

INTRODUCTION

Appellant Michael Teague (“Teague”) is 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), *cert. granted by Ashcroft v. Raich*, 124 S.Ct. 2909 (June 28, 2004), this Court granted motions for bail pending appeal for medical marijuana defendants Keith Terry Alden and Bryan Epis. Despite cultivating only a fraction of the number of plants as they did, Teague has languished in prison, already having served nearly fourteen months of his eighteen month sentence. No appeal has been filed. The transcripts still are not ready. Teague’s release to a halfway house is fast approaching, but the promised appeal of his highly publicized conviction is nowhere in sight. To remedy this violation of Teague’s right to due process and afford him the same consideration as that afforded other medical marijuana defendants awaiting resolution of their constitutional claims under *Raich*, this Court should release Teague on bail pending the appeal of his conviction.¹

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¹ The undersigned counsel was contacted about this case only two weeks ago and has moved as expeditiously as possible in preparing the instant motion for release pending appeal. Because Teague is scheduled to be released to a halfway house in approximately one and one half months, this motion will likely serve as his only vehicle to contest his imprisonment for lack of subject matter jurisdiction and on due process grounds.

STATEMENT OF FACTS

A. The Proceedings Below

Teague is a medical marijuana patient who uses marijuana on the recommendation of his physician to treat chronic back pain stemming from a high school wrestling injury. (*See* Exhibit A). Prior to this case, Teague had a clean criminal history; his mother a retired police officer and his brother a deputy sheriff. Teague cultivated just over one hundred marijuana plants at his home to supply himself with the medicine he needs in accordance with California law. Based on a tip from an informant, deputies from the Orange County Sheriff's Office searched Teague's home on April 2, 2003, and found between 102 and 108 marijuana plants in the garage. *See* Trial Stipulation at 3 (attached to Opposition to Motion for Bail Pending Appeal, filed January 20, 2004 ("Opposition") as Exhibit A). State prosecutors refused to prosecute Teague because they recognized that his conduct complied with California law.

Disappointed with this outcome, members of the local sheriff's office and the ATF convinced federal prosecutors to prosecute Teague under the Controlled Substances Act, 21 U.S.C. § 801 *et seq* ("CSA"). On December 4, 2002, a grand jury returned a 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). (CR 32).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 for lack of subject matter jurisdiction under the Commerce Clause. (CR 57). When the district court denied this constitutional challenge on February 7, 2003 (CR 72), Teague threw himself at its mercy by waiving his right to a jury trial in favor of a bench trial based on stipulated facts. (CR 72-74). He 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), that same day. (CR 72).

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* RT 2/7/03 at 111-13 (attached to Opposition as Exhibit C)). Six months later, the district court sentenced Teague to 18 months in prison. (CR 91).

² "CR" refers to the Clerk's Record (attached as Exhibit 1 to defendant's original bail motion), and is followed by the document control number. "RT" refers to the Reporter's Transcript of Proceedings, and is followed by the applicable date and page references.

At sentencing, the district court found that Teague qualified for the “safety valve” provisions of 18 U.S.C. § 3553(f), since he had no criminal history and, although a firearm was present, Teague did not possess it in connection with the offense. (RT 8/18/03 at 78) (attached to Appellant’s Motion for Bail Pending Appeal, filed December 5, 2003). Under Guideline § 5C1.2(b), Teague was assigned a minimum offense level of 17 because he had been facing a five-year statutory minimum sentence. *See* 21 U.S.C. § 841(b)(1)(B). From this, the district court departed downward two levels due to the “confusion and schism between Federal and State Government.” (RT 8/18/03 at 82). While sentencing Teague at the bottom of the applicable Guideline range and encouraging his counsel to file the appeal “as we speak or as early as tomorrow,” the district court remanded Teague into custody immediately. (RT 8/18/03 at 92). Later, the court explained that it denied him release on bail pending appeal solely because it found that he had failed to raise a “substantial question” of law or fact likely to result in reversal or a reduced sentence. *See* Statement of Reasons for Denying Bail Pending Appeal, filed December 22, 2003, at 2-3 (attached hereto as Exhibit B).

