EISNER GORIN LLP

STATE AND FEDERAL CRIMINAL DEFENSE

MARIJUANA LAW ISSUES IN CRIMINAL DEFENSE

Trump/Sessions View Marijuana as a Dangerous Drug

- The Enforcement Arm of Administration, Attorney General Jeff Sessions describes it as a dangerous drug. Marijuana use is not a "funny thing" to him.
- Sessions: “I reject the idea that we’re going to be better placed if we have more marijuana,” Sessions said in a speech to law-enforcement officials in March. “It’s not a healthy substance, particularly for young people.”
- Washington and Colorado had agreements with Obama Administration, but under Trump federal enforcement is really unknown and may be very punitive. But, with all the other issues for administration, it is hard to imagine that marijuana enforcement is a big objective.
- 30 State currently allow medicinal use of marijuana, but Marijuana is classified a Schedule 1 Drug still and advocacy efforts should continue to be made to reclassify.

Checks and Balances on Trump/Sessions Action

- Clients must be compliance with state law, to increase odds of avoiding federal prosecution. Case prosecutions in federal court happened over the last few years where clients were not in compliance with the state's recreational use or medicinal use laws.
- United States vs. McIntosh (833 F.3d 1163) decision in 2016 limits federal enforcement of marijuana laws where conduct in compliance with state law. Compare this to United States v. Daleman (Washington Slip Opinion 2017 WL1256743) where court found no defense because client not in compliance with state law. Both case attached.
- Recent 2017 budget bill has same Congressional limits on federal prosecution, but Trump stated he will still enforce federal criminal law despite Congressional restriction.
- In the signing statement, Trump singled out a provision in the spending bill that says funds cannot be used to block states from implementing medical marijuana laws. Trump argued in the statement that his constitutional prerogatives supersede the restrictions Congress placed on him as a condition for funding government operations.
- Besides the state marijuana laws, there is also a concern about investing proceeds from marijuana-related business. If the proceeds come from a lawful state-law business, the same defense could apply to a money laundering prosecution as the funds being used by the feds to enforce are in violation of Congressional appropriations bills and McIntosh holding.

Recommendations

- Be very aware of state laws and be in strict compliance.
- Federal Prosecution is possible, but not very likely to be successful if client in compliance with state law.
- Even though federal agenda probably has other priorities, the Supreme Court is now more conservative and probably not marijuana friendly

Rules Committee Print 115

- Congress passed May 3, 2017, in finally approving the FY2017 budget, Consolidated Appropriations Act, 2017, a renewal prohibiting DOJ from using appropriated money to prosecute medical marijuana "use, distribution, possession, or cultivation" so long as each of those was accomplished pursuant to that state's laws.

- Notice the list now has 44 states plus D. C., Guam & Puerto Rico.

SEC. 537.

None of the funds made available in this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

833 F.3d 1163
United States Court of Appeals,
Ninth Circuit.

United States of America, Plaintiff–Appellee
v.
Steve McIntosh, Defendant–Appellant.
United States of America, Plaintiff–Appellee,
v.
Iane Lovan, Defendant–Appellant.
United States of America, Plaintiff–Appellee,
v.
Somphane Malathong, Defendant–Appellant.
United States of America, Plaintiff–Appellee,
v.
Vong Southy, Defendant–Appellant.
United States of America, Plaintiff–Appellee,
v.
Khamphou Khouthong, Defendant–Appellant.
United States of America, Plaintiff–Appellee,
v.
Jerad John Kynaston, AKA Jared J. Kynaston, AKA Jerad J. Kynaston; Samuel Michael Doyle, AKA Samuel M. Doyle; Brice Christian Davis, AKA Brice C. Davis; Jayde Dillon Evans, AKA Jayde D. Evans; Tyler Scott McKinley, AKA Tyler S. McKinley, Defendants–Appellants.
In re Iane Lovan,
Iane Lovan, Petitioner,
v.
United States District Court for the Eastern District of California, Fresno, Respondent,
United States of America, Real Party in Interest.
In re Somphane Malathong,
Somphane Malathong, Petitioner,
v.
United States District Court for the Eastern District of California, Fresno, Respondent,
United States of America, Real Party in Interest.
In re Vong Southy,
Vong Southy, Petitioner,
v.
United States District Court for the Eastern District of California, Fresno, Respondent,
United States of America, Real Party in Interest.
In re Khamphou Khouthong,
Khamphou Khouthong, Petitioner,
v.
United States District Court for the Eastern District of California, Fresno, Respondent,
United States of America, Real Party in Interest.

No. 15–10117, No. 15–10122, No. 15–10127, No. 15–10132, No. 15–10137, No. 15–30098, No. 15–71158, No. 15–71174, No. 15–71179, No. 15–71225

Argued and Submitted December 7, 2015, San Francisco, California

Filed August 16, 2016

Synopsis

Background: In separate criminal prosecutions, defendants who were charged with federal marijuana offenses moved to dismiss their indictments or to enjoin their prosecutions on the grounds that the Department of Justice (DOJ) was barred from spending funds to prosecute them. The United States District Court for the Eastern District of California, Lawrence J. O'Neill, J., denied relief, as did the United States District Court for the Northern District of California, Maxine M. Chesney, J., and the United States District Court for the Eastern District of Washington, Wm. Fremming Nielsen, J., and defendants appealed and petitioned for writs of mandamus.

Holdings: The Court of Appeals, O'Scannlain, Circuit Judge, held that:

[1] defendants had Article III standing to invoke separation of powers principles to seek to enjoin the DOJ from spending federal funds to prosecute them for federal marijuana offenses, on ground that any such use of federal funds violated a Congressional appropriations rider;

[2] while the DOJ, in spending federal funds to prosecute individuals for engaging in conduct allegedly permitted by states' medical marijuana laws, was not taking legal action against states themselves, it was nonetheless spending federal funds to prevent these states from giving practical effect to their medical marijuana laws, in violation of rider attached to appropriations acts;

[3] the DOJ did not spend federal funds to prevent implementation of state medical marijuana laws, in violation of rider attached to appropriations act, if it prosecuted individuals for engaging in any conduct not authorized under state medical marijuana laws;

[4] if the DOJ wished to continue with prosecutions, then defendants were entitled to evidentiary hearings to determine whether their conduct was completely authorized by state medical marijuana laws; and

[5] defendants were not entitled to writs of mandamus.

Vacated and remanded with instructions.

West Headnotes (32)

[1] Federal Courts
Limited jurisdiction;jurisdiction as dependent on constitution or statutes

Federal courts are courts of limited subject matter jurisdiction, possessing only that power authorized both by the Constitution and by Congress.

1 Cases that cite this headnote

[2] Federal Courts
Determination of question of jurisdiction

Before proceeding to the merits of dispute, Court of Appeals must first assure itself that it has jurisdiction.

Cases that cite this headnote

[3] Criminal Law
Finality of determination in general

Criminal Law
Necessity of sentence

Court of Appeals' appellate jurisdiction is typically limited to final decisions of district court, and in criminal cases, this prohibits appellate review until after conviction and imposition of sentence.

Cases that cite this headnote

[4] Criminal Law
Preliminary or interlocutory orders in general

Carson requirements for pursuit of interlocutory appeal from district court order that did not, on its face, deny an injunction, that order must have effect of denying an injunction, have serious, perhaps irreparable, consequences, and be effectually challenged only by immediate appeal, did not apply to district court order directly denying request for injunction to prevent government from spending any federal funds to prosecute them for engaging in conduct allegedly relating to cultivation and distribution of medical marijuana as purportedly permitted under state law; interlocutory appeal from direct denial of requests for injunctions was specifically permitted by federal statute. 28 U.S.C.A. § 1292(a).

Cases that cite this headnote

[5] Criminal Law
Preliminary or interlocutory orders in general

Injunction
Prosecution of Criminal Laws

In almost all federal criminal prosecutions, injunctive relief and interlocutory appeals are inappropriate, as federal courts have traditionally refused, except in rare instances, to enjoin federal criminal prosecutions.

Cases that cite this headnote

[6] Federal Courts
Injunction

Order of federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an "injunction" and thus immediately appealable pursuant to federal statute. 28 U.S.C.A. § 1292(a).

Cases that cite this headnote

[7] **Criminal Law**
Preliminary or interlocutory orders in general
Injunction
Prosecution of Criminal Laws

In almost all circumstances, federal criminal defendants cannot obtain injunctions of their ongoing prosecutions, and orders by district courts relating solely to requests to stay ongoing federal prosecutions will not constitute appealable orders on requests for injunctive relief. 28 U.S.C.A. § 1292(a).

Cases that cite this headnote

[8] **Constitutional Law**
Encroachment on Legislature

It is exclusive province of Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the nation, and once Congress, exercising its delegated powers, has decided the order of priorities in given area, it is for the courts to enforce them when enforcement is sought.

Cases that cite this headnote

[9] **Federal Courts**
Equity jurisdiction in general

Federal court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation.

Cases that cite this headnote

[10] **Injunction**
Public funds;grants and loans

Even if criminal defendants could not obtain injunctions of their prosecutions themselves, they could seek to enjoin the Department of Justice (DOJ) from spending funds from relevant appropriations acts on such prosecutions in alleged violation of riders attached to those appropriations acts.

Cases that cite this headnote

[11] **Federal Courts**
Ancillary and incidental jurisdiction in general

District courts in criminal cases have "ancillary jurisdiction," which is the power to adjudicate and determine matters incidental to the exercise of its primary jurisdiction over a cause under review.

Cases that cite this headnote

[12] **Federal Civil Procedure**
In general;injury or interest

Doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance.

