Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203 Certiorari to the Court of Appeals, 2012 CA 2298 District Court, El Paso County, 2011 CR 1680 **Petitioner:** The People of the State of Colorado, v. **Respondent:** Robert Clyde Crouse.	DATE FILED: March 30, 2016 2:38 PM FILING ID: F887E5A59C4D3 CASE NUMBER: 2014SC109 ▲ **COURT USE ONLY** ▲
Attorney the Respondent: Charles T. Houghton, Esq. Charles T. Houghton, P.C. P.O. Box 847 Colorado Springs, CO 80901 Phone Number: 719-351-4261 E-mail: cthlaw@msn.com FAX Number: N/A Atty. Reg. #:15053	Supreme Court Case Number: 2014 SC 109
RESPONDENT'S ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this 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 brief complies with C.A.R. 28(g).

It contains less than 9500 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(b)

It contains under a separate heading before the discussion of the issue, a statement indicating whether the appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

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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ISSUE UPON WHICH CERTIORARI WAS GRANTED

The Petitioner has stated verbatim the issue upon which certiorari was granted from this court's June 15, 2015 Order and need not be restated here.

STATEMENT OF THE CASE

The basis of this appeal is to address the concerns of Judge Bernard set forth in his dissent in *People v. Crouse*, 2013 COA 174, (2013). It should be noted that Judge Bernard limited the scope of his dissent to whether the CSA preempts the part of *Colorado Constitution*, Article XVIII, Section 14(2)(e) that requires police officers to return medical marijuana to qualified patients. *Crouse, supra* at ¶116.

STATEMENT OF FACTS

The Statement of Facts offered by the Petitioner is generally adequate for purposes of this appeal, except for the interpretive statements concerning the holding of Court of Appeals in *People v. Crouse*, 2013 COA 174, (2013), the dissent filed therein, and the overall intent of the Controlled Substances Act, 21 U.S.C. §801, *et seq.*, (the "CSA").

STANDARD OF REVIEW

Mr. Crouse agrees that the applicable standard of review is a de novo review of the question of law for which certiorari was granted. *Timm v. Prudential Ins. Co. of America*, 259 P3d 521 (Colo. App. 2011).

SUMMARY OF THE ARGUMENT

The majority of cases and authorities that have examined the issue of preemption of state medical marijuana laws by the CSA have come to the conclusion that no such preemption exists. Indeed, the United States Department of Justice's own position on this matter clearly rejects the Petitioner's argument, and the dissent's argument in *Crouse, supra*.

The Petitioner's assertion that by returning medical marijuana to patients pursuant to Article XVIII, Section 14(2)(e) of the Colorado Constitution, the law enforcement agencies involved would be in violation of the CSA and have no immunity under 21 U.S.C. §885(d) is simply not supported by legal authority, nor is such an interpretation supported by the actions of any federal agency charged with enforcing the CSA. According to the Petitioner, a law enforcement agency complying with a lawful order to return marijuana to a qualified patient is subject to federal criminal prosecution and/or federal injunction, an occurrence that has never happened in Colorado or in any other State in the history of the United States. The lack of preemption, and lack of any alleged threat of federal intervention is further supported by the absence of the necessary *mens rea* to support a conviction under the CSA.

The Petitioner asserts that law enforcement agencies cannot simultaneously comply with Colorado law and the CSA. This statement fails to consider the fact

that, just like patients, law enforcement officials can comply with both Colorado law and the CSA by not taking medical marijuana into their possession.

Because of these erroneous base assumptions, the Petitioner concludes that the CSA preempts Colorado law, a conclusion that has been summarily rejected by the Colorado Court of Appeals in *Crouse*, *supra*, and the majority of other courts and authorities called upon to review mandates to return medical marijuana to patients.

ARGUMENT

I. THE CSA DOES NOT PREEMPT STATE LAW CONCERNING MEDICAL MARIJUANA.

The majority opinion of the Colorado Court of Appeals, and its treatment of the dissent's arguments should be given great deference. The analysis employed by the *Crouse* majority, and its rebuttal to the dissent's argument, are well-reasoned and are founded on a solid review of the applicable case law and statutory authority.

The Petitioner's arguments concerning the interplay of 21 U.S.C. §903 contained in Petitioner's Opening Brief, Pages 15 through 19 do not comport with how state medical marijuana laws have in fact been interpreted.

