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## PREVIEW; United States v. Campbell: *Rocky Mountain High – The Ninth Circuit’s Chance to Concentrate on the Definition of Marijuana*

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**PREVIEW; United States v. Campbell: Rocky Mountain High – The Ninth Circuit’s Chance to Concentrate on the Definition of Marijuana**

**Lauren Moose\***

The United States Court of Appeals for the Ninth Circuit is scheduled to consider the matter of United States v. Adam Walter Campbell on Aug. 31, 2020 at 9:00 a.m., in the William K. Nakamura Courthouse, Seattle, Washington. Larry Jent will likely appear on behalf of the Appellant Adam Campbell. Joseph Thaggard will likely appear on behalf of the Appellee the United States.

**I. INTRODUCTION**

The primary issue in this case is whether Appellant Adam Campbell’s manufacture of cannabis concentrates in 2016 complied with the Montana Medical Marijuana Act (“MMA”)<sup>1</sup> effectively enjoining the Department of Justice (“DOJ”) from prosecuting Campbell for violations of 21 U.S.C. § 856(a)(1)<sup>2</sup> and 18 U.S.C. § 2.<sup>3</sup> The Ninth Circuit’s decision will clarify the reach of the MMA, specifically if cannabis extracts and concentrates are considered marijuana as defined by the Montana Code Annotated § 50-32-101(18). This decision has the potential to render certain medicinal preparations illegal if the Ninth Circuit upholds the District Court’s exclusion of cannabis extracts and concentrates from the MMA’s definition of marijuana.<sup>4</sup>

**II. FACTUAL AND PROCEDURAL BACKGROUND**

In May of 2016, the Drug Enforcement Administration (“DEA”) and the Missouri River Drug Task Force (“MRDTF”) investigated Montana Bud, a medical marijuana production and distribution business in Bozeman, Montana.<sup>5</sup> Montana Bud was licensed to sell “marijuana-infused products.”<sup>6</sup> A raid uncovering significant amounts of marijuana plants, hashish oil, and a butane hash oil laboratory led to the indictment of Adam Campbell, an employee of Montana Bud and owner of the

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<sup>1</sup> See generally MONT. CODE ANN. §§ 50-46-301 to 344 (2015). Campbell was prosecuted in accordance to the 2015 version of this act, the current version does offer further clarification on manufacturing concentrates under the MMA.

<sup>2</sup> 21 U.S.C.A. § 856(a)(1) (Westlaw through Pub. L. No. 116-158) (it is unlawful to maintain a space that manufactures controlled substances except as narrowly exempted within state marijuana laws).

<sup>3</sup> 18 U.S.C.A. § 2 (Westlaw through Pub. L. No. 116-158).

<sup>4</sup> United States v. Campbell, No. CR 18-5-BU-DLC, 2018 WL 6728062, at \*6 (D. Mont. Dec. 21, 2018), *appeal docketed*, No. 19-30115 (Jun. 6, 2019).

<sup>5</sup> Appellant’s Opening Brief at \*5, *United States v. Campbell*, (9th Cir. Dec. 5, 2019) (No. 19-30115) [hereinafter Appellant’s Opening Brief].

<sup>6</sup> *Id.* at \*7; see generally MONT. CODE ANN. § 50-46-302(6)(a) (marijuana-infused products contain marijuana and are intended for use by a registered card holder by means other than smoking).

property it operated on.<sup>7</sup> Campbell entered a plea agreement regarding his first two counts, Conspiracy to Manufacture and Distribute Controlled Substances,<sup>8</sup> and Possession with Intent to Distribute Marijuana.<sup>9</sup> The third count, Maintaining Drug Involved Premises, is at issue on this appeal.<sup>10</sup>

