accordance with the presumption's exception for same-day procurement.[139] This burden upon the patient or caregiver parallels the burden of invoking the CUA as an affirmative defense to a prosecution. Since the burden of showing lawful transport does nothing more than allocate to the qualified patient or primary caregiver a burden similar to that imposed if he or she were seeking protections of the CUA,

136. While identification cardholders are immune from arrest when possession is under the general quantity limit, a law-enforcement officer is not required to accept the identification card as valid if he or she "has reasonable cause to believe that the information contained in the card is false or fraudulent, *or the card is being used fraudulently*." Cal. Health & Safety Code Ann. § 11362.78 (Lexis 2007) (emphasis added). Thus, attempting to divert marijuana may still result in arrest.

137. Notably, neither the CUA nor the MMPA afford exemption from criminal conspiracy, thus, a qualified patient or primary caregiver - even if registered under the MMPA identification program - would not be immune from arrest on such a charge, but such arrests would of course need to be sustainable with probable cause.

138. Such a legal presumption could likely work in all motor vehicle scenarios with respect to those states having MMLs or decisional case law that mandates the return of medical marijuana.

139. Of course a person could refute the underlying fact from which the presumed fact of "nonmedical use" ensues, but the underlying fact—a valid traffic stop or police investigation involving a motor vehicle—is not likely to be a disputed issue in the majority of circumstances and, therefore, does not warrant discussion more than casual mentioning.

Requiring proof of same-day procurement, as a practical matter, also requires proof of the source of the marijuana.

the burden-shifting approach is consistent with the affirmative defense approach taken by the MML statutes.

In addition, the presumption creates a bright-line test for establishing lawful transport of medical marijuana. The *Garden Grove* court did not apply or even acknowledge the *Trippet* test in assessing the lawfulness of Kha's transportation of medical marijuana, despite the fact that the Supreme Court of California indirectly endorsed it when the *Wright* case went up on appeal from the same court issuing the *Garden Grove* decision.[140] In any event, the presumption provides a clearly defined standard that readily allows for a determination of when marijuana should be seized and for its subsequent disposition without adhering to a rigid rule of required return as found in the *Garden Grove* decision, or a potentially ambiguous factors test as found in the *Trippet* test.

Finally, by shifting the burden of proof upon the patient or caregiver to show that transport is lawful, the People and the State avoid the problems embodied within the *Hunt* decision. In particular, when the People carry the burden of showing that an otherwise lawfully possessed drug, in this case medical marijuana, is being possessed unlawfully, as when the patient or caregiver is unlawfully transporting marijuana for nonmedical uses, there arises a problematic situation that the officer's testimony may suffer from the infirmity of insufficiency if the court finds that his or her knowledge or experience is lacking with respect to the illegal uses of legal drugs, namely medical marijuana.[141] In this regard, by placing the burden of proof upon the patient or caregiver, any problem regarding the expert qualifications of a testifying officer are altogether avoided.

2. Proof of Lawful Transport Deters Unlawful Profiteering on Medical Marijuana

Only Alaska has imposed a restriction upon when medical marijuana may be transported, but Alaska's statute, unlike the proposed presumption, provides no means - aside from the driver's own assertions - that will allow law enforcement a way to discern whether the transporting of medical marijuana is "necessary" or is prohibited because it is unnecessary. In particular, Alaska law provides:

> A patient, primary caregiver, or alternate caregiver may not engage in the medical use of marijuana in plain view of, or in a place open to, the general public; this paragraph does not prohibit a patient or primary caregiver from possessing marijuana in a place open to the general public if the possession is limited to that necessary to transport the marijuana directly to the patient or primary caregiver or directly to a place where the patient or primary caregiver may lawfully possess or use the marijuana[.][142]

However, in contrast, the proposed presumption implements this "necessity of transporting" limitation for the sake of public safety and policy, while additionally curtailing illegal diversions and drug profiteering.

In *Urziceanu*, the defendant admitted at trial that he "would sometimes buy marijuana on the black market by the pound to supply the [qualified patients]."[143] The *Urziceanu* case demonstrates that persons who supply marijuana to qualified patients or primary caregivers may be acting in an illegal manner. Worse, there may be instances where there is no colorable compliance with MMLs and suppliers are - in fact - drug dealers who are unlawfully profiteering on the sale of marijuana to patients and caregivers.

