IN THE UNITED STATES DISTRCT COURT

FOR THE DISTRICT OF ALASKA

Gordon Warren Epperly
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Gordon Warren Epperly, Sui Juris Petitioner, vs., State of Alaska, Respondent, vs., The United States of America, [UNITED STATES], Respondent.	District Court Case No. 1:15-CV-00002-SLG **Motion To Include Text Of** **5 U.S.C. 701-706** **And Include Text Of** **United States of America v. Michael Carl Visman, 919 F.2d 1390** **Into Record Of The Court** Petition For Redress Of Grievance

COMES NOW Gordon Warren Epperly, the Petitioner of a verified "*Petition for Redress of Grievance*" that is before the above named Court hereby moves the Court to include

the attached "*highlighted*" text of Title 5, Sections 701-706 of the United States Code and the attached "*highlighted*" text of United States of America v. Michael Carl Visman, 919 F.2d 1390 into the Record of the Court.

Statement In Support Of Motion

Title 5 U.S.C. §§ 701-706

1. Within the Petitioner's (*verified*) "*Petition for Redress of Grievance*" [1] and Petitioner's "*Objection to United States 'Motion to Dismiss'*" [2] the Petitioner has made references to sections of Title 5 U.S.C. 701-706 without expressly identifying those provisions of the United States Code. As Attorney Richard L. Pomeroy for the Respondent, "*The United States of America*" continues to assert that the Petitioner, Gordon Warren Epperly has no "*standing*" to seek "*Declaratory Judgment*" relief against the Respondent, "*The United States of America*," the Petitioner finds the need to move the Court to include the attached "*highlighted*" text of Title 5 U.S.C. 701-706 into the Record of the Court which said text should put Attorney Pomeroy's allegations to rest.

[1]/ see Page 12, Paragraphs 21, 22, & 25 of Petitioner's (*verified*) "*Petition for Redress of Grievance*." See also Item two (2) of "*PRAYER FOR RELIEF*" of "*Petition for Redress of Grievance*."

[2]/ see context of statements that appears on Pages 7-10 of Petitioner's "*Opposition to The United States of America's 'Motion to Dismiss'*" that is dated June 29, 2015.

2. The doctrine of exhausting "*Administrative Remedies*" was addressed with an "*e-mailing*" of messages to "*U.S. Deputy Attorney General, James M. Cole*" /[3] on November 25, 2014 and to "*Executive Office for United States Attorneys*" /[4] on January 5, 2015 which were followed up with U.S. Postal Service Mailings of those messages to each of those individuals and to "*U.S. Attorney General, Eric Holder*" and several "*U.S. Attorneys*," including the "*U.S. Attorney*" for the "*District of Alaska*." No responses were given to any of these "*messages*" or mailings and thus said "*silence*" of the U.S. Justice Department constitutes a final ruling of that "*Department*" which may be reviewed by the above named Court. The inclusion of the text of 5 U.S.C. 701-706 into the Record is proper.

United States of America v. Michael Carl Visman, 919 F.2d 1390

3. The question of "*Federalism*" was raised by Attorney, Craig W. Richards for the Respondent, State of Alaska within his June 8, 2015 "*Motion to Dismiss*" which was addressed within Petitioner's June 15, 2015 "*Opposition to State of Alaska's 'Motion to Dismiss'*" under the heading of "*Federalism*" that appears on Page 17.

The U.S. Court of Appeals, Ninth Circuit addressed the question of "*Federalism*" as that question applies to the authority of the U.S. Congress to regulate the "*Intrastate*" intercourse of "*Marijuana*" on November 28, 1990 within the attached case of "*United States of America v. Michael Carl Visman, 919 F.2d 1390*." The Petitioner was

[3]/ Message to "*Deputy Attorney General, James M. Cole*" may be viewed from the Internet at: "http://tinyurl.com/nchndrj".

[4]/ Message to "*Executive Office for United States Attorneys*" may be viewed on the Internet at: "http://tinyurl.com/odz95ws".

not aware of this case at the time he was addressing the Respondent, State of Alaska's "*Motion to Dismiss*." As the above named U.S. District Court for the District of Alaska is located within the jurisdiction of the U.S. Court of Appeals, Ninth Circuit, the ruling of United States of America v. Michael Carl Visman (*supra*.) is binding upon the above named U.S. District Court. The Petitioner, Gordon Warren Epperly hereby moves the Court to include the attached case of United States of America v. Michael Carl Visman into the Record of the Court.

