APPEAL, CUSTAPP, RELEASE

U.S. District Court
District of New Mexico − Version 3.2.2 (Las Cruces)
CRIMINAL DOCKET FOR CASE #: 2:06−cr−00538−JCH−1
Internal Use Only

Case title: USA v. Quaintance, et al
Magistrate judge case number: 2:06−mj−03655

Date Filed: 12/22/2006
Date Terminated: 01/08/2009

Assigned to: District Judge Judith C. Herrera

Appeals court case numbers: '07−2140' 'Tenth Circuit', '09−2013' 'Tenth Circuit Court of Appeals', '09−2015'

Defendant (1)

Danuel Dean Quaintance
TERMINATED: 01/08/2009

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Pending Counts	**Disposition**
21:846: CONSPIRACY (1s)	SENTENCE IMPOSED: BOP 64 months on counts 1 &2 (run concurrently); 4 years total supervised release as to both counts; special conditions imposed; SPA: $200.00; voluntary surrender
21:841(a)(1) &21:841(b)(1)(C): POSSESSION WITH INTENT TO DISTRIBUTE 50 KILOGRAMS AND MORE OF MARIJUANA &18:2 AIDING AND ABETTING (2s)	SENTENCE IMPOSED: BOP 64 months on counts 1 &2 (run concurrently); 4 years total supervised release as to both counts; special conditions imposed; SPA: $200.00; voluntary surrender

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
21:846 CONSPIRACY (1)	dismissed
21:841(a)(1) and 21:841(b)(1)(C) POSSESSION WITH INTENT TO DISTRIBUTE 50 KILOGRAMS AND MORE OF MARIJUANA AND 18:2 AIDING AND ABETTING (2)	dismissed

Highest Offense Level (Terminated)

Felony

Complaints	**Disposition**
21:841 Possession with Intent to Distribute 172 lbs of Marijuana &21:846 Conspiracy [2:06−m −3655]	dismissed

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Material Witness

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Third Party Custodian

Joe Ruiz

Plaintiff

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Date Filed	#	Page	Docket Text
02/24/2006	1	9	CRIMINAL COMPLAINT by USA naming Danuel D. Quaintance, Mary Helen Quaintance &Timothy Jason Kripner by Magistrate Judge William P. Lynch [2:06−m −3655] (klg) (pg). (Entered: 02/24/2006)
03/15/2006	25	15	INDICTMENT by USA Luis Armando Martinez. Counts filed against Danuel D. Quaintance (1) count(s) 1, 2, Mary Helen Quaintance (2) count(s) 1, 2, Timothy Jason Kripner (3) count(s) 1, 2 (rlc) (Entered: 03/17/2006)
04/07/2006	34	17	

			MOTION and mememorandum in support of to dismiss indictment by Danuel Dean Quaintance (*) (bap) (Entered: 04/10/2006)
04/18/2006	39	32	MOTION and memorandum for suppression of evidence by Danuel Dean Quaintance (*) (seal) (Entered: 04/18/2006)
04/24/2006	41	38	RESPONSE by USA to defts Quaintance's motion to dismiss indictment [34−1] (*) (bap) (Entered: 04/25/2006)
04/25/2006	42	51	NOTICE OF FILING EXHIBITS (addendum) by USA re its motion response to defts Danuel Dean Quaintance &Mary Helen Quaintance's mtn to dismiss indictment [41−1] (yc) (Entered: 04/25/2006)
04/27/2006	43	63	RESPONSE by USA to motion for suppression of evidence [39−1] * (sl) (Entered: 04/27/2006)
05/17/2006	65	75	SUPERSEDING Indictment by USA Luis Martinez naming Danuel Dean Quaintance (1) count(s) 1s, 2s, Mary Helen Quaintance (2) count(s) 1s, 2s, Timothy Jason Kripner (3) count(s) 1s, 2s, Joseph Allen Butts (4) count(s) 1 (bc) (Entered: 05/18/2006)
05/23/2006	68	77	REPLY by defendant Danuel Dean Quaintance to Govt's response to motion to dismiss indictment [34−1] (*) (bap) (Entered: 05/23/2006)
06/15/2006	88	87	CLERK'S MINUTES: before District Judge Judith C. Herrera re hrg held on 5/17/06 on various motions [46−1], [39−1], [53−1] C/R: P. Baca (*) (bap) (Entered: 06/15/2006)
06/22/2006	127	107	Defendant's Exhibit−A by Danuel Dean Quaintance, and Mary Helen Quaintance re minutes [97−1] (eg) (Entered: 07/13/2006)
07/05/2006	117	90	MEMORANDUM OPINION AND ORDER: by District Judge Judith C. Herrera denying motion for suppression of evidence [39−1] by Danuel Dean Quaintance and Mary Helen Quaintance (cc: all counsel*) (bap) (Entered: 07/05/2006)
07/18/2006	134	124	SUPPLEMENT by defendant Danuel Dean Quaintance re motion response [116−1] * (vv) (Entered: 07/18/2006)
08/29/2006	154	129	CLERK'S MINUTES: before District Judge Judith C. Herrera re hrg held on 8/21/06 through 8/23/06 on defts' motion to dismiss indictment [34−1] C/R: Paul Baca (*) (bap) (Entered: 08/29/2006)
08/29/2006	155	133	CLERK'S MINUTES: before District Judge Judith C. Herrera re: exhibit List to previous Clerk's Minutes re hrg held on defts' motion to dismiss [154−1], [34−1] C/R: Paul Baca (*) (bap) (Entered: 08/29/2006)
08/30/2006	160	134	NOTICE by defendant Danuel Dean Quaintance of closing argument (*) (bap) (Entered: 08/31/2006)

08/31/2006	163	146	NOTICE by USA of closing remarks (*) (bap) (Entered: 09/01/2006)
09/06/2006	166	154	MEMORANDUM (Rebuttal Argument) by deft Danuel Dean Quaintance in support of motion to dismiss indictment [34−1] (*) (bap) (Entered: 09/07/2006)
11/09/2006	178	161	MEMORANDUM OPINION AND ORDER: by District Judge Judith C. Herrera denying motion to suppress physical evidence &statements [136−1] by Joseph Allen Butts (cc: all counsel*) (bap) (Entered: 11/13/2006)
12/08/2006	187	175	FIRST MOTION in limine re: evidence by Danuel Dean Quaintance (*) (bap) (Entered: 12/08/2006)
12/22/2006	192	179	MEMORANDUM OPINION AND ORDER: by District Judge Judith C. Herrera denying motion to dismiss indictment [34−1] by Danuel Dean Quaintance (cc: all counsel)* (dmw) Modified on 1/3/2007 (Sent for Publishing pursuant to chambers) (bap). Modified on 1/9/2007 (Mail returned as undeliverable as to Aspen Publishers) (bap). (Entered: 12/22/2006)
04/19/2007	217	217	MOTION in Limine *No. 1* by USA as to Danuel Dean Quaintance, Mary Helen Quaintance, Timothy Jason Kripner, Joseph Allen Butts. (Martinez, Luis) (Entered: 04/19/2007)
04/26/2007	219	220	MOTION for Reconsideration *of Order Denying Motion to Dismiss* by Danuel Dean Quaintance. (Robert, Marc) (Entered: 04/26/2007)
05/03/2007	222	234	Clerk's Minutes for proceedings held before Judge Judith C. Herrera :Status Conference via telephone as to Danuel Dean Quaintance, Mary Helen Quaintance, Joseph Allen Butts held on 5/3/2007 (Court Reporter Paul Baca.) (ljs) (Entered: 05/03/2007)
05/03/2007	223	235	RESPONSE in Opposition by USA as to Danuel Dean Quaintance, Mary Helen Quaintance, Joseph Allen Butts re 219 MOTION for Reconsideration *of Order Denying Motion to Dismiss* (Martinez, Luis) (Entered: 05/03/2007)
05/07/2007	230	240	REPLY TO RESPONSE to Motion by Danuel Dean Quaintance re 219 MOTION for Reconsideration *of Order Denying Motion to Dismiss* (Attachments: # 1 Supplement Statement of Danuel D. Quaintance)(Robert, Marc) (Entered: 05/07/2007)
05/09/2007	235	251	MEMORANDUM OPINION AND ORDER by Judge Judith C. Herrera denying 219 Motion for Reconsideration as to Danuel Dean Quaintance (1) (ljs) (Entered: 05/09/2007)
05/11/2007	236	258	ORDER by Judge Judith C. Herrera granting 226 Motion to Join; denying 187 Motion in Limine by Danuel Dean Quaintance ; and granting 217 Motion in Limine by the Government. (ljs) (Entered: 05/11/2007)

05/21/2007	245	262	NOTICE OF APPEAL (Interlocutory) by Danuel Dean Quaintance re 236 Order on Motion in Limine,, Order on Motion for Miscellaneous Relief. Filing fee $ 455, receipt number N/A. (Herrera, Jerry) (Entered: 05/21/2007)
05/21/2007	248	264	ORDER by Judge Judith C. Herrera granting 246 Motion for Extension of Time to File as to Danuel Dean Quaintance (1), Mary Helen Quaintance (2) interlocutory appeal in this case (bap) (Entered: 05/22/2007)
09/13/2007	287	265	TRANSCRIPT Order Form by Danuel Dean Quaintance for proceedings held on August 21−23, 2006 before Judge Herrera, re 245 Notice of Appeal − Interlocutory (pg) (Entered: 09/13/2007)
09/17/2007	288	267	Transmitted Record on Appeal as to Danuel Dean Quaintance, Mary Helen Quaintance, Joseph Allen Butts to US Court of Appeals re 245 247 254 (pg) (Entered: 09/17/2007)
05/09/2008	334	268	JUDGMENT (Mandate)of USCA dismissing the appeal for lack of jurisdiction as to Danuel Dean Quaintance 245 (Attachments: # 1 Opinion and Order, # 2 Judgment)(pg) Modified on 5/9/2008 (pg). (Entered: 05/09/2008)
07/31/2008	347	277	Joint Second MOTION to Dismiss *Superseding Indictment* by Mary Helen Quaintance as to Danuel Dean Quaintance, Mary Helen Quaintance, Timothy Jason Kripner, Joseph Allen Butts. (Robbenhaar, John) Modified text on 8/1/2008 (bap). (Entered: 07/31/2008)
07/31/2008	348	285	Joint MOTION for Reconsideration re 217 MOTION in Limine *No. 1* filed by USA, 187 Motion in Limine, 236 Order on Motion in Limine,, Order on Motion for Miscellaneous Relief by Mary Helen Quaintance as to Danuel Dean Quaintance, Mary Helen Quaintance, Timothy Jason Kripner, Joseph Allen Butts. (Robbenhaar, John) (Entered: 07/31/2008)
08/05/2008	355	291	RESPONSE to Motion by USA as to Danuel Dean Quaintance, Mary Helen Quaintance re 347 MOTION to Dismiss *Superseding Indictment* (Martinez, Luis) (Entered: 08/05/2008)
08/05/2008	358	293	RESPONSE to Motion by USA as to Danuel Dean Quaintance, Mary Helen Quaintance re 348 Joint MOTION for Reconsideration re 217 MOTION in Limine *No. 1* filed by USA, 187 Motion in Limine, 236 Order on Motion in Limine, (Martinez, Luis) Modified text on 8/6/2008 (dmw). (Entered: 08/05/2008)
08/06/2008	359	295	MEMORANDUM OPINION AND ORDER by District Judge Judith C. Herrera denying Defendants Danuel Dean Quaintance and Mary Helen Quaintances Joint Second Motion to Dismiss the Indictment 347 (baw) (Entered: 08/06/2008)
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			ORDER by District Judge Judith C. Herrera denying Motion for Reconsideration 348 (baw) (Entered: 08/06/2008)
08/07/2008	362	300	REPLY TO RESPONSE to Motion by Mary Helen Quaintance as to Danuel Dean Quaintance, Mary Helen Quaintance, Timothy Jason Kripner, Joseph Allen Butts re 347 Joint MOTION to Dismiss *Superseding Indictment* (Robbenhaar, John) (Entered: 08/07/2008)
08/08/2008	364	304	Joint MOTION to Dismiss *For Failure to State a Valid Cause of Action* by Mary Helen Quaintance as to Danuel Dean Quaintance, Mary Helen Quaintance, Timothy Jason Kripner, Joseph Allen Butts. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3a, # 4 Exhibit 3b, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7)(Robbenhaar, John) (Entered: 08/08/2008)
08/15/2008	371	351	JOINT REPLY TO USA's RESPONSE to Motion 370 by Mary Helen Quaintance as to Danuel Dean Quaintance, Mary Helen Quaintance, Timothy Jason Kripner, Joseph Allen Butts re 364 MOTION to Dismiss *for Failure to State a Valid Cause of Action* (Robbenhaar, John) Modified on 8/15/2008 to add "Joint" and linkage (bap). (Entered: 08/15/2008)
08/18/2008	374	355	CONDITIONAL PLEA AGREEMENT as to Danuel Dean Quaintance (mk) (Entered: 08/18/2008)
08/18/2008	375	362	Clerk's Minutes for proceedings held before Magistrate Judge W. Daniel Schneider: Plea Hearing held on 8/18/2008, Guilty Plea entered as to Counts 1 &2 of Superseding Indictment by Danuel Dean Quaintance (1); Court to notify on Sentencing date; Conditions of Release continued. (Court Reporter: P Baca.) (mk) (Entered: 08/18/2008)
08/18/2008	379	363	Clerk's Minutes for proceedings held before District Judge Judith C. Herrera: Jury Selection/Trial Vacated; Court denies Defendants' Joint Motion to Dismiss as to Danuel Dean Quaintance and Mary Helen Quaintance: 364 . (Court Reporter P. Baca.) (id) (dds). (Entered: 08/18/2008)
08/18/2008	380	364	ORDER by District Judge Judith C. Herrera denying 364 Defendants' Joint MOTION to Dismiss for Failure to State a Valid Cause of Action as to Danuel Dean Quaintance and Mary Helen Quaintance (id) (Entered: 08/19/2008)
01/03/2009	407	365	OBJECTION TO PRESENTENCE INVESTIGATION REPORT by Danuel Dean Quaintance (Herrera, Jerry) (Entered: 01/03/2009)
01/03/2009	408	366	SENTENCING MEMORANDUM by Danuel Dean Quaintance (Herrera, Jerry) (Entered: 01/03/2009)
01/05/2009	409	373	RESPONSE by USA as to Danuel Dean Quaintance re 407 Objection to Presentence Investigation Report (Attachments: # 1 Exhibit 12/18/08 Response to Objections)(Martinez, Luis)

			(Entered: 01/05/2009)
01/05/2009	410	378	RESPONSE by USA as to Danuel Dean Quaintance re 408 Sentencing Memorandum (Martinez, Luis) (Entered: 01/05/2009)
01/06/2009	411	379	OBJECTION TO PRESENTENCE INVESTIGATION REPORT by Danuel Dean Quaintance *Amended Document 407* (Attachments: # 1 Supplement Informal ObjectionsLetter to USPO)(Herrera, Jerry) (Entered: 01/06/2009)
01/08/2009	413	384	Clerk's Minutes for proceedings held before District Judge Judith C. Herrera: Sentencing held on 1/8/2009 for Danuel Dean Quaintance (1) Count(s) 1s, 2s; SENTENCE IMPOSED: BOP 64 months on counts 1 &2 (run concurrently); 4 years total supervised release as to both counts; special conditions imposed; SPA: $200.00; voluntary surrender. (Court Reporter Paul Baca) (bap) (Entered: 01/09/2009)
01/12/2009	415	385	JUDGMENT in a Criminal Case as to Danuel Dean Quaintance by District Judge Judith C. Herrera (id) (Entered: 01/12/2009)
01/13/2009	416	390	MEMORANDUM OPINION AND ORDER by District Judge Judith C. Herrera denying 403 Joint Motion for Release Pending Appeal. (baw) (Entered: 01/13/2009)
01/16/2009	418	394	NOTICE OF APPEAL by Danuel Dean Quaintance re 415 Judgment (Filing Fee − Waived) (Herrera, Jerry) (Entered: 01/16/2009)
01/16/2009	419	396	Transmission of Preliminary Record for Notice of Appeal as to Danuel Dean Quaintance to US Court of Appeals re 418 (pg) (Entered: 01/16/2009)
01/20/2009	422	397	NOTICE OF APPEAL of Conditions of Release by Danuel Dean Quaintance as to 416 Memorandum Opinion and Order, Terminate Motions (Herrera, Jerry) (Entered: 01/20/2009)

United States District Court

DISTRICT OF New Mexico

UNITED STATES OF AMERICA
V.

QUAINTANCE, Danuel D.
QUAINTANCE, Mary Helen
KRIPNER, Timothy Jason

(Name and Address of Defendant)

CRIMINAL COMPLAINT

CASE NUMBER: 06-3655M

I, the undersigned complainant being duly sworn state the following is true and correct to the best of my knowledge and belief. On or February 22, 2006 in Hidalgo County, in the District of New Mexico defendant(s) did, (Track Statutory Language of Offense)

knowingly and intentionally possess with attempt to distribute approximately 172 pounds of marijuana and conspire to do the same.

in violation of Title 21 United States Code, 841, 846.

I further state that I am a(n) Task Force Officer and that this complaint is based on the following
Official Title
facts:

(See attached Statement of Facts)

Continued on the attached sheet and made a part ☒ Yes ☐ No

Ivan Zarate, TFO
Signature of Complainant

Sworn to before me, and subscribed in my presence,

2-24-06
Date

at Las Cruces, New Mexico
City and State

U.S. Magistrate Judge
Name and Title of Judicial Officer

Signature of Judicial

CONTINUATION OF STATEMENT OF FACTS

According to USBP Agent Jackson Lara that on February 22, 2006, at approximately 1:50 P.M., Senior Patrol Agent Bernardo M Ramirez III was at the Diamond Shamrock gas station in Lordsburg, New Mexico.

While Agent Ramirez was fueling up, he observed a Chrysler 300 parked next to the Diamond Shamrock, and a green minivan parked in the drive-thru area of the Kentucky Fried Chicken. Agent Ramirez then observed the passenger of the minivan, later identified as Danuel D. QUAINTANCE exit the minivan and walk into the Diamond Shamrock. A short while later the minivan exited the drive through area of the Kentucky Fried Chicken and park in the Diamond Shamrock parking lot. Agent Ramirez then observed the driver of the Chrysler park next to the minivan. The driver of the Chrysler, later identified as Timothy Jason KRIPNER, exited the vehicle and engaged in a conversation with the driver of the minivan, later identified as Mary Helen QUAINTANCE. Agent Ramirez then observed KRIPNER get a large quantity of food that was obviously purchased at the Kentucky Fried Chicken out of the minivan, and place it in the front passenger floorboard of the Chrysler. Agent Ramirez then observed Mr. QUAINTANCE exit the Diamond Shamrock with two bags full of food items, and hand it to KRIPNER. KRIPNER and Mr. QUAINTANCE then engaged in a short conversation. KRIPNER then placed the food items into the Chrysler. Agent Ramirez thought that this was rather odd since there were only three individuals traveling together and they were purchasing such large amounts of food. Through Agent Ramirez's past experience with alien and narcotic smuggling loads apprehended while working at the Lordsburg Station, he has noticed that it is common practice for smugglers to purchase large portions of food for drug backpackers or undocumented aliens.

Agent Ramirez observed that at approximately 1:55 P.M., both vehicles exited the Diamond Shamrock, and entered onto Interstate 10 traveling east from the 22-mile marker. Agent Ramirez began to follow all three individuals, which where driving the Grey Chrysler 300 and the green mini van, in order to maintain surveillance. Agent Ramirez continued to follow them for approximately 10 miles, when he observed the two vehicles exit and travel south on New Mexico Highway 113. In the past, NM Hwy 113 has proven to be a notorious area of travel for both alien and narcotic smugglers. As all three individuals traveled south, Agent Ramirez maintained

surveillance on them for approximately 5 miles with the use of binoculars until he lost sight of them. Agent Ramirez proceeded to travel south in the direction of where the individuals were last seen. Agent Ramirez traveled for approximately 13 miles when he encountered all three individuals traveling north from the 7-mile marker on NM Hwy 113. The 7-mile marker on Hwy 113 has proven to be a notorious delivery point for narcotic smugglers. In the past, Agents of the Lordsburg Station have apprehended numerous individuals in this area attempting to deliver narcotics.

Agent Ramirez advised Agent Jose Portillo of what had occurred and requested his assistance. Agent Portillo responded from the intersection of Interstate 10 and New Mexico highway 113. Agent Portillo began traveling south on highway 113 when he observed what appeared to be two vehicles northbound towards his location. Agent Portillo continued traveling south to confirm that it was the two vehicles that Agent Ramirez had observed traveling in tandem. At approximately the 15 mile marker Agent Portillo confirmed that it was the two vehicles that Agent Ramirez had observed. Agent Portillo turned around and began to follow the vehicle to get a better lock at them. As Agent Portillo pulled behind the gray Chrysler 300 he noticed that KRIPNER, the driver of the grey Chrysler 300, began to swerve into the shoulder of the highway. Agent Portillo also observed that the trunk area of the vehicle appeared dusty and also observed what appeared to be hand prints all around the trunk area of the vehicle. Due to the above mentioned facts and Agent Portillo's past officer experiences he was able to recognize that a smuggling scheme was taking place.

Agent Portillo advised Agent Lara who at this time was position at the intersection of I-10 and highway 113 that he was going to conduct an immigration inspection of the gray Chrysler 300 bearing Arizona temporary tags. Agent Portillo requested Agent Lara to conduct an immigration inspection of the Pontiac mini van which appeared to be guiding the Chrysler 300.

Agent Portillo activated his emergency equipment and the gray Chrysler 300 came to a stop on New Mexico Highway 113 mile marker 17. Agent Portillo approached the vehicle and noticed what appeared to be a square backpack covered with a black shirt behind the passenger seat. Agent Portillo identified himself to KRIPNER, as a United States Border

Patrol Agent. Agent Portillo questioned KRIPNER as to his immigration status to which KRIPNER stated he was a United States Citizen. As Agent Portillo was conducting his immigration inspection he detected a scent of Marijuana coming from the inside of the vehicle. Agent Portillo requested that Agent Lara and his K-9 partner Shasja respond to his location for assistance.

Agent Lara had pulled over the Pontiac mini van bearing Arizona plate 792-PRC. The mini van came to a stop on the intersection of I-10 and NM Hwy 113, just a few miles north of Agent Portillo's location. Agent Lara identified himself as a United States Border Patrol Agent and questioned the driver and passenger as to their immigration status. The driver and passenger, later identified as Mary Helen QUAINTANCE, Mary Helen and QUAINTANCE, Daniel, both stated they were United States citizens. Agent Lara requested that Agent Ford who had arrived on scene stand by with the lead vehicle as he responded to Agent Portillo's location. Agent Lara believed that the van was involved in the smuggling scheme as it was seene leading the gray Chrysler 300.

Upon arriving at the scene, Agent Ford spoke with Agent Lara. Lara departed the scene to assist Agent Portillo approximately one mile south. Ford requested a stolen vehicle and registry check of the Arizona license plate. The registration check showed that the vehicle was registered to the driver, Mrs. QUAINTANCE and the passenger, Mr. QUAINTANCE.

Agent Lara arrived at Agent Portillo's location, at which time Agent Portillo briefed him of the situation. Agent Portillo stated that the driver of the Chrysler 300, KRIPNER, refused to give consent to search the vehicle. At this time, Agent Lara conducted a systematic canine sniff of the exterior of the vehicle. Canine Shasja alerted to the trunk area of the gray Chrysler 300. Agent Lara advised Agent Portillo of his findings. Agent Portillo requested that KRIPNER open the trunk of the vehicle. KRIPNER opened the trunk of the vehicle at which time Agent Lara and Portillo discovered three square burlap backpacks of Marijuana. While conducting an inventory of the interior of the vehicle, they found another burlap backpack of Marijuana and a handheld two-way radio set to channel six. These types of radios are only capable of transmitting within short distances.

Agent Michael Leyva arrived at the Agent Fords location, and a few minutes later Agent Lara advised Ford by radio that they had found marijuana in the Chrysler sedan. Agent Ford then asked Mrs. QUAINTANCE to exit the vehicle, secured her with handcuffs and advised her that she was being detained for further investigation of possession of marijuana. Agent Ford then asked Mr. QUAINTANCE to exit the vehicle. QUAINTANCE did so and then asked if Agent Ford enforced the law. Agent Ford replied that he did and Mr. QUAINTANCE said "You are breaking the law, this is a hate crime." Mr. QUAINTANCE handed Agent Ford a card identifying himself as a member of a church and told Agent Ford that he was in violation of 22 USC regarding the freedom of religion. Agent Ford told Mr. QUAINTANCE to put his hands behind his back and he complied. Agent Ford then secured Mr. QUAINTANCE with handcuffs. Mr. QUAINTANCE said "You are in violation of 22 USC and I am going to sue you personally". Agent Ford told Mr. QUAINTANCE that he should stop talking and that he was being detained. Agent Ford then read Mr. QUAINTANCE his Miranda Rights and asked him if he understood. Mr. QUAINTANCE said that he understood his rights. Mr. QUAINTANCE continued to state about the hate crime and how he was going to sue everyone involved in his detention. Mr. QUAINTANCE said "I am the head of my church and I have the right to have that marijuana." Agent Ford told Mr. QUAINTANCE that he should stop talking and Mr. QUAINTANCE said he wanted to talk. Mr. QUAINTNACE continued to state about the hate crime, his religious freedom, and how he was going to sue everybody.

Agent Ford advised Mrs. QUAINTANCE, of her Miranda Rights. Mrs. QUAINTANCE advised Agent Ford she did not wish to make any statements without a lawyer.

The four bundles were weighed producing a weight of approximately 172 pounds of a green leafy substance. The bundles were also tested producing a positive result for Marijuana.

On arrival of TFO Hernandez re-read KRIPNER his Miranda Rights to which he advised that he fully understood his Miranda Rights and agreed to answer some questions. KRIPNER stated that he knew that the QUAINTANCES had deposited some money into an ATM account so that his cousin could rent the Chrysler 300 which KRIPNER was subsequently arrested in. KRIPNER stated that the QUAINTANCES had also purchased a cellular telephone for him so that he could use but also

throw away in case they were captured. KRIPNER stated that he was going to get paid to transport the Marijuana back to the QUAINTANCE'S residence in Pima, AZ. KRIPNER admitted to knowing the Marijuana was in the vehicle and stated that he was going to take it back to the QUAINTANCE'S residence in Pima, AZ.

On arrival of TFO Hernandez and Zarate Mr. QUAINTANCE asked through the holding cell door if they TFO's were DEA Agents. TFO Zarate advised Mr. QUAINTANCE that they were and Mr. QUAINTNACE immediately started shouting that they belong to a Cognizance Church and they are allowed to posses and transport Marijuana. Mr. QUAINTANCE stated that the TFOs were in violation of 22 USC which states freedom of religion and that is why they are allowed to have and transport the Marijuana. TFO Hernandez re-read Mr. QUAINTANCE his Miranda rights to which he advised that he wanted to answer some questions. Mr. QUAINTANCE stated that he was not going to admit ownership of the Marijuana but that he is allowed under his church to transport and posses Marijuana. Mr. QUAINTANCE then stated that he wanted a lawyer. No more questions were asked of Mr. QUAINTANCE. Mr. QUAINTANCE went on to state once more with out any body asking him any questions that everybody was in violation of 22 USC and that everybody had been placed on notice for the Hate Crimes committed against him and his people. Mr. QUAINTANCE stated that the TFOs should look at thee identification cards that his church has issued where it states that they are allowed to transport and posses Marijuana due to freedom of religion and the Supreme Court allowing them the right to do so.

AUSA Clint Johnson authorized federal prosecution of Samuel QUAINTANCE, Mary Helen QUAINTANCE and Timothy KRIPNER.

_____
Task Force Officer

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

06 MAR 15 PM 4:42

CLERK-LAS CRUCES

UNITED STATES OF AMERICA,	
Plaintiff,	
vs.	
DANUEL DEAN QUAINTANCE, MARY HELEN QUAINTANCE and TIMOTHY JASON KRIPNER,	CRIMINAL NO. 06- 538 JH
Defendants.	COUNT 1: 21 U.S.C. § 846: Conspiracy; COUNT 2: 21 U.S.C.§ 841(a)(1) and 21 U.S.C. § 841(b)(1)(C): Possession with Intent to Distribute 50 Kilograms and more of Marijuana and 18 U.S.C. § 2: Aiding and Abetting.

INDICTMENT

The Grand Jury charges:

COUNT 1

On or about the 22nd day of February, 2006, in Hidalgo County, in the State and District of New Mexico and elsewhere, the defendants, **DANUEL DEAN QUAINTANCE, MARY HELEN QUAINTANCE and TIMOTHY JASON KRIPNER,** did unlawfully, knowingly and intentionally combine, conspire, confederate and agree together and with each other and with other persons whose names are known and unknown to the grand jury to commit the following offense against the United States. to wit: Possession with intent to distribute 50 kilograms and more of Marijuana, a Schedule I controlled substance, contrary to 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(C).

In violation of 21 U.S.C. § 846.

COUNT 2

On or about the 22nd day of February, 2006, in Hidalgo County, in the State and District of New Mexico, the defendants, **DANUEL DEAN QUAINTANCE, MARY HELEN QUAINTANCE and TIMOTHY JASON KRIPNER**, did unlawfully, knowingly and intentionally possess with intent to distribute 50 kilograms and more of Marijuana, a Schedule I controlled substance.

In violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2.

