

Punitive Bail Conditions Deny Presumption of Innocence

Federal invasion takes down Oaksterdam University; Jose Gutierrez singled out for punishment at protest

On April 2, 2012, the Presidential election was still far off and the various federal agencies that prey on pot partisans were in heavy crackdown mode. The feds had been moving against dispensaries with increasing vigor since the previous fall, when California's four US attorneys threatened landlords with forfeiture of their property if they didn't evict tenants involved in cannabis production and distribution.

Early on the morning of April 2 agents from the IRS, the DEA, and the U.S. Marshal's Service raided the building at 1600 Broadway in Oakland that housed Oaksterdam University. Thousands of people preparing to enter the medical marijuana industry had been educated at OU and held its founder, Richard Lee, in high esteem.

Federal agents also raided Lee's apartment and took his computer, phone, and car keys. Other squads took down Lee's Oaksterdam Gift Shop and Blue Sky coffee shop/dispensary.

Word went out and medical marijuana activists raced to the scene to express their outrage. The protest soon shifted from outside 1600 Broadway to the nearby coffee shop, where agents could be seen through the big plate glass windows in the act of confiscating and destroying.

Jose Gutierrez, holding a sign that called the feds "Bullies!" and wearing a mask of a bull, was in the front line on the sidewalk outside the Blue Sky. Apparently the agents inside the small cafe felt threatened and called for back-up. Another squad arrived. Witnesses report that they briefly huddled and then began shoving people aside as they approached the front door. There was no order to disperse.

Three protesters were arrested. An unidentified middle-aged man wearing an Anonymous mask was released from the van taking the prisoners to jail after a message came over the radio that all hands were needed at another OU in Oakland — "Oikos University," a Christian-run trade school where a madman had just killed seven people.

Charges of resisting arrest would soon be dropped against activist Danielle Schumacher. Jose Gutierrez was charged with assault on a federal officer, a felony, and released on a bond of \$20,000.

Some witnesses say Gutierrez had been singled out —two agents went for him before he responded. His supporters hope that members of a Bay Area jury reviewing evidence of the episode will conclude



"BIG TEXAS" said the nametag of the female agent shown here guarding the door to OU. She would claim she was injured (scraped knees) while trying to arrest Jose Gutierrez at Coffeeshop Blue Sky.



MURAL BY R.B. MORRIS III AND MUNIR SHARIF MUNIR was commissioned by Richard Lee and painted on the side of 1600 Broadway, the building into which Oaksterdam University moved in the winter of 2009/10. Overlooking a parking lot, the striking artwork conveyed affection for the city of Oakland, with its functional public transport system (BART), architectural treasures such as the Tribune building, placid Lake Merritt, the great port with its container ships, and the opulent Fox Theater. (OU was the second-largest contributor in the campaign to restore and reopen the Fox.) After the federal raid on April 2, 2012, new landlords bought the building and painted over the mural. The school has relocated to 1734 Telegraph Ave. "The mural is gone, but the spirit and businesses of Oaksterdam survived," says Dale Sky Jones, the OU chancellor. "The dispensary, the gift shop, and the university, which hosts the museum exhibition, are all open."

that the beating he'd received was severe enough punishment for his response to two agents shoving him. (You can see Gutierrez being kicked in the head in the accompanying photo by Michael Short of the *San Francisco Chronicle*.)

Gutierrez, 50, is the father of children ages five and two. His partner Sarah Shrader runs the Sonoma County chapter of Americans for Safe Access. They live in Sebastopol, the town where Jose grew up. His brother is a contractor and Jose worked in construction for many years — "everything from framing to roofing." His back went out in 1999. ("No carpenter makes it past 40 without back trouble," knowledgeable Norm P. once generalized.) An auto accident in January 2012 exacerbated Gutierrez's semi-disabling condition.

"Not Guilty"

"Not guilty," said Gutierrez on Friday, July 13, when Magistrate Judge Donna Ryu asked how he was pleading to the assault charge.