Requiring proof of same-day procurement, as a practical matter, also requires proof of the source of the marijuana. Empty assertions of same-day procurement are unlikely to carry the patient's burden of proof without also demonstrating or documenting where the marijuana was obtained. While the *Garden Grove* court was correct that, under the CUA and MMPA, the source of the marijuana need not be shown to invoke MML protections,[144] requiring proof of same-day procurement: 1) encourages the user to purchase medical marijuana from legitimate dispensaries or cooperatives; 2) favors record-keeping of medical marijuana-related transactions; 3) requires disclosure of the source and time of procurement of the seized medical marijuana; and 4) deters profiteering on the unlawful drug dealing in marijuana since patients and caregivers will have an incentive to purchase their marijuana from authorized sources to ensure its return in the event of a seizure.

A patient seeking to prove same-day procurement has a few options. First, the patient can obtain medical marijuana from an authorized source thereby enabling him to prove same-day procurement if and when necessary. Second, the patient could provide evidence of procurement from an unauthorized source, which would allow law enforcement to discover illegal drug dealing in marijuana. Third, the patient may fail or can refuse to prove same-day procurement of the marijuana, thereby subjecting it to forfeiture.

Furthermore, forfeiture of marijuana that is obtained from a drug dealer is wholly consistent with the purposes of the forfeiture statutes. "[C]ivil forfeiture is intended to

140. Wright, 40 Cal. 4th at 92.
141. Chakos, 158 Cal. App. 4th at 359-360 (finding officer's testimony insufficient to sustain conviction for the sale of medical marijuana).
142. Alaska Stat. § 17.37.040(a)(2)(C) (Lexis 2008).
143. Urziceanu, 132 Cal. App. 4th at 764.
144. Garden Grove, 157 Cal. App. 4th at 374.

Forfeiture results for transporting that risks an endangerment to the safety of others and, thus, falls outside the [Compassionate Use Act's] protections . . . .

be remedial by removing the tools and profits from those engaged in the illicit drug trade,"[145] with law enforcement being the principal objective.[146] While a patient or caregiver may be authorized to obtain and use medical marijuana, marijuana that was illegally sold by and procured from a drug dealer should not lose its status as an illegal transaction merely because the patient or caregiver is authorized to possess it. To the contrary, "[a]ll controlled substances which have been manufactured, distributed, dispensed, *or acquired* in violation of [the Uniform Controlled Substances Act]" are subject to forfeiture.[147]

Ultimately, forfeiture aids in bifurcating lawful medical marijuana acquisitions from unlawful drug sales thereby curtailing the profiteering upon illegal marijuana sales made to qualified patients and their primary caregivers.

3. Forfeiture Does Not Subject a Patient or Caregiver to Criminal Liability

As already noted, the CUA precludes criminal liability of a qualified patient or primary caregiver solely on the basis of their status,[148] but forfeitures are not criminal sanctions.

In *People v. Shanndoah*,[149] the people appealed a trial court order dismissing criminal drug charges against the defendant.[150] The trial court dismissed the criminal charges because the state had previously initiated forfeiture proceedings with respect to drug-related money.[151] The trial court found that the forfeiture was punitive in relation to the drug offenses; thus, double jeopardy had attached and required dismissal of the criminal charges.[152] The issue before the *Shanndoah* court was whether the monetary forfeiture was a criminal sanction that required dismissal of subsequent criminal charges that also related to the drug offenses that gave rise to the forfeiture in the first instance.[153] The court held that forfeitures under the Health and Safety Code are civil in nature.[154] The court reasoned that "forfeiture prescribed by the Health and Safety Code is in rem—that is, it is an action against the property itself [and is] distinct from a criminal proceeding which is in personam."[155] The trial court's dismissal of the criminal charges was reversed.[156]

Because forfeitures of property under the Health and Safety Code provisions are deemed civil sanctions, forfeitures do not violate the CUA's prohibitions on criminal liability. Accordingly, the forfeiture of medical marijuana exacts a *civil* penalty that is directly proportional to the amount of marijuana unlawfully transported.