Campbell moved the United States District Court for the District of Montana to dismiss the remaining count after presenting evidence at a “McIntosh Hearing.”<sup>11</sup> Typically, in adherence with the Supremacy Clause, federal law takes precedence over interfering or contradicting state laws.<sup>12</sup> However, the Ninth Circuit in *McIntosh* carved out an exception to this principle when it clarified the reach of a rider known as the “Rohrabacher-Farr Amendment.”<sup>13</sup> This rider, attached to an omnibus spending bill, halted the DOJ’s use of federal funds to prosecute individuals who violate the Controlled Substance Act while acting in compliance with their state’s medical marijuana laws.<sup>14</sup> The *McIntosh* court held that defendants are entitled to an evidentiary hearing to determine if they acted in compliance with state law.<sup>15</sup> The defendant must strictly comply with state law to enjoin the DOJ’s prosecution.<sup>16</sup> The United States bears the initial burden to establish that the defendant failed to sufficiently comply with state law.<sup>17</sup>

The United States argued that Campbell did not act in strict compliance with the MMA because he: (1) distributed marijuana in greater amounts than those condoned by the MMA; (2) distributed marijuana across state borders; (3) imported hash oil; and (4) manufactured and distributed hash oil.<sup>18</sup> Though the Appellee raised four arguments, the District Court considered the last, manufacturing and distributing hash oil,

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<sup>7</sup> *Campbell*, 2018 WL 6728062 at \*3.

<sup>8</sup> See generally 21 U.S.C.A. § 846 (Westlaw through Pub. L. No. 116-158); *Campbell*, 2018 WL 6728062 at \*4 (out of state possession is not in accordance with the MMA).

<sup>9</sup> See generally 21 U.S.C. § 841(a)(1) (Westlaw through Pub. L. No. 116-158); 18 U.S.C. § 2; *Campbell*, 2018 WL 6728062 at \*4 (out of state possession is not in accordance with the MMA).

<sup>10</sup> 21 U.S.C.A. § 856(a)(1) (Campbell was indicted for owning property used to manufacture “hashish” and “hash oil”).

<sup>11</sup> *United States v. McIntosh*, 833 F.3d 1163, 1176–77 (9th Cir. 2016) (established the right for defendants prosecuted in violation of federal controlled substance laws to demonstrate a strict compliance with state marijuana laws. If strict compliance is shown, it enjoins the expenditure of federal funds to prosecute these defendants).

<sup>12</sup> See U.S. CONST. art. VI, cl. 2.

<sup>13</sup> Consolidated and Further Continuing Appropriations Act, H.R. 83, 113th Cong. § 538 (2014).

<sup>14</sup> *Id.*

<sup>15</sup> *McIntosh*, 833 F.3d at 1179 (this has become known as a “McIntosh Hearing”).

<sup>16</sup> *Id.*

<sup>17</sup> *United States v. Campbell*, No. CR 18-5-BU-DLC, 2018 WL 6728062, at \*3 (D. Mont. Dec. 21, 2018), *appeal docketed*, No. 19-30115 (Jun. 6, 2019). The District of Montana found the government bears the initial burden to establish a preponderance of evidence. If proved, the burden shifts to the defendant. The Ninth Circuit has not provided further direction on who initially bears the evidentiary burden.

<sup>18</sup> Answering Brief of the United States at \*12, *United States v. Campbell*, (9th Cir. Mar. 9, 2020) (No. 19-30115) [hereinafter Answering Brief].

dispositive.<sup>19</sup> Relying on *Montana v. Pirello*,<sup>20</sup> the District Court found “nothing in the MMA or the administrative rules in existence during the period covered by the indictment provided that hashish or hash oil is a substance subject to the MMA.”<sup>21</sup> The District Court found that once reduced to concentrate, marijuana was not an “intact plant material” and could not be considered marijuana per the MMA.<sup>22</sup> The District Court came to this conclusion reliant on *Pirello*’s differentiation between the concentrate “hashish” and “usable marijuana.”<sup>23</sup> This was the only issue analyzed by the District Court. Campbell now appeals this decision and is requesting the Ninth Circuit find that cannabis concentrates are included within the MMA’s legal definition of marijuana.<sup>24</sup>

### III. SUMMARY OF THE ARGUMENTS

Both parties’ arguments center on what the legal definition of marijuana encompasses. Specifically, whether cannabis concentrates are considered marijuana by the MMA.

