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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

STEVEN ADGATE,

Defendant.

CASE NO. 12-CR-0198 MCE

GOVERNMENT'S OPPOSITION TO DEFENDANT ADGATE'S MOTION TO STAY SENTENCE

## I. STATEMENT OF THE ISSUE

**Issue:** In a criminal case, when no notice of appeal is filed, a conviction becomes final 10 days after the Judgment is entered. At that point, the Court lacks jurisdiction to consider new legal arguments attacking the conviction or sentence outside of those granted by Statute or Rule [e.g., § 2255 motions, Rule 35(b), Rule 38 (staying sentences pending appeal), etc.]. Here, the defendant's judgment was entered on July 7, 2016, and no appeal filed. He now asks the Court (August 18, 2016) to stay his sentence so that he can attack his sentence based on *United States v. McIntosh,* No. 15-10117 (9th Cir. August 16, 2016) (spending bill § 542 prohibited DOJ from spending funds for prosecution of individuals who engaged in conduct permitted by state medical marijuana laws). Under these circumstances does the Court have jurisdiction to consider the requested stay?

**Answer:** The Court lacks jurisdiction to stay the sentence in this case to consider new arguments attacking his judgment or sentence. The need for finality of judgment protects the Court from having to

1 address legal arguments outside of the well-established paths of Statutes or Rules. In addition, the
2 defendant waived his right to appeal and to collaterally attack his conviction and sentence. Moreover, if
3 the Court were to consider the merits of the motion, it should be denied because the defendant claims
4 that only part of his marijuana growing was for medical marijuana purposes and cannot effectively raise
5 the *McIntosh* argument absent strict compliance with California medical marijuana laws. Thus, the
6 motion to stay the voluntary surrender date should be denied.

7 **II. BACKGROUND FACTS**

8 Defendant Steven Adgate was indicted on May 24, 2012, along with his 31 codefendants, in a
9 broad ranging marijuana cultivation and distribution conspiracy charge (Count One of the Indictment).
10 He pled guilty on February 18, 2016 to a one-count superseding information charging him with
11 conspiracy to manufacture, possess with the intent to distribute, and to distribute at least 50 marijuana
12 plants. For purposes of determining Adgate's base offense level for Guideline scoring purposes, the
13 statement of facts attached to his plea agreement and reflected in the PSR show that the defendant was
14 personally involved in two warehouse growing operations, the 738 plant Antioch grow cite raided by
15 state authorities in February 2013, and the 758 plant Pittsburg (CA) grow site that was raided by federal
16 authorities in May of 2012.

17 Adgate was sentenced to 26 months in prison on July 7, 2016 and the Judgment was entered on
18 the same day. He was given a voluntary surrender date of September 1, 2016. On August 16, 2016,
19 *United States v. McIntosh,* No. 15-10117 (9th Cir. 2016) (spending bill § 542 prohibited DOJ from
20 spending funds . . .) was issued.

21 On August 18, 2016, the defendant filed the present motion to stay his self-surrender date, citing
22 the need to explore any remedy that *McIntosh* might provide. The defendant claims that the marijuana
23 produced from the Antioch grow cite was actually going to his cousin's marijuana dispensary in
24 Southern California. He then argues that since the AUSAs prosecuting the case were prohibited from
25 spending resources to prosecute persons in compliance with CA medical marijuana law, that portion of
26 defendant Adgate's sentence that related to the Antioch grow could not be considered in calculating the
27 applicable Sentencing Guidelines.

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## III. THE COURT LACKS JURISDICTION TO CONSIDER THE MOTION

Although Courts are generally loath to find that they are without authority to do whatever they have a mind to do, this is an area that could have some appeal because, without it, there is no end to relitigating closed cases. It is the concept of *finality of judgment*. That concept holds that once a Judge has sentenced a defendant and judgment has been entered, future modifications of that sentence can only be done using certain well-established paths (found in Statutes or Rules) and that no generalized authority exists for district courts to later change their minds and modify the sentence rendered. 18 U.S.C. § 3582(c)(1)(B); *United States v. Aguilar-Reyes*, 653 F.3d 1053 (9th Cir. 2011).

No defined path exists granting the Court jurisdiction to, in effect and borrowing a term from civil procedure, arrest the judgment in this case. The defendant has cited no Statute or Rule giving the Court jurisdiction to hear the defendant's late filed attack on his sentence. It cannot be a § 2255 petition because the defendant is not yet in custody and 28 U.S.C. § 2255 states:

> A prisoner in custody under sentence of a court established by an Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Since the defendant is not yet in custody, the present motion cannot be construed as a § 2255 petition. Similarly, the motion cannot be pursuant to the Rules of Criminal Procedure. Rule 35(a) only allows correction of "arithmetical, technical, or other clear error *within 14 days after sentencing*." The government has made no motion pursuant to Rule 35(b) for post-sentencing cooperation. The motion does not seek to correct a clerical error under Rule 36. Rule 38 does not apply because there is no appeal. Thus, no jurisdiction exists for the Court to stay the self-surrender date to reconsider the sentence imposed as to defendant Adgate.