Furthermore, even if construed as a criminal sanction, which it is not, the CUA only prohibits liability for criminal transportation on the sole basis of a person's status as a qualified patient or primary caregiver.[157] Forfeiture, however, only comes into play after medical marijuana is seized subsequent to a valid traffic stop or a police investigation involving the motor vehicle, both of which are based upon probable cause. Thus, forfeiture is not based solely on a patient or caregiver's status but is the consequential result of a seizure stemming from a moving violation or a police investigation involving the patient or caregiver's motor vehicle.

4. Forfeiture Implements Important Policies Without Overburdening Patients' Rights

In the context of seizures of medical marijuana from motor vehicles, a presumption that causes forfeiture strikes a balance between implementing policies without overburdening patient rights or needs.

Forfeiture, subsequent to a valid traffic stop or police investigation involving a motor vehicle, occurs when the patient or caregiver fails to demonstrate to the court that transporting occurred on the day of initial procurement. Forfeiture results for transporting that risks an endangerment to the safety of others and, thus, falls outside of the CUA's protections while avoiding significant inconvenience or hindrance to the qualified patient who may still obtain and use marijuana in accordance with the CUA's contemplated purposes and protections. In the end, endangering conduct and diversion are both unprotected under the CUA and MMPA, therefore, forfeiture is justified if the patient or caregiver cannot demonstrate same-day procurement.

Alternative means, in lieu of a legal presumption that allows for forfeiture, are inadequate for implementing policy concerns. The law could limit how marijuana is transported. For example, the transporting of medical marijuana might be confined to the trunk of the vehicle or in a locked container, the later being the case in Vermont,[158] but these restrictions are ineffective because, while they may prevent the use of marijuana while driving, they have no effect upon driving subsequent to use or upon preventing diversion.

Alternatively, the general quantity limits could be

145. Cal. Health & Safety Code Ann. § 11469(j) (Lexis 2007).
146. *Id.* § 11469(a).
147. *Id.* § 11470(a) (emphasis added); *Id.* § 11475.
148. *Id.* § 11362.765(a).
149. 49 Cal. App. 4th at 1187 (Cal. App. 1st Dist. 1996).
150. *Id.* at 1189.
151. *Id.*
152. *Id.* at 1190.
153. *Id.*
154. *Id.* at 1192.
155. *Id.* at 1191.
156. *Id.* at 1193.
157. Cal. Health & Safety Code Ann. § 11362.765(a), (b)(1)-(2) (Lexis 2007).
158. Vt. Stat. Ann. tit. 18, § 4474c(d) (Lexis 2007).

reduced, but this may have the effect of not allowing a sufficient quantity of marijuana to treat the illnesses of law-abiding patients who are not abusing MMLs. In addition, a reduction to the general quantity limits unduly burdens legitimate patients' rights by restricting possession in situations beyond the motor vehicle context and without a direct correlation to the public safety and policy concerns involving motor vehicles. In this regard, the presumption is tailored to implement policies related to specific concerns involving the transporting of medical marijuana within motor vehicles without overburdening the rights of patients who are otherwise in compliance with MMLs.

In sum, forfeiture allows local law enforcement and the state the ability to ensure patients and caregivers are not abusing MMLs through endangering conduct or diversions while the patient or caregiver's legitimate need to transport marijuana remains intact.

C. THE PRESUMPTION IS LIKELY TO SURVIVE CONSTITUTIONAL CHALLENGES

To the extent that the proposed statutory presumption is subjected to constitutional challenge, it is likely to be upheld. The most probable constitutional challenges, if any, are likely to be an alleged unconstitutional amendment to the CUA or a denial of due process.

1. The Issue of Unconstitutional Amendments to the CUA

Since the *Garden Grove* decision, there have been cases addressing the issue of whether the legislatively enacted MMPA was an unconstitutional amendment to the CUA.[159]

In *Co. of San Diego v. San Diego NORML*,[160] San Diego and San Bernardino counties (collectively "Counties") contested the MMPA's requirement that they implement and administer the identification card system related to qualified patients and primary caregivers.[161] The issue was whether the MMPA was preempted by the federal CSA on the grounds of conflict preemption and obstacle preemption[162] and whether the MMPA's mandate requiring implementation of an identification card system was an unconstitutional amendment to the CUA.[163] The court held the Counties' standing was limited to challenging only those MMPA provisions requiring implementation of the ID card program[164] and that both conflict preemption and obstacle preemption were unfounded.[165] The court also held that the MMPA did not amend the CUA.[166] The court reasoned that the CSA is silent on issuance of ID cards, thus, there could be no positive conflict.[167] Furthermore, issuance of ID cards was not a "significant" obstacle to CSA objectives; thus, obstacle preemption was inapplicable.[168] As to the amendment issue, the court reasoned the MMPA did not add to the CUA as it was a separate legislative scheme, CUA protections remained intact, and the ID card system did not impact the CUA's protections.[169] The judgment was affirmed.[170]

The most probable constitutional challenges, if any, are likely to be an alleged unconstitutional amendment to the [Compassionate Use Act] or a denial of due process.