The Appellant, Campbell, claims the District Court erred by denying his motion to dismiss under *McIntosh*.<sup>25</sup> The District Court interpreted marijuana-infused products to mean products made with “usable” or “intact” marijuana.<sup>26</sup> This decision left mechanically processed or extracted materials and concentrates outside of the definition of marijuana, and therefore, outside the protections of the MMA and the Rohrabacher-Farr Amendment.<sup>27</sup> Campbell argues that the MMA should be read to include cannabis concentrates under the definition of marijuana.<sup>28</sup> If the statutes cannot be reconciled to complement this understanding, Campbell argues the Court should resolve the ambiguities of the statutes by invoking the rule of lenity.<sup>29</sup> Finally, Campbell contends the Court should retroactively apply amendments made to the MMA in 2017, that clarify the use of cannabis concentrates in marijuana-infused products is included under the statute, to his appeal.<sup>30</sup>

The Appellee, the United States, counters by claiming the District Court correctly denied Campbell’s motion to dismiss because the cannabis concentrates hashish and hash oil do not fall under the MMA’s definition

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<sup>19</sup> *Campbell*, 2018 WL 6728062 at \*4.

<sup>20</sup> 282 P.3d 662, 664–65 (Mont. 2012) (holding that hashish was not a “usable” form of marijuana).

<sup>21</sup> *Campbell*, 2018 WL 6728062 at \*4.

<sup>22</sup> *Campbell*, 2018 WL 6728062 at \*17 (citing *Pirello*, 282 P.3d at 664–65 (discussing the definition of “hashish” under the 2009 MMA)).

<sup>23</sup> *Id.* at \*16.

<sup>24</sup> Appellant’s Opening Brief, *supra* note 5, at \*9.

<sup>25</sup> *Id.* at \*10.

<sup>26</sup> *Id.* at \*12; *Campbell*, 2018 WL 6728062 at \*14.

<sup>27</sup> *Campbell*, 2018 WL 6728062 at \*5.

<sup>28</sup> Appellant’s Opening Brief, *supra* note 5, at \*14.

<sup>29</sup> *Id.* at \*22. The rule of lenity requires the court to apply an ambiguous criminal statute in favor of the defendant.

<sup>30</sup> *Id.* at \*25.

of marijuana.<sup>31</sup> The Appellee argues that cannabis concentrates derived from a marijuana plant cannot classify as marijuana under the MMA because they are not dried plant materials.<sup>32</sup> It further claims there was not a grievous ambiguity in the MMA to justify the use of the rule of lenity, and that the 2017 modifications to the MMA substantially changed the MMA instead of clarifying it; therefore the new version of the MMA should not retroactively apply.<sup>33</sup>

#### A. *Appellant's Argument*

Campbell primarily argues that the District Court wrongfully denied his motion to dismiss after his McIntosh Hearing. He claims the District Court incorrectly interpreted the MMA when it excluded cannabis concentrates from the legal definition of marijuana.<sup>34</sup> Subsequently, Campbell asserts the United States failed to establish, by a preponderance of the evidence, that Campbell was guilty since Montana Bud had a license to produce marijuana-infused products.<sup>35</sup> Marijuana-infused refers to a product “that contains marijuana and is intended for use . . . by a means other than smoking” and includes “edible products, ointments, and tinctures.”<sup>36</sup> The 2015 MMA authorizes a provider to “manufacture and provide marijuana-infused products.”<sup>37</sup> Campbell argues “manufacture” in this sense includes extracting concentrates obtained from marijuana plants.<sup>38</sup>

For several reasons Campbell disputes the District Court’s conclusion that marijuana reduced to concentrate is no longer marijuana under the MMA. First, the District Court incorrectly relied on “usable marijuana” because this term applies only to the quantity of dried marijuana material a registered patient or provider may possess at one time, not other types or forms of marijuana a provider may manufacture.<sup>39</sup> Next, Campbell argues *Pirello* has no place in this analysis because marijuana-infused products must contain “marijuana” not “usable marijuana.”<sup>40</sup> Campbell asserts it is unrealistic to create a marijuana-infused product in accordance with the District Court’s limitation of

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<sup>31</sup> Answering Brief, *supra* note 18, at \*20.

