No. 03-50425

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Michael W. Teague,

Defendant-Appellee.

Appeal from
The United States District Court
For the Central District of California
District Court No. CR-02-0098 DOC

APPELLANT'S OPENING BRIEF

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A. Statutory Basis of Subject Matter Jurisdiction of the District Court

The district court had jurisdiction to hear the federal charges under 18 U.S.C. § 3231.

B. Statutory Basis of Jurisdiction in the Court of Appeals

The district court's Judgment is appealable pursuant to 28 U.S.C. § 1291.

C. Timeliness

The district court entered judgment on August 22, 2003. (ER 58).[1] Defendant/appellant Michael Teague ("Teague") filed his Notice of Appeal on August 25, 2003 (ER 62), which is timely pursuant to Rules 4(b)(1)(A)(i) and 4(b)(2) of the Federal Rules of Appellate Procedure.

D. Finality

This appeal is from a final judgment that disposes of all the issues before the district court.

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[1] The following abbreviations will be utilized in this brief:
ER = Excerpts of Record;
CR = Clerk's Record;
RT = Reporter's Transcript at trial;
RT(date) = Reporter's Transcript (date);
PSR = Presentence Report.

ISSUES PRESENTED FOR REVIEW

1. Should the case be remanded to the district to determine whether it erroneously sentenced Teague to a term of four years of supervised release based on its mistaken belief that this was the mandatory minimum?

2. Should this Court reverse Teague's conviction and order the dismissal of his indictment as a matter of law because Teague suffered prejudice and the fundamental integrity of the appellate process was undermined when he served the entirety of his eighteen month prison sentence without an opening brief being filed on his behalf, due to the unreasonable appellate delay caused by his former court-appointed counsel and the court reporter?

3. Did the district court err in failing to dismiss this medical marijuana prosecution because it violates the federalist principles embodied by the United States Constitution, and, in particular, the Tenth Amendment, since the federal government has commandeered evidence gathered by state officials after they declined to prosecute Teague because his conduct has been deemed legal by the State of California?

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Case Below

This is an appeal from a criminal conviction for one count of cultivation of marijuana, in violation of 21 U.S.C. § 841(a)(1). (ER 58). Pursuant to a bench

trial based on stipulated facts, Teague was found guilty of one count of cultivation of marijuana on February 7, 2003. (ER 5 & 58). On August 18, 2003, after five sentencing hearings, the district court sentenced Teague to 18 months imprisonment, four years of supervised release, and imposed a $500.00 fine. (ER 58; CR 84, 85, 86, 89 & 91).

B. Bail Status

Teague has served his term of imprisonment and is currently on supervised release.

SUMMARY OF THE ARGUMENT

Teague is a medical marijuana patient who cultivated just over one hundred marijuana plants for his personal medical use in accordance with California law. After the State authorities who investigated Teague declined to prosecute him because of California's Compassionate Use Act, Cal. Health & Safety Code § 11362.5, the federal government assumed jurisdiction and prosecuted him for marijuana cultivation, seeking a five-year mandatory minimum sentence. Teague had no defense to the federal charges against him, so he threw himself at the mercy of the court, stipulating to the facts ensuring his conviction. After finding him guilty, the district court found Teague eligible for the "safety valve" provisions of 18 U.S.C. § 3553(f) and Sentencing Guideline § 5C1.2, and sentenced him to a term of imprisonment of 18 months and four years of supervised release. (ER 91).

In sentencing Teague to this lengthy term of supervised release, which is nearly three times the length of his prison term, the district court apparently believed that it had no discretion to do otherwise -- the Probation Office led him to believe that this mandatory minimum term applied, notwithstanding Teague's eligibility for the safety valve. Once Teague qualified for the safety valve, the mandatory minimum term of supervised release did not apply and the sentencing court was vested with the discretion to impose a proper term of supervised release, based on the considerations expressed in 18 U.S.C. § 3553(a). All indications are that the district court did not realize this, as it sentenced Teague to four years of supervised release without elaboration. Remand is required to permit the district court to exercise its sentencing discretion.

In addition to this error, Teague was prejudiced by the unreasonable appellate delay caused by his former court-appointed attorney and the court reporter. Because of the derelictions of these individuals, which are attributable to the government for the purposes of this claim, Teague served the entirety of his eighteen-month term of imprisonment before his opening brief was even filed. This fact, coupled with the unusual anxiety and concern Teague suffered from the lack of communication with his court-appointed attorney and from watching other medical marijuana defendants whose opening briefs had been filed get released

from custody pending appeal, requires the reversal of his conviction and the dismissal of the charges against him.

Finally, the district court erred in failing to dismiss the charges against Teague based on the federalist principles embodied by the Federal Constitution and, in particular, the Tenth Amendment. Unlike *Gonzales v. Raich*, __ S.Ct. __ (June 6, 2005), this case is a criminal case, which implicates a different array of federalist principles than that civil case. There can be no greater affront to our federalist system of government than for the government to seek to displace a liberty-enhancing policy of a state by seeking to deter its citizens from exercising their state-conferred liberty through the imposition of extremely harsh criminal penalties. The federal government has essentially commandeered the investigation commenced by state authorities by using the evidence they obtained in their investigation after they declined to prosecute Teague out of respect for California law. By making the state officials its servants, the government has violated the Tenth Amendment.

