

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Richard Seeborg, Judge

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
VS.)	NO. CR 14-00278 RS
)	
ANTHONY PISARSKI and SONNY)	
MOORE,)	
)	
Defendants.)	
_____)	

San Francisco, California
Friday, July 28, 2017

TRANSCRIPT OF PROCEEDINGS

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I N D E X

Friday, July 28, 2017 - Volume 1

GOVERNMENT'S WITNESSES

PAGE VOL.

TINDELL, JASON

(SWORN)	72	1
Direct Examination by Ms. Gilbert	72	1
Cross-Examination by Mr. Richards	82	1
Redirect Examination by Ms. Gilbert	99	1
Recross-Examination by Mr. Richards	101	1

E X H I B I T S

GOVERNMENT'S EXHIBITS

IDEN EVID VOL.

A through M	104	1
O	76	1
N	78	1

DEFENDANTS' EXHIBITS

IDEN EVID VOL.

100 through 109	27	1
-----------------	----	---

PROCEEDINGS

1 Friday - July 28, 2017

10:13 a.m.

2 P R O C E E D I N G S

3 ---000---

4 **THE CLERK:** Calling case CR 14-0278, U.S.A. versus
5 Anthony Pisarski and Sonny Moore.

6 Counsel, please come to the podium and say your name for
7 the record.

8 **MS. GILBERT:** Good morning, Your Honor. Helen Gilbert
9 on behalf of the United States.

10 **THE COURT:** Good morning, Ms. Gilbert.

11 **MR. RICHARDS:** Good morning, Your Honor. Ronald
12 Richards on behalf of Anthony Pisarski.

13 **THE COURT:** Good morning, Mr. Richards.

14 **MR. PALAZZO:** And, Your Honor, Louis Palazzo appearing
15 on behalf of Sonny Moore, who's present at liberty.

16 **THE COURT:** Good morning, Mr. Palazzo.

17 Good morning, Mr. Moore and Mr. Pisarski.

18 This is the time set for the hearing on the stay issue, if
19 I can call it that. Hopefully you-all did receive the order
20 that I issued. I thought it was useful to issue an order in
21 advance so that at least all the parties would know, having
22 read through your papers, how I saw the burden issue falling;
23 and so that, hopefully, will at least streamline our process a
24 bit.

25 Having determined that the burden is a preponderance

PROCEEDINGS

1 burden that the defendants shoulder, I'll look to the
2 defendants to begin the hearing.

3 I have received your various submissions and have taken a
4 look at it, but let me turn to whoever wants to proceed.

5 **MR. PALAZZO:** If I may, I just want to clarify a
6 couple of housekeeping issues in advance.

7 **THE COURT:** Okay.

8 **MR. PALAZZO:** We were under the impression, based upon
9 predecessor counsel's interaction with us, Ms. Vartain
10 specifically, that we would be able to entertain and the Court
11 would entertain declarations.

12 We sought to elicit declarations in support of the hearing
13 today and also in an effort to obviate the needless
14 presentation of testimony beyond the declarations or whatever
15 was sworn to in the declarations.

16 I had a little bit of a misunderstanding with respect to
17 the Court's order as to whether the Court was requiring all of
18 the testimony to be presented live and not by declaration; or
19 whether the Court was simply saying, "I'm going to allow live
20 testimony if someone wants to present live testimony."

21 **THE COURT:** Well, I was never party to any agreement
22 about how this was going to proceed. So whatever Ms. Vartain
23 may have agreed with Defense, I never got any stipulation of
24 any kind. So as far as I'm concerned, the Court is not --
25 hasn't planned on how exactly this is supposed to play itself

PROCEEDINGS

1 out.

2 My order was simply to say to the extent that there was a
3 suggestion in the papers that either I had agreed we weren't
4 going to have live testimony or anyone had precluded it, I
5 wanted to set the record straight that I did not, and I'm
6 leaving it to the parties on how to proceed.

7 Now, with respect to the declarations, the Government has
8 objected to certain of those on various evidentiary grounds;
9 and absent some stipulation that I otherwise agreed to, I'm
10 going to have to consider those objections.

11 So I'm not saying, in other words, that I will preclude
12 consideration of declarations, but I just wanted to make it
13 clear on the record, this is your standard evidentiary hearing
14 from my standpoint. I haven't entered into any understanding
15 nor have I issued any orders that say it's -- you know, "We're
16 not going to have live testimony. We're going to have
17 declarations." I didn't -- none of that was the case.

18 So I guess to answer your question, I'm not precluding
19 consideration of declarations in the appropriate course, but
20 you should also not assume that there is some game plan of
21 which, at least I'm aware, that says how this is supposed to
22 proceed.

23 **MR. PALAZZO:** I spoke with -- well, we spoke with
24 Ms. Gilbert this morning, and I think all counsel feel like
25 they're in somewhat uncharted, you know, waters with respect to

PROCEEDINGS

1 the *McIntosh* evidentiary hearing and whether or not there is an
2 obligation to adamantly impose evidentiary requirements.

3 **THE COURT:** Right.

4 **MR. PALAZZO:** And so to the extent that, you know, we
5 were somewhat in the blind, if you will, and somewhat relying
6 upon the representations and the agreement -- at least from our
7 vantage point it was an agreement -- that we could supply
8 declarations in lieu of live testimony -- that's what we're
9 sort of falling back on, is the declarations -- in terms of
10 demonstrating a *prima facie* case to the Court.

11 And so if they've got live testimony that they want to
12 proceed with, of course, we don't oppose it and object to the
13 presentation of live testimony to rebut the evidence that's
14 been presented, but we think that the quality of the evidence
15 via the declaration should support the *prima facie* showing
16 because that was the intent behind presenting those
17 declarations.

18 **MR. RICHARDS:** I've just got some additional comments
19 for you if you don't mind.

20 **THE COURT:** All right. Well, let me ask a question
21 before that.

22 I mean, there have been a few proceedings. We've seen
23 them. The parties have alerted me to them. Judge Drozd in the
24 Eastern District of California. I believe Judge Chesney may
25 have had one in my district. Some of those led to the *McIntosh*

PROCEEDINGS

1 decision.

2 Did they -- were the evidentiary hearings in those cases
3 done in any particular way vis-a-vis the declaration issue?

4 **MR. RICHARDS:** In *Gentile* they stipulated that they
5 use the affidavit.

6 **THE COURT:** In which case?

7 **MR. RICHARDS:** *Gentile*, the one you cited in your
8 order.

9 **THE COURT:** Oh, okay.

10 **MR. RICHARDS:** Yeah.

11 **THE COURT:** That was done by declaration?

12 **MR. RICHARDS:** That's correct. And they called a live
13 witness in the hearing.

14 I didn't look at anybody being precluded from live
15 witnesses, but your order on Docket 173 ordered us to
16 produce -- in the status report that Ms. Vartain discussed with
17 us, it said we're to submit opening briefs and declarations.

18 So I looked at it as --

19 **THE COURT:** Well, that was leading -- of course. I
20 wanted the -- I wanted that material, paper material. That
21 doesn't mean I'm saying, "Oh, and, by the way, that will
22 suffice and you never have to worry about making an evidentiary
23 showing." You can't assume that from my order.

24 **MR. RICHARDS:** No. Well, this is what we -- let me --
25 we -- I have an extensive experience both in state and federal

PROCEEDINGS

1 court on medical marijuana issues.

2 **THE COURT:** Okay.

3 **MR. RICHARDS:** And so typically in state court there's
4 no Indictments and you have a preliminary hearing; and at the
5 preliminary hearing if you're going to present a medical
6 defense --

7 **THE COURT:** That's not just about marijuana. That's
8 the state practice on everything --

9 **MR. RICHARDS:** Correct.

10 **THE COURT:** -- is you don't generally proceed by
11 Indictment; you proceed by -- you have a preliminary hearing.

12 **MR. RICHARDS:** Right, unless the DA doesn't want a
13 preliminary hearing, then they'll go through the trouble of an
14 Indictment. But typically it's a preliminary hearing.

15 **THE COURT:** Okay.

16 **MR. RICHARDS:** So what I'm saying is that on these
17 medical marijuana cases, I've never had an Indictment. So
18 typically you would -- your client would produce the
19 recommendation; and if the DA said, "I want a custodian of
20 records declaration," you would just go to the doctor's office
21 and have his assistant sign a COR or they could go online -- a
22 lot of them in San Francisco, L.A. counties have online
23 verification -- or the DA would just call the doctor's office
24 and if the doctor wanted to release just the limited
25 information that, "Yes, this was a patient," or, "Yes, this was

PROCEEDINGS

1 my recommendation" because the patient is now showing it
2 publicly, that's how it would work. And then that declaration
3 would be admitted at the hearing.

4 It's not supposed to be -- what I'm trying to explain to
5 the Court is these are -- when people go through the trouble of
6 getting the recommendation from the physician, the criminal
7 goal was not to make the patient now go through a lot of
8 hula hoops to take advantage of a state immunity that was
9 provided so they can legally cultivate marijuana because
10 there -- in that time in 2012 there was no readily available
11 marijuana. You either had to grow your own marijuana or you
12 would have to buy it from a dispensary or get it from a
13 collective.

14 And so what I'm saying is, is that when we looked to
15 prepare for the hearing, what we envisioned is we would present
16 the obvious evidence that, "Hey, there was a doctor. He's a
17 real doctor. The people that are there all have medical
18 recommendations that are going to far exceed the 320 plants,"
19 which we don't know if they're female --

20 **THE COURT:** I mean, we're now getting into --

21 **MR. RICHARDS:** Right.

22 **THE COURT:** We may disagree on what "strict
23 compliance" means. So whatever may happen in state court when
24 you're facing a state criminal charge is fine, but we're in
25 federal court. This is an evidentiary hearing. There's

PROCEEDINGS

1 nothing special about the medical marijuana context. I have
2 evidentiary hearings all the time in criminal cases about all
3 sorts of different criminal activity. The federal rules are
4 what I look to, not the state rules.

5 I understand we have a relation to the state law here
6 because there is reference in the rider to -- in the medical
7 marijuana circumstance, if you can show strict compliance, and
8 that's what we're here to do; but the procedure, since *Erie*
9 *versus Tompkins*, we use federal procedure in federal court and
10 state procedure in state court.

11 And so to some extent, while state law is implicated in
12 this, state procedural law you shouldn't rely on as the model
13 for how we're going to do this.

14 **MR. RICHARDS:** I --

15 **THE COURT:** But let me ask -- maybe I can
16 short-circuit this.

17 Does the Government have a problem with my receiving these
18 declarations that the Defense has proffered to me?

19 **MS. GILBERT:** I think, Your Honor, we have always been
20 of the opinion that the Federal Rules of Evidence do apply to
21 this hearing; but I think what I discussed earlier with the
22 Defense counsel is that, you know, I don't have precedent that
23 says in this particular type of hearing, they apply. So that's
24 an open legal question.

25 If the Court wants to take the declarations, we just would

PROCEEDINGS

1 acknowledge that we haven't had a chance to cross-examine any
2 of these witnesses. They're all hearsay. We have raised some
3 concerns with the credibility of these witnesses and with the
4 statements that they've made, and that we just ask that you
5 give it less weight because of those concerns we have.

6 **THE COURT:** Okay. All right. There is a provision in
7 the federal rules that talk in terms of some preliminary
8 proceedings not requiring -- or at least permitting some
9 hearsay being submitted; and, in fact, we do it, as you know,
10 well, at bail hearings and other hearings. So it's not unheard
11 of that I would be taking some of this material in.

12 The long and short of it is, just so that you're not in
13 suspense, if this is the clarification question you were
14 asking, I will consider the declarations. I will take them
15 into consideration and admit them, but I am going to admit them
16 with the understanding, just as Ms. Gilbert has said, that
17 these witnesses haven't been subject to cross-examination; and
18 to the extent that she's pointing out some problems with those,
19 I'll have the understanding that they weren't -- I'm not sure
20 it's going to call the question one way or the other, but I
21 will receive the declarations.

22 **MR. PALAZZO:** And, Your Honor, just for, again,
23 clarification, that applies across the board. I mean, there
24 are declarations that were submitted by the Government as well.

25 **THE COURT:** Of course.

PROCEEDINGS

1 **MR. PALAZZO:** And within those very declarations,
2 there are hearsay statements that are attributed to third
3 parties.

4 **THE COURT:** Right.

5 **MR. PALAZZO:** And, again, we weren't expecting to have
6 to, you know, force the Government to have all those people
7 come today and testify and then be subject to cross-examination
8 if they were just going to rely on the declarations. And the
9 Court would give -- you know, accord whatever weight it chose
10 to apply.

11 **THE COURT:** Okay.

12 **MR. PALAZZO:** But we wanted to supply the declarations
13 in an effort to try to abbreviate the hearing instead of making
14 it some protracted all-day event and sort of get to the nub of
15 the issue and address the Court's concerns and then make
16 argument, you know, based upon the state law that's been
17 presented as well, Your Honor.

18 **THE COURT:** All right.

19 **MR. RICHARDS:** It's like an injunction, Your Honor.
20 Typically when you're deciding, you know, in a civil case a
21 preliminary injunction, you get declarations all the time and
22 from both parties.

23 And, you know, we're dealing with a seizure, you know,
24 over five years ago, so we felt that you would consider all the
25 Government's declarations and the hearsay in those and put it

PROCEEDINGS

1 all into the goulash and see if we made a showing.

2 We're not dealing with a criminal burden of proof. It's a
3 preponderance of evidence.

4 **THE COURT:** That's fine, and I think I've indicated
5 I'm going to do that.

6 **MR. RICHARDS:** All right.

7 **THE COURT:** You've submitted four declarations, I
8 believe.

9 **MR. RICHARDS:** Yes.

10 **THE COURT:** You've got Pisarski and Moore. I mean,
11 they're here. They could potentially testify.

12 Ramrattan and Apodaca; right?

13 **MR. RICHARDS:** Right.

14 **THE COURT:** So we're really talking about Ramrattan
15 and Apodaca because they are not here, and you don't anticipate
16 calling them; right? Those are the two.

17 **MR. RICHARDS:** We didn't -- we wanted to first rely on
18 the fact that we have 320 plants and we believe that whatever
19 excess cannabis that was going to be yielded from those 320
20 plants, because we don't know if they were male or female or
21 all usable, that the current recommendations for Pisarski,
22 Pamela Moore and Sonny Moore and Sakina Ramrattan, if
23 necessary, are enough.

24 But we believe in that household they were allowed to
25 cultivate marijuana. We don't know what they were going to do

PROCEEDINGS

1 with it once it was harvested.

2 **THE COURT:** So you're now getting into the substance.

3 **MR. RICHARDS:** I'm not trying to get into the
4 substance. I'm saying if you needed those other -- if the
5 whole case came down to Sakina Ramrattan coming in here and
6 saying, "That's my recommendation, et cetera, and I dealt with
7 Mr. Pisarski," I would get her. That's not a problem. But I
8 wasn't going to go cumulative because I felt there's two
9 separate issues.

10 And whenever you want me to explain how I wanted to
11 present my issues, I'll do it. I don't want to do it now if
12 you don't want to hear it right now.

13 **THE COURT:** This is not, as you know, a process of my
14 starting some hearing and then saying, "Oh, I'd like to see
15 this. Will you bring this in?" This is the day for the
16 hearing. You tell me what you think I need to know. I make
17 the rulings I'm going to make. You rise or fall on today's
18 hearing.

19 So I'll tell you one scenario that's not going to happen,
20 is my saying, "Oh, I'd like to hear... Will you please go find
21 this witness for me and bring them in."

22 You have the burden, I think, under a preponderance of the
23 evidence. You submit what you think satisfies your burden and
24 I decide whether or not you've satisfied it or not. That's
25 what this is about. It's going to be done today, and then

PROCEEDINGS

1 we're going to move on one way or the other. That's the deal.

2 **MR. RICHARDS:** All right. That's fine.

3 **THE COURT:** Okay.

4 **MR. RICHARDS:** I get it. That's fine.

5 **THE COURT:** Okay.

6 **MR. PALAZZO:** We just didn't want to have to bring in
7 Dr. Eidelman, Dr. Bradley, and all these people.

8 **THE COURT:** I'm telling you, you're the guys who know
9 what you think satisfies your burden. I may disagree with you,
10 but it's for you to decide. It's not -- in other words, it's
11 not for you to say, "Okay. Here. We've got this much, Judge.
12 Tell me whether or not -- would you like some more? We'll
13 come" -- that's not the way this works.

14 **MR. PALAZZO:** No, I understand, Your Honor.

15 **THE COURT:** Today is your time. You have made your
16 legal assessment on what you think satisfies your burden, and
17 my job is to hear and look and read whatever you submit and
18 decide if I think you have satisfied the burden or not.

19 **MR. PALAZZO:** And if the Court is entertaining what
20 we've submitted in terms of the declarations and the exhibits,
21 then we're good.

22 **THE COURT:** Yeah. Okay.

23 **MR. RICHARDS:** Thank you.

24 **MS. GILBERT:** Two quick housekeeping things. I
25 apologize for not doing this earlier.

PROCEEDINGS

1 First is that the Government may, as I said last night,
2 may call the two case agents on the case --

3 **THE COURT:** Right.

4 **MS. GILBERT:** -- Police Officer Chance Landreneaux and
5 DEA Agent John Rasmussen. They are both sitting at counsel's
6 table and I would ask that they be permitted to stay during the
7 course of the hearing. They're already familiar with the whole
8 case given their prior work on this matter.

9 **MR. PALAZZO:** Are you just going to be relying on the
10 declarations that have already been submitted by them?

11 **MS. GILBERT:** I will, but I brought them here to be
12 able to testify live and put in a few photographs of the
13 search. So I may or may not do that depending on what you-all
14 put forward in your case.

15 **MR. PALAZZO:** Okay.

16 **THE COURT:** Well, I mean, do you object and insist on
17 the rule against witnesses sitting in?

18 **MR. PALAZZO:** Exclusion of witnesses, I understand,
19 Your Honor. I really don't have any heartburn about it. I
20 think their declarations have already been submitted and, you
21 know, we know what they're going to say.

22 **THE COURT:** Okay. All right.

23 **MS. GILBERT:** Thank you, Your Honor.

24 **THE COURT:** Okay. So who would like to commence for
25 the -- which of you or both or --

PROCEEDINGS

1 **MR. PALAZZO:** Well, I'll let Mr. Richards start --

2 **THE COURT:** Okay.

3 **MR. PALAZZO:** -- and then I'll flesh out the issues
4 that I feel are relevant.

5 **THE COURT:** All right. Go ahead, Mr. Richards.

6 (Pause in proceedings.)

7 **MR. PALAZZO:** Again, Your Honor, just so -- in the
8 interest of abbreviating the process and based upon the Court's
9 inclination to accept the declarations and the exhibits that
10 have been proffered to the Court for its entertainment in
11 consideration of the issue, we're going to rest on the -- on
12 what's been submitted to the Court in lieu of presenting live
13 testimony.

14 **THE COURT:** Okay.

15 **MR. RICHARDS:** And so we -- I presented an exhibit
16 list.

17 **THE COURT:** Yes.

18 **MR. RICHARDS:** Okay. So it's Exhibits 100 through
19 109.

20 **THE COURT:** All right. Well, let me, first, on the
21 exhibits -- I told you I will receive and consider the
22 declarations. With respect to the exhibits, you have 100 to
23 109.

24 Ms. Gilbert, what's the Government's position with respect
25 to the admission of exhibits -- and you can take them in -- if

PROCEEDINGS

1 they're --

2 **MS. GILBERT:** Sure, Your Honor. I think our main
3 objection is that these are all hearsay and that no one is here
4 to set a foundation to authenticate these records.

5 You know, for instance, the first two -- all the
6 recommendations -- so that's Exhibit 100, proposed Exhibit 101,
7 that's Exhibit 104, and that's Exhibit 108 -- we don't even
8 have declarations from the doctors stating that they wrote
9 these -- that they wrote these recommendations. These were
10 just submitted as part of declarations from other people. So
11 we object on hearsay grounds to those.

12 On Exhibit 102, Exhibit 103, and Exhibit 109, which regard
13 the bank records, we object because these haven't been
14 authenticated. We have no custodian-of-record information. We
15 don't know if these were fabricated. I'm just saying that we
16 have some evidentiary concerns with these given the fact that
17 these were just introduced by the defendants. I don't have a
18 declaration from Wells Fargo stating that these are accurate
19 records, that they were made at the time.

20 And then regarding the cultivation agreement -- that's
21 Number 105 proposed by the Defense -- again, this is hearsay.
22 None of the individuals who signed those agreements but for
23 Defendant Pisarski are here. We've also raised concerns about
24 these agreements in our papers and whether or not they were
25 actually signed by the people who purported to sign them. So

PROCEEDINGS

1 we object on hearsay grounds primarily.

2 And, finally, on Exhibit 106, which is the Covelo sales
3 permit, I am prepared, if the Defense has rested, to call a
4 custodian of records from the California it's now called the
5 Department of Tax and Fee Administration, formerly the
6 California Board of Equalization. He's here and I actually
7 have him ready to admit that.

8 So I would prefer that that be admitted by him who is the
9 proper custodian of record, but it is the actual copy of the
10 original document which was submitted by a declarant in this
11 case.

12 **MR. RICHARDS:** Okay. First --

13 **THE COURT:** Mr. Richards.

14 **MR. RICHARDS:** First, Your Honor, all the declarations
15 laid the foundation and authenticated these exhibits. It's
16 incorrect for -- well, let's deal with the Wells Fargo records
17 first.

18 They're my client's records. They're the actual bank
19 statements. I provided these to the Government a very long
20 time ago; and if they had evidentiary objections to the
21 exhibits to the declarations, they should have filed objections
22 or told me when I gave it to them a long time ago that, "Hey,
23 you better have a COR affidavit, or" -- but I believe
24 Mr. Pisarski can lay the foundation for his own bank records.
25 They're his records. He did the math.

PROCEEDINGS

1 It's just simply being offered to show that he took cash
2 withdrawals from his records. So that's in his declaration. I
3 don't see how you can receive the declaration but take out the
4 exhibits because each declaration has the exhibits.