<sup>32</sup> *Id.* at \*29–30.

<sup>33</sup> *Id.* at \*31–33.

<sup>34</sup> Appellant’s Opening Brief, *supra* note 5, at \*21.

<sup>35</sup> *Id.* at \*14–15; *see generally* United States v. Campbell, No. CR 18-5-BU-DLC, 2018 WL 6728062, at \*3 (D. Mont. Dec. 21, 2018), *appeal docketed*, No. 19-30115 (Jun. 6, 2019) (stating that the prosecution bears the initial burden of evidence).

<sup>36</sup> MONT. CODE ANN. § 50-46-302(6)(a) (2015).

<sup>37</sup> MONT. CODE ANN. § 50-46-302(13) (2015).

<sup>38</sup> Appellant’s Reply Brief at \*2, *United States v. Campbell*, (9th Cir. Apr. 29, 2020) (No. 19-30115) [hereinafter Appellant’s Reply Brief]; Appellant’s Opening Brief at \*14.

<sup>39</sup> Appellant’s Opening Brief, *supra* note 5, at \*25.

<sup>40</sup> *Id.* at \*16; *see generally* MONT. CODE ANN. § 50-46-302(6)(a), (20) (2015) (defining “usable marijuana” as the dried leaves and flowers of the marijuana plant and any mixtures or preparations of the dried leaves and flowers); *contra* Montana v. Pirello, 282 P.3d 662, 664–65 (Mont. 2012) (holding only “usable marijuana” was protected by the MMA).

“usable marijuana.”<sup>41</sup> To give products such as ointments and edibles their medicinal properties it is necessary to extract THC, the healing factor, from marijuana plants. By using cannabis concentrate, the infused products can boast a consistent dose.<sup>42</sup> He points out the inefficiency of only allowing consumption of medical marijuana in dried form and asserts that the District Court’s interpretation contradicts the MMA’s allowance of medicinal products.<sup>43</sup> He further claims that though the Montana Controlled Substance Act (“MCSA”) defines the concentrate hashish separately from marijuana, this distinction does not support the District Court’s decision.<sup>44</sup> He argues that pursuant to the MCSA, hashish, as all other controlled substances, is considered illegal “except as provided in Title 50, Chapter 46” of the Montana Code Annotated.<sup>45</sup> Campbell asserts since marijuana means “all plant material from the genus *Cannabis* containing tetrahydrocannabinol (“THC”)<sup>46</sup> and because hashish is derived from “marijuana plant materials” the concentrate was intended to classify as marijuana and does not necessitate a separate definition in the MMA.<sup>47</sup>

If the Ninth Circuit rejects Campbell’s argument that hashish and other cannabis concentrates are marijuana under the MMA, he argues the rule of lenity should apply to his case.<sup>48</sup> This rule favors a defendant when a criminal statute is found to be ambiguous.<sup>49</sup> Campbell argues since the MMA allows for the sale of edible medical marijuana and other marijuana-infused products,<sup>50</sup> but fails to provide appropriate direction on how to create these medicinal products, he understandably assumed he could extract concentrate from marijuana plants to infuse his products with consistent, accurate measures of THC.<sup>51</sup>

Campbell’s final argument claims that the 2017 Montana Legislature clarified the presumed ambiguity surrounding this issue, and therefore it should apply retroactively to his appeal.<sup>52</sup> He argues the 2017 version did not add to the 2015 MMA; instead it made clear that the process Montana Bud used to extract cannabis concentrate was always allowed.<sup>53</sup> He contends that because hashish is a concentrate derived from

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<sup>41</sup> Appellant’s Opening Brief, *supra* note 5, at \*23.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Appellant’s Reply Brief, *supra* note 36, at \*1; *see generally* MONT. CODE ANN. § 50-32-101(15).