B. The Proceedings on Appeal

Counsel for Teague filed the notice of appeal on August 25, 2003 (CR 93) and sought and received appointment under the Criminal Justice Act on January 9,

2004. These dates would mark the beginning of a series of delays by counsel 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. Teague's counsel requested that the briefing schedule be vacated on November 26, 2003, and he filed a motion for bail pending appeal on December 5, 2003. This Court remanded the matter to the district court to state its reasons for its denial, *see* Order, filed December 11, 2003, and, after several rounds of additional briefing, this Court denied appellant's release on bail pending appeal on February 5, 2004. By that same order, this Court maintained the briefing schedule requiring appellant's opening brief to be filed on March 15, 2004. *See* Orders, filed January 9 & February 5, 2004.

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. Meanwhile, Teague's appointed counsel missed the March 15 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. *See* Order, filed March 18, 2004. 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." *See* Order, filed March 18, 2004.

Four days later, this Court received Teague's notice of designation of the reporter's transcript, which prompted delays by the court reporter. On April 21, 2004, one day before the transcripts were due, 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. 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." *See Order*, filed April 21, 2004. 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 Order*, filed April 21, 2004.

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. At the same time, this Court set another expedited briefing schedule with the opening brief due on July 21, 2004. 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 to simultaneously to

vacate the briefing schedule. Teague has yet to receive the outstanding transcripts and almost no work on his appeal has been done.

C. Teague's Imprisonment

Meanwhile, Teague has endured prison for more than a year. Committed to the custody of the Bureau of Prisons on August 18, 2003, Teague's release from custody is set for January 9, 2005, and he is expected to be transferred into a halfway house in mid-November. No one, including the district court expected that Teague would remain in prison this long.

At Teague's sentencing, the district court recommended that Teague be enrolled in a 500-hour drug treatment program, which, as the district court noted, would "knock [Teague's] sentence down significantly." (RT 8/18/03 at 89). When Teague attempted to enroll in the program, however, he was told that he was ineligible for it because his sentence was too short. Adding to his woes, the Attorney General's Office of Legal Counsel issued a memorandum opinion on December 13, 2002, which restricted the Bureau of Prisons ("BOP") from releasing inmates to halfway houses to serve their last six months. *See Colton v. Ashcroft*, 299 F.Supp.2d 681, 684-85 (E.D. Ky. 2004). Instead, Teague will be released to a halfway house with only ten percent, or 1.8 months, of his sentence remaining. Despite the fact that other courts have invalidated this policy as illegal, *see Schorr v. Menifée*, 2004 WL 1320898, at *3 (S.D.N.Y. June 14, 2004) (slip

copy) (collecting cases), Teague is unlikely to have time to challenge it before his release to a halfway house in mid-November. He will have served nearly all of his sentence of in prison without having filed an appeal.

LEGAL STANDARDS

In general, persons convicted of federal crimes are not eligible for release pending appeal unless a court finds:

- (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any person or to the community if released . . . and
- (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in --
 - (i) reversal,
 - (ii) an order for a new trial,
 - (iii) a sentence that does not include a term of imprisonment, or
 - (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C. § 3143(b)(1). In addition, those, like Teague, who are convicted of drug offenses with a maximum sentence of at least ten years in prison are ineligible for release unless “it is clearly shown that there are exceptional reasons why detention would not be appropriate.” 18 U.S.C. § 3145(c); *United States v. Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003). This Court reviews legal determinations made by a district court in denying of release pending appeal *de novo* and factual determinations for clear error. *Id.* at 1015 (citations omitted).