Ryu had previously ordered Gutierrez not to smoke marijuana while free on bail. This punitive condition had been requested by a bureaucratic entity called Pre-Trial Services. At Gutierrez's arraignment in July a Pre-Trial Services officer, Kenneth

Gibson (who looks like he spends half his waking hours in the gym), filed a "violation memo" expressing suspicion that Gutierrez was using Marinol to cover up marijuana use. Gibson sought an order from Ryu forbidding Gutierrez to use Marinol, which is synthetic THC. Marinol is an FDA-approved drug. For reasons that defy common sense, the psychoactive compound in marijuana has been placed on Schedule III by the US government, while the whole plant remains on Schedule I.

Assistant Federal Public Defender Ellen Leonida challenged the court's authority to impose such an order based solely on Gibson's suspicions about her client. She called Frank Lucido, MD, who testified that he had prescribed Marinol for Gutierrez in April because he considered it the likeliest option for pain relief, based on the history he had taken. Gutierrez told Lucido that Cannabis was the painkiller that worked best for him. Lucido took him at his word and prescribed Marinol, which is a source of THC but lacks other beneficial compounds produced by the plant.

In response to skeptical-but-polite questioning by Ryu, Lucido consulted Gutierrez's chart and named two other drugs he had used in the past to treat his back pain:



PHOTO BY MICHAEL SHORT OF THE SAN FRANCISCO CHRONICLE shows law enforcement administering "street justice" to Jose Gutierrez in the form of kicks to the head.

Lucido kept trying to explain that his obligation was to prescribe the best possible painkiller, based on the patient's history.

acetaminophen with codeine (generic for Tylenol #3) and the muscle relaxant cyclobenzaprine (generic for Flexeril).

The magistrate, who went to college at Yale and law school at UC Berkeley, kept implying that Lucido should have put the patient on legal painkillers, and Lucido kept reiterating that his obligation was to prescribe the best possible painkiller, based on the patient's history. Ryu said, "there's a whole world of painkillers out there," as if Jose Gutierrez had some kind of ethical obligation to try a few more before she'd consider allowing him to use "the one painkiller in the world that would mask his use of marijuana."

Leonida informed the judge that there was in fact a lab test —contrary to what Pre-Trial Services claimed— that could distinguish metabolites of the plant from metabolites of Marinol. The musclebound Gibson countered that Pre-Trial Services' contract with a lab would not cover the cost of the more sophisticated test.

As Ryu again remarked the multitude of strong, effective, legally available analgesics, Leonida said "Are you saying he should take opiates because they can be identified [by the Pre-Trial Services lab]?" Ryu replied vaguely that we don't make the law but we have to follow the law. Her final order was that Gutierrez explore alternatives to Marinol with his physician and report back on Sept. 11.

Outside the courtroom Lucido thought about things he might have told the magistrate: There are many people for whom Cannabis works better than anything else to relieve various symptoms... It is unlike any other drug in terms of mechanism of action... What else is there to induce appetite?...

Haven't we all thought, a little too late, of the perfect things we could have said in some situation? The French have a term for it: *l'esprit d'escalier*, which refers to the staircase you just walked down when the right-on comments occurred to you.

Post-Arraignment Developments

U.S. District Court Judge Phyllis Hamilton is hearing the criminal case against Jose Gutierrez. Magistrate Ryu has continued to handle aspects of the case relating to bail conditions.

Gutierrez went back to Lucido and got a prescription for Vicodin, which gave him stomach cramps. He was then prescribed Tramadol, another synthetic opioid that

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JOSE ANTONIO GUTIERREZ

Gutierrez continued

MARINOL — GENERIC NAME "DRONABINOL" — is pure THC.

Gutierrez said barely worked. At this point Ryu agreed that he could use Marinol — if he could pay and make arrangements for "collection" and testing by a lab that distinguishes Marinol from the forbidden plant.

Gutierrez arranged to use ElSohly Labs in Jackson, Mississippi, which tests for THCV in the urine. (Mahmoud ElSohly, PhD, is our nation's only legal marijuana grower, according to the federal government. He also operates a research and testing lab.) Marinol, being pure THC, would not leave traces of THCV; the forbidden plant would.

So, once a month Gutierrez drives to a facility in Santa Rosa and pees into a cup while being observed by a man who undoubtedly feels grateful to have a job. The precious bodily fluid is then Fed-Exed overnight as hazardous waste.