Cases that cite this headnote

[13] **Federal Civil Procedure**
In general;injury or interest
Federal Courts
Necessity of Objection;Power and Duty of Court

Federal courts have independent obligation to examine their own jurisdiction even in absence of objection, and standing is perhaps the most important of the jurisdictional doctrines.

Cases that cite this headnote

[14] **Federal Courts**
Inception and duration of dispute; recurrence;'capable of repetition yet evading review'
Federal Courts
Persons Entitled to Seek Review or Assert Arguments;Parties;Standing

For federal jurisdiction to exist, actual controversy must persist throughout all stages of litigation, which means that standing must

be met by persons seeking appellate review. U.S. Const. art. 3, § 2, cl. 1.

Cases that cite this headnote

[15] Federal Civil Procedure
In general;injury or interest
Federal Civil Procedure
Causation;redressability

To have Article III standing, litigant must have suffered or be imminently threatened with concrete and particularized injury in fact, that is fairly traceable to challenged action and likely to be redressed by favorable judicial decision. U.S. Const. art. 3, § 2, cl. 1.

Cases that cite this headnote

[16] Injunction
Persons entitled to apply;standing

Criminal defendants had Article III standing to invoke separation of powers principles to seek to enjoin the Department of Justice (DOJ) from spending federal funds to prosecute them for federal marijuana offenses, on ground that any such use of federal funds violated a Congressional appropriations rider that prohibited the DOJ from spending funds to prevent states' implementation of their own medical marijuana laws. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. art. 1, § 9, cl. 7.

Cases that cite this headnote

[17] United States
In general;necessity

Under the Appropriations Clause, no money may be paid out of the Treasury unless it has been appropriated by act of Congress; in other words, payment of money from the Treasury must be authorized by statute. U.S. Const. art. 1, § 9, cl. 7.

Cases that cite this headnote

[18] United States
In general;necessity

Appropriations Clause plays critical role in the Constitution's separation of powers among the three branches of government and the checks and balances between them, as any exercise of power granted by the Constitution to one of the other branches of government is limited by a valid reservation of Congressional control over funds in the Treasury. U.S. Const. art. 1, § 9, cl. 7.

Cases that cite this headnote

[19] United States
In general;necessity

Appropriations Clause has fundamental and comprehensive purpose to assure that public funds will be spent according to the letter of difficult judgments reached by Congress as to the common good, and not according to individual favor of government agents. U.S. Const. art. 1, § 9, cl. 7.

Cases that cite this headnote

[20] Statutes
Undefined terms

It is fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.

Cases that cite this headnote

[21] United States
Particular subjects and programs

While the Department of Justice (DOJ), in spending federal funds to prosecute individuals for engaging in conduct allegedly permitted by states' medical marijuana laws, was not taking legal action against states themselves, it was nonetheless spending federal funds to prevent these states from giving practical effect to their medical marijuana laws, in violation of rider attached to appropriations acts.

1 Cases that cite this headnote

[22] **Statutes**
Context
Statutes
Statutory scheme in general

Statutory language cannot be construed in a vacuum; rather, words of statute must be read in their context and with a view to their place in overall statutory scheme.

1 Cases that cite this headnote

[23] **Controlled Substances**
Manufacture
Controlled Substances
Possession
Controlled Substances
Sale, Distribution, Delivery, Transfer or Trafficking

Under the Controlled Substance Act (CSA), the manufacture, distribution or possession of marijuana is criminal offense, except when the drug is used as part of a Food and Drug Administration (FDA) preapproved research study. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 202(c), 303(f), 401(a)(1), 404(a), 21 U.S.C.A. §§ 812(c), 823(f), 841(a)(1), 844(a).

Cases that cite this headnote

[24] **United States**
Particular subjects and programs

Department of Justice (DOJ) did not spend federal funds to prevent implementation of state medical marijuana laws, in violation of rider attached to appropriations act, if it prosecuted individuals for engaging in any conduct not authorized under state medical marijuana laws.

11 Cases that cite this headnote

[25] **United States**
Particular subjects and programs

In interpreting appropriations rider and whether it prevented the Department of Justice (DOJ) from spending federal funds to prosecute defendants from engaging in conduct allegedly permitted by states' medical marijuana law, the Court of Appeals could consider only the text of rider itself and could not consider legislative history.

Cases that cite this headnote

[26] **United States**
In general;necessity

It is fundamental principle of appropriations law that court, in interpreting appropriations rider, may consider only the text of the rider, not expressions of intent in legislative history.

1 Cases that cite this headnote

[27] **United States**
In general;necessity

Agency's discretion to spend appropriated funds is cabined only by text of the appropriation, not by Congress' expectations of how funds will be spent, as might be reflected by legislative history. U.S. Const. art. 1, § 9, cl. 7.

Cases that cite this headnote

[28] **Controlled Substances**
Medical necessity
United States
Particular subjects and programs

If the Department of Justice (DOJ) wished to continue with its prosecutions for federal marijuana offenses, then defendants were entitled to evidentiary hearings to determine whether their conduct was completely authorized by state medical marijuana laws, in sense that they had strictly complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana, in which case the DOJ would be prohibited from spending any federal funds on these prosecutions.

8 Cases that cite this headnote

[29] United States
Particular subjects and programs

In determining appropriate remedy for any violation of appropriations rider by the Department of Justice (DOJ), in spending federal funds to prosecute, for federal marijuana offenses, defendants who allegedly engaged only in conduct permitted by state medical marijuana laws, district courts should consider the temporal nature of this lack of funds, only for as long as Congress continued to prohibit such a use of federal funds, along with defendants' speedy trial rights. U.S. Const. Amend. 6; 18 U.S.C.A. § 3161.

3 Cases that cite this headnote

[30] Controlled Substances
Defenses

United States
State and local governments and agencies

Rider attached to appropriations act, to prohibit use of federal funds to prevent implementation of state medical marijuana laws, did not provide immunity from prosecution for federal marijuana offenses.

7 Cases that cite this headnote

[31] Mandamus
Nature and scope of remedy in general

Writ of mandamus is drastic and extraordinary remedy, that is reserved for really extraordinary causes.

Cases that cite this headnote

[32] Mandamus
Existence and Adequacy of Other Remedy in General

Defendants who were being prosecuted for violating federal marijuana law, in alleged violation of rider attached to appropriations act to prohibit use of federal funds to prevent implementation of state medical marijuana laws, were not entitled to writs of mandamus to prevent prosecutions from proceeding; defendants had other means to obtain their desired relief, and district courts' orders denying defendants' requests for injunctive relief were not clearly erroneous as matter of law.

Cases that cite this headnote

***1167** Appeal from the United States District Court for the Northern District of California, Maxine M. Chesney, Senior District Judge, Presiding. D.C. No. 3:14–cr–00016–MMC–3.

Appeals from the United States District Court for the Eastern District of California, Lawrence J. O'Neill, District Judge, Presiding. D.C. Nos. 1:13–cr–00294–LJO–SKO–1, 1:13–cr–00294–LJO–SKO–3, 1:13–cr–00294–LJO–SKO–2, 1:13–cr–00294–LJO–SKO–4.

***1168** Appeal from the United States District Court for the Eastern District of Washington, Wm. Fremming Nielsen, Senior District Judge, Presiding. D.C. No. 2:12–cr–00016–WFN–1

Petitions for Writ of Mandamus. D.C. Nos. 1:13–cr–00294–LJO–SKO–1, 1:13–cr–00294–LJO–SKO–3, 1:13–cr–00294–LJO–SKO–2, 1:13–cr–00294–LJO–SKO–4.

Attorneys and Law Firms

Marc J. Zilversmit (argued), San Francisco, California, for Defendant–Appellant Steve McIntosh.

Robert R. Fischer (argued), Federal Defenders of Eastern Washington & Idaho, Spokane, Washington, for Defendant–Appellant Jerad John Kynaston.

Richard D. Wall, Spokane, Washington, for Defendant–Appellant Tyler Scott McKinley.

Douglas Hiatt, Seattle, Washington; Douglas Dwight Phelps, Spokane, Washington; for Defendant–Appellant Samuel Michael Doyle.

David Matthew Miller, Spokane, Washington, for Defendant–Appellant Brice Christian Davis.

Nicholas V. Vieth, Spokane, Washington, for Defendant–Appellant Jayde Dillion Evans.

Andras Farkas (argued), Assistant Federal Defender; Heather E. Williams, Federal Defender; Federal Defenders of the Eastern District of California, Fresno, California; for Defendant–Appellant/Petitioner Iane Lovan.

Daniel L. Harralson, Daniel L. Harralson Law Corp., Fresno, California, for Defendant–Appellant/Petitioner Somphane Malathong.

Harry M. Drandell, Law Offices of Harry M. Drandell, Fresno, California, for Defendant–Appellant/Petitioner Vong Southy.

Peter M. Jones, Wanger Jones Helsley, P.C., Fresno, California, for Defendant–Appellant/Petitioner Khamphou Khouthong.

Owen P. Martikan (argued), Assistant United States Attorney; Barbara J. Valliere, Chief, Appellate Division; Brian Stretch, United States Attorney; United States Attorney's Office, San Francisco, California, and; Russell E. Smoot and Timothy J. Ohms, Assistant United States Attorneys; Michael C. Ormsby, United States Attorney; United States Attorney's Office, Spokane, Washington; Camil A. Skipper, Assistant United States Attorney; Benjamin B. Wagner, United States Attorney; United States Attorney's Office, Sacramento, California; for Plaintiff–Appellee/Real Party in Interest United States.

Before: Diarmuid F. O'Scannlain, Barry G. Silverman, and Carlos T. Bea, Circuit Judges.

