

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 REPLY BRIEF

Joseph D. Elford (S.B. 189934)
P.O. Box 427112
San Francisco, CA 94142
Telephone: (415) 573-7842
Facsimile: (415) 252-9501

Counsel for Defendant-Appellant
MICHAEL W. TEAGUE

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	i
INTRODUCTION	1
I. THIS CASE SHOULD BE REMANDED FOR RESENTENCING.....	1
II. THIS PROSEUTION VIOLATES THE FEDERALIST PRINCIPLES OF THE UNITED STATES CONSTITUTION.....	1
III. TEAGUE WAS DENIED DUE PROCESS BY THE DELAY IN THE FILING OF HIS APPEAL.....	4
CONCLUSION.....	7

TABLE OF AUTHORITIES

CASES

<i>Hayden v. Keane</i> , 154 F.Supp.2d 610 (S.D.N.Y. 2001).....	4
<i>People v. Spark</i> , 121 Cal.App.4th 259, 16 Cal.Rptr.3d 840 (2004)	2, 4
<i>People v. Urziceanu</i> , 2005 Daily Journal D.A.R. 11,249 (Sept. 12, 2005).....	4
<i>Raich v. Ashcroft</i> , 352 F.3d 1222 (9th Cir. 2003), <i>rev'd by</i> <i>Gonzales v. Raich</i> , 125 S.Ct. 2195 (2005).....	2
<i>United States v. Antoine</i> , 906 F.2d 1379 (9th Cir. 1990).....	5
<i>United States v. Kim</i> , 94 F.3d 1247, 1249-50 (9th Cir. 1996).....	2
<i>United States v. Mohawk</i> , 20 F.3d 1480 (9th Cir. 1994)	6

United States v. Tisor, 96 F.3d 370, 375 (9th Cir. 1996).....2
United States v. Tucker, 8 F.3d 673 (9th Cir.1993) (en banc).....6
United States v. Wilson, 16 F.3d 1027 (9th Cir. 1994).....5

STATUTES

Cal. Health & Safety Code § 11362.5(d).....2

INTRODUCTION

Even while conceding that appellant Michael Teague's ("Teague") case should be remanded to the district court for resentencing, the government contends that he is not a legitimate medical marijuana patient and that he was not prejudiced by the prolonged delay of his appeal. Teague, however, is a qualified medical marijuana patient under California law and the district court ultimately accepted this as a medical marijuana case. Teague suffered prejudice from languishing in prison as other medical marijuana patients were released pending appeal. He should not have been convicted in the first place, as his conduct was legal under California law. Teague's conviction should be reversed or, at a minimum, his case remanded for resentencing.

I. THIS CASE SHOULD BE REMANDED FOR RESENTENCING

The government concedes that Teague's sentence should be remanded to the district court so the district court can exercise its discretion with respect to the term of Teague's supervised release. Teague concurs in this conclusion.

III. THIS PROSECUTION VIOLATES THE FEDERALIST PRINCIPLES OF THE UNITED STATES CONSTITUTION

Seeking to overcome Teague's argument that his prosecution violates the federalist principles of the United States Constitution, the government trumpets several remarks by the district court as proof that Teague does not qualify as a medical marijuana patient. *See* Government's Answering Brief ("AB") at 4-5, 12

& 15-16. The district court, however, made contrary statements when sentencing Teague, and for good reason. Under California law, it is for the doctor, not a court or jury to decide whether one may benefit from the medicinal use of marijuana. *See People v. Spark*, 121 Cal.App.4th 259, 268, 16 Cal.Rptr.3d 840, 846-47 (2004). Teague had a written recommendation from a physician, which makes him a qualified patient. *See* Cal. Health & Safety Code § 11362.5(d).

Nor did the district court find that Teague was selling his marijuana to others. In adjudicating Teague's Commerce Clause challenge prior to this Court's decision in *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), *rev'd by Gonzales v. Raich*, 125 S.Ct. 2195 (2005), the district court did not make any findings regarding whether Teague's conduct fell into the narrow class of activity of marijuana cultivation for personal medical use, since courts had not done this in drug cases prior to *Raich*. Instead, in rejecting Teague's Commerce Clause challenge, the district court simply relied on cases upholding convictions for marijuana cultivation, regardless of the circumstances. *See United States v. Tisor*, 96 F.3d 370, 375 (9th Cir. 1996); *United States v. Kim*, 94 F.3d 1247, 1249-50 (9th Cir. 1996). Indeed, it did this at the government's urging. *See* RT 2/7/03 at 26 (CR 102)¹ (government counsel contending "you cannot get into resolution of

¹ The following abbreviations will be utilized in this brief:

ER = Excerpts of Record;