"The whole thing costs about two-hundred-and-twelve dollars," says Gutierrez. "A hundred and fifty to the lab, thirty-nine for the collection, and then between forty-eight and sixty for the mailing."

Gutierrez will have to follow this costly, absurd procedure until his case is disposed of by Judge Hamilton. He is now being represented by Tony Serra, E.D. Lerman, and Omar Figueroa, all pro bono. A hearing is scheduled for February 13, the day this issue goes to the printer.

Lerman plans to argue that it's a case of government misconduct. Although the

Oakland police knew by 9 a.m. on April 2 that multiple search warrants were being executed by the feds, and that protests were likely, no areas had been taped off for legitimate assembly outside Coffeeshop Blue Sky.

"Most egregious," Lerman says, "is their failure to tell the crowd outside the coffee-shop to disperse." She says witnesses will testify and video will confirm that "law enforcement never told people to move. They huddle and then begin moving on people."

Lerman refers to Judge Hamilton as "our only protection from law enforcement imposing what they call 'street justice.'" Meaning, in this case, cops kicking people in the head for exercising their First Amendment rights.

The officer who Gutierrez allegedly assaulted has not claimed any injury as a result of the encounter, but a U.S. marshal whose nametag read "Big Texas" reported that she suffered scrapes on her knees while trying to make the arrest. Witnesses say Big Texas had been knocked to the ground by her fellow officers as they rushed from 1600 Broadway in response to the call from the group that felt trapped inside Coffeeshop Blue Sky.

WWTB?

There's bitter irony in Jose Gutierrez's fight for the right to medicate with Marinol. Patients almost unanimously report to doctors in the Society of Cannabis Clinicians that the "crude plant" is more effective than pure THC, which leaves them knocked-out loaded.

Tod Mikuriya used to argue that, given its benign side-effect profile, marijuana should be the *first* line of treatment for many conditions. He wrote, "The first-line treatment for any condition, efficacy being equal, would be the drug or procedure least likely to cause harm."

Some people only make the argument they think has a practical chance of prevailing; Tod always made the argument he thought was true. Cannabis should be the first line of treatment for many medical conditions, he reasoned, based on its benign side-effect profile. If Cannabis is equally effective —not necessarily more effective— than, say, Tylenol, it should be preferred for reasons of safety. Tylenol can cause liver damage, and often does.

Abstinence as Punishment

In July 2012 the *New York Times* ran an op-ed piece about the inherent unfairness of judges setting onerous conditions as terms of pretrial release. Did Magistrate Ryu read it? The cogent essay by law professors Dan Markel and Eric Miller would have reminded her: "Before anyone is proven guilty in a court of law, the Constitution extends the presumption of innocence."

The authors decry "a pervasive phenomenon hiding in plain sight: the abuse of bail and other pretrial release powers for punitive and rehabilitative purposes."

Markel and Miller "don't dispute that defendants can be, say, monitored by tracking devices while they are released. But flight risk and crime prevention don't justify bail conditions... which have far more to do with punishments or moral education techniques. While such sanctions could be permitted after conviction, they are flat-out unjustified before adjudication..."

"The use of bail conditions as a means of low-level punishment is more widespread than is generally understood. Drug testing, desisting

from alcohol, as well as attendance at rehabilitation programs... have become all-too-familiar requirements of pretrial release..."

"Many judicial release orders exhibit confusion about or disregard for the distinction between pretrial release and post-conviction punishment. Judges determining pre-trial release are not authorized to act as social workers or agents of public retribution. They need to stop pretending otherwise."

Kosher Marinol

While judges deny the right of pain patients to medicate with Marinol, scientists funded by the National Institute on Drug Abuse are suggesting that it might be just the thing to wean marijuana addicts off the herb!

At the 2012 meeting of the International Cannabinoid Research Society a team from Johns Hopkins led by Ryan Vandrey reported, "Dronabinol dose-dependently attenuated cannabis withdrawal and resulted in few adverse side effects or consequences on cognitive performance... Withdrawal suppression may be therapeutically beneficial to individuals trying to stop cannabis use, and [our] data corroborate prior reports that withdrawal can be suppressed safely with dronabinol."

Sounds almost right for Jose Gutierrez.

