

**HANDLE WITH CARE: ADDRESS
AND SUPPRESS IMPROPER
TREATMENT OF EVIDENCE**

Ashley Bargenquast – Tully & Weiss Attorneys at Law

Qiana Washington – Washington & Associates

**HEALTH &
SAFETY CODE:**

**DIVISION 10,
CHAPTER 8**

This is the chapter that controls how controlled substances are to be seized, forfeited, and disposed of.

Forfeiture of a controlled substance is contingent upon it being acquired/etc. in violation of the division.

11470(a)

CANNABIS COMPLICATION

Cannabis is a controlled substance, even under California law, but is not per se unlawful to possess.

- Medicinally, there is no amount that is per se unlawful to possess; it simply must be reasonably related to the ongoing needs of the patient

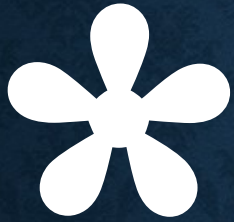
(People v. Kelly (2010) 47 Cal.4th 1008.)

HEALTH & SAFETY CODE:

DIVISION 10, CHAPTER 8

- Controlled substances may be destroyed if a conviction of the owner occurs. (11473)
- If case disposed of without trial/ by way of dismissal/otherwise than by way of conviction, then court order for destruction
 - Unless the court finds it was lawfully possessed. (11473.5)
- Summarily Forfeited to the State if:
 - Schedule I substances possessed in violation of the division or whose owners are unknown are contraband* (11475)
 - If cultivated/grown in violation of division or unknown owners/cultivators (11476)

Health and Safety Code § 11361.1(c)



“Cannabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest.”

**IN ORDER TO DESTROY A CONTROLLED
SUBSTANCE THAT NOT SUMMARILY FORFEITED
YOU MUST HAVE A COURT ORDER.**

**THESE COURT ORDERS MAY ONLY BE ISSUED
WITH A LEGAL BASIS.**

**THE ONLY LEGAL BASES FOR SUCH
DESTRUCTION ARE AFTER RESOLUTION OF
THE CASE.**

BASIC DUE PROCESS!

BUT THERE IS ONE EXCEPTION

**HEALTH
&
SAFETY
CODE
§
11479**

- Notwithstanding 11473 and 11473.5 (after case), after seizure, substances in excess of 10 lbs. or cannabis in excess of 2 lb. may be destroyed without a court order IF this code section is followed.
- “Destruction **SHALL NOT TAKE PLACE** pursuant to this section **UNTIL ALL OF THE FOLLOWING REQUIREMENTS ARE SATISFIED:**”
 - *Emphasis added*

REQUIREMENT 1 – (A)

At least five random and representative samples have been taken, for evidentiary purposes, from the total amount of suspected controlled substances to be destroyed. These samples shall be in addition to the 10 pounds required above. When the suspected controlled substance consists of growing or harvested cannabis plants, at least one 2-pound sample or a sample in the amount of medicinal cannabis a medicinal cannabis patient or designated caregiver is authorized to possess by ordinance in the city or county where the cannabis was seized, whichever is greater, shall be retained. This sample may include stalks, branches, or leaves. In addition, five representative samples of leaves or buds shall be retained for evidentiary purposes from the total amount of suspected controlled substances to be destroyed.

WHAT DO THEY NEED TO DO?

- Controlled Substance
 - 10 pounds
 - 5 random samples – what does this mean?
- Cannabis
 - 2-pound sample, or amount allowed to be possessed by local ordinance
 - Such a limitation on possession would be unconstitutional under *People v. Kelly*
 - Sample can include stalks, branches, or leaves
 - NOTE: Does not include roots or dirt
 - 5 random samples – what does this mean?
 - Leaves or buds

REQUIREMENT 2

- (b) Photographs and videos have been taken that reasonably and accurately demonstrate the total amount of the suspected controlled substance to be destroyed.
- The requirement for videos was added in 2015.
- “The bill would additionally require that the law enforcement agency take videos that reasonably and accurately demonstrate the total amount of the suspected controlled substance to be destroyed.” (S.B. 303, 2015 Leg., Reg. Sess. (Cal. 2015).)