A TRUE BILL:

/s/

FOREPERSON OF THE GRAND JURY

DAVID C. IGLESIAS
United States Attorney

03/07/06 2:48pm

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Cause No. CR 06-538 JH
	§	
DANUEL DEAN QUAINTANCE,	§	
	§	
Defendant.	§	

MOTION TO DISMISS INDICTMENT
AND INCORPORATED MEMORANDUM

DANUEL DEAN QUAINTANCE, Defendant, by and through the undersigned appointed counsel, Marc H. Robert, Assistant Federal Public Defender, moves the Court for an order dismissing this cause, and in support of his motion would respectfully show the Court as follows:

1. Mr. Quaintance is charged with possession of more than 50 kilograms of marijuana with the intent to distribute it, and with conspiracy to possess more than 50 kilograms with the intent to distribute it, on February 22, 2006. Mr. Quaintance is presently residing at his home in Pima, Arizona under conditions of release set by United States Magistrate Judge Martinez. Trial has not been set.

2. This motion, and any further briefing or proceedings concerning this motion are not intended, and should not be construed, as a waiver of any other constitutional rights, particularly those under the Fourth Amendment to the United States Constitution.

3. Mr. Quaintance is the founder of the Church of Cognizance, which has been in formal existence since 1994. The Church of Cognizance observes a form of Zoroastrian religious practice, pursuant to which cannabis is a deity and a sacrament and a central part of religious observance.

4. The use by members of the Church of Cognizance of cannabis is a sincere religious practice.

5. The application of the Controlled Substances Act (CSA), including without limitation 21 U.S.C. §§ 841 846 constitutes a substantial burden on the exercise of religion by members of the Church of Cognizance. The application of the CSA to members of the Church of Cognizance is not in furtherance of a compelling governmental interest. Even if the application of the CSA to the Church of Cognizance furthers a compelling governmental interest, it is not the least restrictive means of furthering that interest. Application of the CSA to members of the Church of Cognizance thus violates the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq*. as well as the Establishment Clause and the First Amendment to the United States Constitution.

6. Because the acts charged in the indictment in this case are constitutionally and statutorily protected, the charges should be dismissed with prejudice.

7. The government opposes this motion.

8. Mr. Quaintance requests an evidentiary hearing on this motion.

9. In connection with the requested evidentiary hearing, and if the Government does not otherwise disclose the information, Mr. Quaintance further requests, pursuant to Rule

26.2 of the Federal Rules of Criminal Procedure, that the government disclose to defense counsel at least forty-eight hours before the hearing any statements, including grand jury testimony, of hearing witnesses. This request is made to avoid delays in the conduct of the hearing which would result if counsel is required to seek multiple recesses to review materials provided by the government at the hearing.

10. Mr. Quaintance requests the opportunity to raise any other motions and arguments the need for which may become apparent based on the evidence that may be developed during any evidentiary hearings in this case.

THE ARREST AND ALLEGED OFFENSE

On February 22, 2006, law enforcement officers conducted an investigation and search of Mr. Quaintance, his wife, Mary Quaintance, and Tim Kripner, and two vehicles while they were in Las Cruces, New Mexico. Following the search, 172 pounds of marijuana were discovered in one of the vehicles.

Mr. and Mrs. Quaintance, and Mr. Kripner, were all charged by criminal complaint. A preliminary hearing was conducted in connection with Mr. Quaintance's case. Indictment was returned on .

Mr. Quaintance also contends that his seizure, search and arrest were conducted unconstitutionally. A motion for suppression of evidence will be filed shortly.

THE RELIGIOUS FREEDOM RESTORATION ACT

RFRA was passed in 1993 in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). In that case, the Supreme Court abolished the

compelling interest test for judicial claims involving the free exercise of religion. RFRA re-established the strict scrutiny test for governmental burdens on the free exercise of religion. The act states in part:

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception.
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

RFRA, 42 U.S.C. § 2000bb-1(a) and (b). Procedurally, it has been held that a person claiming that the government has placed a substantial burden on his religious practice must establish that the governmental action (1) substantially burdens (2) a religious belief, not just a philosophy or way of life, which religious belief (3) is sincerely held. *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996) (*citing Thiry v. Carlson*, 78 F.3d 1491 (10th Cir. 1996). That showing must be made by a preponderance of the evidence. *Id*. Once that is done, the government has an obligation to demonstrate that the burden furthers a compelling governmental interest, and that the burden is the least restrictive means of furthering that compelling interest. *Id*.; *see also Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, ___ U.S. ___, 126 S.Ct. 1211 (2006) (referred to hereafter as "*UDV*"). The threshold for establishing the religious nature of a set of beliefs is low. *Meyers*, 95 F.3d at 1482-83.

In *UDV*, the religious organization sought an injunction against the enforcement of the CSA in connection with UDV's use of hoasca, a tea made from two psychedelic substances imported from Brazil. The government stipulated that the CSA was a substantial burden, and that UDV's use of it was a part of a sincere religious exercise. The burden then shifted to the government to establish what the Supreme Court characterized as a affirmative defense: the existence of a compelling government interest and that the uniform application of the CSA was the least oppressive means of meeting that interest. The district court found that the government had failed to sustain its burden on the "affirmative defense", which finding was not disputed by the government and thus upheld by the Tenth Circuit Court of Appeals and the Supreme Court. Mr. Quaintance submits that he should not have to justify the sincerity of his religious beliefs; the requirement of such a showing risks marginalizing non-mainstream religious beliefs, and offends basic notions of religious freedom. Without waiving that objection, however, Mr. Quaintance recognizes that the present state of the law could be interpreted to require his making that showing. Thus, in the case at bar, Mr. Quaintance will establish that his use of cannabis is a sincere religious practice, and that the enforcement of the CSA is a substantial burden on that practice.

It could not reasonably be claimed that the blind enforcement of the CSA in this situation does not constitute a substantial burden on the practice of using cannabis by the Church of Cognizance in its members' worship. The prohibition against the possession of cannabis, the prohibition against the growing of cannabis, the prohibition against the transportation of cannabis and the threat of prosecution, incarceration and forfeiture of

property for violations of the provisions of the CSA implementing those prohibitions are clearly substantial burdens to the Church's practices. The threshold issue, then, is whether the use of cannabis in the Church's religion is part of a sincere religious practice.

In *Meyers*, the Tenth Circuit addressed a matrix of sorts for the evaluation of a set of beliefs as religious or secular. That analytical matrix was derived from the opinion issued by the underlying district court in evaluating Meyers' claim. *See United States v. Meyers*, 906 F.Supp. 1494, 1502-03 (D. Wyo. 1995) (Brimmer, J.). This matrix was in turn derived from an analysis of cases from various jurisdictions which addressed the question of what constitutes a religion. *Meyers*, 95 F.3d at 1482, n.2. In general, the *Meyers* court broke the inquiry into five principle areas: ultimate ideas, encompassing such things as the purpose of life; metaphysical beliefs, relating to beliefs in things beyond this mortal plane; a moral or ethical system, meaning a set of teachings which address basic issues of right and wrong; comprehensiveness of beliefs, in which the breadth of a body of teachings is examined; and something called accoutrements of religion, which examines the existence of the kinds of procedural manifestations found in mainstream religions.

Mr. Quaintance submits that this "Meyers matrix" is an inappropriate and dangerous imposition of convention on the determination of what constitutes a sincere religious belief for purposes of the instant inquiry. Judge Brorby, in his dissent from the majority opinion in *Meyers*, opined that

> "an approach that prevents the courts from evaluating the orthodoxy and expression of the individual is the approach most in keeping with the mandates of the Constitution and the Supreme Court. For, it seems to me that the free exercise of religion which we are all guaranteed by the First Amendment

> necessarily includes the rights of individuals to define their own religion. Accordingly, it is an unproductive and unnecessarily invasive exercise for the courts to attempt to evaluate an individual's religious claims and practices against any set standard of preconceived notions of what types of religious beliefs are valid or being recognized by the courts. In fact, in the conscientious objector context, the Supreme Court has held "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." Local boards and courts in this sense are not free to reject beliefs because they consider them to be "incomprehensible."

Meyers, 95 F. at 1490 (Brorby, J., dissenting). Quoting the Supreme Court, Judge Brorby expressed the belief that "a determination of what is a religious belief or practice is 'not to turn on a judicial perception of the particular belief of practice in question; religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection.' *Thomas v. Review Bd. Of Indiana Employment Sec. Div.*, 450 U.S,. 707, 714, 101 S.Ct. 1425, 1430, 67 L.Ed.2d 624 (1981)." *Meyers*, 95 F.3d at 1490-91 (Brorby, J., dissenting). Reviewing a variety of legal opinions and learned texts, Judge Brorby concluded that the best definition of religion was offered by William James[1]: "everyone is entitled to entertain such view respecting his relatinos to what he considers the divine and the duties such relationship imposes as may be approved by that person's conscience, and to worship in any way such person thinks fit so long as this is not injurious to the equal rights of others." *Meyers*, 95 F.3d at 1491 (*quoting United States v. Moon*, 718 F.2d 1210, 1227 (2nd Cir. 1983), *cert. denied*, 466 U.S. 971 (1984)). Recognizing that the imposition of a factor-driven matrix on the definition of religion is an endeavor fraught with Constitutional peril, Judge Brorby would have assumed without deciding the validity of Meyers' religious beliefs,

---

[1] W. James, The Varieties of Religious Experience, 31 (1910).

and returned the case to the district court to determine whether the government could sustain its burden.

One example of the difficulty with trying to impose a mainstream-derived matrix in defining a belief system as religion (or not) can be seen in the Native American Church (NAC). There is an exception in the CSA for the use of peyote, a psychedelic substance, in religious ceremonies. The NAC defies definition. There are may be between 250,000 and 400,000 members. Its members may include non-Native Americans. There is no recorded theology. Members combine some elements of Christian teachings with a belief that a holy spirit is embodied in peyote, which facilitates direct contact with God. There are no official criteria defining eligibility for NAC membership, and there is no membership roll. *See* Cynthia S. Mazur, Marijuana as a Holy Sacrament: Is the Issue of Peyote Constitutionally Distinguishable from That of Marijuana in Bona Fide Religious Ceremonies?, 5 Notre Dame L.J., Ethics & Public Policy 693 (1991). The NAC would fail many of Judge Brimmer's mainstream-derived formulations, but is institutionally recognized as a sincere, "real" religion. Attempting to define one religious practice as valid and another as invalid, based on a set of criteria and principles derived from a deeply engrained mainstream religious tradition, is a perilous, highly subjective venture which in the judicial context would often violate the Constitutional proscription against establishment of a religion and its legal progeny.

Among practitioners of even mainstream Christian faiths, extreme variations exist, many of which are abhorrent to mainstream society. Members of some Appalachian churches handle poisonous snakes, believing at risk to their very lives in the religious imperative which

requires such practice. Some, referred to as "holy rollers", engage in physical contortions. Some commit mass suicide, as in the Jonestown and Rancho Santa Fe tragedies. As bizarre as these practices seems to mainstream society, no one would question that its practitioners do what they do for deeply and sincerely held religious reasons.

Congress has codified the founding American belief that people's rights to their religious practice is a "universal human right" which should not be arbitrarily abridged.

> (2) Freedom of religious belief and practice is a universal human right and fundamental freedom articulated in numerous international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Helsinki Accords, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the United Nations Charter, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.
>
> (3) Article 18 of the Universal Declaration of Human Rights recognizes that "Everyone has the right to freedom of thought, conscience, and religion. This right includes freedom to change his religion or belief, and freedom, either alone or in community.

22 U.S.C. § 6401(a). The government's prohibition of the acquisition, possession and use of cannabis arbitrarily prevents members of the Church of Cognizance from the exercise of this basic, universal human right.

Mr. Quaintance agrees with Judge Brorby and William James. It is offensive to the freedom of religion inherent in the Constitution to determine the validity of a person's sincerely held religious belief by evaluating those beliefs with reference to a set of factors derived from mainstream religious belief. However, Mr. Quaintance submits that his religious beliefs, and the foundations of his religion, meet even the questionable criteria of *Meyers*.

CANNABIS AND RELIGIOUS BELIEF

Cannabis, in its various forms, has a relationship with religious belief which can be traced back thousands of years. The word "cannabis" is found in ancient Hebrew texts rendered as q'aneh-bosm, the ancient word for hemp. "[O]n the basis of cognate pronunciations and septuagint reading, some identify Keneh bosem with the English and Greek cannabis, the hemp plant." The Living Torah by Rabbi Aryeh Kaplan 2d ed. 442 (1981). It is believed that cannabis was the active ingredient in the anointing oils of the ancient Hebrews, oils which were used in the installation of kings and priests, and in the consecration of holy items. The Hebrew title "Messiah" means "the anointed one". Thus, it is believed that oil from the cannabis plant was widely used in ancient religious ritual. The Old Testament is replete with references to anointment with oil.

Cannabis is believed to be the plant referred to as "Soma" in the Hindu tradition, as "Keneh Bosm" in ancient Hebrew, and "Haoma" in the Zoroastrian religion. In some religions, and in the Church of Cognizance in particular, cannabis is considered to be the plant source of holy anointing oil of the Torah and the Bible. Cannabis is believed to be the "tree of life", the leaves of which are for the "healing of nations" (Revelations 22:2). Some scholars have researched the physical record, as well as etymological development, to determine that cannabis is indeed the plant which is referred to in so many of the ancient religious texts and used in ancient religious traditions.

The Ninth Mandala of the Hindu Rig Veda, the oldest book in the Sanskrit language (or any other Indo-European language) discusses a psychoactive plant central to its theology.

Scholars date the books from around 4,000 BC. The Ninth Mandala describes the processing of a plant called Soma into a liquid which is then drunk. The Soma itself was and is a deity to adherents, as well as a means of spiritual growth. It is described as "creative" Soma, milking out the "joy-giving ambrosia". Soma, derived from a psychoactive plant the use of which is discussed in detail, was itself holy, and was a part of sacred practices. Members of the Church of Cognizance and other neo-Zoroastrian religions believe that that plant was, and is, cannabis. They believe that that plant was provided by God and is useful in knowing God, in maximizing personal spirituality and necessary to the practice of their religion. They believe that cannabis, or Haoma, is the teacher, the provider, the healer. They believe that its versatility (seeds for nourishment, leaves for healing and spirituality, fibre for fabric, paper and other uses) is another manifestation of its centrality to spirituality. For practitioners of their religion, cannabis is not like scotch or heroin, a way to get high; it is a central and necessary part of a religious practice.

RASTAFARIANISM

Rastafarianism is a religious tradition which includes the sacramental use of cannabis. It has been considered a valid religion in the RFRA context. *See, e.g., Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002); *United States v. Bauer*, 84 F.3d 1549 (9th Cir. 2000); *United States v. Valrey*, 2000 WL 692647 (W.D.Wash.) (unpublished). It is certainly not possible to declare that any religion in which cannabis is part of a sacramental practice is not a sincere religion, or that the use of cannabis is not a sincere part of the practice of that religion.

ZOROASTRIANISM

"Zoroastrianism is the oldest of the revealed world-religions, and it has probably had more influence on mankind, directly and indirectly, than any other single faith." Mary Boyce, Zoroastrians: Their Religious Beliefs and Practices (London: Routledge and Kegan Paul, 1979, p. 1). "Zoroaster was thus the first to teach the doctrines of an individual judgment, Heaven and Hell, the future resurrection of the body, the general Last Judgment, and life everlasting for the reunited soul and body. These doctrines were to become familiar articles of faith to much of mankind, through borrowings by Judaism, Christianity and Islam; yet it is in Zoroastrianism itself that they have their fullest logical coherence...." *Id* at 29. Zoroastrians are followers of a Persian prophet named Zarathustra, who was called Zoroaster in Greek. Zarathustra lived around the Aral Sea around 1500 BC. The scripture of the Zoroastrian religion is the Zend Avesta.

Haoma, or Soma, was a drink of spiritual importance to the adherents of the teachings of Zoroaster. It is described as a drink made from a mountain plant, believed variously to be cannabis, ephedra or a psylocibin type mushroom. The plant, the drink and the god are considered to be the same, a spiritual trinity. In Vedic theology, there is no difference between the plant, the drink and the god; they are the same. In the Zoroastrian and neo-Zoroastrian belief systems, haoma is a deity as well as a sacrament.

THE CHURCH OF COGNIZANCE

The Church of Cognizance was founded in 1991 by Danuel Quaintance. He registered the religious organization with Arizona state officials in 1994. He has practiced his neo-

Zoroastrian beliefs since that time. He believes that cannabis is Haoma, sacred among Zoroastrians and having central roles to play in other major religious practices in early times. Danuel Quaintance sincerely believes that cannabis is a deity and a sacrament which is essential to the practice of his religion. His belief system is derived from among the most ancient religious texts and traditions in the world. His belief in those texts is sincere.

The reaction of most people who hear of a religion in which cannabis is used sacramentally is derision. The mental image which seems to come to most minds is that of a group of people who want to use cannabis recreationally deciding to call themselves a church as a way of avoiding criminal sanction. That knee-jerk reaction will quickly dissipate in the face of the reality of the Church of Cognizance. Danuel Quaintance is a spiritual man who has followed his religious beliefs and practices at great personal risk.

CONCLUSION

> There is a genius to our Constitution. Its genius is that it speaks to the freedoms of the individual. It is this genius that brings the present matter before the Court. More specifically, this matter concerns a freedom that was a natural idea whose genesis was in the Plymouth Charter, and finds its present form in the First Amendment to the United States Constitution--the freedom of religion.
>
> The Government's "war on drugs" has become a wildfire that threatens to consume those fundamental rights of the individual deliberately enshrined in our Constitution. Ironically, as we celebrate the 200th anniversary of the Bill of Rights, the tattered Fourth Amendment right to be free from unreasonable searches and seizures and the now frail Fifth Amendment right against self-incrimination or deprivation of liberty without due process have fallen as casualties in this "war on drugs." It was naive of this Court to hope that this erosion of constitutional protections would stop at the Fourth and Fifth Amendments. But today, the "war" targets one of the most deeply held fundamental rights--the First Amendment right to freely exercise one's religion.

> To us in the Southwest, this freedom of religion has singular significance because it affects diverse cultures. It is as much of us as the rain on our hair, the wind on the grass, and the sun on our faces. It is so naturally a part of us that when the joy of this beautiful freedom sings in our souls, we find it hard to conceive that it could ever be imperilled. Yet, today, in this land of bright blue skies and yellow grass, of dusty prairies and beautiful mesas, and vistas of red earth with walls of weathered rock, eroded by oceans of time, the free spirit of the individual once again is threatened by the arrogance of Government.

United States v. Boyll, 747 F. Supp. 1333, 1334 (D. N.M. 1991) (Burciaga, J.). Judge Burciaga was addressing the religious use of peyote, but there is no analytically significant difference between that and the religious use of cannabis. The Church of Cognizance uses cannabis in the sincere practice of its religious principles. The government's prosecution of Danuel Dean Quaintance for possession of marijuana with intent to distribute imposes a substantial burden on his sincere religious practice. The government must demonstrate a compelling governmental interest in imposing that burden, and that its ham fisted enforcement of the CSA is the least intrusive way of addressing that interest. This case must be dismissed.

Mary Helen Quaintance, through her counsel, Mario Esparza, joins this motion.

Respectfully Submitted,

FEDERAL PUBLIC DEFENDER
500 S. Main St., Suite 600
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electronically filed on April 7, 2006
MARC H. ROBERT
Assistant Federal Public Defender
Las Cruces Office

Counsel for Mr. Quaintance

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss was served upon Assistant United States Attorneys Luis A. Martinez and Amanda Gould, 555 S. Telshor, Suite 300, Las Cruces, New Mexico 88011 (fax number 505.522.2391), by placing a copy of the same in the United States Attorney's box at the Las Cruces office of the United States District Court Clerk on April 10, 2006.

electronically filed on April 7, 2006
MARC H. ROBERT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Cause No. CR 06-538 JH
	§	
DANUEL DEAN QUAINTANCE,	§	
	§	
Defendant.	§	

MR. QUAINTANCE'S FOR SUPPRESSION OF EVIDENCE AND INCORPORATED MEMORANDUM

DANUEL DEAN QUAINTANCE, Defendant, by and through the undersigned appointed counsel, Marc H. Robert, Assistant Federal Public Defender, moves the Court for the suppression of evidence set forth below, and in support of his motion would respectfully show the Court as follows:

1. Mr. Quaintance is charged by indictment filed on March 15, 2006 [Doc. 25] with possession of more than 50 kilograms of marijuana with intent to distribute it and conspiracy. Mr. Quaintance was arraigned on March 29, 2006 and entered a not guilty plea to both charges. Trial is not presently scheduled. Pretrial motions are due on April 18, 2006. Mr. Quaintance is presently free on conditions of release.

2. Mr. Quaintance has filed a motion to dismiss the indictment against him on religious freedom grounds. That motion is pending.

3. The undersigned counsel has attempted to confer with Assistant United States Attorney Luis A. Martinez regarding this motion. Mr. Martinez was unavailable; however, counsel believes that the government opposes this motion.

4. Mr. Quaintance requests an evidentiary hearing on this motion.

5. In connection with the requested evidentiary hearing and if the Government does not otherwise disclose the information, Mr. Quaintance further requests, pursuant to Rule 26.2 of the Federal Rules of Criminal Procedure, that the government disclose to defense counsel at least forty-eight hours before the hearing any statements, including grand jury testimony, of suppression hearing witnesses. This request is made to avoid delays in the conduct of the hearing which would result if counsel is required to seek multiple recesses to review materials provided by the government at the hearing.

6. Mr. Quaintance requests the opportunity to raise any other motions and arguments the need for which may arise from based on the evidence that may be developed during any evidentiary hearings in this case.

FACTS

7. On February 22, 2006, Mr. Quaintance and members of his family and his church were traveling through Lordsburg, New Mexico in two vehicles, a Chrysler sedan and a minivan. They stopped at a fast food restaurant to get something to eat. A Border Patrol agent determined that there was something suspicious about the amount of food which they ordered.

8. After Mr. Quaintance obtained his food, the vehicles got onto Interstate Highway 10 going east. The agent followed them. The vehicles exited the interstate and drove south on NM highway 113. The agent followed them. He observed the vehicles doing nothing wrong. The agent noted that they were on a road he considered suspicious. He noted that the vehicles were dusty. He noted that there were handprints on the vehicles. The agent had a hunch that something illegal was going on, and he advised other agents of his hunch. Other agents stopped the Chrysler and the minivan as it approached I-10 from the south on highway 113. Mr. Quaintance and the others were questioned about their immigration status. An agent claimed to smell marijuana from one of the vehicles and a drug dog was brought to the scene. Marijuana with a total gross weight of approximately 172 pounds was discovered.

ARGUMENT AND AUTHORITY

I. The Stop of Mr. Quaintance's Vehicle was Illegal Because it was Not Based on Reasonable Suspicion that Mr. Quaintance was Engaged in Criminal Activity.

Border Patrol agents on roving patrol may stop vehicles "only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975); *United States v. Venzor-Castillo*, 991 F.2d 634, 637 (10th Cir. 1993); *United States v. Monsisvais*, 907 F.2d 987, 990 (10th Cir. 1990). In order for a Border Patrol agent to constitutionally stop a vehicle traveling on a road or highway, the agent must "have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). Determination of the existence of a sufficient basis for a stop considers the totality of the

circumstances. *United States v. Arvizu*, 534 U.S. 266, 274 (2002);*United States v. Guillen-Cazares*, 989 F.2d 380, 383 (10th Cir. 1993).

The Supreme Court has outlined certain "specific articulable facts" that this Court should consider when determining whether enough reasonable suspicion exists to justify a roving Border Patrol stop. Those facts are: (1) the characteristics of the area in which the vehicle is stopped; (2) patterns of traffic on the road; (3) proximity to the border; (4) previous experiences with alien trafficking in the area; (5) information about recent border crossings; (6) attempts to evade detection; (7) appearance of the vehicle; (8) appearance and behavior of the driver and passengers; and (9) other relevant information. *Brignoni-Ponce*, 422 U.S. at 884-85.

The Court must look at the totality of the circumstances to determine whether the agents had a "particularized and objective basis for suspecting [Defendant] of criminal activity." *United States v. Lopez-Martinez*, 25 F.3d 1481, 1487 (10th Cir. 1994) (quoting *Cortez*, 449 U.S. at 417-18). Although the reasonableness of the agents' conduct is assessed under a totality of the circumstances test, it is useful to evaluate each factor separately because "[s]ome facts must be outrightly dismissed as so innocent or susceptible to varying interpretations as to be innocuous." *United States v. Lee*, 73 F.3d 1034, 1039 (10th Cir. 1996). Indeed, any attempt to assess the quantum of evidence constituting the totality of the circumstances without evaluating the individual components which make up that totality is farcical. That is not "divide and conquer", as the government is wont to argue; that is simply common sense.

The fact the agents may have had some knowledge that Highway 113 had been used in the past to transport drugs or aliens further into the United States does not, without more, justify the stop of Defendant's vehicle. That would mean that anyone driving on Highway 113 could by stopped for no other reason, resulting in the seizures of many innocent people. *See Reid v. Georgia*, 448 U.S. 348,

441 (1980) (holding reasonable suspicion cannot include circumstances which "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures ....").

"General profiles that fit large numbers of innocent people do not establish reasonable suspicion." *United States v. Yousif*, 308 F.3d 820, 828 (8th Cir. 2002). "An individual's presence in an area of expected criminal activity, standing alone, is not enough top support a reasonable, particularized suspicion that the person is committing a crime." *Illinois v. Wardlaw*, 528 U.S. 119 (2000).

The agents in this case lacked a sufficient particularized and objective factual basis to stop Mr. Quaintance and the vehicles. This is so whether the supporting factors are considered individually or collectively. The agents suspected criminal activity on the unlikely basis of the amount of fried chicken which was purchased at a fast food store. The agents followed the vehicles for miles without observing anything like a basis for reasonable suspicion. Considering the totality of the circumstances, there was not an constitutionally adequate basis for the agents' decision to stop the vehicles. The agents were acting on a hunch. The stop was unconstitutional. All evidence seized as a result of the stop must be suppressed as the fruit of a poisoned tree. Such evidence cannot be considered to have been obtained under circumstances sufficiently purged of the original taint of the illegal stop. *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

WHEREFORE, for the foregoing reasons, DANUEL DEAN QUAINTANCE, Defendant, respectfully prays that the Court suppress all of the evidence obtained as a result of the unconstitutional search of the vehicles as related herein, any statement made by Mr.

Quaintance following the unconstitutional search, and provide such other and further relief to which the Court may find Mr. Quaintance to be justly entitled.

Respectfully Submitted,

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filed electronically on April 18, 2006
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Counsel for Mr. Quaintance

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Suppression of Evidence was served on Assistant United States Attorney Luis A. Martinez, 555 Telshor, Suite 300, Las Cruces, New Mexico, 88011, by placing it in the box designated for the United States Attorney's Office at the United States District Court Clerk's office; Mr. Mario A. Esparza, P.O. Box 2468, Las Cruces, New Mexico 88004; and Mr. Leon Schydlower, 210 N. Campbell, El Paso, Texas 79901-1406 on April 19, 2006.

filed electronically on April 18, 2006
MARC H. ROBERT

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff, vs. DANUEL DEAN QUAINTANCE and MARY HELEN QUAINTANCE, Defendants.	))))))))))	CR No. 06-538 JH

GOVERNMENT'S RESPONSE TO DEFENDANTS DANUEL DEAN QUAINTANCE'S AND MARY HELEN QUAINTANCE'S MOTION TO DISMISS INDICTMENT

COMES NOW the United States of America by and through DAVID C. IGLESIAS, United States Attorney for the District of New Mexico and Luis A. Martinez, Assistant United States Attorney for said District, and hereby responds to defendants' motion to dismiss indictment and further states:

I. Background

A. An incident in Missouri.

On February 13, 2006, Joseph Allen Butts, the brother of defendant Mary Quaintance, was arrested pursuant to a traffic stop in Franklin County, Missouri. Mr. Butts was traveling eastbound on Interstate 44 in Franklin County, Missouri. Mr. Butts was driving a Chevrolet pickup truck which contained approximately 338 pounds (152 kilograms) of marijuana in the bed underneath a locked pickup bed cover.

When officers first asked Mr. Butts for consent to search the vehicle Mr. Butts said, "No, it's my sister's and she doesn't like people in their vehicles." The marijuana was

discovered pursuant to a K-9 alert to the vehicle's bed. Mr. Butts stated that the marijuana was for his church and that it was a hate crime to arrest him.

Twelve boxes containing eighteen bundles of marijuana wrapped in plastic wrap and clear tape were seized. Pursuant to an inventory search of the vehicle the following items were seized: 1) paper work indicating Butts' affiliation with the Church of the Cognizance, including a Certified Courier Certificate in Mr. Butts' name, purportedly signed by defendant Danuel Quaintance (addendum A), 2) an open title for the vehicle, current insurance cards for the vehicle, and the vehicle registration, 3) Yahoo maps and directions showing the destination of Indianapolis, Indiana, (addendums B 1-4); 4) Butts' wallet containing membership cards to the church, and 5) $1,511.00 U.S. currency. Mr. Butts stated in response to a question by law enforcement officers referring to the contraband found that, "there was 300 pounds of marijuana in the vehicle."

B. The Defendants Are Arrested Near Lordsburg, New Mexico.

On February 22, 2006, defendants Danuel Dean and Mary Helen Quaintance along with Timothy Jason Kripner were arrested near Lordsburg, New Mexico. Mary Quaintance was driving a mini van with Danuel Quaintance as the sole passenger. Mr. Kripner was driving a leased Chrysler 300. The aforementioned vehicles traveled east together on Interstate 10 for about ten miles, exited and traveled south on N.M. Highway 113. After a relatively short time both vehicles headed north on 113 in tandem. Based on a totality of the circumstances both vehicles were stopped by U.S.B.P. Agents.

The Chrysler driven by Mr. Kripner contained square bundles of marijuana packaged in clear plastic wrap. The bundles were contained in burlap bags. Three bundles were found in the vehicle's trunk. (Photograph; addendum C). Another bundle was discovered in the vehicle's backseat. Also found in the vehicle was a hand held, short distance

capacity, two-way radio set to channel six. Mr. Kripner was in possession of a Church of Cognizance certificate in his name identical to that possessed by Mr. Butts, purportedly signed by Danuel Quaintance. (Addendum D).

