10-year mandatory minimum sentence upheld

Torture Advocate Bybee Rules Against Epis

A three-judge panel from the Ninth Circuit Court of Appeals has upheld a 10-year mandatory minimum sentence for Bryan Epis, 42, the first California medical marijuana grower convicted in federal court in the Prop 215 era. Jay Bybee was one of those three judges.

The judges' 11-page decision ignores the facts and the relevant law as blatantly as the infamous "torture memo" that Bybee signed in August 2002 when he was Assistant Attorney General in the Office of Legal Counsel.

For his willingness to negate the Convention on Torture and prohibitions on torture enacted by Congress, Bybee was rewarded by George W. Bush with a seat on the Ninth Circuit. Since March 2003 this immoral man has been passing judgment on people in nine Western states (eight of which have passed medical marijuana laws, BTW).

The Prosecution Case

Bryan Epis's house in Chico was raided by DEA agents in June, 1997. They confiscated 458 small plants from a 15'-by-15' room in his basement, along with Epis's computer and files. Epis had been growing for himself and four other physician-approved medical users, and donating a small surplus to a newly formed local dispensary. Two of the patients died before Epis came to trial in 2002. The other two testified that Epis had indeed been growing with them.

Assistant U.S. Attorney Samuel Wong offered Epis a deal: plead guilty to criminal cultivation of 100 plants within 1,000 feet of a school (which carries a five-year mandatory minimum sentence) and avoid being charged with conspiracy to grow 1,000 plants (which carries a 10-year mandatory minimum). Epis chose to go to trial.

Because it was a federal case, compliance with Prop 215 was irrelevant and not to be mentioned to the jurors. Defense attorney Tony Serra nevertheless let them know that Epis was growing for medical users. And Judge Frank Damrell instructed them that they were forbidden to take "medical use" into account.

Similar scenarios have played out in some 40 federal courtrooms in the 215 era. At least that many California medical-marijuana growers and distributors are doing time or are in the pipeline to federal prison.

When Epis was on the witness stand, Wong projected on the courtroom wall an Excel spreadsheet detailing costs and sales for a rapidly expanding dispensary business. Epis could not immediately identify or explain the spreadsheet. Wong claimed that it was part of Epis's "marketing plan" for his grow in Chico -proof that he intended to operate long enough to grow 1,000 plants and make millions of dollars.

Wong introduced two pages from the "marketing plan" and the spreadsheet into evidence, and quoted a few sentences to suggest that Epis's goal was vast profit. He subsequently led DEA agent Ronald Mancini and a Butte County Sheriff's deputy through "expert" testimony explaining line-by-line that the spreadsheet revealed how much marijuana Epis planned to grow. By January 1998 he would be "netting $1,856,000 per week." From plants grown in his basement in Chico!

After testifying, Epis realized that the spreadsheet and the lines being quoted as evidence against him came from a 16-page rough-draft proposal for a "Silicon Valley Cannabis Club" that he had briefly considered launching in San Jose. Epis went through his papers and was able to find 10 pages of the Silicon Valley proposal -the context of the spreadsheet- that he had drafted in 1997 and then forgotten about. Epis abandoned the idea without even finishing the draft. Instead of moving to San Jose, Epis remained in Chico (to stay close to his eight-year-old daughter) and developed a hotel reservation website, BestLodging.com.

Jay Bybee authorized torture for suspected terrorists and a 10-year prison sentence for a cannabis cultivator.

Bryan Epis has already served 30 months in federal prison and faces seven more years.

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Tony Serra tried to admit into evidence the incomplete Silicon Valley proposal that Epis had found. Judge Damrell commented on the record, "I'm not gong to allow the jury to hear what the San Jose City Council is doing with medical marijuana clubs." Serra said he thought the prosecution had supplied the whole document in discovery (in which case the Judge likely would have admitted it into evidence). Wong convinced Damrell -and Serra- that he had only supplied the spreadsheet and the marketing-plan pages he had cited. And so the document that would have linked the spreadsheet to Epis's San Jose daydream, not his Chico reality, got marked as "Defense Exhibit A" but not admitted into evidence.