OPINION

O'SCANNLAIN, Circuit Judge:

We are asked to decide whether criminal defendants may avoid prosecution for various federal marijuana offenses on the basis of a congressional appropriations rider that prohibits the United States Department of Justice from spending funds to prevent states' implementation of their own medical marijuana laws.

I

A

These ten cases are consolidated interlocutory appeals and petitions for writs of mandamus arising out of orders entered by three district courts in two states within our circuit. [1] All Appellants have been ***1169** indicted for various infractions of the Controlled Substances Act (CSA). They have moved to dismiss their indictments or to enjoin their prosecutions on the grounds that the Department of Justice (DOJ) is prohibited from spending funds to prosecute them.

In *McIntosh*, five codefendants allegedly ran four marijuana stores in the Los Angeles area known as Hollywood Compassionate Care (HCC) and Happy Days, and nine indoor marijuana grow sites in the San Francisco and Los Angeles areas. These codefendants were indicted for conspiracy to manufacture, to possess with intent to distribute, and to distribute more than 1000 marijuana plants in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(l)(A). The government sought forfeiture derived from such violations under 21 U.S.C. § 853.

In *Lovan*, the U.S. Drug Enforcement Agency and Fresno County Sheriff's Office executed a federal search warrant on 60 acres of land located on North Zedicker Road in Sanger, California. Officials allegedly located more than 30,000 marijuana plants on this property. Four codefendants were indicted for manufacturing 1000 or more marijuana plants and for conspiracy to manufacture 1000 or more marijuana plants in violation of 21 U.S.C. §§ 841(a)(1), 846.

In *Kynaston*, five codefendants face charges that arose out of the execution of a Washington State search warrant related to an investigation into violations of Washington's Controlled Substances Act. Allegedly, a total of 562 "growing marijuana plants," along with another 677 pots, some of which appeared to have the root structures of suspected harvested marijuana plants, were found. The codefendants were indicted for conspiring to manufacture 1000 or more marijuana plants, manufacturing 1000 or more marijuana plants, possessing with intent to distribute 100 or more marijuana plants, possessing a firearm in furtherance of a Title 21 offense, maintaining a drug-involved premise, and being felons in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(c)(1)(A)(i) and 21 U.S.C. §§ 841, 856(a)(1).

B

In December 2014, Congress enacted the following rider in an omnibus appropriations bill funding the government through September 30, 2015:

> None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113–235, § 538, 128 Stat. 2130, 2217 (2014). Various short-term measures extended the appropriations and the rider through December 22, 2015. On December 18, 2015, Congress enacted a new appropriations act, which appropriates funds through the fiscal year ending September 30, 2016, and includes essentially the same rider in § 542. Consolidated Appropriations Act, ***1170** 2016, Pub. L. No. 114–113, § 542, 129 Stat. 2242, 2332–33 (2015) (adding Guam and Puerto Rico and changing "prevent such States from implementing their own State laws" to "prevent any of them from implementing their own laws").

Appellants in *McIntosh*, *Lovan*, and *Kynaston* filed motions to dismiss or to enjoin on the basis of the rider. The motions were denied from the bench in hearings in *McIntosh* and *Lovan*, while the court in *Kynaston* filed a short written order denying the motion after a hearing. In *McIntosh* and *Kynaston*, the court concluded that defendants had failed to carry their burden to demonstrate their compliance with state medical marijuana laws. In *Lovan*, the court concluded that the determination of compliance with state law would depend on facts found by the jury in a federal prosecution, and thus it would revisit the defendants' motion after the trial.

Appellants in all three cases filed interlocutory appeals, and Appellants in *McIntosh* and *Lovan* ask us to consider issuing writs of mandamus if we do not assume jurisdiction over the appeals.

II

[1] **[2]** Federal courts are courts of limited subject-matter jurisdiction, possessing only that power authorized both by the Constitution and by Congress. *See Gunn v. Minton*, —— U.S. ——, 133 S.Ct. 1059, 1064, 185 L.Ed.2d 72 (2013). Before proceeding to the merits of this dispute, we must assure ourselves that we have jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

A

[3] The parties dispute whether Congress has authorized us to exercise jurisdiction over these interlocutory appeals. "Our jurisdiction is typically limited to final decisions of the district court." *United States v. Romero–Ochoa*, 554 F.3d 833, 835 (9th Cir. 2009). "In criminal cases, this prohibits appellate review until after conviction and imposition of sentence." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798, 109 S.Ct. 1494, 103 L.Ed.2d 879 (1989). In the cases before us, no Appellants have been convicted or sentenced. Therefore, unless some exception to the general rule applies, we should not reach the merits of this dispute. Appellants invoke three possible avenues for reaching the merits: jurisdiction over an order refusing an injunction, jurisdiction under the collateral order doctrine, and the writ of mandamus. We address the first of these three avenues.

1

[4] Under 28 U.S.C. § 1292(a), "the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States ... granting, continuing, modifying, *refusing* or dissolving

injunctions, ... except where a direct review may be had in the Supreme Court." (emphasis added). By its terms, § 1292(a)(1) requires only an interlocutory order refusing an injunction. Nonetheless, relying on *Carson v. American Brands, Inc.*, 450 U.S. 79, 84, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981), the government argues that § 1292(a)(1) requires Appellants to show that the interlocutory order (1) has the effect of refusing an injunction; (2) has a serious, perhaps irreparable, consequence; and (3) can be effectually challenged only by immediate appeal.

The government's reliance on *Carson* is misplaced in light of our precedent interpreting that case. In *Shee Atika v. Sealaska Corp.*, we explained:

> In *Carson*, the Supreme Court considered whether section 1292(a)(1) permitted appeal from an order denying the parties' joint motion for approval of a ***1171** consent decree that contained an injunction as one of its provisions. Because the order did not, on its face, deny an injunction, an appeal from the order did not fall precisely within the language of section 1292(a)(1). The Court nevertheless permitted the appeal. The Court stated that, while section 1292(a)(1) must be narrowly construed in order to avoid piecemeal litigation, it does permit appeals from orders that have the "practical effect" of denying an injunction, provided that the would-be appellant shows that the order "might have a serious, perhaps irreparable, consequence."
>
> We find nothing in *Carson* to suggest that the requirement of irreparable injury applies to appeals from orders specifically denying injunctions. *Carson* merely expanded the scope of appeals that do not fall within the meaning of the statute. Sealaska appeals from the direct denial of a request for an injunction. *Carson*, therefore, is simply irrelevant.

39 F.3d 247, 249 (9th Cir. 1994) (citations omitted); *accord Paige v. California*, 102 F.3d 1035, 1038 (9th Cir. 1996); *see also Shee Atika*, 39 F.3d at 249 n.2 (noting that its conclusion was consistent with "the overwhelming majority of courts of appeals that have considered the issue" and collecting cases). Thus, *Carson*'s requirements do not apply to appeals from the "direct denial of a request for an injunction." *Shee Atika*, 39 F.3d at 249.

In the cases before us, the district courts issued direct denials of requests for injunctions. Lovan, for instance, requested injunctive relief in the conclusion of his opening brief: "Therefore, the Court should dismiss all counts against Mr. Lovan based upon alleged violations of 21 U.S.C. § 841 and/or enjoin the Department of Justice from taking any further action against the defendants in this case unless and until the Department can show such action does not involve the expenditure of any funds in violation of the Appropriations Act." At the hearing, Lovan's counsel made exceptionally clear that his motion sought injunctive relief in the alternative:

> THE COURT: But remember, your remedy is not because you are upset that the Department of Justice is spending taxpayer money. Your remedy is a dismissal, which is what you are seeking now, is it not?
>
> MR. FARKAS: And your Honor, as an alternative in our motion, we ask for a stay of these proceedings, asked this Court to enjoin the Department of Justice from spending any funds to prosecute Mr. Lovan if this Court finds he is in conformity with the California Compassionate Use Act. So it is a motion to dismiss or, alternatively, a motion to enjoin until Congress designates funds for that purpose.

Shortly thereafter, Lovan's counsel reiterated: "[W]e would ask either for a dismissal or to enjoin the government from spending any funds that were not appropriated under the Appropriations Act." At the close of the hearing, Lovan's counsel even explicitly argued that the district court's denial of injunctive relief would be appealable immediately: "I believe this might be the type of collateral order that is appealable to the Ninth Circuit immediately. As I said, we are asking for an injunction." The district court denied Lovan's motion, which clearly requested injunctive relief.

Similarly, in *Kynaston*, the opening brief in support of the motion began and ended with explicit requests for injunctive relief. Subsequent filings by other defendants in that case referenced the injunctive relief sought, and one discussed at length how courts of equity should exercise their jurisdiction. The district court denied the motion, which clearly sought injunctive relief.

***1172** In *McIntosh*, the defendant requested injunctive relief in his moving papers, and he mentioned his request for injunctive relief three times in his reply brief. At the

hearing, the question of injunctive relief did not arise, and the district court said simply that it was denying the motion. Although McIntosh could have emphasized the equitable component of his request more, we conclude that he raised the issue sufficiently for the denial of his motion to constitute a direct denial of a request for an injunction.

Therefore, we have jurisdiction under 28 U.S.C. § 1292(a)(1) to consider the interlocutory appeals from these direct denials of requests for injunctions.

3

[5] **[6]** **[7]** We note the unusual circumstances presented by these cases. In almost all federal criminal prosecutions, injunctive relief and interlocutory appeals will not be appropriate. Federal courts traditionally have refused, except in rare instances, to enjoin federal criminal prosecutions. *See Ackerman v. Int'l Longshoremen's Union*, 187 F.2d 860, 868 (9th Cir. 1951); *Argonaut Mining Co. v. McPike*, 78 F.2d 584, 586 (9th Cir. 1935); *Stolt–Nielsen, S.A. v. United States*, 442 F.3d 177, 185 (3d Cir. 2006); *Deaver v. Seymour*, 822 F.2d 66, 69 (D.C. Cir. 1987). "An order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988). Thus, in almost all circumstances, federal criminal defendants cannot obtain injunctions of their ongoing prosecutions, and orders by district courts relating solely to requests to stay ongoing federal prosecutions will not constitute appealable orders under § 1292(a)(1).