The mini van in which the Quaintances traveled contained an identical two-way radio to that found in the Chrysler, also set to channel six. Mr. Quaintance, subsequent to his arrest, stated, "I am the head of my church and I have the right to have 'that' marijuana." The four bundles of marijuana weighed approximately 172.42 pounds (77.58 kilograms). The defendants were arrested and transported to the Lordsburg USBP station.

As task force agents arrived at the Lordsburg USBP station, Mr. Quaintance asked if the agents were with DEA. Upon receiving an affirmative response Mr. Quaintance immediately began shouting among other things, that they belonged to the Cognizance Church and they were allowed to possess and transport marijuana.

Post Miranda, Mr. Quaintance stated he was not going to admit ownership of the marijuana but that he is allowed under his church to transport and possess marijuana.

Post Miranda, Mr. Kripner stated that Mr. Quaintance had deposited some money into an ATM account so his (Kripner's) cousin could rent the Chrysler. Kripner went on to say that Mr. Quaintance had also purchased a cellular telephone for his (Kripner's) use, but to be thrown away if they were captured. Mr. Kripner went on to say that he was going to get paid to transport the marijuana to the Quaintances' residence in Pima, Arizona. Kripner stated that the Quaintances' residence or compound is made up of two trailers. Kripner went on to say that the Quaintances are both unemployed and sustain their lifestyle by selling the marijuana, not only to members, but to anyone willing to buy it. Kripner further stated that he knows Mr. Quaintance and his religion are not real, but figured that

if he would be able to smoke, transport and possess marijuana, that was reason enough to join the church.

C. Law Enforcement Officers Speak to the Defendants' Son-In-Law, Tim Wiedmeyer.

Tim Wiedmeyer is married to Zina Wiedmeyer. Ms. Wiedmeyer is the daughter of Danuel and Mary Quaintance. The Wiedmeyers live in a separate trailer, but on the same or adjacent property on which the defendant's trailer is located. On December 21, 2005, Mr. Wiedmeyer advised officers of the Graham County Sheriff's Office, Safford, Arizona, that he "is not involved in the drug trafficking that takes place on Dan and Mary's property." Mr. Wiedmeyer went on to say that he was worried about losing his property to law enforcement due to Dan and Mary's drug activities.

D. Graham County Sheriff's Office Deputies Search the Defendants' Resident.

On March 3, 2006, Graham County Deputies searched the defendants' trailer in Pima, Arizona. Several items were seized, among which were several burlap bags (Addendum E). These burlap bags closely resembled those which contained marijuana seized on February 22, 2006 from the vehicle driven by Mr. Kripner (Addendum C). Also seized from the residence was an Ultraship Ultra-50 digital scale (Addendum F) and an Ohaus non-electric scale (Addendum G).

E. Defendants Are Released on Bond.

On March 9, 2006, Defendants Danuel and Mary Quaintance appeared before Magistrate Judge Martinez in Las Cruces, New Mexico Federal District Court. The Defendants were released on a $10,000.00 secured bond. The government was not opposed. As a condition of release, the Defendants agreed not to ingest marijuana.

F. A Grand Jury sitting in Las Cruces, New Mexico returned a true bill against the Defendants on March 15, 2006.

II. Discussion

A. The Defendants Are Not Entitled to RFRA Protection Because They Lack a Sincere Religlious Belief.

Within two weeks, law enforcement officers seized approximately 510 pounds of marijuana from the Church of the Cognizance. It is difficult to contemplate that such prodigious amounts of contraband were destined for use as a "sacrament".

Joseph Butts, Church of Cognizance Courier, was arrested traveling east bound on Interstate 44 in Missouri. The Church compound is in Pima, Arizona, hundreds of miles away. Further, Butts was in possession of "Yahoo" maps and directions indicating a final destination as Indianapolis, Indiana (Addendum B1-4). The marijuana was packaged in a manner and in an amount clearly indicating distribution. Additionally, Mr. Butts was in possession of $1,500.00 U.S. currency, sufficient expense money for a trip from Arizona to Indianapolis, Indiana.

The Missouri seizure strongly corroborates Mr. Kripner's statements referring to the defendants, "They sell the marijuana to sustain their lifestyle. . ." and "I know the religion is not real."

The Lordsburg seizure further clarifies the picture of a marijuana distribution organization using religion as contingency should the conspirators be apprehended. A particularly succinct and apropos summation of what occurred in the case at bar is set out by Justice Brimmer of the District of Wyoming. "As is true of the First Amendment RFRA

could easily become the first refuge of scoundrels if defendants could justify illegal conduct simply crying 'religion'." *U.S. v Meyers*, 900 F. Supp. 1494 @ 1498 (1995).

Defendants Mary and Danuel Quaintance provided their couriers, Mr. Butts and Mr. Kripner, with the aforementioned courier certificates. They instructed Mr. Kripner as to what responses to provide law enforcement officers in case of apprehension.

Further illustrating the government's point are Mr. Wiedmeyer's statement and two large scales (Addendums F & G). Scales of this size cannot reasonably be thought of as instruments needed to weigh "sacrament" amounts of a substance. They are, however, large enough to weigh bundles the size of which were seized from the Church of the Cognizance within a two week period in February, 2006.

The defendants must show as a threshold matter that their beliefs constitute a "religion". *Id*. @1498. The government submits the defendants have failed to do so. The defendants argue that they should not have to justify the sincerity of their religious beliefs. (Defendants' Motion pg. 5). They then acknowledge that the present state of the law could be interpreted to require a showing that the defendants have a sincerely held religious belief. In this the government and the defendants agree. The government does not, however, agree that the threshold question is whether the use of cannabis in the church's religion is part of a sincere religious practice (Defendants' motion pg. 6). The government does **not** concede the defendants are engaged in a sincere religious practice. The defendants may participate in a sincere life style which advocates the ingestion of marijuana. The government opines that the defendants' lifestyle also includes maintaining their lifestyle through marijuana sales.

Hence, the threshold issue is whether or not the defendants have established that their possession of approximately 510 pounds of marijuana is protected as a sincere religious belief.

The defendants seek the protection of the Religious Freedom Restoration Act (RFRA). Under RFRA, a plaintiff must establish, by a preponderance of the evidence, three threshold requirements to state a prima facie free exercise claim. *United States v. Meyers*, 95 F. 3d, 1475 @1482 (10th Cir. 1996). The governmental action must (1) substantially burden, (2) a religious belief rather than a philosophy or way of life, (3) which beliefs are sincerely held by the plaintiff. The government need only accommodate the exercise of actual religious convictions. *Id*. There is no RFRA protection for the defendants unless they first meet the aforementioned criteria. Once the plaintiff has established the threshold requirements by a preponderance of the evidence, the burden shifts to the government to demonstrate that the challenged regulation furthers a compelling state interest in the least restrictive manner. Id. Citing *Werner v McCotter*, 49 F.3d 1476 @1480 n.2 (citing 42 U.S.C. §2000bb-1(b)).

This honorable court should first make a finding as to the defendants' sincerity; sincerity is a factual matter. . . Id. @1482. The Tenth Circuit Court of Appeals further noted in *Meyers* that "our review of the requirements, although largely factual in nature, presents mixed questions of fact and law." Id. citing *Thirty v. Carlson,* 78 F.3d 1492, 1994 (10th Cir. 1996).

Secondly, this honorable court should then determine what constitutes religious belief and the ultimate determination as to whether RFRA has been violated. Id.

The government does not dispute that the defendants' beliefs are substantially burdened, the third threshold question which must be found before the defendants can gain RFRA protections.

The government submits that the factual background of this case requires a finding that the defendants' beliefs are not sincere.

If and only if the defendants make a showing of the sincerity of their beliefs by a preponderance of the evidence can they gain RFRA protection. The government would then be required to show that the substantial burden on the defendants' religion (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest. RFRA, 42 U.S.C. § 2000bb-1 (a) and (b).

The latest pronouncement on this issue by the Supreme Court, *Gonzalez v. O Centro Espirita Beneficente Viniao Do Vegetal, et al*, 126 S.Ct. 1211 (2006) does not yet apply. In *O Centro* the government conceded that the challenged application would substantially burden a sincere exercise of religion. Id. @ 1212. The government does no such thing in the case at bar.

B. The Defendants Are Not Entitled to RFRA Protection Because Their Life Style and/or Philosophy Do Not Qualify as a "Religion" nor do They Meet the *Meyers* Factors.

Assuming arguendo, the court finds the defendants hold sincere beliefs, the government submits that these beliefs amount to a lifestyle/philosophy and fall short of "religion" for RFRA purposes.

There is no question the defendants hold a philosophy which maintains that marijuana should not be censured by the government. Likewise, there is no question the defendants advocate marijuana consumption as part of their lifestyle. *U.S. v Meyers*, 95

F.3d 1475 (10th Cir. 1996) sets out factors which this honorable court should use in determining whether the defendants' beliefs rise to the level of "religion" sufficient for RFRA protection.

The defendants refer to these factors as a "matrix of sorts". (Defendants' Motion, pg. 6). The defendants go on to set out the five areas of inquiry or factors in determining whether a belief is a religion for RFRA purposes.

The five (5) factors are: 1) Ultimate Ideas; 2) Metaphysical Beliefs; 3) Moral or Ethical System; 4) Comprehensiveness of Beliefs; and 5) Accoutrements of Religion. The fifth factor is sub-divided into external signs that may indicate a particular set of beliefs are "religious".

The defendants draw from a hodgepodge of unsupported speculations for most of their assertions, referring to excerpts from writing of various established religions in an effort to cloak themselves in a religious mantel. The defendants make the unsupported statement that cannabis was the active ingredient in anointing oils of the ancient Hebrews. (Defendants' motion, pg. 10). They go on to suggest that the oil used with the "anointed one", the Hebrew Messiah, is cannabis oil. The diatribe continues for three pages. The argument is an attempt to justify the defendants' criminal action under the guise of religion. The defendants' motion is rife with unsupported assertions using such phrases as, "It is believed . . . . ", "Thus, it is believed . . . .", "Cannabis is believed . . . . ", and, "Cannabis is believed to be the 'tree of life' . . . ." (Defendants' motion, pg. 10.)

The use of or worship of cannabis as a sacrament and deity is the hallmark of the defendants' beliefs. (Defendants' motion, pg. 13). This does not address the first Meyers factor, fundamental questions about life, purpose and death. *Meyers*, Id. @ 1483. The defendants' beliefs also do not address the second *Meyers* factor, Id, metaphysical beliefs,

that is they do not address a reality which transcends the physical and immediately apparent world. A marijuana high does not qualify as such.

It is unclear to the government if the defendants meet the third *Meyers* factor, Id. moral or ethical system. What is clear is that, if the defendants are in violation of the law, as the government asserts, the defendants and their belief system are less than moral and ethical.

The defendants fail to meet factor four (4), Id., comprehensiveness of beliefs. That is, an answer to many if not most, of the problems and concerns that confront humans. The ingestion of cannabis or its worship can hardly be seen to answer many, and certainly not most, of humankind's problems. On the contrary excessive marijuana ingestion may in fact compound problems facing an individual. Research clearly demonstrates that marijuana has potential to create problems in daily life or make a person's existing problems worse. NIDA Infofacts: Marijuana, March 2004, http://www.nida.nih.gov/infofacts/marijuana. html.

Meyers' fifth factor; Accoutrements of Religion is sub-divided into ten sub-factors, Id. 1483-84. Sub-factor one, Founder, Prophet or Teacher, is difficult to analyze. Defendant Danuel Quaintance claims to have founded the Church of the Cognizance. The defendants claim to observe a form of Zoroastrianism in which cannabis is both a deity and sacrament (Defendants motion, pg. 2). Zoraster and his belief system is a far cry from the defendants' philosophy. Zoraster was a teacher with a belief system which included a spiritual deity and meets all of the *Meyers* factors. The bastardized form created and/or followed by the defendants does not. Danuel Quaintance does not rise to the level of Zoraster.

With regard to sub-part two, the defendants lack important writings and rely on a disjointed "pick and choose" philosophy. The defendants take ideas and symbolism from many of the world's great religions. The defendants focus on any writing from the religions which mention symbolically or otherwise, any plant, tree, shrub, or oil/ointment derived thereof. The defendants then appropriate and reinterpret the writing for their own purposes.

As to sub-part three, Gathering Place(s), the defendants do have a gathering place: a trailer compound.

The defendants have no keepers of knowledge. Lifestyles do not require keepers of knowledge. Therefore, the defendants do not meet sub-part four. And, other than partaking in marijuana on any given hour, day, week or month, the defendants, the government submits, do not meet the remaining five sub-parts under the fifth *Meyers* factor. Id. @ 1483.

III. Summary

The Church of the Cognizance must certainly have a substantial membership in Indianapolis, Indiana judging from the amount of "sacrament" seized in Missouri. Clearly, the defendants, including Mr. Butts, were involved in a conspiracy to possess and distribute marijuana.

Within two weeks another sizeable load of "sacrament" was seized. Mr. Kripner's statements indicate what the circumstances show, a commercial criminal enterprise. Mr. Kripner told authorities that the Quaintances gave him money to have his cousin to lease the "load" vehicle. Mr. Kripner also indicated that the defendants' religion was a farce. Mr. Wiedmeyer's statement regarding the defendants' drug trafficking further corroborates Mr. Kripner when he (Kripner) said that the defendants sell marijuana. Rounding out the

portrait of defendants as drug traffickers are two large scales seized from the defendants' compound.

Sincerity is a factual matter in reference to RFRA protections. The defendants' profane worldly activities highlight the insincerity of their premeditated "religion defense". The defendants distanced themselves from Mr. Kripner by financing the lease of the vehicle that would bear the precious "sacrament". The defendants also provided Mr. Kripner with a "disposable" cellular telephone; disposable if arrest is eminent. As Peter distanced himself from Jesus by his denials, so the defendants distanced themselves from their "deity". They also agreed not to partake of the sacrament in exchange for conditions of release. Damaclean yes, but not demonstrative of a sincere faith.

As noted by the defendants, peyote has been allowed by the courts for use by Native Americans in worship services. These practitioners do not worship peyote but instead use it in an effort to commune with God. (Defendants' motion, pg. 8). This practice traces its origins to the beginning of recorded time. Further, Native Americans have died in defense of their faith and way of life. The defendants, however, surrendered their sacrament and readily agreed to forsake their deity as a condition of bond release.

The defendants adhere to a lifestyle certainly, a philosophy perhaps, but not a "religion" for RFRA purposes. The Church of the Cognizance was set up to challenge the drug laws in an attempt to circumvent prosecution for their drug trafficking.

The principle of religious freedom is one of the pillars upon which the nation's strength depends. RFRA exists to protect sincere religious belief from government intrusion. The defendants' attempt to abuse the protections afforded the people of the United States is disturbing. The government asks this honorable Court to find as a matter of fact and law that the defendants have not demonstrated a sincerity of belief and that

their lifestyle does not rise to the level of "religion" for purposes of RFRA. Further, the government asks the honorable Court to deny the defendants' Motion to Dismiss Indictment.

Respectfully submitted,

DAVID C. IGLESIAS
United States Attorney
Electronically filed 4/24/06
LUIS A. MARTINEZ
Assistant U.S. Attorney
555 S. Telshor, Suite 300
Las Cruces, New Mexico 88011
(505) 522-2304

I HEREBY CERTIFY that a true copy of the foregoing response was mailed to counsel for Defendants, on this 25th day of April, 2006.
/s/ Luis A. Martinez
LUIS A. MARTINEZ
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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CLERK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
DANUEL DEAN QUAINTANCE and MARY HELEN QUAINTANCE,	)	CR 06-538 JH
	)	
Defendants.	)	

NOTICE OF FILING EXHIBIT

COMES NOW the United States of America, by and through David C. Iglesias, United States Attorney for the District of New Mexico, and Luis A. Martinez, Assistant United States Attorney for said district, and files the following Addendums to United States' Response to Defendant's Motion to Dismiss Indictment which was electronically filed on April 24, 2006:

Addendum A:	Certified Courier Certificate in the name of Joseph Allen Butts
Addendum B 1:	Yahoo map and driving directions San Simon, AZ to Hatch, NM
Addendum B 2:	Yahoo map and driving directions Hatch, NM to Indianapolis, In
Addendum B 3 :	Yahoo map and driving directions Hatch, NM to Denver, Co
Addendum B 4:	Yahoo map and driving directions Denver, Co to Indianapolis, In
Addendum C:	Photograph 3 bundles in vehicle trunk
Addendum D:	Certified Courier Certificate in the name of Timothy Kripner
Addendum E:	Photograph of burlap bags
Addendum F:	Photograph Ultraship Ultra-50 scale
Addendum G:	Photograph Ohaus non-electric scale

42

Respectfully submitted,

DAVID C. IGLESIAS
United States Attorney

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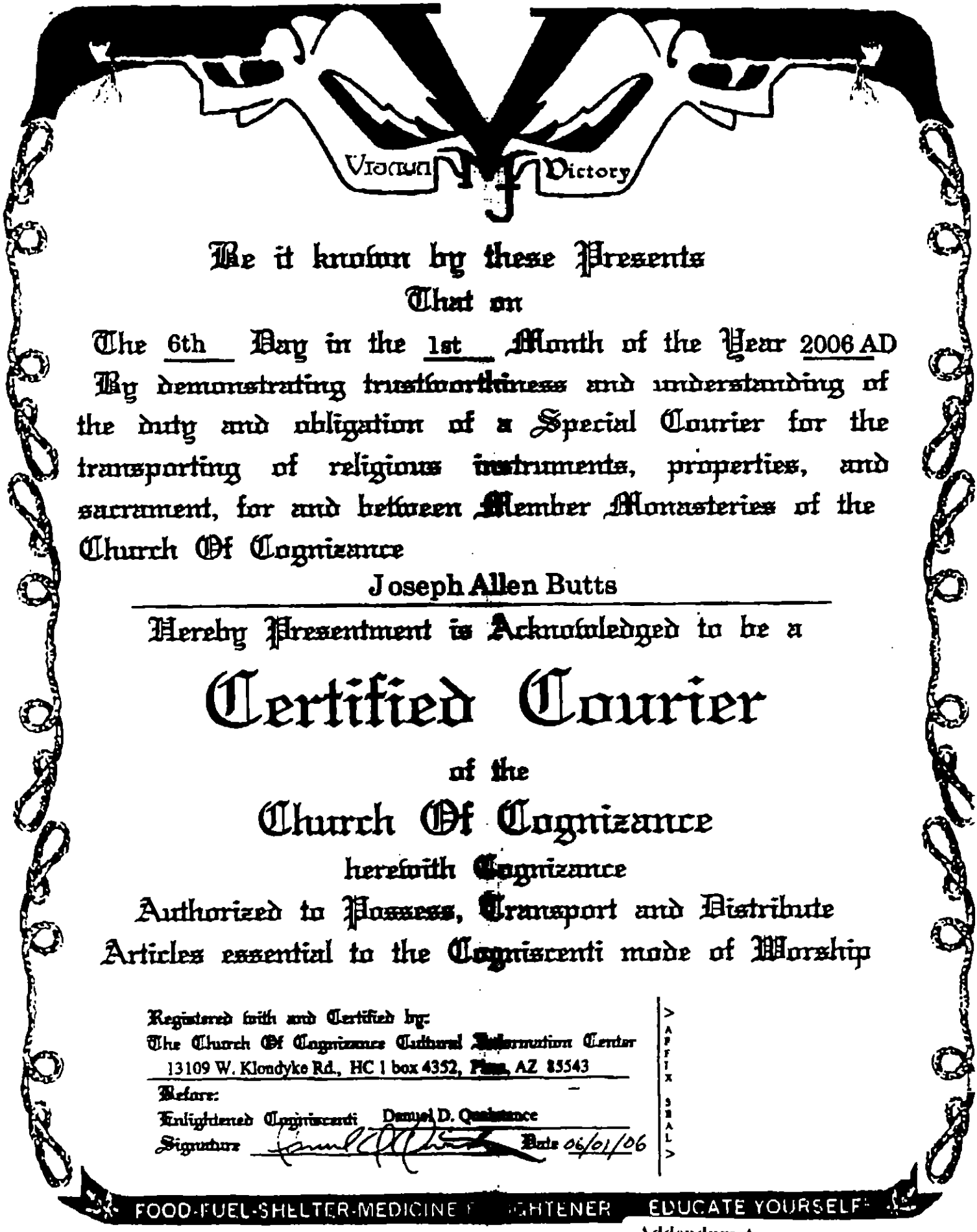


Be it known by these Presents
That on
The 6th Day in the 1st Month of the Year 2006 AD
By demonstrating ~~trustworthiness~~ and understanding of the duty and obligation of a Special Courier for the transporting of religious ~~instruments~~, properties, and sacrament, for and between Member Monasteries of the Church Of Cognizance

Joseph Allen Butts

Hereby Presentment is Acknowledged to be a

Certified Courier

of the

Church Of Cognizance

herewith Cognizance
Authorized to Possess, Transport and Distribute
Articles essential to the Cognoscenti mode of Worship

Registered with and Certified by:
The Church Of Cognizance Cultural Information Center
13109 W. Klondyke Rd., HC 1 box 4352, Pima, AZ 85543

Before:
Enlightened Cognoscenti Daniel D. Quaintance
Signature [signature] Date 06/01/06

<APPLIX SEAL>

FOOD-FUEL-SHELTER-MEDICINE [illegible]GHTENER EDUCATE YOURSELF

Yahoo! Driving Directions

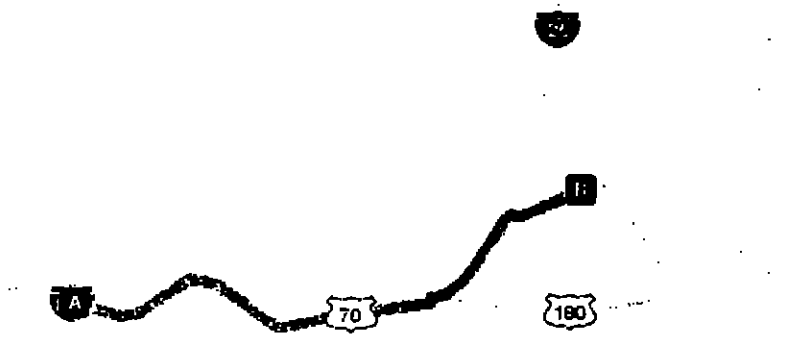
Starting from: A San Simon, AZ
Arriving at: B Hatch, NM
Distance: 141.1 miles **Approximate Travel Time:** 2 hours 40 mins

Your Directions

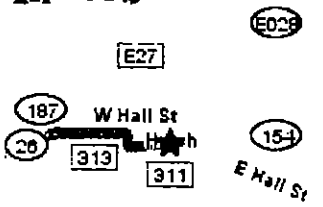
1.	Starting in **SAN SIMON, AZ** on **COCHISE AVE** go toward **5TH ST** - go **0.1** mi
2.	Turn L on **I-10-BL** - go **2.3** mi
3.	Take ramp onto **I-10 EAST** - go **90.5** mi
4.	Take exit **#82A** onto **W CEDAR ST** toward **US-180/SILVER CITY/HATCH** - go **0.4** mi
5.	Turn L on **N GOLD AVE[US-180]** - go **0.7** mi
6.	Continue to follow **US-180 WEST** - go **0.5** mi
7.	Turn R on **NM-26** - go **46.4** mi
8.	Turn R on **RAILROAD AVE** - go **0.2** mi
9.	Arrive at the center of **HATCH, NM**

When using any driving directions or map, it's a good idea to do a reality check and make sure the road still exists, watch out for construction, and follow all traffic safety precautions. This is only to be used as an aid in planning.

Your Full Route



Your Destination



Address:

Hatch, NM

Yahoo! Driving Directions

Starting from: A Hatch, NM
Arriving at: B Indianapolis, IN
Distance: 1464.6 miles **Approximate Travel Time:** 22 hours 31 mins

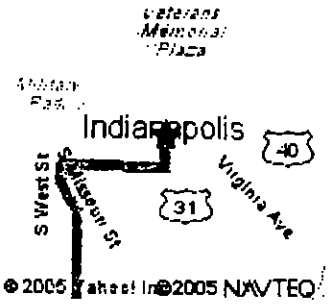
Your Directions

1.	Starting in **HATCH, NM** on **RAILROAD AVE** - go **< 0.1** mi
2.	Turn R on **FRANKLIN ST** - go **0.7** mi
3.	**FRANKLIN ST** becomes **NM-26** - go **0.7** mi
4.	Turn L onto **I-25 NORTH** - go **184.5** mi
5.	Take exit **#226AB** onto **I-40 EAST** toward **SANTA ROSA** - go **536.7** mi
6.	Take L exit **#147B** onto **I-44 EAST** toward **TULSA/WICHITA** - go **499.0** mi
7.	Take L exit **#290A** onto **I-55 NORTH** toward **ILLINOIS** - go **20.7** mi
8.	Take the **I-70 EAST** exit toward **INDIANAPOLIS** - go **220.5** mi
9.	Take exit **#79A/WEST ST** - go **0.3** mi
10.	Turn L on **S MISSOURI ST** - go **0.9** mi
11.	Turn R on **W MARYLAND ST** - go **0.5** mi
12.	Turn L on **MERIDIAN ST** - go **0.2** mi
13.	Arrive at the center of **INDIANAPOLIS, IN**

When using any driving directions or map, it's a good idea to do a reality check and make sure the road still exists, watch out for construction, and follow all traffic safety precautions. This is only to be used as an aid in planning.

Your Full Route

Your Destination



Address:

Yahoo! Driving Directions

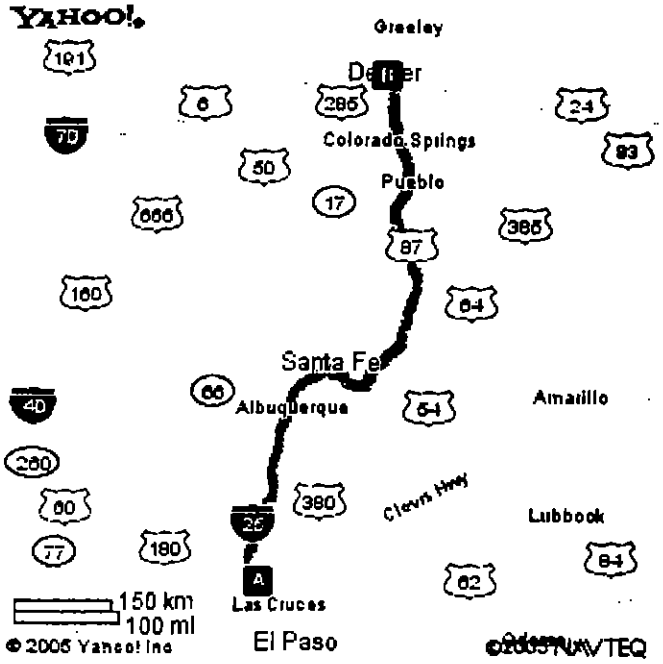
Starting from: A Hatch, NM
Arriving at: B Denver, CO
Distance: 630.3 miles **Approximate Travel Time:** 9 hours 41 mins

Your Directions

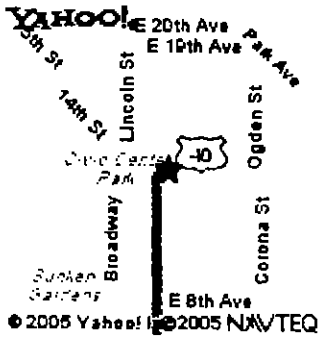
1.	Starting in **HATCH, NM** on **RAILROAD AVE** - go **< 0.1** mi
2.	Turn R on **FRANKLIN ST** - go **0.7** mi
3.	**FRANKLIN ST** becomes **NM-26** - go **0.7** mi
4.	Turn L onto **I-25 NORTH** - go **626.0** mi
5.	Take exit **#207A/LINCOLN ST** toward **BROADWAY** - go **0.2** mi
6.	Continue on **LINCOLN ST** - go **1.7** mi
7.	Turn R on **E 7TH AVE** - go **0.1** mi
8.	Turn L on **SHERMAN ST** - go **0.8** mi
9.	Arrive at the center of **DENVER, CO**

When using any driving directions or map, it's a good idea to do a reality check and make sure the road still exists, watch out for construction, and follow all traffic safety precautions. This is only to be used as an aid in planning.

Your Full Route



Your Destination



Address:

Denver, CO

Addendum B-3

Yahoo! Driving Directions

Starting from: A Denver, CO
Arriving at: B Indianapolis, IN
Distance: 1082.4 miles **Approximate Travel Time:** 16 hours 39 mins

Your Directions

1.	Starting in **DENVER, CO** on **SHERMAN ST** - go **0.1** mi
2.	Turn L on **E 14TH AVE** - go **1.2** mi
3.	Turn L on **VINE ST** - go **0.1** mi
4.	Turn R on **E COLFAX AVE[I-70-BL]** - go **1.1** mi
5.	Turn L on **COLORADO BLVD** - go **2.6** mi
6.	Take ramp onto **I-70 EAST** - go **592.4** mi
7.	Take L fork onto **I-70-ALT EAST** - go **4.1** mi
8.	Merge onto **I-70 EAST** - go **228.6** mi
9.	Take exit **#232** onto **I-270 NORTH** toward **CHICAGO** - go **30.9** mi
10.	**I-270 NORTH** becomes **I-70 EAST** - go **219.4** mi
11.	Take exit **#79A/WEST ST** - go **0.3** mi
12.	Turn L on **S MISSOURI ST** - go **0.9** mi
13.	Turn R on **W MARYLAND ST** - go **0.5** mi
14.	Turn L on **MERIDIAN ST** - go **0.2** mi
15.	Arrive at the center of **INDIANAPOLIS, IN**

When using any driving directions or map, it's a good idea to do a reality check and make sure the road still exists, watch out for construction, and follow all traffic safety precautions. This is only to be used as an aid in planning.