A more accurate examination necessarily begins with the assumption that in cases such as the instant case, federal law does not preempt state law. Any preemption analysis must start with the "assumption that Congress did not intend

to displace state law." *Crouse* at ¶17, (cite omitted). This "non-preemption" concept has particularly applicable when dealing with police powers, such as marijuana enforcement, an area traditionally reserved to the individual States.

"There is, however, a presumption against federal preemption when it comes to the exercise of "historic police powers of the States." (quote from *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). State medical marijuana laws have generally been accorded this presumption, as they are enacted pursuant to traditional state police powers in defining criminal conduct and regulating drugs and medical practices." See *Medical Marijuana: The Supremacy Clause, Federalism, and the Interplay Between State and Federal Laws*, Congressional Research Service, CRS Report for Congress, Todd Garvey, Legislative Attorney, November 9, 2012, Page 8.

It would be easy to come to the conclusion that any state law that permits an activity prohibited under federal law would be preempted. However, this is simply not the case.

> Courts, however, have not viewed the relationship between state and federal marijuana laws in such a manner, nor did Congress intend the CSA displace all state laws associated with controlled substances.[51] Instead, the relationship between the federal ban on marijuana and state medical marijuana exemptions must be considered in the context of two distinct sovereigns, each enacting separate and independent criminal regimes with separate and independent enforcement mechanisms, in which certain conduct may be prohibited under one sovereign and not the other. Although state and federal marijuana laws may be "logically inconsistent," a decision not to criminalize - or

> even to expressly decriminalize – conduct for purposes of the law within one sphere does nothing to alter the legality of the same conduct in the other sphere.

Id. at 8. (Footnote 51 states, "21 U.S.C. §903 (limiting the preemptive scope of the CSA to only those state laws that create a "positive conflict" with federal law)."

To further bolster this conclusion, the well-reasoned discussion about federal preemption appearing in *Crouse* at ¶¶17-26 should be reviewed.

The CSA was passed in 1970, more than three decades before the State of Colorado passed Amendment 20, Article XVIII, Section 14. Common sense dictates that the U.S. Congress could not have contemplated that the States would pass legislation that allowed the medical use of marijuana. However, the courts that have been faced with this alleged conflict, as evidenced by the ruling in *Crouse, supra*, and the authorities cited therein, have come to the conclusion that it is without question that the CSA does not preempt Article XVIII, Section 14 of the Colorado Constitution.

However, the question remains whether Section 14(2)(e) requiring law enforcement agencies to return marijuana to qualified patients somehow violates the CSA. It is the directive to cause a law enforcement official to give medical marijuana back to a qualified patient that requires some additional discussion.

Regarding this particular matter, it is important to note that the obligation to return medical marijuana at issue in this appeal is not without its limits. The obligation to return only applies to medical marijuana, and then only to qualified

patients, who have been acquitted of the charges that lead to the seizure of medical marijuana in the first place.

> . . . Marijuana and paraphernalia seized by state or local law enforcement officials from a patient or primary care-giver in connection with the claimed medical use of marijuana shall be returned immediately upon the determination of the district attorney or his or her designee that the patient or primary care-giver is entitled to the protection contained in this section as may be evidenced, for example, by a decision not to prosecute, the dismissal of charges, or acquittal.

Colo. Const. art. XVIII, § 14(2)(e).

This limited obligation cannot be held to thwart the purpose of the CSA, nor can it be the grounds for denying immunity under Section 885(d).

II. THE ACTS REQUIRED UNDER ARTICLE XVIII, SECTION 14(2)(e) OF THE COLORADO CONSTITION ARE IMMUNE FROM PROSECUTION UNDER THE CSA PURSUANT TO 21 U.S.C. §885.

The immunity language contained in the federal statute states:

> Except as provided in sections 2234 and 2235 of title 18, no civil or criminal liability shall be imposed by virtue of this subchapter upon any duly authorized Federal officer lawfully engaged in the enforcement of this subchapter, or upon any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement *of any law or municipal ordinance* relating to controlled substances.

21 U.S.C. § 885(d), (emphasis added)

Section 885(d) does not limit itself to enforcement of just the CSA. It clearly states that a law enforcement officer is granted immunity from any civil or

criminal liability for the enforcement of "*any law* or municipal ordinance related to a controlled substance." Id., (emphasis added).