Epis was convicted of growing 100 small indoor plants and conspiring to grow 1,000 plants within 3.3 football fields of Chico Senior High School. He was denied bail and sent to prison at Lompoc in September 2002. He was later transferred to Terminal Island.

Enter Brenda Grantland

While Epis was in prison, attorney Brenda Grantland took on his appeal. She reviewed the case file and realized it was incomplete. Tony Serra told her that during the move of his office from Pier Five to North Beach, things had been misplaced. Among the missing items was the marked copy of Defense Exhibit A, the Silicon Valley proposal minus six pages, that had not been accepted as evidence.

Grantland found the copy that the government provided to the defense o in discovery, among thousands of pages the agents printed off Epis's seized computer.

At a special hearing in October 2003, Wong argued that Exhibit A was a completely scrambled document (which Wong somehow had in his possession, though the original was missing) containing all but 6 pages of the Silicon Valley proposal - but admitted that the complete document had been turned over by the government o in discovery. Grantland complained that prosecutorial misconduct had occurred at trial when Wong misled Serra and the judge into believing that the whole proposal was not turned over by the government in discovery. "If Wong hadn't misled him," says Grantland, "Serra could have called his office and asked someone to go through the discovery materials and bring the complete Silicon Valley proposal to court so that it could have been introduced as evidence -proving that the government had it all along.

The paths of Bryan Epis and Jay Bybee first intersected in June 2004 when the Ninth Circuit panel heard oral arguments from Grantland challenging Epis's conviction on numerous grounds, including prosecutorial misconduct.

Bybee was a newcomer to the bench. The dominant figure on the panel, according to Grantland, was a brilliant, elderly judge named Donald Lay.

Grantland figures it was Judge Lay's doing that the panel allowed Epis out on bail and remanded the case to Judge Damrell for re-sentencing in light of the Ninth Circuit's ruling in the case of Raich v. Ashcroft. (Californians Angel Raich and Diane Monson had been medicating legally under state law with marijuana grown in California. The Ninth Circuit ruled that there had been no impact on interstate commerce, therefore the feds didn't have jurisdiction to prosecute them. Grantland argued that the same principle applied to Epis's grow in Chico. The U.S. Supreme Court eventually ruled against Raich and Monson.)

In preparation for the re-sentencing hearing ordered by the Ninth Circuit, Grantland asked to see the evidence seized from Epis' home. She suspected that the spreadsheet that was the lynchpin of the prosecution case may have been altered by the agents to create the exponentially increasing numbers, while the agents had custody of Epis' computer. After much stalling, Wong told the court that except for the government's trial exhibits, all the evidence, including the backup hard drive from Epis' computer, had been destroyed.

Grantland demanded a hearing to determine whether this had been done intentionally, and whether the agents who testified against Epis knew that the spreadsheet and marketing-plan were excerpts from the irrelevant Silicon Valley proposal and had nothing to do with his Chico grow. Damrell agreed that she could depose the agents involved. Wong filed a motion arguing that the case had been remanded to Damrell only for re-sentencing, and that the question of prosecutorial misconduct was beyond the court's jurisdiction. Damrell acquiesced.

The "Safety-Valve" Debriefing

At an interview called a "safety valve debriefing" in March 2006, Wong deposed Epis, who was hoping to qualify for the "safety valve" exception to the 10-year mandatory minimum. To qualify, Epis would have to convince the court that he had come clean and was telling the truth about the crime.

Wong asked Epis about his relations with others involved in the grow, trying to establish that Epis had been the supervisor. He also asked whether the spreadsheet and excerpts from the marketing plan that Epis couldn't explain on the witness stand were indeed plans for expansion in Chico. Epis said no, they related to his abandoned Silicon Valley proposal. Wong then called for an evidentiary hearing to confirm that Epis was lying.