5 The Sakina Ramrattan declaration, her photograph and
6 driver's license are on the recommendation, and she signs the
7 declaration stating that it's her recommendation. Mr. Pisarski
8 signs his that that's Mr. Eidelman's.

9 I cited case law for you in the brief which shows that the
10 defendant can testify they have a recommendation and it's their
11 recommendation. They don't need the doctor to get a
12 declaration. That just never occurs. You don't have to go to
13 a doctor and say, "Now I need you to write a separate
14 declaration."

15 But I would just ask the Court to receive them and give it
16 the weight that it deserves. But that's what I was saying. If
17 the Court -- if there's a legitimate contention that
18 Dr. Eidelman didn't sign it, then I would just ask the Court
19 to -- I'll drive to his office in Hollywood when I get back
20 today, and I'll have him sign a custodian of records affidavit.

21 I mean, I know who Dr. Eidelman is. He's been around for
22 20 years. I think in 1996 when I wrote the first article on
23 Proposition 215 for a Los Angeles lawyer, Dr. Eidelman opened
24 up his practice and started giving recommendations.

25 Okay. And so the issue is simply -- I mean, if there's a

PROCEEDINGS

1 doubt as to these, the Government should have told us, you
2 know, that "I have some doubts."

3 **THE COURT:** Let me ask Ms. Gilbert.

4 **MS. GILBERT:** Yes.

5 **THE COURT:** Are you -- are any of your objections
6 relevance objections, or are all these all authentication,
7 foundation, hearsay?

8 **MS. GILBERT:** I think we object to the relevance, and
9 I think our brief states this, to the Wells Fargo Bank records.
10 Our view is that even if he did withdraw all of that cash, it's
11 irrelevant to proving whether or not he was making a profit or
12 not with the marijuana business.

13 So I think the -- those are relevance objections.

14 **THE COURT:** Although, that objection is more -- in my
15 mind, it doesn't -- it doesn't go the distance to prove what
16 they're trying to prove.

17 I'm not sure it would be irrelevant. I mean, it could
18 theoretically if you then combined it with some other showing.
19 It might be the sort of information that goes to the question.
20 You just are arguing by itself it's not enough. It's just --

21 **MS. GILBERT:** No, Your Honor, that's correct.
22 Actually, that's a very good point. No, I think that's right.
23 I think if -- so, you know, I think we agree that they're
24 relevant to -- the remainder particularly are -- certainly
25 relevant to the case here.

PROCEEDINGS

1 We have -- I am very concerned, I'll be honest with you,
2 about admitting the cultivation agreements themselves. That is
3 my biggest concern, because we have raised serious questions
4 about whether these individuals actually signed the agreement
5 in our brief.

6 **THE COURT:** This is Exhibit 105?

7 **MS. GILBERT:** This is 105, exactly.

8 **MR. RICHARDS:** Which individual are you referring to?
9 Because that wasn't in your papers. You didn't present those
10 declarations.

11 **MS. GILBERT:** It was -- in our papers we noted that
12 Laura Labelle had been interviewed by Officer Chance
13 Landreneaux, and that was in Mr. Landreneaux's declaration.

14 Now, I understand, you know, that would be hearsay for him
15 to testify to that; but Ms. Labelle is not here to state
16 whether or not she actually signed that agreement, and we have
17 evidence that shows she may not have signed that agreement.

18 And so, you know, I think that's a witness, for example,
19 that I would very much like to have been able to cross-examine
20 to determine whether or not she actually signed that agreement,
21 and particularly because that agreement states that
22 Mr. Pisarski is her primary caregiver. The information that
23 she told an officer in 2015 was that she had never met him and
24 he wasn't her primary caregiver.

25 **THE COURT:** What is your foundational showing on 105?

PROCEEDINGS

1 I mean, what does --

2 **MR. RICHARDS:** Well, Sakina Ramrattan testified in her
3 declaration that's her signature, and I don't -- we don't care
4 about Laura Labelle. I mean, you know, when DEA comes to your
5 house and says, "We want to talk to you about marijuana," it
6 doesn't shock me that someone may get nervous.

7 But we don't need Laura Labelle's grower agreement to
8 prove what we need to prove here, so I --

9 **THE COURT:** Okay. So are you --

10 **MR. PALAZZO:** We'll forego that one.

11 **MR. RICHARDS:** Yeah, we'll forego that.

12 **THE COURT:** You'll forego that one.

13 **MR. RICHARDS:** And then we'll save time.

14 **THE COURT:** Okay. So 105 is just Ms. Ramrattan's
15 agreement, or is it --

16 **MR. RICHARDS:** All of them. We can withdraw the Laura
17 Labelle portion of that.

18 **MS. GILBERT:** I would ask that they also withdraw the
19 Joseph Augustine portion as well because -- so they put in --
20 they attached to Ms. Ramrattan's declaration three cultivation
21 agreements: One by Ms. Ramrattan herself and two by additional
22 people.

23 **THE COURT:** Okay.

24 **MS. GILBERT:** So even if the Court allowed the
25 Ramrattan cultivation agreement based on the fact she at least

PROCEEDINGS

1 filed a declaration stating "That's my signature," we have
2 nothing in the records, even the declarations from
3 Mr. Augustine or Ms. Labelle, and we actually -- and we
4 produced this information to the defendants. We tried to track
5 down Ms. Labelle and Mr. Augustine.

6 We were able to track down Mr. Augustine. He lives in
7 Pennsylvania. And he stated that although he had signed that
8 agreement, he had never met Mr. Pisarski and Mr. Pisarski was
9 never his caregiver, which makes me very concerned about the
10 legitimacy of that agreement given that Mr. Pisarski has signed
11 that agreement indicating that he's Mr. Augustine's caregiver.

12 **THE COURT:** So these are all -- just so that I'm
13 following all this, these three are part of the Ramrattan
14 collective, which is the more informal of the two --

15 **MR. RICHARDS:** Correct.

16 **THE COURT:** -- collectives?

17 **MS. GILBERT:** Correct, Your Honor.

18 **THE COURT:** So I'll go ahead and receive
19 Ms. Ramrattan's agreement.

20 With respect to Ms. Labelle, you're saying, "Okay. We
21 don't need to receive that."

22 **MR. RICHARDS:** Augustine's different. Let me tell you
23 why.

24 He -- they went and found Mr. Augustine. He said, "That's
25 my signature." My client never dealt with Mr. Augustine. He

PROCEEDINGS

1 dealt with Ramrattan. That's who the liaison was. That's what
2 she said in his [sic] declaration. That's what he said. We're
3 not suggesting that you need to actually know each other.

4 And we believe that Mr. Augustine signed it. If he
5 doesn't remember signing it now -- he acknowledged he signed it
6 and there's no evidence from the -- the Government knows he
7 signed it.

8 **THE COURT:** You see, we're now -- we are -- for
9 purposes of doing this according to some rules, we're way down
10 the page here because we've got several links in the chain that
11 are not here.

12 No one -- let's assume -- I'm perfectly willing to assume
13 that this gentleman signed that agreement, but we've now got
14 some issues that Ms. Gilbert is suggesting apply as to what
15 that really means, and we don't have Mr. Augustine here nor do
16 we have a declaration from Mr. Augustine. So I don't know any
17 of these issues.

18 Now, but I'm not -- I don't want to get too bogged down
19 because I don't think this is the central question.

20 I will receive the Ramrattan agreement, and then we're not
21 going to receive -- so we're modifying 105 to be the Ramrattan
22 agreement, and then the Augustine and the Labelle agreements
23 I'm not going to receive.

24 Okay. They will not be admitted. Okay?

25 **MR. PALAZZO:** Okay.

PROCEEDINGS

1 **THE COURT:** Next.

2 **MR. RICHARDS:** All right.

3 **MR. PALAZZO:** Any other issues with the exhibits?

4 **MS. GILBERT:** I mean, I think we do still have issues
5 with the recommendations; but I will say this, Your Honor --

6 **THE COURT:** They go to the weight and I will admit
7 that.

8 **MR. PALAZZO:** Perfect.

9 **MS. GILBERT:** Agreed.

10 **THE COURT:** And let me just ask a question with
11 respect to, you provided to me -- "you" being the Defense
12 side -- I think this is -- 109 is more voluminous. It's all
13 the Wells Fargo records, but there was one page that you
14 highlighted, I believe.

15 **MR. RICHARDS:** Right. Yeah. I didn't want you to
16 have to look through all the records. On the first page of the
17 244 pages --

18 **THE COURT:** Right.

19 **MR. RICHARDS:** -- if you look at it, you have it in
20 your hand, Your Honor, it's the top right --

21 **THE COURT:** Yes.

22 **MR. RICHARDS:** -- that's the total cash withdrawals
23 for that period, 799,000.

24 **THE COURT:** So this page -- you're doing that to help
25 me summarize, if you will. You're not suggesting this page has

PROCEEDINGS

1 some particular significance?

2 **MR. RICHARDS:** Only that that's my client's
3 calculations --

4 **THE COURT:** Okay.

5 **MR. RICHARDS:** -- and I didn't want you to have to add
6 up everything.

7 **THE COURT:** Okay. Thank you.

8 **MR. RICHARDS:** That's the first page of the exhibit.

9 **THE COURT:** Very good. Okay.

10 So I will receive those exhibits with the understanding
11 that there are some weight issues that Ms. Gilbert has
12 highlighted for me. Okay?

13 (Defense Exhibits 100 through 109 received in evidence)

14 **MR. PALAZZO:** Thank you, Your Honor.

15 **MR. RICHARDS:** Now, as far as my presentation, now
16 that we've got the evidence out of the way, can I just simply
17 tell you, then, how you should view the evidence and then rest;
18 or do you want --

19 **THE COURT:** You may.

20 **MR. RICHARDS:** Okay. Great.

21 All right. So as the Court may or may not be aware, the
22 issue in this case is what marijuana are we dealing with on
23 July 10th, 2012. That's the only marijuana we're dealing with.

24 So the law --

25 **THE COURT:** You mean that's what's been charged in the

PROCEEDINGS

1 Indictment.

2 **MR. RICHARDS:** That's correct. So we're not dealing
3 with what happened before or after. We're dealing with that
4 narrow day.

5 And marijuana in California has had a long, tortured
6 history with respect to when Proposition 215 was first enacted
7 in November of 1996, and then the legislature in 2003 issued
8 some more extensive guidelines and laws.

9 **THE COURT:** MMA; right? Or MMPA. Excuse me.

10 **MR. RICHARDS:** Yeah.

11 So in 2012, as the Court saw from the citations, a flurry
12 of Court of Appeal opinions started being generated in the
13 various courts dealing with medical marijuana and various
14 issues. And on that date when the Humboldt County sheriffs
15 came to the location, there was -- they took the marijuana
16 plants, the medical cannabis that was growing, and it's been
17 destroyed to the best of my knowledge. So that was in July.

18 Typically the time when these things are fully bloomed is
19 in October. So you don't know which -- how these plants are
20 going to turn out. The fact that there's 320 plants doesn't
21 mean you're going to get 320 plants of usable marijuana.
22 There's male plants, female plants, plants get lost to mold.
23 There's many different things that occur.

24 So at this moment in time you have 320 plants and you have
25 a seizure. We never are going to know what happened to those

PROCEEDINGS

1 plants. So the Government in their papers and all these other
2 arguments is trying to expand this to what would have happened
3 if there was excess cannabis and where would this all have
4 gone.

5 So the question is: How do we want you to view this
6 evidence? We want you to view the evidence that you had the
7 Moore recommendation for Pamela and Sonny. You had the
8 Pisarski recommendation. That is more than enough to cover any
9 marijuana that was going to be harvested.

10 So they're allowed to cultivate marijuana because at that
11 time, and the theory has always been, you have to grow your own
12 marijuana. And that's why, you know, you saw the *Jackson* case
13 come out and then the *Anderson* case, all these state cases,
14 *Baniani* that we cited for you, because as the law was
15 developing, it became clear to the courts that you're never
16 going to have a normal situation because you can't go into a
17 bank, you can't have a storefront, and so you have to,
18 basically, pool your resources together.

19 So you would need people like Mr. Pisarski who,
20 ironically, he, in the time period that he was doing this, he
21 paid over \$1.5 million in taxes. He had a successful --

22 **THE COURT:** Let me stop you on that. He pays
23 1.5 million in federal taxes.

24 **MR. RICHARDS:** Right.

25 **THE COURT:** At least that's what you've told me.

PROCEEDINGS

1 **MR. RICHARDS:** That's what he testified, Your Honor.

2 **THE COURT:** But one of the aspects of compliance in
3 this case is paying state sales taxes. Where is the evidence
4 that he paid state sales tax?

5 **MR. RICHARDS:** Okay. That is absolutely inaccurate.
6 I don't know why the Government -- that is just wrong. The
7 fact is, is that there has never been a California case that
8 I've ever heard of or been involved in where a defendant lost
9 their immunity because they didn't pay sales tax on marijuana
10 sales, but that's a red herring because there were no sales in
11 this case. The marijuana that was seized was never sold.

12 **THE COURT:** No, no, but the question is whether or not
13 this -- I understand your point that the particular marijuana
14 that's the focus of the case is what's seized and charged.
15 That's fine. But the course of business is relevant.

16 So if this -- if you don't have evidence that shows that
17 the defendants scrupulously followed all the requirements to
18 provide medical marijuana consistent with state law, you've got
19 a problem even if on that particular day and time there was, as
20 you suggest, we don't know exactly how many plants were
21 ultimately going to come to fruition and all of that. On that
22 day I need to have some evidence that you had jumped through
23 all the necessary hoops -- "you" being your clients -- to
24 provide medical marijuana.

25 **MR. RICHARDS:** No, Your Honor, respectfully, the

PROCEEDINGS

1 Government is steering you into a dispensary analysis. This is
2 the nuance that is being missed in the papers. This is a
3 grower that has a house --

4 **THE COURT:** Right.

5 **MR. RICHARDS:** -- that makes up a -- he has 410 acres.
6 The greenhouse takes up 1 percent of that, a 15-minute walk
7 from the house. So --

8 **THE COURT:** But the rider is not -- on which you're
9 relying is not limited to a dispensary.

10 **MR. RICHARDS:** You're right.

11 **THE COURT:** The rider is anybody who is involved in
12 this business, effectively.

13 **MR. RICHARDS:** No, no, no. The rider protects
14 patients to grow their own marijuana.

15 **THE COURT:** Correct. Well, I don't think that's
16 correct.

17 **MR. RICHARDS:** This is the disconnect: The Government
18 is creating regulations that don't apply to what's going on
19 here. I'm just -- let me just --

20 **THE COURT:** Well, is it your position that growers
21 have -- they're just unconstrained by any regulation? That
22 only the dispensary has regulations that they have to comply
23 with under state law?

24 **MR. RICHARDS:** A grower -- a grower who has a doctor's
25 note and is living in a home with two other people that have

PROCEEDINGS

1 doctors' notes, they can grow as much marijuana as their
2 medical needs require, and they're allowed -- because they
3 cannot buy it in the store. There's only one growing season a
4 year they can grow it.

5 **THE COURT:** But they can't sell it into the
6 marketplace.

7 **MR. RICHARDS:** There is no evidence they sold it into
8 the marketplace, you're right.

9 **THE COURT:** I'm not asking for what they can and
10 cannot do in the abstract.

11 **MR. RICHARDS:** No, they can't. They can deliver it to
12 a collective that then is closed circuit and distributes it to
13 their other members. They're entitled to get compensated for
14 labor, for soil, and for their expenses. That's what they're
15 entitled to do. They get an immunity under 11362.775. It
16 gives them the full immunity against possession for sale.

17 But that's not the case we have here. The Government --
18 look, I am confident this prosecutor has never prosecuted a
19 state marijuana case in her career.

20 Is that a fair statement?

21 Okay. So, I mean, that's not the law. This is not a
22 storefront where patients are coming in off the street, they're
23 registering, and then they're distributing marijuana. That's a
24 strict analysis because the police send in undercovers all the
25 time. There's city licenses. There's whole city regulations

PROCEEDINGS

1 in L.A., Orange County, and San Francisco.

2 The issue here is this is a country grower that owns a
3 horticulture business that has bank accounts and tax returns,
4 and makes plenty of money in his regular business. So in this
5 time period he's deciding to grow some marijuana and if there's
6 excess cannabis -- the only reason why I presented to you
7 Ramrattan and Covelo is to show you that if there was excess
8 cannabis, he had another patient that had an informal
9 collective that he would unload it to if that option was
10 available. We'll never know about this marijuana because it
11 was seized.

12 So in this particular hearing, he only needs to show that
13 he was legally allowed to grow marijuana, and the best evidence
14 as to why it was legal is the Humboldt County sheriffs never
15 charged him. It was never referred to the DA.

16 **THE COURT:** That doesn't mean anything.

17 **MR. RICHARDS:** Well, it means a lot to the extent that
18 if --

19 **THE COURT:** No, it doesn't. There are many people
20 that don't get charged for all sorts of criminal conduct, and
21 that's a function of the resources of law enforcement and other
22 things. You can't prove the "I'm innocent because I -- you can
23 take the fact that I was not charged by state authority to mean
24 I am innocent of all criminal conduct." It doesn't work that
25 way.

PROCEEDINGS

1 **MR. RICHARDS:** Okay. Well, I'm saying it's a factor
2 that is interesting, that if there was some rampant violation
3 of state law.

4 The issue is the cultivation of marijuana outside is not
5 an easy process, and so in this particular case there's no
6 history that Mr. Pisarski was successful in the marijuana
7 cultivation industry. The year before -- you know, I could
8 give you evidence -- there was mold. It's irrelevant because
9 what's relevant is this marijuana.

10 So the analysis is narrow. Were they in compliance with
11 state law as patient growers? Because the only way you can get
12 marijuana is you grow your own marijuana in that time period
13 five years ago.

14 **THE COURT:** Can I -- and this is jumping ahead to the
15 Government's -- what the Government's going to present for me,
16 but I might as well get your view of it now. Can I take any
17 inference at all from the circumstances of how cash is found in
18 this -- in where he's doing the growing, that they're -- you
19 know, it's all -- cash is wrapped up and hidden and all of
20 that? Can I -- are you suggesting I shouldn't make any
21 inference at all with that?

22 **MR. RICHARDS:** You can make inference of it, but
23 having wrapped-up cash does not mean that you're not allowed to
24 have marijuana, I mean, and grow marijuana. And I will tell
25 you -- and I've been doing these cases a very long time -- I

PROCEEDINGS

1 have never had a client in my whole career give me years of
2 bank statements and show me cash withdrawals from his own
3 Wells Fargo account totaling \$800,000.

4 **THE COURT:** I get --

5 **MR. RICHARDS:** So that's a factor that evens out the
6 cash, but it doesn't make --

7 **THE COURT:** What does the cash withdrawal in your mind
8 mean? I'm not sure what -- okay. He's withdrawing money from
9 his Wells Fargo account. Why -- what am I to take from that?
10 I'm not sure.

11 **MR. RICHARDS:** That the cash at the residence was
12 cash. That's cash from his withdrawals. And in that industry,
13 Your Honor, they want to -- that time especially you cannot
14 open up a bank account.

15 **THE COURT:** I understand that.

16 **MR. RICHARDS:** So everybody would buy and sell in cash
17 not because it was nefarious. The federal government wouldn't
18 give you a tax deduction. There was no credit cards.

19 Dispensaries would receive money in cash and pay in cash. And
20 if there was ever excess cannabis, that's how this was dealt.

21 But what I don't think you can consider is just the fact
22 that it's -- the cash doesn't invalidate the recommendation
23 even if, hypothetically, that three years ago he illegally sold
24 marijuana.

25 Because I'll tell you to be intellectually upfront with

PROCEEDINGS

1 you, many times in 2008, 2009 a client would be illegally
2 selling marijuana -- okay? -- or maybe even going back now to
3 2003 because I want to focus when the legislature really put in
4 some immunities, and I would tell clients, "What? Are you
5 nuts? Why don't you do it legally? Get notes. Document what
6 you're doing. Go to a real doctor like Eidelman where you
7 can -- he's always available. Get someone that people know of
8 that's been doing this a long time, that has a real license."

9 And so the thing is, is that -- is that it doesn't matter
10 why he had cash because the issue is: Was he legal when they
11 seized the plants? What are you charging him with under state
12 law?

13 Now, I'm not arguing state procedure. We have to follow
14 state law. If you have a -- if you have a recommendation that
15 allows you to grow up to 100 plants, the police cannot question
16 that recommendation. State law does not allow the DA to say,
17 "I don't agree with the doctor's recommendation." That's not
18 for the DA or the Government to do. The doctor's
19 recommendation is the recommendation.

20 So in this case if we limit it to that day, we have three
21 medical recommendations that provide compliance with 320
22 undeveloped plants. So I can't -- I just wanted to show the
23 Court in our papers that there was another unrelated person who
24 signed a declaration that said that he would grow for us and
25 that they had a written agreement that established the

PROCEEDINGS

1 compensation, but it's not pertinent if you accept the fact
2 that he was legal for just cultivating marijuana.

3 The only crime, by the way, that could have possibly been
4 committed under state law on July 12th, 2010, is a violation of
5 11358 of the Health and Safety Code, cultivate -- illegal
6 cultivation of marijuana. There was no evidence of him
7 distributing. There was no undercover. There was no evidence
8 of anything other than there was a growing and that there may
9 have been evidence, if you look at the Government's cash in the
10 worst possible light, that there may have been evidence of past
11 sales of something that resulted in cash receipts if you
12 disregard the Wells Fargo Bank records. But what does that
13 mean? How does that invalidate the doctor's recommendation?
14 It just doesn't.

15 And so the way the courts have evolved in the cases that
16 we cited -- you know, *London*, *Baniani*, and *Anderson* -- all the
17 patient has to do is say they have a recommendation and the
18 burden then shifts to the Government.

19 Even on the preponderance of the evidence standard, they
20 have to put on evidence that somehow he can't grow -- and I
21 wasn't trying to be funny when I said a measly 300 plants. It
22 is measly when the DA, if he takes the stand, he knows there
23 was people growing 10,000 plants just next-door. That's a
24 commercial operation.