[8] **[9]** **[10]** **[11]** Here, however, Congress has enacted an appropriations rider that specifically restricts DOJ from spending money to pursue certain activities. It is "emphatically ... the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once 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." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978); *accord United States v. Oakland Cannabis Buyers' Co–op.*, 532 U.S. 483, 497, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001). A "court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.' " *Oakland Cannabis*, 532 U.S. at 497, 121 S.Ct. 1711 (quoting *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 551, 57 S.Ct. 592, 81 L.Ed. 789 (1937)). Even if Appellants cannot obtain injunctions of their prosecutions themselves, they can seek—and have sought—to enjoin DOJ from *spending funds* from the relevant appropriations acts on such prosecutions.[2] When Congress has enacted a legislative ***1173** restriction like § 542 that expressly prohibits DOJ from spending funds on certain actions, federal criminal defendants may seek to enjoin the expenditure of those funds, and we may exercise jurisdiction over a district court's direct denial of a request for such injunctive relief.

B

1

[12] **[13]** As part of our jurisdictional inquiry, we must consider whether Appellants have standing to complain that DOJ is spending money that has not been appropriated by Congress. "The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance." *Kowalski v. Tesmer*, 543 U.S. 125, 128, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004). Although the government concedes that Appellants have standing, we have an "independent obligation to examine [our] own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." *United States v. Hays*, 515 U.S. 737, 742, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) (internal quotation marks and alterations omitted).

[14] **[15]** **[16]** Constitutional limits on our jurisdiction are established by Article III, which limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. It "demands that an 'actual controversy' persist throughout all stages of litigation. That means that standing 'must be met by persons seeking appellate review ....' " *Hollingsworth v. Perry*, —— U.S. ——, 133 S.Ct. 2652, 2661, 186 L.Ed.2d 768 (2013) (citations omitted). To have Article III standing, a litigant "must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action ... and likely to be

redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, —— U.S. ——, 134 S.Ct. 1377, 1386, 188 L.Ed.2d 392 (2014).

In *Bond v. United States*, the Supreme Court addressed a situation similar to the cases before us. 564 U.S. 211, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011). There, the Third Circuit had concluded that the criminal defendant lacked "standing to challenge a federal statute on grounds that the measure interferes with the powers reserved to States," and the Supreme Court reversed. *Id.* at 216, 226, 131 S.Ct. 2355.

The Court explained that "[o]ne who seeks to initiate or continue proceedings in federal court must demonstrate, among other requirements, both standing to obtain the relief requested, and, in addition, an 'ongoing interest in the dispute' on the part of the opposing party that is sufficient to establish 'concrete adverseness.' " *Id.* at 217, 131 S.Ct. 2355 (citations omitted). "When those conditions are met, Article III does not restrict the opposing party's ability to object to relief being sought at its expense." *Id.* "The requirement of Article III standing thus had no bearing upon [the defendant's] capacity to assert defenses in the District Court." *Id.*

Applying those principles to the defendant's standing to appeal, the Court concluded that it was "clear Article III's prerequisites are met. Bond's challenge to her conviction and sentence 'satisfies the case-or-controversy requirement, because the incarceration ... constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction.' " *Id.* Here, Appellants have not yet been deprived of liberty via a conviction, but their indictments imminently threaten such a deprivation. *Cf. Susan B. Anthony List v. Driehaus*, —— U.S. ——, 134 S.Ct. 2334, 2342–47, 189 L.Ed.2d 246 (2014) (threatened prosecution may give rise to standing). They clearly had Article III standing to pursue their challenges below because ***1174** they were merely objecting to relief sought at their expense. And they have standing on appeal because their potential convictions constitute concrete, particularized, and imminent injuries, which are caused by their prosecutions and redressable by injunction or dismissal of such prosecutions. *See Bond*, 564 U.S. at 217, 131 S.Ct. 2355.

After addressing Article III standing, the *Bond* Court concluded that, "[i]f the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object." *Id.* at 223, 131 S.Ct. 2355. The Court explained that both federalism and separation-of-powers constraints in the Constitution serve to protect individual liberty, and a litigant in a proper case can invoke such constraints "[w]hen government acts in excess of its lawful powers." *Id.* at 220–24, 131 S.Ct. 2355. The Court gave numerous examples of cases in which private parties, rather than government departments, were able to rely on separation-of-powers principles in otherwise jusiticiable cases or controversies. *See id.* at 223, 131 S.Ct. 2355 (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010); *Clinton v. City of New York*, 524 U.S. 417, 433–36, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995); *Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986); *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982); *Youngstown Sheet &Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935)).

The Court reiterated this principle in *NLRB v. Noel Canning*, ——U.S. ——, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014). There, the Court granted relief to a private party challenging an order against it on the basis that certain members of the National Labor Relations Board had been appointed in excess of presidential authority under the Recess Appointments Clause, another separation-of-powers constraint. *Id.* at 2557. The Court "recognize[d], of course, that the separation of powers can serve to safeguard individual liberty and that it is the 'duty of the judicial department'—in a separation-of-powers case as in any other—'to say what the law is.' " *Id.* at 2559–60 (citing *Clinton*, 524 U.S. at 449–50, 118 S.Ct. 2091 (Kennedy, J., concurring), and quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803)); *see also id.* at 2592–94 (Scalia, J., concurring in the judgment) (discussing at great length how the separation of powers protects individual liberty).

Thus, Appellants have standing to invoke separation-of-powers provisions of the Constitution to challenge their criminal prosecutions.

2

[17] Here, Appellants complain that DOJ is spending funds that have not been appropriated by Congress in violation of the Appropriations Clause of the Constitution. *See* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law ...."). This "straightforward and explicit command ... means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990) (citation omitted). "Money may be paid out only through an appropriation made by law; in ***1175** other words, the payment of money from the Treasury must be authorized by a statute." *Id.*

[18] **[19]** The Appropriations Clause plays a critical role in the Constitution's separation of powers among the three branches of government and the checks and balances between them. "Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." *Id.* at 425, 110 S.Ct. 2465. The Clause has a "fundamental and comprehensive purpose ... to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *Id.* at 427–28, 110 S.Ct. 2465. Without it, Justice Story explained, "the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure." *Id.* at 427, 110 S.Ct. 2465 (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1348 (3d ed. 1858)).

Thus, if DOJ were spending money in violation of § 542, it would be drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause. That Clause constitutes a separation-of-powers limitation that Appellants can invoke to challenge their prosecutions.

III

The parties dispute whether the government's spending money on their prosecutions violates § 542.

A

We focus, as we must, on the statutory text. Section 542 provides that "[n]one of the funds made available in this Act to the Department of Justice may be used, with respect to [Medical Marijuana States[3]] to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, § 542, 129 Stat. 2242, 2332–33 (2015). Unfortunately, the rider is not a model of clarity.

1

[20] "It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.' " *Sandifer v. U.S. Steel Corp.*, —— U.S. ——, 134 S.Ct. 870, 876, 187 L.Ed.2d 729 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979)). Thus, in order to decide whether the prosecutions of Appellants violate § 542, we must determine the plain meaning of "prevent any of [the Medical Marijuana States] from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." The pronoun ***1176** "them" refers back to the Medical Marijuana States, and "their own laws" refers to the state laws of the Medical Marijuana States. And "implement" means:

> 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.

See Sanford v. MemberWorks, Inc., 625 F.3d 550, 559 (9th Cir. 2010) (We "may follow the common practice of consulting dictionaries to determine" ordinary meaning.); *Sandifer*, 134 S.Ct. at 876. In sum, § 542 prohibits 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.

2

[21] DOJ argues that it does not prevent the Medical Marijuana States from giving practical effect to their medical marijuana laws by prosecuting private individuals, rather than taking legal action against the state. We are not persuaded.

[22] **[23]** Importantly, the "[s]tatutory language cannot be construed in a vacuum. It is [another] fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, —— U.S. ——, 136 S.Ct. 1061, 1070, 194 L.Ed.2d 108 (2016) (internal quotation marks omitted). Here, we must read § 542 with a view to its place in the overall statutory scheme for marijuana regulation, namely the CSA and the State Medical Marijuana Laws. The CSA prohibits the use, distribution, possession, or cultivation of any marijuana. *See* 21 U.S.C. §§ 841(a), 844(a). [4] The State Medical Marijuana Laws are those state laws that authorize the use, distribution, possession, or cultivation of medical marijuana. Thus, the CSA prohibits what the State Medical Marijuana Laws permit.

In light of the ordinary meaning of the terms of § 542 and the relationship between the relevant federal and state laws, we consider whether 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. We conclude that it can.

DOJ, without taking any legal action against the Medical Marijuana States, prevents them from implementing their laws that authorize the use, distribution, possession, or cultivation of medical marijuana by prosecuting individuals for use, distribution, possession, or cultivation of medical marijuana that is authorized by such laws. By officially permitting certain conduct, state law provides for non-prosecution of individuals who engage in such conduct. If ***1177** 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.

We therefore conclude that, at a minimum, § 542 prohibits 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.

3

[24] Appellants in *McIntosh* and *Kynaston* argue for a more expansive interpretation of § 542. They contend that the rider prohibits DOJ from bringing federal marijuana charges against anyone licensed or authorized under a state medical marijuana law for activity occurring within that state, including licensees who had failed to comply fully with state law.

