No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2019

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SINYO SILKEUTSABAY;
LA LY YANG;
BOUALONG SILKEUTSABAY;
KHAMLAY SILKEUTSABAY,

PETITIONERS,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

==========

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Did the Courts below err in their analysis of Washington State law governing growing and selling medical marijuana?

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On September 04, 2013, the Grand Jury in the Eastern District of Washington filed a three-count indictment charging Sinyo Silkeutsabay, La Ly Yang, Boualong Silkeutsabay and Khamlay Silkeutsabay with: (1) conspiring to manufacture 1000 or more marijuana plants, (2) manufacturing 1000 or more marijuana plants, and (3) possessing a firearm in furtherance of a drug trafficking crime. Following the District Court's denial of a Motion to Enjoin Prosecution or Dismiss the Indictment, all four defendants entered conditional pleas of guilty, reserving the right to appeal the Court's ruling on the Motion.

On appeal, the Ninth Circuit remanded for a McIntosh evidentiary hearing to determine whether the defendants complied Washington law concerning their production and distribution of medical marijuana. The District Court concluded they were not in full compliance and reinstated the convictions and sentences.

Petitioners once again appealed to the Ninth Circuit, which affirmed the District Court. A petition for Rehearing/Rehearing En Banc was denied. This timely Petition for Certiorari follows.

This Petition presents the question of whether the Ninth Circuit erred in the analysis of the laws and policies of the State of Washington governing growing and selling of medical marijuana. Resolution of this question is of critical importance because the Ninth Circuit's position would effectively nullify the CAFCA's clear mandate requiring deference to state law with respect to manufacture, possession,

and sale of medical marijuana, at least in those states within the Ninth Circuit. The federal policy is formalized in the Consolidated and Further Continuing Appropriations Act § 538 (2015) (hereinafter CAFCA). *See infra* at 4-5.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231. The Ninth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. EVOLUTION OF WASHINGTON MARIJUANA LAWS

The State of Washington has long recognized the benefits of medical marijuana and has passed and modified several laws to allow and govern its production, sale, and use. The current law, Medical Cannabis, was passed in 2011 and is codified in Chapter 69.51A (2012) of the Revised Code of Washington. This case involves the continuing evolution of Washington medical marijuana law and the interaction with federal laws and policy, particularly as stated in CAFCA. Washington's evolution began at least forty years ago when Washington courts recognized a necessity defense for medical marijuana usage. *State v. Diana*, 24 Wa.App. 908, 604 P. 2d 1312 (1979).

Since 1999 the State of Washington has authorized the use of medical marijuana. *See* former Washington State Medical Use of Marijuana Act (hereinafter MUMA), RCW 69.51A (1999). The legal framework in Washington criminalizing marijuana use, possession, distribution and cultivation had been

constantly in flux. MUMA provided for exemptions, exceptions and affirmative defenses of these crimes for both individuals and collectives.

After the passage of MUMA, the United States Attorneys for the Eastern District of Washington and the Western District of Washington wrote to Washington State Governor Christine Gregoire, threatening federal prosecution for any Washington State officials or employees who facilitated the use of medical marijuana in performing their sanctioned duties and functions. They asserted the legislative proposals would create a licensing scheme permitting large-scale marijuana cultivation and distribution. This authorized conduct would be contrary to federal law and thus, would undermine the federal government's efforts to regulate the possession, manufacturing, and trafficking of controlled substances.

Accordingly, the Department of Justice (hereinafter DOJ) would consider civil and criminal remedies regarding those who set up marijuana growing facilities and dispensaries as they would be doing so in violation of federal law. Others who knowingly facilitate the action of licensees, including property owners, landlords, and financiers would be in violation of federal law and also subject to prosecution. Additionally, state employees who conducted activities condoned by the Washington State legislative proposals would not be immune from liability under the Controlled Substance Act (hereinafter CSA). The DOJ would consider imposing remedies including injunctive actions to prevent cultivation and distribution of marijuana and other associated violations of the CSA, civil fines, criminal prosecution, and forfeiture of any property used to facilitate a violation of the CSA. The letter

reminder the governor that the U.S. Attorney General had repeatedly stated, the Department of Justice remained firmly committed to enforcing the CSA in all states. Governor Gregoire, USAO Letter, Medical Marijuana Legislative Proposals, April 14, 2011. *See Cannabis Action Coalition v. City of Kent,* 180 Wn. App. 455, 322 P.3d 1245 (Div. I 2014).