Your Full Route **Your Destination**

Victoria Victory

Be it known by these Presents

That on

The 20th Day in the 2nd Month of the Year 2006AD

By demonstrating trustworthiness and understanding of the duty and obligation of a Special Courier for the transporting of religious instruments, properties, and sacrament, for and between Member Monasteries and Wellness Centers of the Church Of Cognizance

Timothy Kripner

Hereby Presentment is Acknowledged to be a

Certified Courier

of the

Church Of Cognizance

herewith Cognizance

Authorized to Possess, Transport and Distribute Articles essential to the Cogniscenti mode of Worship

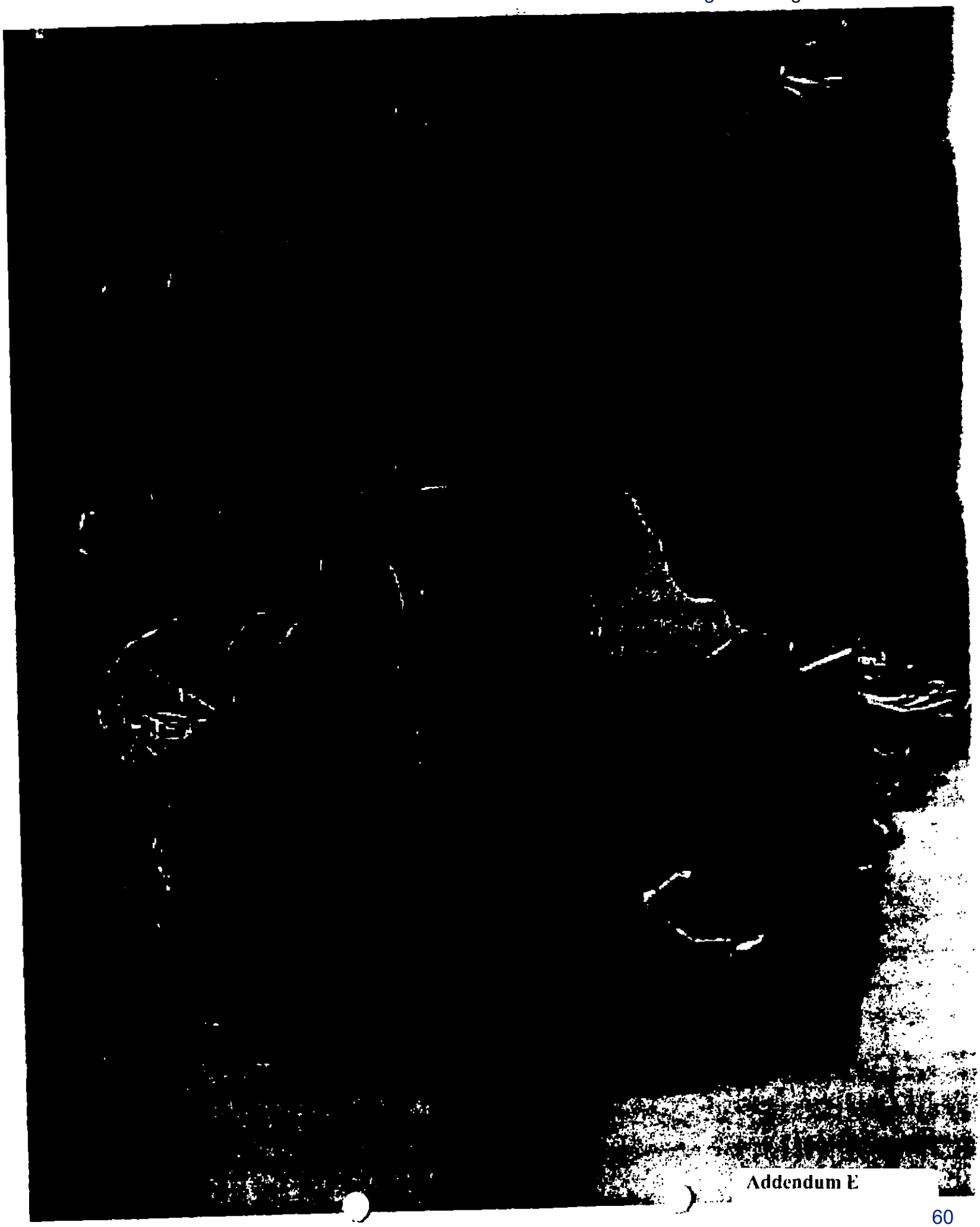
Registered with and Certified by:
The Church Of Cognizance Cultural Information Center
13109 W. Klondyke Rd., HC 1 box 4352, Pima, AZ 85543

Before:
Enlightened Cogniscenti Danuel D. Quaintance
Signature Date: 2-21-06

> AFFIX SEAL >

FOOD-FUEL-SHELTER-MEDICIN ENLIGHTENER EDUCATE YOURSELF

Addendum D



Addendum E


ULTRAVIOLENCE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CR No. 06-538 JH
	)	
DANUEL DEAN QUAINTANCE,	)	
	)	
Defendant.	)	

GOVERNMENT'S RESPONSE TO DEFENDANT DANUEL DEAN QUAINTANCE'S MOTION TO SUPPRESS

COMES NOW the United States of America by and through DAVID C. IGLESIAS, United States Attorney for the District of New Mexico and Luis A. Martinez, Assistant United States Attorney for said District, and hereby responds to defendant Danuel Dean Quaintance's motion to suppress and further states:

I. Factual Background

On February 22, 2006, at approximately 1:30 pm Senior Border Patrol Agent Bernardo M. Ramirez, III was fueling his patrol vehicle at the Diamond Shamrock gas station in Lordsburg, New Mexico. Agent Ramirez saw a Chrysler 300 parked next to the Diamond Shamrock. A green minivan was parked in the drive through area of the Kentucky Fried Chicken Restaurant next to the Diamond Shamrock. Agent Ramirez saw the minivan's passenger, defendant Danuel Quaintance, exit the vehicle and walk into the Diamond Shamrock. Shortly, the minivan driven by Mary Quaintance went through the Kentucky Fried Chicken Restaurant's drive through and parked in the Diamond Shamrock's parking lot. Timothy Jason Kripner then drove the Chrysler a short distance and parked

next to the minivan. Mr. Kripner exited the Chrysler and began speaking with Ms. Quaintance. Agent Ramirez saw Mr. Kripner take a large quantity of food that was obviously purchased at the Kentucky Fried Chicken Restaurant from the minivan and place it in the front passenger floorboard of the Chrysler. Mr. Quaintance then exited the Diamond Shamrock with two large see through plastic bags of food items and handed them to Mr. Kripner. The two had a short conversation. Kripner than placed the food items into the Chrysler. Agent Ramirez thought this odd, since there was so much food for only three people.

Agent Ramirez has extensive experience with alien apprehensions and narcotic loads while working at the Lordsburg Station. Agent Ramirez has observed smugglers, as a common practice, purchase large portions of food for drug "backpackers" or undocumented aliens.

At approximately 1:55 p.m., both vehicles exited the parking lot and enter onto Interstate 10, traveling east from the 22 mile marker. Agent Ramirez followed both vehicles for approximately ten (10) miles when both suspect vehicles exited Interstate 10 and went south on New Mexico 113. New Mexico 113 is known to Agent Ramirez as a notorious route of travel for alien and narcotic smugglers.

Agent Ramirez pulled his patrol unit over and, using binoculars, maintained surveillance on the vehicles as they traveled south on New Mexico 113 for approximately five miles until losing sight of the vehicles.

Agent Ramirez proceeded in the direction the vehicles had last been seen. He traveled south for approximately 13 miles when he encountered the vehicles headed

toward him traveling north in tandem from the 7 mile marker [1] on New Mexico Highway 113. Agent Ramirez knew the 7 mile marker to be a notorious delivery point for narcotic smugglers. Previously, agents of the Lordsburg USBP station have apprehended numerous individuals attempting to deliver narcotics in this area.

Agent Ramirez communicated to Agent Jose Portillo what he (Ramirez) had observed and requested Agent Portillo's assistance. Agent Portillo drove to the intersection of Interstate 10 and New Mexico Highway 113 and observed two vehicles traveling in tandem northbound heading toward him. Agent Portillo drove south on Highway 113 toward the vehicles to confirm that they were the suspect vehicles. At approximately the 15 mile marker, Agent Portillo confirmed they were the suspect vehicles.

Agent Portillo pulled in behind the Chrysler 300 and noticed that Mr. Kripner, the driver and sole occupant, swerved the Chrysler onto the shoulder of the highway. Agent Portillo noted that the vehicle's trunk area appeared dusty and observed what appeared to be hand prints about the trunk area of the vehicle. Agent Portillo's past law enforcement experiences coupled with the information transmitted to him by Agent Ramirez caused Agent Portillo to conclude a smuggling scheme was afoot.

Agent Portillo apprised USBP Agent Lara, who at this time had positioned his patrol unit at the intersection of Interstate 10 and Highway 113, of the situation and advised that he was going to conduct an immigration inspection of the Chrysler. Agent Portillo requested Agent Lara conduct an immigration inspection of the Pontiac minivan which

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[1] The mile markers are set from N.M. Highway 9 south to north. N.M. Highway 9 intersects N.M. Highway 113 approximately 20 miles south of the intersection of Highway 113 and Interstate 10. There is a railroad crossing at mile marker 7. The rails are set across Highway 113. Additionally there are large metal gates on either side of Highway 113 at mile marker 7. The rails and the gates provide distinct reference points and are frequently used by narcotic smugglers as a rendevous point.

appeared to be guiding the Chrysler. Agent Portillo activated his emergency equipment after which the Chrysler driven by Mr. Kripner came to a stop on Highway 113, mile marker 17. As Agent Portillo approached the vehicle he noticed a square backpack covered by a black shirt behind the passenger seat, and as Agent Portillo questioned Mr. Kripner as to his (Kripner's) immigration status, Agent Portillo detected the odor of marijuana emitting from the inside of the vehicle. The Chrysler driven by Mr. Kripner had Arizona temporary tags.

Meanwhile, approximately a mile to two miles north of Agent Portillo's location, at the Intersection of I-10 and New Mexico Highway 113, Agent Lara stopped the Pontiac minivan which bore Arizona license plates. Ms. Quaintance was the driver of the minivan; Mr. Quaintance was the sole passenger. Agent Lara requested Agent Ford who had arrived at the scene, to stand by with the lead vehicle as he, Agent Lara, responded to Agent Portillo's location. It was later established that Agent Portillo's stop of the Chrysler was approximately two miles south of the I-10 at NM 113 intersection. Agent Ford remained with the minivan and the Quaintances and requested a stolen vehicle and registry check on the vehicle's Arizona license plate. Previously Agent Ford had been advised the minivan and the Chrysler had been traveling in tandem.

As Agent Ford's request was being processed Agent Lara arrived at Agent Portillo's location. Mr. Kripner refused Agent Portillo's request for consent to search the Chrysler. Agent Lara's canine Shusja alerted to the trunk area of the Chrysler. After which agents requested Mr. Kripner open the vehicle's trunk. Mr. Kripner complied and agents found three square burlap backpacks containing marijuana. An inventory inspection of the vehicle by agents netted a fourth burlap backpack of marijuana and a handheld two-way radio with short distance capacity set on channel six.

Agent Lara advised Agent Ford via radio that marijuana had been found in the Chrysler. Agent Ford asked Ms. Quaintance to exit the vehicle and handcuffed her advising her she was being detained for further investigation of possession of marijuana. Agent Ford requested Mr. Quaintance to exit the vehicle. Mr. Quaintance did so and asked Agent Ford if he enforced the law. Agent Ford replied that he did and Mr. Quaintance said, "You're breaking the law, this is a hate crime." Mr. Quaintance handed Agent Ford a card identifying himself as a member of a church and told Agent Ford that he was in violation of 22 USC, the freedom of religion. Agent Ford told Mr. Quaintance to put his hands behind his back and he complied. Agent Ford secured Mr. Quaintance with handcuffs. Mr. Quaintance said, "You are in violation of 22 USC and I am going to sue you personally." Agent Ford told Mr. Quaintance that he should stop talking and that he was being detained. Agent Ford then read Mr. Quaintance the Miranda warnings and asked if he understood. Mr. Quaintance said that he did. Mr. Quaintance continued to state that this was a hate crime and how he was going to sue everyone involved with his detention. Mr. Quaintance said, "I am the head of my church and I have the right to have 'that' marijuana." Agent Ford told Mr. Quaintance he should stop talking; Mr. Quaintance said he wanted to talk. Mr. Quaintance continued to talk about hate crimes, religious freedom and lawsuits. The defendants were transported to the Lordsburg Border Patrol Station. The four bundles of marijuana weighed approximately 172 pounds.

II. Discussion

A. Standing: Preface

The defendant requests this Honorable Court suppress all of the evidence obtained as a result of the unconstitutional search of the vehicles related herein. . . . (Defendant's motion, pg. 5). The defendant expects this Honorable Court to consider suppression of

evidence, yet curiously ignores the issue of standing. ". . . we have held that without a possessory or property interest in the vehicle searched passengers lack standing to challenge vehicle searches." *United States vs. DeLuca*, 269 F.3d 1128 @ 1133 citing *Eylico-Montoya*, 70 F.3d @ 1162 (citations omitted).

The defendant asserts that "The Agents in this case lacked a particularized and objective factual basis to stop Mr. Quaintance and the vehicles." (Defendant's motion, pg. 5). The government not only disagrees with the defendant's premise but also notes that the defendant seeks suppression as to two separate vehicles. Mr. Quaintance was a passenger in the green minivan driven by his wife and could not have been an occupant of the Chrysler 300 driven by Mr. Kripner. Hence, the defendant's assertion and request for suppression as to the marijuana and "other evidence" in both vehicles is curious, to say the least.

1. Standing as to the Chrysler 300 driven by Mr. Kripner.

The marijuana cannot be excluded as evidence against the defendant. Mr. Quaintance does not have an expectation of privacy in the Chrysler 300 from which the marijuana was seized. In fact, the government contends that it is not likely that even Mr. Kripner, the driver of the Chrysler, has standing to complain of the marijuana seizure. Mr. Quaintance was not a passenger in the Chrysler at the time it was stopped. The vehicle was leased and no defendant in the case at bar has an ownership interest in the Chrysler. The vehicle was leased in the name of Eugene Waylon of Apache, Arizona, allegedly Mr. Kripner's cousin.

To successfully suppress evidence as the fruit of an unlawful detention, a defendant must first establish that the detention did violate his Fourth Amendment rights. *United States vs. Nava-Ramirez*, 210 F.3d 1128 @ 1130 citing *United States vs. Shareef*, 100

F.3d 1491, 1500. The defendant then bears the burden of demonstrating "a factual nexus between the illegality and the challenged evidence. Id. @ 1131 citing *United States vs. Kendlk*, 633 F.2d 1334, 1335 (9th Cir. 1980). The defendant has failed to do so, hence the marijuana and all other inculpatory evidence seized from the Chrysler should not be excluded.

2. Standing as to the Green Minivan Driven by Mary Quaintance in which Mr. Quaintance was a Passenger.

The government concedes Mr. Quaintance has standing as to the green minivan driven by Ms. Quaintance. Agent Ford's check for registered owner based on the Arizona License Plate confirmed the vehicle's owner as Mary Quaintance. Since Ms. Quaintance is Mr. Quaintance's spouse, the government does not contest an ownership interest in the vehicle as to Mr. Quaintance.

B. The Stop of the Green Minivan Driven by Mary Quaintance was Based on Reasonable and Articulable Suspicion and is Therefore Constitutionally Sound

Defendant's assertion that "any attempt to access the quantum of evidence constituting the totality of the circumstances without evaluating the individual components which make up that totality is farcical" (Defendant's Motion, pg. 4). The defendant further asserts that this view is not divide and conquer but common sense. Id @ pg. 4. Nonetheless, the defendant cannot ignore the legion of authority which demands a totality of the circumstances analysis. This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that "might well elude an untrained person." *United States v. Arvizu,* 534 U.S. 266 @ 273, 122 S.Ct. 744 @ 750-51 (2002), quoting *United States v. Sokolow*, 490, U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d. (1989).

Agent Ramirez, utilizing his past experience, deduced from the number of individuals (3) and the large amount of food bought by Mr. Quaintance coupled with the vehicle's location, that criminal activity may possibly be developing. The government anticipates Agent Ramirez to testify in a suppression hearing, that if the vehicles would have continued on from the gas station to Interstate 10, his suspicion would have been assuaged.

This did not happen. The government anticipates Agent Ramirez will testify that he was suspicious of the copious amounts of food due to his previous experience with alien and narcotics smuggling enterprises. Agent Ramirez, the government expects, will also say individuals involved in the aforementioned nefarious enterprises will often purchase food for smuggled aliens or in the case of narcotics smuggling, for individuals employed to portage the marijuana to a rendevous point.

As the vehicles traveled south after entering N.M. Highway 113 from Interstate 10, Agent Ramirez' suspicions rose. With every mile the vehicles traveled south, his suspicions grew. As Agent Ramirez, utilizing his binoculars, watched the vehicles disappear down the highway, his suspicions heightened. The vehicles were now obviously nearing the notorious mile marker 7, the known staging area for narcotics smuggling enterprises. Agent Ramirez once again followed the southerly path the vehicles had taken. Shortly, after 13 miles, the tandem vehicles were now traveling north from mile marker 7 and headed toward Agent Ramirez.

Agent Portillo, after being contacted by Agent Ramirez, drove south on Highway 113.

As a result of the combined circumstances coupled with their previous experience, the Agents' suspicions were now at a zenith. The coupe de gras came as Agent Portillo

maneuvered his unit behind the Chrysler. The hand prints in the dirt on the vehicles trunk spoke volumes. The time it took the vehicles to travel south on 113, get to mile marker 7 and return northbound on 113 easily fit the picture of a contraband pick up. The large food purchase now made sense. The hand prints on the vehicles were the handwriting on the wall.

The government submits that the vehicle stop conducted by the Agents was "text book" constitutional. Based on reasonable suspicion drawn from a totality of the circumstances the rationale for the stop was reasonable and articulable. Agents using their training, experience, powers of observation and common sense engaged in the performance of their duties; in this case, drug interdiction.

C. What can be Excluded Should this Honorable Court find the Stop of the Minivan Constitutionally Infirm?

The minivan contained no marijuana and one inculpatory item: the short range two-way radio set on channel six. The stop also resulted in Mr. Quaintance's first inculpatory "blurt out". Assuming, arguendo, that the stop violated the Fourth Amendment, only the foregoing can be suppressed. Mr. Quaintance would have nonetheless been arrested, based on the abundance of probable cause remaining.

1. Inevitable Discovery of the Short Distance Two-Way Radio found in the Minivan.

The Inevitable Discovery Doctrine applies even if the government had not already initiated the alternative investigation by which the government would have inevitably discovered the challenged evidence. *United States v. Sanders*, 43 Fed. Appx. 249 (Tenth Circuit 2002) @ 253 discussing *United States v. Larsen*, 127 F.3d 984 (10th Cir. 1997).

In fact, this is not the situation in the case at bar. That is, an investigation involving the Chrysler 300 had already begun by the time the minivan was stopped. The tandem travel of the vehicles, the numerous food items, the curious travel and route of travel and the dusty hand prints coupled with the discovery of marijuana would have resulted in Mr. Quaintance's arrest.

The minivan would have been subject to a lawful inventory search and the two-way radio would inevitably have been discovered (as was the case).

Mr. Quaintance's first "blurt out" at the scene of the minivan's stop is also admissable as it was made voluntarily by Mr. Quaintance. It was not made in response to interrogation nor was it made while in custody.

It should be noted that "what makes a discovery 'inevitable' is not probable cause alone . . . but probable cause plus a chain of events that would have led to a warrant (or another justification) independent of the search." *United States vs. Souza*, 223 F.3d 1197 @ 1204 (10th Cir. 2000). The chain of events in motion were now an irresistible wave that was sweeping over the conspirators by the time of the minivan's stop. Hence, even if the minivan's stop was unlawfull, the inevitable discovery doctrine should be applied.

III. Defendant's Statements

1. Defendant's Statements Made Voluntarily and Not in Response to Interrogation While in Custody at the Lordsburg Station Should Not be Suppressed.

The defendant, while in custody at the Lordsburg Border Patrol Station, asked Task Force Agents Zavarte and Hernandez through his cell door if they were DEA agents. They replied in the affirmative. Mr. Quaintance immediately began shouting that they belonged to the Cognizance Church and that they were allowed to possess and transport marijuana. The defendant went on to say that they (the Task Force Agents) "were in violation of 22

USC, which states freedom of religion and that is why they are allowed to have and transport the marijuana." Since these statements were made voluntarily and not in response to interrogation, they are admissible against the defendant in a potential trial.

2. Defendant's Statements Made While in Custody at the Lordsburg Border Patrol Station in Response to Interrogation Pursuant to Miranda Warnings.

Task Force Agent Hernandez re-read Mr. Quaintance the Miranda warnings witnessed by Task Force Agent Zarate. Mr. Quaintance stated that he wanted to answer some questions. Mr. Quaintance stated he was not going to admit ownership of the marijuana but that he is allowed under his church to transport and possess marijuana. The defendant then stated he wanted a lawyer. No more questions were asked of the defendant. The foregoing statements made by the defendant pursuant to his Miranda warning are also admissible as to Mr. Quaintance.

IV. Conclusion

The defendant's arrest was valid and the vehicle stops were made well within constitutional bounds. Now before this Honorable Court are co-conspirators caught in the act of committing a crime and law enforcement officers who have done an exemplary, constitutionally sound and effective job.

The defendant lacks standing to challenge the bulk of the evidence sought to be excluded. His statements were made voluntarily as spontaneous outbursts or pursuant to Miranda warnings. As a result, the government requests this Honorable Court deny defendant's motion in whole or in the alternative, in part.

Respectfully submitted,

DAVID C. IGLESIAS
United States Attorney
Electronically filed 4/27/06
LUIS A. MARTINEZ
Assistant U.S. Attorney
555 S. Telshor, Suite 300
Las Cruces, New Mexico 88011
(505) 522-2304

I HEREBY CERTIFY that a true copy of the foregoing response was delivered to counsel for Defendant, on the 28th ____ day of April, 2006.
/s/ Luis A. Martinez
LUIS A. MARTINEZ
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANUEL DEAN QUAINTANCE,
MARY HELEN QUAINTANCE,
TIMOTHY JASON KRIPNER,
and JOSEPH ALLEN BUTTS,

Defendants.

CRIMINAL NO. 06-538 JH

COUNT 1: 21 U.S.C. § 846: Conspiracy;

COUNT 2: 21 U.S.C.§ 841(a)(1) and 21 U.S.C. § 841(b)(1)(C): Possession with Intent to Distribute 50 Kilograms and more of Marijuana and 18 U.S.C. § 2: Aiding and Abetting.

SUPERSEDING INDICTMENT

The Grand Jury charges:

COUNT 1

Beginning on or about the 13th day of February, 2006, up to and including the 22nd day of February, 2006, in Hidalgo County, in the State and District of New Mexico and elsewhere, the defendants, **DANUEL DEAN QUAINTANCE, MARY HELEN QUAINTANCE, TIMOTHY JASON KRIPNER, and JOSEPH ALLEN BUTTS,** did unlawfully, knowingly and intentionally combine, conspire, confederate and agree together and with each other and with other persons whose names are known and unknown to the grand jury to commit the following offense against the United States, to wit: Possession with intent to distribute 100 kilograms and more of Marijuana, a Schedule I controlled substance, contrary to 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(B).

In violation of 21 U.S.C. § 846.

05

COUNT 2

On or about the 22nd day of February, 2006, in Hidalgo County, in the State and District of New Mexico, the defendants, **DANUEL DEAN QUAINTANCE, MARY HELEN QUAINTANCE and TIMOTHY JASON KRIPNER**, did unlawfully, knowingly and intentionally possess with intent to distribute 50 kilograms and more of Marijuana, a Schedule I controlled substance.

In violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2.

A TRUE BILL:

/s/

FOREPERSON OF THE GRAND JURY

DAVID C. IGLESIAS
United States Attorney

05/03/06 10:44am

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Cause No. CR 06-538 JH
	§	
DANUEL DEAN QUAINTANCE,	§	
	§	
Defendant.	§	

MR. QUAINTANCE'S REPLY TO GOVERNMENT'S
RESPONSE TO MOTION TO DISMISS INDICTMENT

DANUEL DEAN QUAINTANCE, Defendant, by and through the undersigned appointed counsel, Marc H. Robert, Assistant Federal Public Defender, submits the following reply to the government's response to Mr. Quaintance's motion to dismiss indictment, and in support of his motion would respectfully show the Court as follows:

1. Mr. Quaintance has moved [Doc. 34] to dismiss the indictment [Doc. 25] against him because the indictment and prosecution violates his rights under the United States Constitution and the Religious Freedom Restoration Act. The government has filed a response to that motion [Doc. 41]. Co-defendant Mary Helen Quaintance has joined in that motion [Doc. 35]. Mr. Quaintance replies to the government's response[1].

[1] The government has filed a superseding indictment [Doc. 65]. That indictment adds separate events to the charge of conspiracy and increases the potential consequences to include a minimum mandatory sentence of five years in custody where no minimum mandatory sentence was previously threatened. Arraignment on that indictment is scheduled for June 2, 2006. Mr. Quaintance reserves the right to make additional arguments within the new motion deadline to be set on the superseding indictment.

2. The government predictably contends that Mr. Quaintance is not practicing a "religion" and that his reliance on the RFRA is therefore unavailing. The government would presume to tell the Court, and Mr. Quaintance, what is and is not a religion. The government is incorrect on several levels.

3. Webster's Third International (unabridged) offers seven definitions of "religion". Religion is "the personal commitment to and serving of God or a god with worshipful devotion, conduct in accord with divine commands esp. as found in accepted sacred writings or declared by authoritative teachers, a way of life recognized as incumbent on true believers, and typically the relating of oneself to an organized body of believers (definition 1). Religion is also "one of a the systems of faith and worship (definition 3(a)). Religion is "the body of institutionalized expressions of sacred beliefs, observances and social practices found within a given cultural context (definition 3(b)). Religion is "the profession or practice of religious beliefs" (definition (4)). Religion is "a personal awareness or conviction of the existence of a supreme being or of supernatural powers or influences controlling one's own, humanity's or all nature's destiny (definition 6).

4. The government's position in response to Mr. Quaintance's motion to dismiss is that Mr. Quaintance's beliefs constitute a "lifestyle" or "philosophy", not a religion. Undoubtedly, Mr. Quaintance's beliefs do not coincide with the prosecutor's own beliefs, and are different from the religious beliefs of many other people. To dismiss them as a "lifestyle", shorn of their history and theology, is as inaccurate as it is offensive. The government suggests that Mr. Quaintance and the Church of Cognizance is nothing more than a group of

people who believe that cannabis should not be legally proscribed. That suggestion ignores the ancient religious tradition which underlies the beliefs of the members of the Church of Cognizance (COC).

5. Every society of people has explained their existence as originating in mystical times and circumstances and have sought ways to reconnect and/or influence those forces from which they come. *See, e.g.*, Mircea Eliade, Patterns in Comparative Religion, New York: Sheed and Ward, 1949. Societies thus seek to connect with the supernatural forces believed to describe their source, and they do so in a wide variety of ways. Each of the ways that various human societies describe the supernatural source of their existence is a religion. Many of these belief systems may be written down and may include formal institutions, and many may not. These things are commonly found in rigorous studies of the wide variety of the manifestations of religion in human history, and even in present times.

6. Mr. Quaintance founded the COC in 1991. In 1994, Mr. Quaintance registered the church with Arizona authorities. Mr. Quaintance has been practicing his beliefs for many years.

7. Mr. Quaintance has ministered to the members of the Church of Cognizance in many ways for many years. He has presided at weddings and funerals. He has provided spiritual guidance to inmates incarcerated in prison. At the evidentiary hearing on his motion to dismiss, Mr. Quaintance will testify to the various things he has done in his capacity as the leader of his church, and will provide such documentary proof of his activities as remain in

his possession[2]. It is also anticipated that members of the COC will testify to the manner in which the church ministers to their spiritual needs.

8. The Church of Cognizance is a religion based on the precepts of Zoroastrian religious beliefs. The Zoroastrian religious tradition is thousands of years old. There is historical and archeological evidence of that religious tradition. The study of such things is a serious academic pursuit. Counsel anticipates presenting testimony from an expert in the study of ancient and modern religious practices to provide the Court with an empirical basis for the discussion of the Zoroastrian system of beliefs, and the place of those beliefs in the theology which provides the foundation for the Church of Cognizance.

9. The government suggests that the Church of Cognizance does not fit within the *Meyers* list of factors for the definition of a religion. Mr. Quaintance rejects the *Meyers* formulation as inconsistent with the First Amendment. The definition of what is and is not a religion with reference to markers drawn from the mainstream religious practices is inaccurate in its application to present day spiritual endeavors and offensive to the Constitution. However, Mr. Quaintance submits that even under the skewed *Meyers* analysis he is engaged in sincere religious practice. The Court should so find.

10. The government suggests that because Mr. Quaintance has not identified the meaning of life his religious pursuit does not meet the *Meyers* standard. The Church of

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[2] Since his arrest in February, 2006, Mr. Quaintance has suffered an invasion by various law enforcement officers, who have taken many computers and records containing information about Mr. Quaintance's ministry. Mr. Quaintance expects that the contents of those computers and records will be returned to him as soon as possible after government experts have obtained all the information to be found there, and that the government will provide to Mr. Quaintance's counsel all discovery resulting from the search and harvesting of these resources.