ASSERVATION

COMES NOW THE PETITIONER, Gordon Warren Epperly, does hereby state under pains of penalty of perjury that he is the author of the above ***"Motion To Include Text Of 5 U.S.C. 701-706"*** *and* ***"Motion To Include Text Of United States of America v. Michael Carl Visman, 919 F.2d 1390" Into Record Of The Court*****"** and the statements made therein are true and correct to the best of his knowledge.

Dated this Thirteenth day of the month of July in the year of our Lord, Jesus the Christ, Two-Thousand and Fifteen.

Seal

Gordon Warren Epperly

Gordon Warren Epperly – Petitioner / Affiant

CERTIFICATE OF MAILING

COMES NOW Petitioner, Gordon Warren Epperly, hereby certifies under penalties of perjury that true and correct copies of Petitioner's ***"Motion To Include Text Of 5 U.S.C. 701-706"*** *and* ***"Motion To Include Text Of United States of America v. Michael Carl Visman, 919 F.2d 1390" Into Record Of The Court"*** has been certified mailed to:

Certified Mail No. 7015 0640 0007 2746 0166

Richard L. Pomeroy
Assistant U.S. Attorney
222 West 7th Ave., #9, Rm. 253
Anchorage, Alaska 99513-7567

Certified Mail No. 7015 0640 0007 2746 0159

Christopher D. Peloso
Assistant Attorney General
Department of Law
P.O. Box 110300
Juneau, Alaska 99811-0300

by depositing said Petitioner's ***"Motion To Include Text Of 5 U.S.C. 701-706" and "Motion To Include Highlighted Text Of United States of America v. Michael Carl Visman, 919 F.2d 1390" Into The Record of the Court"*** with the U.S. Postal Service, Mendenhall Station, at Juneau, Alaska.

Dated this Thirteenth day of the month of July in the year of our Lord Jesus Christ, Two-Thousand and Fifteen .

Seal

Gordon Warren Epperly

Gordon Warren Epperly - Affiant

THE ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 701 - 708

§ Section 701. - Application; definitions

This chapter applies, according to the provisions thereof, except to the extent that -

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law

(b) For the purpose of this chapter -

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include -

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title

§ Section 702. - Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered

against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein

(1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or

(2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought

§ Section 703. - Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement

§ Section 704. - Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority

§ Section 705. - Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings

§ Section 706. - Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

919 F.2d 1390

UNITED STATES of America, Plaintiff-Appellee,
v.
Michael Carl VISMAN, Defendant-Appellant.

No. 89-10630.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 7, 1990.
Decided Nov. 28, 1990.

Charles M. Bonneau, Sacramento, Cal., for defendant-appellant.

Robert M. Twiss, Asst. U.S. Atty., Sacramento, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of California.

Before ALARCON, BRUNETTI and KOZINSKI, Circuit Judges.

ALARCON, Circuit Judge:

1 Michael Carl Visman (Visman) appeals from his conviction and sentence for three counts of violating the Comprehensive Drug Abuse Prevention and Control Act of 1970. Count I charged Visman with conspiracy to manufacture, possess with intent to distribute, and distribution of marijuana in violation of 21 U.S.C. Secs. 846 and 841(a)(1). Count II charged Visman with manufacturing marijuana in violation of 21 U.S.C. Sec. 841(a)(1) and aiding and abetting in violation of 18 U.S.C. Sec. 2. Count III charged Visman with maintaining a place for the manufacture of marijuana in violation of 21 U.S.C. Sec. 856 and aiding and abetting in violation of 18 U.S.C. Sec. 2. (ER 1-2).

PERTINENT FACTS

2 On October 13, 1989, officers from the United States Forest Service flew an aerial reconnaissance mission in search of suspected marijuana patches on National Forest lands in Camino, California. The agents observed a marijuana patch near the United States Forest Service nursery in a blackberry thicket on Visman's property. The next day an eradication team returned to the area. They found a tunnel 50 to 70 feet long leading through the blackberry thicket to the marijuana patch.

3 On another part of Visman's property, the officers found the source of the irrigation system for the marijuana patch. The officers then went to Visman's residence. Detective Groth advised Visman of his Miranda rights. Visman consented to a full search of his house and grounds. The officers discovered evidence of marijuana cultivation in the basement. The officers saw some loose marijuana on the floor, closed off windows, an electrical bypass and walls painted white three fourths of the way up the wall.

