Ninth Circuit Uproots Department of Justice Regarding Prosecution of Medical Marijuana Cases

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On August 16, 2016, the United States Court of Appeals for the Ninth Circuit rebuked the Department of Justice ("DOJ") in *United States v. McIntosh*, a case that involves the tension between federal and state laws involving medical marijuana.[1] The Court held that a Congressional rider to the appropriations bill precluded the DOJ from using federally-approved funds to prosecute individuals who "strictly comply" with their state laws concerning medical marijuana. The crux of the case involves the clash between the Controlled Substances Act ("CSA")[2] which prohibits the possession, use, cultivation or distribution of marijuana, and the laws in 25 states and the District of Columbia that permit medical marijuana. The case also involved the application of another federal law.

Under the Supremacy Clause, when there is an inconsistency between federal and state law, federal law trumps state law. Enter the bipartisan Rohrabacher-Farr amendment which Congress enacted in 2014 as a rider to the 2015 appropriations bill.[3] The Court examined the explicit language in the Rohrabacher-Farr amendment which states, in part:

> "None of the funds made available under this Act to the Department of Justice may be used with respect to [the states and the District of Columbia which enacted medical marijuana laws], to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."

Id. at 11-12. Significantly, the following year Congress enacted the Consolidated Appropriations Act of 2016, which again prohibited the DOJ from prosecuting medical marijuana cases where individuals acted in accord with state law.[4]

In *McIntosh*, the Court consolidated ten separate appeals stemming from California and Washington district courts. The defendants in all ten cases were being prosecuted by the U.S. Attorneys' Office for violating the CSA, notwithstanding that California and Washington are among the 25 states that have legalized medical marijuana.

The defendants argued that the Rohrabacher-Farr Congressional rider precluded the DOJ from using funds to prosecute individuals who comply with their respective state laws. By contrast, the DOJ argued that the CSA allowed it to prosecute individuals who possess, use, grow or distribute medical marijuana. The Court rejected the DOJ's argument, noting that "[o]nce Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for… the courts to enforce them when enforcement is sought." *Id.* at 18. The unanimous three-member panel of judges noted that "[a] court cannot ignore the judgment of Congress, deliberately expressed in legislation." *Id.*

The Court recognized the obvious inconsistency in the law by observing, "[t]he CSA prohibits what the State Medical Marijuana Laws permit." If the DOJ prosecutes individuals who comply with state laws concerning medical marijuana, the DOJ "prevent[s] the state from giving practical

1 *United States v. McIntosh*, 9th Cir. No. 15-10117, August 16, 2016.
2 21 U.S.C. § 841 *et seq.*
3 Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235 § 538.
4 Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542.

effect to its law providing for non-prosecution of individuals who engage in permitted conduct." *Id.* at 27. In rejecting the DOJ's arguments, the Court concluded, that "at a minimum, § 542 prohibits [the] DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws." *Id.*

The cases were remanded back to the respective district courts for evidentiary hearings to determine if the defendants complied with state laws. If they did not, they could be prosecuted by the DOJ. However, as this landmark decision illustrates, unless Congress changes the provisions of § 542, which is theoretically possible, the DOJ is precluded from preventing the implementation of state laws that authorize the use, distribution, possession, or cultivation of medical marijuana. Thus, unless a future Congress appropriates funds for the DOJ to prosecute similar medical marijuana cases, individuals using medical marijuana in full compliance with state law will not be prosecuted by the DOJ – at least in the Ninth Circuit.[5] Whether the DOJ will try to argue similar cases in other courts remains an open question. However, as the Court noted, notwithstanding the CSA, Congress has expressly precluded the DOJ from using appropriated funds to prosecute individuals who comply with state medical marijuana laws.

At least nine additional states have medical marijuana bills on their ballots in November. By any reasonable estimation, the issue of medical marijuana will continue to be a growing concern in the health care community.

Disclaimer: As noted above, federal law is, at best, inconsistent in the area of medical marijuana. Because marijuana remains classified as a Schedule I controlled substance by the United States Drug Enforcement Agency, it is a crime under federal law to cultivate, distribute, sell or use marijuana. Any content contained herein is not intended to provide legal advice in connection with the violation of any state or federal law.

5 The 2016 Congressional Appropriations Act is in effect through September 30, 2016, when the fiscal year ends.

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