

Case against pot dealer presses on

Despite DOJ memo urging restraint, federal prosecutor doggedly pursues conviction

By Henry Meier

Let's make one thing clear: Charles Lynch broke the law.

For almost exactly one year - from April 2006 until March 29, 2007 - Lynch was the driving force behind a marijuana operation that raked in more than \$2.1 million, according to fastidious records the now-convicted felon kept.

Evidence presented in a 2008 trial showed Lynch cultivated more than 3,000 marijuana plants and sold an estimated 153 kilograms of pot. Two hundred and seventy one minors - individuals under the age of 21 as defined by federal law - were sold the drug, according to the trial record. A jury found him guilty of crimes that carried a mandatory minimum sentence of five years in prison.

So why, then, given the evidence and the inflexible constraints of the mandatory minimum, did U.S. District Judge George H. Wu issue a sentence of just a year and day - and the record shows he was reluctant to give even that - for Lynch's apparently egregious federal crimes?

Unraveling that question - and the question of why, more than three years after Lynch's sentencing, the government is still waging an appellate war to get the five-year mandatory penalty imposed and Wu thrown off the case - opens a rabbit hole into the world of federal marijuana regulation. Legal observers say the case underscores a realm of convoluted laws that are often enforced by the whims of individual prosecutors who possess almost unlimited discretion.

"It's not how anybody but Rube Goldberg would design this enforcement machine," said Douglas A. Berman, a professor and at Ohio State's Moritz College of Law and one of the country's foremost sentencing experts.

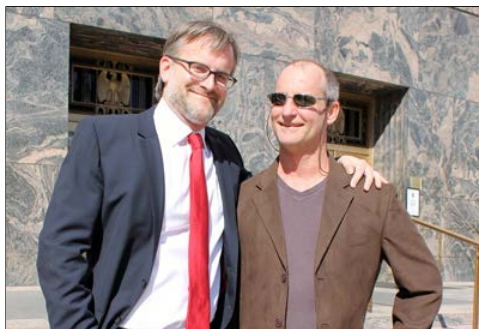
The crux of the issue, according to many attorneys, scholars and a growing number of federal judges, is that the logic designating cannabis a Schedule I drug has been largely debunked. The label puts marijuana in the same category as heroin and makes it more verboten than cocaine, methamphetamine and LSD.

Advocacy group Americans for Safe Access challenged the designation before the D.C Circuit Court of Appeals. The three judge panel denied the rescheduling push in January, however, ruling 2-1 that "adequate and well-controlled studies" had not yet determined the medical value of the drug.

Public sentiment concerning the substance has also shifted dramatically. Fifty-eight percent of Americans think marijuana should be legal, according to a recent Gallup poll, and 21 states have formally legalized pot in some way. Two of those states, Washington and Colorado, passed referendums last November allowing recreational use.

The government has tried to address the conflict with a series of memos beginning in 2009 clarifying the Justice Department's enforcement priorities. The most recent memo, issued by Deputy Attorney General James M. Cole on Aug. 29, makes it clear that "prosecutors should not consider the size or commercial nature of a marijuana operation alone" as reason to prosecute and that an operation "demonstrably in compliance with a strong and effective regulatory system" should be a lower priority.

Given the new guidance, other details of the Lynch case become increasingly germane. Most notably, the jury in the case was barred from considering California



Henry Meier / Daily Journal
Federal public defender Rueven Cohen, left, and client Charles Lynch

statutes legalizing the cultivation and sale of marijuana for medical purposes.

While all the evidence used to convict Lynch was factually correct, his actions were all legal under California law. Contrary to the government's presentation of the facts, Lynch was not some rogue drug dealer, but a former computer programmer who opened a medical marijuana dispensary known as the Central Coast Compassionate Caregivers.

Deputy Federal Public Defender Rueven L. Cohen, Lynch's attorney, quoted legal luminaries in advocating his client had been subjected to overzealous prosecutorial action.

"Former Attorney General and Supreme Court Justice Robert Jackson once said that 'the most dangerous power of the prosecutor is that he will pick people that he thinks he should get, rather than cases that need to be prosecuted,'" Cohen wrote in an email.

The prosecutor in the case, Assistant U.S. Attorney David Kowal, successfully kept out all mention of California's medical marijuana law - a common prosecutorial tactic, according to attorneys involved in such cases. That virtually guaranteed a government victory. Unable to present the reason he sold pot, Lynch's defense was scuttled. This despite the fact that he ran as transparent and compliant an operation as possible, according to Wu.

"Before opening the [Central Coast Compassionate Caregivers], he notified governmental authorities including the City of Morro Bay's mayor and city council plus various local law enforcement entities such as the county sheriffs and (according to Lynch) the DEA," Wu wrote in his April 2010 sentencing memo. "Consequently, should any governmental authority have believed that some public safety issue or other societal interest warranted the prevention of any commencement of CCCC's operations, that authority could have sought to enjoin the CCCC from opening. None did.

"Were all purported criminals so accommodating, this country would be a much safer and law-abiding place."

Cohen argued that at this point, the case practically begs for prosecutorial restraint.

"Charlie ran exactly the type of dispensary that the Cole Memorandum now exempts from prosecution," Cohen said. "Given the scarcity of government resources these days and the country's current mores about marijuana and its prohibition, does it really make sense to expend additional resources in seeking a five-year sentence for a kind and gentle software engineer who has no prior criminal record at all?"

Apparently, according to the government's pursuit of Lynch's case, the answer is an emphatic yes.

In a voluminous, 211-page brief filed Nov. 1 rebutting Lynch's appeal and cross-appealing his sentence, Kowal renewed his attack on Wu's lenient sentence, going so far as to call for the judge's removal from the case.

When asked why the case remains a priority, Thom Mrozek, spokesman for the Central District's U.S. attorney's office, said the case had been vetted and met the guidelines for prosecution and a mandatory sentence.

"This appeal is being pursued with the authority and consent of the Department of Justice in Washington, D.C.," he said. "The prosecution of Mr. Lynch, both at the time it was brought and currently, fall under the DOJ guidelines.

"He was convicted of this crime and the law says he has to serve five years," Mrozek added.

Outside observers were puzzled by this contention, however, noting discretionary action is always an option. And other Central District prosecutors have voluntarily dismissed other marijuana enforcement actions since the recent DOJ memo.

"There's just a lot of stuff that doesn't make sense," Alex Kreit, a professor at Thomas Jefferson Law School who tracks marijuana regulation. "There seems to be a lot of prosecutors on the ground level that don't want to follow the advice from the Department of Justice in D.C. It's surprising there's not internal political will to

enforce the policies in these memos."

Lynch, who is currently out on bond but unable to find work and unable to access his savings because his account has been frozen, isn't holding out much hope of a sudden change of heart from the government.

"They're like bulldogs," he said. "Once they get their teeth into you, they don't let go. They're not going to say, 'All right, things have changed. Let's let this go.' They won't ever do that."

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