4 During the search of the house, Visman stated, "I knew it was wrong. I should not have let my family members talk me into this. I'm involved because my house and land were used to grow it, and it would be wrong to blame it all on him." Visman also stated that his brother had gotten him into this and that it had ruined his whole life.

5 Visman testified in his own defense at trial. During his testimony, he denied that he participated in cultivating marijuana. He claimed that the equipment in his basement was for growing macrobiotic vegetables.

6 On July 20, 1989, the jury found Visman guilty and the court referred the matter to the United States Probation Service for the preparation of a presentence report. During his interview with the probation officer, Visman admitted that he knew the marijuana was growing in the blackberry thicket and that he was going to split the proceeds from the crop with his brother. After the sentencing hearing, the trial court entered a finding of fact that Visman had committed perjury during trial. The court granted the government's motion for an upward departure in sentencing based on obstruction of justice. The district court sentenced Visman to 30 months in custody followed by two years of supervised release.

DISCUSSION

I. FEDERAL JURISDICTION

7 Visman contends that there is no basis for federal jurisdiction over the criminal cultivation of marijuana plants found rooted in the soil. First, Visman argues that there is no reasonable basis to assume that plants rooted in the soil affect interstate commerce. Second, Visman argues that Congress does not have the authority to regulate intrastate illegal conduct that affects interstate commerce.

8 We review a district court's assumption of jurisdiction de novo. United States v. Layton, 855 F.2d 1388, 1394 (9th Cir.1988) (citing United States v. Hill, 719 F.2d 1402, 1404 (9th Cir.1983)). Federal jurisdiction over this matter was based on the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Drug Act). 21 U.S.C. Sec. 801 to Sec. 966. Visman was convicted under Sec. 841(a)(1), Sec. 846 and Sec. 856 of the Drug Act.

9 Title 21 U.S.C. Sec. 801 contains the introductory provisions to the Drug Act, including Congressional findings and declarations. In Sec. 801, Congress specifically found that a nexus exists between marijuana and interstate commerce. Congress concluded that controlled substances have a "detrimental effect on the health and general welfare of the American people." 21 U.S.C. Sec. 801(2). Congress also found that "local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances." 21 U.S.C. Sec. 801(4). Congress also found that "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." 21 U.S.C. Sec. 801(6).

10 The Supreme Court has instructed that Congress may regulate those wholly intrastate activities which have an effect upon interstate commerce. Wickard v. Filburn, 317 U.S. 111, 125, 63 S.Ct. 82, 89, 87 L.Ed. 122 (1942); United States v. Darby, 312 U.S. 100, 120-21, 61 S.Ct. 451, 460-61, 85 L.Ed. 609 (1941).

11 In Perez v. United States, 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971), the Court ruled that the defendants' local, illegal activity of loan sharking was within a "class of activity" that adversely affected interstate commerce and Congress had the power to regulate it. Id. at 156-57, 91 S.Ct. at 1362-63. The Court concluded that "[e]xtortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce." Id. at 154, 91 S.Ct. at 1361. The Court stated, "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." Id. (quoting Maryland v. Wirtz, 392 U.S. 183, 193, 88 S.Ct. 2017, 2022, 20 L.Ed.2d 1020 (1968)).

12 This court has previously held that Congress may constitutionally regulate intrastate drug activity under 21 U.S.C. Sec. 841(a)(1). United States v. Rodriquez-Camacho, 468 F.2d 1220 (9th Cir.1972); United States v. Montes-Zarate, 552 F.2d 1330 (9th Cir.1977). In United States v. Rodriquez-Camacho, the appellant argued that Congress may not constitutionally regulate the intrastate distribution of controlled substances under Sec. 841(a)(1). Rodriquez-Camacho, 468 F.2d at 1221. We also stated that "Congress may regulate not only interstate commerce but also those wholly intrastate activities which it concludes have an effect upon interstate commerce." Id. (citing Perez v. United States, 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971)). We recognized further that "[m]arijuana is listed among the controlled substances in the challenged statute, and Congress has made specific findings as to the effect of intrastate activities in controlled substances on interstate commerce." Rodriquez-Camacho, 468 F.2d at 1221. We stated that " '[t]his court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.' " Id. at 1221-22 (quoting Stafford v. Wallace, 258 U.S. 495, 521, 42 S.Ct. 397, 403, 66 L.Ed. 735 (1922)). We concluded that Congress had a rational basis for making its findings and that "[t]his is a matter ... whose ultimate resolution lies in the legislature and not in the courts." Id. at 1222.