Conversely, in *People v. Kelly*,[171] which was decided before *San Diego NORML*, the court struck down a MMPA provision as an unconstitutional amendment.[172] In *Kelly*, the defendant was a qualified patient who was convicted for the sale and cultivation of marijuana subsequent to police seizure of 12 ounces of marijuana in addition to living plants.[173] The issue was whether the MMPA's general eight ounce limitation upon the possession of medical marijuana, as a legislative enactment, unconstitutionally amended the CUA thereby rendering it prejudicial error for the prosecutor to argue that the defendant could be convicted for possessing more than eight ounces without a special physician's prescription.[174] The court held that the general quantity limits within the MMPA were an unconstitutional amendment to the CUA; thus, the prosecutor's argument in support of the defendant's conviction was improper.[175] The court reasoned that the only limitation imposed upon possession of medical marijuana under the CUA was that possession be reasonably related to the patient's medical needs, and because the MMPA added general quantity limitations upon possession, it modified the CUA and was an unconstitutional amendment.[176] The court struck down the general quantity limitations con-

159. *See generally* Co. of San Diego v. San Diego NORML, 165 Cal. App. 4th 798 (Cal. App. 4th Dist. 2008); People v. Kelly, 163 Cal. App. 4th 124 (Cal. App. 2nd Dist. 2008), *superseded by grant of review*, 2008 Cal. LEXIS 9776 (Lexis 2008); People v. Phomphakdy, 165 Cal. App. 4th 857 (Cal. App. 3rd Dist. 2008).
160. 165 Cal. App. 4th at 798.
161. *Id.* at 808.
162. *Id.* at 809.
163. *Id.* at 829.
164. *Id.* at 818.
165. *Id.* at 826-827.
166. *Id.* at 831.
167. *Id.* at 825.
168. *Id.* at 827.
169. *Id.* at 831.
170. *Id.* at 832.
171. Kelly, 163 Cal. App. 4th 124, *superseded by grant of review*, 2008 Cal. LEXIS 9776.
172. Another case, Phomphakdy, 165 Cal. App. 4th at 862-866, relied upon the *Kelly* decision and reached the same result by essentially adopting its reasoning and same line of cases for support. To avoid redundancy, discussion will be limited to *Kelly*.
173. Kelly, 163 Cal. App. 4th at 128-129, *superseded by grant of review*, 2008 Cal. LEXIS 9776.
174. *Id.* at 130.
175. *Id.*
176. *Id.* at 133-134.

Currently, the Kelly case is under review before the California Supreme Court . . . .

tained in the MMPA[177] and reversed the conviction.[178]

Currently, the *Kelly* case is under review before the California Supreme Court with the issues limited to whether the general quantity limits unconstitutionally amend the CUA and if there were alternatives to invalidation.[179] As the *Kelly* appellate court noted, "Legislative acts, such as the MMP, are entitled to a strong presumption of constitutionality[,]"[180] but the appellate court's opinion is devoid of any attempt to interpret the general quantity limits with the CUA so that the two may peaceably coexist. Since "[a]n interpretation which gives effect is preferred to one which makes void[,]"[181] the court was obligated to attempt to reconcile the laws before severing the purportedly offending law.

Though *Kelly* could be overturned on the basis of failing to adhere to the maxims of jurisprudence, the reasoning of the *San Diego NORML* court that the MMPA did not amend the CUA is equally applicable to the general quantity limitations provision. The general quantity limitations at issue in *Kelly*, like the ID card system at issue in *San Diego NORML*, did not add to the CUA as the MMPA is a separate legislative scheme. Further, the CUA protections remain intact, and the general quantity limitation does not impact the CUA's protections, as will be explained.