STATEMENT OF FACTS

A. Pretrial and Trial Proceedings

To "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes" without criminal penalty, fifty-six percent of the California electorate approved Proposition 215 ("the Compassionate Use Act") in

November of 1996. *See* Cal. Health & Safety Code § 11362.5(b)(1). Pursuant to this law, and because he is allergic to conventional painkillers, Teague obtained a physician's recommendation to use marijuana to treat his chronic back pain, which stems from a serious high school wrestling injury. (*See* PSR ¶¶67 & 68).[2] This makes him a "qualified patient" under California law. (Cal. Health & Safety Code § 11362.5(d)).

In accordance with California law, Teague cultivated just over one hundred marijuana plants at his home to supply himself with the medicine he needs to treat his chronic back pain. (*See* ER 7). Based upon a tip from a confidential informant who was facing criminal prosecution, deputies from the Orange County Sheriff's Office obtained a search warrant to search Teague's home. (CR 67, Exhibit A, at 3). On April 2, 2003, these state officials executed this search warrant and found between 102 and 108 marijuana plants in Teague's garage. (ER 7). No significant sums of cash were found, but a pistol was found in the pocket of a jacket hanging in Teague's closet, which his mother had left there. (ER 10 & 35; PSR ¶ 26).[3] State prosecutors refused to prosecute Teague, who had no prior criminal history,

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[2] The Presentence Report has been transmitted this Court under seal, pursuant to 9th Circuit Local Rule 30-1.9.

[3] Although the government has repeatedly accused Teague of being a marijuana dealer and has falsely attributed statements to him that he sold marijuana to his friends, the district court noted that there was no significant traffic into and out of Teague's home and that there was "no indicia of serious dealing here at all." (RT (8/19/03) at 65). Further, the district court stated that if Teague *had* been a dealer, "you didn't have sixty months, you had much more." (RT (8/19/03) at 69).

presumably because his conduct conformed with California law. *See* Cal. Health & Safety Code § 11362.5.

Disappointed with this outcome, federal prosecutors elected to prosecute Teague under the federal Controlled Substances Act, 21 U.S.C. § 801 *et seq* ("CSA"). On December 4, 2002, a grand jury returned a First Superseding Indictment against Teague, charging him with manufacturing marijuana, in violation of 21 U.S.C. § 841(a), and unlawfully possessing a firearm, in violation of 18 U.S.C. § 922(g)(3). (ER 1-2). The district court later dismissed the gun charge with the government's approval. (CR 72).

Caught in the crossfire between federal and state law, Teague filed a motion to dismiss the indictment against him on federalism grounds and for lack of subject matter jurisdiction. (CR 57). When the district court denied this constitutional challenge on February 7, 2003 (ER 16-21), Teague threw himself at its mercy by waiving his right to a jury trial in favor of a bench trial based on stipulated facts (ER 3-13). That same day, Teague admitted cultivating between 102 and 108 marijuana plants and the district court found him guilty of one count of manufacturing more than 100 marijuana plants, in violation of 21 U.S.C. § 841(a). (*See* ER 7 & 57).

Over the government's objection, the district court permitted Teague to remain free on bail pending sentencing, finding that "there is some opportunity or

chance, on defendant's part . . . to have a successful appeal in the Circuit in this matter" and that Teague had presented clear and convincing evidence that he was not a danger to the community or a flight risk. (*See* ER 25-27). Six months later, the district court sentenced Teague to 18 months in prison, four years of supervised release, and imposed a $500.00 fine. (ER 57-61).

B. Sentencing

The Presentence Report ("PSR") prepared by the Probation Office in May of 2003 recommended that Teague not receive the benefits of the "safety valve" provisions of 18 U.S.C. § 3553(f) or Sentencing Guideline § 5C1.2, and that he be sentenced to the statutory minimum terms of sixty-months imprisonment and four years of supervised release. *See* 21 U.S.C. § 841(b)(1)(B); PSR ¶¶28-31, 95-96 & 98-99. The PSR concluded that Teague was ineligible for the safety valve because he possessed the pistol found in his jacket in connection with the offense. (PSR ¶¶28-30). With regard to criminal history, the PSR determined that Teague had no prior convictions of any kind and thus fell within Criminal History Category I. (PSR ¶¶51-52).

