IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES, Defendants-Appellants.	Nos. 98-16950 98-17044 98-17137

APPELLEE'S MOTION TO STAY AND RECALL THE MANDATE

Pursuant to Fed. R. App. P. 41(d)(2) and Ninth Circuit Rule 41-1, appellee the United States of America hereby moves to stay or recall the mandate for ninety (90) days to preserve the status quo while the Solicitor General determines whether to seek certiorari in this case. In the event that the Solicitor General determines not to seek certiorari, we will inform the Court immediately of that decision.

STATEMENT

1. Title II of the Controlled Substances Act prohibits the distribution and manufacture of marijuana, see 21 U.S.C. § 841(a)(1). Congress placed marijuana in Schedule I, the most restrictive category of controlled substances, because it found that marijuana has a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use * * * under medical supervision," id. at § 812(b)(1).

2. The Oakland Cannabis Buyers' Cooperative distributes marijuana in violation of federal law. See 21 U.S.C. § 841(a)(1). The United States filed this civil action against the Cooperative and its director in January 1998, and moved for a preliminary injunction based on affidavits of undercover government agents who had purchased marijuana from the Cooperative. The district court issued a preliminary injunction on May 19, 1998. United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086 (N.D. Cal. 1998). The court enjoined defendants from "engaging in the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana, in violation of 21 U.S.C. § 841(a)(1)." ER 636-37.

Defendants later moved the court to modify the injunction to include a broad "medical necessity" exemption. Defendants' motion requested a ruling that persons obtaining a doctor's certificate would be free to "obtain cannabis from the Cooperative to alleviate and/or treat a serious medical condition." ER 1812. The district court denied this motion. ER 1845.

3. Defendants appealed from the denial of their proposed modification. A panel of this Court disagreed with the district court's analysis, finding that "medical necessity" was an appropriate basis for modifying the district court's injunction.

ARGUMENT

1. "Ordinarily * * * a party seeking a stay of the mandate following this court's judgment need not demonstrate that exceptional circumstances justify a stay." Bryant v. Ford Motor Co., 886 F.2d 1526, 1528 (9th Cir. 1989). Under Fed R. App. P. 41(d)(2)(A), a stay of the mandate should ordinarily be granted if the movant "show[s] that the certiorari petition would present a substantial question and that there is good cause for a stay." See also 9th Cir. Rule 41-1 (noting that a stay will be denied if a petition for certiorari would be frivolous or merely filed for delay).

Although the court's electronic docket does not reflect issuance of the mandate, we are informed by the clerk's office that the mandate issued today on March 8, 2000. There is no reason, however, to apply the more stringent standards that might apply when a court is asked to recall its mandate to reconsider its underlying decision to address, for example, the impact of intervening changes in the law. See Bryant, 886 F.2d at 1529. This is particularly the case because the mandate now issues automatically within seven days of the denial of rehearing.[1] The government does not ask the Court on this motion to reconsider its decision. Rather, it simply seeks a stay to permit the

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[1] The problem is exacerbated when counsel are located in another city. The problem was further compounded in this case because lead counsel, Mark B. Stern, presented oral argument in the Second Circuit on March 2 and in the Tenth Circuit on March 7.

Solicitor General to determine whether to seek certiorari and prepare a petition if he determines to do so.

The issue before the Court is whether a substantial question for Supreme Court review exists that warrants a stay of the mandate. The ruling in this case plainly meets that standard.

2. This Court's invocation of the doctrine of necessity to authorize distribution of marijuana raises an issue of significance that would present a substantial question for Supreme Court review. Congress has concluded that marijuana has no currently accepted medical value and another court of appeals has upheld the reasonableness of that classification. This Court's ruling is flatly to the contrary.

Congress classified marijuana as a Schedule I drug with "no currently accepted medical value," 21 U.S.C. § 812(b)(1). In a 1998 "Sense of the Congress" resolution entitled "NOT LEGALIZING MARIJUANA FOR MEDICINAL USE," Congress reaffirmed its continued support for "the existing Federal legal process for determining the safety and efficacy of drugs and oppose[d] efforts to circumvent this process by legalizing marijuana, and other Schedule I drugs, for medicinal use without valid scientific evidence and the approval of the Food and Drug Administration * * * ." See Pub. L. No. 105-277, Div. F, 112 Stat. 2681, 2681-761 (1998).