25 You know, this would never be brought today, a 300-plant

PROCEEDINGS

1 case. That is a very small number of marijuana plants that are
2 undeveloped. And so we don't think that we're required under a
3 preponderance of the evidence standard to prove more than what
4 we've already proven.

5 I mean, it's a rural house. He's out very far away. I
6 think 30 minutes from any store. I mean, it's far away. It's
7 not like there's any -- it's a nonurban area. It's on
8 410 acres. And he explained in his declaration that he had no
9 alarm on the greenhouse. He couldn't hear anything going off.
10 It was far from the house. I mean, this was just someone -- a
11 lot of people in that area grow marijuana. I mean, they just
12 do. And he was -- they were growing marijuana for their use.

13 And whether -- the Government wants the Court to keep
14 thinking this is like Neiman Marcus or some 7-Eleven. It's
15 not. He's just a grower. And once a grower brings the product
16 to the dispensary -- that's why I presented the transport
17 agreement -- typically how it works is the grower will go to
18 the dispensary. The burden where the microscope falls is on
19 who's selling it to the end user, to the street person, to the
20 patient, not -- the law is very elastic and liberal for the
21 grower because there would be no source of supply. So the
22 legislature set up very strong protection to growers and they
23 have full immunity as long as they're bringing the marijuana to
24 a collective.

25 So I would agree if the Government saw Mr. Pisarski drive

PROCEEDINGS

1 to the street and meet some guy that was an undercover working
2 for the DEA and he didn't check that he was a member of a
3 collective and he sold and then they arrested him, I wouldn't
4 be making that argument. He's outside the protection. But you
5 can't prosecute him and find that the protection doesn't apply
6 for conduct that hasn't occurred yet. That's *Minority Report*,
7 the movie. I mean, we don't have that here. And so that's the
8 issue.

9 And all the things with the photos and the firearm and
10 everything, that's just to have you get distorted and say, "Oh,
11 this guy is dealing dope because he has the cash and there was
12 a weapon." That has nothing to do with whether he's allowed to
13 grow marijuana for medicinal purposes in the state of
14 California.

15 I mean, that policy has become so strong that in November
16 of last year, they defeloned all of marijuana and under
17 certain amounts it's completely legal, but you can have a
18 billion pounds of marijuana now in California and it's no more
19 than a misdemeanor. Can you believe it? I mean --

20 **THE COURT:** You know, I totally understand the context
21 in which this is arising. I'm a resident of the state of
22 California and vote in the elections. But, you know, we are --
23 we have to struggle here; and it's not of my making or your
24 making that we have the federal system overlaying the state
25 system, and it's not an optimal statutory scheme.

PROCEEDINGS

1 I mean, as the *McIntosh* case says when they're talking
2 about the rider, they're suggesting that maybe it wasn't the
3 masterpiece of statutory construction. I understand what you
4 say of the realities of where we are here, and it doesn't
5 offend me at all. That's where we are.

6 But the fact is that doesn't answer this case. I have
7 to -- I have to apply this what I think is a fairly narrow
8 rider to the state of the federal law, which still criminalizes
9 this conduct. Even as you say, it may be that it's de -- and
10 you're right, it's effectively defeloned in our state under
11 the state's law, but painfully -- it's painfully true, and you
12 know it as well as I do, the state of California doesn't
13 control the federal prosecution.

14 **MR. RICHARDS:** Right. Let's talk about the State
15 Board of Equalization. If you're growing your own marijuana,
16 that's not a taxable event.

17 **THE COURT:** Well, let's go back to 2012 and medicinal
18 marijuana.

19 **MR. RICHARDS:** Right.

20 **THE COURT:** And let's not talk about today --

21 **MR. RICHARDS:** I'm not.

22 **THE COURT:** -- because it doesn't help this analysis.

23 **MR. RICHARDS:** In 2012, you didn't need to have a
24 State Board of Equalization number to grow marijuana in your
25 home. It's not required. It's only required if there's an

PROCEEDINGS

1 event that triggers a sales tax, but that's a sales tax
2 violation. It doesn't -- the schemes are separate. The
3 Revenue and Taxation Code, if you violate it, it's a
4 misdemeanor.

5 **THE COURT:** But isn't it -- but when you're talking
6 about the rider, doesn't that mean that you're not strictly
7 complying? Even if it's, under your characterization, a fairly
8 minimal problem under state law, if you haven't jumped through
9 all the hoops under state law, you are then not strictly
10 complying because then you don't get the benefit of the rider.

11 **MR. RICHARDS:** No, that's a mistake, and I'll tell you
12 why it's a mistake. The rider has -- the rider doesn't address
13 sales tax. State law, if you look at the MMPA, has nothing to
14 do with sales tax. It doesn't mention sales tax at all.

15 The guidelines -- the ancient Jerry Brown guidelines that
16 were written in 2010, which doesn't take into account all the
17 Court of Appeal cases that came out, they just say that the
18 state is going to charge sales tax on marijuana sales. That's
19 great for the state, but that doesn't make the possession of
20 marijuana with a medical recommendation illegal if you don't
21 have a sales tax number.

22 The state wants sales tax, but there's never -- there's
23 not one case that you'll ever read that the court says if they
24 don't have a sales tax number, they lose the immunity or
25 they're divested of the immunity to transport marijuana to a

PROCEEDINGS

1 collective or to provide excess cannabis.

2 In fact, there's no sale because they're only being
3 reimbursed for the labor, the materials, to actually bring it
4 to the collective. The sale occurs at the collective or the
5 dispensary. That's the taxable event. There's not two taxable
6 events. That's the confusion here. It's the grower is growing
7 an agricultural product so that product is given to somebody
8 who then is going to sell it and collect the sales tax.

9 But even if the --

10 **THE COURT:** What is the relationship of your client to
11 these collectives?

12 **MR. RICHARDS:** He's a grower member of the collective.

13 **THE COURT:** A grower member. Okay.

14 **MR. RICHARDS:** Right.

15 **THE COURT:** So when the collective then sells to the
16 dispensary --

17 **MR. RICHARDS:** Correct.

18 **THE COURT:** -- okay, he's part of that? He's not
19 just -- he doesn't grow, sell to the collective, and the
20 collective then sells to the dispensary. He's part of the
21 collective, is he?

22 **MR. RICHARDS:** The defendant?

23 **THE COURT:** Correct.

24 **MR. RICHARDS:** He's a member of the collective. If
25 there's excess cannabis, I was only trying to show you that

PROCEEDINGS

1 there was people he knew that had informal collectives and a
2 formal collective that would then assist in getting that
3 marijuana, if there was excess, to a responsible person that
4 was allowed to have it.

5 The Government is saying, "Well, we don't know who that
6 was going to go to." Either do I because it never happened.
7 So I'm not going to -- if it did happen, if he brought it to an
8 irresponsible or un -- a party that couldn't enjoy the
9 immunity, then we would have a problem, but that never occurred
10 and we don't have to engage in what would have happened.

11 And so he's a member. Typically the growers are members
12 of the collective and they get an agreement so if they're
13 stopped by the police and they have, you know, 25 pounds of
14 medical cannabis, they tell the police, "I'm going to this
15 collective"; and the collective, who hopefully has their
16 licenses in order, will say, "Yes, he's bringing us our
17 medicinal marijuana." That's the whole point of that
18 relationship.

19 But in this case that's not a relationship you need to
20 examine because he was growing in the first instance for
21 himself, his co-owner of the property, and that person's
22 mother, Pamela Moore. That's the only people we're dealing
23 with at this point, and we have enough from those
24 recommendations.

25 And so I just didn't want you to think -- I was trying to

PROCEEDINGS

1 be explanatory that this Sakina Ramrattan, she had a note up to
2 100 pounds. She would explain that she couldn't grow it all in
3 her house, that he would provide the excess cannabis. But
4 that's not a taxable event. If Mr. Pisarski gives marijuana to
5 Mr. Moore, that's not a taxable event.

6 But, hey, look, the IRS, the FTB, the State Board of
7 Equalization, they like to say a lot of things could be a
8 taxable event but that's litigated in Tax Court. That doesn't
9 have anything to do with criminal immunities. This is a
10 completely separate playground and basket, and it's just
11 indicia.

12 What the guideline is saying is -- what the Government is
13 saying is, hey, if this is all strict compliance, then he
14 would -- he would -- the Attorney General recommended that you
15 get a resale number, but the Attorney General's guidelines are
16 not law. That's the problem with this analysis. The law is
17 11362.775, and there is no requirement of getting a business
18 license, a tax license, because a lot of this stuff is done
19 informally and on small scales because if it gets to over 1,000
20 plants, you have federal mandatory minimums and other problems.

21 So the general gestalt of people that were growing low
22 amounts of marijuana for medicinal purposes in that time period
23 wanted to stay under the federal radar. This is the unusual,
24 very unusual case that a 300-plant case would end up in federal
25 court. That's unusual, very, and so that's why PSR --

PROCEEDINGS

1 Probation told me they haven't seen a case for many years with
2 this type of marijuana, you know. And that's why this case
3 should only be looked at the facts of this case and not looked
4 at what was going to happen prospectively.

5 And he's not -- anybody in the state of California that
6 grows medical marijuana, there is no -- you are provided no
7 evidence in the brief that the legislature enacted a law that
8 says you have to have a resale number in your own home. I
9 mean, it's just not there.

10 And those guidelines were enacted at a time before the
11 courts got involved. After the courts, you had *Jackson*,
12 *Anderson*, all these other great opinions. Those guidelines are
13 superfluous at this point. I mean, that's another unfair thing
14 to the defendant. Those guidelines were 2010. This occurred
15 in 2012. We're in 2017. The law is so much better for
16 defendants, and I think that you wouldn't --

17 **THE COURT:** It may be.

18 **MR. RICHARDS:** But you wouldn't disagree that we don't
19 apply the case law in 2012. We at least apply the current case
20 law -- case law, I'm not talking about procedure -- but case
21 law and how it's interpreted the 2003 immunities. It's an
22 evolving statute. The courts weren't -- a court can't get a
23 case for a couple years, a Court of Appeal, so those are all
24 binding.

25 If you apply all those cases, you'd see it's a low

PROCEEDINGS

1 threshold. The defendant says he has a note. The note -- the
2 note authorizes a certain amount of marijuana. We are so below
3 what could have possibly been yielded from that residence that
4 there's nothing more we need to present to you unless the
5 Government can prove that we haven't met this burden that
6 somehow this note didn't exist, we're not allowed to grow any
7 marijuana. I mean, all this other stuff about the collectives
8 and taxes and the Covelo resale number got canceled, all this
9 other stuff is irrelevant because I just wanted -- I was giving
10 it to you for corroboration.

11 **THE COURT:** But if I sort of hear what you're
12 saying --

13 **MR. RICHARDS:** Yeah.

14 **THE COURT:** -- effectively you're saying that in 2012,
15 your client was a grower and there really were no regulations
16 that pertained to him. There's no constraints upon -- as long
17 as there's some -- he can show that there were some patients or
18 primary caregivers that were looking to purchase marijuana and
19 he can show that they're out there, that's all he needs to do.

20 **MR. RICHARDS:** If he's -- that's a great statement,
21 but I want to just add another sentence. If he got charged
22 with transportation, he'd have to show he's bringing it to a
23 collective. If he -- primary caregiver is not the same as
24 growing for a collective. That's a very important nuance.

25 **THE COURT:** My point that I'm trying to hone in on

PROCEEDINGS

1 here is: Effectively you're saying that when the *McIntosh* case
2 says -- and that is, by the way, whatever else is said here, I
3 have to follow the *McIntosh* case.

4 **MR. RICHARDS:** Right.

5 **THE COURT:** It is the Ninth Circuit's edict.

6 **MR. RICHARDS:** We agree.

7 **THE COURT:** You like it, you don't like it, it doesn't
8 matter. I have to follow it.

9 And so when they say I must determine whether or not there
10 has been strict compliance, and the way they say it in here is
11 whether or not the conduct was completely authorized by state
12 law, by which we mean that they strictly complied with all
13 relevant conditions imposed by state law on the use,
14 distribution, possession, and cultivation of medical marijuana.

15 And if I'm hearing you correctly, you're saying, well,
16 your clients really had no particular state law requirements.
17 They were growing this. As long as they're growing a
18 sufficiently small amount, that you can account for how it
19 would ultimately go to someone who is a patient or primary
20 caregiver or themselves, end of story.

21 **MR. RICHARDS:** That's correct. There was no --

22 **THE COURT:** Okay. I just want to know if that's your
23 understanding.

24 **MR. RICHARDS:** There was no bureau of growers at that
25 time and there's none today. The growers have been given, I

PROCEEDINGS

1 would say, the most liberal amount of the protection of the
2 immunity.

3 **THE COURT:** All right. Fine. I want to make sure I
4 understand your argument.

5 **MR. RICHARDS:** Yeah. Because without the growers,
6 there is no medical cannabis. You need the growers. And then
7 the growers aren't having contact with people lining up in a
8 city to buy marijuana. That's more risky, there's more risk of
9 other problems, and so that's where different regulations are
10 concerned.

11 But there is strict compliance with their law because the
12 only law that they were complying with is that if they were
13 going to go outside -- the only facts in this case that we
14 agree to that I don't think there's a quarrel is, that the only
15 criminal act, absent the immunity that everybody was looking
16 at, was there was cultivation of undeveloped plants. That's an
17 undisputed fact.

18 There was no other evidence in this Indictment of -- that
19 those plants had done anything but been taken out of the ground
20 from the roots that they were in. That's all that happened.

21 So if the police showed up, which they did, and the only
22 thing the grower would need to show that they have strict
23 compliance is they would have to show for sure a medical
24 marijuana recommendation that would cover those plants, which
25 we have more than enough to cover, or something from a

PROCEEDINGS

1 collective in the residence that shows that they were growing
2 that medical cannabis for a specific collective and it was
3 authorized and that's where they were going to transport it to.

4 And here we have the fact that they were allowed to grow
5 it for themselves, and it's only the excess cannabis. The
6 Government shouldn't worry about the cannabis they were going
7 to keep. If there was excess cannabis, this is not a hard
8 burden to show where that would have went, but we don't want to
9 go there, that's the problem, because we don't know what would
10 have been had they not seized it. And so that's why I think on
11 that limited lens we've met the burden.

12 We don't pick the facts, so that's the facts in this case.
13 When they indicted this case, the agents never thought that on
14 July 28th, 2017, I would be able to assert an immunity under
15 11362.775. That was never contemplated by this investigation
16 because the law in July of 2012 was: The state is getting very
17 good for growers. Let's send the case federal.

18 That's why the case went federal because the laws -- these
19 defenses weren't allowed in federal court. Now you've been
20 thrown this total loop where now you have to sit as a state
21 court judge and say, "Is this strict compliance? What's the --
22 how is the grower not in compliance to grow their own marijuana
23 if I accept the fact that they had a valid recommendation and I
24 don't know what these plants would have yielded if they became
25 fully matured and which ones were female, which ones were

PROCEEDINGS

1 male?" I have no idea. I don't know if they were ever -- the
2 crop was ever going to make it to fruition. There's many
3 things that can harm an outdoor crop.

4 So that's really the issue that you're dealing with, and I
5 think that because of those facts, *McIntosh* applies to them
6 because why are we prosecuting someone like this? There's
7 no -- this Indictment is only charging them with cultivation.
8 I mean, that's the crime that was occurred. There's no -- this
9 is not a case where there's wiretaps or Pisarski has been
10 selling it, you know, all over the place. This is a localized
11 residential, you know, marijuana grow for a guy that lives, you
12 know, in an isolated part of California. That's all this is.

13 **THE COURT:** Okay.

14 All right. Mr. Palazzo, anything you want to add?

15 **MR. PALAZZO:** Yes, Your Honor. Thank you.

16 And, again, I'm going to try to keep my comments brief,
17 and I really want to hone in and more narrowly address what I
18 think is the issue in the case.

19 I trust that the Court did receive my reply and the
20 attachments.

21 **THE COURT:** I did.

22 **MR. PALAZZO:** And I think within that, you know, I
23 sort of direct the Court as to what the real issue is, and I
24 think that the Court actually harkened to the issue in the
25 order, which is: On July 10th, 2012, were the defendants in

PROCEEDINGS

1 strict compliance with California law so that they are
2 deserving of the *McIntosh* protections that the decision
3 provided?

4 And in this case I think that, again, if you're looking at
5 the state law, the elements that provide limited immunity are
6 outlined as basically four. Is the patient -- does the patient
7 have a recommendation, or is he a primary caregiver? And did
8 he possess or cultivate marijuana? And was it done for
9 personal medical purposes? And did the patient do so based
10 upon the recommendation or approval of a physician? Those are
11 the four elements that provide limited immunity under the
12 Compassionate Use Act.

13 Then if you shift to the Medical Marijuana Program Act,
14 that's where you get into the issue of the collective. And
15 what the case law discusses is, when this is kind of addressing
16 some of the points that the Court was raising in terms of what
17 regulations apply, the case law that's been cited is -- speaks
18 to the issue of a collective if there are a few members that
19 are growing for each other and for their medical purposes, and
20 then it also discusses if you have a collective that is much
21 more expansive.

22 And if you look at the case that addresses the distinction
23 and then what regulations, to use the court's verbiage, apply,
24 it's kind of outlined in the *Orlosky* case, which is a 2015 case
25 that's been cited.

PROCEEDINGS

1 And within that particular case, they discuss if you're --
2 first of all, they say in the Medical Marijuana Program Act
3 under -- that's been codified in Health and Safety Code,
4 Section 11362.775, that it does allow for a collective
5 cultivation; and there's no mention made, as the court
6 instructs, of any formality requirements. There's no mention
7 made of permissible number of persons. There's no mention made
8 of acceptable financial arrangements that are required. And
9 there's also a fourth item mentioned by the court in that
10 decision where there is no mention made of distribution
11 limitations within the MMPA.

12 They do also address in that decision that the business
13 formality criteria have been only applied in cases involving
14 expansive marijuana distribution operations to persons outside
15 of cultivation activities. So if you get into something that's
16 much more expansive, then I think the regulations that the
17 court was describing kick in.

18 In this particular case, based upon the declarations and
19 the exhibits that have been proffered to the Court, we meet the
20 elements that I discussed at the outset, the four elements that
21 provide limited immunity, because you've got three people that
22 have provided recommendations to the Court. And there's also
23 mention made that the amounts can be reasonable for the uses
24 that the person has for medical marijuana.

25 So there's no -- the case law speaks to the issue of not

PROCEEDINGS

1 having even limitations under the *Kelly* case, which states that
2 limitation may not be used to burden the reasonable medical
3 needs authorized under the Compassionate Use Act. And so the
4 amount reasonably related to the patient's medical needs is
5 what's permitted under the *Kelly* decision. Again, that's also
6 cited within the moving papers.

7 And then, lastly, there's also a case of -- that I cited
8 which had an odd name to it. It was, like, Camerottin
9 (phonetic) -- or, no. There was a case cited within that case,
10 which was *People versus Windus*, W-I-N-D-U-S, and it's a 2008
11 case and it states that the Compassionate Use Act does not
12 require that a physician specify the amount of marijuana needed
13 to address a defendant's needs. So that's -- and, again, as I
14 mentioned, that's a 2008 case and the cite is 165 Cal.App. 4th
15 634.

16 So looking at the facts of this case and trying to address
17 the Court's issue regarding whether or not strict compliance of
18 state law was indeed had as it relates to use, distribution,
19 possession, cultivation, as cited by the court from the
20 *McIntosh* decision, you have people that are growing for their
21 own needs; and you can also construe that as an informal
22 collective as permitted in the *Orlosky* case where they don't
23 require formalities. It speaks to that very issue where it was
24 defendant and a roommate had not formed a marijuana collective
25 with some indicia of formality, but the collective cultivation

PROCEEDINGS

1 defense allows qualified patients to associate to collectively
2 cultivate marijuana for medical purposes.

3 So that is an extension. That case law stemming from the
4 MMPA and the statutory scheme that evolved from that
5 legislation allows people to, not only three people such as we
6 have here, to collect -- to have their own informal collective,
7 but it also allows the distribution of marijuana to a
8 collective such as Ms. Ramrattan's collective that she
9 described in her declaration.

10 So I think that's what was being addressed by
11 Mr. Richards, that looking at this in the more narrow scope and
12 in its isolation, you have compliance with state law by virtue
13 of three people with three recommendations growing their own
14 marijuana for medical purposes for their own needs on the
15 property.

16 Now, whether or not from that particular grow on
17 July 10th, 2012, there was going to be something that would be
18 provided beyond the medical needs, because that was something
19 that you couldn't really forecast until you actually harvest
20 and you see, hey, how many flowers are on each of these plants.
21 We know the male plants don't produce, so you're looking at
22 only female plants. And then you're looking at the female
23 plants that actually survive that outdoor process and what
24 you're able to harvest in terms of the flowers and then turn
25 into buds.

PROCEEDINGS

1 And then you've got to wonder whether or not -- okay,
2 what's the concentration of the THC within that particular bud,
3 that medical cannabis that you're going to consume or ingest?
4 How are you going to ingest it? Are you going to smoke it?
5 Are you going to create an edible that you're going to use to
6 ingest it in that fashion?

7 So there are a lot of variables that are not known until
8 the actual date of harvesting as to whether or not that is
9 going to satisfy the medical needs of the three people such as
10 we have here.

11 **THE COURT:** So you're essentially telling me that if
12 you have a -- let's say in 2012 you have a grow operation and
13 you have some -- you can -- you have documentation that
14 indicates at least some medically appropriate users out there
15 waiting to receive -- either the growers themselves or some
16 others that have a medical justification for receiving the
17 marijuana. Once you have that, it doesn't matter. You're in
18 compliance with state law. You can have a gigantic operation,
19 you can have a small operation; but because one doesn't know
20 how at that moment in time all this marijuana will either come
21 to fruition or how it will be used, it doesn't matter. You've
22 got -- it's almost as if you've got this jumping-off point of
23 some justification -- or some, you know, legally appropriate
24 use of some marijuana. That's all you need under state law.