The district court held five sentencing hearings, in which Teague, his mother, and others testified, before the court sentenced Teague on August 18, 2003. (*See* CR 84, 85, 86, 89 & 91; ER 57). The hotly disputed issues in these proceedings were whether Teague qualified for the safety valve and, if so, whether

he was eligible for any downward departures. As for the safety valve, the court concluded that it applied because Teague had no criminal history and, although a firearm was present, Teague did not possess it in connection with the offense. (ER 42). After making downward adjustments to Teague's base offense level of 16, the court reset the offense level to 17 because Sentencing Guideline § 5C1.2(b) requires this for cases involving the application of the safety valve to a five-year statutory minimum sentence. (*See* ER 38-43). The court, then, departed downward two levels from this offense level, due to the "confusion and schism between Federal and State Government," and sentenced Teague to a term of imprisonment of 18 months, which was at the bottom of the applicable Guideline range. (ER 46-47 & 49-50). Without elaboration, the court ordered Teague to be placed on supervised release for a term of four years. (ER 50) After encouraging Teague's counsel to file the appeal "as we speak or as early as tomorrow," the court remanded Teague into custody immediately. (ER 54).

C. Teague's Imprisonment and Appellate Delay

Due to an unreasonable delay occasioned by Teague's former court-appointed counsel and the court reporter, Teague served the entirety of his eighteen-month sentence in custody with no appeal having been filed. Teague filed his Notice of Appeal on August 25, 2003 (ER 62) and he filed the Designation of Transcripts on September 18, 2003 (CR 97). On November 26,

2003, former counsel for Teague, David Nick ("Nick"), filed a motion to be appointed appellate counsel under the Criminal Justice Act, which was granted on January 9, 2004. (CR 100). These dates would mark the beginning of a series of delays by Nick and the court reporter resulting in the denial of Teague's right to due process.

By order of this Court, dated September 4, 2003, the transcripts were to be filed by October 20, 2003, and the opening brief was due on November 28, 2003. (CR 94). Teague's counsel requested that the briefing schedule be vacated on November 26, 2003, and he filed a motion for bail pending appeal in this Court on December 5, 2003. (CR 99 & 100). This Court remanded the matter to the district court to state its reasons for its denial (CR 99), and, after several rounds of additional briefing, this Court denied appellant's release on bail pending appeal on February 5, 2004 (CR 104). By this same order, this Court maintained the briefing schedule requiring appellant's opening brief to be filed on March 15, 2004. (CR 100 & 104).

On February 19, 2004, Teague's counsel filed a motion for reconsideration of the order denying bail pending appeal, which was denied by this Court on March 29, 2003. (CR 106). Meanwhile, Teague's appointed counsel missed the March 15th deadline for the opening brief and, on March 18, 2003, he filed a motion seeking an extension of time due to his busy trial calendar. (CR 105). On

March 18, 2004, this Court reset the due date for the opening brief to April 14, 2004, and placed the appeal on the next available calendar upon the completion of briefing because of "the brevity of defendant's sentence." (CR 105).

Four days later, this Court received Teague's notice of designation of the reporter's transcript, which prompted delays by the court reporter. (*See* CR 107). One day before the transcripts were due, on April 21, 2004, Assistant Court Reporter Adriana Camelo ("Camelo") filed a motion for an extension of time to file the transcripts on behalf of Court Reporter Jane Sutton ("Sutton"), due to a family emergency. (*See* CR 108). This Court granted half of the requested two-month extension and, once again, expedited the briefing schedule, noting that "[b]ecause of [the] brevity of defendant's sentence, the court resets a shorter period of time to file the briefs." (CR 108). The opening brief was rescheduled for June 14, 2004, with an admonition that "[r]equests for an extension to file a brief under Ninth Circuit Rule 31-2.2(a) shall not be granted," absent a showing of "extraordinary circumstances." (*See* CR 108).

Four days before the opening brief was due, however, on June 10, 2004, Camelo again filed a motion for an extension of time to file the transcripts on Sutton's behalf, which provided Sutton until June 30, 2004, to do so. (CR 109). At the same time, this Court set another expedited briefing schedule with the opening brief due on July 21, 2004. (*See* CR 109). On July 20, 2004, court-

appointed counsel for Teague filed an emergency motion for production of transcripts at the government's expense, which this Court granted on August 5, 2004, prompting it, once again, to simultaneously to vacate the briefing schedule. (*See* CR 110). When no appeal was filed for Teague in September, as he expected, his mother contacted the undersigned counsel, who made an appearance on behalf of Teague and filed a Third Motion for Bail Pending Appeal on October 4, 2004. (CR 111). That motion was denied on November 1, 2004 (CR 111), and on December 6, 2005, the undersigned counsel substituted in as counsel of record for Teague (CR 112). With additional prompting by the undersigned counsel, court reporter Sutton filed the remaining outstanding transcripts on December 29, 2004. (*See* CR 113-120).