13 In United States v. Montes-Zarate, the appellant claimed that the district court did not have jurisdiction over the possession of marijuana with intent to distribute because no interstate nexus was established. Montes-Zarate, 552 F.2d at 1331. We held that Sec. 841(a) "is constitutional and that no proof of an interstate nexus is required in order to establish jurisdiction of the subject matter." Id. We adopted the reasoning of the Fourth Circuit and concluded as follows:

14 Congressional findings on which the legislature rested disclosed that intrastate possession, distribution and sale of drugs ... directly and injuriously effected the introduction of them into other States to the injury of the public health and welfare there. 21 U.S.C. Secs. 801, 812. Thus the definition and proscription of transactions of 'controlled substances', 21 U.S.C. Sec. 812(b), entirely within a State is altogether constitutional.

15 Id. (quoting United States v. Atkinson, 513 F.2d 38, 39-40 (4th Cir.1975)).

16 We hold that Congress may constitutionally regulate intrastate criminal cultivation of marijuana plants found rooted in the soil. We defer to Congress' findings that controlled substances have a detrimental effect on the health and general welfare of the American people and that intrastate drug activity affects interstate commerce. Rodriquez-Camacho, 468 F.2d at 1221-22. We further hold that local criminal cultivation of marijuana is within a class of activities that adversely affects interstate commerce.

II. WAIVER OF RIGHT TO CHALLENGE ON APPEAL

17 The government argues that Visman waived his right to challenge on appeal a two-level increase for obstruction of justice by failing to object at the sentencing hearing. We agree.

18 During the sentencing proceedings, the district court summarized the recommendations of the probation officer in the presentence report including the addition of "two levels because the defendant lied at trial...." When asked if there was any objection to the probation officer's computation, Mr. Weiner, the defendant's counsel, replied, "No, we concur." Later in the proceedings, the court asked counsel if there were "any other objections to statements of material fact, sentencing classification, sentencing Guideline ranges, or policy statements contained in or omitted from the presentence report...." Mr. Weiner replied, "No, Your Honor." Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure provides that "where factual inaccuracy is alleged, the defendant has the burden of introducing, or at least proffering, evidence to show the inaccuracy." United States v. Roberson, 896 F.2d 388, 391 (9th Cir.1990).

19 Other circuits have held that a defendant waives a challenge to a presentence report by failing to object in the district court. In United States v. Soliman, 889 F.2d 441 (2nd Cir.1989), the defendant failed to challenge a presentence report in the district court. Id. at 445. The district court assessed a two-point penalty for obstruction of justice based on information in the presentence report that the defendant had testified untruthfully at a suppression hearing. Id. The Second Circuit held that the defendant could not seek relief on appeal after failing "to avail himself of this opportunity below." Id.

20 In United States v. Atehortua, 875 F.2d 149 (7th Cir.1989), the Seventh Circuit held that the defendant "has not found any case excusing failure to raise an objection to the presentence report in a timely fashion; neither have we." Id. at 151. The court concluded that the defendant forfeited his opportunity to contest the probation officer's severity rating calculation on appeal. Id. In United States v. Stout, 882 F.2d 270 (7th Cir.1989), the Seventh Circuit stated that "[b]ecause Rule 32 contemplates that a defendant will inform the district court of any error in the presentence report prior to, or at, the sentencing hearing, Stout may have waived his right to dispute the probation office's estimate of his offense severity rating." Id. at 272 n. 3.

21 We have considered the waiver of an objection to sentencing in two decisions prior to the enactment of the Sentencing Guidelines. In United States v. Cloud, 872 F.2d 846 (9th Cir.1989), the defendant argued that a provision requiring the unpaid balance of the restitution payments to become due and payable upon his death was void under 18 U.S.C. Sec. 3565(h). Id. at 857. We held that "[w]e need not decide this issue, however, because it does not appear that [the defendant] presented it to the court below." Id. (citing United States v. Grewal, 825 F.2d 220, 223 (9th Cir.1987)). In United States v. Grewal, we refused to consider whether the amount of restitution imposed as a condition of probation exceeded the actual loss suffered by the victim because the defendant did not raise this issue at the district court level. Grewal, 825 F.2d at 223.

22 Visman waived his right to challenge the two-level increase for obstructing justice under Federal Sentence Guideline 3C1.1 because he agreed to the adjustment and failed to present the issue in the district court.

23 AFFIRMED.