25 **MR. PALAZZO:** No. Let me just clarify. I understand

PROCEEDINGS

1 where the Court is going with that.

2 If this were a grow, for instance, and there were 5,000
3 plants and you had Pamela Moore, Sonny Moore, and Tony
4 Pisarski --

5 **THE COURT:** Right.

6 **MR. PALAZZO:** -- then I think the Court can say, "Wait
7 a second. That's not a reasonable amount that we would expect
8 for medical purposes for these three people." Okay?

9 So that's the distinction here. And --

10 **THE COURT:** So do I have to conclude that, well,
11 within reason, the 371, or however many plants, okay, I assume
12 that there would be use by the growers themselves for medical;
13 and the other people that you mentioned, am I supposed to do
14 some calculation on whether or not that's a reasonable amount
15 for those people?

16 **MR. PALAZZO:** Well, I don't think you need to do a
17 calculation, Your Honor; but if you look at, for instance --
18 this is, I think, how we sort of get to the issue of is it
19 reasonable, and it kind of gives the Court a little bit of a
20 guideline as well.

21 If you look, for instance, at the document that was
22 furnished to the Court, which is Document 176-8 filed on
23 July 10th, 2017, by Mr. Richards on behalf of Mr. Pisarski, on
24 that particular document it says Mr. Pisarski may grow up to 99
25 plants and possess up to 6 pounds of dried cannabis flowers for

PROCEEDINGS

1 his own personal medical use.

2 So sometimes you have recommendations that will have a
3 specific number like that, like 99 plants, and sometimes you
4 don't. And so you have to, you know, again be reasonable and
5 apply a reasonable standard.

6 If we determine, hey, this recommendation says 99 plants
7 and maybe you have another recommendation that doesn't confine
8 it to 99 plants -- again, a reasonable amount -- I think you
9 can extrapolate from that and say: Okay. We've got three
10 people on that property. Sonny is a primary caregiver for his
11 mother. Tony Pisarski is, in a sense, a co-primary caregiver
12 for Pamela Moore. So even in her own right in terms of the
13 recommendation that she had personally, she could have been a
14 participant in the grow.

15 But as an overlay, you have the protection of the primary
16 caregiver where the declarations speak to the issue of, "Hey, I
17 was providing and we were providing a residence for my mother
18 and providing for her health, safety, and welfare."

19 And so if you look at the reasonableness standard, I think
20 that kind of gives you the guideline that the Court might be
21 expecting to see and say whether or not this is compliant, and
22 that's outlined in that exhibit where there's 99 plants. So
23 you multiply that by three people, you're at the 297 plants of
24 the 320 that we had here. And, again, you have a certain
25 amount of attrition that occurs just through the growing

PROCEEDINGS

1 process and as a function of whether you've got male or female
2 and how much they flower and the other factors that I mentioned
3 and variables that I mentioned.

4 So that --

5 **THE COURT:** Can I shift you for a moment? And this is
6 something I didn't talk about with Mr. Richards, but with one
7 of you or both of you I want to talk to you about it, and that
8 is the admissions in the Plea Agreement. What do I make of
9 that?

10 **MR. PALAZZO:** They're consistent.

11 **THE COURT:** Well, I have it in front of me and I know
12 there are two or three places. There's a forfeiture section,
13 which we can talk about in a moment; but during that period,
14 according to the language of the agreement (reading):

15 "I knowingly grew and possessed marijuana on this
16 property and I did so with the intention to sell marijuana
17 to others" -- so it's not just for personal use. He's
18 admitting -- both defendants are admitting that they're
19 planning to sell it -- "and I joined in the agreement
20 knowing of its purpose and intending to accomplish that
21 purpose."

22 And then it talks about the amount.

23 **MR. PALAZZO:** Yeah.

24 **THE COURT:** I mean, you said that's consistent, so
25 tell me why it's consistent.

PROCEEDINGS

1 **MR. PALAZZO:** It's consistent. Here's why it's
2 consistent, Your Honor. As was discussed, if, in fact, there
3 was excess, you are permitted under state law and under case
4 law that addresses and interprets that law to sell that
5 marijuana to the collective -- for instance, Ms. Ramrattan's
6 collective -- and you're able to, under the case of -- under
7 the case of the -- of I believe it's the *London* case, *People*
8 *versus London*, a 2014 case, 228 Cal.App. 4th 544, states that
9 the monetary reimbursement that a collective or co-op member
10 provides should be only an amount necessary to cover overhead
11 costs and operating expenses.

12 So you can, indeed, and I think Ms. Ramrattan's
13 declaration speaks to the issue of providing remuneration that
14 was way below what the retail or wholesale value of the actual
15 marijuana was. Again -- and that's probably why there was
16 maybe some pay -- I think they characterize them as pay-owe
17 sheets. Not pay-owe sheets relating to marijuana; pay-owe
18 sheets as it relates to construction costs. That's what's in
19 the record, not anything other than that. I want to make that
20 clear.

21 **MR. RICHARDS:** Your Honor, on the issue of the
22 Plea Agreement, so it's clear in the record, what their intent
23 was to plead guilty to a federal crime is irrelevant when
24 you're now resetting this and saying "Did they have immunity
25 under state law and were they compliant?"

PROCEEDINGS

1 **THE COURT:** Factual admissions in a Plea Agreement are
2 admissions. So whether or not -- what they were intending to
3 do and why they were doing it doesn't really go to the question
4 of whether or not when you make a factual admission in a
5 Plea Agreement, you can't just say, "I'm not -- I didn't mean
6 it."

7 **MR. RICHARDS:** No, no. That's not what I'm saying.
8 I'm saying that the admissions there that they said they were
9 going to sell it -- okay, they didn't say they were going to
10 illegally sell it under state law -- but they never sold it.

11 What they needed to do to satisfy the elements of the
12 federal charge, now we're looking at were they in strict
13 compliance with state law. That's not a subjective. There's
14 no scienter. That's the problem with that analysis. The
15 defendants -- for possession for sale, that's a specific intent
16 crime. For whether you have an immunity under state law,
17 that's objective.

18 **THE COURT:** Okay.

19 **MR. RICHARDS:** That's the difference.

20 **THE COURT:** Well, but you're talking about that
21 particular admission is going to prospective conduct, and I
22 hear what you're saying. But then --

23 **MR. RICHARDS:** It's intent.

24 **THE COURT:** Well, but how about the provision under
25 paragraph 11 under the forfeiture section that says "I admit

PROCEEDINGS

1 the subject property was derived from proceeds obtained
2 directly or indirectly as a result of the violation identified
3 above and/or was used or intended to be used to commit or to
4 facilitate the commission of the violation"?

5 He's saying historically, that's saying "I got all this
6 money for" --

7 **MR. RICHARDS:** No, no. Judge, that's federal
8 violations. It doesn't say state violations.

9 **THE COURT:** So what?

10 **MR. RICHARDS:** Well, no, because it's still illegal
11 under federal law. The Plea Agreement was to admit facts to
12 violate federal marijuana law.

13 **THE COURT:** I don't -- but I think we're of two ships
14 that are passing in the night. The purpose of admitting these
15 facts is not the -- is not what I'm asking about. They
16 admitted facts. Whether or not it has an implication one way
17 or the other way for state law versus federal law, they're
18 stuck with the admission of fact. They said that all of this
19 property was obtained by virtue of the business, the marijuana
20 business, that they were in. That's what they admitted.

21 **MR. RICHARDS:** The property that they obtained, that
22 they forfeited, was the result of sales that violate marijuana
23 law. That's what they admitted to to effectuate the
24 forfeiture, a federal marijuana law. But now you're looking
25 at, for the purposes of this criminal prosecution --

PROCEEDINGS

1 **THE COURT:** Just, for example, the state law talks
2 about whether or not it's for profit or not. Can't I take this
3 into consideration, that there's a great deal of money being
4 obtained from this business?

5 **MR. RICHARDS:** No, because that admission relates to
6 other assets using a civil lens to forfeit the money under a
7 federal forfeiture statute. They conceded for the purposes of
8 resolving their case that that money was derived from illegal
9 marijuana sales in violation of federal law.

10 But now you're looking at the 320 plants, not at what
11 happened previously. You're looking at: Were they in
12 compliance with state law? You weren't allowed to look at that
13 before, that immunity. That was not relevant before.

14 And we did have a motion to withdraw our Plea Agreement.

15 **THE COURT:** Well, I'll get to that in a moment.

16 **MR. RICHARDS:** Yeah. But, I mean, the issue is -- the
17 narrow issue is on -- we wouldn't have discussed at the time of
18 the plea, it wasn't contemplated for us to give legal advice to
19 our clients about whether they can assert an injunctive relief
20 on an immunity provided by state law. We didn't give them that
21 advice, so --

22 **THE COURT:** The problem, though --

23 **MR. RICHARDS:** -- they shouldn't be cabined with that
24 admission for state law because you don't need to go there.

25 **THE COURT:** It's an admission. The facts are admitted

PROCEEDINGS

1 facts. You can use them for -- it isn't, "Well, I only
2 admitted it if it's used for this purpose. I didn't admit it
3 if it's used for this purpose." It's an admitted fact.

4 **MR. RICHARDS:** No, I know, but let's --

5 **THE COURT:** We take from it what we take from it.

6 **MR. RICHARDS:** Okay. And if the fact is "I admit it.
7 I possessed marijuana for sale that I was cultivating in
8 violation of federal law," you can have that fact because the
9 fact is still here today. It's still illegal under federal
10 law. But because of *McIntosh*, they said there's no money to
11 prosecute people that are in compliance with state law. We're
12 only examining state law. That wasn't --

13 **THE COURT:** But if there are factual admissions from
14 which I can make some inferences that go to whether or not they
15 satisfied state law, I can make those. I can use those facts,
16 or a better way to say it is you can't disavow those facts just
17 because we're in a different context now.

18 **MR. RICHARDS:** I agree you can use them, and I don't
19 have an issue with you using them because they're true. That's
20 what they said. But the issue really is, in all fairness, no
21 one was analyzing how those facts that they admitted -- there
22 wasn't an admission to any lack of immunity under state law or
23 any state law violations.

24 **THE COURT:** I understand.

25 **MR. RICHARDS:** That wasn't contemplated.

PROCEEDINGS

1 **THE COURT:** Let me ask -- I'm sorry I interrupted you.

2 **MR. PALAZZO:** That's fine, Your Honor.

3 **THE COURT:** Go ahead.

4 **MR. PALAZZO:** So I do think it's a little bit unfair
5 to try to use the language in the forfeiture agreement that was
6 a consequence of trying to resolve the case.

7 But, again, I don't --

8 **THE COURT:** There are consequences to making
9 admissions.

10 **MR. PALAZZO:** There are consequences to making
11 admissions and sometimes -- I think the Court should consider,
12 based upon its own experience, why people end up making
13 admissions in terms of furtherance of resolution of cases.
14 Sometimes, you know, pleas are for convenience, pleas are for a
15 variety of different reasons, and the required admissions are
16 required to be made on the record in order for the validity of
17 the plea.

18 **THE COURT:** True.

19 **MR. PALAZZO:** So, again, accord whatever weight you
20 want to that, Your Honor. I don't necessarily believe it does
21 anything in the way of negating the application of the immunity
22 that's afforded under state law as it relates to the grow on
23 July 10th, 2012.

24 And I want to make clear that, you know, with respect to
25 the remarks of a business and all the rest of this, I mean,

PROCEEDINGS

1 Sonny Moore's declaration was "I wasn't profiting from
2 anything. This wasn't my business. Was I going to use the
3 marijuana or medical cannabis being grown for purposes of my
4 medical condition and to allay my chronic pain associated with
5 my neck surgery? Yes."

6 Whatever was going to happen beyond that in terms of this
7 issue of the collective to Ms. Ramrattan, as the Court can
8 glean from the papers, that was all, you know, something that
9 Mr. Pisarski was doing on his own. Sonny Moore wasn't a part
10 of that arrangement. The agreements are not between
11 Ms. Ramrattan and Mr. Moore. They're agreements between
12 Ms. Ramrattan and Mr. Pisarski.

13 Yes. And, in fact, you can glean from the papers also
14 that Mr. Moore wasn't even there during the time frame of the
15 search. He wasn't interviewed. There was no contact made
16 because he wasn't there. So I don't think he had even been
17 there for a month or more prior to that.

18 But, nonetheless, it doesn't do anything to in any way
19 detract from the protections that are afforded for this grow as
20 it relates to the case -- this state case law. And as I was
21 harkening to the issue of the 99 plants, the Court can, again,
22 discern from that, hey, this is reasonable -- this 320-plant
23 grow is reasonable based upon that recommendation that was
24 issued by Dr. Eidelman to Mr. Pisarski back in 2012.

25 And then you've got the benefit of the recommendation that

PROCEEDINGS

1 was given in December of 2011 that is applicable to 2012, and
2 you also have the benefit of Ms. Moore's recommendation that
3 was furnished to the Court in the exhibits as well. So you
4 have that. So you meet the criteria that's outlined.

5 As I mentioned, any sale that may have occurred was,
6 again, between Mr. Pisarski and Ms. Ramrattan, if it was going
7 to occur at all. And, again, it was something that we'd have
8 to sort of take a wait-and-see approach to see what was
9 yielded; but that sale is permitted under case law as long as
10 you don't do it for profit, meaning you can defray your
11 expenses as associated with the overhead costs and the
12 operating expenses under case law.

13 So -- and, you know, with all due respect to the Court, I
14 do disagree a little bit -- I mean, and I addressed this in my
15 opening paragraph in my reply -- where the Government takes the
16 position that, you know, we have to prove this by a burden --
17 adopting a burden of proof by a preponderance of the evidence.
18 When, in fact, all of the case law that I've cited in --

19 **THE COURT:** I understand your argument.

20 **MR. PALAZZO:** Okay.

21 **THE COURT:** It's a fair point. You can certainly make
22 the argument.

23 Not to just repeat this, but I do -- I am in the position
24 of following the circuit guidance, and a lot of your argument,
25 if I'm understanding it correctly, is that the circuit got it

PROCEEDINGS

1 wrong in *McIntosh* because they didn't properly analyze
2 California law in terms of the burden.

3 Even if I -- if that is correct, until the circuit decides
4 it was wrong, I follow the circuit. I have to. I don't have a
5 choice. So I understand why you make those arguments.

6 **MR. PALAZZO:** We're just preserving it, Your Honor.

7 **THE COURT:** Yeah, yeah, I understand that; but you've
8 got to understand from me that even if I were to say, "Oh,
9 those are interesting and good arguments and all that," it's a
10 different place where you have to persuade them.

11 **MR. PALAZZO:** Understood, and I'm going to wind up
12 here.

13 And I will highlight the fact that what we've presented
14 has been unrebutted. I mean, you can come in and you can talk
15 about, hey, there was money in the trailer and there was a
16 handgun in a room. None of that is relevant to the issue that
17 the Court should be narrowly focused on, which is: Is the grow
18 a legal grow at the time?

19 **THE COURT:** But don't some of those factors go to
20 those questions?

21 **MR. PALAZZO:** No, I don't -- I don't think so,
22 Your Honor. Again, if you look at the proximity, it's not as
23 if they had AR-15s at the ready. It's not as if there were
24 guns at the green -- at the greenhouse. I mean, you've got --

25 **THE COURT:** Those examples are apropos because I would

PROCEEDINGS

1 consider those things because those -- just the things that you
2 mention are absent here, but they certainly would be relevant
3 factors.

4 From that I take it that I have to look at the whole
5 scenario here and make some inferences on whether or not this
6 was a for-profit operation or not is one of the factors that is
7 determinative of whether or not you're in compliance with state
8 law.

9 **MR. PALAZZO:** Right.

10 **THE COURT:** So you're just saying, "Well, if you look
11 at these, they don't amount to a whole lot." They might amount
12 to a whole lot if we had, you know, weaponry there, but we
13 don't. So I understand your point.

14 **MR. PALAZZO:** Okay.

15 **THE COURT:** But I want to make sure that you agree
16 with me that it's not that I should disregard any of the
17 circumstantial situation at the grow operation; right? I can
18 take that into account.

19 **MR. PALAZZO:** Right. I'm just saying it's not indicia
20 of something illegal operating.

21 **THE COURT:** I understand.

22 **MR. PALAZZO:** And I also want to, again, underscore
23 the issue of the Court individualizing the analysis that would
24 apply to each person. So, I mean, even Mr. Pisarski said
25 multiple times, "Hey, from the outset on to present day, this

PROCEEDINGS

1 was my -- you know, this is something that I was doing." He
2 had the arrangements for any excess that would go to the
3 collective.

4 **THE COURT:** You're saying there's some distance or
5 differentiation that should be had between the two defendants?

6 **MR. PALAZZO:** Sure. Sure. And, again, you know, I
7 think that's something that, you know, should be included in
8 the calculus.

9 **THE COURT:** I understand. I understand.

10 **MR. PALAZZO:** And that's all I kind of wanted to
11 highlight for the Court and stress that -- oh, and let me just
12 back up on just a couple things that the Court was mentioning
13 during Mr. Richards' presentation.

14 You talked about sales tax, Your Honor. Again, there
15 would be no sales tax applicable to Mr. Moore insofar as his
16 conduct in connection with the grow and his recommendation and
17 his mother's recommendation. It's not a taxable event. I
18 don't think -- I don't think the Government has even proffered
19 or adduced any suggestion that, you know, any transaction that
20 occurred was a taxable event.

21 And I also wanted -- the last thing I wanted to say to the
22 Court was, you know, I think that to some extent I know that
23 this has been an evolving, you know, body of law that has
24 developed and, you know, the rule of lenity also should apply
25 in the Court's analysis, and I just kind of put that on the

PROCEEDINGS

1 record.

2 **THE COURT:** I don't disagree with you that it always
3 is there, but when does it kick in? In other words, does the
4 rule of lenity mean that you err on the side of the Defense on
5 all the legal issues? Or the rule of lenity comes into play
6 when you get to sentencing, doesn't it?

7 **MR. PALAZZO:** Well, no. I think the rule of lenity --

8 **THE COURT:** I mean, when you're actually imposing a
9 sentence.

10 To say -- let me just see if I can fairly characterize
11 what you said. The landscape has changed significantly and
12 even though we're focused on 2012, I should take into account
13 that the current reality looks at this conduct in a very
14 different way than it did then, and so under the concepts of
15 lenity, you know, you take that into account.

16 **MR. PALAZZO:** That's all I mean.

17 **THE COURT:** And I am not disagreeing with you that
18 that might be appropriate, but what I'm wondering is: Okay.
19 When and how exactly does that kick in?

20 It could well be that if -- I know you don't want to be at
21 this point, but if I'm imposing a sentence, that's when I take
22 it into account. But you're saying, "No, no. You should take
23 the rule of lenity into account in analyzing this very specific
24 legal question."

25 **MR. PALAZZO:** Well, I'm just saying --

TINDELL - DIRECT / GILBERT

1 Afternoon Session

12:34 p.m.

2 **THE COURT:** Okay. We're ready to resume and,
3 Ms. Gilbert, your turn.

4 **MS. GILBERT:** Yes, Your Honor. We're going to call
5 one witness, and that's Jason Tindell, from the California
6 Department of Tax and Fee Administration.

7 **THE COURT:** Very good.

8 **MS. GILBERT:** So we'll get him right now.

9 (Pause in proceedings.)

10 **THE COURT:** Sir, if you could come forward to the
11 witness stand to be sworn.

12 **THE CLERK:** Please remain standing and raise your
13 right hand.

14 JASON TINDELL,

15 called as a witness for the Government, having been duly sworn,
16 testified as follows:

17 **THE WITNESS:** Yes.

18 **THE CLERK:** Thank you. Please be seated.

19 Please state your full name and spell your last name.

20 **THE WITNESS:** My name is Jason Tindell, T-I-N-D-E-L-L.

21 DIRECT EXAMINATION

22 **BY MS. GILBERT:**

23 **Q.** And, Mr. Tindell, where do you work?

24 **A.** I work at the California Department of Tax and Fee
25 Administration, formerly the California State Board of

TINDELL - DIRECT / GILBERT

1 Equalization.

2 **Q.** When did the department change its name from the Board of
3 Equalization to the Department of Tax and Fee Administration?

4 **A.** It was actually a split-off from the Board of
5 Equalization. The Board of Equalization still exists, but the
6 majority of the tax and fee programs moved over to our
7 department starting on July 1st of this year.

8 **Q.** How long have you worked at this agency either prior to or
9 after the split?

10 **A.** 13 years.

11 **Q.** And what do you do at the Department of Tax and Fee
12 Administration?

13 **A.** I'm a Business Taxes Specialist I. My job primarily is to
14 handle collection accounts \$150,000 and above.

15 **Q.** Do you hold a public position in California?

16 **A.** Yes, I do.

17 **Q.** And does -- this agency of the Department of Tax and Fee
18 Administration, does it maintain records?

19 **A.** Yes, we do.

20 **Q.** What kind of records does the department maintain?

21 **A.** We maintain records on all of our tax and fee payers.

22 **Q.** Does that include records of sellers' permits?

23 **A.** Correct.

24 **Q.** And do you also maintain records of sales tax, both
25 reported and paid?

TINDELL - DIRECT / GILBERT

1 **A.** Yes.

2 **Q.** Are you familiar with how those records are kept?

3 **A.** Yes.

4 **Q.** Can you tell us a little bit about how they're kept?

5 **A.** All the records now are stored digitally. The returns can
6 be either filed by paper or they could be filed electronically.
7 Paper ones, it's scanned and processed, manually inputted into
8 the system, and they get sorted electronically.

9 **Q.** And is that true also of how sellers' permits records are
10 maintained?

11 **A.** Correct. Currently -- I forget which year we specifically
12 went over to electronic only, but that was about -- I think
13 about three, four years ago. Prior to that, everything was
14 done by paper.

15 **Q.** Are these records -- and let's talk specifically about
16 sellers' permits and then recordings of sales tax, both
17 reported and paid. Are those records made at or near the time
18 that that information is supplied to your department?