Cognizance believes in basic precepts for living a health life. COC seeks to maximize mankind's potential with the aid of Haoma (cannabis), which is believed to be "the ancient teacher of wisdom, compassion, and the way to the kingdom of glory in heaven on earth, while humans let ego block their own, and others, path to this kingdom of glory". *Church of Cognizance Introduced*. A copy of that tract will be submitted to the Court as Attachment A in hard copy. The COC believes that *cannabis sativa* in all its forms is the "tree of life" referred to in the bible, and is also referred to in other ancient religious texts. Many religious traditions are based on or involve psychoactive plants or substances and psychoactive experiences. *See, e.g.,* Huston Smith, *Cleansing the Doors of Perception: The Religious Significance of Entheogenic Plants and Chemicals*, Putnam 2000; Walter Houston Clark, *The Psychology of Religion*, MacMillan 1958; Walter Houston Clark, *Chemical Ecstasy*, Sheed & Ward, 1969; Robert Forte, *Entheogens and the Future of Religion*, Council on Spiritual Practices, 1997; Mircea Eliade, *Patterns in Comparative Religion*, Sheed and Ward, 1949. In short, COC believes that cannabis is not just a pathway to spiritual enlightenment and achievement, but is a sacrament and a deity, and is used and worshiped as such.

11. COC believes that cannabis is the provider of not only spiritual transcendence, but also corporeal sustenance. The seeds are processed into a thoroughly nutritious food. The fibre is processed into fabric and other useful products.

12. The government contends that COC is not a sincere and legitimate religion because it draws "from a hodgepodge of unsupported speculations for most of their assertions, referring to excerpts from writing of various established religions in an effort to cloak

themselves in a religious mantel [sic]." Response at 9. This is a meaningless diversion. Christianity itself, in early times, was marked by many competing beliefs reflected in various writings. Gnostics were a significant part of early Christianity until they were branded as heretics by St. Irenaeus and relegated to the spiritual basement. Most religious traditions developed from evolving theses and writings, and many borrowed traditions and written theology from others. Yet others have no written theology or cosmology; notable among them is the Native American Church, which is broadly recognized as a legitimate religion.

13. A distinction is to be made between what may be characterized as religions based on faith (that written doctrine is *truth*) and religions based on experience, which involve creating an environment in which practitioners can experientially expand their understanding and knowledge of life and their place in the universe. Experiential practitioners engage in active or passive meditation, isolation or sensory deprivation, scarification, sleep deprivation, sweat lodges, and psychoactive substances, or entheogens. Entheogens are broadly used in religious practice as a source of divine inspiration. Examples are legion throughout the history of religious practice, as can be seen in the authorities on religious practice cited above.

14. The government suggests that the Church of Cognizance is not moral or ethical, as contemplated by the *Meyers* formulation, because their practice violated the law. This is a vacuous solipsism. Recall that the very practice of early Christianity was illegal, and still is in some parts of the world. Recall that a man was sentenced to death (later commuted) in a Muslim country for converting to Christianity. That a religious practice may violate the law

does not equate to an absence of a moral code. "Good Thoughts, Good Words, Good Deeds" is the Zoroastrian and COC creed. COC believes in family and helping those less fortunate.

15. The government continues a litany of bombast and insult by characterizing the beliefs of COC as "bastardized" (Response at 10) and not in keeping with Zoroaster (although the government does not say how). As with most religious traditions, the COC has adopted those parts of Zoroastrian belief which comport with their own spiritual mission. Technically, one could not convert to Zoroastrianism; one had to be born into the church or be a descendant of Zarathustra in order to become a part of that group. Forming a spiritual construct by reference to a variety of ancient and modern religious traditions is not "bastardized"or "hodgepodge" or "disjointed" or "pick and choose". It is a thoughtful, reasoned approach to gaining an understanding of the spiritual being and man's place in the universe.

16. The government compares Mr. and Mrs. Quaintance's decision to accept the Court's conditions of release with the apostle Peter's denials of Christ (Response at 11). This is as contemptible as it is absurd. The Quaintances were offered two choices by the Court. Be denied their sacrament and healer at home, or be denied their sacrament and healer while locked up. They logically chose the former. They have never wavered in their belief or declaration that cannabis is their deity and sacrament.

17. The government calls Mr. Quaintance's home a "compound", invoking images of the burning buildings of the David Koresh/Branch Davidian compound. Mr. Quaintance lives in a trailer. Members of his family live in two other trailers in the same general area on the same piece of property. The property is not barricaded or fortified. It is a neighborhood

and a home. It is one of the places where members meet to engage in their religious practice. Like the Quakers, COC members meet in other members' homes rather than have grand edifices for religious purposes.

18. The government suggests that the presence of scales in the area including Mr. Quaintance's residence belies the claim that cannabis is used in sacramental practice (Response at 6). Of course, the government has no idea of the manner in which the COC handles its sacramental material, and of the church's need for quantities of its sacrament. The government assumes and implies that the church, and Mr. Quaintance, is engaged in the commercial sale of cannabis. Agents of law enforcement tried repeatedly to inveigle church members into selling cannabis in order to make this claim. They failed every time. The government has provided no evidence of a single sale as a result of its vast, expensive, multi-jurisdictional and protracted investigation.

19. The government suggests that co-defendant Tim Kripner told them that the church, and Mr. Quaintance, support themselves by selling cannabis to any willing buyer (Response at 3). That is not true. On information and belief, Mr. Kripner said no such thing. The Quaintances live on their social security payments. They have few expenses and live modestly. They do not sell marijuana.

20. The government contends that Mr. Quaintance's son-in-law, Tim Wiedmeyer, told Graham County (Arizona) sheriff's officers that he wasn't involved in the "drug trafficking" on the Quaintance property (Response at 4). Mr. Wiedmeyer said no such thing. Mr. Wiedmeyer, who believes that agents endowed with the authority to enforce the law and

who represent the government should represent the highest standards of integrity, is deeply troubled at the mischaracterization of his words by those very agents.

21. The government questions both the sincerity of Mr. Quaintance's beliefs and that those beliefs constitute a religion (Response at 7-8). The first challenge, to Mr. Quaintance's sincerity, is nothing more than an uninformed opinion held by the prosecutor. The prosecutor knows nothing of Mr. Quaintance and the length, breadth and depth of his religious belief and practice. At the evidentiary hearing on Mr. Quaintance's motion, Mr. Quaintance will describe the arc of the development of his religious beliefs.

22. In sum, the government's attack on Mr. Quaintance's religious beliefs and the practices of the Church of Cognizance reflects the prejudice held by the prosecutor, possibly borne of the depth and sincerity of his own religious tradition. It is difficult for one steeped in the beliefs and traditions of any religious tradition, particularly a mainstream religious tradition, to take seriously any religious tradition which includes things that are considered to be outside the mainstream or strange. Yet such religions exist, in this country and abroad. The number and nature of various religious traditions are limited only by the number of places people can gather, talk, ask questions and seek after knowledge and insight. The Church of Cognizance is exactly such a religion, and Mr. Quaintance is a sincere practitioner.

23. The briefing so far has discussed the sincerity of Mr. Quaintance's religious practice, a threshold consideration for the Court. Additional briefing and evidence will be needed for the other criteria under RFRA.

Respectfully Submitted,

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electronically filed on May 23, 2006
MARC H. ROBERT
Assistant Federal Public Defender
Las Cruces Office

Counsel for Mr. Quaintance

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply to Response to Motion to Dismiss was served upon Assistant United States Attorneys Luis A. Martinez and Amanda Gould, 555 S. Telshor, Suite 300, Las Cruces, New Mexico 88011 (fax number 505.522.2391), by placing a copy of the same in the United States Attorney's box at the Las Cruces office of the United States District Court Clerk on May 23, 2006.

electronically filed on May 23, 2006
MARC H. ROBERT

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

Clerk's Minutes
Before the Honorable Judith C. Herrera

Case No.	**06cr538**	Date:	**May 17, 2006**
Title:	**United States v. Quaintance et al.**		
Courtroom Clerk:	**Yvonne Co**	Court Reporter:	**Paul Baca**
Court in Session:	**10:53 a.m.**	Court in Recess:	**2:23 p.m.**

Type of Proceeding: **Motion to Suppress; Motion by Plaintiff Mary Helen Quaintance to Dismiss Attorney and Substitute Counsel; Motion by Defense Counsel Mario Esparza to Withdraw**

Court's Rulings/Disposition: **Motion for Suppress taken under advisement; Motions regarding withdrawal of counsel will be withdrawn.**

Order Consistent with Court's Ruling to be Prepared by:

Deadline for Submission of Order to Court:

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
Luis A. Martinez, Assistant U.S. Attorney	**Marc H. Robert, Esq., Attorney for Danuel Dean Quaintance**
Amanda Gould, Special Assistant U.S. Attorney	**Mario A. Esparza, Esq., Attorney for Mary Helen Quaintance**

Proceedings:

Court in Session:

10:53 a.m.	Court in session. Parties state appearances.
10:54 a.m.	Ms. Gould calls Bernardo M. Ramirez III, U.S.B.P, and Mr. Ramirez sworn.
10:55 a.m.	Ms. Gould conducts direct examination of Mr. Ramirez.
11:05 a.m.	Government's Exhibit 1, Drawing by Agent Ramirez, admitted over no objection by Mr. Robert.
11:22 a.m.	Mr. Robert conducts cross-examination of Agent Ramirez.
11:38 a.m.	Mr. Robert moves admission of Exhibits A through G, and Court admits same over no objection.

11:57 a.m.	Mr. Esparza conducts cross-examination of Agent Ramirez.
12:04 p.m.	Ms. Gould conducts re-direct-examination of Agent Ramirez.
12:11 p.m.	Mr. Martinez calls Jose Portillo and Agent Portillo sworn.
12:11 p.m.	Mr. Martinez conducts direct examination of Agent Portillo.
12:31 p.m.	Mr. Robert conducts cross-examination of Agent Portillo.
12:43 p.m.	Mr. Esparza conducts cross-examination of Agent Ramirez.
12:45 p.m.	Ms. Gould calls Jackson Lara, and Agent Lara sworn.
12:45 p.m.	Ms. Gould conducts direct examination of Agent Lara.
12:58 p.m.	Mr. Robert conducts cross-examination of Agent Lara.
1:11 p.m.	Mr. Esparza conducts cross-examination of Agent Lara.
1:12 p.m.	Ms. Gould conducts re-direct-examination of Agent Lara.
1:13 p.m.	Mr. Martinez calls Brian Ford and Mr. Ford sworn.
1:14 p.m.	Mr. Martinez conducts direct examination of Agent Ford.
1:26 p.m.	Mr. Martinez completes direct examination of Agent Ford; Mr. Robert makes objection and Mr. Martinez responds.
1:28 p.m.	Court in recess.
1:52 p.m.	Court in session.
1:53 p.m.	Mr. Robert conducts cross-examination of Agent Ford.
1:57 p.m.	Mr. Esparza conducts cross-examination of Agent Ford.
1:58 p.m.	Ms. Gould calls Jesus Hernandez, DEA, and Agent Hernandez sworn.
1:59 p.m.	Ms. Gould conducts direct examination of Agent Hernandez.
2:07 p.m.	Mr. Robert conducts cross-examination of Agent Hernandez.
2:08 p.m.	Mr. Esparza conducts cross-examination of Agent Hernandez.
2:10 p.m.	Mr. Martinez rests on behalf of the Government; Defense counsel does not intend to present evidence.
2:11 p.m.	Judge takes matter under advisement.
2:11 p.m.	Mr. Esparza presents argument regarding motion to withdraw. Mr. Esparza asks to withdraw motion and Ms. Quaintance agrees to withdraw her motion.
2:14 p.m.	Parties discuss other pending motions.
2:20 p.m.	Parties discuss motion to sever and possible agreement between the parties.

2:23 p.m.	Court in recess.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. Cr. No. 06-538 JCH

DANUEL DEAN QUAINTANCE, and
MARY HELEN QUAINTANCE,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendants Danuel Dean Quaintance and Mary Helen Quaintance's Motion for Suppression of Evidence and Incorporated Memorandum, dated April 18, 2006 **[Doc. No. 39]**. On May 17, 2006, the Court held an evidentiary hearing on the motion to suppress. Defendant Danuel Dean Quaintance was present at the hearing and was represented by Marc Robert, Esq. Defendant Mary Helen Quaintance was present at the hearing and was represented by Mario Esparza, Esq. The United States was present and represented by Assistant United States Attorney Luis Martinez. After considering the evidence presented at the hearing, along with the arguments of counsel, written briefs, and applicable law, the Court concludes that the motion is not well taken and should be denied.

FINDINGS OF FACT

Based upon the evidence presented at the hearing, the Court makes the following findings of fact.

On February 22, 2006, at approximately 1:30 p.m., Senior Border Patrol Agent Bernado

Ramirez III was fueling his patrol vehicle at the Diamond Shamrock gas station in Lordsburg, New Mexico. Agent Ramirez observed a grey Chrysler 300 parked next to the Diamond Shamrock, and a green minivan parked in the drive through area of the Kentucky Fried Chicken next to the Diamond Shamrock. These vehicles were occupied by Defendants Danuel and Mary Quaintance ("Quaintance Defendants"), who were traveling through Lordsburg with co-Defendant Timothy Jason Kripner. The Quaintance Defendants were driving the green minivan and co-Defendant Kripner was driving the Chrysler 300.

Agent Ramirez observed the minivan's passenger, Defendant Danuel Quaintance, exit the vehicle and walk into the Diamond Shamrock. Shortly thereafter, the minivan driven by Defendant Mary Quaintance proceeded through the Kentucky Fried Chicken drive through and parked in the Diamond Shamrock's parking lot. Co-Defendant Kripner drove and parked the Chrysler next to the minivan. Co-Defendant Kripner exited the Chrysler and began speaking with Defendant Mary Quaintance, who remained in the minivan. Co-Defendant Kripner then removed two large bags of Kentucky Fried Chicken food from the minivan and placed the bags on the front floorboard of the Chrysler. Thereafter, Defendant Danuel Quaintance exited the Diamond Shamrock with two large see-through plastic bags of food, which he also placed on the front floorboard of the Chrysler. Agent Ramirez testified that individuals meeting guides who smuggle aliens or narcotics across the border often purchase large quantities of food for the guides' consumption on their trips back to Mexico. The Court finds Agent Ramirez's testimony in this regard credible. U.S. Border Patrol Agent Jose Portillo also testified that individuals carry large quantities of food for those smuggling illegal narcotics or aliens into the country. The Court likewise finds Agent Portillo's testimony credible.

The Quaintance Defendants, driving the minivan, exited the Diamond Shamrock followed by co-Defendant Kripner, who was driving the Chrysler. Agent Ramirez also was leaving the Diamond Shamrock, and he followed the Defendants onto Interstate 10 traveling east. After traveling approximately ten miles, Defendants exited Interstate 10 at mile marker 34 onto New Mexico Highway 113 south. Agent Ramirez followed Defendants off of Interstate 10.

Agents Ramirez and Portillo testified that Highway 113 is a notorious route for alien and narcotic smugglers. Agents Ramirez and Portillo also testified that Highway 113 is used by individuals living locally. The Court finds Agent Ramirez's and Portillo's undisputed testimony regarding the notorious nature of Highway 113 and the fact that Highway 113 is used primarily by locals credible. Agent Ramirez further testified that he had noticed that the minivan had an Arizona license plate and that the Chrysler had a temporary license plate. Agent Ramirez found it suspicious that the Defendants, who did not appear to live locally, had exited on Highway 113.

Near mile marker seven on Highway 113, railway tracks cross the Highway. Just north of the railroad crossing are two hills, and between the crossing and the hills are gates on each side of the Highway. Agent Ramirez testified that this portion of Highway 113 is particularly well known as being notorious for drug and alien smuggling because the hills provide cover and the gates can be used as markers for the drop-off and pick-up of illegal aliens or narcotics. The Court finds Agent Ramirez's testimony in this regard credible.

After exiting the interstate, Agent Ramirez parked his vehicle at an abandoned gas station located near the intersection of Interstate 10 and Highway 113, at approximately mile marker nineteen. Agent Ramirez, using binoculars, continued to observe the green minivan, followed by the grey Chrysler, traveling south on Highway 113. Agent Ramirez watched the vehicles

traveling south on Highway 113 through his binoculars for approximately five miles. Agent Ramirez then informed law enforcement of his observations and attempted to locate an agent near his geographic area. Agent Portillo responded, and Agent Ramirez informed him of his observations.

Agent Ramirez began driving south on Highway 113 when he lost visual of the vehicles at approximately mile marker fourteen. At certain points, when the road curved, he was again able to see the vehicles. Agent Ramirez then lost visual of the vehicles for three to four minutes. As Agent Ramirez approached mile marker seven, he observed the vehicles passing him and traveling northbound, still in tandem with the green minivan leading the Chrysler, on Highway 113. Agent Ramirez knew that the vehicles would not have had time to reach town or any other usual destination during the three to four minutes he did not see them. Agent Ramirez's suspicions were further heightened because it was unusual for cars to travel south for several miles on Highway 113 to no specific destination, and then, to simply turn around and travel north again. Agent Portillo's suspicions were raised for the same reason.

Agent Ramirez then turned around and began following the vehicles north. Agent Portillo drove to the intersection of Interstate 10 and Highway 113, and observed two vehicles heading north towards him. Agent Portillo drove south on Highway 113 towards the vehicles to confirm that they were the vehicles described by Agent Ramirez. At approximately mile marker fifteen, Agent Portillo confirmed the identity of the vehicles. Agent Portillo informed Agent Ramirez that he was going to conduct an immigration inspection of the Chrysler and that he was going to have another agent conduct an inspection of the minivan.

Agent Portillo pulled in behind the Chrysler and noticed that co-Defendant Kripner

swerved the Chrysler onto the shoulder of the highway. In addition to knowing that Highway 113 is a notorious smuggling route, that the vehicles had traveled south for a short period of time and then turned around and drove north, and that the Defendants had purchased large quantities of food, Agent Portillo's suspicions were further raised because the two vehicles were traveling in tandem. Agent Portillo testified that based upon his experience, the first vehicle acts as the "heat" vehicle. If law enforcement becomes suspicious, the first vehicle tries to attract attention away from the following vehicle, thereby allowing the following vehicle to slip by law enforcement undetected. Agent Portillo also became more suspicious because the Chrysler had temporary tags. Agent Portillo testified that he has seen a pattern of rental vehicles being used to transport narcotics. He therefore proceeded to run the tag, which came back as a dealer plate. As Agent Portillo's vehicle came closer to the Chrysler, Agent Portillo noticed that co-Defendant Kripner got "real nervous." Agent Portillo also noticed dusty handprints on the vehicle's trunk. Based upon the foregoing, Agent Portillo concluded that a smuggling scheme was afoot.

Agent Portillo radioed U.S. Border Patrol Agent Jackson Lara, who at this time had positioned his patrol unit at the intersection of Interstate 10 and Highway 113, of the situation and advised that he was going to conduct an immigration inspection of the Chrysler. Agent Portillo requested that Agent Lara conduct an immigration inspection of the green minivan, which was leading the Chrysler north on Highway 113. Agent Portillo then activated his emergency equipment and the Chrysler came to a stop on Highway 113, near mile marker seventeen. As Agent Portillo approached the vehicle, he observed a bundle covered by a black shirt behind the passenger seat. This bundle was consistent in appearance to other bundles containing narcotics. When co-Defendant Kripner rolled his window down, Agent Portillo detected the odor of

marijuana emitting from inside of the vehicle.

Soon thereafter, Agent Lara stopped the green minivan near mile marker nineteen. Defendant Mary Quaintance was the driver and Defendant Danuel Quaintance was the sole passenger. At some point during the first five minutes that he was on the scene, Agent Lara became aware that Agent Portillo had detected the smell of marijuana from the Chrysler. Agent Portillo requested that Agent Lara bring his canine Shusja to the Chrysler to conduct a canine search of the vehicle because co-Defendant Kripner initially had refused to give his consent to search the Chrysler. U.S. Border Patrol Agent Brian Ford arrived at the scene, and Agent Lara proceeded two miles south to Agent Portillo's location. Agent Ford remained with the Quaintance Defendants.

Agent Lara's canine Shusja alerted to the trunk area of the Chrysler. Agents Portillo and Lara thereafter requested that co-Defendant Kripner open the vehicle's trunk. Co-Defendant Kripner complied, and the agents found three square burlap backpacks containing marijuana. The bundles in the trunk were identical to the bundle in the backseat. An inventory inspection of the vehicle netted a fourth burlap backpack of marijuana and a handheld two-way radio with short distance capacity set to channel six.

Agent Lara advised Agent Ford via radio that marijuana had been found in the Chrysler. Agent Ford asked Defendant Mary Quaintance to exit the vehicle and handcuffed her advising her that she was being detained for possession of marijuana. Agent Ford asked Defendant Danuel Quaintance to exit the vehicle. Defendant Danuel Quaintance complied, and thereafter made certain incriminating statements not in response to interrogation. Agent Ford instructed Defendant Danuel Quaintance to put his hands behind his back and the Defendant complied.

Agent Ford secured the Defendant, read him his *Miranda* warnings, and asked him if he understood. Defendant responded in the affirmative. The Defendant again made certain incriminating statements not in response to interrogation. Agent Ford again told Defendant Danuel Quaintance that he should remain silent, but the Defendant indicated he wanted to talk.

All three Defendants were transported to the Lordsburg Border Patrol Station. Defendant Danuel Quaintance made additional incriminating statements at the station. Certain of these statements were made in response to interrogation while others were not. For example, when Defendant Danuel Quaintance was in his cell, he made certain incriminating statements through his cell door to law enforcement agents not in response to interrogation. Law enforcement agents, however, also obtained statements from Defendant Danuel Quaintance in response to interrogation. Prior to interrogating Defendant, law enforcement read him his *Miranda* rights a second time. When Defendant Danuel Quaintance asked for a lawyer, law enforcement stopped interrogating Defendant, but Defendant continued to make additional incriminating statements not in response to interrogation. The length of the interrogation was not long or protracted. There is no evidence that law enforcement used physical force or the threat of physical force. The Defendant is of an age sufficient to render a knowing and intelligent waiver of his *Miranda* rights. There is no evidence in the record that indicates the Defendant's intelligence or education would prohibit him from giving a knowing and intelligent waiver.

The four bundles of marijuana seized from the Chrysler weighed approximately 172 pounds.

The Government has charged Defendants Danuel Dean Quaintance and Mary Helen Quaintance with possession of more than 50 kilograms of marijuana with intent to distribute the

marijuana, and conspiracy to possess more than 50 kilograms of marijuana. Defendant Danuel Dean Quaintance filed the motion to suppress on April 18, 2006. Defendant Mary Helen Quaintance filed a motion to join the motion to suppress on May 2, 2006. On May 8, 2006, the Court granted Defendant Mary Helen Quaintance's motion to join the motion to suppress.

DISCUSSION

The Quaintance Defendants ask this Court to suppress all evidence obtained as a result of the search of both the green minivan and the Chrysler, including any statements made by Defendant Danuel Quaintance following the search, on the ground that the stop of vehicles was not based upon reasonable suspicion.[1] The Government maintains that the stop was based upon reasonable and articulable suspicion, and, in the alternative, that even if the stop was not supported by reasonable suspicion, the inevitable discovery doctrine bars application of the exclusionary rule. The Government further contends that certain pre-*Miranda* statements made by Defendant Danuel Quaintance should not be suppressed because they were made voluntarily and not in response to interrogation, and that certain post-*Miranda* statements made in response to interrogation should not be suppressed because Defendant Danuel Quaintance waived his *Miranda* right to remain silent.

[1] It is unclear whether the Quaintance Defendants seek suppression of evidence seized from both the green minivan and the Chrysler driven by co-Defendant Kripner. To the extent the Quaintance Defendants seek suppression of the evidence seized from the Chrysler, the Government contends, and the Court agrees, that the Quaintance Defendants do not have standing to challenge the search of the Chrysler. The Chrysler was driven by co-Defendant Kripner and neither of the Quaintance Defendants were passengers. The Chrysler was leased to Eugene Waylon of Apache, Arizona, and individual who is allegedly co-Defendant Kripner's cousin. The Quaintance Defendants, therefore, had no reasonable expectation of privacy in the Chrysler, and therefore do not have standing to seek suppression of evidence seized from the Chrysler. Accordingly, to the extent the Quaintance Defendants' motion seeks suppression of evidence seized from the Chrysler, the Court denies the motion.

I. Legality of the Stop.

"Border Patrol agents 'on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion' that those vehicles' occupants may be involved in criminal activity." *United States v. Cantu*, 87 F.3d 1118, 1121 (10th Cir. 1996) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975)). Reasonable suspicion does "not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *United States v. Arvizu*, 534 U.S. 266, 274 (2002). Rather, "reasonable suspicion represents a 'minimum level of objective justification.'" *United States v. Mendez*, 118 F.3d 1426, 1431 (10th Cir. 1997) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).

"Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area." *Brignoni-Ponce*, 422 U.S. at 884. Officers may consider:

> (1) [the] characteristics of the area in which the vehicle is encountered; (2) the proximity of the area to the border; (3) the usual patterns of traffic on the particular road; (4) the previous experience of the agent with alien traffic; (5) information about recent illegal border crossings in the area; (6) the driver's behavior, including any obvious attempts to evade officers; (7) aspects of the vehicle, such as a station wagon with concealed compartments; and (8) the appearance that the vehicle is heavily loaded.

United States v. Monsisvais, 907 F.2d 987, 990 (10th Cir. 1990). When evaluating an officer's decision to stop a vehicle, a court may not engage in a "sort of divide-and-conquer analysis" by evaluating and rejecting each factor in isolation. *Arvizu*, 534 U.S. at 274; *United States v. Gandara-Salinas*, 327 F.3d 1127, 1130 (10th Cir. 2003). This is because factors that by

themselves may be "consistent with innocent travel" may collectively amount to reasonable suspicion. *Arvizu*, 534 U.S. at 274-275 (quoting *Sokolow*, 490 U.S. at 9). Rather, "the totality of the circumstances--the whole picture--must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). "In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling." *Brignoni-Ponce*, 422 U.S. at 885.

An evaluation of the *Brignoni-Ponce* factors indicates that seven of the eight factors weigh in favor of finding that the border patrol officers had reasonable suspicion to stop the vehicles. First, with respect to the characteristics of the area in which the vehicle was encountered, both Agents Ramirez and Portillo testified that Highway 113 is a notorious route for alien and narcotic smugglers, and the Court already has found this testimony credible. *Cf. United States v. Quintana-Garcia*, 343 F.3d 1266, 1268 (10th Cir. 2003) (crediting testimony that New Mexico Highway 26 is a known smuggling route); *United States v. Barbee*, 968 F.2d 1026, 1029 (10th Cir. 1992) (crediting officers' uncontested testimony that old New Mexico Highway 52 is a known smuggling route); *compare Monsisvais*, 907 F.2d at 992 (finding that the absence in the record of any detail as to the characteristics of the same area coupled with statements by the officer that illegal smuggling "sometimes" occurred on New Mexico Highway 85 weighed against finding reasonable suspicion). Agent Ramirez also testified that the portion of Highway 113 near mile marker seven is particularly well known as being notorious for drug and alien smuggling because the hills provide cover and the gates can be used as markers for the drop-off and pick-up of illegal aliens or narcotics. The Court also already has found this testimony credible.

Accordingly, the first *Brignoni-Ponce* factor weighs in the Government's favor.

The second *Brignoni-Ponce* factor likewise weighs in the Government's favor. With respect the proximity of the area to the border, Highway 113 lies relatively close, approximately fifty miles, to the United States-Mexico border. "While the Supreme Court has cautioned that 'roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well,' proximity to the border may be considered as a factor in the reasonable suspicion calculus." *United States v. Diaz-Juarez*, 299 F.3d 1138, 1142 (9th Cir. 2002) (quoting *Brignoni-Ponce*, 422 U.S. at 882). "Obviously, the closer the stop occurs to the border, the more weight the Court can accord to this factor." *United States v. Mendez*, No. 04-2279, 2006 U.S. App. LEXIS 14845, *11 (10th Cir. June 14, 2006) (unpublished opinion). Here, the stop occurred approximately fifty miles from the border. A distance of fifty miles or less has routinely been held sufficiently close to the border to contribute to a finding of reasonable suspicion.[2] *See Quintana-Garcia*, 343 F.3d at 1272 (fifty to sixty miles from the border); *United States v. Barron-Cabrera*, 119 F.3d 1454, 1458 n.4 & 1460 (10th Cir. 1997) (forty-five miles from the border); *United States v. Lopez-Martinez*, 25 F.3d 1481, 1485 (10th Cir. 1994) (sixty miles from the border); *compare United States v. Venzor-Castillo*, 991 F.2d 634, 635, 639 (10th Cir. 1993) (agent lacked reasonable suspicion to conduct stop 235 miles from border).

The third factor, the usual patterns of traffic on the particular road, also weighs in favor of

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[2] As the Tenth Circuit noted in *United States v. Mendez*, "'We also find it instructive, although not dispositive, that federal law permits Border Patrol agents to make warantless stops within a reasonable distance from the border.'" No. 04-2279, 2006 U.S. App. LEXIS 14845, *11 n.3 (10th Cir. June 14, 2006) (unpublished opinion) (quoting *Quintana-Garcia*, 343 F.3d at 1272 n.6) (additional citations omitted). "Federal regulations define 'reasonable distance' as, *inter alia*, 100 miles from the border." *Id.* (citing 8 C.F.R. § 287.1(a)(2)).

the Government. Agents Ramirez and Portillo testified that Highway 113 is used primarily by individuals living locally, and that the license plate on the green minivan was from Arizona and the license plate on the Chrysler was a temporary dealer plate. *Cf. Mendez*, 2006 U.S. App. LEXIS 14845, *12-13 ("While the presence of a foreign license plate would constitute stronger support of a finding of reasonable suspicion, . . . we have also found the presence of an out-of-state license plate from a neighboring state can contribute to such a finding.") (citations omitted). Furthermore, both Agents Ramirez and Portillo found it suspicious that the two vehicles had traveled south on Highway 113 for several miles to no specific destination, only to turn around and drive north on Highway 113. Agent Ramirez explained that the vehicles would have had no time to reach town or any other usual destination during the three to four minutes they vehicles were out of his sight. Two non-local vehicles exiting Interstate 10 to travel south on Highway 113 only to turn around a drive north on that same highway is not consistent with usual and local traffic patterns on Highway 113.

