

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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| UNITED STATES OF AMERICA |) | |
| |) | |
| v. |) | Criminal No. 09cr209 |
| |) | |
| ROBERT PAWLOWSKI |) | |

BRIEF IN SUPPORT

Pennsylvania’s Medical Cannabis Law

Pennsylvania enacted its Medical Marijuana Act on April 17, 2016. See Medical Marijuana Act, P.L. 84, 35 P.S. §§ 10231.101 – 10231.2110, codified at 35 Pa. Stat. Ann. §§ 10231.101 – 10231.2110. The Act declares that “use or possession of medical marijuana ... is lawful within this Commonwealth,” so long as the “patient” receives certification from an approved medical practitioner and a valid identification card from the state Department of Health. 35 Pa. Stat. Ann. § 10231.303(a)-(b); see also *id.* at §§ 10231.403 & 10231.501. Moreover, the Medical Marijuana Act permits people on probation/parole to become patients on the same basis as any other person.

The Act sets up a highly regulated system of cultivation, processing and dispensing medical cannabis products to Pennsylvania residents with one of 23 qualifying conditions, set forth at §103. The Act requires a prospective patient to have a diagnosis for one of the qualifying conditions, to register with the Department of Health, and to receive a certification from a Pennsylvania physician who is registered with the Department of Health and authorized to make medical cannabis recommendations. The Department of Health issues a Pennsylvania Patient Identification card and requires annual renewal and re-certification. A patient must be in possession of the identification card whenever the patient is in possession of medical cannabis. The Act restricts medical cannabis to oil, pill, topical, liquid, tincture and dry leaf “flower.” A patient may incorporate medical cannabis into an edible form, such as an infused butter or baked product. A

patient may not “smoke” dry leaf flower but may vaporize or nebulize any Pennsylvania medical cannabis product.

The Consolidated Appropriations Act of 2020

In the Consolidated Appropriations Act of 2020, Congress used its appropriations power to provide billions of dollars to the Department of Justice, while prohibiting use of those funds to “prevent” states from “implementing” their medical-marijuana laws.

On December 20, 2019, President Trump signed the Consolidated Appropriations Act, 2020, funding the federal government through September 30, 2020. *See* Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317 (2019). The Act provides billions of dollars to the Department of Justice, but includes a rider at § 531 stating that “[n]one of the funds made available in this Act to the Department of Justice may be used, with respect to [Pennsylvania and 49 other states and jurisdictions] to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.” *Id.* at § 531, 2431. Identical language has been included in every appropriations act since 2014.³

In *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), the Ninth Circuit held that this appropriations rider “prohibits DOJ from spending money on actions that prevent the Medical Marijuana States’ giving practical effect to their state laws that authorize ... medical marijuana,” such as by “prosecut[ing] ... individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws.” *Id.* at 1176-77. Courts have also found that the rider prohibits DOJ from spending funds to enforce injunctions, participate in sentencing and revocation of supervised release proceedings, or defend appeals in cases where the underlying conduct was consistent with state medical-marijuana laws.

The Spending Rider Prohibits the Department of Justice from Enjoining Pennsylvania Medical Cannabis Use

The spending rider prohibits DOJ from using funds to “prevent” Pennsylvania “from implementing [its] own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.” Pub. L. No. 116-6, § 537, 133 Stat. 13, 138 (2019). In an opinion by Circuit Judge Diarmuid O’Scannlain, the Ninth Circuit in *McIntosh* began with the statutory text, citing three dictionary definitions of the word “implement.”

To “carry out, accomplish; esp.: to give practical effect to and ensure of actual fulfillment by concrete measure.” *Implement*, Merriam–Webster’s Collegiate Dictionary (11th ed. 2003);

“To put into practical effect; carry out.” *Implement*, American Heritage Dictionary of the English Language (5th ed. 2011); and

“To complete, perform, carry into effect (a contract, agreement, etc.); to fulfil (an engagement or promise).” *Implement*, Oxford English Dictionary, www.oed.com.

McIntosh, 833 F.3d at 1175-76 (citations omitted). Based on these definitions, the court explained, the rider must be read to “prohibit[] DOJ from spending money on actions that prevent the Medical Marijuana States’ giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana.” *Id.* at 1176.

The *McIntosh* court also considered the rider’s “place in the overall statutory scheme for marijuana regulation, namely the [Controlled Substances Act] and the State Medical Marijuana Laws.” *Id.* While the federal Controlled Substances Act prohibits the use, distribution, possession, or cultivation of marijuana, more and more states are enacting laws to permit the use of marijuana for medical purposes. *Id.* at 1176. The *McIntosh* court reasoned that “a superior authority, which prohibits certain conduct, can prevent a subordinate authority from implementing a rule that officially permits such conduct by punishing individuals who are engaged in the conduct officially permitted by the lower authority.” *Id.* at 1177.⁵

In light of its plain language and the broader statutory context, the Ninth Circuit concluded that “at a minimum,” the rider prohibits DOJ from using funds to prosecute medical-marijuana cases where the defendant complied with state law, because such prosecutions would “prevent” states from “implementing” their laws legalizing medical marijuana. *Id.* at 1177.

By officially permitting certain conduct, state law provides for non-prosecution of individuals who engage in such conduct. If the federal government prosecutes such individuals, it has prevented the state from giving practical effect to its law providing for non-prosecution of individuals who engage in the permitted conduct.

Id. at 1176-77. This conclusion was undoubtedly correct, and the Department of Justice did not seek Supreme Court review.