That hearing was held in February 2007. According to Grantland, Agents Redmond and Mancini both "admitted having seen the complete Silicon Valley proposal... They both admitted that the figures in the spreadsheets were identical to the figures in the Silicon Valley proposal."

Moreover, the spreadsheets related to a dispensary that would be buying and selling marijuana, whereas Epis was charged as a cultivator. And the amount that Epis could grow in his basement (within 1,000 feet of the high school) was minuscule compared to the amounts projected on the spreadsheet.

At sentencing in September 2007, Damrell ruled that Epis may have not spoken the truth when he failed to recall whether a man named Keith Dusek did

Ashley Epis was eight years old when her father was tried and convicted in 2002.

continued on next page

Torture Advocate Rules *from previous page*

"If he would tolerate torture by federal agents as a means of obtaining confessions, all prosecutorial misconduct would be tolerable." —Attorney D.

more than put up mylar to advance the grow project. Wong pressed Damrell to specify Epis's false statements for the record, noting "it impacts on whether Exhibit 27 [the Excel spreadsheet] was misused by the prosecution." Damrell said, "Let the Ninth Circuit sort that out. I'll not make that finding."

Wong also tried to get Damrell to find that Epis had falsely claimed that the marijuana grown in his basement did not leave Chico. "How is that relevant?" Damrell asked. "That's something for the Ninth Circuit to consider. This is a sentencing hearing we're dealing with now. The horse has left the barn on those issues as far as this court is concerned."

Damrell re-sentenced Epis to the 10-year mandatory minimum, allowing him to stay free on bail pending appeal to the Ninth Circuit. The wise Judge Lay had died, replaced on the three-judge panel hearing the Epis case by Johnnie Rawlinson, a Clinton appointee considered to be a lightweight and right-winger. The panel reviewed the record and briefs, dispensed with oral arguments, and filed its decision April 8.

The decision was written by either Bybee or Judge Michael Daly Hawkins, a former federal prosecutor appointed by Clinton. Rawlinson filed a one-sentence statement concurring "in the result" -an opportunistic little maneuver that distances her from the faulty logic.

"They can't just affirm findings that the judge didn't make!" —Brenda Grantland

Ignoring The Facts and the Law

Blatantly ignoring relevant facts and precedents was a characteristic of Bybee's torture memo. Harold Koh, the Dean of Yale Law School, testified before Congress that "the Bybee memorandum is perhaps the most clearly legally erroneous opinion I have ever read." He said it contained "five obvious failures," one of which was to ignore the existing zero-tolerance policy on torture by U.S. interrogators.

According to the 11-page written decision in the Epis case, "It was not an abuse of discretion for the district court to find that the prosecutor did not solicit or allow to go uncorrected any false testimony related to the spreadsheet."

But the district court never made a finding in this regard! Grantland had tried unsuccessfully to get Judge Damrell to hold an evidentiary hearing on prosecutorial misconduct. "They can't just affirm findings that the judge didn't make," she exclaimed upon reading the decision.

Similarly, the Bybee-or-Hawkins decision stated, "The district court did not err in holding that Epis had not met his burden of showing that any of the destroyed evidence would have been exculpatory or that the government destroyed the evidence in bad faith." But Judge Damrell had denied a hearing on that issue too! Initially the judge had been appalled by the destruction of evidence (which took place at four separate locations and despite DEA procedures meant to safeguard against it).

Damrell had agreed initially that Grantland could try to establish prosecutorial misconduct by deposing the agents who authorized the destruction of evidence. When Wong moved that such an inquiry was beyond the narrow scope of the hearing, Damrell called it off. There was no "holding" that the evidence had been destroyed inadvertently.