To avoid the specter of state employees being carted off to federal prisons, Governor Gregoire vetoed the provisions of the act that implemented state regulatory functions. She stated: "[t]hese sections would open public employees to federal prosecution and the United States Attorneys have made it clear that state law would not provide these individuals safe harbor from federal prosecution." Laws of 2011, Ch. 181, Governor's Veto Message at 1374-1375.

Sections of the Washington law that did not address regulatory functions were left intact. The result led to a confusing set of local and administrative rules that left patients, doctors, providers, lawyers, law enforcement officers and the courts to sort out the varying nuances and meanings. The law was amended by the State Legislature in 2011 and the title was changed from Medical Marijuana to Medical Cannabis (MUCA). RCW 69.51A (2012).

B. FEDERAL RESPONSE TO STATE LEGALIZATION OF MEDICAL MARIJUANA

On December 19, 2014, Congress passed the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (hereinafter "CAFCA"). Section 538 of this act states:

> None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State law that authorizes the use, distribution, or cultivation of medical marijuana.

C. PROCEEDINGS IN THE DISTRICT AND COURT OF APPEALS

La Ly Yang had almost 300 patients for whom she was the designated provider in 2012. La Ly Yang incorporated Double A Organics in 2012 as a nonprofit, and shortly thereafter, changed the name to US Cannabis in 2013. La Ly Yang opened the medical marijuana dispensary on Rainier Avenue SW in Seattle, Washington, on Thanksgiving Day of 2012. Vincent Montel Rodabough, an insurance agent and Government cooperating witness, provided liability insurance coverage for this location, insuring the medical marijuana dispensary through Lloyd's of London. This policy also covered theft and business interruption.

Sinyo Silkeutsabay also opened a medical marijuana dispensary in White Center, Seattle on December 24, 2012. Mr. Rodabough again secured insurance for the White Center dispensary through Lloyd's of London. The White Center dispensary was much larger than the Rainier dispensary. It was large enough to grow medical marijuana on site. The insurance obtained by Mr. Rodabough included coverage for a medical marijuana grow.

The Seattle dispensaries were operated according to Washington State Law, which allowed an individual who cannot otherwise provide medical marijuana for

themselves to designate someone to grow and provide marijuana for his or her personal consumption.

As the businesses started to grow and believing they could legally do so, La Ly Yang, Sinyo Silkeutsabay and Mr. Rodabough discussed potential larger grow sites to supply the Seattle area dispensaries, including a piece of property in the Eastern region of Washington State, near the town of Colville, Washington. La Ly Yang also contacted California attorney Ariel Clark to discuss potential legal issues. Ms. Clark contacted the local Colville authorities who indicated they had no issue with a medical marijuana grow.

Ms. Clark advised La Ly Yang that the Colville area would be a suitable place for a marijuana grow. *Id.* Ms. Clark further advised that the size of the marijuana grow would depend on the number of patients that chose either La Ly Yang or Sinyo Silkeutsabay as their designated provider.

Property in Colville was purchased in order to begin a medical marijuana grow to supply the Seattle based dispensaries. Due to the distance between Colville and Seattle, where La Ly Yang and Sinyo Silkeutsabay operated their dispensaries, they needed people to tend to the grow. Sinyo Silkeutsabay contacted family members who agreed to do so, thereby allowing La Ly Yang and Sinyo Silkeutsabay to continue daily operations at their Seattle medical marijuana dispensaries, while other friends and family tended to the Colville grow in Eastern Washington. The medical marijuana at the Colville grow was planted in May of 2012. ER 449.