The narrow view of the immunity afforded under 21 U.S.C. §885(d) advocated by the Petitioner simply does not withstand scrutiny. Such a view was summarily rejected by the majority opinion in *Crouse*. *See Crouse supra,* ¶35. In addition, three cases have rejected the Petitioner's argument, *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656, 678, (Cal. Ct. App. 2007); *State v. Okun*, 296 P.3d 998, 1002 (Ariz. Ct. App. 2013) and *State v. Kama*, 39 P.3d 866. 868 (Or. Ct. App. 2002). The court in *Okun*, *supra*, squarely addressed the issue by stating, "This provision immunizes law enforcement officers such as the Sheriff from any would-be federal prosecution for complying with a court order to return Okun's marijuana to her." Id. at 1002. The court in *City of Garden Grove*, supra, went further and stated:

> By analogy, it would stand to reason that the only way a police officer could be found in violation of 21 U.S.C. §841(a)(1) for distributing a controlled substance is if he or she intended to act as a drug peddler rather than a law enforcement official. In this case, it is quite obvious the police do not want to give Kha his marijuana back at all, let alone have him use it for illicit purposes. They are acting under compulsion of lawful court order. Therefore, we cannot see how anyone could regard compliance with this order a violation of 21 U.S.C. §841(a)(1).
>
> Assuming one could, it seems to us clear the police would be entitled to immunity under 21 U.S.C. §885(d).

City of Garden Grove v. Superior Court, 68 Cal. Rptr. 3d 656, 681 (Cal. Ct. App. 2007)

The majority in *Crouse, supra* adopted *City of Garden Grove*. *See Crouse* ¶33. The Court of Appeals went on to amplify the analysis because it was not binding authority in Colorado. *See Crouse*, ¶34. The Petitioner on the other hand fails to cite a single case or instance wherein a law enforcement agency or official has been threatened with, let alone being charged with, a violation of the CSA for returning marijuana pursuant to a state requirement to do so.

As was held in *Crouse, supra*, the act of returning marijuana to a qualified patient pursuant to Section 14(2)(e) is engaging in the enforcement of a law. The *Crouse* court pointed out that the police officers involved are "duly authorized officer[s] 'of a "political subdivision" of the state of Colorado." *Crouse* at ¶34. They would be engaged in the enforcement of a law, Section 14(2)(e), by following the Colorado Constitutional mandate to return the medical marijuana. Indeed, the officers were under a court order to return the marijuana. The officers involved "should not be charged with evaluating the legality of the order, . . ." Id. Further, if they were not acting in their official capacity, they would not be afforded Section 885(d) immunity for taking possession of the marijuana in the first place.

Looking at this issue from a different perspective, because they are enforcing a state law, rather than a federal law, by seizing the marijuana in the first

place, they are enforcing "a law" and would be granted §885(d) immunity. By enforcing another "law," i.e. returning the marijuana, their immunity is not lost. Without question, they would be entitled to immunity under Section 885(d).

On this point two additional considerations should be mentioned. First, law enforcement officials in Colorado can only enforce Colorado law, they have no authority to enforce federal law, nor can they be conscripted by the federal government to enforce federal law. Second, law enforcement officials do not get to pick and choose which Colorado law with which they will comply. If a law enforcement officer believes that he or she cannot comply with a valid court order, they can choose another line of work, or suffer of the consequences of failure to obey.

A further testament to the recognition of the Section 885(d) immunity by the federal government is the fact that never in the history of the United States, or even in the 16 years since the passage of Amendment 20 in Colorado, not once has the federal government even hinted, much less asserted any claim against any law enforcement official in Colorado, or in any other state, for returning medical marijuana to a qualified patient. Absent such an immunity, there should have been at least one instance, in the history of the United States, or in any state, in which a law enforcement official is threatened with federal action. In short, it has never happened because such law enforcement officials are immune from prosecution.

This court should also note that the only cases that are directly on point are C*rouse, supra., City of Garden Grove, supra, Kama, supra and Okun, supra.* All of these cases hold that law enforcement officials returning medical marijuana to qualified patients have immunity under 21 U.S.C. §885(d).

III. STATE AND LOCAL LAW ENFORCEMENT OFFICIALS ARE INCABLE OF FORMING THE CRIMINAL *MENS REA* NECESSARY TO VIOLATE THE CSA.