The decision dooming Epis to 10 years in prison glossed over his argument concerning the ambiguous legal situation that prevailed in 1997. In the years ahead the Ninth Circuit itself would agree that there can be a "medical necessity" defense for growing marijuana, and that Californians could grow, obtain from caregivers, and use marijuana for medical purposes. The U.S. Supreme Court would reverse the Ninth Circuit on these points, but until they ruled on *Raich*, their trend had been towards states'rights.

The decision defines the little indoor garden as "a large-scale marijuana growing operation." This trumping up of the threat to justify inordinate punishment is also characteristic of Bybee's torture memo, which transforms occasional terrorist acts into a jihad so threatening to the United States that we have to abandon our legal and ethical standards.

Bybee's claim that government agents are immune to prosecution if they are "only following orders" from the President is the defense rejected by U.S. and allied prosecutors at the Nuremberg war crimes trials. Legal scholars contend that Bybee's memo was part of a plan by the Bush-Cheney administration to violate the laws of war -a conspiracy that would be a war crime in itself. Federal judges have lifetime appointments but involvement in a conspiracy to commit war crimes would be grounds for impeachment.

Brenda Grantland says, "The news about Judge Jay Bybee being the author of the DOJ torture memos broke just a few days before our first (and only) oral argument in Epis' case, back in 2004. I have always had a bad feeling about Bryan's fate being in his hands."

She has asked the Ninth Circuit to hold an en banc hearing in which 11 judges would consider Epis's appeal. "They're going to have to remand it to Damrell and tell him 'Your hands are not tied, make findings.'"

Bybee's "Pretzel Logic"

Some pro-cannabis activists are equally concerned about other issues, and some even see how issues interrelate. Jeanmarie Todd was circulating a petition from thinkprogress.org to impeach Bybee before she learned of his role in the Epis case. When she found out, she e-mailed, "Oddly enough, I used to know Jay Bybee when he was just an ambitious attorney at a top DC law firm and a member of the same Mormon Church congregation I attended (The "singles ward" meeting in Chevy Chase, MD.). I would never have guessed he'd become the author of torture-enabling memos, a judge in the 9th Circuit, and one ruling the wrong way on an issue so close to my heart.

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"Now that I think about it, the same pretzel logic and compartmentalized thinking that would allow such an intelligent person to remain a fundamentalist Christian would also be necessary to protecting his brain from the cognitive dissonance of justifying horrific treatment of fellow human beings, and the same blinders-on refusal to actually look at the scientific evidence that would enable one to "believe" in the purported evils of marijuana and the criminalization thereof."

Jeanmarie was president of the Mendohealing collective that got wiped out when their Fort Bragg farm was raided by law enforcement in February. Her beau, David Moore, is in the Mendocino County jail. David would offer comfort, Bybee would authorize pain. One's a prisoner, one's a judge.

The waterboard... inflicts no pain or actual harm whatsoever." —Jay Bybee

The thinkprogress petition quoted Bybee authorizing government interrogators to:

- Slam a detainee's head against a wall: "any pain experienced is not of the intensity associated with serious physical injury."
- Slap a detainee's face: "The facial slap does not produce pain that is difficult to endure."
- Place a detainee into stress positions: "They simply involve forcing the subject to remain in uncomfortable positions."
- Waterboard a detainee: "The waterboard... inflicts no pain or actual harm whatsoever."

One wonders how long it would take Judge Bybee to change his learned opinion if it was his head being slammed against the wall?

A veteran appeals specialist who requested anonymity because he appears before the Ninth Circuit comments, "Bybee was appointed without the public or Congress knowing about his advocacy of illegal conduct by government agents. Had those facts been revealed, he would never have been confirmed. Bybee is not fit to sit in judgment of others. If he would tolerate torture by federal agents as a means of obtaining confessions, all prosecutorial misconduct would be tolerable."

PRODUCTIVE CITIZEN Bryan Epis posts online petitions "relating to changing unjust marijuana laws" on his website — http://www.bestlodging.com/politics.