ARGUMENT

I. EXCEPTIONAL REASONS REQUIRE TEAGUE'S IMMEDIATE RELEASE

This case, as the district court repeatedly recognized, involves exceptional circumstances. In *Garcia*, this Court clarified that the determination whether exceptional reasons make it unreasonable to incarcerate a defendant prior to the resolution of his appeal depends on the totality of circumstances, affording courts broad discretion to courts to consider all of the facts. *Id.* at 1018-19. Among the “exceptional reasons” it identifies are: (1) the nature of violent act itself, including unusual circumstances surrounding the act; (2) the length of the sentence imposed; (3) and whether defendant’s arguments on appeal present highly unusual issues or issues not previously decided by the appellate court. *Id.* at 1019-21. In some cases, federalism concerns might also serve as an exceptional reason for release, such as where a “state law or policy affirmatively authorized or directed the acts for which the defendants were convicted under federal law.” *See id.* at 1021 n.7.

A. Teague’s Conduct Was Nonviolent, Which Is Why the District Court Departed Downward and Sentenced Teague at the Lowest End of the Guideline Range

Despite the lengthy maximum sentence for Teague’s conduct, his actions were nonviolent and different in kind from the for-profit, recreational marijuana

cultivation subject to mandatory detention by Congress. The district court found that there was “no indicia of serious dealing here at all” (RT 8/18/03 at 65) and that Teague “did not use violence or credible threats of violence or possess a firearm or other dangerous weapon . . . in connection with the offense” (RT 8/18/03 at 75-76). Teague cultivated marijuana on the advice of a physician in accordance with California law, which this Court recognized in *Raich* to differ in kind from recreational drug trafficking. *See Raich*, 352 F.3d at 1228.³ Teague’s violation, thus, differs from the usual violation of the CSA in much the same way as a mercy killing differs from a typical murder – to alleviate pain and suffering, rather than to inflict it. In *Garcia*, this Court noted that “[i]f the act of violence or the circumstances surrounding the act were highly unusual -- the Justice Department Letter offers the example of a mercy killing -- exceptional reasons might be more likely to exist.” 340 F.3d at 1019.

Due in large part to the nonviolent nature of Teague’s offense, the district court found that he qualified for the “safety valve” provisions of 18 U.S.C. § 3553

³ This Court explained:

[A]ppellants’ class of activities -- the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician -- is, in fact, different in kind from drug trafficking. For instance, concern regarding users’ health and safety is significantly different in the medicinal marijuana context, where the use is pursuant to a physician's recommendation. Further, the limited medicinal use of marijuana as recommended by a physician arguably does not raise the same policy concerns regarding the spread of drug abuse.

(f), and, in applying the Guidelines, it departed downward two levels and sentenced Teague at the lowest end of the guideline range, or 18 months. (RT 8/18/03 at 78-86). In *Garcia*, this Court acknowledged that “the primary purpose of the Mandatory Detention Act--to incapacitate violent people--is only weakly implicated where the sentence imposed is very short, because regardless of whether the defendant is released pending appeal, he will soon be free.” 340 F.3d at 1019. More specifically in this case, since Teague has already served nearly fourteen months of his eighteen month sentence, it is almost certain that he will “be forced to serve most or all of his sentence before his appeal has been decided.” *See id.* Unless this motion is granted, Teague’s appeal will be virtually nullified. *Cf. United States v. McManus*, 651 F.Supp. 382, 384 (D. Md. 1987) (“There seems little point to an appeal if the defendant will serve his time before a decision is rendered”) (quoted in *Garcia*, 340 F.3d at 1019).

B. This Case Involves Important, Unresolved Federalism Questions

Also motivating the district court’s sentencing determination, and providing yet another exceptional reason for release, is the conflict between state and federal law over the regulation of medical marijuana. The district court recognized that “this case does embody what I’ve come to believe is the perfect storm of controversy” (RT 8/18/03 at 49) with Teague “caught in a major power struggle between the Federal Government and the State” (RT 8/18/03 at 72). After expressing its “deep concern” over this federal/state dichotomy, the district court

found this case to lie outside the heartland of activity proscribed by Congress and it departed downward for this reason. (RT 8/18/04 at 81-82). This case, thus, involves a “state law or policy affirmatively authorize[ing] or direct[ing] the acts for which the defendants were convicted under federal law.” *Cf. Garcia*, 340 F.3d at 1021 n.7. And the Supreme Court has yet to resolve the conflict. *Cf. Garcia*, 340 F.3d at 1020-21 (“If one or more issues raised on appeal has not previously been decided by the court to which petitioner will appeal, that may, in at least some cases, also weigh in favor of finding exceptional reasons”). Standing alone, any one of these factors furnishes an exceptional reason for Teague’s release. Taken together, they clearly do so.