19 **A.** Yes.

20 **Q.** And are these records regularly made and preserved as part
21 of the public business of your agency?

22 **A.** Yes.

23 **Q.** And are you familiar with the process for searching these
24 records?

25 **A.** Yes.

TINDELL - DIRECT / GILBERT

1 Q. Have you performed searches of these records before?

2 A. Yes. Quite a few times.

3 Q. I'm going to ask you specifically about a few searches you
4 performed related to this case for which you're testifying.

5 Have you conducted a diligent search to determine whether
6 the State of California has ever issued a seller's permit to
7 any organization called Green Remedies?

8 A. Yes.

9 Q. And I'm going to show you what's been marked as Exhibit O.

10 MS. GILBERT: May I approach the witness?

11 THE COURT: Yes, you may.

12 THE WITNESS: (Witness examines document.)

13 BY MS. GILBERT:

14 Q. What I've handed you has both a front and a back. Do
15 you -- are you familiar with this document?

16 A. Yes.

17 Q. And what is it?

18 A. It's a copy of a California seller's permit.

19 Q. And is it -- a copy of a seller's permit for what entity?

20 A. Green Remedies, Incorporated.

21 MS. GILBERT: Your Honor, we move to enter this as
22 Exhibit O.

23 MR. RICHARDS: No objection.

24 MR. PALAZZO: No objection.

25 THE COURT: Okay. Exhibit O will be admitted.

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1 (Government's Exhibit O received in evidence)

2 **BY MS. GILBERT:**

3 **Q.** I asked you previously if you had done a diligent search
4 for any sellers' permits related to an entity called
5 Green Remedies and you said yes. Can you tell us now the
6 result of the search that you performed?

7 **A.** I located this permit right here.

8 **Q.** Did you locate any other sellers' permits?

9 **A.** For Green Remedies, Incorporated, no.

10 **Q.** And can you tell us if -- that seller's permit that's at
11 Exhibit O, what is the effective date of that permit?

12 **A.** The effective date of the permit was March 10th, 2016.

13 **Q.** And what is the end date of the permit?

14 **A.** Permits are -- at this point they are active. I would
15 have to double-check my notes to see if it was still open or
16 not, but permits do not have a natural end date. They are open
17 and active until either they get revoked or they're closed out.

18 **Q.** So did any organization named Green Remedies have a
19 seller's permit at any time in 2012?

20 **A.** No.

21 **Q.** Have you conducted a diligent search to determine whether
22 any organization named Green Remedies reported and/or paid
23 sales tax at any time?

24 **A.** Yes.

25 **Q.** And as a result of this search, have you determined

TINDELL - DIRECT / GILBERT

1 whether any entity named Green Remedies reported or paid sales
2 tax in 2012?

3 **A.** No entity named Green Remedies, Incorporated, did not file
4 or pay taxes. They did not have a permit that I was able to
5 locate.

6 **Q.** And did you -- were you able to determine whether an
7 entity named Green Remedies ever paid any sales tax or reported
8 any sales tax?

9 **A.** As I recall, they filed a return for 2016 on this permit
10 we have right here. It was filed zero, no sales.

11 **Q.** Have you conducted a diligent search to determine whether
12 the State of California has ever issued a seller's permit to an
13 organization called Covelo Cutoff Collective?

14 **A.** Yes.

15 **MS. GILBERT:** And I'm going to, with Your Honor's
16 permission, approach the witness to present to him what's been
17 marked as Exhibit N.

18 **THE COURT:** Yes.

19 **THE WITNESS:** (Witness examines document.)

20 **BY MS. GILBERT:**

21 **Q.** Mr. Tindell, are you familiar with this document?

22 **A.** Yes.

23 **Q.** And what is it?

24 **A.** It is a seller's permit for Covelo Cutoff Collective.

25 **MS. GILBERT:** The Government moves to admit what's

TINDELL - DIRECT / GILBERT

1 been marked as Exhibit N.

2 **MR. RICHARDS:** No objection.

3 **THE COURT:** Exhibit N will be admitted.

4 (Government's Exhibit N received in evidence)

5 **BY MS. GILBERT:**

6 **Q.** And what is the effective date of this seller's permit for
7 Covelo Cutoff Collective?

8 **A.** January 1st, 2012.

9 **Q.** And is there an end date for this permit as well?

10 **A.** This permit was closed out as "Did Not Operate."

11 **Q.** And when was that? When was the permit closed out?

12 **A.** The permit was closed out as of the same date that it was
13 effectively started. So it was January 1st, 2012.

14 **Q.** Have you conducted a diligent search to determine whether
15 Covelo Cutoff Collective reported and/or paid sales tax?

16 **A.** Yes.

17 **Q.** And what is the result of that search?

18 **A.** I was unable to locate any payments or returns filed for
19 Covelo Collective.

20 **Q.** Have you conducted a diligent search to determine whether
21 the State of California has ever issued any seller's permit to
22 an entity related to Anthony Pisarski?

23 **A.** Yes.

24 **Q.** And what was the result of that search?

25 **A.** There was three sellers' permits that were located under

TINDELL - DIRECT / GILBERT

1 Mr. Pisarski's name. The first one was a partnership that was
2 2002 to 2004. After that, it became -- converted to an LLC,
3 and that was between 2004 and 2006. And from 2006 to present,
4 it is now a corporation.

5 **Q.** And was this permit issued to a specific entity with a
6 specific name?

7 **A.** Yes.

8 **Q.** And do you recall what the name of that entity was?

9 **A.** If I recall correctly, it's Northcoast Horticultural
10 Supply. The various versions were just that for the
11 partnership, the second one was LLC, and this third one had the
12 incorporation attached to it.

13 **Q.** So is it correct that all of the sellers' permits you
14 found that were associated with Mr. Pisarski were for an entity
15 called Northcoast Horticultural Supply in three different
16 corporate forms?

17 **A.** Yes, all the sellers' permits.

18 **Q.** And did you determine whether there were any other
19 sellers' permits issued to Mr. Pisarski by the State of
20 California?

21 **A.** I was unable to locate any other issued to Mr. Pisarski.

22 **Q.** Have you conducted a diligent search to determine whether
23 the State of California has ever issued a seller's permit to
24 any entity related to an individual named Sonny Moore?

25 **A.** Yes, I have.

TINDELL - DIRECT / GILBERT

1 Q. And what was the result of that search?

2 A. I was unable to locate any permit at all.

3 MS. GILBERT: Your Honor, we have no further
4 questions.

5 THE COURT: Thank you.

6 In terms of when the tax obligation kicks in -- I realize
7 you -- are you a tax lawyer?

8 THE WITNESS: I'm not a lawyer, no.

9 THE COURT: All right. But you're familiar with --

10 THE WITNESS: Very.

11 THE COURT: -- the state taxes?

12 THE WITNESS: Correct.

13 THE COURT: When you are talking about marijuana
14 cultivation, where does the state sales tax kick in? In other
15 words, is it at the grower stage, the collective stage, the
16 dispensary stage? When does -- tell me when sales tax applies.

17 THE WITNESS: Sales --

18 MR. RICHARDS: Your Honor, may I just make one -- I
19 don't mean to object to your question, but we were never --

20 THE COURT: It's never smart to object to a judge's
21 question, but go ahead.

22 MR. RICHARDS: No, I'm not. Just for the record, he
23 was offered as a records witness, so there was no --

24 THE COURT: Notice?

25 MR. RICHARDS: -- declaration that he was going to

TINDELL - DIRECT / GILBERT

1 provide any expert testimony. I would have *voir dired* him and,
2 I mean, I would have -- that's a very loaded issue, the tax
3 issue, and that's why I thought he was just going to talk about
4 State Board of Equalization permits issued/not issued.

5 **THE COURT:** Okay. Well, certainly Ms. Gilbert didn't
6 do this, I did it; and I note your objection, but I do want an
7 answer to the question.

8 So go ahead.

9 **THE WITNESS:** Sales tax applies at the retail sale.
10 So in the case of a collective, it would be from the collective
11 to a patient.

12 **THE COURT:** All right. How about from the grower
13 to -- well, I suppose the distinction between grower and
14 collective is somewhat complicated; but if someone is simply a
15 grower and sells to, say, a dispensary, is there a sales tax
16 obligation there?

17 **THE WITNESS:** There would be one for -- sales tax, the
18 money itself, no; but for a reporting obligation, anybody who
19 sells tangible personal property in the state, even if they
20 would be considered a reseller at that point, they would be
21 required to hold a permit.

22 **THE COURT:** But nothing particular to marijuana?

23 **THE WITNESS:** The law is going to change on
24 January 1st, but as we're speaking as of right now, they would
25 just be required to hold a permit and note their sales, you

TINDELL - CROSS / RICHARDS

1 know, for resale if that's what they're doing. There would be
2 no tax obligation at this time.

3 **THE COURT:** Okay.

4 All right, Mr. Richards.

5 **MR. RICHARDS:** Yeah, just briefly based on that
6 question.

7 **CROSS-EXAMINATION**

8 **BY MR. RICHARDS:**

9 **Q.** You testified correctly, I believe, that the sales tax
10 obligation doesn't trigger until the retail sale; correct?

11 **A.** The obligation to pay sales tax, correct.

12 **Q.** Right. And just so the record is clear so we don't have a
13 debate later on, retail sale -- your understanding of a retail
14 sale in this context would be someone walking into a store, a
15 marijuana dispensary across the street, and purchasing
16 marijuana at the cash register and they collect the sales tax;
17 correct?

18 **A.** Correct, the person who would be considered the end
19 consumer.

20 **Q.** The end consumer?

21 **A.** Correct. If they went off and resold it, there would
22 be -- generally they would issue their own seller's permit, so
23 they would purchase it tax free.

24 **Q.** Right. So it's your understanding that when the grower is
25 providing the marijuana to that dispensary, that the sale tax

TINDELL - CROSS / RICHARDS

1 event occurs at the end for the resale -- the consumer;
2 correct?

3 **A.** Yeah, when it becomes taxable.

4 **Q.** It's not double taxed?

5 **A.** Correct.

6 **Q.** Okay. I'm leaving that area.

7 All right. With respect to the searches that you did for
8 these sellers' permits, you don't have any personal knowledge
9 as to why certain permits were issued to these individuals and
10 what they were used for; correct?

11 **A.** On the records it would indicate what -- the intent to
12 what they were going to sell. If I had access to being able to
13 search those records, I could go through everything and say
14 what their intent was because on the application they would
15 explain what they're going to sell.

16 **Q.** Did you speak to any of these people?

17 **A.** Speak to any of the permit holders?

18 **Q.** Yes.

19 **A.** No.

20 **Q.** Okay. Did you ever go out to any of these locations and
21 see what was going on there?

22 **A.** No.

23 **Q.** All right. And with respect to the -- your current job
24 for the State Board of Equalization -- I just want to be clear
25 about your expertise or your job duty -- is you're not charged

TINDELL - CROSS / RICHARDS

1 with investigating marijuana tax issues; correct?

2 **A.** I have accounts that do pertain to, yeah, collectives if
3 that's your question.

4 **Q.** Are you an auditor?

5 **A.** No.

6 **Q.** Are you a tax enforcement agent?

7 **A.** Compliance representative, correct.

8 **Q.** Compliance -- you're a compliance representative?

9 **A.** Correct. My job entails many different things. I mean,
10 part of it is making sure people are, you know, properly
11 permitized, making sure that what they are reporting is also
12 correct as well. I'll go through and -- not necessarily go
13 through a detailed audit, but I will go through and make sure,
14 you know, maybe their merchant statements are reflected in
15 their sales tax returns and stuff like that.

16 **Q.** Okay. And just one last question. When you were talking
17 about the growers, just so the record is clear, if you're
18 growing marijuana at your house, isn't it true that you're not
19 required to have a seller's permit?

20 **A.** If you are going to resell it, you are required to have a
21 seller's permit. If it is just for your personal consumption,
22 then, no.

23 **Q.** Well, no, you just said, though -- you testified earlier,
24 and I was very clear in my question, the taxable event occurs
25 at the retail sale; correct?

TINDELL - CROSS / RICHARDS

1 **A.** The taxable part, but you're still required to hold a
2 seller's permit if you are going to resell something. That's
3 part of the way of tracing items. So if somebody comes in for
4 an audit, you know, you have to go back to the suppliers. And
5 so you have to go to the suppliers because what ends up
6 happening is, say, the collective didn't have a resale permit,
7 you know, they would go back and say, "Well, there's no resale
8 card here." That would end up being a taxable event going back
9 maybe to the growers.

10 **Q.** No, but that's -- if the grower brings the medical
11 marijuana to, let's say, a dispensary across the street and
12 they have a resale permit and they collect the tax, that's the
13 end of your inquiry; correct?

14 **A.** If the grower cannot document that it was for resale, then
15 we'd consider that a taxable event. So if they weren't able to
16 prove that the sale to the collective -- maybe the collective
17 was just going to consume it.

18 **Q.** No, no. Let me just try to ask my question again. Just
19 listen carefully.

20 **A.** All right.

21 **Q.** Following up on your testimony that the taxable event
22 occurs at the retail level --

23 **A.** Uh-huh.

24 **Q.** -- you don't disagree with that; correct?

25 **A.** When the sales tax would be due, correct.

TINDELL - CROSS / RICHARDS

1 Q. Right. So assuming the grower delivers the medical
2 cannabis to a retailer that has a valid seller's permit and
3 collects the sales tax, that's the end of your inquiry;
4 correct?

5 A. Correct, if they have a valid seller's permit.

6 Q. Right. So the only time this would come into a problem
7 for a grower, hypothetically, is if the person that received
8 that marijuana or cannabis that they were selling at the retail
9 level somehow did not have a seller's permit and did not
10 collect the tax; correct?

11 A. Or if the grower could not document that the person did.

12 Q. Right.

13 A. If they didn't accept the resale card. They have to
14 accept -- technically you would have to accept the resale card
15 in order to sell to them. There should be a resale card on
16 file in order for them to sell it to them without tax.

17 Q. If the -- but I guess -- I'm not trying to mix words with
18 you, but I just want to -- in this -- you don't know the issues
19 in this case --

20 A. No, I don't.

21 Q. -- so I just want to make it clear because it's not
22 getting clear.

23 If tax is collected at the retail level, isn't it true you
24 don't go back and collect more tax from the person that
25 supplied the medical cannabis? Correct?

TINDELL - CROSS / RICHARDS

1 **A.** If it's documented, correct.

2 **Q.** Okay. So if it's not documented, like let's just say the
3 grower doesn't have a resale number, then the risk is that they
4 may have to pay the tax; right? If for some reason the
5 retailer doesn't pay and they don't have a permit, the risk
6 that they take is they may owe tax; correct?

7 **A.** Correct, if they don't have it documented.

8 **Q.** Right. But that's the risk. In other words, the -- I'm
9 just trying to make it clear. The reason why you'd want to get
10 a resale number is if somehow the retailer didn't collect the
11 tax, then you would possibly not be exempt from the sales tax
12 requirement; correct?

13 **A.** By law, you're required to hold a permit if you're going
14 to sell tangible personal property in the state of California,
15 which medical marijuana is.

16 **Q.** But --

17 **A.** So a grower is required by law. Each sale they're
18 required to have a permit.

19 **Q.** But there's no specific Revenue and Taxation Code that
20 deals with medical marijuana, correct, in 2012?

21 **A.** It's under tangible -- the sale of tangible personal
22 property.

23 **Q.** I know, but it's a catchall. There's a lot of things that
24 are tangible personal property; right?

25 **A.** Right. And anybody who's going to sell them or resell

TINDELL - CROSS / RICHARDS

1 them, they have to hold a permit in the state of California.

2 Q. But let's just say I want to sell my car tomorrow, you
3 know, my Dodge, and I sell it to a dealer.

4 A. That's --

5 Q. I don't have a resale number; right?

6 A. That's a completely different example because that's
7 considered a use tax, not a sales tax issue. Only -- this is
8 kind of way off scope, but in order to sell a vehicle and be
9 required to collect the sales tax, you have to have a
10 California Department of Motor Vehicles dealer's license. So
11 that example doesn't quite work.

12 Q. Okay. What about some gold coins?

13 A. Depending on the dollar amount, that could be different.

14 Q. What about some bananas?

15 A. Bananas are food and for -- is it human consumption or for
16 a monkey? I mean, for a monkey, it would be taxable. For a
17 person, human consumption, no.

18 Q. What about dog food?

19 A. Dog food would be taxable.

20 Q. Okay. So if I sold some dog food to the 7-Eleven and I
21 didn't have a resale permit and the 7-Eleven paid the tax
22 legally, I wouldn't owe the tax; correct?

23 A. One more time. Will you rephrase that?

24 Q. If I took something and I sold it to a retailer --

25 A. Correct.

TINDELL - CROSS / RICHARDS

1 Q. -- dog food -- which is typically taxable; right?

2 A. Uh-huh.

3 Q. Yes?

4 A. Correct.

5 Q. You've got to say "yes."

6 -- and the 7-Eleven took my dog food and they sold the dog
7 food to somebody else and they collected the sales tax, that's
8 the end of the taxable event; correct?

9 A. That instance -- I hate to do this again -- that would be
10 considered an occasional sale and it wouldn't have been taxable
11 regardless. But let's just say he regularly sold dog food.

12 Q. What if I just occasionally sold dog food? Occasionally,
13 let's just go with that. So you're saying --

14 THE COURT: We're getting out into the ocean here.

15 MR. RICHARDS: Right.

16 THE WITNESS: Sales tax is --

17 THE COURT: I understand the point you're trying to
18 drive home, but every example is going to be met with a new
19 technical issue. So I know what you're getting at.

20 MR. RICHARDS: All right.

21 THE COURT: And so -- but let me go through this
22 scenario with you to make sure I understand this.

23 And let's talk about three different scenarios. One is a
24 marijuana grower. And to the extent you can focus on 2012, I
25 know that's difficult, but that's the temporal context. In

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1 2012 a marijuana grower who simply has a patient or a medical
2 prescription and uses the marijuana for either him or herself
3 or for their primary caregiver for another, they grow it, they
4 use it, I take it no permit is required; is that correct?

5 **THE WITNESS:** Correct.

6 **THE COURT:** Okay. Scenario number two, the grower is
7 not connected to a collective but grows the marijuana and then
8 sells it to a collective who then down the chain sells it. Is
9 a seller's permit required by the grower in that scenario?

10 **THE WITNESS:** Yes.

11 **THE COURT:** All right. So if a grower is part of a
12 collective, not selling to the collective but is part of the --
13 grows and then is a member of the collective and that
14 collective then sells marijuana downstream to a dispensary or
15 to users, is a permit required?

16 **THE WITNESS:** The collective should have one there if
17 the grower is part of the collective.

18 **THE COURT:** All right. Okay.

19 **BY MR. RICHARDS:**

20 **Q.** On the judge's example, whether they have a permit or not,
21 there's no taxable event until it gets to the retail; correct?

22 **A.** Correct.

23 **Q.** All right. So the only prejudice to the collective not
24 having a permit would be that if the retailer screws up, for
25 lack of a better word, the collective may not be able to claim

TINDELL - CROSS / RICHARDS

1 a tax exemption; correct?

2 **A.** You mean the grower would not be able to claim an
3 exemption?

4 **Q.** Well, the judge used the example if the grower is a member
5 of the collective --

6 **A.** Correct.

7 **Q.** -- and the marijuana is given to the collective and they
8 bring it to the dispensary and the dispensary does not collect
9 the tax, the collective runs the risk of having to potentially
10 lose their tax exemption and pay that sales tax; right?

11 **A.** It would be -- the sale would be a taxable transaction
12 from the collective --

13 **Q.** Because the --

14 **A.** -- regardless because there wouldn't be a resale. In the
15 first example the grower was separate from the collective. So
16 the grower to the collective. That's a sale for resale. This
17 one, the collective has the grower in there so basically
18 they're the ones who are growing it and selling it. So there
19 wouldn't be any transaction because it's the -- it would be
20 considered the same entity.

21 **Q.** Right.

22 **A.** It would all be under the collective. But if the grower
23 and the collective are separate, then there is a transfer;
24 there is, you know, tangible personal property. There would be
25 a sale. This way, you know, you grow and you sell it, so there

TINDELL - CROSS / RICHARDS

1 would only be one sale to the end consumer.

2 **Q.** Well, it's not to the end consumer. It's to the
3 dispensary who's selling it to the consumer.

4 **A.** So you have the -- oh, the collective and the dispensary
5 are separate?

6 **Q.** Yeah. This is real critical not to merge everything.

7 Yes.

8 Just so -- because this gets confusing later on when you
9 look at it.

10 The dispensary is a dispensary. For your mind, that's a
11 storefront. Okay?

12 **A.** Uh-huh.

13 **Q.** The collective is a group of people that collectivize and
14 grow marijuana and sometimes exchange it amongst each other.
15 But as you said, that's not a taxable event between members;
16 correct?

17 **A.** If they are exchanging it in between themselves in the
18 collective?

19 **Q.** Yes.

20 **A.** So they're selling it?

21 **Q.** No. Exchanging it.

22 **A.** Barter?

23 **Q.** Okay. Let's just make it easy. The retail seller to the
24 person on the street, they pay the sales tax; right?

25 **A.** Correct.

TINDELL - CROSS / RICHARDS

1 Q. And as long -- if the sales tax is collected -- going back
2 to the dispensary, going back to the collective -- you don't
3 collect the sales tax twice; correct?

4 A. Correct.

5 Q. Okay. So the only risk to those people before the person
6 that buys it at the storefront, they have a risk that if for
7 some reason their permit is not valid or nonexistent and the
8 retailer fails to collect the sales tax, they could be liable
9 for the sales tax; right?

10 A. Correct.

11 Q. But if they have the permit and they keep records, then
12 that protects them from a taxable event; right?

13 A. Correct.

14 MR. RICHARDS: I think I've covered that.

15 THE COURT: Let me make sure, though, I understand.

16 Did you -- I think your testimony was separate and apart
17 from any tax obligation, there is a state requirement to have a
18 permit.