On July 8, 2013, the DEA, with help from various members of the local law

enforcement, executed a search warrant of the Colville medical marijuana grow site. Agents seized at the grow site a total of 1,031 marijuana plants. On September 04, 2013, an Indictment was filed charging defendants with Conspiracy to Manufacture 1000 or More Marijuana Plants, in violation of 21 U.S.C. § 846; Manufacture of 1000 or More Marijuana Plants, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C.§ 2; and Possession of a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c).

Khamlay Silkeutsabay filed a Motion to Dismiss and/or Enjoin Prosecution seeking to have the District Court dismiss the Indictment or enjoin the Government from taking any action in furtherance of the prosecution of this case. The Motion was based upon CAFCA §538 (hereinafter §538), which prohibits the Department of Justice from using any appropriated funds "to prevent [Washington and other enumerated states] . . . from implementing their own State laws that authorize the use, distribution, or cultivation of medical marijuana." All Defendants joined in the Motion.

Defendants argued that prosecution of individuals by the DOJ for their involvement in medicinal marijuana directly prevents states such as Washington State from implementing their own medicinal marijuana laws. The Defendants further argued that "the expenditure of funds contained in §538 was intended to prohibit the use of any federal funds to prosecute persons engaged in using, distributing, and cultivating medical marijuana."

In its response, the Government argued that the Defendants were operating

outside the parameters set forth by Washington State law regarding medical marijuana. The Government asserted that there "[was] no evidence that any of the defendants, when they were growing medical marijuana under Washington State law, qualified for an affirmative defense." Due to the plant count, the Government further argued, "[i]t is clear from Washington medical marijuana law that there is no way that the growing of over 1000 marijuana plants is authorized."

The Defendants' reply argued that the question before the Court was not whether the Defendants' alleged activity was in "compliance" in the opinion of the DOJ, but whether Congress intended for that determination to be made at the state level versus federal level. Furthermore, the Defendants were never charged with a state crime or had their license suspended or revoked. In conclusion, the Defendants asserted that questions of compliance should first be a question for the State, not for federal government agencies.

Without a hearing, the Court entered its Order denying the Motion on February 13, 2015. The Court concluded that because of the plant count, the Defendants were out of compliance with Washington State's medical marijuana law, and therefore, the DOJ could continue to use funds to prosecute the Defendants.

All Petitioners later pled guilty to a variety of charges stemming from the medical marijuana grow, but reserved their right to appeal the motion to dismiss referenced above. The Defendants were sentenced during a consolidated sentencing hearing.

Defendants appealed to the Ninth Circuit Court of Appeals. The 9th Circuit remanded the case to the District Court for an evidentiary hearing, emphasizing the District Court must follow state law in its analysis of compliance.

Prior to the evidentiary hearing, the Defendants asked the District Court to declare the case complex, arguing that the Ninth Circuit in the remand order also stated that the issue of compliance with state law is inextricably intertwined with state procedural law, and that many issues regarding the proper procedures were matters of first impression. Specifically, as they argued in briefing, these included the allocation of burden of proof, what strict compliance means, whether the statutory affirmative defense meets the requirements of compliance and the extent to which Washington procedural law is implicated in an analysis of compliance with Washington medical marijuana law.

While these are issues that had never been decided by any court, the District Court ruled the issue of compliance with state law was not complex as that law was well established. The Court also denied a request for additional CJA funding for investigation.

Following the evidentiary hearing, the District Court again denied the motion to dismiss. Following sentencing, Petitioners again appealed to the Ninth Circuit again arguing their actions were in conformance with state law and therefore not chargeable under § 538. Citing *United States v. McIntosh,* 833 F.3d 1163, 1178 (9th Cir. 1916), the Ninth Circuit affirmed in an unpublished opinion

holding that appellants were not in compliance with Washington law and therefore not eligible for § 538 protection:

> Washington's 2011 Medical Use of Cannabis Act states a medical marijuana provider may not supply marijuana to more than one patient within a given fifteen-day window. See Wash. Rev. Code§ 69.51A.040.