It is also important to note that any threat of federal criminal prosecution, and any preemption suggested by the Petitioner, is further diminished by the fact that governmental entities cannot form criminal intent.

> The weight of persuasive authority supports a conclusion that government entities cannot form specific criminal intent. See *Gill Ramirez Group*, 786 F.3d at 412; *Rogers*, 359 Fed. Appx. at 201; *Lancaster Community Hospital*, 940 F.2d at 404. See also *City of Newport v. Fact Concerts, Inc.* 453 U.S. 247, 261, 101 S. Ct. 2748, 2757, 69 L. Ed. 2d 616, (1981) (noting "respectable authority to the effect that municipal corporations can not, (sic), as such, do a criminal act or a willful and malicious wrong") (citation and internal quotation marks omitted.)

Safe Streets Alliance, et al., v. Alternative Holistic Healing, et al., United States District Court for the District of Colorado, Case No. 1:15-cv-00349 – REB-CBS, *Order re: Motions to Dismiss*, Judge Robert E. Blackburn, January 19, 2016, at Page 13-14.

As pointed out above, the *Crouse* court pointed out that the police officers involved are "duly authorized officer[s] 'of a "political subdivision" of the state of Colorado." *Crouse* at ¶34. Unless the law enforcement agency or its individual officers were acting outside the scope of their State approved duties, they cannot

form the necessary criminal *mens rea* to violate the CSA. Based upon the authorities cited above, it would be difficult to reach a conclusion that a law enforcement official could form the necessary criminal intent to violate the CSA by following a State mandate to return medical marijuana to a medical patient who was acquitted of the charges that lead to the seizure.

IV. IT IS POSSIBLE FOR STATE LAW ENFORCEMENT OFFICIALS TO COMPLY WITH BOTH THE CSA AND STATE LAW.

The Respondent contends that the CSA preempts Section 14(2)(e) of Article XVIII of the Colorado Constitution because of an alleged conflict that makes it physically impossible or when state law stands as an obstacle to the objectives of federal law.

Regarding the issue of obstacle preemption, as seen above, and in *Crouse*, *supra*, Colorado law does not present an obstacle to the objectives of the CSA, especially given the extremely limited circumstances in which marijuana must be returned. Nor does Colorado law create a situation wherein it is impossible to comply with both state and federal law.

The Petitioner's arguments on the impossibility issue are predicated on the assumption that law enforcement agencies are forced to choose between upholding the Colorado Constitution and violating the CSA, as if such agencies are powerless puppets in the alleged conflict between Colorado law and the CSA. Indeed, the dissent claims that the law enforcement officers are caught "in a classic 'Catch-22'.

If they comply with federal law, they risk prosecution under state law. If they comply with state law, they risk prosecution or restraint by injunction under federal." *Crouse*, at ¶86.

Setting aside the fact that the risk of federal intervention is non-existent, this argument fails to recognize the State of Colorado law enforcement agency's role in the matter. The Respondent fails to point out what the City of Colorado Springs in its Amicus Brief glaringly admits, that neither a law enforcement agency, nor any individual law enforcement officer, is under any requirement to seize marijuana. "The CSA does not require that local law enforcement officials seize marijuana. It does not require officials to retain marijuana." *Amicus Brief of the City of Colorado Springs* at 15. No requirement under state law can be found that requires such a seizure.

It has been observed that a patient can comply with both the CSA and a state law allowing the medicinal use of marijuana by simply refraining from possession marijuana at all. *See Emerald Field Fabricators v. Bureau of Labor and Industries*, 230 P.3d 518, 528 (Oregon 2010). The same argument can be made of law enforcement agencies and their individual law enforcement officials. They can comply with both the CSA and state law by simply NOT seizing medical marijuana. Further, as was pointed out in *Crouse, supra*, a Colorado law

enforcement agency cannot force the patient to accept return of the medical marijuana.

Accordingly, the "Catch-22" that they are caught in is uniquely of their own doing, a direct result of their own act, while suggesting a threat of federal prosecution that is imaginary, at best. If they have reason to believe that the marijuana would have to be returned in the first place, they could simply take pictures, videotape, or otherwise use their discretion to not seize the medical marijuana, thereby avoiding putting themselves in a position where they must, in their mind, violate federal law.