The *Kelly* court relied on *Cal. Lab. Fed'n. v. Occupational Safety & Health Stand. Bd.*[182] for the proposition that the general quantity limitations in the MMPA amounted to an amendment of the CUA, but *Cal. Lab.* is distinguishable. If the MMPA imposed an absolute cap upon quantity limits, as did the Budget Act with respect to the attorney fees at issue in *Cal. Lab.*,[183] then the MMPA's general quantity limit would be amendatory. However, the MMPA did not impose an absolute limit upon the amount of marijuana that may be possessed since a patient or caregiver, with a doctor's recommendation, "may possess an amount of marijuana [that is] consistent with the patient's needs."[184] Accordingly, the general quantity limits specified in the MMPA, as distinguished from the absolute cap limit imposed on attorney fees in *Cal. Lab.*, are more akin to a general guideline as to what a reasonable quantity shall be for the treatment of illnesses. Since the general quantity limit guideline - when read as a whole with other provisions in the MMPA - does not place any absolute limit upon the amount of marijuana that a patient may possess or grow, the MMPA's general quantity limit guideline does not impact the CUA's protections since those protections remain intact. Specifically, patients may possess and grow an amount of marijuana that is reasonably necessary for their condition, even when that amount exceeds the general quantity limit guideline.

While a physician's recommendation is required for marijuana in excess of the general quantity limit,[185] a physician's recommendation is also needed for medical marijuana below the general quantity limit.[186] Thus, the requirement of a physician recommendation designating a specific amount of medical marijuana that is needed for a patient's condition, which exceeds the general quantity limits, is no more onerous than the requirement that they seek a recommendation to become a qualified patient in the first instance. Accordingly, the MMPA's general quantity limit neither withdraws protections nor adds obstacles to a patient's right to obtain sufficient quantities of marijuana for his or her illness; thus, the MMPA did not amend the CUA.

Finally, "[i]nterpretation must be reasonable,"[187] and the law disfavors constructions that lead to absurd results. However, severing the general quantity limit from the MMPA severely impairs an important objective of the CUA and MMPA by removing the only measurable standard by which lawful conduct can be ascertained. The net effect for non-cardholding qualified patients and primary caregivers, who are not immune from arrest, is that the judge or jury must decide whether the amount of marijuana they possessed was reasonable for their medical condition, after arrest and prosecution. Because people will differ in their own beliefs as to what is reasonable, severing the general quantity limit brings uncertainty to the law. Thus, patients and caregivers may be placed in the compromising position that a conviction may ultimately result if, despite their legitimate need, the amount of marijuana they possess is found to be unreasonable. Additionally, the effect upon cardholding patients is that they, in the absence of evidence of criminal conduct, may possess excessively large quantities of marijuana while enjoying immunity from arrest and prosecution. When factoring in the current lack of restrictions upon transporting and the *Garden Grove* rule of required return, we are left with a potentially disastrous set of laws that seem to favor illegal drug trafficking. Severing the general quantity limit from the MMPA leads to unreasonable and absurd results.

2. The Presumption Within the Framework of an Amendment to the CUA

The proposed presumption's limitation upon transporting is incapable of amending the CUA. Since the MMPA was a legislative enactment that extended protection from

177. *Id. at* 136.
178. *Id.* at 138.
179. Kelly, 2008 Cal. LEXIS 9776 (Lexis 2008).
180. Kelly, 163 Cal. App. 4th at 132, *superseded by grant of review*, 2008 Cal. LEXIS 9776.
181. Cal. Civ. Code Ann. § 3541 (Lexis 2008).
182. 5 Cal. App. 4th 985 (Cal. App. 1st Dist. 1992).
183. *Id.* at 991-992.
184. Cal. Health & Safety. Code Ann. § 11362.77(b) (Lexis 2008).
185. *Id.*
186. *Id.* § 11362.5(b)(1)(A).
187. Cal. Civ. Code Ann. § 3542 (Lexis 2007).

criminal prosecution to the crime of transporting,[188] which was a punishable offense under the CUA standing in isolation,[189] any limitation upon the unfettered right to transport medical marijuana is merely a limitation upon a legislatively granted immunity and cannot be an abrogation of a right granted by voter initiative under the CUA. Indeed, under the CUA, no such right existed. As such, the proposed presumption's limitation upon transporting cannot be an amendment to the CUA because the CUA afforded no right of qualified immunity from prosecution for transporting.