Memorandum Opinion at 2 (9/4/19) (unpublished); *see* Appendix xxx.

ARGUMENT

The District Court and the Ninth Circuit Court of Appeals erred in their reading and analysis of Washington's law regarding production, possession, and distribution of medical marijuana. This resulted in the erroneous conclusion that Appellants had violated state law and were subject to federal prosecution.

Two cases in the courts of Washington clearly establish that Appellant's activity was in conformity with the laws of the state. See *State v. Shupe*, 172 Wash.App. 341, 289 P.3d 741 (2012); *State v. Markwart,* 182 Wash.App 355, 329 P.3d 108 (2014). *Shupe* dealt with the "one patient at a time" issue:

> The intent then is to make medical marijuana available so that qualifying patients may "fully" participate in the medical use of marijuana. The provision empowers the medical practitioner to exercise only the best professional judgment in delivering care to patients. Significantly, the provision allows designated providers to assist patients without fear of conviction. RCW 69.51A.005. Given these goals, the proper interpretation of "to only one patient at any one time" is an interpretation that allows the greatest number of qualified patients to receive the medical marijuana treatment that they need. In other words, ***"only one patient at any one time" means one transaction after another so that each patient gets individual care.***

172 Wa.App at 355-56; 249 P.3d at 748 (*emphasis added.*)

Markwart also involved growing and selling medical marijuana and the court found *Shupe* was controlling:

> [T]he State contends that Scott Shupe's authorization from a patient, unlike Tyler Markwart's authorization, ended upon the sale. Along these lines, the State argues that a provider cannot grow marijuana for more than one person at a time. We find no language in *Shupe* stating that Shupe's authorization form consented to only one sale. Regardless, the statute does not require that the authorization end with one sale. Nor does the statute limit the provider to growing for one patient at a time. The State's argument conflicts with the language and spirit of *Shupe*. **If one can be the provider for more than one patient at one time, although one must conduct sales at different times, one must be able to grow marijuana for more than one patient at a time.**

172 Wash.App at 357-58, 329 P.3d at 119-20 (emphasis added). The Ninth Circuit ignored these cases and particularly *Shupe*'s conclusion of the purpose of "one patient at any one time," i.e., to ensure that each patient receives individual care.

The goal stated in *Shupe* to ensure "the greatest number of qualified patients to receive the medical marijuana treatment that they need" can only be met by the conclusion that Washington law does not impose a 15-day interval between distribution to any number of qualified patient if they distribute to only one patient at a time.

RCW 69.51A must be read as a whole and not as individual sections, words, sentences, or even subsections. Clearly, the intent of the phrase "one person at a time" is limited to individual sales and not to a limit on the number of persons to whom a person may be the designated provider.

CAFCA § 538 precludes federal prosecutions against individuals engaged in medical marijuana production and sales in accordance with state law. As argued above, Washington State law permits growing plants in a number to serve several patients.

If Washington marijuana laws are interpreted and enforced according to the government's standards, those laws would become meaningless. The term "serve as provider" must mean "become a designated provider." A provider cannot *begin* serving as a designated provider for more than one person in any 15-day period. To give any other meaning to the phrase would not ensure the greatest number of qualified patients receive the medical marijuana they need.

If a provider could sell to only one patient in a 15-day period, the provider could sell to only 24 patients maximum in a year (in 360 days). In *Shupe*, the State made a similar argument:

> The State urges that "only one patient at any one time" means that Mr. Shupe could be a marijuana provider to only one person at a time. Resp't's Br. at 4-5. This would mean that Mr. Shupe could not keep records showing that he was the provider for 1,280 people. Instead, he would have to be the provider for 1 patient—period. Moreover, the State contends that this is a fact question for the jury. Here, the jury *evaluated* the evidence and determined that Mr. Shupe had provided marijuana to more than one patient at a time.

172 Wash.App. at 747, 289 P.3d at 353-54.

The Washington Court of Appeals rejected this argument, vacated the conviction, and dismissed the prosecution. 172 Wash.App. at 749, 289 P.3d at 355.