Put another way, if a law enforcement agency or official wishes to avoid the risk of federal injunction or prosecution from some alleged threat of a violation of the CSA, they have the option to simply not seize medical marijuana in the first place.

V. THE FEDERAL GOVERNMENT ITSELF HAS TAKEN THE STANCE THE FEDERAL LAW DOES NOT PREEMPT STATE LAW.

Given that the United States Department of Justice, (the "DOJ"), is the sole and only federal entity that could enforce the CSA, it would be difficult to imagine a situation where the DOJ would espouse a policy that would be in conflict with the CSA on any theory of preemption. However, its policies on enforcement and prosecution are most instructive on this point.

On August 29, 2013 the Deputy Attorney General for the United States Department of Justice issued a memorandum to all United States Attorney entitled "*Guidance Regarding Marijuana Enforcement*," (This Memorandum can viewed at https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf, and will be referred to herein as the "Guidance Memo").

Ignoring the fact that police officers enjoy immunity under 21 U.S.C. §885(d), disregarding the fact that a law enforcement official has never been threatened with or charged for returning medical marijuana to qualified patients and overlooking the fact that they lack the requisite *mens rea* to violate the CSA, the DOJ has, through the Guidance Memo, announced its position on the preemption matter.

The Guidance Memo states that the DOJ will only focus its resources and efforts, including prosecution, on eight enforcement priorities in relation to the manufacture, sale and possession of marijuana. The eight priorities are:

- Preventing distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;

- Preventing state-authorized marijuana from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

See Guidance, pp. 1-2.

None of the eight priorities set forth in the Guidance involve returning wrongfully seized medical marijuana to qualified patients. The DOJ went on to clarify its position by stating:

> For example, the Department of Justice has not historically devoted resources to individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities, and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above.

Id. at 2.

In reviewing a potential RICO claim, Federal District Court Judge Blackburn gave much deference to the Guidance Memo and stated,

> There certainly can be no more 'judgment-laden standard' than that which confers almost complete discretion on the Attorney General to determine whether to assert the supremacy of federal law to challenge arguably conflicting state marijuana laws. (cite omitted). The Department of Justice has made a conscious, reasoned decision to allow states which have enacted laws permitting the cultivation and sale of medical and recreational marijuana to develop strong and effective regulatory and enforcement schemes. **See** James M. Cole, **Guidance Regarding Marijuana Enforcement**, United States Department of Justice, Office of the Deputy Attorney General (August 29, 2013).

Safe Streets Alliance, et al., v. Alternative Holistic Healing, et al., *supra* at 11, (bold language in original).

This can only be read to mean that the federal government itself does not believe that it has preempted the enforcement of marijuana laws. Otherwise, it would have been impossible for the DOJ to defer to the individual states in marijuana related matters. Further, if the DOJ were concerned that somehow the actions of law enforcement in returning marijuana to patients would be violate the objectives of the CSA, it could have easily made it one of their enforcement priorities. The DOJ declined to do so.

Judge Blackburn further stated, "More importantly, the authority to enforce these, (and most other) substantive provisions of the CSA – *or not* – rests entirely with the United States Attorney General, and by her delegation, the Department of Justice. (cites omitted)." Id. at 10, (emphasis in original).

The DOJ itself, through the Guidance Memo, has espoused a written policy that affirmatively allows state law to supersede arguably conflicting federal laws. The DOJ certainly would not adopt a policy that would put the objectives of the CSA at risk, even if the Guidance were interpreted to merely delineate prosecutorial discretion. It is clear that the federal government itself has deferred to the state regarding marijuana matters. Nothing could more informative than the DOJ's own written policy on such matters.

CONCLUSION

Based on the authorities cited above, the provisions of Article XVIII, Section 14(2)(e) requiring the return of medical marijuana to a qualified patient are not preempted by the CSA. The majority decision of the Court of Appeals in *Crouse* should be affirmed.

Respectfully submitted this 30th day of March 2016

/s/ Charles T. Houghton
Signature of Respondent's Attorney
(*Original signature are kept on file pursuant to the Colorado Rules of Civil Procedure)*

CERTIFICATE OF SERVICE

I certify that on this 30th of March 2016 a true copy of the foregoing Respondent's Answer Brief was e-served using the Colorado ICCES e-filing system on:

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