For instance, Appellants in *Kynaston* argue that "implementation of laws necessarily involves all aspects of putting the law into practical effect, including interpretation of the law, means of application and enforcement, and procedures and processes for determining the outcome of individual cases." Under this view, if the federal government prosecutes individuals who are not strictly compliant with state law, it will prevent the states from implementing the *entirety* of their laws that authorize medical marijuana by preventing them from giving practical effect to the penalties and enforcement mechanisms for engaging in unauthorized conduct. Thus, argue the *Kynaston* Appellants, the Department of Justice must refrain from prosecuting "unless a person's activities are so clearly outside the scope of a state's medical marijuana laws that reasonable debate is not possible."

To determine whether such construction is correct, we must decide whether the phrase "laws that authorize" includes not only the rules authorizing certain conduct but also the rules delineating penalties and enforcement mechanisms for engaging in unauthorized conduct. In answering that question, we consider the ordinary meaning of "laws that authorize the use, distribution, possession, or cultivation of medical marijuana." "Law" has many different meanings, including the following definitions that appear most relevant to § 542:

> "The aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them."
>
> "The set of rules or principles dealing with a specific area of a legal system <copyright law>."

Law, *Black's Law Dictionary* (10th ed. 2014); and:

> "1. a. The body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects. (In this sense usually *the law*.)."
>
> "One of the individual rules which constitute the 'law' (sense 1) of a state or polity.... The plural has often a collective sense ... approaching sense 1."

Law, *Oxford English Dictionary*, www.oed.com. The relative pronoun "that" restricts "laws" to those laws authorizing the use, distribution, possession, or cultivation of medical marijuana. *See* Bryan A. Garner, *Garner's Dictionary of Legal Usage* 887–89 (3d ed. 2011). In sum, the ordinary meaning of § 542 prohibits the Department of Justice from preventing the implementation of the Medical Marijuana States' laws or sets of rules and only those ***1178** rules that authorize medical marijuana use.

We also consider the context of § 542. The rider prohibits DOJ from preventing forty states, the District of Columbia, and two territories from implementing their medical marijuana laws. Not only are such laws varied in composition but they also are changing as new statutes are enacted, new regulations are promulgated, and new administrative and judicial decisions interpret such statutes and regulations. Thus, § 542 applies to a wide variety of laws that are in flux.

Given this context and the restriction of the relevant laws to those that authorize conduct, we conclude that § 542 prohibits the federal government only from preventing the implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana. DOJ does not prevent the implementation of rules authorizing conduct when it prosecutes individuals who engage in conduct unauthorized under state medical marijuana laws. Individuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and prosecuting such individuals does not violate § 542. Congress could easily have drafted § 542 to prohibit interference with laws that address medical marijuana or those that regulate medical marijuana, but it did not. Instead, it chose to proscribe preventing states from implementing laws that authorize the use, distribution, possession, and cultivation of medical marijuana.

B

[25] The parties cite various pieces of legislative history to support their arguments regarding the meaning of § 542.

[26] **[27]** We cannot consider such sources. It is a fundamental principle of appropriations law that we may only consider the text of an appropriations rider, not expressions of intent in legislative history. "An agency's discretion to spend appropriated funds is cabined only by the 'text of the appropriation,' not by Congress' expectations of how the funds will be spent, as might be reflected by legislative history." *Salazar v. Ramah Navajo Chapter*, —— U.S. ——, 132 S.Ct. 2181, 2194–95, 183 L.Ed.2d 186 (2012) (quoting *Int'l Union, UAW v. Donovan*, 746 F.2d 855, 860–61 (D.C. Cir. 1984) (Scalia, J.)). In *International Union*, then-Judge Scalia explained:

> As the Supreme Court has said (in a case involving precisely the issue of Executive compliance with appropriation laws, although the principle is one of general applicability): "legislative intention, without more, is not legislation." The issue here is not how Congress expected or intended the Secretary to behave, but how it *required* him to behave, through the only means by which it can (as far as the courts are concerned, at least) require anything—the enactment of legislation. Our focus, in other words, must be upon the text of the appropriation.

746 F.2d at 860–61 (quoting *Train v. City of New York*, 420 U.S. 35, 45, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975)); *see also Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 646, 125 S.Ct. 1172, 161 L.Ed.2d 66 (2005) ("The relevant case law makes clear that restrictive language contained in Committee Reports is not legally binding.");

Lincoln v. Vigil, 508 U.S. 182, 192, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993) (" '[I]ndicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on' the agency." (citation omitted)).

We recognize that some members of Congress may have desired a more expansive ***1179** construction of the rider, while others may have preferred a more limited interpretation. However, we must consider only the text of the rider. If Congress intends to prohibit a wider or narrower range of DOJ actions, it certainly may express such intention, hopefully with greater clarity, in the text of any future rider.

IV

[28] We therefore must remand to the district courts. If DOJ wishes to continue these prosecutions, Appellants are entitled to evidentiary hearings to determine whether their conduct was completely authorized by state law, by which we mean that they strictly complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana. We leave to the district courts to determine, in the first instance and in each case, the precise remedy that would be appropriate.

[29] **[30]** We note the temporal nature of the problem with these prosecutions. The government had authority to initiate criminal proceedings, and it merely lost funds to continue them. DOJ is currently prohibited from spending funds from specific appropriations acts for prosecutions of those who complied with state law. But Congress could appropriate funds for such prosecutions tomorrow. Conversely, this temporary lack of funds could become a more permanent lack of funds if Congress continues to include the same rider in future appropriations bills. In determining the appropriate remedy for any violation of § 542, the district courts should consider the temporal nature of the lack of funds along with Appellants' rights to a speedy trial under the Sixth Amendment and the Speedy Trial Act, 18 U.S.C. § 3161. [5]

V

[31] **[32]** For the foregoing reasons, we vacate the orders of the district courts and remand with instructions to conduct an evidentiary hearing to determine whether Appellants have complied with state law. [6]

***1180 VACATED AND REMANDED WITH INSTRUCTIONS.**

All Citations

833 F.3d 1163, 16 Cal. Daily Op. Serv. 8916, 2016 Daily Journal D.A.R. 8484

Footnotes

1 Appellants filed one appeal in *United States v. McIntosh*, No. 15–10117, arising out of the Northern District of California; one appeal in *United States v. Kynaston*, No. 15–30098, arising out of the Eastern District of Washington; and four appeals with four corresponding petitions for mandamus—Nos. 15–10122, 15–10127, 15–10132, 15–10137, 15–71158, 15–71174, 15–71179, 15–71225, which we shall address as *United States v. Lovan*—arising out of the Eastern District of California.

2 We need not decide in the first instance exactly how the district courts should resolve claims that DOJ is spending money to prosecute a defendant in violation of an appropriations rider. We therefore take no view on the precise relief required and leave that issue to the district courts in the first instance. We note that district courts in criminal cases have ancillary jurisdiction, which "is the power of a court to adjudicate and determine matters incidental to the exercise of its primary jurisdiction over a cause under review." *United States v. Sumner*, 226 F.3d 1005, 1013–15 (9th Cir. 2000); *see Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378–80, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); *Garcia v. Teitler*, 443 F.3d 202, 206–10 (2d Cir. 2006).

3 To avoid repeating the names of all 43 jurisdictions listed, we refer to Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia,

Washington, Wisconsin, Wyoming, the District of Columbia, Guam, and Puerto Rico as the "Medical Marijuana States" and their laws authorizing "the use, distribution, possession, or cultivation of medical marijuana" as the "State Medical Marijuana Laws." While recognizing that the list includes three non-states, we will refer to the listed jurisdictions as states and their laws as state laws without further qualification.

4 This requires a slight caveat. Under the CSA, "the manufacture, distribution, or possession of marijuana [is] a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study." *Gonzales v. Raich*, 545 U.S. 1, 14, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005); *see* 21 U.S.C. §§ 812(c), 823(f), 841(a)(1), 844(a). Thus, except as part of "a strictly controlled research project," federal law "designates marijuana as contraband for *any* purpose." *Raich*, 545 U.S. at 24, 27, 125 S.Ct. 2195.

5 The prior observation should also serve as a warning. To be clear, § 542 does not provide immunity from prosecution for federal marijuana offenses. The CSA prohibits the manufacture, distribution, and possession of marijuana. Anyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes (or attempts or conspires to do so) is committing a federal crime. The federal government can prosecute such offenses for up to five years after they occur. *See* 18 U.S.C. § 3282. Congress currently restricts the government from spending certain funds to prosecute certain individuals. But Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding. Moreover, a new president will be elected soon, and a new administration could shift enforcement priorities to place greater emphasis on prosecuting marijuana offenses.

Nor does any state law "legalize" possession, distribution, or manufacture of marijuana. Under the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits. U.S. Const. art VI, cl. 2. Thus, while the CSA remains in effect, states cannot actually authorize the manufacture, distribution, or possession of marijuana. Such activity remains prohibited by federal law.

6 We have jurisdiction under the All Writs Act to "issue all writs necessary or appropriate in aid of [our] jurisdiction[ ] and agreeable to the usages and principles of law." 28 U.S.C. § 1651. The writ of mandamus "is a drastic and extraordinary remedy reserved for really extraordinary causes." *United States v. Guerrero*, 693 F.3d 990, 999 (9th Cir. 2012) (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004)). We **DENY** the petitions for the writ of mandamus because the petitioners have other means to obtain their desired relief and because the district courts' orders were not clearly erroneous as a matter of law. *See id.* (citing *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654–55 (9th Cir. 2010)). In addition, we **GRANT** the motion for leave to file an oversize reply brief, ECF No. 47–2; **DENY** the motion to strike, ECF No. 52; and **DENY** the motion for judicial notice, ECF No. 53.