<sup>45</sup> MONT. CODE ANN. § 45-9-102(1) (2015).

<sup>46</sup> MONT. CODE ANN. § 50-32-101(18) (2015).

<sup>47</sup> Appellant’s Reply Brief, *supra* note 38, at \*1–4.

<sup>48</sup> Appellant’s Opening Brief, *supra* note 5, at \*22.

<sup>49</sup> *See generally* United States v. Wyatt, 408 F.3d 1257, 1262 (9th Cir. 2005) (holding “when a criminal statute is ambiguous” it favors the defendant).

<sup>50</sup> MONT. CODE ANN. § 50-46-302(13) (2015).

<sup>51</sup> Appellant’s Opening Brief, *supra* note 5, at \*22.

<sup>52</sup> *Id.* at \*25

<sup>53</sup> Appellant’s Reply Brief, *supra* note 38, at \*3.

the marijuana plant, though the 2015 MMA lacked the clarifying language of the 2017 MMA, the intent for the concentrates to be regulated by the MMA did not change.<sup>54</sup>

### B. Appellee's Argument

The United States responds to Campbell's claim that it failed to surmount its burden of evidence at the McIntosh Hearing by pointing to two presumed deficiencies in his argument.<sup>55</sup> It first highlights an interpretation of *United States v. Evans* that would relieve the government of the initial burden of proof.<sup>56</sup> Second, if it was required to initially prove a lack of strict compliance by Campbell, it met its burden.<sup>57</sup> The United States claims that it did demonstrate that Montana Bud and Campbell manufactured and distributed hash oil, which it claims is not marijuana defined by the MMA, and thus outside the protections of the Rohrabacher-Farr Amendment.<sup>58</sup> It relies heavily on *Pirello*, and assert that none of the terms "marijuana, marijuana-infused product, or usable marijuana" include hashish or hash oil in their definitions—therefore cannabis concentrates cannot be considered marijuana.<sup>59</sup> The Appellee claims that the Montana Legislature intentionally chose not to define a marijuana-infused product as containing a cannabis concentrate, and that this choice demonstrates the MMA does not condone a provider's manufacture of cannabis concentrates.<sup>60</sup> It attacks Campbell's efficiency argument by claiming nothing stops patients and providers from only using dried marijuana in marijuana-infused products.<sup>61</sup>

The Appellee argues that the District Court correctly ruled that the MMA lacked an ambiguity so uncertain that the rule of lenity must be applied in Campbell's favor.<sup>62</sup> The government denies Campbell's complaint that the MMA provides for the sale of infused products without providing a clear understanding of how to legally infuse those products consistently.<sup>63</sup> Instead, Appellee asserts that hashish and other cannabis concentrates clearly fall outside the plain language parameters of the MMA; thus there cannot be a grievous ambiguity in the language of the

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<sup>54</sup> See MONT. CODE ANN. § 50-46-302(10) (2017) (Marijuana concentrate is "any type of marijuana product consisting wholly or in part of the resin extracted from any part of the marijuana plant"); MONT. CODE ANN. § 50-32-101(15) (2015) ("Hashish . . . is composed of resin from the cannabis plant").

<sup>55</sup> Answering Brief, *supra* note 18, at \*24.

<sup>56</sup> 929 F.3d 1073, 1076–77 (9th Cir. 2019) (required the defendant to first prove compliance with state law).

<sup>57</sup> Answering Brief, *supra* note 18, at \*25.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at \*26.

<sup>60</sup> *Id.* at \*27.

<sup>61</sup> *Id.* at \*29.

<sup>62</sup> *Id.* at \*31.