II. TEAGUES APPEAL RAISES SUBSTANTIAL QUESTIONS OF LAW WHICH ARE LIKELY TO RESULT IN REVERSAL

A. This Prosecution Violates the Federalist Principles of the Commerce Clause and the Tenth Amendment, and Requires Reversal under *Raich*

In the more than seven months since this Court last denied Teague release on bail pending appeal, it has granted motions for bail pending appeal to medical marijuana defendants Keith Alden and Bryan Epis (who cultivated far more plants than did Teague), due to the substantial questions raised by their appeals in light of *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), *cert. granted by Ashcroft v. Raich*, 124 S.Ct. 2909 (June 28, 2004). *See United States v. Keith Terry Alden*, No. 02-10673 & 10674 (9th Cir. Mar. 30, 2003) (unpublished order); *United*

States v. Bryan Epis, No. 02-10523 (9th Cir. July 12 and August 9, 2004) (published orders) (attached hereto as Exhibit C). The likely explanation for the differential treatment afforded to Teague is that his appeal has not yet been filed for reasons beyond his control. *See supra* at Part II.B.

This Court found in *Raich* that persons who cultivate marijuana for their personal medical use on the recommendation of their physician in accordance with California law have demonstrated a strong likelihood of success on their claim that the CSA is an unconstitutional exercise of Congress' Commerce Clause authority as applied to them. 352 F.2d at 1227. Although the Supreme Court has decided to grant *certiorari* to review *Raich*, it remains binding precedent in this Circuit unless and until it is reversed. *See Baharona-Gomez v. Reno*, 167 F.3d 1228, 1234 n. 6 (9th Cir. 1999). Because Teague engaged in the same activity as that involved in *Raich*, there is a substantial question whether this prosecution is unconstitutional.

To evade the binding authority of *Raich*, the government will likely contend that Teague's use of marijuana is not truly medical and that the district court found that he was selling some of it to others. *See* Opposition at 10-12. Neither of these issues, however, was before the district court for fact-finding, since it acted prior to *Raich*. *See* RT 8/18/03 at 26 (prosecutor observing "the charge here is not dealing marijuana. The charge here is manufacturing or growing marijuana."). While making several contradictory comments on the subjects, the district court

implicitly found that Teague was a qualified medical marijuana patient under California law when it “accept[ed] some confusion on [his] part” due to the schism between state and federal law. (RT 8/18/03 at 82-83).⁴ Similarly, it implicitly found that he was not selling it for profit when it sentenced him well below the statutory minimum after promising that this would not happen if it was shown that Teague was, in fact, a dealer. See RT 8/19/03 at 69 (“if he turned out to be a dealer, you didn’t have sixty months, you had much more”). In any event, it is precisely because these subjects were not fully and fairly litigated in the pre-*Raich* context of the proceedings below that Teague’s conviction should be remanded to the district court to make the necessary factual findings. See *United States v. Bryan Epis*, No. 02-10523 (9th Cir. July 12 and August 9, 2004) (Exhibit C). The government’s arguments go more to how the question should be resolved, rather than to whether such a question is raised by this appeal. Cf. *United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985) (noting that a “‘substantial question’ is one that is fairly debatable or fairly doubtful; it is one of more substance that would be necessary to a finding that it was not frivolous.”).