With respect to the fourth *Brignoni-Ponce* factor, the previous experience of the agent with alien traffic, Agents Ramirez and Portillo both testified that Highway 113 is a notorious smuggling route for aliens and narcotics. Moreover, both agents testified that they are aware of a pattern in which individuals meeting guides who smuggle aliens or narcotics across the border purchase large quantities of food for the guides' consumption on their trips back to Mexico. In addition, Agent Portillo testified that in his experience, smugglers may use two vehicles traveling in tandem, with the first vehicle acting as the "heat" vehicle to detract attention from the second vehicle, which presumably would be carrying illegal aliens or contraband. Agent Portillo also testified that he has seen a pattern of rental vehicles being used to transport narcotics.

Accordingly, the fourth *Brignoni-Ponce* factor weighs in the favor of the Government.

With respect to the fifth factor, information about recent illegal border crossings in the area, Agents Ramirez and Portillo both testified that Highway 113 is a notorious alien and narcotic smuggling route. The Government, however, did not produce any evidence of specific, recent illegal border crossings in the area. On balance, however, this factor also weighs slightly in the Government's favor.

With respect to the sixth factor, the driver's behavior, including any obvious attempts to evade officers, this factor likewise weighs in the Government's favor. The two vehicles exited Interstate 10 and drove south down Highway 113, a highway used predominantly by locals, for several miles to no specific destination only to turn around and drive north on Highway 113. In addition, the Defendants were driving in two vehicles in tandem, and Agent Portillo testified that this resembled cases in which smugglers use the first vehicle to act as the "heat" vehicle to detract attention from the second vehicle. Finally, Agent Portillo also testified that as he drove his vehicle closer to the Chrysler, co-Defendant Kripner got "real nervous." This behavior, including the possible use of a "heat" vehicle to evade officers, weighs in the Government's favor.

With respect to the seventh *Brignoni-Ponce* factor, aspects of the vehicle, such as a station wagon with concealed compartments, the Government presented evidence that the Chrysler was dusty, and that Agent Portillo observed dusty handprints on the trunk of the vehicle. This evidence does not weigh heavily in the Government's favor, but nonetheless does constitute evidence from which one could conclude that the Defendants had driven down Highway 113, which is dusty, to the area near mile marker seven to drop off or pick up contraband, which involved opening the trunk and leaving dusty handprints on the trunk. The fact that the vehicles

did not have local license plates also tips the balance of this factor in the Government's favor.

The eighth, and final, *Brignoni-Ponce* factor does not weigh in the Government's favor. The Government presented no evidence at the hearing on the motion to suppress that either of the vehicles looked heavily loaded. Accordingly, this factor weighs against the seven other factors that weigh in the Government's favor.

Seven of the eight *Brignoni-Ponce* factors weigh in favor of finding that the officers had a reasonable suspicion to stop the vehicles. Although individually, dusty handprints on a truck, or the purchasing of a large amount of food, may not constitute specific articulable facts that taken together with rational inferences from those facts would reasonably warrant suspicion that the Quaintance Defendants were involved in criminal activity, *Cantu*, 87 F.3d at 1121, the Court cannot apply a "divide-and-conquer analysis, *Arvizu*, 534 U.S. at 274; *Gandara-Salinas*, 327 F.3d at 1130. All of the circumstances described above, considered together, constitute a minimum level of objective justification, *i.e.*, reasonable suspicion, for the stop. *Mendez*, 118 F.3d at 1431; *compare Arvizu*, 534 U.S. at 274 (reasonable suspicion does "not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard").[3] Accordingly, the Court denies the Quaintance Defendants' motion to suppress on the ground that the officers lacked reasonable suspicion to stop the green minivan.

[3] Because the Court finds that the stop was based upon reasonable suspicion, the Court declines to decide whether the Government's alternative argument that the exclusionary rule is inapplicable because the inevitable discovery doctrine applies.

II. Legality of the Statements.

Miranda requires that procedural safeguards be administered to a criminal suspect prior to "custodial interrogation." *Miranda v. Arizona*, 384 U.S. 436 (1966). Defendant Danuel Quaintance made statements prior to and after receiving his *Miranda* warnings. Specifically, when Agent Lara advised Agent Ford via radio that marijuana had been found in the Chrysler, Agent Ford asked Defendant Danuel Quaintance to exit the green minivan. Defendant Danuel Quaintance complied, and thereafter made certain incriminating statements not in response to any interrogation, inquiry, or questioning by law enforcement. Then, after Agent Ford read the Defendant his *Miranda* warnings, the Defendant again made certain incriminating statements not in response to interrogation. Agent Ford told Defendant Danuel Quaintance that he should remain silent, but the Defendant indicated he wanted to talk. Later, at the Lordsburg Station, the Defendant made additional statements through his cell door to law enforcement agents not in response to interrogation. Because Defendant Danuel Quaintance's statements were made voluntarily and not in response to interrogation, *Miranda* does not apply and the statements are admissible.

Defendant Danuel Quaintance also made statements while in custody and in response to interrogation. The Government contends that the Defendant made these statements after officers gave him his *Miranda* warnings and that the Defendant voluntarily chose to waive his *Miranda* rights. The government bears the burden of proving a valid waiver of *Miranda* rights by a preponderance of the evidence. *See Colorado v. Connelly*, 479 U.S. 157, 168 (1986). The Supreme Court has held that a district court's inquiry into the validity of a waiver of *Miranda* rights has two dimensions:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if "the totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421 (1986).

A determination of whether the waiver of *Miranda* rights is voluntary, knowing and intelligent thus is based on the totality of the circumstances. Under this approach, the Court must examine "several factors including the characteristics of the suspect, such as his [or her] age, intelligence, and education, and the details of the interrogation, such as whether the suspect was informed of his [or her] rights, the length of the detention and the interrogation, and the use or threat of physical force." *United States v. Nguyen*, 155 F.3d 1219, 1222 (10th Cir. 1998).

There is no evidence in this record that Defendant Danuel Quaintance's statements were the result of intimidation, coercion, or deception or that the waiver was without a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Defendant Danuel Quaintance is of a reasonable age to render a voluntary, knowing, and intelligent waiver, and there is no evidence in the record to indicate that the Defendant's intelligence or education weighs against finding his waiver voluntary, knowing, and intelligent. Law enforcement officers read Defendant his *Miranda* warnings a second time at the Lordsburg station prior to interrogating him. The length of their interrogation was not long or protracted. There is no evidence that law enforcement used physical force or the threat of physical force. The Defendant, after receiving his *Miranda* warnings a second time, made certain incriminating

statements in response to interrogation. After the Defendant made these statements, he indicated that he wanted an attorney. At that time, although the agents asked no further questions, the Defendant continued to make incriminating statements. The Court concludes that "the totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension. Accordingly, the Court denies the motion to suppress to the extent it seeks suppression of Defendant Danuel Quaintance's post-*Miranda* statements in response to interrogation.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendants Danuel Dean Quaintance and Mary Helen Quaintance's Motion for Suppression of Evidence and Incorporated Memorandum, April 18, 2006 **[Doc. No. 39]** is hereby **DENIED**.

Dated this 5th day of July 2006.

JUDITH C. HERRERA
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Case No. 06-538 JH

DANUEL QUAINTANCE and
MARY HELEN QUAINTANCE,

Defendant.

DEFENDANT'S EXHIBIT-A REGARDING MOTION TO AMEND CONDITIONS OF RELEASE

127

STATE OF ARIZONA)
COUNTY OF GRAHAM) ss.
THIS IS A CERTIFIED COPY OF INSTRUMENT
RECORDED IN DOCKET 481 PAGE 81-96
DATE 8-12-1994 TIME 1:20 pm
WENDY JOHN, GRAHAM COUNTY RECORDER
BY Kathy Valenzuela

DECLARATION OF RELIGIOUS SENTIMENT

Though no other Cititzen of any other Religious Persuasion is required by law to Declare their Beliefs.
And While the First Amendment prohibits Congress from Enancting Laws respecting an Establishment of Religion.
And While Arizonas Constitution Article XX Guarantees Perfect Toleration of Religious Sentiment
And While Congress has recognized laws neutral to Religion have burdened certain Religious Beliefs and Practices Leading them to pass the Religious Freedom Restoration Act of 1991, to provide both Defence and Claim to a person who's Religion has been Burdened, by the Government (under.color of law)

We:
Danuel D. Quaintance and Mary Quaintance Do Declare Hemp/ Marijuana to be Essential to the practice of Our Religious Beliefs and Sentiments: and do hereby declare ourselfs to be an Individual Orthodox Member Monastery of the Church of Cognizance to be Known as dan & mary's Monastery of the Church of Cognizance

signed Danuel D. Quaintance dated 5/12/94
signed Mary Quaintance dated 5/12/94
Dated: 8/12/94 Dorothea B. Re, Notary Com. Exp. 12/5/95

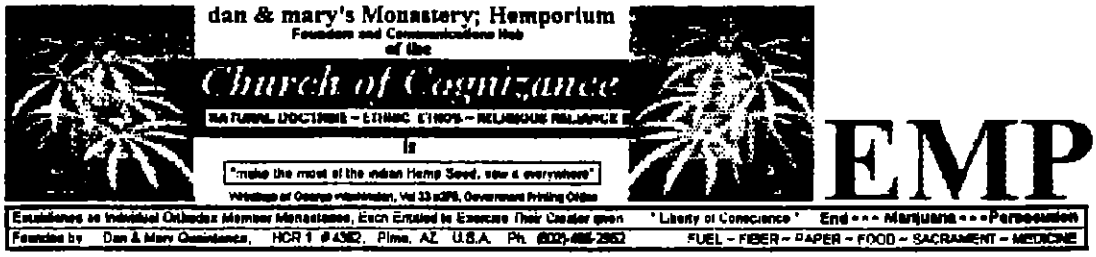
Signatures Hereafter attached are an acknowlegement that the person(s) signing have read this Declaration of Religious Sentiment, and by such act indicate they are aware of the same.

signed ______ dated ______
signed ______ dated ______
signed ______ dated ______
signed ______ dated ______
signed ______ dated ______
signed ______ dated ______

08-12-94 1:20PM
STATE OF ARIZONA, County of Graham, ss Fee $20.00 No. 4484
I hereby certify that the within instrument was filed and recorded at request of Danuel D Quaintance
in Docket No. 481 Page 81-96 and indexed in MISC
Witness my hand and official seal the day and year aforesaid.
SHIRLEY ANGLE
COUNTY RECORDER by Irene Haney Deputy

DEFENDANT'S EXHIBIT A

DOCKET 481 PAGE 081



THE DRAWING FROM AN 1876 EDITION OF THE ILLUSTRATED POLICE NEWS SHOWS THE INTERIOR OF A HASHISH DEN FOR WOMEN ON 10TH AVENUE IN NEW YORK CITY.

HUMAN BODY PRODUCES MARIJUANA ANALOG

-E Pennisi] pg. 165 **SCIENCE NEWS SEPTEMBER 11, 1993**

" This receptor' molecule readily latches on to delta-9-tetrahydrocannabinol (THC),marijuana's active ingredient.... it also accepts the body's natural version of THC, a substance called anandamide (SN: 2/6/93,p.5).

". Because the spleen and brain receptors are different and because other researchers have discovered marijuana receptors in fish and sea urchins Munro suspects that this ancient psychoactive agent ties into an ancient and widespread internal signaling system for organisms"

(organisms are defined as basic elements of life)

DOCKET 481 PAGE 082

BILL H.R. 2797
TO PROTECT THE EXERCISE OF RELIGION

102 D CONGRESS, 1st session, House of Representatives, June 26, 1991

Be It enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. SHORT TITLE.

This Act may be cited as the **" Religious Freedom Restoration Act of 1991".**

SEC. 2 CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) Findings.-The Congress finds-

(1) the framers of the American Constitution, recognizing free exercise of religion as an unalienable right secured its protection in the First Amendment to the Constitution;

(2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not burden religious exercise without compelling justification;

(4) in Employment Division of Oregon v. Smith the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v.Yoder is a workable test for striking a sensible balances between religious liberty and compelling governmental interests.

(b) PURPOSES.-The purposes of this Act-

(1) to restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v.Yoder and to guarantee applicability in all cases where free exercise of religion is burdened; and

(2) to provide a claim or defense to persons whose religious exercise is burdened by government.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL.-Government shall not burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)

(b)EXCEPTION.-Government may burden a persons exercise of religion only if it demonstrates that application of the burden to the person

(1)is essential to further a compelling governmental interest; and

(2)is the least restrictive means of furthering that compelling interest

(c) JUDICIAL RELIEF.-A Person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES

(removed to conserve space)

SEC,5. DEFINITIONS

As used in this Act-

(1) the term 'government' includes a branch, department. agency, instrumentality. and official (or other person acting under color of law) of the United States, a State, or a division of a State

(2) the term 'State' includes the district of Columbia the commonwealth of Puerto Rico, and each territory and possession of the United States; and

(3) the term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion

SEC.6. APPLICABILITY

(a) IN GENERAL,- This Act applies to all Federal and State law, and the implementation of the law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act is subject to this Act unless such a law explicitly excludes such application by reference to this Act.

(c) RELIGIOUS BELIEF UNAFFECTED.-

Nothing in this Act shall be construed to affect. interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion.

DOCKET 481 PAGE 083

CHURCH OF COGNIZANCE

CONSTITUTIONAL RIGHTS VIOLATION ADVISORY

EVERY PERSON (this includes EVERY government official) who under color of law, deprives a Citizen of Rights, Privileges, or Immunities secured by the United States Constitution are subject to civil and/or criminal penalties pursuant to title 42, U.S. Code. Section 1983,1985.,and/or Title 18, U.S. Code Section 241 242. Penalties include up to $10,000 fine and/or 10 years in prison, or both, and up to life imprisonment if death results.

CONSTITUTION OF THE STATE OF ARIZONA

ORDINANCE
Article XX

The following ordinance shall be irrevocable without the consent of the United States and the people of this State:

First. **Perfect toleration** of religious sentiment shall be secured to every inhabitant of this State, and no inhabitant of this State shall ever be molested in person or property on account of **his or her mode of religious worship**, or lack of the same.

DOCKET 481 PAGE 084

The Natural Doctrine of
The Church of Cognizance ,

IS....:

In accordance with the will of the Founding Fathers, and first President of America: as shown in the writings of George Washington Volume 33, p270, Government Printing Office

"make the most of the Indian Hemp Seed, sow it every where"

The Church of Cog-niz-ance
Ethnomically defines in general;
A Persecuted segment of society that promotes cultivation and utilization of "The Herb" Indian Hemp (a.k.a. Cannabis Sativa, Hemp, Marijuana, ...), in any and all of its benevolent uses; befitting of:
"Life, Liberty, and the Pursuit of Happyness";
as was the case for over 15,000 years, prior to the demonization of this Gracious Herb;
by Giant Corporate Interest, in pursuit of riches.
This at the expense of said persecuted segment of society, and society in general: by the violance produced in Americas **"Persecution" disguised as a " Drug War"**
waged against 30plus Million Americans: for no clearer reason than intolerance of their ETHOS.(customs, habits, traditions)
Most of this group having had their vote taken, face **Taxation without Representation;** and would change the law if they had a voice in their Government

The Church of Cognizance ,
FINDS
*** the beginning of persecution in America; for life style / Ethos.** in the follow excerpts of the congressional record; Some benevolent uses are testified to, along with evidence showing unconstitutional tactics

Resolution 6385 "Marijuana Tax Act of 1937"... pg. 2:" ..**The purpose of House Resolution 6385 is to employ the Federal taxing power** [1] not only to raise revenue from the marijuana traffic, but also **to discourage the current and widespread undesirable use of marijuana by smokers** and by drug addicts and thus drive the traffic into channels where the plant will be put to **valuable industrial, medical, and scientific uses.....**

The Church of Cognizance ,
IS
the right of each Equally Created Individual to exercise their Creator given; Natural, Substantive, and Constitutionally protected Right to exercise their **"LIBERTY OF CONSCIENCE".**
The Church of Cognizance is considered to be **INDIVIDUAL MONASTIC ORDERS;** each Protected and Free; to decide for themselves what it is they choose to **BELIEVE and PRACTICE,** in choice of their **Reliances stemming from those Beliefs.**
Each individual is responsible for their own actions, taken toward, or infringing,, other's protected Liberties **Without a victum, there is no harm done, and therein no crime committed**

---

[1] shows TAXS are being used to deprive the citizens of a right. In that same year, 1937 the United States Constitution Sesquicentennial Commission with the President of the U.S. as chairman published "The Story of the Constitution" which states on pg. 35: "... Congress cannot under the present of taxation exercise powers which are denighed it...this power does not carry with it the right to destroy the guarantees which are place in the constitution and amendments..."
also shows the recognized fact there exist both "SMOKERS OF MARIJUANA" and "DRUG ADDICTS"

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FROM BLACKS LAW DICTIONARY

Liberty of Conscience

Liberty for each individual to decide for himself what is to him religious. Gobitis v. Minersville School Dist.,.D.C.Pa., 21 F.Supp. 581, 584. See, also, Religious Liberty, as defined below.

Religious Liberty

Freedom from dictation, constraint, or control in matters affecting the conscience, religious beliefs, and the practice of religion; freedom to entertain and express any or no system of religious opinions, and to engage in or refrain from any form of religious observance or public or private religious worship, not inconsistent with the peace and good order of society and the general welfare. See Frazee's Case, 63 Mich. 396, 30 N.W. 72.6 Am St.Rep. 310; State v. White, 64 N.H. 48, 5 A.828.

Law of the Land

The general misconception is that any statute passed by legislators bearing the appearance of law constitutes the law of the land.

The U.S. Constitution is the Supreme law of the land, and any statute, to be valid, must be in agreement. It is impossible for both the Constitution and a law to be valid, one must prevail. This is succinctly stated as follows:

the general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it. An unconstitutional law, in legal contemplation, it is as inoperative as if it had never been passed...

Since an unconstitutional law is void the general principles follow that it imposes no, duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it

A void law cannot be legally consistent with a valid one. An unconstitutional law cannot operate to supersede any existing valid law. Indeed, insofar as a statute runs counter to the fundamental law of the land, it is superseded thereby.

No one is bound to obey an unconstitutional law and no court is bound to enforce it

Sixteenth American Jurisprudence.

SECTION 177

"Laws which can be broken without any wrong to one's neighbor are counted but a laughing-stock; and so far from such laws restraining the appetites and lust of man-kind, they rather heighten them."

--Benedict Spinoza, TRACTATAS POLITICUS (1677)

DOCKET 481 PAGE 086

religion [12] Latin *religio* originally meant 'obligation, bond ' It was probably derived from the verb **religare** 'tie back, tie tight' (source of English rely), a compound formed from the prefix re- 'back' and ligare tie' (source of English *liable. ligament*, ect.) it developed the specialized sense 'bond between human beings and the gods, 'and from the 5th century it came to be used for **'monastic life'** in the sense in which English originally acquired it via Old French religion 'Religious practices emerged from this, but the word's standard modern meaning did not develop until as recently as the 16th century,
ally, liable. ligament, ligature, rely are etymologically linked words

rely [14] **Rely** comes via Old French relier from Latin **religare** 'tie back, tie tightly' (source also of English **religion**). It was a compound verb formed from the prefix re 'back' and ligare 'tie' (source of English ally, liable, ligament, ect.). It was originally used for 'assemble,' which by the 16th century had developed via **'come together with one's friends'** to depend. ' The derivative reliable is first recorded in 16th-century Scottish English, but did not enter general usage until the mid 16th century.
ally, liable, ligament, ligature, religion are etymologically linked words
John Ayto "DICTIONARY OF WORD ORIGINS"

MAPLE SUGAR HASHISH CANDY Starting in the 1860s, the Ganjah Wallah hasheesh Candy Company" made maple sugar ***hashish candy*** which soon became one of the most popular treats in America. It was sold over the counter and advertised in newspaper by **Sears-Roebuck**, as well as being listed in its own catalogs, ***as a totally harmless fun candy for 40 years***.

Jack Herers "EMPEROR WEARS NO CLOTHES" pg.62

DOCKET 481 PAGE 087

THE MYSTIC PHILOSOPHERS

Cannabis legend and consumption are fundamental aspects of many of the world's great religions:-for example:

SHINTOISM (Japan)-Marijuana was used for the binding together of married couples, to drive away evil spirits, and was thought to create laughter and happiness in marriage.

HINDUISM (India) The God Shiva is said "to have brought **cannabis** from the Himalayas for **human enjoyment and enlightenment-"** The Sardu Priests travel throughout India and the world sharing "chillum" pipes filled with cannabis, sometimes blended with other substances.

At the turn of the twentieth century, the **Indian Hemp Drugs Commission** set up to study the use of hemp in India contains the following **report**:
"...It is inevitable that temperaments would be found to whom the quickening spirit of bhang is the spirit of freedom and knowledge.
" bhang is the Joy-giver, the Sky-filler, the Heavenly-Guide, the Poor Man's Heaven, the Soother of Grief...**No god Or man is as good as the religious drinker of bhang**... the supporting power of bhang has brought many a **Hindu** family safe through the miseries of famine **To forbid or even seriously to restrict the use of so gracious an herb as the hemp would cause widespread suffering and annoyance, and to large bands of worshipped ascetics, deep-seated anger.** It would rob the people of a solace in discomfort, of a cure in sickness, of a guardian whose gracious protection saves them from the attacks of evil influences.."
"...in the ecstasy of bhang (marijuana) the spark of the Eternal in man turns into light the murkiness of matter or illusion and the self is lost in the central soul fire. Raising man out of himself and above mean individual worries, bhang makes him one with the divine force of nature and the mystery 'I am he' grew plain. "

BUDDHISTS (Tibet, India and China) from the 6th century B.C. on-ritually used cannabis: initiation rites and mystical experiences were (are) common in many Chinese Buddhist Sects. **Some Tibetan Buddhists and lamas (priests) consider cannabis their most holy plant.** Many Buddhist traditions, writings, and belief indicate that **"Siddhartha"** (the **Buddha**) himself, used and ate nothing but hemp and its **seeds** for six years prior to announcing (discovering) his truths and becoming the Buddha (Four Noble Truths, the Eightfold Path).

Regarding the **ZOROASTRIANS (Magi)** of Persia (c. Eighth to Seventh Centuries B.C. to Third to Fourth Centuries A.D.), it is widely believed by many Christian scholars, commentators, etc., that the three "Magi" or else Men who attended the birth of Christ were cult references to the Zoroastrians.

The Zoroastrian religion was based (at least on the surface) on the entire cannabis plant. Cannabis was the chief religious sacrament of its priest class, its most important medicine, (e.g., obstetrics, incense rites, anointing, christening), as well as lighting or fire oils in their secular world. The word "magic" is generally considered derived from the Zoroastrians "Magi."
The **ESSENES** of ancient Israel used hemp medicinally, as did the THERAPUTEA of Egypt, from where we get the term "therapeutic"; and both are believed by some scholars to be disciples, or of a brotherhood with, the priests/magicians of the Zoroastrians.

DOCKET 481 PAGE 088

SUFIS OF ISLAM-Moslem "mystical priests have taught, used, and extolled **cannabis for divine revelation, insight, and oneness with Allah**, for at least the last 1,000 years. Many Moslem and world scholars believe the mysticism of the Sufi Priests was actually that of the Zoroastrians who survived conversion during the Moslem (change your religion and give up liquor or be beheaded) conquests of the 7th and 8th centuries A.D.
SHAYKH AZ-ZAWAJI HAYDAR (c. 1150-1221) **The Persian founder of the Haydari order of Sufis**, he is credited with discovering hashish and cultivating **hemp in his monastery** in Khurasan By his order, **hemp was planted around his tomb**, which is still **visited by Sufi pilgrims**.

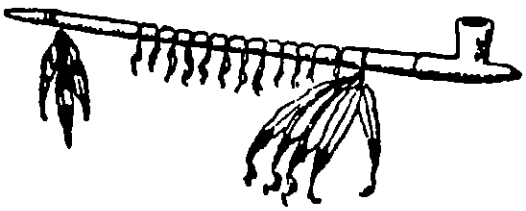
Some **COPTIC CHRISTL4N** (Egypt/Ethiopia) **sects** believe the **sacred "green herb of the Field"** in the Bible, and the **secret incenses sweet incenses**, and anointing oils of the Bible to be cannabis.

The BANTUS (in Africa) had **secret societies** (Dagga Cults") which restricted marijuana use to the noblemen; and the pygmies, Zulus, and Hottentots found it an indispensable medication for cramps, epilepsy, and gout, and **as a religious sacrament.**

The RASTAFARIANS are a contemporary religious sect that uses cannabis (ganja) its **sacred sacrament** to commune with their God (Jah).

kief (kēf or kē-ef′), *n.* [= *kaif.*] Among the Arabs, easeful or dreamy quiescence; a state of drowsy contentment, as from the use of a narcotic; also, a substance, esp. a smoking preparation of hemp leaves, used to produce this state.

CAL·U·MET (–yu·mĕt) *noun* A tobacco pipe with a long, ornamented reed stem, having usually a red–clay bowl; used by American Indians in religious and magic ceremonies, to ratify war and peace treaties, etc.: often called *peace pipe.* [<F. <L. *calamus*, reed]



CALUMET

THE NEW CENTURY DICTIONARY 1946 FIRST COPYWRITED 1927 D.APPLETON-CENTURY CO.

DOCKET 481 PAGE 089

HEMPSEED AND EFAs

"THE FOOD OIL CONSPIRACY by DR. Michael Macleod , **May/June 1993 NEWLIFE**

Seed oils contain essential compounds without which the prostaglandin's. which are central to immune function, cannot be formed. Vegetable oils found in clear bottles at the supermarket, margarine, and the plethora of baked goods which use hydrogenated oils, do not contain these compounds: G A [gamma linolenic acid], EPA [eicosapentaenoic acid], linoleic, linolenic acids are all necessary for vibrant health. These compounds are called essential fatty acids (EFAs), which combined with protein, high in phosphorous and sunshine play a key role in the life energy of the body... At the turn of the century, American society was beginning to be urbanized and the small cottage industries which produced flax and hempseed oil and sold it fresh in the local markets as oil and butter were bought over or driven out of the market by vegetable oil manufacturers like Proctor and Gamble. In 1911, Proctor and Gamble marketed Crisco, the first commercial oil shortening, which is still very popular throughout the third world. Since then margarine use has steadily increased and vegetable oil consumption has increased by 360%. Overall fat consumption increased by 35% from 1910 to 1980. During that period the cancer rate has risen from 1 person in thirty, to 1 in five. The death rate from CVD [cardiovascular disease] was one in seven at the turn of the century and now, one out of two people will die making it the leading killer in the western world.. . . Dr. Budwig . . .found by analyzing the blood of cancer patients, diabetics and liver diseased people, that they consistently lacked the EFA, cislinolenic acid and substances which combine with LA: phospholipids [vital to cell membranes] and albumin, a protein which carries the essential fatty acid [together called a lipoprotein. The blood lipoproteins containing LA plus sulphur-rich proteins were gone; in their place Dr. Budwig found a sticky yellow-green protein substance. She tried giving her patients a diet of flax oil and sulphur-rich skimmed milk and produced remarkable results. Unfortunately for Dr. Budwig, she also found that fatty tumors contained polymerized fats of marine origin; polymers created by heating fish and whale oil heated to very high temperatures and included in the manufacture of. margarine.(Hydrogenation process producing Trans-fatty acids) She was soon locked out of her laboratory and refused access to research. It seemed that margarine profits were too big for this information to go mainstream. Junk foods loaded with empty calories from starch, sugar, saturated animal fat and refined vegetable oils started to replace real food. Junk food that is not burnt off is first stored as glycogen in the liver until it is full, then it is converted into sticky fats and dumped into adipose tissues clogging the arteries on the way.

Jack Herer (author Emperor wears no clothes)
speaking with Dr. Hamilton a Ph.D biochemist of UCLA;
in .. April 1992 High Times **Hempseed Natures Perfect Food** pg.38
"could you give me one line summing up the essential fatty acids in hemp that I could quote you on; ' Yes. **Hemp is the highest of any plant in essential fatty acids.**' She went on to point out that hempseed oil is 55% linoleic acid and 25% linolenic acid. only flax. oil has more linolenic acid at 58%, but hempseed oil is the highest in total essential fatty acids at 80% of total oil volume and among the lowest in saturated fats at 8% of total oil volume." the article goes on, on pg. 51 "Dr.Johanna Budwig from Germany, who pioneered research into the role of TFA's (Trans-fatty acids) in diseases like cancer and diabetes, these trans-fatty acids may be at the heart of tumor growth. .....Dr. Budwig reasoned that if cancer is a deficiency caused by a lack of EFAs then feeding patients a diet high in EFAs should alleviate some of their problems. When she feed flax oil high in LNA and LA along with sulfur rich skim milk protein to cancer patients whom traditional Cancer therapy had failed the yellow-green pigment slowly disappeared: tumors receded and patients recuperated. in about three months and during this time symptoms of diabetes and liver disease also disappeared ."-

Dr. Budwig has used her oil-protein combination therapy to successfully treat cancers of the brain, breast, liver lymph and stomach; leukemia; melanoma; CVD; diabetes; acne and other skin conditions; weak vision and hearing; dry skin; menstrual problems like cramps and breast pain; glandular atrophy; fatty liver; gallstones; pancreas malfunction; kidney degeneration; immune deficiency; low vitality and many other ailments including arthritic conditions.