WHAT DO THEY NEED TO DO?

- How much was destroyed?
 - This is simple when it comes to controlled substances, because it is simply the amount.
 - But what about cannabis?
- Things we want it to provide evidence of:
 - Size of plants
 - Potential yield
 - Potentially health of plants
 - Verification of alleged amount

REQUIREMENT 3

- (c) The gross weight of the suspected controlled substance has been determined, either by actually weighing the suspected controlled substance or by estimating that weight after dimensional measurement of the total suspected controlled substance.

WHAT DO THEY NEED TO DO?

- Actual weight of the substances (ex. weight at a dump's scales before and after a truck is emptied, aggregate weight of individual weighed evidence items, etc.)
- Dimensions of the aggregate substance.
 - If they do it this way I generally insist upon a photograph showing it, as required in (a)

REQUIREMENT 4

- (d) The chief of the law enforcement agency has determined that it is not reasonably possible to preserve the suspected controlled substance in place, or to remove the suspected controlled substance to another location. In making this determination, the difficulty of transporting and storing the suspected controlled substance to another site and the storage facilities may be taken into consideration.

WHAT DO THEY NEED TO DO?

- A line in the affidavit saying that the Sheriff of the County or Chief of Police has found/determined these things.
- NOTE: There is not an allowance for this finding to come from anybody except the chief of the law enforcement agency. Even though the actual destruction can take place by an agent.

REQUIREMENT 5

- Subsequent to any destruction of a suspected controlled substance pursuant to this section, an affidavit shall be filed within 30 days in the court that has jurisdiction over any pending criminal proceedings pertaining to that suspected controlled substance, reciting the applicable information required by subdivisions (a), (b), (c), and (d) together with information establishing the location of the suspected controlled substance, and specifying the date and time of the destruction. In the event that there are no criminal proceedings pending that pertain to that suspected controlled substance, the affidavit may be filed in any court within the county that would have jurisdiction over a person against whom those criminal charges might be filed.

WHAT DO THEY NEED TO DO?

- Affidavit within 30 days of destruction
 - Late filing is not fatal – see Substantial compliance
- Everything in (a) – (d) AND “information establishing the location of the suspected controlled substance, and specifying the date and time of the destruction.”
- Notes:
 - This applies whether there is a case filed or not.
 - Contradictory to the sworn statement in a return of property
- NO CASE LAW SAYING A FAILURE TO DO SO IS OK!

WHAT SATISFIES THE REQUIREMENTS ?

- Strict Compliance
 - Statutory requirements are mandatory, rather than directory, and exact strict compliance when such an intent is expressed or implicit in the statute. (*Edwards v. Steele* (1979) [25 Cal.3d 406, 409-410](#) [[158 Cal.Rptr. 662, 599 P.2d 1365](#)].)
 - Section 11479 is mandatory in its terms; it specifies that destruction of evidence "shall not take place" unless specified requirements are satisfied.

People v. Wilson (1987) 191 Cal.App.3d 161;

BUT

- Substantial Compliance

- People v. Superior Court (Calamaras) (1986) 181 Cal.App.3d 901, 905, 226 Cal.Rptr. 636: photos showing the height and leaf samples substantially complied with representative sample; no constitutionally material evidence lost.
- People v. Eckstrom (1986) 187 Cal.App.3d 323, 335, 231 Cal.Rptr. 664: not all plants had to be in a single photograph, the filing delay did not prejudice the D*, substantial compliance, so ok.
- Littlefield v. County of Humboldt (2013) 218 Cal.App.4th 243, 255: affidavit didn't have location cannabis seized from or precise date and time, but it was known where it was seized and time was given "before 11:00 the morning after the raid" so not possible prejudice*.

- What about the Strict Compliance standard?

- People v. Wilson was not overturned, but substantial compliance with each mandatory requirement is allowed.
- The case law is incredibly limited, but failure to meet one of the requirements entirely has not been excused.

