

Quinn Emanuel Cannabis Litigation Practice Alert

Ninth Circuit Clarifies Restrictions On Prosecutions Related To Medical Marijuana

In *United States v. Pisarski*, No. 17-10428, 2020 U.S. App. LEXIS 21564 (9th Cir. July 10, 2020), the United States Court of Appeals for the Ninth Circuit upheld an order enjoining the federal government from prosecuting two California marijuana growers. The opinion addresses the scope of the appropriations rider passed by Congress that prohibits use of congressionally allocated funds to prevent states from implementing medical marijuana programs and its impact on criminal prosecutions of federal cannabis defendants. The opinion also clarifies the burden defendants must meet to establish strict compliance with state medical marijuana law when they are being prosecuted for prospective illegal activity.

I. Background

In December 2014, Congress passed an appropriations rider prohibiting the Department of Justice from using congressionally allocated funds to prosecute state-legal medical cannabis operators for non-compliance with federal law.¹ Sometimes referred to as the Rohrabacher-Farr amendment, the rider has since been renewed annually. In August 2016, the Ninth Circuit held in *United States v. McIntosh*, 833 F.3d 1163, that criminal defendants could seek injunctions enjoining federal prosecution on the basis of the rider. The *McIntosh* decision entitles Ninth Circuit cannabis defendants to an evidentiary hearing to demonstrate their “strict[]” compliance with state medical marijuana law.² A showing of strict compliance by a preponderance of the evidence precludes the use of federal funds for prosecution.

This case involves a *McIntosh* hearing sought by Defendant-Appellees Anthony Pisarski and Sonny Moore (“Defendants”). After a federal law enforcement raid uncovered 327 cannabis plants, loaded firearms, and over \$400,000 in cash on their Humboldt County property, Defendants pleaded guilty in July 2014 to conspiracy to manufacture and possess with intent to distribute marijuana.³ But before sentencing could occur, the appropriations rider was enacted. Pursuant to the rider, Defendants moved to enjoin the Department of Justice from expending funds on their prosecution. A *McIntosh* hearing was held on July 28, 2017, at which Defendants presented evidence to demonstrate their strict compliance with California’s Medical Marijuana Program Act.

The United States District Court for the Northern District of California granted Defendants’ motion to enjoin the prosecution, finding that Defendants had met their burden to establish strict compliance with state law.⁴ The court held that “where defendants are charged with intent to sell marijuana, but the details of such a prospective sale are thin at best,” the “suboptimal” evidence proffered by Defendants was sufficient.⁵ The court found that Defendants had shown by a preponderance of the evidence that their intended future sale of the cannabis plants on their property would have complied with state law.⁶ The government subsequently appealed the stay.

II. The Ninth Circuit’s Ruling

As a threshold matter, the Ninth Circuit first rejected Defendants’ argument that the appropriations rider barred the government from appealing the district court’s *McIntosh* finding because the appeal required an expenditure of funds.⁷ Because the rider applies only where Defendants can establish

¹ Consolidated and Further Continuing Appropriations Act Of 2015, Pub. L. No. 113–235, § 538, 128 Stat. 2130, 2217 (2014).

² *United States v. McIntosh*, 833 F.3d 1163, 1179 (9th Cir. 2016).

³ 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and 846.

⁴ *United States v. Moore*, 274 F. Supp. 3d 1032, 1034 (N.D. Cal. 2017).

⁵ *Id.* at 1039-40.

⁶ *Id.*

⁷ *Pisarski*, 2020 U.S. App. LEXIS 21564, at *10.

strict compliance with state law, the Court determined that the rider “does not . . . bar the government from spending funds to determine whether the rider applies to the prosecution in the first place.”⁸

The Court then considered whether Defendants did in fact strictly comply with California medical marijuana law. Reviewing the district court’s decision for clear error, the Court found that the lower court did not clearly err in finding Defendants demonstrated by a preponderance of the evidence that they were in strict compliance with California law at the time of their arrest.⁹

The Ninth Circuit found that because Defendants were charged specifically with intent to distribute marijuana, the district court had appropriately limited the *McIntosh* hearing to the conduct underlying that charge: the prospective sale of the 327 cannabis plants on the property.¹⁰ At the hearing, Defendants presented evidence, including third-party declarations and cultivation agreements, that the plants would have been sold to two California marijuana collectives for a reimbursement of costs rather than for profit, as state law requires. The Court rejected the government’s argument that the *McIntosh* hearing should have focused on the entire scope of the alleged conspiracy. The Court also rejected the government’s argument that the presence of firearms and cash on the property demonstrated that Defendants were not in compliance with California law, crediting the district court’s finding that their presence was “equally consistent with the operation of a rural, cash-intensive enterprise” as it was with an unlawful operation.¹¹

Judge Wallace issued a dissent disputing that Defendants had proved strict compliance with California law by a preponderance of the evidence, holding that a suboptimal showing was not enough and stating that Defendants had to “overcome an exacting burden.”¹² Judge Wallace believed the district court had erred by failing to consider prior judicial opinions and state Attorney General guidelines for marijuana growers in its analysis and had failed to make necessary findings of fact.¹³ Judge Wallace wrote: “I fear that as a result of today’s opinion, district courts may now adopt a proportionality approach in any case in which a California resident is charged with possession of distributable quantities of marijuana, staying a federal marijuana prosecution so long as there is a theoretical possibility of compliance at the time of a future sale.”¹⁴

III. Key Takeaways

The Ninth Circuit has stated that neither the appropriations rider nor the decision in *McIntosh* is an “impenetrable bulwark” for cannabis defendants in federal court.¹⁵ To enjoin a federal prosecution, defendants should be prepared to demonstrate strict compliance with state medical cannabis law. Nonetheless, the fact the *Pisarski* court found Defendants’ showing was adequate even though the district court described it as “suboptimal” indicates that the standard courts are applying, at least in the case of alleged prospective criminal conduct, is not as exacting.

⁸ *Id.* at *11.

⁹ *Id.* at *13.

¹⁰ *Id.* at *15.

¹¹ *Id.* at *16.

¹² *Id.* at *26.

¹³ *Id.* at *34.

¹⁴ *Id.* at *38-39.

¹⁵ *Id.* at *11.

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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