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United States District Court,
E.D. California.

UNITED STATES of America, Plaintiff,
v.
Richard DALEMAN, Defendants.

No. 1:11-CR-00385-DAD-BAM
|
Signed 02/17/2017

ORDER DENYING DEFENDANT'S MOTION TO ENJOIN THE EXPENDITURE OF FUNDS ON HIS PROSECUTION

Dale A. Drozd, UNITED STATES DISTRICT JUDGE

***1** Defendant Richard Daleman is charged with conspiracy to cultivate 1,000 or more marijuana plants in violation of 21 U.S.C. §§ 841 and 846 (Count One); cultivation of 1,000 or more marijuana plants in violation of 21 U.S.C. §§ 841 or aiding and abetting the same in violation of 18 U.S.C. § 2 (Count Two); cultivation of more than 50 but less than 100 marijuana plants in violation of 21 U.S.C. §§ 841 (Count Three); and possession of 100 more kilograms of marijuana with the intent to distribute in violation of 21 U.S.C. §§ 841 or aiding and abetting the same in violation of 18 U.S.C. § 2 (Count Four). (Doc. No. 8.) [1]

This prosecution has a lengthy factual background which both parties have attempted to summarize in their own fashion (*see* Doc Nos. 121 at 2-15; 127 at 5-8) and which the court will not repeat in its entirety here. In short, defendant Daleman was investigated for marijuana cultivation by Tulare County law enforcement beginning in 2008, was charged with unlawful cultivation and possession of marijuana for sale in state court and was acquitted of those charges following a jury trial in March 2009. In June 2011 Tulare County law enforcement again executed a search warrant at the defendant's property and seized evidence of a large marijuana cultivation operation. In August of 2011 the Tulare County Resource Management Agency issued the defendant a notice of violation with respect to a county ordinance regarding the cultivation of marijuana and ordered him to cease and desist. In September 2011 defendant Daleman obtained a temporary restraining order in the Tulare County Superior Court preventing the county from destroying the marijuana plants located on his property. In October of 2011 a confidential source introduced undercover Detective Perez to defendant Daleman for purposes of negotiating the purchase of marijuana from him. As a result, purchases of one pound and later pounds of marijuana from the defendant were consummated and the sale of 190 pounds of marijuana for over $200,000 was negotiated and agreed to on October 25, 2011. On October 31, 2011 law enforcement officers executed a search warrant on defendant's property resulting in the seizure of over two thousand marijuana plants and hundreds of pounds of processed marijuana. A federal criminal complaint was filed the following day, November 1, 2011. (Doc. No. 1.) An indictment was returned by the federal grand jury for this district on November 10, 2011. (Doc. No. 8.) This federal criminal action also has a lengthy procedural history which has included the denial of the defendant's motion to suppress evidence following an evidentiary hearing as well as the denial of the defendant's motion to dismiss the indictment. (Doc. Nos. 86, 104.)

Now before the court is defendant Daleman's motion to enjoin the U.S. Department of Justice from spending funds to continue his prosecution. (Doc. No. 121.) At the request of the defense, a supplemental evidentiary hearing [2] was held in connection with defendant's motion on February 13, 2017. At that hearing attorney Marc Days appeared on behalf of defendant Daleman and Assistant U.S. Attorney Kathleen Servatius appeared on behalf of the government.

***2** For the reasons set forth, defendant's motion to enjoin the expenditure of funds by the U.S. Department of Justice in prosecuting this case will be denied.

I. Section 542 of the Consolidated Appropriations Act and the *McIntosh* Decision

On December 18, 2015, Congress enacted an appropriations act appropriating funds through the fiscal year ending September 30, 2016. [3] Section 542 of that Consolidated Appropriations Act of 2016 provides, "[n]one of the funds made available in this Act to the Department of Justice may be used, with respect to any of the States ... to prevent them from implementing their

own laws authorize the use, distribution, possession, or cultivation of medical marijuana." Pub. L. No. 114–113, 129 Stat. 2242, 2332–33, § 542.[4] In the motion pending before the court, defendant Daleman contends the expenditure of funds to prosecute this case violates this limitation on expenditures enacted by Congress and, therefore, also violates the Appropriations Clause of the Constitution and must be enjoined by this court.

The Ninth Circuit has recently had occasion to address this very issue in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016). In *McIntosh* the court construed the plain text of the appropriations rider at issue in assessing the appellants' assertion that their criminal prosecution must be enjoined and concluded

> that § 542 prohibits the federal government only from preventing the implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana. DOJ does not prevent the implementation of rules authorizing conduct when it prosecutes individuals who engage in conduct unauthorized under state medical marijuana laws. *Individuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and prosecuting such individuals does not violate § 542.* Congress could easily have drafted § 542 to prohibit interference with laws that address medical marijuana or those that regulate medical marijuana, but it did not. Instead, it chose to proscribe preventing states from implementing laws that authorize the use, distribution, possession, and cultivation of medical marijuana.
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> * * *
>
> If DOJ wishes to continue these prosecutions, *Appellants are entitled to evidentiary hearings to determine whether their conduct was completely authorized by state law, by which we mean that they strictly complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana.* We leave to the district courts to determine, in the first instance and in each case, the precise remedy that would be appropriate.
>
> ***3** We note the temporal nature of the problem with these prosecutions. The government had authority to initiate criminal proceedings, and it merely lost funds to continue them. DOJ is currently prohibited from spending funds from specific appropriations acts for prosecutions of those who complied with state law. But Congress could appropriate funds for such prosecutions tomorrow. Conversely, this temporary lack of funds could become a more permanent lack of funds if Congress continues to include the same rider in future appropriations bills. In determining the appropriate remedy for any violation of § 542, the district courts should consider the temporal nature of the lack of funds along with Appellants' rights to a speedy trial under the Sixth Amendment and the Speedy Trial Act, 18 U.S.C. § 3161.

833 F.3d at 1179 (emphasis added). The court in *McIntosh* did not, however, explicitly address the issues of who has the burden of proving strict compliance with state law in this regard and what that burden is.

At the hearing on defendant's request for an evidentiary hearing in connection with the pending motion, held on February 6, 2017, the court determined that it is the defendant who bears the burden of proof on this issue. That determination was made based upon this court's consideration of: (1) the plain text of the appropriations rider;[5] (2) the traditional rule considering the allocation of the burden of proof which, "based on considerations of fairness, does not place the burden upon a litigant of establishing facts particularly within the knowledge of his adversary [.]" *United States v. New York, New Haven & Hartford Railroad Co.*, 355 U.S. 253, 256 n.5 (1957); and (3) the general rule "that the proponent of a motion bears the burden of proof." *United States v. Veon*, 538 F. Supp. 237, 245–46 (E.D. Cal. 1982).

***4** Finally, the court concluded that the burden borne by the defendant was to prove that he was in strict compliance with California marijuana laws by a preponderance of the evidence. The evidentiary hearing on this issue of compliance with state law is similar to other ancillary proceedings outside the criminal trial where a preponderance of the evidence standard is employed. *See, e.g.*, *Veon*, 538 F. Supp. at 248 (applying a preponderance of the evidence standard for a criminal forfeiture hearing). Although the court rejected any notion that by seeking to enjoin the expenditure of funds on his prosecution defendant is raising an affirmative defense to the pending federal charges, this conclusion that the preponderance of the evidence standard applies is consistent with the

burden of proof imposed upon a defendant in presenting an affirmative defense. *See United States v. Sandoval-Gonzalez,* 642 F.3d 717, 723 (9th Cir. 2011) *United States v. Cruz*, 554 F.3d 840, 850 (9th Cir. 2009) ("Generally, 'the defendant must prove the elements of [an] affirmative defense by a preponderance of the evidence,' unless some other standard is set by statute.") (quoting *United States v. Beasley*, 346 F.3d 930, 934 (9th Cir. 2003) (concluding that the defendant bears the burden of proving the affirmative defense of justification by a preponderance of the evidence because it "does not involve the refutation of any of the elements of [the charged offense], but requires proof of additional facts and circumstances distinct from the evidence relating to the underlying offense.")) [6]

Defendant Daleman initially argued that the question of whether DOJ was prohibited from spending funds on his prosecution should be submitted to the jury and only in the alternative, should be the subject of an evidentiary hearing. (Doc. No. 121 at 2-3.) The court rejected the argument that the issue was one for a jury to decide because, for the reasons discussed above, the issue of the defendant's strict compliance with state law is ancillary to and distinct from the prosecution of the alleged violations of federal criminal law and is not an affirmative defense to those charges. The government argued that the evidentiary hearing previously held with respect to defendant's motion to suppress evidence provided a sufficient evidentiary basis upon which to resolve defendant's motion to enjoin and that "[b]ased on the testimony, reports, affidavits, and exhibits, this Court has a complete record for review without the need for additional testimony." (Doc. No. 127 at 10.) The court rejected the government's argument as well, at least in part. In doing so the court relied upon the Ninth Circuit's conclusion in *McIntosh* that the appellants in that case were "entitled to an evidentiary hearing to determine whether their conduct was completely authorized by state law[.]" *McIntosh*, 833 F.3d at 1179. [7] As a result of these rulings, as noted above, it was agreed by the parties that in ruling upon the pending motion this court would consider all relevant evidence previously submitted in connection with earlier resolved pretrial motions in this prosecution as well as any additional evidence, including live testimony, which the defendant wished to offer. That hearing was held on February 13, 2017, with defendant Daleman calling four witnesses to testify, including himself. [8]

II. Whether the Defendant Was in Strict Compliance with California Medical Marijuana Laws

***5** Defendant Daleman maintains that he was in compliance with California law regulating medical marijuana because he is a "qualified patient who was authorized to possess, cultivate, and distribute marijuana." (Doc. No. 121 at 19.) He contends that his marijuana operation was in compliance as found by the Tulare County Sheriff's deputies (who did not arrest him after the execution of the June 2011 search warrant) and the three lawyers who testified at the February 13, 2017 evidentiary hearing. In this regard, defendant argues that the number of marijuana plants located by law enforcement officers on his property did not exceed the number authorized by valid medical marijuana recommendations. (Doc. No. 133 at 1.) According to defendant the individual plots on his farm were demarcated and identified the qualified medicinal marijuana patient associated with each plot as well as the number of plants authorized by the patient's recommendation. (*Id.* at 4.) Defendant contends that he did not have an ownership interest in those plots and that he simply leased them to qualified medical marijuana patients. (*Id.*) Defendant also maintains that in October of 2011, when he negotiated the sale of 190 pounds of marijuana to Detective Robert Perez (acting in an undercover capacity) for over $200,000, he did not do so for profit because the proceeds of that transaction were to go toward costs related to his farm as well as ongoing litigation fees. (Doc. No. 121 at 20–21.) Moreover, he attempts to justify the recorded transaction on the grounds that he believed the undercover officer was both a qualified patient and acting on behalf of a medical marijuana dispensary in Los Angeles. (Doc. No. 121 at 20–21.)