19 THE WITNESS: For the sale of tangible personal
20 property in this state.

21 THE COURT: Right. Which would include marijuana?

22 THE WITNESS: Correct.

23 THE COURT: And that is not keyed one way or the other
24 to a taxable event. It is you have to have a permit.

25 THE WITNESS: Correct. The sellers' permits aren't

TINDELL - CROSS / RICHARDS

1 tied all the way down to the taxable event. It's just to trace
2 it all the way back.

3 **THE COURT:** Understood. Okay.

4 **BY MR. RICHARDS:**

5 **Q.** But the question -- I'm following up on your question --
6 when you say you have to have a permit -- okay? -- if you don't
7 have a permit, what's the consequence?

8 **THE COURT:** Well, my question wasn't the consequence
9 of not having a permit. My question is: What is the state
10 requirement as to what you have to have?

11 The testimony was you have to have a permit. I don't --
12 my question was not: What are the consequences if you don't
13 have a permit? I want to know what the requirements are under
14 state law. That was my question.

15 **MR. RICHARDS:** Okay. But I guess what I'm trying --

16 **THE COURT:** And I understand your point is the only
17 risk is the tax issue. I understand that, but that wasn't my
18 question. So you don't have to keep following up my question
19 with that question.

20 **MR. RICHARDS:** No, I won't, Your Honor. But then just
21 on an aside, the issue of whether you need a resell permit when
22 you're selling tangible personal property, there's no crime if
23 you don't have the permit is what I'm saying, is that you risk
24 a sales tax liability. So that's what I was trying to
25 establish.

TINDELL - CROSS / RICHARDS

1 It's not like the state says "Every time you sell tangible
2 personal property if you don't have this sales tax permit,
3 you're in big trouble. You're in tax trouble potentially."

4 **THE COURT:** And we should -- this is an aside. The
5 rider is not talking about complying only with state law that
6 implicates criminal conduct or other. It's complying with
7 state requirements. It's not looking at whether or not the
8 state requirement has a consequence if you don't have the -- if
9 you don't comply.

10 I think it says if the state says you have to have a
11 permit, you have to have a permit. It doesn't matter whether
12 or not if you didn't get a permit, nothing bad is going to
13 happen to you. That's not what the rider says. The rider says
14 you've got to comply with the state requirements, and my
15 question was: Is it a state requirement that they have a
16 permit? Very simple.

17 **BY MR. RICHARDS:**

18 **Q.** When the judge asked you is it a state requirement to have
19 a permit for tangible personal property, when does that -- does
20 that requirement only kick in if there's a sale that is a
21 taxable event?

22 **A.** No.

23 **Q.** Okay. When -- well, what -- if you're not selling
24 tangible personal property, you don't need a permit; correct?

25 **A.** If you're not selling tangible personal property within

TINDELL - CROSS / RICHARDS

1 the state of California, correct.

2 **Q.** Right. So in an occasional sale, you don't need a
3 seller's permit for tangible personal property; correct?

4 **A.** Correct.

5 **Q.** Okay. So what's the definition of an occasional sale?

6 **A.** It is -- basically it's two or less events in a 12-month
7 period.

8 **Q.** Okay. So, hypothetically, if someone was -- if someone
9 was doing something that only had an event once a year, then
10 that's occasional; correct?

11 **A.** It also depends on scope, and "scope" is not actually
12 defined. So it's kind of up to the department on what they
13 consider scope. Generally a lot of times it's about \$10,000.
14 So a sale of \$10,000 or more, they would require a permit. It
15 wouldn't be considered an occasional sale. There's no
16 definition on "scope." It's left up to the department.

17 **Q.** So it's a subjective thing?

18 **A.** Sounds like it.

19 **Q.** Okay. So it's not like if someone was reading the code,
20 though, is it fair to say that the law simply says if you have
21 a sale two or less times a year, you need -- or two or more
22 times a year, you need a personal use permit?

23 **A.** It also says depending on the scope and the other factors.
24 I do not have the law in front of me, so I can't quote it. But
25 it was more intended somebody is having a garage sale, they

TINDELL - CROSS / RICHARDS

1 have two garage sales. They don't want the neighbors calling
2 out -- you know, sending people out there for \$5 in tax. So it
3 was one of those things that I guess over the years they just
4 kind of left it open to the interpretation of the department to
5 figure out what is actually worthwhile, what's worth our time
6 going out there.

7 **Q.** And what is the department's purpose in having a permit
8 issued to somebody -- or somebody getting a permit if they're
9 not -- if they're supplying the product to a retailer?

10 **A.** It's to trace it.

11 **Q.** For tracing purposes?

12 **A.** For audit purposes, correct.

13 **Q.** Okay.

14 **A.** Without being able to go back to figure out who suppliers
15 are and other items, it would be nearly impossible to, you
16 know, gain compliance. Sales tax is voluntary compliance.

17 **Q.** So if the grower is a member of the retail collective,
18 then the permit would be issued to the retail collective. Like
19 when we were talking earlier, you referenced, oh, is the
20 dispensary the collective. Remember that testimony?

21 **A.** Yes.

22 **Q.** So if a grower was a member of the dispensary that was
23 selling the retail marijuana -- retail medical cannabis, then
24 they wouldn't need an individual permit because you would use
25 the permit of the retail dispensary; correct?

TINDELL - CROSS / RICHARDS

1 **A.** If they aren't selling it, correct. If they are just the
2 grower and they're providing it as part of the collective,
3 correct. If they were selling it, that would be -- yeah, they
4 would be required to hold a permit. It would be a separate
5 transaction; but if they're part of a collective, they're
6 growing it on behalf of the collective, they're not -- you
7 know, they're not selling it, then correct.

8 **Q.** So in your experience, because you said you do these, is a
9 lot of these dispensaries collectives that sell the medical
10 marijuana?

11 **A.** They're -- most of them are considered, yeah,
12 collectives --

13 **Q.** They're collectives. So basically --

14 **A.** -- who do the retail sale.

15 **Q.** So the collective also does retail sales?

16 **A.** Yes.

17 **Q.** So --

18 **A.** Sometimes they do buy from growers. Sometimes they grow
19 their own. It just depends. Each operation is different.

20 **Q.** So if a grower at the time they actually did a transaction
21 was a member of a retail collective, then they don't need a
22 specific personal use permit themselves; correct?

23 **A.** If they aren't selling it. If they are selling it, then
24 that wouldn't matter. It all depends if they're acting on
25 behalf of the collective or are they acting on their own behalf

TINDELL - REDIRECT / GILBERT

1 and selling it. I mean --

2 **Q.** If the collective has grower members and those grower
3 members provide the medical cannabis to the collective and then
4 the collective retail sells it, the only resale number required
5 is the one the collective issues; correct?

6 **A.** Correct.

7 **MR. RICHARDS:** All right. Thank you.

8 **THE COURT:** Thank you.

9 Ms. Gilbert, I know I opened up quite the door there,
10 so --

11 **MS. GILBERT:** Let me just ask one clarifying question
12 because I don't want to open up any other doors.

13 **REDIRECT EXAMINATION**

14 **BY MS. GILBERT:**

15 **Q.** If -- I think you had said both that -- let's say you have
16 a case where a grower is part of a collective and a grower is
17 supplying medical marijuana to the collective. In that case,
18 is it correct that you said that the collective would need to
19 have the seller's permit?

20 **A.** Correct.

21 **Q.** You had previously said also something about a reporting
22 requirement, which is separate than actually paying the taxes.
23 Would the collective in that case be required to report the
24 sales for purposes of tax, or --

25 **A.** Correct.

TINDELL - REDIRECT / GILBERT

1 Q. All right. So there's both a permit requirement, there's
2 a reporting requirement, and then the taxable event happens at
3 a different time; is that right?

4 A. Yeah. The taxable event occurs at the retail sale.

5 Q. At the retail sale.

6 If the grower was just supplying marijuana to a collective
7 and the grower was part of that collective and the collective
8 in turn reimbursed the grower for the expense of providing that
9 marijuana and then that marijuana was distributed amongst the
10 members of the collective, what are the obligations vis-a-vis a
11 permit and reporting for sales tax purposes in that scenario?

12 A. It would depend on whether or not we'd consider it a
13 separate transaction or not. That's where the whole issue of
14 the collective comes into play. Are they just signed up for
15 being a member of the collective, or are they actually part of
16 the collective, they all work together?

17 You know, if it is a true collective, then the collective
18 would have the permit. If this person is a grower who just
19 signed up on a piece of, you know, paper but then the
20 collective gives them money and pays them money and they're
21 taking profit and everything else, it would appear that it was
22 a separate transaction. It just depends. Without knowing all
23 the background of this case, it could be a lot of different
24 things.

25 Q. But I guess let me be -- let's make it really simple. In

TINDELL - RECROSS / RICHARDS

1 either of the scenarios, someone has to have a seller's permit;
2 is that right?

3 **A.** Correct.

4 **Q.** So either the collective has to have a permit or in some
5 cases, if it's a separate sale, the actual grower has to have a
6 permit; is that what you're saying?

7 **A.** The grower and the collective, correct.

8 **Q.** And both would have to have a permit?

9 **A.** Correct. If the grower was operating under the
10 collective, they would use the collective's seller's permit.

11 **Q.** But in either scenario, the collective is required to have
12 a seller's permit?

13 **A.** Yes.

14 **MS. GILBERT:** That's it. No further questions.

15 **MR. RICHARDS:** Your Honor, just one more follow-up.

16 **THE COURT:** Okay.

17 **RECROSS-EXAMINATION**

18 **BY MR. RICHARDS:**

19 **Q.** When you're growing marijuana at your house, you're not
20 required to have a permit at any specific time; correct?

21 **A.** For 2012, yeah, correct.

22 **Q.** Right. So the permit requirement comes into play at the
23 time the marijuana is harvested or processed. And then if
24 you're going to do a sale that requires a permit, then you need
25 to get the permit; correct?

TINDELL - RECROSS / RICHARDS

1 **A.** If it's -- correct. If it's for home use, your own
2 personal consumption, then no permit is required.

3 **Q.** Yeah, but that -- I'm not -- I appreciate that, but this
4 is just a technical point. Let's just say hypothetically --

5 **THE COURT:** Let me see if I can just -- if you're
6 planning to make a sale in six months but you haven't gotten to
7 the point, you're in the ramp-up stage, do you need a permit
8 before you actually get to the point where you want to sell the
9 product? When do you have to get the permit if you've got a
10 sale contemplated?

11 **THE WITNESS:** In this -- if you wanted to buy things,
12 say, to incorporate and use in your resale card to maybe buy
13 some fertilizer in order to use it, you would get it right
14 away. So you can, you know, purchase the fertilizer because
15 you're using it for something you'd resell. If you're just
16 growing it for, say, you don't want any of these tax
17 exemptions, it would be when you were going to sell.

18 **THE COURT:** Okay.

19 **MR. RICHARDS:** Okay. Does that -- because,
20 Your Honor, there was no evidence about anybody trying to get
21 tax-free fertilizer.

22 **Q.** So what you just said about the tax-free, that's if you
23 wanted to get the advantages of having tax-free fertilizer,
24 housing materials, then you'd want --

25 **A.** Correct.

PROCEEDINGS

1 Q. -- to get the resale number earlier because you wouldn't
2 want to pay sales tax?

3 A. It's not required until the sale.

4 Q. Right. But let's say you didn't care about that or that
5 wasn't any issue. You're not breaking any law by waiting six
6 months, as the judge said, until you're about to sell it. That
7 that's when you get the permit; correct?

8 A. Any law for sales and use tax, correct.

9 Q. Sales and use tax. So, in other words, you're not
10 required to have a permit simply because you may sell something
11 in the future; correct?

12 A. Correct.

13 MR. RICHARDS: All right. Thank you.

14 THE COURT: Ms. Gilbert?

15 MS. GILBERT: We have no further questions,
16 Your Honor.

17 THE COURT: Okay. Thank you. You may step down.

18 MS. GILBERT: I'm going to approach and grab these two
19 exhibits.

20 May the witness be dismissed, Your Honor?

21 THE COURT: Yes. Thank you. I know that was longer
22 than you had anticipated. Thank you very much.

23 THE WITNESS: Thank you.

24 (Witness excused.)

25 MS. GILBERT: At this point, Your Honor, the

PROCEEDINGS

1 Government rests.

2 **THE COURT:** Okay. So the record is clear, did you
3 move to admit other of these exhibits and have they all been
4 admitted by stipulation, or where are we on these?

5 **MS. GILBERT:** No, Your Honor. We didn't discuss that.
6 We're happy to discuss moving them -- admitting them by
7 stipulation in the same manner that the Court took notice of
8 the defendants' submissions, but we don't feel strongly either
9 way. We think that the facts are established already.

10 **THE COURT:** Well, I'll follow your lead. If you --
11 I'm not going to ask you to admit anything that -- it's up to
12 you. If you're not moving to admit it, we won't have it.

13 **MS. GILBERT:** Does the Defense have any objections?

14 **MR. RICHARDS:** In the spirit of extreme collegiality,
15 we will do whatever the Government wants us to do on this
16 issue. No problem.

17 **MS. GILBERT:** Well, then, we'd move to admit the
18 photographs that we've presented in Exhibits A through M.

19 **THE COURT:** A through M. Okay. A through M will be
20 admitted.

21 (Government's Exhibits A through M received in evidence)

22 **THE COURT:** And then you've admitted the other --

23 **MS. GILBERT:** And then we are not moving to admit --

24 **THE COURT:** P?

25 **MS. GILBERT:** -- P. We will not move to admit P.

PROCEEDINGS

1 **THE COURT:** Okay. Well, now you've rested in terms of
2 evidentiary submission, but let me ask you some questions
3 about -- well, let me just ask you to go ahead and begin the
4 discussion, and then I'll reserve the right to interrupt from
5 time to time with questions. So go ahead.

6 **MS. GILBERT:** Please do, Your Honor. And I'm happy to
7 just address your questions if that's more focused.

8 But I think there are just a few -- I think this is
9 actually fairly straightforward in some ways. *McIntosh*
10 controls here. The only question is whether or not the
11 defendants strictly complied with all relevant law imposed by
12 the state on the use, distribution, possession, and cultivation
13 of medical marijuana. That's the standard here. And that is
14 strict compliance with all California law.

15 That includes the Compassionate Care Act, that includes
16 the medical marijuana program, and that includes the Attorney
17 General's guidelines discussing those programs. And those
18 guidelines were the California legislature --

19 **THE COURT:** Well, those guidelines, the argument the
20 Defense makes is those aren't statutory requirements of the
21 state. That's guidance that the Attorney General is providing.
22 But failure to, quote/unquote, "comply" with an Attorney
23 General interpretation or guidance, is that -- why should that
24 be deemed to be a failure to comply --

25 **MS. GILBERT:** Well --

PROCEEDINGS

1 **THE COURT:** -- for the rider?

2 **MS. GILBERT:** I think it -- so under -- it seems in
3 California law they look -- they give -- they're not -- courts
4 are not bound by the AG guidelines, but they certainly look to
5 them as an interpretation of the relevant provisions on medical
6 marijuana law.

7 Many of the cases cited by the defendants, including
8 *People versus London*, rely on the AG guidelines when
9 determining the scope of conduct and whether or not in those
10 cases -- because they're state cases they're determining
11 whether or not there should be a jury instruction on immunity
12 based on the defendant's compliance with the medical marijuana
13 program. But the state cases look to the California AG
14 guidelines as well in order to elucidate what the definition is
15 of the medical marijuana program.

16 Furthermore, the other courts that have looked at this
17 issue on the federal level, the District Court in the
18 Eastern District of California in both *Gentile* and *Daleman* also
19 relied on the AG guidelines.

20 But we can even separate from the AG guidelines. Almost
21 all of them are enshrined -- are interpretations of pretty
22 clear standards in the medical marijuana program, and they are
23 specifically regarding the collectives where I think the law
24 there is complicated to comply with, to be sure.

25 But, furthermore, you have the California -- as it was

PROCEEDINGS

1 then known, the California Board of Equalization issued two
2 special notices that specifically said that any transactions
3 involving marijuana must comply by getting permits, and that is
4 supported by the testimony here from the Board of -- excuse
5 me -- the Department of Tax and Fee Administration employee.

6 So I think even if you look -- even if you don't believe
7 that the guidelines are binding, they're certainly relevant to
8 the inquiry.

9 And *McIntosh* also says -- it doesn't limit itself to
10 California law as enshrined in the code. It says all
11 California law and there is, I think, a good argument that that
12 includes the AG guidelines.

13 Furthermore, I think that Your Honor previously discussed,
14 and I think defendants have talked about, the time period that
15 we're looking at here. The defendants pled to conduct
16 beginning at a date unknown and continuing to July 10th of
17 2012.

18 Now, we specifically are looking at the 320 plants that
19 form the basis for this Indictment, but the defendants
20 themselves, specifically Defendant Pisarski himself states in
21 his own declaration that he began supplying marijuana to the
22 two collectives discussed, the Covelo Cutoff Collective and the
23 informal collective involving Ms. Ramrattan, in 2010. Both the
24 Ramrattan declaration and the Apodaca declaration specifically
25 also state that Mr. Pisarski started supplying them with

PROCEEDINGS

1 marijuana in 2010.

2 I think in this case it's extremely relevant to look to
3 the entire course of conduct. They both admitted in their
4 Plea Agreement that they intended to sell marijuana; and you
5 have, then, information that the defendants themselves
6 submitted that they had already been selling or supplying
7 marijuana to collectives as of 2010. So --

8 **THE COURT:** The argument the Defense is mounting here,
9 as I understand it, the beginning premise is a focus on the
10 federal charge. The federal charge is possession with intent
11 to do something. And they're then saying, if I'm hearing them
12 correctly, in a case, for example, where the federal charge was
13 based on a transaction that had already occurred, that would be
14 a clearer circumstance because if it had already occurred, you
15 look at when the sale, for example, had happened and you look
16 at what California law was and were they in compliance with
17 California law on the date of sale.

18 Here, because it's possession with intent to distribute or
19 to sell, that if we look at the state of the law in 2012, a lot
20 of these state requirements aren't really requirements until
21 the future event occurs. And, therefore, they are,
22 quote/unquote, "in compliance" because the effect of this
23 nature of the charge versus the compliance requirements, if I'm
24 hearing them correctly.

25 **MR. RICHARDS:** That's correct.

PROCEEDINGS

1 **THE COURT:** Respond to why that's not the way it
2 should be analyzed.

3 **MS. GILBERT:** Absolutely, Your Honor. And I think
4 that falls into sort of two buckets. Let me start with the
5 collective bucket because that wouldn't apply to the second
6 basis for their claim that they were in compliance, which is
7 that they were merely patients growing for their own use. I'll
8 address that in a moment, but let me start with the collective.

9 In this case let's say that we're not even looking at
10 their past conduct involving their relationships with the two
11 collectives that they've admitted. They're intending to sell
12 to the collectives. They've told us the two collectives that
13 they're intending to sell to. They have told us nothing else
14 about these collectives. They haven't made any effort to
15 establish that they intended to sell to collectives that they
16 knew contained only qualified patients and primary caregivers.
17 They haven't made any -- they haven't shown that they were
18 keeping track of the expenses for growing marijuana.

19 They already had, I think you'll see in the Government
20 Exhibit A, and the defendants have admitted, they had 320 live
21 plants. They clearly had spent money to produce those plants,
22 to grow them, their time, their costs, their expenses. None of
23 that has been documented.

24 In order for them to have intended to supply to a
25 collective and to be in compliance with California law, they

PROCEEDINGS

1 would have had to be doing all of that, or they would have at
2 the time of sale have had to have all of that available.

3 There's no evidence that anything was --

4 **THE COURT:** But if they're right and theoretically
5 they could come up to speed and be in compliance at the moment
6 of sale, for example, doesn't that create an issue as to the
7 degree to which compliance would have been affected and had to
8 be affected for purposes of the rider on the operative date of
9 the criminal conduct?

10 **MS. GILBERT:** Well, I think we need to look at the
11 entire picture here. The defendants haven't argued and have
12 made no claim that they intended to comply with any of these
13 requirements. Instead, they've said that none of those
14 requirements had actually applied to them.

15 If they had come in and put in declarations that said,
16 "Yes, I intended to sell to this collective and I was intending
17 to track all of my expenses and I was intending to ensure that
18 I was only reimbursed for the exact costs of operations, and I
19 intended to make no profit and I was going to demonstrate that
20 in these ways and I intended to ensure that the collective
21 members were all qualified patients and/or primary caregivers
22 of those patients," they've made absolutely no showing of that
23 whatsoever. They haven't even made that argument, Your Honor.

24 I think under those circumstances, the idea that they were
25 actually in strict compliance on the day, on the last day of

PROCEEDINGS

1 the conduct, they have certainly not met that burden by any
2 measure.

3 And that is certainly consistent with what the court said
4 in *Gentile* where in that case they even were providing -- in
5 that case the defendants provided some records of sales, some
6 records of the transactions. Here, they put forward absolutely
7 nothing.

8 But let's set aside the collective argument. They also
9 say that they were complying with California law under just the
10 Compassionate Use Act, which would mean that it was medical
11 marijuana used for their -- only for their personal use.

12 First, they've already admitted that they intended to sell
13 the marijuana elsewhere and that they previously did so. I
14 think that completely undermines their argument that they were
15 intending to only use the marijuana that they were growing for
16 themselves.

17 Second, let's say that they were -- let's say -- put that
18 to the side. They have presented insufficient evidence to show
19 that they actually had enough prescriptions to cover all of the
20 plants that were found on their property.

21 **THE COURT:** You think strict compliance requires the
22 whole terrain to be occupied by a prescription that would
23 account for all of that?

24 **MS. GILBERT:** I think so. I mean, so what I'm relying
25 on, Your Honor, is -- and this relates to an argument that the

PROCEEDINGS

1 Defense made as well, and I think we all agree that under
2 California law -- and this is in *People versus Kelly* -- for the
3 Compassionate Use Act to cover someone's conduct, it has to be
4 marijuana reasonably related to current medical needs.