CR = Clerk's Record;

evidentiary factual matters in a motion to dismiss an Indictment”); RT 2/7/03 at 29 (CR 102) (government counsel arguing “the cases make it very clear that you do not look at each individual case in deciding whether there is a sufficient nexus under the Commerce Clause. It’s the general class of activity that’s looked at. Here the class of activity is manufacturing of marijuana.”); RT 2/7/03 at 42 (CR 102) (government counsel arguing that “the courts have made clear that you do not take out a particular situation when you’re analyzing the effect on interstate commerce. You look at the general class of activity”); *see also* See RT 8/18/03 at 26 (CR 96) (government counsel observing “the charge here is not dealing marijuana. The charge here is manufacturing or growing marijuana.”). Thus, even while the district court commented that “there is no evidence of purported medicinal purpose upon which this motion is based” (ER 18-19), it later declared that it did not deny the motion to dismiss for “lack of evidence” (ER 20) and in sentencing Teague it found that he was not a marijuana dealer. *See* RT 8/19/03 at 69 (CR 96) (“if he turned out to be a dealer, you didn’t have sixty months, you had much more”). These *findings* belie any contention that the district court had definitively resolved this issue adverse to Teague. *See also* ER 46-47 (departing

RT(date) = Reporter’s Transcript (date).

Teague is still attempting to have the district court certify the record and he may need an order from this Court that it do so.

downward two levels due to “confusion and schism between Federal and State Government”).

Because of this, the government’s argument regarding the commandeering doctrine misses the mark. It contends that the Teague’s conduct violated both state and federal law, since his doctor did not perform a proper examination and he had engaged in sales. AB at 15-16. As noted above, under California law, the court is not to second-guess the medicinal marijuana recommendation of a licensed physician. *See People v. Spark*, 121 Cal.App.4th 259, 268, 16 Cal.Rptr.3d 840, 846-47 (2004). Even if Teague had accepted donations for his marijuana from other qualified patients, which he did not, this too would have complied with California’s medical marijuana laws. *See People v. Urziceanu*, 2005 Daily Journal D.A.R. 11,249 (Sept. 12, 2005). Teague’s conduct was, therefore, legal under California law, which explains why the state prosecutor did not seek to prosecute him. The government’s use of the fruits of the state’s investigation to overcome the policy decision made by the voters of California violates the constitutional principles of federalism. *Cf. Hayden v. Keane*, 154 F.Supp.2d 610, 615 (S.D.N.Y. 2001).

III. TEAGUE WAS DENIED DUE PROCESS BY THE DELAY IN THE FILING OF HIS APPEAL

Notwithstanding the constitutional questions involved in Teague’s case, he did not have an opportunity to litigate them prior to serving nearly the entirety of

his eighteen month sentence. This forms the basis for Teague's contention that he has been deprived of due process. *See United States v. Wilson*, 16 F.3d 1027, 1030 (9th Cir. 1994); *United States v. Antoine*, 906 F.2d 1379, 1382 (9th Cir. 1990).

Feigning not to understand this, the government contends that Teague could not have suffered any prejudice from appellate delay because seven months elapsed between his retained counsel receiving the transcripts and the filing of the opening brief. AB at 16-17. Teague has not, and would not, complain about the delay his counsel requested after he had already been released from prison, a delay which has in no way prejudiced Teague. Instead, the due process concern implicated in this case is that Teague was *incarcerated* without being able to communicate to the outside world, all the while expecting that his appeal would be filed. It hardly bears stating that the seventeen months Teague spent in prison were radically different from the seven months he has since spent on supervised release. The former delay is fully attributable to the government. AOB at 20.

Properly understood as his prolonged incarceration while awaiting the filing of his appeal, Teague's due process claim involves substantial prejudice to him. Teague suffered increased anxiety and concern from the appellate delay because he had been led to believe that he had strong grounds for appeal and that this appeal would be filed immediately. In actuality, however, the opening brief on appeal was not timely filed, due to the derelictions of the court reporter and court-

appointed counsel. Teague only learned this approximately fifteen months into his eighteen month sentence, as he watched other medical marijuana patients released on bail pending appeal under *Raich* because their opening briefs had been filed. These forms of prejudice “distinguish [this] case from that of [] other prisoner[s] awaiting the outcome of an appeal.” *Cf. United States v. Tucker*, 8 F.3d 673, 676 (9th Cir. 1993). At a minimum, the case should be remanded to the district court for an evidentiary hearing to adjudicate this.

Furthermore, the appellate delay suffered by Teague in this case amounts to structural error. His appeal, at least as far as it concerns his imprisonment, has been rendered a meaningless ritual. *See* AOB 23-24. This sets this case apart from *Tucker* and *United States v. Mohawk*, 20 F.3d 1480 (9th Cir. 1994), and constitutes structural error.

///

///

///

///

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 and an evidentiary hearing.

DATED: September 26, 2005

Respectfully submitted,

JOSEPH D. ELFORD
Attorney for Appellant
P.O. Box 427112
San Francisco, CA 94142
Tel: (415) 573-7842
Fax: (415) 252-9501

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 1,503 words.

Dated: September 26, 2005

Joseph D. Elford

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were served, via first class mail, upon AUSA Andrew Stopler, Office of the U.S. Attorney, 411 Fourth St., Santa Ana, CA 92701-4599, this Twenty-Sixth day of September, 2005.

Joseph D. Elford