The government argues that defendant Daleman was clearly not operating in strict compliance with state law in any number of respects. First, the government contends defendant Daleman possessed more marijuana than was authorized. (Doc. No. 127 at 14.) In addition, the government maintains that the defendant's interaction with Detective Perez were not in compliance with state law because the defendant cannot claim caregiver protection with respect to anyone and because Detective Perez was not a member of the collective. (*Id.* at 15, 19.)

The sale and possession for sale of marijuana is unlawful under California law and this remains the case for

purposes of the pending motion. See Cal. Health & Safety Code §§ 11359, 11360; *see also People v. Trippet*, 56 Cal. App. 4th 1532, 1546 (1997); *People ex re. Lungren v. Peron*, 59 Cal. App. 4th 1383, 1389 (1997). Nonetheless, this court must consider the evidence and the parties' arguments in light of California's Compassionate Use Act ("CUA") and the Medical Marijuana Program Act ("MMPA"). California's CUA, passed as Proposition 215 in 1996, provides immunity from prosecution for violating state law to "a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." Cal. Health & Safety Code § 11362.5(b)(1)(C). In 2003, the California Legislature enacted the MMPA to clarify the scope of the CUA. "In addition to establishing the identification card program, the MMP[A] also defines certain terms, sets possession guidelines for cardholders, and recognizes a qualified right to collective and cooperative cultivation of medical marijuana." California Attorney General's Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use (Aug. 2008) at 2, available at http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf (hereinafter, "the Guidelines") (citing Cal. Health & Safety Code §§ 11362.7, 11362.77, 11362.775). [9]

The Guidelines note,

> "California law does not define collectives, but the dictionary defines them as 'a business, farm, etc., jointly owned and operated by the members of a group.' (*Random House Unabridged Dictionary*; Random House, Inc. © 2006.) Applying this definition, a collective should be an organization that merely facilitates the collaborative efforts of patient and caregiver members—including the allocation of costs and revenues. As such, a collective is not a statutory entity, but as a practical matter it might have to organize as some form of business to carry out its activities. *The collective should not purchase marijuana from, or sell to, non-members; instead, it should only provide a means for facilitating or coordinating transactions between members.*"

Id. at 8 (emphasis added).

***6** The Guidelines also provide suggested practices for "operating collective growing operations to help ensure lawful operations." *Id.* at 9. Notably, the Guidelines provide that cooperative or collectives must be non-profit operations as "nothing in Proposition 215 or the MMP[A] authorizes collectives, cooperatives, or individuals to profit from the sale or distribution of marijuana." *Id.* (citing § 11362.765(a)). However, a letter from the California Attorney General's office dated December 21, 2011 notes that the term "profit" remains undefined in so far as "determining what costs are reasonable for a collective or cooperative to incur. This is linked to the issue of what compensation paid by a collective or cooperative to members who perform work for the enterprise is reasonable." (Doc. No. 133-2 at 4.) In addition, the Guidelines provide that members should acquire, possess, and distribute marijuana among members of the collective only such that "the cycle should be a closed-circuit of marijuana cultivation and consumption with no purchases or sales to or from non-members." Guidelines at 10. Members can also reimburse the collective or cooperative for marijuana allocated to them only as long as "any monetary reimbursement that members provide to the collective or cooperative should only be an amount necessary to cover overhead costs and operating expenses." *Id.* The guidelines also recommend procedures for verifying the member's status as a qualified medical marijuana patient or primary caregiver:

> Unless he or she has a valid state medical marijuana identification card, this should involve personal contact with the recommending physician (or his or her agent), verification of the physician's identity, as well as, his or her state licensing status. Verification of primary caregiver status should include contact with the qualified patient, as well as validation of the patient's recommendation. Copies should be made of the physician's recommendation or identification card, if any[.]"

Id. at 9.

Given the evidence before it, this court need not determine whether the number of marijuana plants found on defendant Daleman's property during the searches in 2011 exceeded the number authorized by valid medical marijuana recommendations. [10] Nonetheless, the court does note that defendant's testimony both before and at the February 13, 2017 hearing regarding the specifics of how he was operating is, at the very least, confusing. He testified at the earlier suppression hearing that he did not hold himself out as operating a collective at his property but that he instead belonged to a collective or collectives operating at locations other than his farm. (Doc. No. 56 at 23–24.) At that same hearing he testified as follows: "I wasn't in the business of growing marijuana for my own personal use, and I was in the business of renting land out. I was put in the business of selling marijuana to go do litigation against the County." (*Id.* at 28.) Nonetheless, even if defendant Daleman had been effectively operating a collective, the court finds that his negotiated sale of marijuana to undercover Detective Perez is a more than sufficient basis upon which to conclude that he was not operating in strict compliance with state law.

Defendant's first interaction with Detective Perez occurred on October 21, 2011. (Doc. No. 127 at 6.) The parties dispute whether Detective Perez represented himself to the defendant as a qualified patient from a medical marijuana dispensary in Los Angeles. [11] While defendant maintains that he was quickly shown paperwork by someone suggesting that Detective Perez represented "a smoke shop" or that his uncle owned a medical marijuana dispensary in Los Angeles, defendant has conceded that he did not make a copy of that paperwork. (*See* Doc. No. 56 at 19.) At their first meeting, Detective Perez purchased one pound of marijuana from the defendant for $1220 and indicated a desire to purchase a large amount of marijuana to ship out of state. (Doc. No. 127 at 6.) Defendant stated that he could provide more than 150 pounds. (*Id.*) On October 25, 2011, at a meeting that was surreptitiously recorded by law enforcement, defendant Daleman advised Detective Perez that an individual from Santa Cruz had arrived with over 160 pounds of marijuana and was waiting in a motel in Tulare. Defendant Daleman further represented that he had another 24 pounds and that he could obtain an additional 40 pounds of marijuana. (Doc. No. 127-1 at 70.) Defendant Daleman ultimately arranged to sell 190 pounds of marijuana to Detective Perez for over $200,000 to be picked up the following Monday. (Doc. Nos. 127 at 7; 127-1 at 71, 81-82, 84.) Detective Perez specifically advised defendant Daleman that they were "taking it [the marijuana] back east," not to a Los Angeles dispensary. (Doc. No. 127-1 at 74.) Detective Perez and another undercover agent then purchased an additional two pounds of marijuana from defendant Daleman at $1220 per pound. (Doc. Nos. 127 at 7; 127-1 at 73.) Finally, defendant has testified that he intended to use the money he believed he would make from this transaction to pay his litigation related fees and expenses, which he estimated to be approximately $250,000. (Doc. Nos. 56 at 20; 121 at 21; 127 at 6.)

***7** The evidence of defendant Daleman's interaction with Detective Perez appears to this court to be compelling evidence of the unlawful sale of marijuana in violation of California law and certainly not of a transaction authorized by California's medical marijuana laws. Under those laws, certain transactions among members of a collective are protected. However, here, defendant's sales of marijuana to Detective Perez did not include any member of a collective with which he was associated. Defendant has presented no persuasive evidence that the individual from Santa Cruz who he alleges donated 160 pounds of the marijuana to be sold was a member of defendant's, or any other, collective. Likewise, defendant has offered no persuasive evidence that Detective Perez and the other undercover agent who accompanied him were members of a collective. He has failed to offer a copy of Perez's physician's recommendation or identification card (*see* Guidelines at 9), offering the explanation that he did not have a cord for his copy machine at the time. Even if an expansive view of a "collective" is adopted wherein, "large-scale cultivation and transportation of marijuana, memberships in multiple collectives, and the sale of marijuana through dispensaries" (Doc. No. 133-2 at 3) is permitted, defendant Daleman has failed to present any persuasive evidence that Detective Perez was representing a legitimate medical marijuana dispensary in Los Angles or that he was a qualified patient. Rather, the evidence before the court establishes that Detective Perez and the other undercover agent represented to defendant that they intended to take the marijuana they were buying from him "back east" to distribute it and not to an authorized dispensary in Los Angeles. Finally, under California law for medical marijuana transactions

to be authorized, "the cycle should be a closed-circuit of marijuana cultivation and consumption with no purchases or sales to or from non-members." Guidelines at 10; *see also People v. Hochanadel*, 176 Cal. App. 4th 997, 1018 (2009); *County of Los Angeles v. Hill*, 192 Cal. App. 4th 861, 869-70 (2011). Defendant Daleman's transaction with undercover Detective Perez clearly does not comply with that requirement. [12]

The Ninth Circuit has emphasized that in order to find that the Rohrabacher-Farr amendment prohibits DOJ's expenditure of funds in connection with a federal marijuana prosecution, a defendant must establish at an evidentiary hearing that he or she "*strictly* complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana." *McIntosh*, 833 F.3d at 1179 (emphasis added). Defendant Daleman has failed to make that required showing by a preponderance of the evidence.