3. The Presumption Affords Due Process of Law

The *Garden Grove* court, relying on *People v. Lamonte*,[190] found that the police could not retain Kha's medical marijuana without running afoul of the due process clause of the Fourteenth Amendment.[191] The presumption, however, satisfies the due process standards articulated in *Lamonte*.

In *Lamonte*, the defendant was arrested after trying to use fabricated credit cards in a restaurant.[192] The police recovered many items from the defendant's car including numerous credit cards, false identification cards, laminating equipment, various telephone and computer equipment, and a shotgun.[193] Lamonte negotiated a guilty plea to the charges of felon in possession of a firearm and burglary and then sought return of all property, except the weapons.[194] The motion was opposed by the state.[195] The issue was whether the state could withhold property on the basis that the property items were instrumentalities of crime.[196] The court held that the defendant's property was not contraband and must be returned to him.[197] The court reasoned that only contraband was excepted from return and merely using a lawful item in the commission of a crime does not make it contraband.[198] The court directed the property to be returned.

"Contraband is goods or merchandise whose importation, exportation, or possession is forbidden."[199] Since the presumption presumes that possession of marijuana within a vehicle is for nonmedical use and unlawful, the reasoning of the *Lamonte* court would permit forfeiture subsequent to a lawful seizure. The marijuana that is presumed for nonmedical use is unlawful contraband and, as the *Lamonte* court noted that contraband does not need to be returned,[200] the marijuana seized - applying *Lamonte* - would not need to be returned.

Second, as the *Lamonte* court appropriately noted, "[t]he confiscation and destruction of property without a hearing, proceeding or other forum to determine whether the property was dangerous, illegal to possess or otherwise excepted from return to the owner is an unconstitutional deprivation of property without due process of law."[201] However, the presumption affords the patient or caregiver an opportunity, through judicial process, to assert that the presumption is inapplicable because the marijuana was procured on the same day in which the traffic stop or motor vehicle investigation occurred. Thus, because the patient or caregiver would be afforded a hearing to determine the legal or illegal character of the seized marijuana, the operation of the presumption satisfies due process of law.

Ultimately, the presumption's operation, with respect to qualified patients and primary caregivers who transport marijuana in motor vehicles, is likely to be upheld as constitutional because it does not amend the CUA, nor does it offend due process of law.

CONCLUSION

Medical marijuana laws are intended to afford suffering or ill patients a means of relief that conventional prescription medications are unable to provide. However, there are well-documented abuses of medical marijuana laws by persons who would attempt to subvert their intended purposes while invoking the protections the statutes afford. In this regard, the non-essential transporting of marijuana by a qualified patient or primary caregiver who is driving should be viewed as conduct that indicates an intent to use or possess marijuana in a way that is not contemplated under MMLs - namely engaging in conduct that endangers others and/or unlawful diversions for nonmedical use - and, thus, should be viewed as outside MML protections. In those states adhering to a rule requiring the return of lawfully seized medical marijuana, a legal presumption that effectuates a forfeiture of marijuana that is legally seized subsequent to a valid traffic stop or motor vehicle investigation may be a viable means of implementing public safety and public policy concerns related to highway safety and drug enforcement efforts.

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188. Wright, 40 Cal. 4th at 92.
189. Cal. Health & Safety Code Ann. § 11362.5(d) (Lexis 2008); Young, 92 Cal. App. 4th at 237.
190. 53 Cal. App. 4th 544 (Cal. App. 4th Dist. 1997).
191. Garden Grove, 157 Cal. App. 4th at 386-387.
192. Lamonte, 53 Cal. App. 4th at 546.
193. *Id.* at 546-547.
194. *Id.* at 547.
195. *Id.*
196. *Id.* at 552.
197. *Id.* at 553.
198. *Id.* at 552-553.
199. *Id.* at 552.
200. *Id.* (*citing* Aday v. Super. Ct. of Alameda Co., 55 Cal. 2d 789, 800 (1961), which found that obscene books that were contraband should not to be returned).
201. *Id.* at 551.