Hemp is the highest of any plant in essential fatty acids

MARIJUANA MAY BE OVER 600 MILLION YR. OLD

AUGUST 1992 DISCOVER pg. 12 STONED SPERM
THE ACTIVE INGREDIENT IN Marijuana is a molecule called tetrahydrocannabinol, or THC, which binds to a receptor on the surface of brain cells. Mood elevation often ensues, as well as a heightened ability to find interest in very silly things. These effects are mysterious enough, but the greater mystery is why our brain cells have specific receptors for THC, which doesn't exist naturally in our bodies. Now the plot thickens: our distant cousins the spiny sea urchins have THC receptors too-not in their brains, of which they have none to speak of, but on their sperm **Echinoderms, the phylum that includes sea urchins, and chordates, the phylum that includes vertebrates like us, are believed to have diverged from a common ancestor some 600 to 800 million years ago.** Thus the THC receptor seems to be at least that old-which only makes researchers all the more eager to find out what it does for organisms that don't smoke pot. **"It's survived over this enormous time," says Schuel. "whatever it's doing, it must be tremendously important."** AUGUST 1992 DISCOVER

HUMAN BODY PRODUCES MARIJUANA ANALOG

-E Pennisi] pg. 165 **SCIENCE NEWS SEPTEMBER 11, 1993**
,Molecular biologists searching for molecules important for the migration of white blood cells have instead stumbled upon a new type of marijuana receptor, thus far found only in the spleen. **This receptor' molecule readily latches on to delta-9-tetrahydrocannabinol (THC),marijuana's active ingredient.** says Sean Munro of the Medical Research Council Laboratory of Molecular Biology in Cambridge- England. **it also accepts the body's natural version of THC, a substance called anandamide (SN: 2/6/93,p.5).**

Munro and his colleagues had been using a genetic polymorase chain reaction to search through laboratory grown human Lymphoid cells "we never ;got what we were looking for," Munro recalls.

Instead, they discovered a receptor whose genetic code has '14 percent of its sequence in common with the brain's known marijuana receptor. When the researchers inserted this genetic code into cells grown in the lab, the cells bound marijuana-like substances, though not to the same degree as the brain's cannabinoid receptor, Munro and his colleagues report in the Sept. 2 NATURE. The researchers determined that the rat brain lacks this newly identified receptor which is located on cells called macrcophages that lie in the parts of the spleen where substances in the blood first encounter the **immune system.** Another study, now accepted for publication, confirms that parts of rat spleen, as well as lymph nodes, contain marijuana receptors, **says Miles Herkenham,** who, with Allison B. Lynn, surveyed tissue using tagged molecules known to link with these receptors. They work at the National Institute of Mental Health in Bethesda, Md. In the spleen, THC-like compounds seem to affect the ability of cells to generate a messenger molecule that helps activate white blood cells. says Norbert E. Kaminsku at Michigan State University in East Lansing. Last year, Kaminski discovered a marijuana receptor in mouse spleens. **Because the spleen and brain receptors are different and because other researchers have discovered marijuana receptors in fish and sea urchins Munro suspects that this ancient psychoactive agent ties into an ancient and widespread internal signaling system for organisms (organisms are defined as basic elements of life) -**

DOCKET 481 PAGE 091

Archaeological digging at Non Nak Tha in Thailand has yielded in graves dated **15,000 B.P., the remains of animal bones that appear to have had plant material repeatedly burned in their hollow centers.** The favorite instrument for the smoking of cannabis in India even to this day is a ***chelum*** a simple wooden, ceramic, or soapstone tube that is packed with hashish and tobacco

700 B.C., The Scythians, a nomadic central Asian barbarian group are the people who brought the use of cannabis to the European world.

500 B.C. if not earlier The first pipe seems to have been the hollow straight tube found throughout North America, Mexico, and parts of Canada. The smoking tube, usually stone or another hard material was probably **in use as early as 500 B.C. if not earlier** . McGuire considered them to be " **the Sacred pipe of the Indians**, and that this had been a general and **ancient practice** may be inferred from finding such tubes throughout the whole country where the pipe was smoked." (J.D. McGuire, Report of the Nation Museum, **1897**

400 B.C. to A.D. 500 The Hopewell Mound Builders of the Upper Mississippi and Ohio River valleys brought pipe making and smoking to a high art form.

... Smoking of one kind of herb or another was pretty widespread among almost all Indian tribes, but few produced such artistic pipes in such numbers as the **Hopewell Mound Builders.** The pipes of this period, provide the earliest evidence of an artistically inclined culture that smoked obsessively

1611 Hemp cultivated for fiber in Jamestown, Virginia

JAMES 1(1566- 1625)

Hoping to establish a colonial fiber source, the king of England allowed gardens for hemp and flax cultivation to be given to each Jamestown colonist in 1611; this was the first private property in Virginia. In 1619 the first representative government in the colonies, the Virginia General Assembly required all householders having any hemp seed to plant it the next season. This was ***Americes first marijuana law.***

1732-1799 GEORGE WASHINGTON

this U.S. president ***imported hemp seeds from all over the world*** and planted them in his vinyard at Mt. Vernon from 1765 to 1796. ***He hoped to establish an American hemp industry*** able to compete with those of England, Russia, and Italy. .

He wrote " make the most of the Indian Hemp Seed and sow it everywhere"

"Writings of George Washington Vol.33 pg.270, Government Printing office

1743 1826 THOMAS JEFFERSON (1743 1826)

One of the most versatile U.S. presidents, he ***planted an acre of hemp*** at Monticello in 1811, ***wrote a pamphlet on hemp cultivation,*** and ***invented a power machine for breaking hemp*** in 1815.

1840-1900 Over 100 articles appear in American medical journals in which marijuana is recommended for various medical purposes

1851 The Hasheesh Eater by Fitz Hugh Ludlow is published Marijuana as an intoxicant is the subject

1870 Marijuana is listed in the U.S. Pharmacopeia as medicine for various ailments

1895 The English Indian Hemp Drug Commission states that moderate use of marijuana has no evil results

1900 Marijuana is being used in the southwestern United States

1900-1910 Marijuana smoking spreads to the Gulf states Tales spread of marijuana's destructive effects

DOCKET 481 PAGE 092

1914-1931 Individual states prohibit the use of marijuana for nonmedical purposes and classify it as a narcotic
1915 Importing marijuana, except for medical use, is forbidden
1917 A chief of police claims that marijuana and violence are linked
1919 The idea of controlling marijuana is thought incompatible with concern over the constitutionality of interfering with private conduct
1920 The U S Department of Agriculture publishes a pamphlet urging Americans to grow cannabis for hemp production
1920s An association made between marijuana, Mexicans, crime, and lawlessness in the Southwest National concern over marijuana use is minimal Alcohol and narcotics prohibition keep law enforcement agencies busy
1922-1925 U S troops are smoking marijuana in Panama; the Panama Canal Zone Report concludes that there is no evidence that marijuana use is habit-forming or deleterious; the report recommends that no action be taken to prevent the use or sale of marijuana
1925-1930 Local laws against marijuana are not enforced because law enforcement officials are concerned with alcohol prohibition. The price of marijuana is low
1929 Marijuana is classified as a narcotic; national concern increases
1930 Sixteen states have laws prohibiting the use of marijuana
1932 The Uniform States Narcotics Act recommends that all states have similar harsh approaches to the control of marijuana
1933 The second Panama report reaffirms its position that no steps should be taken to prevent the sale or use of marijuana to American soldiers
1934 The Federal Bureau of narcotics is more insistent on a uniform approach to marijuana control in all states because it is "the worst evil of all"
1935 Articles in the popular press (Hearst Yellow Journalism) suggest that marijuana is dangerous, a cause of crime, and should be controlled by all states, even though it is perceived as a problem in only some areas
1936 The Federal Bureau of Narcotics is under pressure from the states in the Southwest to create federal legislation to control marijuana use; it is claimed that marijuana causes crimes
The Government Produces "REEFER MADNESS" as an educational film
1937 The Marijuana Tax Act, which stipulates that all manufacturers, importers, and dealers pay a large tax on marijuana, is passed
1938 POPULAR MECHANICS, FEBRUARY ISSUE, PG. 238, **HEMP TO BE A "NEW BILLION DOLLAR CROP**
The Federal Bureau of Narcotics arrests marijuana users whom they had formerly ignored or turned over to state authorities; enforcement personnel told to continue to concentrate primarily on narcotics traffic
1941 The U S. enters World War II and enforcement of the laws against marijuana and interest in marijuana declines Marijuana dropped from the U.S. Pharmacopoeia and the National Formulary
1942 The government Produce "HEMP FOR VICTORY" encouraging Farmers to grow Hemp as part of the "War Effort"
1943 The editor of the journal Military Surgeon states that although some military personnel smoke marijuana he does not view it as a problem
1944 The La Guardia report states that the medical, psychological, and social problems attributed to marijuana use have been exaggerated
1965 The Narcotics Drug Control Act increases the existing penalties for marijuana trafficking late 1960s The National Institutes of Mental Health begins the project of cultivating marijuana for research
1970 The Controlled Substances Act, classifies marijuana along with heroin and LSD as Schedule 1 drugs those drugs considered to have a high potential for abuse and addiction and no recognized medical use
1970 NORML-the National Organization for the Reform of Marijuana Laws-is founded

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1972 NIDA-the National Institute on Drug Abuse-is created to provide a meaningful response to the growing enigma of illicit drug use and abuse
1972 The National Commission of Marijuana and Drug Abuse, appointed by President Nixon and headed by Raymond Schaefer, the former governor of Pennsylvania recommends the decriminalization of marijuana
1974 NIDA begins supplying standardized marijuana to scientists late 1970s NIDA increases its research support to investigate the effects of marijuana
1982 The National Academy of Medicine issues the most recent issue of the series on marijuana and health-a compilation of the most up to-date information on the subject; the report calls for a larger interest in marijuana research
1982 The National Task Force on Cannabis Regulation issues a report in which it proposes alternatives to the current policy of marijuana prohibition National Academy of Sciences recommends the decriminalization of marijuana
1983 NIDA expands its commitment to research on marijuana

FOOD OF THE GODS
A Bantam Book / March 1992/ pg. 151,152

It is not possible to say with certainty when cannabis was first smoked or indeed whether smoking was once part of the cultural repertoire of Old World peoples and then forgotten only to be reintroduced from the New World at the time of the Spanish Conquest. For while smoking was unknown to the Greeks and the Romans it may have flourished in the Old World in prehistoric times. Archaeological digging at Non Nak Tha in Thailand has yielded in graves dated **15,000 B.P., the remains of animal bones that appear to have had plant material repeatedly burned in their hollow centers.** The favorite instrument for the smoking of cannabis in India even to this day is a ***chelum*** a simple wooden, ceramic, or soapstone tube that is packed with hashish and tobacco

How long have chelums been used in India is a matter of debate. but there can be little doubt that the method is extremely effective.
The Scythians, a nomadic central Asian barbarian group who entered eastern Europe around 700 B.C., are the people who brought the use of cannabis to the European world.

Herodotus describe their novel method of self-intoxication. a kind of cannabis sweat lodge:

They have a sort of hemp growing in this country (Scythia), very like flax, except in thickness and height; in this respect the hemp is far superior: it grows both spontaneously and from cultivation..... When, therefore, the Scythians have taken some seed of this hemp, they creep under the [cloths of the sweat lodge] and then put the seed on the red hot stones: but this being put on smokes, and produces such a steam, that no Grecian vapour-bath would surpass it. The Scythians, transported by the vapour, shout aloud.
Else where Herodotus comments on another. similar method:

[The Scythians] have discovered other trees that produce fruit of a peculiar kind, which the inhabitants, **when they meet together in companies**, and have lit a fire, throw on the fire, as they sit round in a circle: and that by inhaling the fumes of the burning fruit that has been thrown on they become intoxicated by the odor, just as the Greeks do by wine; **and that the more fruit that is thrown on the more intoxicated they become, until they rise up to dance and betake themselves to singing.**

DOCKET 481 PAGE 095

Did Indians smoke pot / High Times/ May 1992

The pipe evidence is among our best archaeological and historical means of documenting the exchange between the hemp cultures and the tobacco cultures J D McGuire in his monumental work on pipes for the National Museum in 1897 makes this statement "The shape of the Eskimo pipe as well as the diminutive size of the bowl, forcibly suggest that it is an importation into America from the continent of Asia " Another writer who researched the subject found "the distinguishing characters of Eastern Asiatic and consequently also of Western Eskimo pipe-smoking are the use of a very small bowl, which is smoked out in a few whiffs and the practice of very deep inhalation of the smoke: so that these few whiffs, produce a condition of well-nigh intoxication"
(Alfred Dunhill The Pipe Book 1927)

That North America should be the location of the largest number and most varied types of prehistoric smoking pipes is curious, but also only logical since the area where the tobacco and hemp cultures met and diffused. Because we have written records to prove it the 1492 meeting is usually considered the first however archeological evidence indicates it was the latest contact of the two cultures and by no means the first

The censers pots and smoking bowls of the ancient Phoenicians Greeks Hebrew. Thracian and Scythians were the logical smoking devices for an area where hemp grew wild in abundance. People who can step outside their back door and pick an arm load of cannabis are more likely to be extravagant in its use then those who must obtain it from far away, or from a few plants.--North America, where tobacco was plentiful but hemp was scarce, the smoking pipe went through many changes.

The first pipe seems to have been the hollow straight tube found throughout North America, Mexico, and parts of Canada. The smoking tube, usually stone or another hard material was probably **in use as early as 500 B.C. if not earlier** . McGuire considered them to be " **the Sacred pipe of the Indians**, and that this had been a general and **ancient practice** may be inferred from finding such tubes throughout the whole country where the pipe was smoked." (J.D. McGuire, Report of the Nation Museum, 1897)

The Hopewell Mound Builders of the Upper Mississippi and Ohio River valleys brought pipe making and smoking to a high art form.

... Smoking of one kind of herb or another was pretty widespread among almost all Indian tribes, but few produced such artistic pipes in such numbers as the **Hopewell Mound Builders.** The pipes of this period, **400 B.C. to A.D. 500,** provide the earliest evidence of an artistically inclined culture that smoked obsessively. Most Indian tribes used the pipe only for ceremonial purposes **smoking was not a habit but a ritual.** The most interesting characteristics of the Hopewell Mound pipes are the curved base and the animal, bird or human figure facing the smoker. The curved base was probably an evolutionary advance over the flat base which did not conform to the curvature of the body while moving about. Also, the curved base permitted the smoker to rest the pipe on his or her lap while weaving, fishing, making pottery, or sitting, waiting for game.

Having the curved figure facing the smoker was no doubt for the purpose of communicating with the object. This is not surprising, since birds and animal often played an important part in the artistic, **religious**, and economic life of the Indians.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Cause No. CR 06-538 JH
	§	
DANUEL DEAN QUAINTANCE,	§	
	§	
Defendant.	§	

MR. QUAINTANCE'S SUPPLEMENT TO HIS RESPONSE [DOC. 116] TO GOVERNMENT'S APPEAL OF ORDER AMENDING CONDITIONS OF RELEASE [DOC. 92] AND MOTION TO STAY AMENDMENT OF CONDITIONS OF RELEASE [DOC. 93]

DANUEL DEAN QUAINTANCE, Defendant, by and through the undersigned appointed counsel, Marc H. Robert, Assistant Federal Public Defender, submits the following supplemental response to the government's Notice of Appeal [Doc. 92] of the order amending Mr. Quaintance's conditions of release [Doc. 101] and Motion to Stay implementation of that order [Doc. 93], and in support of his position would respectfully show the Court as follows:

1. Mr. Quaintance has filed a response [Doc. 116] to the government's appeal of the Magistrate Judge's Order Amending Conditions of Release. Mr. Quaintance wishes to present additional authority to the Court in support of his position.

2. The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court. *Bandy v. United States*, 81 S.Ct. 197, 5 L.Ed.2d 218 (1960), quoting *Reynolds v. United States*, 80 S.Ct. 30, 32, 4 L.Ed.2d 46 (1959); *Cohen v. United States*, 82 S.Ct. 526, 7 L.Ed.2d 518 (1962). The conditions set for release should constitute

no greater deprivation of liberty than is reasonably necessary. *United States v. Williams*, 356 F.3d 1045 (9th Cir. 2004). Impositions of conditions of release must be supported by reasons that the conditions are necessary to reasonably assure a defendant's appearance or the community's safety. *United States v. Spilotro*, 786 F.2d 808 (8th Cir. 1986). Conditions of release that "reasonably assure" a defendant's appearance and the safety of the community are sufficient; it is not necessary that the conditions *guarantee* those things. *United States v. O'Brien*, 895 F.2d 810 (1st Cir. 1990); *United States v. Fortna*, 769 F.2d 243 (5th Cir. 1985).

3. Although there is no constitutional right to bail, application of the statutes and rules relating to bail must be applied fairly and reasonably in order to assure due process. *United States ex rel. Means v. Solem*, 440 F. Supp. 544, 548 (D.S.D. 1977).

4. The conditions imposed by the initial order setting conditions violated Mr. Quaintance's First Amendment rights to speech and association. While those rights are not absolute, *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *Means*, 440 F.Supp at 550, a high constitutional standard must be met before those rights are infringed. The government (including the courts) must demonstrate that the restriction of constitutional rights must further a compelling government interest, and that the restriction is no greater than necessary to achieve that compelling government interest. *Procunier v. Martinez*, 416 U.S. 396, 427, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974); *Buckley*, 424 U.S. at 25; *Means*, 440 F.Supp. at 551.

5. None of the restrictions placed on Mr. Quaintance's exercise of his constitutional rights to speech and association could possibly relate to any concern that he might not appear

for court. In the first place, Mr. Quaintance has always appeared for court (or made appropriate arrangements where appearance could be waived). In the second, the kinds of restrictions placed on him have little or nothing to do with appearance in court. The government's claimed concern is for the safety of the community.

6. "[A]n invasion of First Amendment rights can not be predicated on a speculative concern of danger." *Means*, 440 F.Supp. at 551, citing *Procunier v. Martinez*, 416 U.S. at 420. Here, the government suggests no factual basis for its claim that permitting Mr. Quaintance to talk to members of his spiritual community (or, for that matter, members of his temporal community) could pose a danger to any community.

7. In *Leary v. United States*, 431 F.2d 85 (5th Cir.1970), the court addressed similar issues. In that case, the defendant was on record as advocating the use of narcotic drugs. The defendant, Timothy Leary, was well known, and his views were also well known and widely disseminated. The district court decided that such advocacy made Leary a threat to the community. The Fifth Circuit, speaking through Judge Wisdom, rejected that notion. "The district court's holding raises a serious constitutional question. If the 'danger' referred to in [18 U.S.C.] § 3148 includes mere 'advocacy' of the use of illegal drugs or of other law violations, the section offends the constitutional guaranty of freedom of speech." *Leary*, 431 F.2d at 89. The court went on to conclude that if bond could be revoked by the exercise of Leary's rights to freedom of speech and freedom of the press, 18 U.S.C. § 3146 imposed an unconstitutional condition. *Id*. "To avoid holding the statute unconstitutional, one must

construe the term 'danger' as conduct, not advocacy falling short of actual incitement to imminent unlawful conduct." *Id*.

8. Similarly, in *Williamson v. United States*, 184 F.2d 280 (2nd Cir. 1050), the court considered the government's application to revoke bond for defendants appealing their convictions. The government said that the defendants were dangerous because of their penchant for making speeches and writing articles in support of the communist party which did not advocate the violent overthrow of the government. Rejecting the government's argument, the court said:

> Courts should not utilize their discretionary powers to coerce men to forego conduct as to which the Bill of Rights leaves them free. Indirect punishment of free press or free speech is as evil as direct punishment of it. Judge Cardozo wisely warned of 'the tendency of a principle to expand itself to the limit of its logic.' (Cardoza, Nature of the Judicial Process 51). If the courts embark upon the practice of granting or withholding discretionary privileges or procedural advantages because of expressions or attitudes of a political nature, it is not difficult to see that within the limits of its logic the precedent could be carried to extremeties to suppress or disadvantage political opposition."

Williamson, 184 F.2d at 283.

9. The Magistrate Judge amended Mr. Quaintance's conditions of release to permit him to have contact with the members of his church and others, but prohibited him from advocating the use of cannabis, or talking about its acquisition or distribution. Even those restrictions violate the Constitution. The government, however, thinks the amended conditions insufficiently restrictive. The Constitution stands between the government and the unsupportable restrictions it seeks.

WHEREFORE, for the foregoing reasons, DANUEL DEAN QUAINTANCE, Defendant, respectfully prays that the Court enter an order denying the government's appeal of the order amending conditions of release, vacating the stay of that order, amending the conditions of release to permit Mr. Quaintance to have contact with all those with whom he would have contact and to speak as he would, short of incitement to imminent criminal conduct; and providing such other and further relief to which the Court may find Mr. Quaintance to be justly entitled.

Respectfully Submitted,

FEDERAL PUBLIC DEFENDER
500 S. Main St., Suite 600
Las Cruces, NM 88001
(505) 527-6930
Fax (505) 527-6933

filed electronically on July 18, 2006
MARC H. ROBERT
Assistant Federal Public Defender
Las Cruces Office

Counsel for Mr. Quaintance

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Supplemental Response to Government's Appeal was served on Assistant United States Attorney Amanda Gould, 555 Telshor, Suite 300, Las Cruces, New Mexico, 88011, by placing it in the box designated for the United States Attorney's Office at the United States District Court Clerk's office; Mr. Mario A. Esparza, P.O. Box 2468, Las Cruces, New Mexico 88004; and Mr. Leon Schydlower, 210 N. Campbell, El Paso, Texas 79901-1406 on July 18, 2006.

filed electronically on July 18, 2006
MARC H. ROBERT

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

Clerk's Minutes
Before the Honorable Judith C. Herrera

Case No.	**Crim. No. 06-538**	Date:	**August 21-23, 2006**
Title:	**United States v. Danuel Dean Quaintance, Mary Helen Quaintance, Timothy Jason Kripner, and Joseph Allen Butts**		
Courtroom Clerk:	**Yvonne Co**	Court Reporter:	**Paul Baca**
Court in Session:	**See below**	Court in Recess:	**See below**
Type of Proceeding:	**Hearing on Motion to Dismiss Indictment**		
Court's Rulings/Disposition:	**Motion Taken Under Advisement**		

Attorney(s) Present for Plaintiff(s):

Luis Martinez, Assistant U.S. Attorney

Amanda Gould, Special Assistant U.S. Attorney

Attorney(s) Present for Defendant(s):

Marc H. Robert, Esq., Attorney for Danuel Dean Quaintance

Steve Almanza, Esq., Attorney for Mary Helen Quaintance

Bernadette Sedillo, Esq., Attorney for Joseph Allen Butts

Proceedings:

Court in Session:

	Monday, August 21, 2006
10:42 a.m.	Court in session; parties state appearances.
10:45 a.m.	Mr. Robert addresses the Court regarding two witnesses and potential self-incrimination.
10:47 a.m.	Mr. Martinez addresses same.
10:48 a.m.	Mr. Robert presents additional argument and objects to government's witness on grounds of relevancy.
10:52 a.m.	Court will rule upon relevancy objections in the context of testimony.

10:53 a.m.	Mr. Robert calls Deborah Pruitt, and Dr. Pruitt sworn.
10:55 a.m.	Mr. Robert conducts direct examination of Dr. Pruitt.
11:54 a.m.	Mr. Robert passes the witness.
11:54 a.m.	Court in recess.
1:13 p.m.	Court in session.
1:14 p.m.	Ms. Gould conducts cross-examination of Dr. Pruitt.
2:09 p.m.	Mr. Robert conducts redirect examination of Dr. Pruitt.
2:29 p.m.	Ms. Gould conducts re-cross-examination of Dr. Pruitt.
2:30 p.m.	Mr. Robert conducts re-redirect examination of Dr. Pruitt.
2:31 p.m.	Mr. Robert calls Richard Mack, and Mr. Mack sworn.
2:33 p.m.	Mr. Robert conducts direct examination of Mr. Mack.
2:37 p.m.	Mr. Martinez conducts cross-examination of Mr. Mack.
2:39 p.m.	Mr. Robert calls Michael Senger, and Mr. Senger sworn.
2:40 p.m.	Mr. Robert conducts direct examination of Mr. Senger.
3:03 p.m.	Court in recess.
3:21 p.m.	Court in session.
3:21 p.m.	Mr. Robert continues to conduct direct examination of Mr. Senger.
3:57 p.m.	Mr. Martinez conducts cross-examination of Mr. Senger.
4:12 p.m.	Court discusses schedule with parties.
4:13 p.m.	Court in recess.
	Tuesday, August 22, 2006
9:42 a.m.	Court in session. Parties and court discuss scheduling.
9:50 a.m.	Mr. Robert calls Anna Dibble, and Ms. Dibble sworn.
9:51 a.m.	Mr. Robert conducts direct examination of Ms. Dibble.
10:14 a.m.	Ms. Gould conducts cross-examination of Ms. Dibble.
10:27 a.m.	Mr. Robert conducts redirect examination of Ms. Dibble.
10:30 a.m.	Ms. Gould conducts re-cross-examination of Ms. Dibble.
10:34 a.m.	Mr. Robert conducts re-redirect examination of Ms. Dibble.
10:34 a.m.	Court poses questions to Ms. Dibble.

10:40 a.m.	Mr. Robert calls Danuel Quaintance, and Mr. Quaintance sworn.
10:40 a.m.	Mr. Robert conducts direct examination of Mr. Quaintance.
11:00 a.m.	Court in recess.
12:44 p.m.	Court in session.
12:44 p.m.	Mr. Robert continues to conduct direct examination of Mr. Quaintance.
1:30 p.m.	Court in recess.
3:25 p.m.	Court in session.
3:26 p.m.	Mr. Robert continues to conduct direct examination of Mr. Quaintance.
4:16 p.m.	Mr. Martinez conducts cross-examination of Mr. Quaintance.
4:34 p.m.	Mr. Robert rests.
4:35 p.m.	Counsel for Mary Quaintance makes proffer of client's testimony. Counsel for Joseph Butts makes proffer of client's testimony. Government accepts both proffers.
4:38 p.m.	Government discusses admissions of certain evidence and counsel present argument.
4:42 p.m.	Ms. Gould calls Timothy Kripner.
4:43 p.m.	Court in recess.
4:51 p.m.	Court in session.
4:52 p.m.	Mr. Kripner sworn.
4:52 p.m.	Ms. Gould conducts direct examination of Mr. Kripner.
5:16 p.m.	Mr. Robert conducts cross examination of Mr. Kripner.
5:26 p.m.	Court in recess.
	Wednesday, August 23, 2006
9:35 a.m.	Court in session.
9:40 a.m.	Mr. Martinez calls Dr. Jehan Bagli, and Dr. Bagli sworn.
9:41 a.m.	Mr. Martinez conducts direct examination of Dr. Bagli.
10:10 a.m.	Mr. Robert conducts cross-examination of Dr. Bagli.
10:26 a.m.	Mr. Martinez conducts redirect examination of Dr. Bagli.
10:30 a.m.	Mr. Robert conducts re-cross-examination of Dr. Bagli.
10:30 a.m.	Ms. Gould calls Jesus Hernandez, and Mr. Hernandez sworn.
10:31 a.m.	Ms. Gould conducts direct examination of Mr. Hernandez.

10:45 a.m.	Mr. Robert conducts cross-examination of Mr. Hernandez.
10:50 a.m.	Mr. Almanza conducts cross-examination of Mr. Hernandez.
10:55 a.m.	Ms. Gould conducts redirect examination of Mr. Hernandez.
10:56 a.m.	Government rests.
10:56 a.m.	Mr. Robert calls Agent Ivan Zarate, and Agent Zarate sworn.
10:57 a.m.	Mr. Robert conducts rebuttal examination of Agent Zarate.
11:04 a.m.	Mr. Almanza conducts rebuttal examination of Agent Zarate.
11:12 a.m.	Mr. Robert calls Danuel Quaintance, and conducts rebuttal examination of Mr. Quaintance.
11:13 a.m.	Mr. Almanza calls Mary Quaintance and Ms. Quaintance sworn.
11:17 a.m.	Mr. Martinez conducts cross-examination of Ms. Quaintance.
11:17 a.m.	Court takes motion under advisement. Court will accept Defense counsel's written closing argument by August 30, 2006. Government may submit its written closing argument by September 1, 2006.
11:19 a.m.	Court in recess.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Before the Honorable Judith C. Herrera

EXHIBIT LIST

Case Title:	**United States v. Danuel Dean Quaintance, Mary Helen Quaintance, Timothy Jason Kripner, and Joseph Allen Butts**	**Case No.:**	**06cr538**
Clerk:	**Yvonne Co**	**Court Reporter:**	**Paul Baca**

PLTF	DEFT	OBJECTION	ADMITTED	DESCRIPTION OF EXHIBITS
	X		X	Exhibit 1, Dr. Pruitt's CV
	X		X	Exhibit 2, Dr. Pruitt's Expert Report
X		X	X	Exhibit 1, Photograph
	X		X	Exhibit 3, Pamphlet w/ Pledge
	X		X	Exhibit 4, Affidavit of M. Senger
X			X	Exhibit 2, Photograph
	X		X	Exhibit 5, Affidavit of Anna Dibble
	X		X	Exhibit 6a, Photograph
	X		X	Exhibit 6b, Photograph
	X		X	Exhibit 6c, Photograph
	X		X	Exhibit 6d, Photograph
	X		X	Exhibit 6e, Photograph
	X		X	Exhibit 6f, Photograph
	X		X	Exhibit 6g, Photograph
X			X	Exhibit 3, Courier Certificate
X			X	Exhibit 4, Courier Certificate for Joseph Butts
X			X	Exhibit 5, Photograph from Webpage
X		X	X	Exhibit 6, Map
	X		X	Exhibit 8, Pamphlet Signed by T. Kripner
	X		**Parties Did Not Move to Admit**	Exhibit 7, Writings of Church of Cognizance
X		X	X	Exhibit 10, CV of Dr. Bagli
X		X	X	Exhibit 7, Photograph
X		X	X	Exhibit 8, Photograph
X		X	X	Exhibit 9, Photograph
X			X	Exhibit 11, Photograph

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Cause No. CR 06-538 JH
	§	
DANUEL DEAN QUAINTANCE,	§	
	§	
Defendant.	§	

MR. QUAINTANCE'S CLOSING ARGUMENT

DANUEL DEAN QUAINTANCE, Defendant, by and through the undersigned appointed counsel, Marc H. Robert, Assistant Federal Public Defender, submits the following argument following the close of evidence in the first phase of the hearing on Mr. Quaintance's motion to dismiss indictment [Doc. 34].