Meanwhile, Teague was released from prison into the custody of a halfway house the day after Thanksgiving, 2004. His stay at the halfway house ended on January 7, 2005, which commenced his four-year term of supervised release. The appeal was then stayed on February 10, 2005, at Teague's request, pending the Supreme Court's decision in *Gonzales v.* Raich, __ S.Ct. __ (June 6, 2005). (CR 122 & 123). After this decision was issued, Teague timely filed the instant opening brief by mail on July 27, 2005.[4]

[4] The undersigned counsel has made several efforts to contact the district court to request that it issue the certificate of record, to no avail. The undersigned counsel

ARGUMENT

I. THE DISTRICT COURT ERRED IN IMPOSING A FOUR-YEAR TERM OF SUPERVISED RELEASE BASED UPON ITS MISTAKEN BELIEF THAT TEAGUE WAS SUBJECT TO SUCH A MANDATORY MINIMUM TERM

A. Introduction and Standard of Review

Having been led by the Probation Office to believe that no term of supervised release less than four years was allowable under 21 U.S.C. § 841(b)(1)(B) and Sentencing Guideline 5D1.2(a)(1) and (b), the district court imposed a sentence of four years supervised release based on this premise. Because the district court found that Teague qualified for the "safety valve," however, he was not subject to any mandatory minimum term of supervised release, so this was error. Due to the district court's apparent erroneous understanding of the permissible range of supervised release, the sentence must be vacated and the case remanded for resentencing.[5]

B. Legal Standards

Section 841(b) of Title 21 of the United States Code, the penalty provision to Section 841(a), sets forth various mandatory minimum penalties depending

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will vigilantly pursue this and expects the certificate of record to be issued by the district court prior to the filing of appellee's answering brief.

[5] Because the issue was not raised in the court below, this court reviews the sentencing error for "plain error." *See United States v. Ameline*, 409 F.3d 1073, 1078 (9th Cir. 2005). "An error is 'plain' if 'contrary to law at the time of the appeal. . . .'" *Id.* (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)).

(primarily) on the quantity and type of the drugs at issue.[6] Subsection 841(b)(1)(B)(vii), for instance is triggered where, as here, the offense involves more than 100 marijuana plants. This subsection mandates a minimum term of imprisonment of five years and a minimum term of supervised release of four years.

In order to alleviate some of the harshness of these mandatory minimums, Congress enacted the Mandatory Minimum Sentencing Reform Act, which is codified at Section 3553(f) of Title 18 of the United States Code and incorporated into the Sentencing Guidelines as Section 5C1.2. This Act provides an exception, or "safety valve," to the application of the mandatory minimums in certain cases. Section 5C1.2 of the Guidelines, tracking the language of 18 U.S.C. § 3552(f), sets forth the five criteria that must be met for a defendant to escape the mandatory minimum penalties of Section 841(b).

Once a sentencing court finds that a defendant satisfies these criteria for the safety valve, it is free to impose a sentence without reference to the statutory minimum terms of imprisonment *or* supervised release of Section 841(b)(1)(B). Sentencing Guideline 5C1.2 provides that "the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory

[6] The various subsections to Section 841(b) carry enhanced penalties for recidivists and for offenses involving death or serious bodily injuries. Neither consideration is relevant in this case.

minimum sentence. . . ." Application Note 9 of this Guideline clarifies that "[a] defendant who meets the criteria under this section is exempt from any otherwise applicable statutory minimum sentence of imprisonment *and statutory minimum term of supervised release*." U.S.S.G. § 5C1.2, Comment n.9 (emphasis added).

Once no longer governed by the statutory minimum, the district court retains the ultimate discretion in ordering the term of supervised release. *See United States v. Chinske*, 978 F.2d 557, 559 (9th Cir. 1992). This discretion was reaffirmed in *United States v. Booker*, __ U.S. __, 125 S.Ct. 738 (2005), wherein the Supreme Court held that the Sentencing Guidelines are only advisory.

Under subsection 5D1.2(a) of the Guidelines, a defendant convicted of either a Class A or Class B felony is subject to a three to five year term of supervised release. U.S.S.G. § 5D1.2(a)(1).[7] Although subsection 5D1.2(b) provides that "the term of supervised release imposed shall not be less than any statutorily required term of supervised release," Application Note 1 to Section 5D1.2 specifically states that "[a] defendant who qualifies under [the safety valve] is not subject to any statutory minimum sentence of supervised release. In such a case, the term of supervised release shall be determined under subsection (a)." Thus, the Guidelines explicitly gave the district court the discretion to impose a term of supervised release below the statutory minimum of four years.

[7] Teague was found guilty of violating 18 U.S.C. § 841(b)(1)(B), which is a Class B felony. *See* 18 U.S.C. § 3559(a).

C. The District Court Failed to Exercise Its Discretion in Sentencing Teague

Although the district court did not elaborate on its reasons for imposing a five-year term of supervised release, all indications are that it did so because it believed it lacked the discretion to do otherwise. The PSR stated that 21 U.S.C. § 841(b)(1)(B) provided for a minimum term of supervised release of four years. (PSR ¶99). Applying this minimum term to the Sentencing Guidelines, the PSR reported that Guidelines 5D1.2(a)(1) and (b) required a supervised release term of four years minimum to five years maximum. (PSR ¶98). The PSR wholly ignored that Teague's eligibility for the safety valve rendered the statutory minimum inapplicable and, under the Guidelines, yielded an advisory term of supervised release of *three* (not four) to five years. *See* U.S.S.G. § 5D1.2(a). Furthermore, the district court had the discretion to depart downward from this Guideline, or pay little heed to its advice, once it was no longer bound by the statutory minimum. *See United States v. Booker*, __ U.S. __, 125 S.Ct. 738 (2005); *Chinske*, 978 F.2d at 559.