## IV. THE DEFENDANT WAIVED HIS RIGHT TO APPEAL OR COLLATERAL REVIEW

The plea agreement in this case signed by defendant Adgate states (p. 9):

> The defendant understands that the law gives the defendant a right to appeal his guilty plea, conviction, and sentence. The defendant agrees as part of his plea, however, to give up the right to appeal the guilty plea, conviction, and the sentence imposed in this case as long as the sentence

> does not exceed the top of the applicable guideline range as determined by the court.
>
> Notwithstanding the defendant's waiver of appeal, the defendant will retain the right to appeal if one of the following circumstances occurs: (1) the sentence imposed by the District Court exceeds the statutory maximum; and/or (2) the government appeals the sentence in the case. The defendant understands that these circumstances occur infrequently and that in almost all cases this Agreement constitutes a complete waiver of all appellate rights.
>
> In addition, regardless of the sentence the defendant receives, the defendant also gives up any right to bring a collateral attack, including a motion under 28 U.S.C. § 2255 or § 2241, challenging any aspect of the guilty plea, conviction, or sentence, except for non-waiveable claims.

The right to collaterally attack a judgment of conviction pursuant to § **2255** is statutory, and a knowing and voluntary waiver of a statutory right is enforceable. *United States v. Jeronimo,* 398 F.3d 1149, 1153 (9th Cir.2005), *overruled on other grounds by United States v. Jacobo Castillo,* 496 F.3d 947, 957 (9th Cir.2007) (*en banc*); *United States v. Abarca,* 985 F.2d 1012, 1014 (9th Cir.1993) (allowing defendant to waive the statutory right to file a § **2255** petition challenging the length of his sentence).[1]

The ink is hardly dry on the paper and the defendant is already breaching the plea agreement. The defendant got the benefit of his bargain with a 26-month sentence. He traded security of a known sentence recommendation in return for giving up potential or possible claims to derail the criminal charges. The government supposedly received some finality to the case as to defendant Adgate, and saved the time and risk of trial, appeal, and collateral attack. The government is entitled to insist upon the benefits of the plea agreement too. The Court should not now hear the defendant's *McIntosh* argument as it has been waived.

## V. THE DEFENDANT'S MCINTOSH ARGUMENT LACKS MERITS

Finally, even if the Court were to reach the merits of the *McIntosh* argument, it lacks merit. The defendant's argument boils down to a claim that that he was growing marijuana in compliance with the California medical marijuana laws (CA-MML) *in one of the two marijuana grows in which he was*

[1] However, a defendant may not waive an ineffective assistance of counsel claim challenging the knowing and voluntary nature of the plea agreement or the voluntariness of the waiver itself. *See Jeronimo*, 398 F.3d 1149, 1156 n. 4 (9th Cir. 2005); *Washington v. Lampert*, 422 F.3d 864, 871 (9th Cir.2005) (a plea agreement that waives the right to file a federal habeas petition pursuant to § 2254 is unenforceable with respect to an ineffective assistance of counsel claim that challenges the voluntariness of the waiver).

*involved*. He claims that the Antioch 739 marijuana plant grow was CA-MML complaint but makes no similar claim as to the 758 plant Pittsburg (CA) warehouse grow. He claims that the *sentence* he received is somehow illegal because the government, the Probation Department, and the Court considered the Antioch grow in calculating the applicable Sentencing Guideline Range (specifically the base offense level and maintaining a place). Essentially he wants the Court to proportion the alleged CA-MML compliant Antioch grow from the non-compliant Pittsburg grow for purposes of Guideline calculations and then resentence the defendant.

The problem with this argument is that it is foreclosed by *McIntosh*. The decision in that case required the defendant to have strictly complied with California law to come within the prohibition on DOJ fund expenditures. Slip op. at 32-33. Here, at best, the defendant claims only to have half-complied. So the § 542 argument is not available to this defendant.

As McIntosh makes clear, growing 'medical' marijuana is still illegal under federal law, but the United States is temporarily barred from prosecuting such growing activity by the 2016 Appropriations Act, section 542. But counting a prior marijuana grow warehouse, even if it was CA-MML compliant, as relevant conduct for determining the Sentencing Guideline in an overarching conspiracy does not offend section 542 or otherwise "prevent the states from implementing its own laws" that "authorize" medical marijuana.

Finally, the calculation of the relevant Sentencing Guidelines is, in the first instance, entrusted to the Probation Department and, in the end, the Court. There is no statutory or Sentencing Guideline provision that would allow, much less direct, the Courts to ignore relevant conduct in calculating the applicable Sentencing Guideline offense level on the basis of possible compliance with state medical marijuana law. In fact, that would be contrary to federal law. *McIntosh,* slip op. at 32 n.5. Thus, the sentence is not illegal nor were the Guidelines improperly calculated.

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## CONCLUSION

For all of the above reasons, it is respectfully submitted that the defendant's motion to stay the date by which the defendant must self-surrender to the BOP to commence serving his sentence be denied.

Dated: August 22, 2016

BENJAMIN B. WAGNER
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By: /s/ RICHARD J. BENDER
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