SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: April 20, 2016 4:46 PM FILING ID: E334CE82A17F4 CASE NUMBER: 2014SC109
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 12CA2298 District Court, El Paso County, 11CR1680	
THE PEOPLE OF THE STATE OF COLORADO, Petitioner, v. ROBERT CLYDE CROUSE, Respondent.	▲ **COURT USE ONLY** ▲ Case No.: 14SC109
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REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The reply brief complies with the applicable word limits set forth in C.A.R. 28(g).

It contains 1,779 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

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I. Law enforcement's obligation under Colorado law to return medical marijuana thwarts the purposes of the Federal Controlled Substances Act (CSA) because the state return directive is an obstacle to the purposes of the Federal Controlled Substances Act; the magnitude of the violation is irrelevant.

In his answer brief, Crouse characterizes Colorado's return directive (which is found in Article XVIII, section 14(2)(e) of the Colorado Constitution) as a "limited obligation" that "cannot be held to thwart the purpose of the CSA." Answer Brief, p. 6. Implicit in this characterization is a perception that state laws that conflict with federal law infrequently or in "minor" ways are somehow immune from preemption. The resolve of the United States Supreme Court is otherwise. See, e.g., Ridgeway v. Ridgeway, 454 U.S. 46, 54, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981)(even in areas where federal law has limited application, the Court will not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights); Free v. Bland, 369 U.S. 663, 666, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962)("any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield")(emphasis added).

The objectives of the CSA (which are set forth at pages 12-13 of the People's Opening Brief) include a complete prohibition on the use and distribution of marijuana for medical purposes. The argument that the narrow scope of

Colorado's return directive is insufficient to obstruct this purpose is contrary the United States Supreme Court's preemption jurisprudence and should be rejected.

II. By its terms, the CSA's immunity provision applies only to "lawful" acts related to the enforcement of laws proscribing the use and distribution of controlled substances. The provision is inapplicable to the distribution of marijuana for medical purposes which is always unlawful under the CSA.

The People's opening brief (pp. 19-24) argues that 21 U.S.C. § 885(d) does not provide immunity to law enforcement officers for marijuana distribution that is lawful under state law but unlawful under federal law because such an application of § 885(d) is inconsistent with the purposes of the CSA. Although Crouse contends that the People's interpretation of the CSA's immunity provision "does not withstand scrutiny," he provides no substantive rebuttal of that interpretation beyond noting that the People's position was "summarily rejected" by a majority of the court of appeals. Answer Brief, p. 7.

Crouse's characterization of the majority's analysis is accurate; the majority did reject the People's interpretation of § 885(d). See People v. Crouse, 2013 COA 174, ¶¶ 35-38. But in doing so, the majority overlooked the fundamental rule of preemption analysis: "'[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (2010), quoting Retail Clerks v. Schermerhorn, 375 U.S.

96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963). Here, the purposes of Congress in enacting the CSA are at odds with Colorado's return directive.

"The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." Gonzalez v. Raich, 545 U.S. 1, 12, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). Congress created a "comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances.'" Id. at 24. Congress classified marijuana as a Schedule I drug in part because of its "lack of any accepted medical use." Id. at 14. "Despite considerable efforts to reschedule marijuana, it remains a Schedule I drug." Id. at 15.

There is no medical necessity exemption under the CSA for marijuana distribution. United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 486, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001) (so stating). Therefore, a state provision like Colorado's return directive, which requires the distribution of marijuana that law enforcement officers have seized, is contrary to the CSA's objectives.

Because the distribution of marijuana for medical use is unlawful under the CSA, the immunity provided under 21 U.S.C. § 885(d) to law enforcement officers who are "lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances" does not apply to officers who distribute medical

marijuana under Colorado law. To conclude otherwise leads to an illogical result. Surely, in enacting § 885(d), Congress did not intend to provide immunity for acts of marijuana distribution that are contrary to the purpose of the CSA. Interpretations of legislation that produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982)(so stating).

Crouse's reliance upon cases from other states (answer brief, p. 7) to support his contention is likewise unavailing. None of the three cases on which Crouse relies construe § 885(d) in the context of obstacle preemption. See City of Garden Grove v. Superior Court, 68 Cal. Rptr.3d 656 (Cal. Ct. App. 2007)(a field preemption case); State v. Kama, 178 Or.App. 561, 39 P.3d 866 (2006)(no question of federal preemption under any theory was raised or addressed); State v. Okun, 231 Ariz. 462, 296 P.3d 998, ¶ 18 (Ariz.App. 2013)(declining to address the issue of federal preemption in the abstract where, among other things, the state's brief contained no meaningful discussion of preemption).