The spending rider clearly applies beyond the criminal prosecutions at issue in *McIntosh*, as the Ninth Circuit emphasized that its decision described only the “minimum” scope of the appropriations rider. *Id.* at 1177. Indeed, the broad language of § 537 prohibits DOJ from using funds on any and all “actions that prevent the Medical Marijuana States’ giving practical effect to their state laws.” *Id.* at 1176 (emphasis added). Courts have therefore applied the rider in many different contexts.

In *United States v. Marin Alliance for Medical Marijuana*, 139 F. Supp. 3d 1039, 1045 (N.D. Cal. 2015), for example, District Judge Charles Breyer held that the rider prohibited DOJ from spending money to enforce a pre-existing permanent injunction against a medical-marijuana dispensary, so long as the dispensary operated consistent with state law. Similarly, in *United States v. Pisarski*, 274 F. Supp. 3d 1032, 1040 (N.D. Cal. 2017), the district court enjoined DOJ from spending money in sentencing proceedings for defendants who had pled guilty to federal medical-marijuana offenses before the rider was enacted.

The rider has also been extended to protect individuals from federal prosecutions that indirectly attempt to punish them for state law-compliant actions. For example, a U.S. District

Court for the Eastern District of Michigan concluded that the rider prohibits DOJ from using funds to prosecute an owner of a state law compliant marijuana dispensary for possession of a firearm in connection with his medical marijuana business. In that case the court stated that “[a]lthough the Government is not attempting to directly prosecute [the defendant] for his medical marijuana business,” the prosecution “accomplishes materially the same effect.” *See United States v. Samp*, No. 16 20263, 2017 WL 1164453, at *2 (E.D. Mich. Mar. 29, 2017).

Other Federal Courts Have Permitted Medical Cannabis Use

Other Federal Judges have allowed defendants under federal supervision to use medical marijuana:

- *United States v. Tanya B. Kenney*, 16-10182-DPW (D. Mass. 2018).

Judge Cabell found that a defendant who had been issued a Massachusetts medical marijuana card and was using medical marijuana in accordance with state law was not in violation of her pretrial conditions.¹ *See* Transcript of November 3, 2016 Interim Status Conference, at 14:3-7, 14:21-15:24, *attached as* Exhibit A.

- *United States v. Gerard R. Proulx*, 15-10133-GAO (D. Mass. 2018).

Judge O’Toole modified defendant’s conditions of supervision to allow for the use of medical marijuana: “the defendant shall refrain from any unlawful use of a controlled substance with the exception for marijuana that is authorized for medical purposes by a qualifying certificate under state law.” *See* 15-10133-GAO, D.E. 38, Order Amending Supervised Release Conditions, *attached as* Exhibit B.

- *United States v. Ronall A. Howard*, 16-mj-00328 (E. Va 2016).

Judge Buchanan setting special conditions of supervision excusing defendant from submitting monthly reports and excusing defendant from drug and alcohol testing and/or treatment. *See* 16-mj-00328, Judgment, *attached as* Exhibit C.

- *United States v. Richard Martin*, 09-cr-98, Doc. No. 133 (W.D.P.A. 2019).

Judge Cercone declined to impose a sanction or restrict defendant where defendant obtained a medical card for use of marijuana. In deciding so, the Court reasoned,

The federal government has chosen not to interfere with the state providing this form of medical treatment to those who comply with state law and its accompanying regulations. And the medical benefits from the treatment should not be discounted as illicit behavior undertaken for personal thrill and/or the result of dependency behavior. Deference about such assessments should be given to those who are skilled in prescribing the treatment. Accordingly, the court will not prohibit defendant's use of prescription marijuana provided defendant's use remains in

compliance with state law and is not connected to any other unlawful activity or violation of the conditions of supervision. *See* 09-cr-98, Doc. No. 133, Memorandum Order at 1-2, *attached as* Exhibit D.

- *United States v. Nicole Hooper*, 19-cr-142, Doc. Nos. 61, 64 (W.D.P.A. 2020)

Judge Bissoon recently permitted the use of medical marijuana provided use remains in compliance with Pennsylvania law. **Noteworthy, the United States consented to the defendant's use of medical marijuana** so long as she was in compliance with state law. *See* 19-cr-00142, Government's Response to Defendant's Motion to Modify Conditions of Pre-Trial Release, Doc. No. 61 at 1 ("the government consents to defendant's use of medical marijuana, given that she complies with the Pennsylvania state regulatory requirements"), *attached as* Exhibit E.

- *United States v. Cameron Jackson*, 17-cr-577 Doc. No. 16 (E.D.PA. 2019)

Judge Jan E. DuBois addressed the issue of whether the budgetary spending rider prohibited the Department of Justice from enforcing federal law relative to the prohibition of medical cannabis use. The Court found that the spending rider did, in fact, enjoin the Department of Justice and ordered that a hearing be conducted to confirm that the defendant's cannabis use was in compliance with Pennsylvania law. The Court's Opinion and Order is *attached as* Exhibit F.

Conclusion

Defendant has been certified pursuant to Pennsylvania's Medical Marijuana Law, codified at 35 Pa.C.S.A. §10231.101 *et seq.* Defendant has been certified by a Pennsylvania physician who is registered with the Department of Health and authorized to make medical marijuana recommendations. The Consolidated Appropriations Act of 2020 prohibits the Department of Justice from using its budget to enforce federal law relative to well-regulated medical cannabis programs authorized pursuant to state law. Defendant's bond conditions should be modified to permit medical marijuana use if same is compliant with Pennsylvania law.

Respectfully Submitted,

/s/ Patrick K. Nightingale

Patrick K. Nightingale, Esq.

Attorney for Defendant
Robert Pawlowski