<sup>63</sup> *Id.*

statute to provide Campbell relief.<sup>64</sup> They firmly differentiate between marijuana and cannabis concentrates, claiming that because the MCSA differentiates concentrates as “highly-condensed psychoactive resin” they cannot also classify as marijuana.<sup>65</sup>

Finally, the Appellee denies that the 2017 modifications to the MMA were mere clarifications of the role of concentrates within the MMA.<sup>66</sup> They assert the changes in 2017 added to the scope of the MMA, and as such cannot be applied retroactively.<sup>67</sup> For current law to be applied to preceding criminal charges, there must be a clear intent by the legislature to allow for such action.<sup>68</sup> The United States argues that no clear intent exists within the 2017 MMA.<sup>69</sup>

#### IV. ANALYSIS

The deciding issue, whether cannabis concentrates fit the definition of marijuana under the MMA will be considered de novo.<sup>70</sup> Regardless of which side the Ninth Circuit comes down on, this case will have lasting implications that affect both qualifying patients and medical marijuana providers in Montana as they interpret present and future modifications to the MMA.

Neither the arguments concerning the rule lenity or applicability of the 2017 MMA will contribute much to this decision. Both will likely fall, by default, in line with the Ninth Circuit’s interpretation of the main issue. Because Montana’s medical marijuana laws have historically changed from legislative session to session, Campbell’s argument that the ambiguity of the statute should favor his position at first seems like a valid approach. In 2004, Montana enacted the MMA and the original version remained lenient until 2011, when stricter legislation took its place.<sup>71</sup> Again in 2015, the MMA saw changes.<sup>72</sup> The 2015 version of the statute is at issue here. The clash of understanding by Campbell and the United States in and of itself demonstrates an ambiguity in the MMA. However,

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<sup>64</sup> *Id.* at \*32 (citing *United States v. Phillips*, 376 F.3d 846, 857, n. 39 (9th Cir. 2004) (The ambiguity must be “grievous” in nature to favor the defendant under this rule.).

<sup>65</sup> *Id.* at \*33.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *See generally* *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1079 (9th Cir. 2005).

<sup>69</sup> Answering Brief, *supra* note 18, at \*35.

<sup>70</sup> *See generally* *Garmon v. County of Los Angeles*, 828 F.3d 837, 842 (9th Cir. 2016) (Where issues of statutory interpretation are considered by appellate courts as if for the first time.).

<sup>71</sup> *Montana Cannabis Indus. Ass’n v. State*, 286 P.3d 1161, 1163 (Mont. 2012); *see generally* Thomas J. Bourguignon, *Montana Cannabis Industry Association v. State of Montana and the Constitutionality of Medical Marijuana*, 75 MONT. L. REV. 167, 171–72 (2014) (The 2004 act allowed qualifying patients access to medical marijuana, it did not restrict the number of patients a caregiver could assist, in 2011 the act became more restrictive, and required “objective proof” to become a registered cardholder; it also limited providers to three qualifying patients).

<sup>72</sup> *See generally* MONT. CODE ANN. §§ 50-46-301 through 344 (2015).



Campbell raises the rule of lenity as a tiebreaker, not a primary issue; consequently, the Ninth Circuit will likely find it does not support his argument.<sup>73</sup> If the Ninth Circuit agrees with his primary argument, that cannabis concentrates are marijuana, the rule of lenity proves unnecessary. However, if the Court does find that the MMA did not cover concentrates, it will likely reach this conclusion because it considers the 2015 MMA clear enough in its definitions to support the District Court's conclusion that there was no grievous ambiguity in the statute's writing.<sup>74</sup>

Campbell's request for the 2017 MMA to retroactively apply suffers a similar redundancy. He argues that the 2017 MMA clarified that his actions were legal under the 2015 MMA.<sup>75</sup> If the Ninth Circuit concurs, application of the 2017 MMA is unnecessary because the 2015 MMA will sufficiently protect him.<sup>76</sup> However, if the Ninth Circuit instead finds that cannabis concentrates are not defined as marijuana under the 2015 MMA, it will likely not agree with Campbell's claim that the 2017 MMA clarified, rather than added to the understanding of concentrates per marijuana-infused products.<sup>77</sup>