III. The likelihood that law enforcement officers will be prosecuted under the CSA for complying with Colorado's return directive is irrelevant to preemption analysis. The dispositive question is whether compliance with state law violates a federal law provision.

Crouse spends much of his answer brief arguing that there is no indication that federal authorities ever have or ever will file federal charges against law enforcement officers who comply with Colorado's return directive. Answer Brief, pp. 8-9, 13-17. He supports his argument by relying on a United States Department of Justice (DOJ) memorandum[1] that does not explicitly identify the prevention of medical marijuana use and distribution as a priority for federal prosecutors. Answer Brief, pp. 14-17. Crouse's argument is misdirected, and irrelevant to the issue of preemption, which is concerned with the intent of Congress: "[I]in our constitutional order it's Congress that passes the laws, Congress that saw fit to enact 21 U.S.C. § 841, and Congress that in § 841 made the distribution of marijuana a federal crime." Feinberg v. C.I.R., 808 F.3d 813, 816 (10th Cir. 2015).

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[1] A copy of the memorandum, prepared by Deputy Attorney General James M. Cole, is filed as an attachment with this reply brief. The memorandum's stated purpose is to guide the exercise of prosecutorial discretion in prosecuting federal crimes involving marijuana. The memorandum explicitly states that it does not alter in any way the authority of the DOJ to enforce federal laws related to marijuana, regardless of state law. See memorandum from James M. Cole, Deputy Attorney General, U.S. Dep't of Justice, to All United States Attorneys, Guidance Regarding Marijuana Enforcement, p. 4 (Aug. 29, 2013).

Given that the federal government lacks the resources to prosecute all drug crimes[2], it is no surprise that it gives priority to certain drug offenses. It does not follow from this that uncharged acts of marijuana distribution are legal under the CSA. See Todd Garvey, Cong. Research Serv., R42398, Medical Marijuana: The Supremacy Clause, Federalism, and the Interplay Between State and Federal Laws, 15 (2012)(cited in Crouse's answer brief and filed as an attachment with this reply brief, in which Garvey writes that "the U.S. Attorneys for the Eastern and Western Districts of Washington State have expressly noted that state officials could be subject to prosecution under federal law for carrying out aspects of a state medical marijuana program that violates the CSA").

Ultimately, the issue for purposes of preemption is not whether federal prosecutors will bring a criminal action against law enforcement officers who comply with Colorado's return directive. The purpose of Congress in enacting the CSA is the touchstone for determining whether the CSA preempts Colorado law. And under the CSA, the distribution of marijuana for medical purposes remains illegal.

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[2] See Michael M. O'Hear, Federalism and Drug Control, 57 Vand. L. Rev. 783, 810 (2004)("Due to resource constraints, the federal government can only investigate, prosecute, and incarcerate a small percentage of drug offenders.")

IV. Crouse's argument that law enforcement agencies are incapable of forming the necessary mens rea to violate the CSA's prohibition on marijuana distribution raises an irrelevant issue that should not be considered for the first time on appeal.

Relying exclusively on a civil case in which the named defendants were governmental entities rather than individuals, Crouse argues that state and local law enforcement officials are incapable of forming the criminal intent to violate the CSA's distribution prohibition. Answer Brief, pp. 10-11. This argument was not made to the district court or the court of appeals, and therefore it should not be considered for the first time by this Court. See People v. Salazar, 964 P.2d 502, 507 (Colo. 1998) (issues not raised in or decided by a lower court will not be addressed for the first time on appeal).

Even if considered on the merits, Crouse's argument regarding mens rea is irrelevant to whether law enforcement officers can be charged as individuals for conduct that violates the CSA. Crouse makes no argument that they cannot, and the need for the immunity provision in 21 U.S.C. § 885(d) indicates that individual officers can be charged for acts of distribution that do not fall under the protection of that provision.

CONCLUSION

For the reasons set forth in the opening brief and in this reply brief, the court of appeals erred in affirming the district court's order requiring the Colorado Springs Police Department to return Crouse's marijuana to him. The court of appeals' opinion should be reversed.

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CERTIFICATE OF SERVICE

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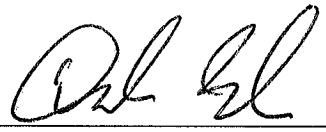

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