That the district court was misled by the PSR into believing that it lacked this discretion is evidenced by its inconsistent treatment of Teague at sentencing. The court departed downward in imposing Teague's term of imprisonment and, after doing this, chose the lowest possible prison term from the range specified in the Guidelines. *Cf. United States v. Calderon*, 163 F.3d 644, 646 (D.C. Cir. 1999)

(noting that such actions by sentencing court strongly suggest that it would have given defendant a shorter term of supervised release, if it had known it had such discretion). Further proof of this is found in the facts that the length of Teague's supervised release term is nearly three times the length of his prison sentence and the district court did not discuss the applicability of the factors set forth in 18 U.S.C § 3553(a) when imposing the four-year term of supervised release upon him (ER 50). Remand is required because all indications are that the district court did not understand that it had the authority to impose a shorter term of supervised release than the four years it imposed. *Cf. United States v. Graham*, 317 F.3d 262, 274-75 (D.C. Cir. 2003) (plain error found, requiring remand for resentencing, where trial court may have mistakenly applied mandatory minimum sentencing provisions of § 841, which would have increased defendant's term of supervised release by two years); *Calderon*, 163 F.3d at 646 (remanding to allow sentencing court to exercise discretion with respect to term of supervised release where court mistakenly believed that defendant was subject to statutory minimum term of supervised release, even though she qualified for safety valve); *see also United States v. Ameline*, 409 F.3d 1073, 1074 (9th Cir. 2005) ("when we are faced with an unpreserved *Booker* error that may have affected a defendant's substantial rights, and the record is insufficiently clear to conduct a complete plain error analysis, a limited remand to the district court is appropriate for the purpose of

ascertaining whether the sentence imposed would have been materially different had the district court known that the sentencing guidelines were advisory").

II. TEAGUE WAS DENIED DUE PROCESS BY THE DELAY OF THE FILING OF HIS OPENING BRIEF, WHICH REQUIRES THAT THE CHARGES AGAINST HIM BE DISMISSED

A. Introduction and Standard of Review

Even before Teague began serving his four years of supervised release, his due process rights had been violated. Despite the fact that this Court repeatedly expedited his briefing schedule due to the short length of Teague's sentence of imprisonment, his previous court-appointed counsel did not file the opening brief more than three-quarters into Teague's sentence, due, in part, to the court reporter's delay in the production of the transcripts. This Court has admonished that "extreme delay in the processing of an appeal may amount to a violation of due process." *See United States v. Wilson*, 16 F.3d 1027, 1030 (9th Cir. 1994) (quoting *United States v. Antoine*, 906 F.2d 1379, 1382 (9th Cir. 1990)). Whether this is so is a question of law reviewed by this Court *de novo*. *See McBride v. PLM Int'l, Inc.*, 179 F.3d 737, 741 (9th Cir. 1999); *Untied States v. Munsterman*, 177 F.3d 1139, 1141 (9th Cir. 1999).

B. Legal Standards

In *United States v. Tucker*, 8 F.3d 673 (9th Cir.1993) (en banc), this Court noted four areas of inquiry which are helpful in evaluating appellate delay claims:

(1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right to appeal; and (4) the prejudice to the defendant. *Id.* at 676 (citing *United States v. Antoine*, 906 F.2d 1379, 1382 (9th Cir. 1990)). The fourth inquiry is considered by this Court to be the most important and is analyzed by focusing on one, or more, of three types of prejudice: (1) oppressive incarceration pending appeal, (2) anxiety and concern of the convicted party awaiting the outcome of the appeal, and (3) impairment of the convicted person's grounds for appeal or of the viability of his defense in case of retrial. *Id.*; *United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994).

C. The Unreasonable Delay in the Filing of Teague's Opening Brief Is Not Attributable to Him

First, as to the length of the delay, this factor must be considered in light of the length of Teague's sentence, which was short, but not *de minimis*. *Cf. United States v. Chavez*, 979 F.2d 1350, 1354 (9th Cir. 1992) ("We recognize that the right to have an appeal processed in a timely manner cannot be 'quantified into a specified number of days or months.'") (quoting *Barker v. Wingo*, 407 U.S. 514, 523 (1972)). Given that the length of the delay from the filing of the notice of appeal to the completion of the outstanding transcripts exceeded all but one week of the total length of Teague's completed prison sentence, this delay must be considered substantial. *Cf. United States v. Johnson*, 732 F.2d 379, 381-82 (4th Cir. 1984) ("the two-year delay in this case is in the range of magnitude of delay as

a result of which courts have indicated that due process may have been denied") (citations omitted); *see also Hill v. Reynolds*, 942 F.2d 1494, 1496 (10th Cir. 1991) (holding a delay of two years, nine months more than sufficient to support due process claim); *United States v. Antoine*, 906 F.2d 1379, 1382 (9th Cir. 1990) (length of delay element satisfied when two years of a three-year delay was attributable to failure of court reporter); *People of Territory of Guam v. Olsen*, 462 F.Supp. 608 (D.C. Guam 1978) (finding a two-year delay so prejudicial, in and of itself, as to require reversal and the entry of a judgment of acquittal).