⁴ It bears noting that under California law, neither the court nor the prosecutor is free to second-guess the medical judgment of a licensed physician. See *People v. Spark*, 121 Cal.App.4th 259, 16 Cal.Rptr.3d 840, 846-47 (2004) (“Whether the medical use of marijuana is appropriate for a patient’s illness is a determination to be made by a physician. A physician’s determination on this medical issue is not to be second-guessed by jurors who might not deem the patient’s condition to be sufficiently ‘serious.’”); *People v. Wright*, 121 Cal.App.4th 1356, 18 Cal.Rptr.3d 220, 227 (2004) (same).

Nor, in any event, would Teague be left without a substantial question on appeal if one adopts the government's factual assertions. All sides agree that Teague was not a large-scale drug trafficker -- the government even conceded in the proceedings below that "[t]here's evidence which suggests the defendant is not a large-scale dealer. . . . There's not a lot of cash found to suggest the defendant was making a lot of money from his marijuana sales. There were no pay owe sheets. And there was not a lot of traffic in and out of the house." (RT 8/18/03 at 28). Teague cultivated marijuana to relieve his pain and suffering and he traded some with other medical marijuana patients to achieve more effective results without deriving a profit. In *County of Santa Cruz v. Ashcroft*, 314 F.Supp.2d 1000, (N.D. Cal. April 21, 2004), the court extended the holding of *Raich* to enjoin the regulation of a nonprofit cooperative which cultivates marijuana for distribution to its approximately 250 members. *Compare Raich*, 352 F.3d at 1227 ("none of the cases in which the Ninth Circuit has upheld the CSA on Commerce Clause grounds involved the use, possession, or cultivation of marijuana for medical purposes"). This case, as *Raich* and *Santa Cruz* demonstrate, presents a substantial question whether Congress has exceeded the bounds of its Commerce Clause powers in seeking to regulate medical marijuana. Indeed, the federalism concerns motivating those decisions are even greater in this, a criminal case. *See, e.g., 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) (“[W]e *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); *The Federalist No. 17* at 102-03 (A. Hamilton) (“the ordinary administration of criminal and civil justice” should be governed by local legislation); *cf. Jones v. United States*, 529 U.S. 848, 859 (2000) (Stevens, J., concurring) (noting that federal sentence of 35 years for crime with state maximum sentence of 10 years “illustrates how a criminal law like this may effectively displace a policy choice made by the State”); *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).⁵

⁵ For these same reasons, there is a substantial question whether this prosecution violates the federalist principles of the Tenth Amendment -- issues expressly reserved in *Raich*. 352 F.3d at 1227. The Tenth Amendment works in tandem with the Commerce Clause to ensure that the federal government legislates only in areas of truly national concern. *Conant v. Walters*, 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring). As with the Commerce Clause, the guiding principle of the Tenth Amendment inquiry is individual liberty, *see United States v. Wilson*, 880 F.Supp. 621, 633 (E.D. Wis. 1995), and its fundamental purpose is to empower states to protect the rights and liberties of its citizens from encroachment by a foreign centralized government. *See, e.g., New York v. United States*, 505 U.S. 144, 181 (1991) (“State sovereignty is not just an end in itself; ‘Rather federalism secures to citizens the liberties that derive from the diffusion of sovereign power’”) (quotation omitted). Yet, despite the fact that California expressly enacted the Compassionate Use Act “pursuant to the powers reserved to the State of California and its people under the Tenth Amendment to the United

B. There is a Substantial Question Whether Teague’s Conviction Should Be Reversed Because He Was Denied Due Process in the Delay of His Appeal

Despite the importance of the federal constitutional issues presented, Teague’s appeal has been delayed to a point where it has been rendered virtually meaningless to him. Teague has already served more than three-quarters of his sentence, while the transcripts he needs to file his appeal still are not ready. *Cf. United States v. Wilson*, 16 F.3d 1027, 1030 (9th Cir. 1994) (“extreme delay in the processing of an appeal may amount to a violation of due process.”) (quoting *United States v. Antoine*, 906 F.2d 1379, 1382 (9th Cir. 1990)). Regardless whether the blame for this delay lies with the court reporter or Teague’s court-appointed counsel, both derelictions are “attributable to the government for purposes of determining whether a defendant has been deprived of due process.” *Id.* (citing *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990)).