CONCLUSION

Accordingly and for all of the reasons set forth above, the court denies defendant Daleman's motion to enjoin the expenditure of funds on his federal prosecution. (Doc. No. 121.) The jury trial in this action remains scheduled for February 28, 2017, absent further order of the court. [13]

IT IS SO ORDERED.

All Citations

Slip Copy, 2017 WL 1256743

Footnotes

1 There is also a criminal forfeiture allegation brought in the indictment pursuant to 21 U.S.C. § 853(a).

2 Ultimately, as discussed below, it was agreed by the parties that the court could consider the evidence, both documentary and testimonial, submitted in connection with the defendant's previously ruled upon motions in ruling upon the now pending motion.

3 Congress has failed to enact a new appropriations act since this one and government funding has been provided since September 30, 2016, pursuant to a continuing resolution. However, for purposes of the pending motion the government has stipulated that Section 542, the so-called Rohrabacher-Farr amendment, currently remains in effect.

4 This provision had originally appeared as Section 538 of the Consolidated and Further Continuing Appropriations Act of 2015. Pub. L. No. 113–235, 128 Stat. 2130, § 538.

5 As the government persuasively argued, "Congress could have, but did not, explicitly place the burden on the government of demonstrating non-compliance when it enacted the appropriations riders." (Doc. No. 127 at 11) (citing *Gonzales v. O Centro Espirita Beneficente Unaio De Vegetal*, 546 U.S. 418, 424 (2006) (noting that, Congress explicitly placed the burden on the government to prove that it has a compelling interest in barring the use of peyote under the Religious Freedom Restoration Act).) In determining Congressional intent, the court is limited to the text of the appropriations rider. *See, e.g. McIntosh*, 833 F.3d at 1178 ("It is a fundamental principle of appropriations law that we may only consider the text of an appropriations rider, not expressions of intent in legislative history.") In other parts of the Consolidated Appropriations Act where Congress restricted the use of funds upon an agency, it has specifically stated when the funds can be used, what requirements must be satisfied to use the funds, and by whom. *See, e.g.*, Pub. L. No. 114–113, 129 Stat. 2242, 2332–33, § 7048 ("Of the funds appropriated by this act that are available for a contribution to the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund), 10 percent should be withheld from obligation *until* the Secretary of State determines and reports to the Committees on Appropriations that the Global Fund is ...") (emphasis added). Congress has not done so in Section 542.

6 Notably, the plain language of the rider merely places an obligation upon the Department of Justice not to spend funds. As the Ninth Circuit has made clear, this is an issue ancillary to federal marijuana prosecutions since the Controlled Substances Act continues to prohibit the manufacture, distribution and possession of marijuana and "§ 542 does not provide immunity from prosecution" for those offenses. *McIntosh*, 833 F.3d at 1179 & n. 5. Thus, it cannot be said that defendant Daleman is presenting an affirmative defense to the pending federal charges by way of his motion to enjoin.

7 The Ninth Circuit's conclusion in this regard provides further support for the determination that defendant's motion does not present an affirmative defense to be presented to and considered by a jury at trial.

8 Those witnesses included attorneys Andy Rubinger, William Roger McPike and John Patrick Ryan. Mr. Rubinger was the public defender who represented defendant Daleman at his 2009 trial in the Tulare County Superior Court which

resulted in his acquittal. Mr. McPike was an attorney hired by defendant to consult with him regarding California law regulating medical marijuana. Mr. Ryan was the attorney who represented defendant in connection with the cease and desist order issued by Tulare County in 2011 and the subsequent proceedings in the Tulare County Superior Court where he successfully obtained a temporary restraining order. While all three attorneys had visited defendant Daleman's property where marijuana was grown, their testimony was quite general in nature and not particularly relevant to resolution of the specific issues raised by the pending motion.

9 California Health & Safety Code § 11362.81(d) required the California Attorney General to establish guidelines clarifying the scope of the MMPA.

10 According to defendant, he was growing 90 marijuana plants as authorized by his own medical marijuana recommendation. (Doc. No. 133 at 1.) He argues that "[i]n addition, recommendations at the farm did not exceed the number authorized. Recommendations authorized 3,021 plants and there were 2,420 plants when considering 257 plants claimed by the government were starter plants with no roots." (*Id.* at 1–2.) The government, however, maintains that defendant was growing 150 plants for his personal use, exceeding the authorized number for that purpose. (Doc. No. 127 at 5.) The defendant's wife also had her own medical marijuana recommendation authorizing 90 plants, but when officers executed their search of the property she indicated that her plants were outside where the officers instead found 257 plants. (*Id.*) Ultimately, according to the government, "[t]he recommendations authorized a total of 2,161 marijuana plants but 2,677 were counted in that field." (*Id.*)

11 Defendant continues to maintain that he *believed* detective Perez was both a qualified patient and dispensary operator out of Los Angles. (Doc. No. 121 at 20.) The government contends, "[t]he source did not introduce the detective as the owner or operator of a dispensary, the detective did not make such a claim, nor did the detective ever indicate he possessed a recommendation for the use or cultivation of medical marijuana." (Doc. No. 127 at 6.) The original conversation during which defendant was introduced to Detective Perez was recorded by law enforcement, but it was reportedly discovered that the recording had been lost after the defendant requested a copy of it in discovery. (Doc. No. 121 at 20.)

12 In addition, the evidence establishes that defendant was in possession of hundreds of pounds of marijuana at the time of the 2011 searches. Yet, he has presented no evidence that this amount of marijuana was possessed for his own medical needs. Nor has he presented any evidence that he was the primary caregiver for anyone, so as to in some way bring his distribution of marijuana under the protection afforded by California law. *See People v. Mentch*, 45 Cal. 4th 274 (2008)

13 Defendant's counsel has indicated that if the motion to enjoin is denied, defendant wishes to pursue an interlocutory appeal of that order. Ordinarily, orders addressing pretrial motions in criminal cases are not subject to interlocutory appeal. *See United States v. Lewis*, 368 F.3d 1102, 1104 (9th Cir. 2004); *see also United States v. Austin*, 416 F.3d at 1016, 1020 (9th Cir. 2005). However, under the "collateral order doctrine" exception orders meeting certain requirements are subject to interlocutory review. *Lewis*, 368 F.3d at 1104-06; *see also Austin*, 416 F.3d at 1021-24. Those requirements may, arguably, be present here. Moreover, the court notes that the *McIntosh* decision itself was rendered in response to consolidated interlocutory appeals and petitions for writs of mandamus from pretrial orders issued by district courts. *McIntosh*, 833 F.3d at 1168. Accordingly, if defendant elects to pursue an interlocutory appeal from this order and wishes to seek a stay of the scheduled jury trial and there is no stipulation reached between the parties with respect to that request, his counsel is directed to do so by way of application for order shortening time so that the motion for a stay may be addressed prior to the currently scheduled trial date.

DMITRY GORIN. ESQ.
California State-Bar Certified Criminal Law Specialist
California State-Bar Certified MCLE Lecturer
Licensed Attorney #178353 (since 1995)

EISNER GORIN LLP
Century City and Van Nuys Offices
Defense Boutique, State and Federal Court, Trials and Appeals
Cell: 818-384-9311 | Office: 877-781-1570
dg@egattorneys.com

PROFESSIONAL EMPLOYMENT

EISNER GORIN, LLP 2006-Present
Principal Trial Attorney

Represent clients in state and federal court, specializing in serious crimes' investigation and jury trial litigation. Approximately 100 jury trials.

PEPPERDINE UNIVERSITY, SCHOOL OF LAW 2001-2015
Adjunct Professor of Law

Instruct upper-division coursework on criminal practice and sentencing in state, federal, and juvenile court.

UCLA, COLLEGE OF LETTERS AND SCIENCE 2003-2010
Speech and Communications Department
Visiting Professor and Lecturer

Instruct upper-division courses on courtroom communication, history of jury trials, and public speaking.

OFFICE OF THE LOS ANGELES COUNTY DISTRICT ATTORNEY 1993-2006
Senior Deputy District Attorney

Litigate complex, special-victim-unit jury trials and felony cases, including high-publicity cases, murders, gang crime, sexual assault, and domestic violence. Decide on charging, and direct officers on investigation and search warrant inquiries. Retired as a Deputy District Attorney III.

EDUCATION

UCLA School of Law, Doctorate of Jurisprudence, 1995

UCLA Department of Economics, Bachelor of Arts, 1992

HONORS AND DISTINCTION

Best U.S. Lawyers (Criminal Defense, Top 1% Nationally), 2016-Present

Super-Lawyers (Criminal Defense, Top 2.5% California), 2010-Present

A.V. Pre-Eminent Law Firm (Top 5% U.S. Law Firm), 2006-Present

Association of Deputy District Attorneys, Deputy District Attorney of the Month, 2003 Nominee (People v. Israel Pulido)

Association of Deputy District Attorneys, Deputy District Attorney of the Month, 2001 Award (People v. Robert Bloom - Death Penalty)

U.S. Postal Inspector, Successful Prosecution Award, 2000 (People v. Jonathan Taylor – Three Strikes)

Project Lead, Public Service Award, 1996

UCLA School of Law, Moot Court Honors Award, 1994

Magna Cum Laude, 1992

Phi Beta Kappa, 1992

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