Second, Teague is not responsible for the failure of his prior court-appointed attorney to file the opening brief, nor for the court's reporter's repeated requests for extensions of time to prepare the outstanding transcripts due to personal issues. According to this Court, both derelictions are "attributable to the government for purposes of determining whether a defendant has been deprived of due process." *United States v. Wilson*, 16 F.3d 1027, 1030 (9th Cir. 1994) (citing *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990)).

Third, Teague timely filed his Notice of Appeal and has repeatedly asserted his right to appear before this Court. On the day he was sentenced, Teague filed a motion with the district court for bail pending appeal (CR 79) and, when it became apparent that his appeal would be delayed in a manner as to encroach upon his due process rights, he filed additional motions for bail pending appeal with this Court

for a total of three such motions. *See* Appellant's Request for Judicial Notice, filed herewith, Exhibit 3. Teague cannot be faulted for sitting on his rights.

D. Teague Suffered Extraordinary Anxiety and Concern from the Appellate Delay

Unlike the defendants in *Coe*, *Tucker*, and *Antoine*, Teague has suffered a level of anxiety and concern regarding this appeal that is different and greater than that experienced by other prisoners. Teague was led to believe that his case held out promise for reversal and that an appeal would be filed immediately upon his incarceration, due to the important federalist principles at issue. Indeed, the district court commented in the proceedings below that "there is some opportunity or chance, on defendant's part . . . to have a successful appeal in the Circuit in this matter" (ER 25) and that it was "going to have this tested in the Supreme Court, if possible" (ER 37). With Teague and his family listening attentively, the district court noted that Teague brought this case to trial "to preserve a constitutional issue" (ER 43) and that Teague's "able counsel, Mr. Nick, will file [the] appeal immediately" (ER 48). Such comments by a learned jurist, nonbinding though they may be, gave Teague strong hope that his state-sanctioned conduct would be vindicated on appeal.

This hope, however, slowly turned to despair, as more than thirteen months elapsed with Teague in prison and no opening brief having been filed. Making matters far worse, Teague's counsel did not communicate with him in this period,

so Teague waited anxiously for word that his oral argument would be scheduled any day. It does not take enormous imagination or uncommon sensitivity to envision the depth of frustration, fear and powerlessness endured by a prisoner whose chances for freedom and vindication are in the hands of an attorney hundreds of miles away, who has abandoned his duty.[8]

Twisting the knife still deeper, Teague saw himself become the last of his kind remaining in prison. Based on this Court's decision in *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), *rev'd by Gonzales v. Raich*, __ S.Ct. __ (June 6, 2005), this Court granted motions for bail pending appeal for medical marijuana defendants Keith Terry Alden and Bryan Epis. *See* Appellant's Request for Judicial Notice, Exhibit A, at 9-10 & Exhibit B, at 6-7. Despite cultivating only a fraction of the number of plants as they did and receiving a far shorter sentence, Teague languished in prison well after they had been released. The obvious explanation for the differential treatment afforded to Teague is that he had failed to file an opening brief -- Epis only received bail pending appeal from this Court when he had done so, after two previous such motions had been denied. *See* Appellant's Request for Judicial Notice, Exhibit A, at 3, 7 & 9-10. Teague served

[8] Teague states these facts as an offer of proof and recognizes that there is not yet any evidentiary support for this in the record. If this Court finds that such proof is necessary for the resolution of this appellate issue, Teague respectfully requests that the case be remanded to the district court to determine the level of anxiety Teague suffered.

time in prison with Epis and he anxiously awaited being released just as Epis was. *See supra* at 22 n.8. Any person in Teague's situation would have suffered increased anxiety and concern from this unusual appellate delay. To remedy this and prevent it from happening again to other defendants in the future, this Court should exercise its supervisory powers and order the dismissal of the indictment. *See People of Territory of Guam v. Olsen*, 463 F.Supp. at 614; *cf. Tucker*, 8 F.3d at 676 (sanctioning such remedy where prejudice is shown by defendant).[9]

E. Teague's Conviction Should Be Reversed and the Charges Against Teague Dismissed Because of Structural Error

Although Teague recognizes that prejudice must ordinarily be shown to require the reversal of a conviction due to routine appellate delay, *see, e.g., Tucker*, 8 F.3d at 676, this case stands apart from such cases because Teague served the entirety of his prison sentence, which was not *de minimis*, before his newly retained counsel filed the opening brief. This fundamental defect in the appellate processing of this case presents a complete breakdown in what the Supreme Court has deemed a critical stage of the criminal justice system. *See Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000); *see also Penson v. Ohio*, 488 U.S. 75, 88 (1988)

[9] Teague respectfully submits that any remedy short of this would only compound the due process violation, as he would be subject to additional anxiety and concern if he were compelled to endure another trial and sentencing after serving all of term of imprisonment. In the alternative, Teague requests that the matter be remanded to the district court, so Teague can establish the factual record for his exceptional anxiety and concern.