The crux of this case is whether cannabis concentrates constitute marijuana as defined by the MMA. For Campbell to prevail on this issue, his argument will have to overcome the District Court's outdated precedent.<sup>78</sup> In 2012, Buddy Pirello argued his criminal charges for possession should be dropped because he possessed the concentrate hashish in accordance with the MMA's limitations of "usable marijuana."<sup>79</sup> The Court found that hashish did not meet the criteria of usable marijuana because the MMA defined it as "the dried leaves and flowers of marijuana and any mixture or preparation of marijuana."<sup>80</sup> The Court found because the plant material used to make hashish was reduced to resin, it not only no longer qualified as usable marijuana, it also failed to fit the general definition of marijuana under the MMA.<sup>81</sup> Therefore, it did not classify as a medical marijuana exemption of the Controlled Substances Act.<sup>82</sup> Whether *Pirello* correctly interpreted concentrate as separate from the definition of usable marijuana does not apply to

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<sup>73</sup> *United States v. Campbell*, No. CR 18-5-BU-DLC, 2018 WL 6728062, at \*17 (D. Mont. Dec. 21, 2018), *appeal docketed*, No. 19-30115 (Jun. 6, 2019).

<sup>74</sup> *Id.*; *see generally* *United States v. Phillips*, 376 F.3d 846, 857, n. 39 (9th Cir. 2004) (the ambiguity in the statute must be grievous to favor the defendant); *Montana v. Pirello*, 282 P.3d 662, 664–65 (Mont. 2012) (the Court would likely use this precedent to reach a conclusion the statute was sufficiently clear).

<sup>75</sup> Appellant's Opening Brief, *supra* note 5, at \*25.

<sup>76</sup> *Id.*

<sup>77</sup> Appellant's Reply Brief, *supra* note 38, at \*3–4.

<sup>78</sup> *Campbell*, 2018 WL 6728062 at \*14; *see generally* *Pirello*, 282 P.3d at 662.

<sup>79</sup> *Pirello*, 282 P.3d at 664–65.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 665; *see generally* 21 U.S.C. chp. 13 (chapter on controlled substances).

Campbell's issue. The issue is if cannabis concentrates fit within the general definition of marijuana, not the *usable* marijuana definition. Current courts and legislature are trending towards defining cannabis concentrates as marijuana for purpose of state medical marijuana laws.<sup>83</sup>

Accordingly, the Ninth Circuit will likely find that the District Court incorrectly relied on *Pirello*; both because the present case addresses a different issue, and *Pirello* has become outdated. Campbell never argued that cannabis concentrates are usable marijuana; he claims that concentrates fit the general definition of marijuana, and thus are an accepted component of a marijuana-infused products.<sup>84</sup> Usable marijuana references the amount of dried plant material a person can possess.<sup>85</sup> Though *Pirello* does offer a Montana based precedent, the Ninth Circuit will likely instead apply a different, more fitting analysis that recently arose from Arizona in *Arizona v. Jones*.<sup>86</sup> Due to the factual similarities of this present case and *Jones*, and that of Montana and Arizona's marijuana laws, it is likely the Ninth Circuit will follow the Arizona Supreme Court's analysis and find that cannabis concentrates are marijuana for the purposes of the MMA.<sup>87</sup>

In *Jones*, the Arizona Supreme Court considered the plain language of that state's statute, and found that cannabis concentrates are marijuana for the purposes of the Arizona Medical Marijuana Act ("AMMA").<sup>88</sup> The Court closely examined the definition of marijuana, defined in the AMMA, as "all parts of the plant" and held that the plain meaning of "all" and "parts" extended to cannabis extracts and concentrates as they originate from parts of the marijuana plant.<sup>89</sup> The Court also interpreted "manufacture" to mean making a "product suitable for use," especially when creating a marijuana product not intended to be smoked.<sup>90</sup> After taking into consideration medical use and methods of consumption, the Court concluded that, though cannabis concentrates are not expressly stated in the AMMA's definition of marijuana, the surrounding statutes implied that the extension of state medical marijuana laws encompassed cannabis concentrates.<sup>91</sup> Montana and Arizona have