As the Supreme Court has explained, "[u]nder our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with

their own conceptions of prudent public policy." United States v. Rutherford, 442 U.S. 544, 555 (1979) (reversing court of appeals' finding of implied exemption in FDA Act that would permit terminally ill patients to use Laetrile). Nor has the Supreme Court ever interpreted the law of necessity to permit the courts to re-balance legislative judgments. To the contrary, the Court has made clear the defense of necessity is subject to extremely strict limitations. United States v. Bailey, 444 U.S. 394, 415 (1980). See Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 5.4, at 442 (2d ed. 1986) ("[t]he defense of necessity is available only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values. If it has done so, its decision governs") (footnote omitted).

Congress has determined that marijuana has no currently acceptable medical value. Defendants can challenge that judgment in the legislature and through the administrative process, where the classification has already been upheld by another court of appeals. Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1137 (D.C. Cir. 1994) (upholding DEA's decision to retain marijuana on Schedule I). Unsurprisingly, the courts of appeals have uniformly rejected challenges to the classification of marijuana raised in criminal proceedings, emphasizing the possibility of recourse to the legislature and the availability of obtaining administrative and judicial review as provided by statute. See United States v. Burton, 894 F.2d 188, 192 (6th

Cir. 1990), cert. denied, 498 U.S. 857 (1990) ("it has repeatedly been determined, and correctly so, that reclassification is clearly a task for the legislature and the attorney general and not a judicial one"); United States v. Greene, 892 F.2d 453, 455 (6th Cir. 1989), cert. denied, 495 U.S. 935 (1990); United States v. Fry, 787 F.2d 903, 905 (4th Cir.), cert. denied, 479 U.S. 861 (1986); United States v. Wables, 731 F.2d 440, 450 (7th Cir. 1984); United States v. Fogarty, 692 F.2d 542, 547 n.4 (8th Cir. 1982), cert. denied, 460 U.S. 1040 (1983); United States v. Middleton, 690 F.2d 820, 823 (11th Cir. 1982), cert. denied, 460 U.S. 1051 (1983); United States v. Kiffer, 477 F.2d 349, 357 (2d Cir.), cert. denied, 414 U.S. 831 (1973).

This Court's ruling purports to sanction prospectively the medical use of marijuana. That ruling is unprecedented, contrary to the judgment of Congress and at odds with the judicial determination that the congressional classification is valid and should be sustained. It plainly would present a substantial question for Supreme Court consideration.

Good cause plainly exists to grant this motion. The district court's injunction does no more than mirror the requirements of federal law. Before the district court is asked to consider whether to prospectively permit the distribution of cannabis in violation of federal law, it is altogether appropriate that the Solicitor General have the opportunity to determine whether to seek further review of the panel's decision. Defendants, who deliberately chose not to appeal the preliminary

injunction in this case, cannot now be heard to argue that any special factors in this case require the Court to deny the government's motion.

3. A ninety-day stay will ensure that the Solicitor General has adequate time to consult with affected officials and agencies within the government, to evaluate the case, and to determine whether a petition for a writ of certiorari is necessary and appropriate. In the event that the Solicitor General determines not to seek certiorari, we will notify the Court immediately.

4. We have spoken with Christina Kirk-Kazhe, counsel for the plaintiffs-appellants, who informed us that plaintiffs-appellants intend to oppose this motion.

CONCLUSION

For the reasons stated above, this motion should be granted and the mandate in this case should be stayed or recalled until May 30, 2000.

Respectfully submitted,

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March 8, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2000, I caused to be served a copy of the foregoing MOTION OF THE UNITED STATES FOR A STAY OF THE MANDATE OR, IN THE ALTERNATIVE, TO RECALL THE MANDATE by Federal Express upon:

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