(appellate proceedings represent fundamental component of criminal justice system). This procedural breakdown deprived Teague of the constitutional right to challenge a judgment of conviction in a timely manner, which has rendered the appellate process a "meaningless ritual," at least as far as his imprisonment is concerned. *See Douglas v. California*, 372 U.S. 353, 358 (1963); *see also United States v. Champion*, 15 F.3d 1538, 1558 (10th Cir. 1994) (appeal that is inordinately delayed constitutes a meaningless ritual). The Supreme Court has repeatedly held that harmless error analysis does not apply structural errors, such as these. *Cf. Sullivan v. Louisianna*, 508 U.S. 275, 279 (1993) (structural errors will always invalidate a conviction); *Arizona v. Fulminante*, 499 U.S. 279, 319 (1991) (structural error represents a "defect in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards").

III. THIS PROSEUCTION VIOLATES THE FEDERALIST PRINCIPLES EMBODIED BY THE FEDERAL CONSTITUTION AND, IN PARTICULAR, THE TENTH AMENDMENT

In the district court, Teague moved for dismissal of this prosecution on the ground that the federal government lacked jurisdiction under the Commerce Clause to prosecute the wholly-intrastate cultivation of medical marijuana, and was likewise barred by the Tenth Amendment from doing so where a state had relied on its sovereign powers to decide matters of public health and morals in enacting legislation legalizing the provision of medical marijuana. (CR 57). He renews the

latter claim here. This Court reviews this claim *de novo*. *See United States v. Crawford*, 115 F.3d 1397, 1401 (8th Cir. 1997).

Although the Supreme Court just weeks ago held that the federal government has the authority under the Commerce Clause to regulate medical marijuana, at least in a civil case, *Gonzales v. Raich*, __ S.Ct. __ (June 6, 2005), this case, as a criminal case, implicates a different array of federalist principles that were not present in that civil suit. *Cf. United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) ("States possess primary authority for defining and enforcing the criminal law"); *id.* At 584 (Thomas, J., concurring) ("we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power") (emphasis in original). There can hardly be greater intrusion upon the sovereignty of the state than when the federal government seeks to displace a liberty-enhancing policy decision of its citizens by imprisoning them for exercising their state-conferred liberty. To this end, California's Compassionate Use Act was expressly enacted "pursuant to the powers reserved to the State of California and its people under the Tenth Amendment to the United States Constitution," *see* S.B. 420, Section 1(e) (Sept. 11, 2003), to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes," Cal. Health & Safety Code § 11362.5(b)(1)(A).

Just because Congress exercises a power conferred upon it by the Federal Constitution does not mean that the tactics it employs are necessarily constitutional. The Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," not only requires a narrow interpretation of the federal government's commerce powers, but it provides an affirmative external limitation on the government's exercise of those powers. *See Reno v. Condon*, 528 U.S. 141, 149 (2000); *Alden v. Maine*, 527 U.S. 706, 713-14 (1999); *New York v. United States*, 505 U.S. 144, 157 (1991); *Fry v. United States*, 421 U.S. 542, 547 n. 7 (1975); *ACORN v. Edwards*, 81 F.3d 1387, 1393 (5th Cir. 1996). This Court in *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), *rev'd by Gonzales v. Raich*, __ S.Ct. __ (June 6, 2005), expressly reserved the question whether the federal government's regulation of medical marijuana violates the principles of federalism embodied by the Tenth Amendment. *Id.* at 1227. This case requires an affirmative answer.

Under the Tenth Amendment, the federal government may not "commandeer" state officials to enforce federal law, nor can it employ means that are more intrusive than necessary to effectuate its legitimate federal goals. *See Printz v. United States*, 521 U.S. 898, 930-31 (1997); *Conant v McCaffrey*, 309 F.3d 629, 646-47 (9th Cir. 2002) (Kozinski, J., concurring); *District of Columbia v.*

Train, 521 F.2d 971, 994 (D.C. Cir. 1995), *vacated as moot*, 431 U.S. 99 (1977). In this case, the federal government has done precisely this. It was only after state law enforcement conducted the investigation of Teague and declined to prosecute him in light of the state's medical marijuana laws that the federal government took the evidence gathered by state officials to prosecute Teague in federal court. By exploiting the fruits of state law enforcement officials in this manner, the federal government has effectively made them its servants. Such commandeering violates the Tenth Amendment. *Cf. Hayden v. Keane*, 154 F.Supp.2d 610, 615 (S.D.N.Y. 2001) (noting that federal agency's attempt to nullify bail decisions of state court by issuing parole violation warrant on eve of bail hearing would undermine state autonomy and violate principles of federalism).