Resource Page

ONLINE

CENTER FOR SENTENCING INITIATIVES, NATIONAL CENTER FOR STATE COURTS
http://www.ncsconline.org/csi/index.html

The National Center for State Courts has a new section on its website devoted to discussion and research about sentencing issues. The website explores the expanded use of evidence-based sentencing practices, as well as risk- and need-assessment information that may help in identifying sentencing options that can best protect the public, reduce recidivism, and hold offenders accountable. The website was set up with assistance from the Public Safety Performance Project of the Pew Charitable Trusts' Center on the States and the State Justice Institute.

The Conference of Chief Justices and Conference of State Court Administrators adopted a resolution in 2007 endorsing the increased use of evidence-based sentencing practices. The resolution concluded that "the use of validated 'offender risk and need assessment tools' is critical in reducing recidivism" and urged states "to adopt sentencing and correction policies and programs based on the best research evidence of practices shown to be effective in reducing recidivism." Judges and policy makers can turn to this new website to stay up-to-date on research in this area.

There are already several useful reports and resources on the website. We note a few of them here.

BRIAN J. OSTRUM, CHARLES W. OSTROM, ROGER A. HANSON & MATTHEW KLEIMAN, ASSESSING CONSISTENCY AND FAIRNESS IN SENTENCING: A COMPARATIVE STUDY IN THREE STATES (2008).
These researchers at the National Center for State Courts studied sentencing patterns in three states that use substantially different systems of sentencing guidelines: Minnesota, which has a relatively strict system; Michigan, which allows more judicial discretion; and Virginia, where compliance with the recommended sentences is voluntary. The study reported these key findings:

- Guidelines do make sentences more predictable. Predictability was highest in Minnesota and lowest in Virginia.
- Guidelines effectively limit disparities in sentencing based on characteristics such as race and economic impact. The study found that the influence of those factors was negligible in all three of these states, even Virginia with its voluntary guidelines: "A voluntary guideline system with substantial sentencing ranges does not necessarily lead to increases in discrimination, as many observers might have expected."
- Guidelines make sentencing patterns more transparent.
- State officials have many options available to them when designing sentencing guidelines.
- Active participation by a sentencing commission is an essential part of an effective guideline-sentencing system.

NEAL B. KAUDER & BRIAN J. OSTROM, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM (2008).
This report reviews sentencing-guidelines systems in 21 states, placing them on a continuum from the most voluntary to the most mandatory. Judges and policy makers may find this review of interest in identifying states that have similar systems: judges might find relevant caselaw in a state with similar provisions, while policy makers may be interested in states both similar and divergent.

ROGER K. WARREN, EVIDENCE-BASED PRACTICE TO REDUCE RECIDIVISM: IMPLICATIONS FOR STATE JUDICIARIES (2007).
Roger Warren, a former California judge and past National Center for State Courts president, makes the case for applying evidence-based sentencing practices to reduce recidivism. Warren reviews research about what works in reducing recidivism; he crystallizes the research into a set of evidenced-based practices. A detailed review of drug courts, which have implemented many evidence-based practices in sentencing, is included. Warren emphasizes ways in which judges can enhance reduced recidivism. In addition to evidence-based practices, he reviews procedural-fairness concepts that can lead to greater acceptance of court outcomes and to defendants taking responsibility for their own conduct.

CHARLES H. WHITEBREAD 1943–2007
***Los Angeles Times* Obituary:**
http://articles.latimes.com/2008/sep/23/local/me-whitebread23

Law professor Charles H. Whitebread, who reviewed the decisions of the United States Supreme Court at the American Judges Association's annual education conference for more than 25 years, died September 16, 2007. He was 65.

He taught at the University of Southern California law school from 1981 to 2008; before that, he taught at the University of Virginia law school from 1968 to 1981.

Whitebread's presentations at AJA conferences were the highlight of each year's annual meeting. Whitebread also wrote a summary of the past year's cases each year for *Court Review*, and he served on *Court Review*'s editorial board from 1998 until his death. Some remembrances of him are found at page 4 of this issue. For those who would like to read an obituary, a good one ran in the September 23, 2008, *Los Angeles Times* (Valerie J. Nelson, *Supreme Court Expert Taught at USC*, available on Westlaw at 2008 WLNR 18054334).

In its obituary, the *Times* reported that Whitebread's popularity was reflected in a Facebook group called, "Charlie Whitebread Rocks My World." The group had more than 1,600 members.