5 So if we look to -- I'm looking at just -- and, again, we
6 have a lot of objections to the evidence provided by the
7 defendants, but I'm going to assume that it's all credible.
8 Let's assume that. Mr. Pisarski has put forward a
9 recommendation that says he should have 99 plants for himself
10 for his own use. Okay.

11 Mr. Moore has stated in his declaration that he had a
12 valid recommendation at the time also for 99 plants. That
13 recommendation still has not been submitted. So I just took a
14 look at what's marked as Document 190-1, which the Defense
15 moved to admit and the Court took under advisement that it
16 was --

17 **THE COURT:** Right.

18 **MS. GILBERT:** -- that's not even a recommendation for
19 a prescription. That's a form that the defendant looks like he
20 filled out for a clinic in order for the clinic to later
21 provide him with a recommendation, but there's no
22 recommendation there.

23 Okay. So let's instead say we'll credit Moore's statement
24 himself that he had a recommendation for 99 plants. We can
25 look to the recommendation that he did submit, which was for

PROCEEDINGS

1 2015, and that's at Docket 175-1, which says 99 plants. Okay.
2 So that gets us 99 plants for Pisarski, 99 plants for Moore.

3 They third argue that they were growing for Pamela Moore,
4 who is Mr. Moore's mother. Mr. Pisarski has submitted
5 Ms. Moore's recommendation. That includes no number for the
6 number of plants. There is no declaration from Ms. Moore about
7 how many plants she needed to reasonably treat her current
8 medical needs in 2012. She hasn't testified here, of course,
9 either.

10 Finally, we have on the day of the search that was
11 executed here on July 10th of 2012, Ms. Moore was interviewed
12 by DEA Agent John Rasmussen, and she claimed that seven of the
13 327 plants found there were hers. Only seven. So I think that
14 that -- I think ascribing any amount to Ms. Moore is impossible
15 in this case given the evidence that we have.

16 Even if you said Ms. Moore can have 99 plants, 99 times 3
17 does not add up to 327 plants. And I know that I'm using two
18 different numbers here, and I'll just clarify.

19 The search recovered 327 marijuana plants. Seven were
20 growing on the outside of the residence, and those are the
21 seven that were claimed by Ms. Moore, Defendant Moore's mother;
22 320 were growing inside the two greenhouses, and those are
23 the -- that's the number that the defendants have pled to and
24 admitted to in their factual statement of their Plea Agreement.

25 So even if you put aside all of the collective business,

PROCEEDINGS

1 which the defendants themselves have raised as a defense
2 here -- or, excuse me, I guess not a defense because of the
3 posture, but in this case -- there's not enough here to support
4 by a preponderance of the evidence that the 320 plants for
5 which they were charged were for their own personal use or for
6 that of Ms. Moore. So I think that that argument fails just on
7 its face.

8 And whether they were serving as primary caregivers to
9 Ms. Moore or not, it's irrelevant. What really would matter is
10 how many plants she needed. Let's assume that they were
11 serving as primary caregivers for her and they're growing for
12 her. We still don't know how many plants were reasonably
13 related to her medical need. Even if it was 99, we're still
14 not getting up to 327.

15 So I think based on all of that, I think the final
16 piece -- and I'm happy to go through more of the collective
17 arguments. I think the Court is probably very familiar with
18 our brief, and I think we've just shown that there's just not
19 enough evidence in the record to support the defendants' claims
20 that they were operating in a nonprofit status, that the two
21 collectives were closed-circuit collectives; and I think the
22 testimony that we just heard from Mr. Tindell, it made very
23 clear one thing. Someone has to have a seller's permit, and
24 his testimony made clear that no one had a seller's permit at
25 the time that we are discussing in 2012.

PROCEEDINGS

1 Finally, the Court has mentioned this already, I would
2 just point to the other indicia of unlawfulness found here, and
3 that is not my decision to say that it's indicia of
4 unlawfulness. That's in the California AG guidelines. They
5 specifically state -- and I think the Court in *Gentile* found
6 this as well -- when you have an excessive amount of cash,
7 firearms, other drug evidence found, all indicia of unlawful
8 sales. And here, there was a phenomenal amount of cash found
9 on the property. It was over \$400,000 packaged in a manner
10 that I would argue is inconsistent with lawful sales of
11 marijuana.

12 In addition --

13 **THE COURT:** Well, the defendants suggest the nature of
14 the legitimate medical marijuana business is they don't have
15 the luxury of operating with traditional financial institutions
16 and the like who won't touch the business, as I understand it,
17 or at least in 2012 didn't. So there is, perhaps, more of a
18 prospect that cash will be utilized. But you seem to suggest
19 that, I guess, it's both amount and the way it is wrapped?

20 I mean, if you have a lot of cash because you're otherwise
21 obliged to have cash because the banks won't be open to you,
22 you do want to not make the cash obvious if you're keeping it
23 in your house because you could be subject to being robbed;
24 right?

25 **MS. GILBERT:** That may be true. But, you know, then I

PROCEEDINGS

1 would say why is it not in a safe? Why is it wrapped in
2 plastic and then black plastic on the --

3 **THE COURT:** I guess my question to you is: That is
4 curious, but why is that indicative of -- how does that become
5 indicative of improper conduct; the wrapping, for example?

6 **MS. GILBERT:** Well, I think the wrapping goes to the
7 fact that that cash was meant to be concealed. And it's not
8 just how it was wrapped, but it was the second batch of cash
9 and this was around \$189,000 that was found welded inside of a
10 trailer. That cash was clearly meant to be hidden. I think
11 that that's clear from the photograph Your Honor can look at.

12 **THE COURT:** I guess, though, I don't see how that's
13 all that different than putting it in a safe. It's a version
14 of a safe. I mean, you're trying to keep it away in a secure
15 area. I mean, I don't know. I'm not sure. I think if it is
16 something from which we can make an inference, it's not a
17 particularly strong inference, but --

18 **MS. GILBERT:** Well, that may be true, Your Honor, but
19 I think that does, then, go to the fact that we have no records
20 for what profit or not profit they were earning. Instead, we
21 have a phenomenal amount of cash on hand. And so I think if
22 you say that if they're arguing, "Oh, they can't use banks for
23 our business," that's one thing; but then they're not doing
24 what the AG guidelines make clear that they're required to do,
25 which is to record their costs and prove here that they were

PROCEEDINGS

1 operating in nonprofit status.

2 **THE COURT:** Let me ask on the two defendants, and as
3 Mr. Palazzo made reference to, there are some distinctions in
4 the record between the two; and it appears that there's more
5 evidence of transactional evidence, if you will, pertaining to
6 Mr. Pisarski than to Mr. Moore. So why should Mr. Moore be
7 swept into the sort of collective action, if you will?

8 **MS. GILBERT:** Well, I think it's because Mr. Moore
9 admitted that he was part of the collective action. I mean --

10 **THE COURT:** So you're depending in part on the plea?

11 **MS. GILBERT:** In part on the plea, but also -- I mean,
12 let me go through it step by step.

13 **THE COURT:** Yes.

14 **MS. GILBERT:** So the first is they were charged with
15 conspiracy. They both admitted to conspiracy. They
16 admitted -- they both admitted to ownership of those 320
17 plants. They both admitted to ownership of -- or, excuse me --
18 they both agreed to forfeit all of the cash and firearms and
19 everything. And there's no distinction in the factual basis
20 here that they've both admitted to for their conduct.

21 Second, I think that we can attribute Mr. -- if they both
22 said that "This marijuana was ours together" and Mr. Pisarski
23 says "I intended to sell it to these collectives," I think you
24 can't distinguish Mr. Moore from that statement because they're
25 in on this endeavor together. They co-owned that property.

PROCEEDINGS

1 They both had indicia that they lived there. Mr. Moore has
2 admitted that. You know, I don't think you can separate the
3 two of them.

4 But I think even if you wanted to say, fine, only
5 Mr. Pisarski was part of the collective and Mr. Moore just
6 intended to grow it for himself, again the numbers don't add up
7 here. But I think that their conduct is attributed to each
8 other and that it's very clear from the nature of the
9 Plea Agreement.

10 I think I would also say just, you know, I'm not sure how
11 this plays out at this moment, but the Presentence Reports have
12 both been prepared in this case and revised. The defendants
13 did not object to any of the facts in those reports but for one
14 about Mr. Moore's fingerprint being on a bullet, and so I'm
15 putting that to the side. That's not the basis for any
16 argument here. But neither of them have objected to the
17 description of what was found, what occurred, who owned what,
18 who lived there, and I think the Court can just take that all
19 under advisement.

20 Thank you.

21 **THE COURT:** Okay. Any other short --

22 **MR. RICHARDS:** Yeah, just some short comments.

23 First of all, we also have the declaration of Ramrattan,
24 which was for 99 plants, if there was excess cannabis, and the
25 Government doesn't disagree that you can't tell. There was no

PROCEEDINGS

1 testimony or any contention that those plants could have been
2 male, female, or unusable. So the 320 is not a static number.
3 I mean, so by the time it came to yield, we don't know what was
4 going to happen.

5 And, you know, you're an umpire. You're calling balls and
6 strikes here. We get the facts. It's not like the defendants
7 are jumping up and down that they got arrested and then
8 released by state custody, then got indicted by federal.

9 I mean, the facts are the facts, and the fact that we're
10 all cabined by is that we had 320 undeveloped plants. So you
11 can't go back now and say they needed to -- we needed to
12 provide testimony five years later what we would have done had
13 we decided to sell them at all and what those decisions would
14 have been. That's not -- I don't think I'd have credibility
15 with the Court if we presented a hypothetical factual situation
16 of a hypothetical buyer that we don't know who it would have
17 been now in July of 2017.

18 So that's why there was no testimony that they would have
19 been compliant because the snippet of time we're dealing with
20 is 320 undeveloped plants. So we're stuck with those plants.

21 And I think that the Court was correct in asking those
22 questions. And I asked a critical question, you don't need a
23 permit until you're going to sell something. And the AG
24 guidelines are not laws. Those guidelines -- I was not kidding
25 when I said it was Jerry Brown that wrote the guidelines in

PROCEEDINGS

1 2010. A lot's happened since then. These guidelines --

2 **THE COURT:** He's still there. No.

3 **MR. RICHARDS:** He's still there, but he's the
4 governor. You never leave.

5 You know, he's been around so long, as an aside, when I
6 used to play on the beach in Malibu, he was there with Linda
7 Ronstadt when he was the first governor. I mean, it's like he
8 never leaves.

9 **THE COURT:** I remember when I was in college, yeah.

10 **MR. RICHARDS:** So the issue is with respect to what
11 we're dealing with in this case, is that we have a very liberal
12 approach to growers and when -- these burdens -- a grower
13 that's growing at his house doesn't need to be a, quote,
14 "nonprofit grower." They just can't sell for profit. They can
15 get reimbursed for their labor, their time, but we don't have a
16 sale to argue. So the difficulty from the Defense is we don't
17 have to set up a hypothetical strawman to show you that we're
18 compliant. All you have is a guy that's growing at his house
19 and there was some cash.

20 Now, I will tell you, Judge, it is stupid to leave money
21 in a safe. I will tell you I never would have a safe in my
22 house. It's very dangerous. People put a gun to your head and
23 say, "Open the safe." The first thing they do is go to the
24 master bedroom and take the safe, throw it off the second
25 story, put it in a car and leave. Hiding money like in

PROCEEDINGS

1 clothes, in a trailer, that's a smart place to hide it because
2 no one is going to look for it.

3 So if you do have cash or jewelry or something, you would
4 never want to leave it, and he's out in the sticks, in a safe
5 that says "Valuables inside." So that's not normal.

6 And I think that, again, we never presented Mr. Pisarski
7 as someone that was only growing marijuana. The tax
8 representations, you know, we phoned the business to get those
9 exact numbers for those five years. That's why I'm comfortable
10 with him putting it under oath that that's the taxes that were
11 paid.

12 And he had a legitimate business that made money. The
13 marijuana that was being grown, there is no evidence that that
14 was his only business or that was how -- his primary source of
15 income. And it takes 12 pounds, you know, to make one pound of
16 oil, and there was evidence in the record that they found, you
17 know, processing. A lot of people like to smoke the stuff in
18 vapor or put it in edibles, and so it's really we're all
19 engaging in speculation what could have happened to that.

20 And so when we provided the collective evidence, it was
21 simply to show that there's two ways he has strict compliance.
22 I know the Government -- and, by the way, in the *Gentile* case,
23 that was a dispensary case and the name of the dispensary was
24 A&P Medicinal Cooperative in Bakersfield, and so they had
25 evidence of all these sales. See, that's a business.

PROCEEDINGS

1 And you run into more problems -- I mean, just before they
2 made it legal, it was very difficult as a state practitioner to
3 defend over-the-counter marijuana sales because the state
4 police would come in. And, you know, it's very hard to run an
5 all-cash business with -- and, by the way, the irony, Judge, is
6 in those businesses, there's at least five guys with large
7 weapons at the door on the street with flack jackets and armed
8 security. I mean, you'd laugh if you ever went to Venice
9 Boulevard in L.A. and seen some of these dispensaries. It
10 looks like you're going into, like, a Central American bank.
11 You know, there's large capacity rifles everywhere. And so --
12 and because they're targets for robberies.

13 And so these stores did run into problems, and you
14 wouldn't be defending those for compliance because they always
15 ran into problems, you know, if they didn't have issues.

16 But these growers, the law, it's true, that if you're just
17 growing in your house and you haven't done anything yet,
18 there's not a lot of regulations, but I'm not suggesting that
19 there are no regulations. We're only suggesting in the narrow
20 snapshot that you've been evaluating, nothing had happened yet.

21 And the admissions in the Plea Agreement all dealt with
22 intent because those are federal crimes, but now we're looking
23 at if we do a reset and pretend -- see, the other thing is, you
24 know, in the -- I can't pronounce the name but in, like, the
25 Sissel -- it's like that long name that the Ninth Circuit

PROCEEDINGS

1 reversed all those convictions and sent the case back for
2 remand, the Silla -- it's like -- it's another *McIntosh* -- it's
3 a post-*McIntosh* case. But what -- in that case those people
4 had already been sentenced, and they sent it back to the
5 Ninth Circuit -- the Ninth Circuit sent it back to start over
6 with *McIntosh*.

7 So the fact that there's a Plea Agreement is not *ipso*
8 *facto* outcome determinative. What's determinative is if you
9 take aside the Plea Agreement still recognizing the admissions,
10 was the conduct at issue in strict compliance with state --

11 **THE COURT:** Am I right in understanding your argument
12 as being you think there's great significance to the fact that
13 the criminal charge is not charging a completed transaction but
14 is charging possession with intent to sell? Do you think
15 that's the critical distinction here on applying the *McIntosh*
16 standard?

17 **MR. RICHARDS:** You mean for the purposes of state law
18 or federal law?

19 **THE COURT:** I'm saying if they had -- if a sale had --
20 if this was a buy/bust, or something like that, and they had
21 charged this as a sale of marijuana, you think you wouldn't
22 have any of these arguments?

23 **MR. RICHARDS:** No, I wouldn't.

24 **THE COURT:** Okay.

25 **MR. RICHARDS:** No. No. Because -- I'm going to give

PROCEEDINGS

1 you that case.

2 **THE COURT:** I think I know what you're talking about
3 and I've got it in the papers. I mean, it was cited to me, so
4 don't worry about it. You don't have to find it.

5 **MR. RICHARDS:** Oh, okay. Yeah.

6 **THE COURT:** I'll find it.

7 **MR. RICHARDS:** I don't personally think that the -- I
8 don't personally think that in a federal case where if this was
9 a case where they were charged with -- where the facts were
10 they were distributing it like a storefront, those are harder
11 facts.

12 I mean, and what Mr. Palazzo said, you know, with respect
13 to these cases where you have 10,000 plants, 30,000 plants, I
14 feel sorry for the defender that's going to have to come in and
15 say, "You know, they're in compliance," because those make it
16 more complicated unless it's a large collective.

17 But at the end of the day, the things that he found in his
18 house were not shocking compared to things that you would find
19 in a home. This was a home marijuana grow. It wasn't like on
20 some commercial operation where the operation was separated in
21 a different area.

22 Oh, here's the case that was driving me nuts. It's
23 S-I-L-K-E-U-T-S-A-B-A-Y, *Silkeutsabay*. That's at 678 Fed.
24 Appendix 608. And so the Ninth Circuit remanded those even
25 though they were sentenced.

PROCEEDINGS

1 So what I'm saying is, you can't penalize them because we
2 resolved the case with a federal component, but the relevant
3 charge, as I said earlier, was 11358 of the Health and Safety
4 Code. That's a straightforward cultivation. I mean, there
5 would be no other charge you could charge them with yet because
6 there's no indicia of anything at this point. You don't have
7 even a usable marijuana. So --

8 **THE COURT:** You don't honestly contend, though --
9 that's Exhibit A -- that that's just a home marijuana grow.
10 That's a little more extensive than a mom-and-pop backyard grow
11 some marijuana.

12 **MR. RICHARDS:** Well, it would be in San Francisco or,
13 you know, in downtown Los Angeles; but, see, the difference is,
14 Judge, if you live in Humboldt County and you have 410 acres, I
15 just want -- I mean, we've just got to look at who we're
16 dealing with. It's a young guy. You know, there's wild
17 animals, bears. You know, you're in a very rural area on
18 410 acres. So on a little snippet of that in a greenhouse he's
19 growing 300 plants.

20 No, you're right, it's not one person growing marijuana
21 for themselves in an indoor grow; but, look --

22 **THE COURT:** Okay. I hear you. We have a lot of cases
23 from Humboldt, so I understand this.

24 **MR. RICHARDS:** Look, I'll tell you something on just a
25 good example. Like, before I moved houses, I didn't have any

PROCEEDINGS

1 land at all, but then I moved and I had, like, an empty plot.
2 It was, like, half an acre. So instead of planting one lime
3 tree, I planted 20. I never am going to need 20 but because I
4 had so many extra spaces, it just lined up nicely.

5 Like, if you have the extra space, if they're going to
6 grow and there's three people there, it's not a big stretch
7 when you lose a lot of plants to mold and they're not all
8 usable to grow 300 plants. It's just not a lot when right up
9 the street they were investigating 10,000 plants. I mean, as
10 you said, from Humboldt County.

11 And these other cases in the pipelines that deal with
12 growers, this is the smallest amount of plants. Most of these
13 cases are 10- to 30,000 plants. I mean, they're huge
14 operations. This wasn't that type of operation. I mean, you
15 didn't see fields of people working. And so I would just say
16 that if we cabin this, that they meet the medical requirement
17 and they deserve the immunity.

18 And when the Ninth Circuit said "strict compliance,"
19 unfortunately, you know, they left it up to the District Courts
20 to figure out the procedure and everything else. And I watched
21 the oral argument. When I was watching it, I thought of you
22 and I said, "Judge Seeborg is not going to be happy when
23 they're saying, 'Oh, the District Courts will figure all this
24 out,'" because I thought that, you know, it seems like they're
25 just dumping a mess to get it all back again and have all the

PROCEEDINGS

1 cases related.

2 But I don't think the goal is that -- in our case where we
3 did present a preponderance of the evidence, I don't think the
4 goal is not to give -- is not to stay the proceeding. I mean,
5 it's not like in five years they're coming in here five years
6 later, you're not seeing, "Hey, you know, look at all these
7 wiretaps now we've got on Pisarski"; or we had the hearing
8 today, you didn't see one witness from the Government to say,
9 "Hey, I bought a lot of dope from Pisarski."

10 In *Gentile* they had methamphetamine in the store. I mean,
11 they were doing stuff that wasn't your typical. I mean, in
12 five years of investigation these guys have been on pretrial,
13 you don't see one other piece of evidence uncovered that
14 suggests that Pisarski was a big player or illegally selling
15 marijuana, and I think that's important. I mean, they've had
16 five years.

17 **THE COURT:** It may be of consequence at a certain
18 point in this case, but as you understand well, I don't make
19 the charging decisions. Hypothetically I could agree with you
20 that why is the Government pursuing this case. Legitimate
21 question, but it is not for me. I don't have a basis to say I
22 would have made a different charging decision when I was in the
23 U.S. Attorney's Office. That doesn't translate into I'd just
24 dismiss the case. I can't do that.

25 **MR. RICHARDS:** No, but --

PROCEEDINGS

1 **THE COURT:** So I have it, it's mine to deal with, and
2 one can argue whether or not it's a good use of prosecutorial
3 resources but that's sort of an academic discussion. It
4 doesn't really play into this, does it?

5 **MR. RICHARDS:** No, but the search of the residence --
6 and I had counsel re-send us all the discovery again last night
7 to just -- I mean, I guess -- and so I wanted to make sure I
8 wasn't missing anything so I started getting a lot of discovery
9 last night but it was just the same discovery in these new
10 records. The search doesn't reveal anything but construction
11 and it doesn't reveal anything that would support the
12 contention that there is sales that are -- that this 327 plants
13 are tied to or that there's some large-scale business going on.

14 I mean, I'm just saying if there was a witness or somebody
15 that was going to contradict or shed some light on this 327
16 plants, you don't have that. There's no cooperator. There's
17 no other person that says something different. And, I mean,
18 we've had a long time to investigate this case, and the best
19 the Government has is someone doesn't remember signing an
20 agreement and we've withdrawn that evidence.

21 And I just think that strict compliance, the standard that
22 the Government has raised in their papers would be met by no
23 state defendants. I think the Court has to take a realistic
24 look on what's the thrust of the law in the state of
25 California. Is it to force people that get notes or that go

PROCEEDINGS

1 through the rigmarole of collective action so they can grow a
2 medicine that's illegal under federal law, is the thrust to
3 make them go through large hula hoops to get immunity? It's
4 not.

5 And even though we have a difference of opinion on the
6 burden, and you could see how easy the burden is under state
7 court. Asserting an affirmative defense is not an
8 insurmountable burden. It's preponderance of the evidence.

9 I mean, they're not suggesting -- I mean, presumably they
10 could have checked those recommendations, presumably they could
11 be making these arguments; but what they tactically did in
12 their opposition was to try to drag us into the tax issue, to
13 the business issue, but there's nothing to do yet, and that's a
14 fact that they can't escape.