That the federal government is using its authority to regulate interstate commerce as a pretext for seeking to displace a liberty-enhancing policy of the State of California in areas of traditional state concern is evidenced by the extremely punitive means it has employed here -- a federal prosecution with statutory minimum penalties ranging from five years to forty years imprisonment. *Cf. United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (noting disturbing trend of "Congress appropriating state police powers under the guise of regulating commerce"); *United States v. Constantine*, 296 U.S. 287, 296 (1935) ("under the guise of a taxing act the purpose is to usurp the police powers

of the state").[10] The Supreme Court has warned that "Congress cannot, under the pretext of executing a delegated power, pass laws for the accomplishment of objects not intrusted to the federal government." *Linder*, 268 U.S. at 17; *see also Printz*, 521 U.S. at 923-24 ("When a 'Law ... for carrying into Execution' the Commerce Clause violates the principle of state sovereignty … it is not a 'Law ... proper for carrying into Execution the Commerce Clause, and is thus, in the words of The Federalist, 'merely [an] act of usurpation' which 'deserves to be treated as such.'"); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) ("should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government," Court would be bound to hold law invalid). As the court stated in *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1995), *vacated as moot*, 431 U.S. 99 (1977), the Tenth

[10] Lest there be any doubt on this score, the Controlled Substances Act, on its face, expressly states that it is designed to protect the "health and general welfare of the American people," 21 U.S.C. § 801(2), and Congress recently affirmed that it is maintaining the ban on medical marijuana because "the ambiguous cultural messages about marijuana use are contributing to a growing acceptance of marijuana use among children and teenagers," House Joint Res. 117 (Sept. 15, 1998). These, however, are matters for the state, not the federal, government to decide. *See Morrison*, 529 U.S. at 618 & n.8 ("the Founders denied the National Government [the police power] and reposed [it] in the States" "the Constitution reserves the general police power to the States"); *Lopez*, 514 U.S. at 566 ("The Constitution . . . withhold[s] from Congress a plenary police power"); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) ("The States traditionally have had great latitude under their police powers to legislate as to 'the protection of the lives, limbs, health, comfort, and quiet of all persons'") (quotation omitted); *Linder v. United States*, 268 U.S. 5, 18 (1925) ("Obviously, direct control of medical practice in the states is beyond the power of the federal government").

Amendment "prevent[s] Congress from selecting methods of regulating which are 'drastic' invasions of state sovereignty where less intrusive approaches are available." *Id.* at 994; *cf. United States v. Wilson*, 880 F.Supp. 621, 633 (E.D. Wis. 1995) ("[t]he Court's role in deciding the proper use of the Commerce power . . . necessarily includes analyzing how a particular exercise of that enumerated power relates to the Tenth Amendment and the incidents of state sovereignty that the Tenth Amendment protects"); *see also City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end"). The government indisputably has the authority under *Gonzales v. Raich* to regulate Teague's medical marijuana activity, such as by seizing his medical marijuana or filing a civil action against him. But, rather than attempt to vindicate its interests through these orderly processes, the government has resorted to the most extreme and punitive means available, which betrays its true intent to displace California's policy regarding the health and safety of its citizens by deterring them from exercising their state-conferred liberty.[11] *Cf. Jones v. United States*, 529 U.S. 848,

[11] It bears noting that in *New York v. United States*, 505 U.S. 144, 505 (1991), the Supreme Court described the purpose of the Tenth Amendment as follows:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of public officials governing the States. To the contrary, the Constitution divides authority between federal and state

859 (2000) (Stevens, J., concurring) (noting that federal sentence of 35 years for crime with maximum state sentence of 10 years "illustrates how a criminal law like this may effectively displace a policy choice made by the State"); *see also Conant v McCaffrey*, 309 F.3d 629, 646-47 (9th Cir. 2002) (Kozinski, J., concurring). This prosecution was neither necessary, nor proper, nor constitutional under the Tenth Amendment.

CONCLUSION

For the foregoing reasons, this Court should reverse Teague's conviction and order the dismissal of the charges against Teague or, in the alternative, remand for resentencing.

DATED: July 27, 2005

Respectfully submitted,

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governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."

STATEMENT OF RELATED CASES

I am aware of no related cases pending in this Court.

Dated: July 27, 2005

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Joseph D. Elford

CERTIFICATION REGARDING BRIEF FORM

I, Joseph D. Elford, certify pursuant to Fed.R.App.P. 32(a)(7)(B) and Ninth Circuit Rule 32-1, that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 7,481 words.

Dated: July 27, 2005

_____
Joseph D. Elford

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were served, via second day Federal Express, upon AUSA Andrew Stopler, Office of the U.S. Attorney, 411 Fourth St., Santa Ana, CA 92701-4599, this Twenty-Seventh day of July, 2005.

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Joseph D. Elford