PREJUDICE?

- There is no explicit exploration or guidance on analyzing whether the non-compliance with the section prejudices the defendant, but it is mentioned in both *Littlefield* and *Eckstrom*
- I have had this used to deny my motions.

NOT A COMMON MOTION

- Courts have been very confused by this motion
 - Whether the pre-trial court can hear it?
 - What the standard is
 - What the remedy is

But the most common question



Is this a *Trombetta*?

NO.

**BUT THERE IS A
MATERIALITY
CONCERN**

People v. Superior Court (Calamaras) (1986) 181 Cal.App.3d 901, 906

- In light of the so-called "truth-in-evidence" provision added to our constitution by Proposition 8 (Cal. Const., art. I, § 28, subd. (d); cf. *People v. Tierce* (1985) [165 Cal.App.3d 256, 263](#) [[211 Cal.Rptr. 325](#)]), suppression of evidence on the basis of the prosecution's failure to preserve underlying physical evidence should be ordered only if required as a matter of federal constitutional law.
- The recently explicated federal standard is substantially different from that stated in the earlier California cases: "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense.
- To meet this standard of constitutional materiality, [citation], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."
 - *California v. Trombetta, supra*, [467 U.S. 479, 488-489](#) [[81 L.Ed.2d 413, 422, 104 S.Ct. 2528, 2534](#)].

REALLY?

- The statement that only material evidence with a known exculpatory nature before destruction with no comparable alternative source can be suppressed is FALSE
- We can also suppress evidence that meets *Youngblood*, so evidence that is potentially useful but destroyed in bad faith can also be suppressed.

STATUTORY TROMBETTA

- The legislature created a specific instance where such destruction is allowed but **ONLY** if the mandatory code section is followed.
 - So non-compliance with 11479 is codified bad faith.
 - The codified requirements are what the legislature requires for comparable evidence to have been retained
- Because “The quantity and quality of the contraband seized is always relevant to the issue of whether the narcotics are held for sale or personal use.”
 - *People v. O’Hearn* (1983) 142 Cal.App.3d 566, 570, citing *People v. Shipstead* (1971) 19 Cal.App.3d 58, 77, 96 Cal.Rptr. 513.

THEN WHAT KIND OF MOTION IS IT?

There is no remedy in the code section

- PC 1538.5
 - This is because destruction in violation of Health and Safety Code section 11479 constitutes a due process violation under state and federal constitutional standards. (*People v. Wilson* (1987) 191 Cal.App.3d 161, 167.)
- Suppression motion shown in case law
 - *People v. Superior Court (Calamaras)* (1986) 181 Cal.App.3d 901; *People v. Wilson* (1987) 191 Cal.App.3d 161; *People v. O'Hearn* (1983) 142 Cal.App.3d 566.

WHEN IT DOESN'T WORK

1538.5(I) – A SECOND SHOT

- Post prelim felonies or indictments have the right to **renew** or make the motion at a special hearing relating to the validity of the search or seizure.
- If no motion was made at the preliminary hearing, then it can be fully litigated.
- This procedure applies to felonies OR, “... If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.”
 - Section (g)

1538.5(I) – A SECOND SHOT

- If the motion was made at the preliminary hearing, unless otherwise agreed to by all parties, evidence presented at the special hearing shall be limited to
 - the transcript of the preliminary hearing and
 - to evidence that could not reasonably have been presented at the preliminary hearing,
 - except that the people may recall witnesses who testified at the preliminary hearing.
 - If the people object to the presentation of evidence at the special hearing on the grounds that the evidence could reasonably have been presented at the preliminary hearing, the defendant shall be entitled to an in camera hearing to determine that issue.

1538.5(I) – A SECOND SHOT

- The court shall base its ruling on all evidence presented at the special hearing and on the transcript of the preliminary hearing and the findings of the magistrate shall be binding on the court as to evidence or property not affected by evidence presented at the special hearing.
- Review after the special hearing is held, prior to trial, shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his or her motion at the special hearing.
 - If misdo and prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the appellate division. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.