In *United States v. Wilson*, this Court reversed appellant’s convictions for fraud because it found that the long delay from trial to transcript deprived appellant of due process. 16 F.3d at 1031. In determining whether such delay

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), the federal government has engaged in concerted efforts to deprive Californians of this state-conferred right, including federal prosecutions like this one. This most punitive tactic, which usurps the State’s police powers, violates the principles embodied by the Tenth Amendment. *Cf. Jones*, 529 U.S. at 859; *Hayden*, 154 F.Supp.2d at 615.

results in prejudice sufficient to warrant reversal, this Court instructed courts to consider the following three factors: “(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.* (quoting *United States v. Tucker*, 8 F.3d 673, 676 (9th Cir.1993)).

Here, Teague not only has a strong argument that any incarceration of him is oppressive, since the government is acting outside the scope of its Commerce Clause powers, *see supra* at Part II.A, but, more importantly, he has been prejudiced by the unusual anxiety and concern he has suffered while awaiting the outcome of his appeal. Teague was led to believe that his case held out promise for reversal and that an appeal would be filed immediately, due to the important federalist principles at issue. In the proceedings below, the district court stated that “there is some opportunity or chance, on defendant’s part . . . to have a successful appeal in the Circuit in this matter” (RT 2/7/03 at 111) and that it was “going to have this tested in the Supreme Court, if possible” (RT 8/18/03 at 73). With Teague and his family listening attentively, the district court noted that Teague brought this case to trial “to preserve a constitutional issue” (RT 8/18/03 at 79) and that Teague’s “able counsel, Mr. Nick, will file [the] appeal

immediately” (RT 8/18/03 at 84).⁶ 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 has slowly turned to despair, however, as more than thirteen months elapsed with Teague in prison and no appeal has been filed. Twisting the knife still deeper, Teague saw his close friend in prison, medical marijuana defendant Bryan Epis released from custody, despite having received a far longer sentence than Teague for cultivating five times as many plants.⁷ Any person in Teague’s situation would have suffered increased anxiety and concern from the delay in the appellate process. At the barest minimum, this is a “fairly debatable.”

III. TEAGUE DOES NOT POSE A DANGER TO THE COMMUNITY, NOR IS HE A FLIGHT RISK

The district court found by clear and convincing evidence that Teague does not pose a danger to the community and that he is not a flight risk. *See* RT 2/7/03 at 112 (“I don’t consider you a danger to yourself, nor a flight risk, nor a danger to the community under these circumstances”); *see also* RT 2/7/01 at 114 (“I don’t

⁶ In contrast to these affirmations of the strength of Teague’s appeal, the district court’s subsequent finding that it presents no “substantial questions” was made outside his presence and was not communicated to him until very recently.

⁷ The dissimilar treatment afforded Epis and Teague demonstrates clearly the prejudice to Teague from the delay in the filing of his appeal. Epis had filed multiple motions for bail pending appeal with this Court, which were repeatedly denied by the motions panel. It was only after Epis filed his appeal that his motion for bail was granted in light of *Raich*. (Exhibit C).

perceive that you are a danger.”). The government did not contend otherwise is its Opposition. Teague has lived his whole life in the Long Beach area, until he was sent to prison. He is not a violent person. He has a loving and supportive family, including a brother and mother with a law enforcement background and a fifteen-year-old son. The district court did not commit clear error in finding that Teague is not likely to flee or pose a danger to the community if released.

CONCLUSION

For the foregoing reasons, this Court should grant Teague’s renewed motion for bail pending appeal.

DATED: October 2, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served, via overnight mail, upon AUSA Ronald L. Cheng, Office of the U.S. Attorney, 312 N. Spring St., Los Angeles, CA 90012, and AUSU Andrew Stopler, Office of the U.S. Attorney, 411 Fourth St., Santa Ana, CA 92701-4599, this Second day of October, 2004.

Joseph D. Elford