

Case o' the Week

A little memo on a big case.

From: Steven Kalar, Federal Public Defender, N.D. Cal. FPD Date: Monday, Oct. 24, 2016
Re: *United States v. Nixon*, 2016 WL 6068201 (9th Cir. Oct. 17, 2016): **Marijuana**: Appropriation rider does not prevent prohibition of med. m.j. as probation condition

Players: Per curiam decision, by Judges Trott, Owens, and Friedland.

Facts: Nixon was sentenced to three years of probation for drug charges. *Id.* at *1. "As a condition of probation, the district court required that Nixon refrain from unlawful use of a controlled substance and submit to periodic drug testing." *Id.* Congress then enacted a rider on an appropriation bill that prohibited the use of federal funds to "prevent States [that had enacted medical marijuana laws] from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *Id.* Nixon moved the court to modify his conditions of probation, and permit him to use medical marijuana in compliance with California's Compassionate Use Act. *Id.* The court denied the motion, concluding that the rider may have impacted DOJ – but had "no effect on the Court or the Probation office, which is an arm of the Court." *Id.* Nixon appealed.



Issue(s): "[W]hether a congressional appropriations rider that prohibits [DOJ] from using certain funds to prosecute individuals for engaging in conduct permitted by state medical marijuana laws impacts the ability of a federal district court to restrict the use of medical marijuana as a condition of probation." *Id.* at *1.

Held: "We hold that it does not." *Id.* "Nixon's reading is not supported by the plain language of the appropriations rider and is foreclosed by our precedent. On its face, the appropriations rider restricts only the DOJ's ability to use certain funds on particular prosecutions during a specific fiscal year. *See United States v. McIntosh*, . . . 2016 WL 4363168, at *11 (9th Cir. Aug. 16, 2016) (observing that the restriction on DOJ's use of the appropriated funds is 'temporal' in nature.) Accordingly, we have warned that individuals still face the possibility of prosecution under the CSA . . . Accordingly, the district court did not abuse its discretion by refusing to modify the conditions of Nixon's probation to allow him to possess and use marijuana for medical purposes in violation of federal law." *Id.* at *2-*3.

Of Note: In August, we hailed Judge O'Scannlain's *McIntosh* decision on medical marijuana as an admirably honest interpretation of Congressional intent. *See* blog here: <http://circuit9.blogspot.com/2016/08/case-o-week-high-times-enjoining.html> One wondered, however, how *McIntosh* would affect conditions of supervision and pretrial release. *Nixon* (sort of) answers that question. Yet . . . read the case closely. The Ninth only holds that it was not an abuse of discretion to refuse Nixon's requested modification. *Id.* at *3. It does *not* hold that DOJ can *prosecute* these violations – see "How to Use" below for thoughts on that twist.

How to Use: Assume your client on probation, or supervised release, or pretrial release, has a lawful cannabis card and pees dirty for pot. After *Nixon*, a court can legally hold a violation hearing. After *Nixon*, Probation or Pretrial can hand up Form 12s and Form 8s. However, Probation and Pretrial Officers don't have bar cards. What attorney has been funded by Congress to *prosecute* marijuana violations of supervision? That thorny question is dodged here: Nixon didn't raise it. *See id.* at *2 & n.2 ("We therefore need not decide whether the appropriations rider affects the DOJ's ability to participate in post-sentencing proceedings.") Moreover, if DOJ doesn't participate and the Court anoints Probation or Pretrial ("arms of the court") to "prosecute" the violation, other problems arise. *See id.* (declining to resolve any problems presented by the separation of powers doctrine). It's the next big issue – who, precisely, is paying for AUSAs to litigate these violations?

For Further Reading: *Richard Nixon* and pot have a long and complicated history. For a fascinating account of how our thirty-seventh President smuggled the devil's weed into the U.S., see article here:

<http://www.classicalite.com/articles/11131/20140905/richard-nixon-smuggled-three-pounds-marijuana-louis-armstrong-u-s.htm>