In summary, the Ninth Circuit clearly erred in applying state law, particularly in ignoring the holdings of *Shupe* and *Markwart*. "[O]nly one patient at any one time" means one transaction after another so that each patient gets individual care. 172 Wa.App at 355-56; 249 P.3d at 748. "If one can be the provider for more than one patient at one time, although one must conduct sales at different times, one must be able to grow marijuana for more than one patient at a time." 172 Wa.App at 357-58, 249 P.3d at 119-20.

CONCLUSION

For the foregoing reason, the Court should grant the Petition.

Respectfully submitted,

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APPENDIX I

NINTH CIRCUIT OPINION (UNPUBLISHED)

FILED

SEP 04 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SINYO SILKEUTSABAY; LA LY YANG; BOUALONG SILKEUTSABAY; KHAMLAY SILKEUTSABAY, Defendants-Appellants.	No. 17-30262 D.C. No. 2:13-cr-00140-TOR-1 MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Thomas O. Rice, District Judge, Presiding

Argued and Submitted August 26, 2019
Seattle, Washington

Before: HAWKINS, McKEOWN, and BYBEE, Circuit Judges.

Appellants Sinyo Silkeutsabay, La Ly Yang, and Boualong Silkeutsabay pled guilty to conspiracy to manufacture 100 or more marijuana plants in violation of 21 U.S.C. § 846 and Appellant Khamlay Silkeutsabay pled guilty to misprision

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

of a felony in violation of 18 U.S.C. § 4. All four pled as a defense § 538 of the Consolidated and Further Continuing Appropriations Act of 2015, which forbids the Department of Justice from using congressionally allocated funds to inhibit the implementation of state medical marijuana laws. Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (hereinafter § 538). The district court found that because Appellants violated Washington state medical marijuana law, they were not entitled to § 538's protection, and thus their convictions could stand. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Appellants made various claims about the burden of proof and the availability of common law defenses in this case. Appellants concede that our decision in *United States v. Evans*, 929 F.3d 1073 (9th Cir. 2019), disposes of each of those issues.

2. Appellants' sole remaining claim is that § 538 shields them from this prosecution. To reap § 538's protection, Appellants must establish that they strictly complied with Washington law in operating their medical marijuana dispensaries and farm. *United States v. McIntosh*, 833 F.3d 1163, 1178 (9th Cir. 2016). They did not do so. Washington's 2011 Medical Use of Cannabis Act states a medical marijuana provider may not supply marijuana to more than one patient within a given fifteen-day window. *See* Wash. Rev. Code § 69.51A.040

(2012); *see also id.* § 69.51A.100 (2012). Appellants admit to having served between ten and thirty patients a day in their dispensaries. This practice exceeds the statutory limit, in clear violation of Washington law. Because Appellants failed to strictly follow Washington law, § 538 does not protect them from federal prosecution. *See McIntosh*, 833 F.3d at 1178.

AFFIRMED.

APPENDIX II

DENIAL OF REHEARING

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SINYO SILKEUTSABAY; LA LY YANG; BOUALONG SILKEUTSABAY; KHAMLAY SILKEUTSABAY, Defendants-Appellants.	No. 17-30262 D.C. No. 2:13-cr-00140-TOR-1 Eastern District of Washington, Spokane ORDER

Before: HAWKINS, McKEOWN, and BYBEE, Circuit Judges.

The panel judges have voted to deny appellant's petition for panel rehearing.

Appellant's petition for panel rehearing, filed September 17, 2019, is DENIED.

CERTIFICATE OF SERVICE

I certify the enclosed Petition for Certiorari was filed by mailing the original and 10 copies to:

Supreme Court of the United States
1 First Street, NE
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A copy was also served on the Solicitor General by mail address to:

Officer of the Solicitor General

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Gerald R. Smith

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 9, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Officer of the Solicitor General
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By: /s/ KATHLEEN SCHROEDER
Legal Assistant to Peter S. Schweda