15 And that for your analysis it shouldn't be on, "Well, I'm
16 going to find they weren't strictly compliant because had we
17 advanced the ball six months, there's no way they could have
18 complied." That's not fair because that's not the deck that
19 you were dealt. The deck that we're asserting is simply, hey,
20 the guy was growing marijuana. He had a note. He wasn't going
21 to get arrested. And if he was going to do something more with
22 excess cannabis, then he needed to maybe get some additional
23 documents, like a resale number, which is the easiest thing in
24 the world to get.

25 I mean, and even though the Court would want him to be in

PROCEEDINGS

1 compliance with all aspects, the code doesn't say in the code
2 you have to have a resale number, and there's no evidence they
3 didn't have a resale number when they would have sold this
4 marijuana. I mean, we don't know.

5 And so that's why I don't think -- you can't convict
6 someone -- it's not once a thief, always a thief. If their
7 position is, "Well, we sought evidence," or, "We think they
8 used to sell marijuana," that's -- you don't get arrested for
9 what you used to do. Marijuana is a controlled substance.
10 Possession is a continuing offense. So if you're cultivating,
11 it's only the cultivation at the site that day. It's not --
12 you can't arrest somebody because they cultivated three years
13 ago.

14 And so that's -- I know this sounds like a lot of
15 lawyering and wordsmithing but, I mean, if we're going to be
16 very technical and hold them to all these things, they deserve
17 the benefit. And when Mr. Palazzo was talking about lenity,
18 the rule of lenity is not only at sentencing, it's if a statute
19 has two different interpretations.

20 **THE COURT:** That's true. That's true.

21 **MR. RICHARDS:** And I'm saying in a close case -- let's
22 just say this is a close case. The close case should go to the
23 defendant --

24 **THE COURT:** Understood.

25 **MR. RICHARDS:** -- because you could see from listening

PROCEEDINGS

1 to this agent, these laws were all over the place and in every
2 case they talk about the patchwork. I mean, it's very
3 confusing.

4 But at the end of the day, I would ask the Court to only
5 apply laws enacted by the state legislature and apply
6 California case law and say, "If I was sitting across the
7 street in the state criminal court, would I find that this guy
8 made a showing to get a jury instruction to the jury?"

9 **THE COURT:** Of course, though, that's not the
10 standard. I don't want to start again, but it's not the
11 standard. You can argue why it should be the standard, but the
12 standard at the moment in *McIntosh* is preponderance of the
13 evidence on your burden, and you say you've met it; and I
14 understand that --

15 **MR. RICHARDS:** Right.

16 **THE COURT:** -- but I can't slide back into the
17 standard being would it work in a state criminal prosecution.

18 **MR. RICHARDS:** Well, this is a federal -- this is a
19 criminal prosecution. But I don't want the record to suggest
20 that I think *McIntosh* said the defendant has to provide an
21 affirmative defense. I think *McIntosh* said apply state law and
22 then the Government in their brilliant think tank started
23 saying, "It's an injunction. It's like an injunction, so the
24 burden of proof is on the defendant."

25 Because their first brief to you when I saw it, I said,

PROCEEDINGS

1 "Oh, my God. They're going to try to argue a different
2 standard than state law," which is I understand that you're
3 following it, but I'm letting you know that the opinion doesn't
4 say the defendant must present an affirmative defense and
5 actually it doesn't tell you what standard.

6 **THE COURT:** No, but it pretty clearly says by a
7 preponderance -- that the defendant has to show by a
8 preponderance of the evidence strict compliance with the state
9 law, and that's what it says. I mean, it's -- you know, we
10 can -- anyway.

11 **MR. RICHARDS:** Yeah, and my narrow nuance of that is
12 is I think that once we show by a preponderance of the evidence
13 that there is compliance and then you apply state law, state
14 law says then the burden shifts to the Government to prove lack
15 of compliance.

16 And so that -- see, I never thought we were saying
17 different things. I always agreed that the defendant has the
18 burden of producing the facts to show that they have the
19 defense, but that burden is not a high burden. Once that
20 burden is there, then under state law --

21 **THE COURT:** That's not, in my mind -- and I don't want
22 to get too deeply into this -- that's not the same as
23 preponderance of the evidence. That's your burden going
24 forward to then shift the burden back to the other side.
25 That's sort of a *prima facie* type of burden, and reasonable

PROCEEDINGS

1 minds can argue whether or not that ought to be what it is, but
2 I don't think -- we can agree to disagree -- I don't think
3 that's what *McIntosh* says. Now, maybe *McIntosh* wasn't right,
4 but it's right for my world.

5 **MR. RICHARDS:** I agree with that.

6 **THE COURT:** So, you know -- but we may disagree on
7 exactly what it says. But, in any event, I think we've been
8 over this ground.

9 **MR. RICHARDS:** Yeah. If it's close, I would just say
10 that absent some -- I would just leave you with this: It's not
11 like a hard hill to climb. It's a hill but, I mean, you
12 have -- for these plants, you're blessed with the fact that you
13 have them as you have them, and you have people living in the
14 house that all have notes, and you have Sakina Ramrattan that
15 also had a note. I mean, you don't have -- it doesn't have to
16 be that complex.

17 And I understand the prosecutorial motive to say, "Well,
18 if they had a business, they needed this." But they can't make
19 my client an elephant when he's really a lion. You can't
20 really do that. I mean, we are -- the facts are what they
21 were, and there's nothing wrong, when we thought about what are
22 we going to present to you, to say we're just going to deal
23 with the marijuana at issue that's illegal under federal law.
24 I mean, that's all we're going to do. They weren't charged
25 with other conduct.

PROCEEDINGS

1 I mean, the guidelines, the Plea Agreement, the only
2 controlled substance we stipulated to was that marijuana. And
3 so when we were analyzing, we thought we would just come to you
4 with a straightforward, circumscribed presentation on that date
5 only, and that's -- the chips fall where they fall.

6 **THE COURT:** Okay.

7 **MR. RICHARDS:** All right.

8 **MR. PALAZZO:** Your Honor, very quickly, if I may.

9 **THE COURT:** Yes.

10 **MR. PALAZZO:** And I promise I'm not going to test your
11 patience. I will be quick. I just wanted to say a couple
12 things.

13 With respect to the desired imposition of the AG
14 guidelines, that is not state law. You have mentioned *McIntosh*
15 numerous times. You said strict compliance with state law. AG
16 guidelines are not state law.

17 Secondly, with respect to the statement and assertion that
18 there's been no evidence adduced with respect to profit-making
19 motive, the declaration that Mr. Moore provided to the Court in
20 his initial briefing was at paragraph 6 he said, with respect
21 to that grow (reading):

22 "I did not receive any profit nor did I expect to
23 receive any profit from the disposition of the plants."

24 The 300 plants on July 10th, 2012.

25 And then I also wanted to mention in response that -- I

PROCEEDINGS

1 think, two things. The relevant imposition and rubric of
2 demonstrating compliance with state law may not necessarily
3 just exist on July 10th, 2012, especially if there was a
4 potential of sale to the collective by Mr. Pisarski down the
5 road in October, November, what have you.

6 So as the testimony revealed, there would be no
7 requirement to get that permit, that resale permit, until that
8 time and that occurrence happened.

9 **THE COURT:** Understood.

10 **MR. PALAZZO:** With respect to the tracking of
11 expenses, there were, indeed, expenses listed that were seized
12 of construction and so forth. And just because they don't have
13 the universe of documents related to a particular grow and how
14 much was spent in terms of fertilizer and whatever have you,
15 that doesn't mean they didn't exist or they couldn't then
16 recapitulate those expenses for purposes of determining, you
17 know, whether or not they're making a profit when they go to
18 sell and get reimbursed their overhead and their operational
19 expenses as it relates to Mr. Pisarski from the collective.

20 So just because they don't find certain documents doesn't
21 mean they don't exist or they won't exist at some point in the
22 future.

23 **THE COURT:** Don't you have to come forward with them
24 now because you have the burden of showing it wasn't for
25 profit?

PROCEEDINGS

1 **MR. PALAZZO:** No, because there was no sale. There
2 was no sale that occurred with regard to those plants.

3 Lastly, some of the language that you were honing in on
4 with respect to the admissions, you know, I just wanted to
5 highlight that I don't see it being as problematic, especially
6 when you consider -- you were sort of focusing in on the
7 forfeiture language, which was --

8 **THE COURT:** Right.

9 **MR. PALAZZO:** -- that both defendants admitted that
10 all the property subject to forfeiture, quote, "was derived
11 from proceeds obtained directly or indirectly as a result of
12 the violation identified above and/or," so you have a
13 disjunctive there --

14 **THE COURT:** Yeah.

15 **MR. PALAZZO:** -- "was used or intended to be used, in
16 any manner or in any part, to commit," again "or" as a
17 disjunctive, "to facilitate the commission of the violation."

18 So just because there's money that might exist there and
19 part of that is being subject to forfeiture, there's nothing
20 that it can't be harmonized with respect to, yeah, money was
21 being used for purposes of expending that money for buying
22 certain things to create the grow and then ultimately to
23 potentially, if it materialized, sell part of that to recoup
24 expenses.

25 So there's really nothing that is incongruous in terms of

PROCEEDINGS

1 the language that's been cited, especially with all those
2 disjunctives and then the manner or in part. That kind of
3 covers -- depending on how you want to construe it, that covers
4 the conduct, and it's not inconsistent with what we're
5 contending today.

6 And then, lastly, if you look at Exhibit F, you know, it
7 almost looks like this -- you know, this is sort of people that
8 are in a remote rural area that are almost preparing for the
9 doomsday scenario with all of this canning, all these jars
10 containing all this food, and the manner in which it's stored.
11 So it kind of struck me that some of the other conduct is not
12 necessarily uncharacteristic of that kind of a mentality, so to
13 speak.

14 And the final thing I want to say is I just want to make
15 sure that the exhibits that we tendered to the Court are,
16 indeed, admitted with the exception of those two cultivation
17 agreements. Am I correct?

18 **THE COURT:** Correct.

19 **MR. PALAZZO:** Okay. Thank you, Your Honor. I
20 appreciate it.

21 **MS. GILBERT:** The Government has nothing further.

22 **THE COURT:** Okay. We're about to close out. I have
23 one more question for you, and I don't mean this question to
24 open up the whole discussion again.

25 But you had said at one point when you were talking about

PROCEEDINGS

1 the charge and you were talking about beginning in 2010 and
2 continuing on and talking about the admission in the
3 Plea Agreement that effectively admitted to some conduct,
4 conspiratorial type, but when the Defense says that the focus
5 for purposes of the rider should be on, effectively, the 320
6 plants, do you disagree with that?

7 **MS. GILBERT:** I think *McIntosh* said conduct, if I
8 recall. And I would want to take a quick look, but I think --
9 what I think is look to *McIntosh*. *McIntosh* said did they
10 strictly comply with California law.

11 And I think we have to look at whether they complied at
12 the time of the charge, but the charge begins before July 10th
13 of 2012. But I don't think you can just -- I think that -- I'm
14 not -- you know, I don't think we need to prove that the sales
15 that they made in 2010 or 2011 -- I don't think they need to
16 prove, excuse me, that the sales they made in 2010 or 2011 were
17 compliant with state law. It really is regarding the federal
18 charge.

19 Because if their conduct at the time of the charge was
20 compliant, then we can't prosecute -- we cannot continue to
21 prosecute them for the Indictment that's before the Court.

22 **THE COURT:** Well, you're stayed from doing it.

23 **MS. GILBERT:** Correct. We're stayed from expending
24 any funds is I think the best interpretation of *McIntosh*.

25 And so then the question is the only -- under *McIntosh*,

PROCEEDINGS

1 the only -- the defendants can only get that stay if they show
2 that they were strictly compliant with all of state law, and I
3 think that -- I don't think that that -- I don't think *McIntosh*
4 limits you.

5 **THE COURT:** In other words, another way to ask this
6 question is --

7 **MS. GILBERT:** Yeah.

8 **THE COURT:** -- if I conclude that what they've
9 admitted to is they were engaged in a marijuana business that
10 was illegal from the federal perspective from 2010 onward, are
11 you saying that ends the question or not?

12 Because they are more or less pointing out to me, many
13 times now, that the admissions really are -- they're suggesting
14 they're not backing away from the admissions, not suggesting I
15 can't take them into account, but simply saying all they
16 admitted to was, yes, they were engaging in -- from 2010
17 onward, their conduct was violative of federal law, but that
18 doesn't mean that you go back to 2010 on the compliance
19 question with state law.

20 When you're looking at that question, you're looking at
21 the 320 plants, 327 or whatever, on the date of the -- and
22 that's what I'm trying to drill down to and to get your view on
23 it. I don't know if you even understand the question.

24 **MS. GILBERT:** No, I understand -- no, I think I do
25 understand what you're saying.

PROCEEDINGS

1 I do think that the best reading of *McIntosh* is that we
2 look to their conduct that is the basis of the charge, and the
3 basis of the charge is the 320 plants. So, I mean, I agree
4 with the Court. I think that that is the best reading of the
5 law.

6 **THE COURT:** Okay.

7 All right. Let me ask, in terms of going forward, it
8 seems to me -- I just want to get a confirmation of this --
9 that there are certain avenues that we will ride down depending
10 upon what I decide. And I'm not going to decide it right now.
11 I'm going to take it back and review all this. It was an
12 interesting argument.

13 If the decision is that the Defense has not carried its
14 burden, then the next question, if I'm not mistaken, becomes --
15 well, at one point there was a motion to withdraw the plea.
16 That is technically administratively not out there, but that
17 would be subject to being revived by the defendants.

18 So that's one avenue, is that correct, that it would be --
19 if the decision of the Court is favorable to the Government on
20 this particular motion, the next thing that would have to be
21 adjudicated is potentially a motion to withdraw the plea?

22 **MR. RICHARDS:** Yes, but depending on my next point, I
23 have one question before that that would change that, make that
24 moot. So can I just ask you that question?

25 **THE COURT:** Yeah.

PROCEEDINGS

1 **MR. RICHARDS:** Okay. As the Court can appreciate,
2 we're dealing with serious charges, you know, felony charges --

3 **THE COURT:** Sure.

4 **MR. RICHARDS:** -- and the law is, like, moving around
5 very quickly. And then the Congress -- I didn't even put this
6 time, you know, the unbelievable amount of bills going through
7 Congress dealing with stuff just like that. I didn't want to
8 burden you with that, but my intention is that if you -- if the
9 Court denied this motion, the first -- my first request would
10 be, of course, is we would want to seek relief or review like
11 the other defendants have done and that they did in *McIntosh*
12 and they've done since *McIntosh* because, one, to be honest with
13 everybody, you know, in another year Congress may say this is
14 not a controlled substance anymore, and that will be a whole
15 nother series of issues. So I don't -- I'm not in a rush to
16 run my client to the guillotine.

17 **THE COURT:** No, you don't need to dance around it.
18 From your perspective, time is on your side, and I understand
19 that.

20 **MR. RICHARDS:** Well, legitimately. I'm not delaying
21 for the purpose of delaying. I mean, there is -- you know, I
22 never thought in my career I'd see five states already --

23 **THE COURT:** We don't -- I agree with you. I
24 understand that --

25 **MR. RICHARDS:** Okay.

PROCEEDINGS

1 **THE COURT:** -- and you don't need to justify why
2 time-wise it is -- you perceive a benefit, and that's perfectly
3 fair.

4 But, okay. So you would be seeking review at that point.

5 **MR. RICHARDS:** With your permission.

6 **THE COURT:** Well, but then the question is: Seeking a
7 stay and then -- okay.

8 **MR. RICHARDS:** In *McIntosh* they gave interlocutory
9 review.

10 **THE COURT:** Okay. So that answers part of my
11 question. So, in other words, where we would be in the event I
12 said no to the stay would be a request for a further stay for
13 purposes of appellate review as opposed to adjudicating the
14 motion to withdraw the plea.

15 **MR. RICHARDS:** Yes.

16 **THE COURT:** Okay. Now, if I deny the motion -- I
17 mean, if I grant the motion, what that does is, if I understand
18 it correctly, takes us to September, and then we have to
19 reassess because the rider only goes through September of 2017;
20 right?

21 **MR. RICHARDS:** Right. But in September if they
22 extended the rider -- and I will represent that the Senate
23 committee rejected the AG's request to not put the rider in
24 again. I don't know if you know that, but they said, "No,
25 we're not listening to you. We're going to keep the rider."

PROCEEDINGS

1 **THE COURT:** Although, the one thing we can all agree
2 on is there's zero point to speculating on what will happen. I
3 mean, that's interesting, but I wouldn't take that to the bank.
4 Who knows what's going to happen?

5 **MR. RICHARDS:** I wouldn't, but I will tell the Court
6 that there's a tremendous amount of interest politically and
7 it's an expanding interest --

8 **THE COURT:** Sure.

9 **MR. RICHARDS:** -- that states can make their own laws
10 related to this stuff and that the federal government is moving
11 back. I just see the trend. It's a fair statement that --

12 **THE COURT:** You've got that trend, and then you've got
13 a Department of Justice that is perhaps going a different
14 direction as of today, but who knows.

15 **MR. RICHARDS:** Maybe. Did something -- I didn't check
16 the news.

17 **THE COURT:** I haven't looked at the news today.

18 **MR. RICHARDS:** But the other -- yeah, so what I'm
19 saying is, if it is extended in September, I would start asking
20 the Government to dismiss based on potential speedy trial or
21 other issues. That's what they suggested, that the stay
22 shouldn't be forever, but I wouldn't -- I would agree -- I
23 wouldn't want to play -- I'd want to give them the same
24 courtesy that if in September the rider was gone, then I
25 wouldn't expect them to honor it anymore and I wouldn't be

PROCEEDINGS

1 crying foul and I would just, you know.

2 **THE COURT:** Okay.

3 **MR. RICHARDS:** But I think maybe you might want to --
4 I mean, it's already late July. September is coming pretty
5 quickly. I mean, you did one time in May say, "Hey, let's see
6 what happens." I mean, I think that you would feel better
7 if -- I mean, like you said at the onset, "Hey, if they
8 withdraw the rider, we don't need to go through this exercise";
9 but, I mean, we are coming up on the end of the rider.

10 **MS. GILBERT:** Unless there's a continuing
11 appropriation. Who knows; right? We never know.

12 **THE COURT:** Right.

13 **MR. RICHARDS:** And maybe they'll pass a real law that
14 doesn't have, like, this sort of, you know, "I want to touch it
15 but it's not cold." I mean, they may just pass a law that
16 says, you know, that we're going to -- like California did, all
17 pending matters go to misdemeanors or, you know, whatever.
18 But, I mean, the rider is an unusual way to --

19 **THE COURT:** Yes. Whatever one may think of the intent
20 behind it, this is not a very workable situation they've left
21 us with for anybody, for Prosecution, for the Defense. It
22 doesn't work very well --

23 **MR. RICHARDS:** Right.

24 **THE COURT:** -- but that's -- it's not our -- we're
25 stuck with what we're stuck with.

PROCEEDINGS

1 So, okay. That answers my question. I now kind of -- I
2 understand the scenario.

3 The one thing, then, that is unlikely to be in the
4 immediate future whatever, even if I go that route, the
5 motion -- the reason I'm asking this question is I looked back
6 at the docket and at one point you had made a motion to
7 withdraw the plea, and that actually is, just to tell you, it's
8 now closed on the court's record. So there is no pending
9 motion to that end, and you're fine with that?

10 **MR. RICHARDS:** As long as the Court doesn't think I'm
11 not deleterious in making it. The only reason why I was going
12 to make it is if you weren't going to grant a *McIntosh* hearing.
13 Then *McIntosh* came out, and then -- that was only if I couldn't
14 get the hearing. You granted the hearing.

15 **THE COURT:** All right.

16 **MR. RICHARDS:** But I don't want the record to reflect
17 we're playing fast and loose with the withdrawal. The
18 withdrawal was a stopgap issue because if he couldn't get the
19 hearing, I felt he was entitled to it and the circumstances had
20 changed.

21 But there is case law that says you have to, you know,
22 move diligently to withdraw a plea, but we don't really want to
23 withdraw the plea in the sense that we would like to just have
24 the case stayed. If the rider goes away and there is no more
25 rider, I'll represent to the Court and to my colleague that I

PROCEEDINGS

1 think we'll just go through with the sentencing.

2 I didn't create the rider. The day of the sentencing when
3 the president said he was going to sign this rider, you were
4 kind enough and my prior colleague, Adam --

5 **MS. GILBERT:** Wright.

6 **MR. RICHARDS:** -- Wright, who's a great guy, said,
7 "I'm not going to make you go forward in case this creates some
8 law," and then we had to wait a year for the Ninth Circuit to
9 make the law.

10 **THE COURT:** Right.

11 **MR. RICHARDS:** But that's why we stayed it, because I
12 had an excellent, ethical prosecutor that was very conscious
13 about not making someone plead to something and then a month
14 later it becomes -- they have a defense. And so he was very
15 decent in that regard and so were you.

16 **THE COURT:** I remember we got very close because I had
17 the PSR. I had my sentencing notes all ready.

18 **MR. RICHARDS:** Yeah.

19 **THE COURT:** Okay. And Ms. Gilbert has come in late in
20 the game, so at this rate Ms. Vartain's son will then be in
21 college.

22 (Laughter)

23 **MS. GILBERT:** Exactly. Exactly.

24 **THE COURT:** All right. Very good. Well, I will take
25 it under submission and go through all this. It was very

PROCEEDINGS

1 helpful. Thank you very much.

2 **MR. RICHARDS:** Thank you.

3 **MR. PALAZZO:** Thank you, Your Honor.

4 **MS. GILBERT:** Thank you, Your Honor.

5 (Proceedings adjourned at 2:09 p.m.)

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8 CERTIFICATE OF REPORTER

9 I certify that the foregoing is a correct transcript
10 from the record of proceedings in the above-entitled matter.

11

12 DATE: Thursday, August 24, 2017

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17 Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
18 U.S. Court Reporter

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