

Police Prosecutor Update

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SMOKEABLE HEMP FEDERAL COURT INJUNCTION

On September 13, 2019, the Southern District of Indiana issued its decision in C.Y. Wholesale v. Eric Holcomb, enjoining the State of Indiana from enforcing I.C. 35-48-4-10.1. The court found that the new legislation criminalizing smokeable hemp was preempted by federal statute in two ways. The first way was “express preemption.” The Farm Bill of 2018 stated, “No state . . . shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with [Section 10113 of the 2018 Farm Bill].” Because the statute did not expressly exempt out of state transporters from the criminal penalty (even though there provisions for them elsewhere in the statute), our prohibition was preempted. The court also ruled that the statute was “conflict preempted.” According to the court, Congress intended to de-stigmatize and legalize all low-THC hemp, including its derivatives and extracts, and to treat it as a regulated agricultural commodity. The 2018 Farm Bill expanded the federal definition of hemp to specifically include hemp derivatives and extracts, such as *hemp bud and hemp flower*. The plaintiffs, therefore, have shown at least some likelihood of establishing that provisions which criminalize hemp bud and hemp flower – derivatives of the kind specifically legalized by the Farm Bill – frustrates Congress’ objectives. The Court appeared to find that hemp bud and hemp flower were either extracts or derivatives of hemp, even though, in reality, they are parts of the plant.

Prior to enactment of I.C. 35-48-4-10.1, IPAC had sent the following guidance regarding the prosecution of marijuana:

If you need quantitative analysis ISP will submit it to another lab. The costs of the additional testing will not be charged to you; however, should you need testimony from the other lab, your county will have to pay the costs of bringing the witness from out-of-state in for testimony. Please also be aware that the out-of-state lab will need a sample of product weighing between 0.2g and 5g for quantitative testing. It will be up to the submitting agency to notify the laboratory that it wants quantitative analysis on a marijuana or marijuana extract exhibit. Also, keep in mind that based upon case facts that potentially not all marijuana cases may require this additional testing, and the ISP Lab may require a confirmed court date in order to proceed with the quantitation testing.

A very troubling complication of this ruling is the impact on the traditional marijuana case. The ordinary possessor of marijuana, or the street dealer, possesses marijuana with no indication of origin from industrial hemp, and when it comes to mounting a defense, newly asserts that his product has a legal origin. Sometimes, the facts of the case will make this type of defense implausible; a compressed brick of marijuana concealed in the spare tire is not going to come from industrial hemp. However, going forward, law enforcement needs to more proactively investigate persons found possessing or dealing marijuana to determine that the offender believes the substance to be marijuana, purchased it as marijuana, or sold it as marijuana. This will alleviate the need to quantitatively test all marijuana cases.

This is a publication of the Prosecutor’s Office which will cover various topics of interest to law enforcement officers. Please direct any questions or suggestions you may have for future issues to the Prosecutor’s Office.