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<sup>83</sup> *E.g.*, MONT. CODE ANN. § 50-46-302(10) (2017) (marijuana concentrate means any marijuana product consisting of extracted plant material); *See also* Arizona v. Jones, 440 P.3d 1139 (Ariz. 2019) (Arizona's medical marijuana act defines marijuana as including cannabis concentrates); People v. Mulcrevy, 182 Cal. Rptr. 3d 176 (Cal. App. 3d dist. 2014) (finding concentrates are protected by the Compassionate Use Act).

<sup>84</sup> Appellant's Reply Brief, *supra* note 38, at \*1-2.

<sup>85</sup> *Id.*

<sup>86</sup> *See generally* Jones, 440 P.3d at 1139.

<sup>87</sup> *Id.* at 1144.

<sup>88</sup> *Id.* at 1142.

<sup>89</sup> Jones, 440 P.3d at 1142; compare MONT. CODE ANN. § 50-32-101(18) (2015) (the Montana definition also includes "all parts of any plant of the genus cannabis").

<sup>90</sup> Jones, 440 P.3d at 1142.

<sup>91</sup> *Id.*; see ARIZ. REV. STAT. ANN. §§ 36-2801(1), (8), (15).

very similar statutory definitions of marijuana.<sup>92</sup> Since the states share such close language, it is likely the Ninth Circuit comes to the same conclusion regarding the MMA that the Arizona Supreme Court came to regarding the AMMA.

The Court in *Jones* referenced *Pirello*, and distinguished the Montana Court’s analysis from their own because *Pirello* “cross-references and incorporates the criminal code distinction between marijuana and hashish.”<sup>93</sup> However, the Ninth Circuit will likely consider this distinction a fault to the application of *Pirello* to the present case, not a difference between the Montana and Arizona statutes. This is likely because *Pirello* identifies the distinction between hashish and “usable marijuana” under the 2009 MMA, not how the 2015 MMA might allow for the use and manufacture of cannabis concentrates under the general definition of marijuana.<sup>94</sup> The Ninth Circuit will likely focus on the Arizona Supreme Court’s analysis that because “resin must first be extracted from the plant” it “reflects that it is part of the plant.”<sup>95</sup> This conclusion supports that the cannabis concentrate hashish, made from resin, fits the MMA’s definition of marijuana.<sup>96</sup>

## V. CONCLUSION

This Ninth Circuit decision will determine the legal definition of marijuana in Montana for the purposes of the MMA. If the Ninth Circuit affirms the District Court’s decision, it will restrict medical marijuana to the exclusive use of dried products, effectively banning cannabis concentrates and extracts. This extends to edibles and ointments that use cannabis concentrates to ensure a consistent measure of THC; these products could remain illegal under the separate definition of hashish found in the MCSA. Failure to reverse the District Court’s decision could severely limit qualifying patients’ use of medical marijuana.

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<sup>92</sup> MONT. CODE ANN. § 50-32-101(18) (2015) (“marijuana means all plant material from the genus cannabis containing tetrahydrocannabinol); ARIZ. REV. STAT. ANN. § 36-2801(10) (“marijuana means all parts of any plant of the genus cannabis”).

<sup>93</sup> *Id.*

<sup>94</sup> *Montana v. Pirello*, 282 P.3d 662, 664–65.

<sup>95</sup> *Jones*, 440 P.3d at 1142; *see generally* ARIZ. REV. STAT. ANN. § 36-2801(10) (“marijuana means all parts of any plant of the genus cannabis”).

<sup>96</sup> MONT. CODE ANN. § 50-32-101(18) (2015) (“marijuana means all plant material from the genus cannabis containing tetrahydrocannabinol); *see Jones*, 440 P.3d at 1142 (“Taken together, ‘all parts’ refers to all constituent elements of the marijuana plant, and the fact the resin must first be extracted from the plant reflects that it is part of the plant”).