Mr. Quaintance's motion to dismiss indictment raises a defense under the Religious Freedom Restoration Act to the charges of possession of marijuana with intent to distribute and conspiracy. Under RFRA, upon a showing that the proscribed conduct is a part of a sincere religious practice and that the government action substantially burdens that practice, the government must show a compelling interest in proscribing the conduct and that its action is the least intrusive means of accomplishing that interest. The government contests Mr. Quaintance's claim that his conduct is a part of a sincere religious practice, but concedes that the government's action is a substantial burden. On August 21 through 23, 2006, an evidentiary hearing was conducted concerning the question of whether Mr. Quaintance's possession of cannabis is part of a sincere religious practice. The Court indicated that it would

accept written argument from the defense by August 30, 2006, and a response by the government by September 1, 2006.

Dr. Deborah Pruitt testified as an expert in the anthropological study of religion. She defined a religion as a system of beliefs and practices which address the relationship between people and sacred, mystical forces. She noted that many religious belief systems throughout the world, and throughout recorded history, involve belief in a supreme being or a group of gods, and many do not. She noted the distinction between categories of religious belief systems which are mediated by a priest or prophet other authority figure vested with superior knowledge or power, and those which are experiential in nature, in which the practitioner seeks to have a direct experience with the sacred, mystical forces. She indicated that many systems of religious belief incorporated the use of psychoactive substances, or "entheogens", as a part of the effort to connect with sacred, mystical forces. She testified that the use of entheogens in religious practice has reduced very recently, in anthropological terms, as a result of the dominance of large religious organizations and the prohibition of the use of psychoactive substances in many societies and the persecution of the religious use of entheogens. She testified that there is an almost inextricable connection between religious faith and various forms of healing. Finally, Dr. Pruitt testified that Danuel Quaintance has substantial expertise in the history and analysis of ancient religious texts which refer to entheogens, and arguably cannabis, as an important part of ancient religious traditions.

Mr. Quaintance testified. He has always been deeply involved in religion, including his serving as a reader of scripture and leader of religious discussion in the Lutheran church.

He found his religion wanting, however, and pursued spiritual fulfillment through various studies. His pursuit continued during his service in the U.S. military and beyond, as he dealt with the physical depredations of exposure to radioactive elements and Agent Orange. He studied the Bible, pursuing the origins of that sacred text to times before the formulation of the King James version of the Bible in the 1600s. His desire for understanding led him to the Avesta and to other texts relating to Indo-Persian and Asian religions. His study of those texts, the languages in use during those times and the archeological record led him to, among other things, the conclusion that cannabis had been a sacrament and a deity in those ancient religious traditions. He learned that the cannabis plant provided nearly perfect nutrition (mostly through preparations from the seeds of the plant), clothing and shelter (through the creation of cloth and other materials from the trunk and branches of the plant), healing and spiritual enlightenment (from the leaves and resins of the plant). His studies led him to an understanding of the reasons that the plant was considered sacred, and indeed to his own belief that cannabis is sacred.

Mr. Quaintance's own experience with the plant led him to the same conclusions and understandings. He recognized cannabis as a teacher and guide when, on the verge of dropping out of high school, he experienced cannabis and was moved to reconnect with his education and complete his studies on time. Over time, he came to understand that cannabis was an important connection to the spiritual world and his own spiritual growth. His physical and medical troubles led him to the conclusion that cannabis is also a healer, as reported in the ancient texts as he has interpreted them.

Mr. Quaintance formed the Church of Cognizance in 1991, registering the name with civil authorities in the State of Arizona. The Church rejects the use of cannabis for recreational purposes, or to just "get high". In keeping with the ancient teachings he had studied (and continues to study), he made "haoma", a drink, from cannabis. He recognized and used the plant in various ways, including as sustenance, fibre, spiritual guide, sacrament and deity. The Church also rejects the introduction of cannabis into commerce, meaning that the sale of cannabis as a black market commodity, as in many of the drug transactions and cases that come to the attention of the courts, is prohibited. Indeed, as former Sheriff Mack testified, during the several years that the Church of Cognizance was in existence in Graham County, Arizona and Sheriff Mack was in office, the Sheriff heard nothing suggesting that there was any kind of drug trafficking going on at the Quaintance residence. Sheriff Mack had networks and sources of information relating to the investigation and interdiction of drug trafficking activities. He was also aware of Mr. Quaintance and his presence in the county. Nonetheless, there was nothing that came to Sheriff Mack's attention indicating that the black marketing of marijuana was occurring at the Quaintance residence.

The creed of the Church of Cognizance, and of Mr. Quaintance, is that spirituality and spiritual ascendency comes from within, a creed not unlike that found in the Gnostic Gospels, ancient Christian texts found during the last century in earthen jars in Egypt, hidden from religious authoritarians who had ordered them destroyed as heretical. The creed also finds analogies in eastern religious traditions, addressing the maximization of spirituality by meditation, deprivation and other activities focused inward rather than on an external entity,

as noted by Dr. Pruitt. "Good thoughts, good words, good deeds" is the expression in words of that creed. Mr. Quaintance, as the leader of the Church of Cognizance, lives and practices this creed. He ministers to those in need, whether or not members of the Church. He has counseled people facing personal crises. He has performed marriages and officiated at funerals.

Michael Senger and Anna Dibble, members of the Church of Cognizance, came to court at significant personal risk and testified about their own spiritual journeys. Each of them had been significantly involved in more mainstream religious pursuits, and had found them wanting. Each of them had done research into alternative religious pursuits, their paths eventually leading them to Danuel Quaintance and the Church of Cognizance. They had nothing to gain from testifying to their spiritual journey, and much to lose; each of them is now at risk of investigation and prosecution. However, they both came to Court and testified about their sincere belief in the spiritual and religious principles espoused by Danuel Quaintance and the Church of Cognizance. Listening to the descriptions of their separate quests for higher spiritual knowledge and understanding, one is hard pressed to question the sincerity of Danuel Quaintance, Michael Senger or Anna Dibble.

Much will doubtless be made of the quantity of cannabis involved in the two seizures at issue in this case, in Missouri and in New Mexico. However, Mr. Senger and Mr. Quaintance explained that one person in the practice of the Church of Cognizance can require 20 pounds of cannabis annually. For 10 people, that means 200 pounds annually; for 15

people, 300 pounds; for 20 people, 400 pounds. There are substantially more than 20 members of the Church of Cognizance nationwide.

Why not acquire cannabis in small quantities? Ideally, members would grow their own sacrament, for their own use. However, that is a dangerous pursuit. If the wrong person sees the modest garden, the practitioner is subject to prosecution and imprisonment. For a time, Mr. Quaintance acquired cannabis in quarter-pound and half-pound quantities from Mr. Kripner. While the cost of growing marijuana is next to nothing, the price which must be paid on the black market, resulting from marijuana prohibition and prosecution, is significant. A solution came to Mr. Quaintance from the monastery in Mexico. It is not known whether that source of supply produces cannabis which is distributed through other means. However, the monastery offered to provide Mr. Quaintance with enough cannabis to see to the Church's needs for as much as a year. Mr. Quaintance was not required to pay for the cannabis (reflecting, again, the insignificant cost of production) and was thus motivated to attempt to acquire a sufficient quantity for Church needs. Acquiring cannabis in smaller quantities is also a dangerous proposition. The smaller the quantity purchased the more numerous are the times the Church member is required to subject himself to the black market with its high prices, threat of arrest and imprisonment and constant threat of violence. Acquiring larger quantities reduced those threats and helped to meet Church needs.

Some of the cannabis was intended for Church of Cognizance members or facilities in Indiana. That marijuana was intended for Church uses, not for commercial distribution. When it is available in sufficient quantities, cannabis can be handled on an "underground railroad",

much as escaped slaves were handled during the 19th century in this country. The people who assisted escaped slaves were violating the law at the time, but did so in service of what was to them an obvious and superseding moral and spiritual imperative. So does the Church of Cognizance handle cannabis in the sincere practice of their religious beliefs.

Mr. Quaintance's religious belief system is *syncretic* to some extent, as described by Dr. Pruitt. Syncretism occurs when a person or group takes aspects of other belief systems and fashions them into a set of beliefs and practices that meets their spiritual requirements and needs. The government suggested during the hearing that such a thing is absurd, that a collection of borrowed beliefs cannot be a religion. As Dr. Pruitt testified, that is simply incorrect. An examination of the history of Christianity and the various denominations of Christian congregations shows that she is right. Many of the Christian denominations that dominate mainstream religious culture bear little resemblance to the sects with which Christianity began. Many of the denominations bear little resemblance to each other. The variations in creed and practice have resulted from modifications, divisions, schisms, over the years, decades or centuries; in short, *syncretism*. Those denominations are no less sincere religions for the variations in their origins and practices.

The government argues loudly that Mr. Quaintance's beliefs are not religious, and are not sincere. Again, it is difficult to question Mr. Quaintance's sincerity after listening to him describe the basis and path of his journey of discovery and belief. But is it religious?

The Tenth Circuit seeks to establish the parameters of what constitutes a religion in *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996). The evidence shows that the Church

of Cognizance meets the criteria of *Meyers* and is thus a religion on that basis. At the same time, Mr. Quaintance submits that the creation of a matrix based on mainstream religious practices is a violation of the First Amendment and should be rejected. In that, Mr. Quaintance agrees with the treatment of that issue by Judge Brorby in dissent in *Meyers*.

> "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." Local boards and courts in this sense are not free to reject beliefs because they consider them "incomprehensible." *United States v. Seeger,* 380 U.S. 163, 184-85, 85 S.Ct. 850, 863, 13 L.Ed.2d 733 (1965) (quoting United States v. Ballard, 322 U.S. 78, 86, 64 S.Ct. 882, 886, 88 L.Ed. 1148 (1944)). By attempting to evaluate another's religion with a factor-driven test we have essentially gutted the Free Exercise Clause of its meaning and are ignoring the Supreme Court's cautionary words that a person's views can be "incomprehensible" to the court and still be religious in his or her "own scheme of things." *Id.*

Meyers, 75 F.3d at 1490.

> Few would quarrel, we think, with the proposition that in no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man's predicament in life, in death or in final judgment and retribution. This fact makes the task of discerning the intent of Congress in using the phrase 'Supreme Being' a complex one. Nor is it made the easier by the richness and variety of spiritual life in our country. Over 250 sects inhabit our land. Some believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace. There are those who think of God as the depth of their being; others, such as the Buddhists, strive for a state of lasting rest through self-denial and inner purification; in Hindu philosophy, the Supreme Being is the transcendental reality which is truth, knowledge and bliss.

United States v. Seeger, 380 U.S. 163, 174-75 (1965). In *Seeger*, the Court held that a person who holds a sincere belief which "in his life fills the same place as a belief in God fills in the life of an orthodox religionist" was entitled to consideration as a conscientious objector to the

draft. *Id*. at 192-93. Mr. Quaintance's sincere beliefs occupy that place. He is sincere in his religious beliefs. The Court should so find, permitting the process to move forward to a hearing on the existence of a compelling governmental interest and the least oppressive means of accomplishing that interest.

Meyers discusses a matrix of five criteria for determining what is a religion. However, in discussing each of these criteria, the Tenth Circuit says that religion "often" bears these markers, or that "more often than not" religions will have these kinds of ideas. Strict adherence to such criteria, then, is not only ethically and constitutionally repugnant: it is not required by *Meyers*. Those criteria are: ultimate ideas, metaphysical beliefs, a moral or ethical code, comprehensiveness of beliefs and the accoutrements of religion. Mr. Quaintance discussed each of these criteria, explaining how the Church of Cognizance meets them. Again, however, it must be stressed that these markers, this matrix, is an attempt to require sometimes unusual religions to conform to the look, feel and sound of mainstream religions. Most repugnant, perhaps, is the "accoutrements of religion" criterion, which would require a religionist to essentially have a church, steeple, holidays and vestments. Obviously, not all religions have those things. They are no less religions for those omissions.

The government has, throughout the life of this case, attempted to brand Mr. Quaintance's beliefs as a "philosophy" or a "lifestyle". These are false distinctions which should not be permitted to derail the Court's inquiry. A system of religious beliefs, however derived, is a philosophy. Christian practice is a philosophy, as is Islam, as is Judaism, as is Buddhism, as are all other religions, mainstream or not. Attempting to label something as a

"philosophy" in no way denies that something as a religion. Likewise, the word "lifestyle" in this context is a chimera. The many manifestations of Christianity in our country each engender a lifestyle, many significantly different from others. Some prohibit the consumption of alcohol, while some permit it. Some prohibit dancing. Some prescribe severe dress and severe manners of living. Their religious beliefs, their *philosophies*, directly or indirectly dictate their "lifestyles". That such is the case makes their religious beliefs no less sincere.

Timothy Kripner testified that the marijuana seized in his case was intended for sale in California. On July 13, 2006, he met with the prosecutors and the case agent and provided information. In court, under oath, he gave some information that was significantly different from what he had told the government as reflected in its report. He testified that there was supposed to be $100,000 left in a car somewhere in California (and entrusted to him!), a thing which was not included in the report prepared by the case agent. He said that Mr. and Ms. Quaintance purchased and consumed cocaine with him; in the report and in the debrief, he said that only Ms. Quaintance used cocaine with him and was an addict. Of course, no evidence whatsoever was found of cocaine use by either Mr. or Mrs. Quaintance when the house was searched with a fine-toothed comb. She testified that she cannot consume such things due to medical conditions. Kripner testified to three trips transporting marijuana, when the report shows that he only discussed two trips in his debrief. During his testimony, Kripner admitted that he would lie under oath to avoid jail. Of course, the biggest lie Kripner told was that he had no hope or expectation of sentencing consideration as a result of his testimony. After the hearing (but not before, as required by law), the government provided counsel with a copy of

a *Kastigar* letter which was signed by Kripner and his counsel during his debrief. The letter discusses the possibility of getting sentencing relief as a result of his cooperation. No lawyer representing such a one would fail to mention the possibility of sentencing consideration in discussing the possible consequences of cooperation; Leon Schydlower is known to be highly competent. Kripner's claim that such thoughts never entered his mind are wholly incredible, and highlight his general lack of credibility. His testimony should be discounted entirely.

The Court should find that Mr. Quaintance acted out of sincere religious belief, and this matter should be set for the next phase of the hearing on his motion to dismiss, dealing with compelling government interest and least intrusive means of satisfying any such interest. Mr. Quaintance requests the opportunity to present evidence on that question.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Argument was served upon Assistant United States Attorneys Luis A. Martinez and Amanda Gould, 555 S. Telshor, Suite 300, Las Cruces, New Mexico 88011 (fax number 505.522.2391), by placing a copy of the same in the United States Attorney's box at the Las Cruces office of the United States District Court Clerk on August 30, 2006.

electronically filed on August 30, 2006
MARC H. ROBERT

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff, vs. DANUEL DEAN QUAINTANCE and MARY HELEN QUAINTANCE, Defendants.	))))))))))	CR No. 06-538 JH

GOVERNMENT'S CLOSING REMARKS

The defendants seek the protection of the Religious Freedom Restoration Act (RFRA). As set out in *United States v. Meyers,* 95 F. 3d. 1475, 1482 (10th Cir. 1996). Under RFRA, a plaintiff must establish, by a preponderance of the evidence, three threshold requirements to state a prima facie free exercise claim. *Meyers* further states that the governmental action must 1) substantially burden, 2) a religious belief rather than a philosophy or way of life, 3) which beliefs are sincerely held by the plaintiff. The government need only accommodate the exercise of actual religious convictions.

THE DEFENDANTS FAILED TO ESTABLISH A RELIGIOUS BELIEF AS REQUIRED IN *U.S. v. Meyers*

The defendants demonstrated a philosophy which holds that marijuana use should be the focus of one's life. The philosophy maintains that every individual member of the "Church of the Cognizance" (COC) is a "monastery" unto him/her self, free to pick and choose what they

wish to believe, creating a milieu of religious concepts haphazardly and randomly blurred together. The only consistent element common amongst the individual members of COC is that they smoke marijuana. The defendants have developed a pseudo-religious façade of religion in an attempt to justify the use, transportation and distribution of marijuana.

The defendants failed to establish by a preponderance of the evidence that their way of life is a religion pursuant to the factors set out by the court in *Meyers*, Id.

1. The defendants did not establish that their philosophy deals with Ultimate Ideas. Since every COC member decides for themselves what is or is not significant, there cannot be uniformity of ideas, let alone any semblance of ultimate ones. The COC philosophy was summed up by defense witness Michael D. Senger who testified that members were "individual orthodox member monasteries."

2. The defendants failed to establish that they hold Metaphysical Beliefs, that is, a belief in a reality which transcends the physical and immediately apparent world. Danuel Quaintance testified that he himself did not believe in an afterlife or any such notion. He stated that some COC members do hold such beliefs, and some don't. Again, this lack of uniformity of metaphysical beliefs cuts hard against a finding that the defendants beliefs are tantamount to a religion as set out in *Meyers.*

3. The defendants claim the Zorastian moto "good thoughts, good words, good deeds" as their own. This philosophy in part meets the third *Meyers* factor, Moral or Ethical System, but only in part, as the philosophy allows each "monastery" to interpret this phase independently and not as part of a moral or ethical system. Further, the defendants and their philosophy does not "require the believer to abnegate elemental self-interest". *Id.* at 1483. The

philosophy maintains a "do your own thing" ethos. This philosophy is in sharp contrast to the testimony of defense witness Dr. Pruitt who stated that each culture/society will dictate rules, norms of behavior and values as part of their religions.

4. The defendants most certainly did not establish that their philosophy demonstrates a Comprehensiveness of Beliefs. To the contrary, the defendants are obsessed and focused on marijuana and are therefore, generally confined to a single teaching.

5. Accouterments of Religion, the final *Meyers* factor, which is divided into ten (10) sub-factors, is likewise not satisfied by the defendants.

a. *Founder, Profit or Teacher*

The defendants in their filing initially claimed a neo-Zorastrian belief system. But after being advised of what the government's witness, Zorastrian Everst Dr. Jehan Bagli, would and did testify to, defendants, during the motion hearing, began to withdraw from their initial position. Dr. Bagli testified that smoking marijuana was a double desecration in the Zorastrian faith. Since Zoraster himself would have disapproved of the COC central practice, hence the COC is deprived of a founder. They are left with Danuel Quaintance who espouses a narrow philosophical view to which smoking marijuana is central.

b. *Important Writing*s

It is the government's position that Danuel Quaintance's disjointed, poorly supported, illogical ramblings on a website do not qualify as important writings.

c. *Gathering Place*

The defendants have no temples or churches in which to worship. This sub-factor remains unfulfilled since each COC member is an individual orthodox monastery and smokes marijuana when and where they please.

d. *Keeper of Knowledge*

This sub-factor was not met. Again, since each member is a monastery unto themselves there is no single body of knowledge to keep.

e. *Ceremonies or Rituals*

The defendants offered no evidence to satisfy this sub-factor. Government's witness Kripner testified that he smoked marijuana with the Quaintances and no fanfare accompanied the act. Further, Kripner testified that, absent a ceremony or ritual, he was given his "courier certificate" on the morning before the afternoon in which the stop of his vehicle occurred.

f. *Structure or Organization*

None was demonstrated by the defendants.

g. *Holidays*

This factor was also not met by the defendants.

h. *Diet or Fasting.*

Other than ingesting marijuana, neither does the COC have specific diet, nor is fasting involved.

i. *Appearance or Clothing*

In sharp contrast to the priestly vestments utilized by Dr. Bagli in Zorastrian rituals conducted in Zorastrian holy places, the defendants wear no particular attire when they smoke marijuana.

j. *Propagation*

Danuel Quaintance stated people contact him via telephone or e-mail, and apparently he makes no efforts to gain converts to his philosophy.

THE DEFENDANTS FAILED TO ESTABLISH THE SINCERITY OF THEIR BELIEFS AS A RESULT OF ENGAGING IN THE TRANSPORTATION AND DISTRIBUTION OF LARGE SCALE AMOUNTS OF MARIJUANA

The defendants' lack of sincerity is patent. The defendants', in their filings, initially asserted their beliefs were neo-Zorastrian. This strongly mirrors the hypothesis set out by Judge Brimmer in *U.S. v. Meyers,* 906 F. Supp 1494, 1508, (10th Cir. 1996), wherein it was stated:

> Had Meyers asserted that the Church of Marijuana was a Christian sect, and that his beliefs were related to Christianity, the Court probably would have been compelled to conclude that his beliefs were religious. Under these hypothetical circumstances, Meyers would have been able to fit his beliefs into a tradition that is indisputably religious.

When confronted with the government's expert, Dr. Jehan Bagli, who testified that marijuana smoking is totally incompatible with the Zoroastrian faith, the defendants retreated from their initial position. At the hearing before this honorable Court, the defendants argued that their beliefs were drawn from a myriad of religious traditions. They further claimed each

member of their "church" to be an "Individual Orthodox Member Monastery", free to choose what to believe. This sudden change of position clearly demonstrates the defendant's insincerity. Dr. Bagli demonstrated how the defendants' beliefs were distinctly not Zoroastrian. The defendants' belief system becomes a "stand alone" belief system that is unattached to any tradition which is indisputably religious. *Id.* at 1508.

Danuel Quaintance admitted under cross-examination that Joseph Butts was transporting approximately 338 pounds of marijuana at his (Quaintance's) direction. Danuel Quaintance also conceded the aforementioned load of marijuana was for distribution. Mr. Quaintance stated the marijuana was destined for a "wellness center" north of Indianapolis, Indiana. It is improbable that the defendants were to receive no compensation. As government witness Kripner stated, "Nobody does it for free. It's about the money."

The Quaintances oversaw the transportation of the 77 kilograms ten days after the arrest of defendant Butts. The Quaintances distanced themselves from their deity/sacrament by taking steps to conceal their involvement in the conspiracy. Danuel Quaintance stated "that wasn't our role" when asked why he did not drive the marijuana-laden vehicle. This, the government contends, is true. Danuel and Mary Quaintance are leaders, managers and organizers within the conspiracy. The Quaintances secured a cell phone and a walkie-talkie, in order to maintain contact with their courier, defendant Kripner. The Quaintances also provided the monies, at least in part, which enabled Kripner to lease the load vehicle. Defendant Quaintance admitted on cross examination to the aformentioned criminal acts. These admissions corroborate government witness Kripner's testimony. These corroborating admissions by Mr. Quaintance make Mr. Kripner worthy of belief.

By claiming their philosophy to be a religion, the defendants avail themselves of a premeditated, preconceived defense if arrested while transporting and distributing marijuana. It is obvious from the hearing that the Quaintances, Butts and associates all advocate the use, including for medical purposes, of marijuana. The defendants maintained a website for all to see, but transported large amounts of marijuana clandestinely.

The motive for the defendants is obviously financial gain, as testified to by defendant Kripner. Mr. Kripner was being paid for his services, including his transportation of drug sale proceeds from California to the Quaintances' compound. As a result of their involvement in a large scale marijuana conspiracy, the defendants have failed to prove their sincerity as to their beliefs, even assuming their philosophy a religion.

CONCLUSION

The defendants proved neither the sincerity of their beliefs nor that those beliefs are tantamount to a religion as envisioned by the 10th Circuit in *Meyers*. Their hidden agenda, now brought to light, is marijuana smuggling for financial gain and the legalization of marijuana. Their "religion", too, is revealed for what it truly is: a hodge podge, schizophrenic jumble of ideas amounting to nothing more than individual philosophies with marijuana use at the core of each.

Respectfully submitted,

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I HEREBY CERTIFY that a true copy
of the foregoing was mailed
to counsel for Defendants, on this ___
day of August, 2006.
LUIS A. MARTINEZ
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Cause No. CR 06-538 JH
	§	
DANUEL DEAN QUAINTANCE,	§	
	§	
Defendant.	§	

MR. QUAINTANCE'S REBUTTAL ARGUMENT

DANUEL DEAN QUAINTANCE, Defendant, by and through the undersigned appointed counsel, Marc H. Robert, Assistant Federal Public Defender, submits the following rebuttal argument concerning first phase of the hearing on Mr. Quaintance's motion to dismiss indictment [Doc. 34]. Mr. Quaintance submitted a closing argument on August 30, 2006. The government's reply was filed on August 31, 2006. Since Mr. Quaintance has the burden of proof as to this phase of the hearing, Mr. Quaintance is entitled to a rebuttal argument.

Mr. Quaintance and the Church of Cognizance Meet the *Meyers* Criteria

The government suggests that Mr. Quaintance has failed to satisfy the criteria set forth in *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996). The government ignores the broader definitions of religion in cases decided by the United States Supreme Court, cited in Mr. Quaintance's closing argument [Doc. 160]. Mr. Quaintance submits that the *Meyers* criteria are unconstitutional and should not be applied. However, notwithstanding that argument, the government is incorrect. The government's conclusory and argumentative assertions about

what the Church stands for fail in the face of the obvious depth and sincerity of Mr. Quaintance's beliefs.

Mr. Quaintance testified at length about the basis and content of his beliefs and the principles of the Church of Cognizance. His beliefs and practices are different from those propounded in the large edifice with the stained-glass windows and the cross on the steeple. Mr. Quaintance doesn't don richly appointed and colored vestments. He does, however, have a belief system in which he has invested significantly more time, energy and intellectual inquiry than most practitioners of mainstream religious systems. He has studied various religious systems from around the world. He has learned that cannabis was worshiped in various ancient traditions, including the early Zoroastrian tradition. Dr. Bagli confirmed this. His etymological studies convinced him that the cannabis plant was a plant referred to as sacred in the Avesta and various other ancient religious texts, including the Bible. Dr. Pruitt confirmed this. Most people who think of themselves as religious have not read the Bible in its entirety. Mr. Quaintance, dissatisfied with the reliability of the King James Bible, written in the 1600s, plunged deeper in time to attempt to discern the truths which underlay modern religious belief. The government engages in arrogant sophistry when it dismisses Mr. Quaintance's beliefs as "lifestyle" or "philosophy". Mr. Quaintance's beliefs are deeply held and hard-earned.

Ultimate Ideas. Mr. Quaintance discussed his beliefs and has expressed them in the document submitted as Defendant's Exhibit 7[1]. Among his beliefs is the principle that

[1] Mr. Quaintance submitted Defendant's 7 without objection. However, by omission, the document was not formally offered and admitted. Counsel will submit a written stipulation to the

human beings are called upon to be the best that they can be, and to treat other human beings in a moral and principled manner. Good Thoughts, Good Words, Good Deeds is the creed. There are other major religious traditions which seek to maximize the spiritual growth of the individual by focusing inward, among them Hindus and Buddhists. Indeed, the early Gnostic Christians preached a gospel based on their renditions of the teachings of Jesus Christ suggesting that the pursuit of God, and of heaven, was best conducted inside one's own mind, spirit and life on earth. *See* Elaine Pagels, *The Gnostic Gospels*, Vintage Books 1979. To suggest as the government does that a spirituality, a religious belief system, focusing inward is illegitimate simply ignores major religious belief systems engaging millions of people.

Metaphysical Beliefs Mr. Quaintance testified that he prayed to Haoma to help to vanquish the "evil and deception" and to help him prevail in this case. He believes that Haoma, cannabis, manifests a power in the world with the capacity to influence the course of events. That power is engaged with a power intrinsic to the world and all in it, a notion similar to the concept of "Gaia", accepting mystical forces at work of and in the world. It is a power that Mr. Quaintance believes is available to those who become aware of it and study it. Mr. Quaintance believes that cannabis, "the teacher and provider", is a sacred pathway to such knowledge. The government complains that Mr. Quaintance does not believe in an afterlife, which is of course a prominent feature in most mainstream American religions. The government's complaint ignores the broader reach of this criterion. It also reminds us that a belief system need not mirror mainstream religious practices to be legitimate. Whether Mr.

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admission of Defendant's Exhibit 7.

Quaintance believes in an afterlife as such, he has certainly explained his belief in what *Meyers* calls metaphysical manifestations.

Moral or Ethical Code Here, the government complains that Mr. Quaintance's beliefs do not require that he abnegate elemental self-interest. That complaint could not be more plainly baseless. Mr. Quaintance has studied and adopted a belief system which has subjected him to persecution and possible lengthy incarceration. His very presence in court and in this case are manifestations of his "abnegation"; he risks all, including life and health, in the pursuit of his beliefs. More generally, Mr. Quaintance's beliefs regarding the treatment of other people is modest in the fashion of Jesus, who urged the rich to surrender their worldly possessions and follow him. As demonstrated in the photographs admitted into evidence, Mr. and Ms. Quaintance live a very modest life. Certainly, their existence is not consistent with the government's claim that his possession of cannabis is profit-driven. They give to others of themselves and what little they possess. Rather than proclaiming their beliefs once a week, they live their beliefs every day. Their moral code is one from which the world would profit greatly in widespread observation.

Comprehensiveness of Beliefs The government dismisses this factor with one line, claiming that Mr. Quaintance's beliefs are focused solely on cannabis, and are thus not comprehensive. The government simply ignores Mr. Quaintance's testimony, and his materials, regarding the origins and nature of his beliefs. The government's dismissiveness is no substitute for evidence or argument. The evidence presented by Mr. Quaintance on this score is itself comprehensive.

Accoutrements of Religion The government criticizes Mr. Quaintance's writings as illogical and disjointed, and thus apparently unworthy of consideration. If poor grammar and syntax are disqualifiers for valid religion, then the Constitution's guarantees of religious freedom truly are meaningless. Mr. Quaintance discussed at length the things he has read, and submitted and discussed his accumulated materials. The other factors, such as a gathering place, keeper of knowledge, ceremonies and rituals, structure or organization, holidays, diet and fasting, appearance and clothing and propagation, are dangerous criteria in the determination of what is a valid religious belief. These things are drawn from common American Sunday experience, anthropomorphizing the mainstream religious experience and rejecting those which look different. This is a bigotry which the Constitution does not permit. Mr. Quaintance testified as to the Church of Cognizance's beliefs and practices as to each of these things.

The government claims that Mr. Quaintance backtracked on his religious foundations when he discovered the content of the testimony of the Zoroastrian priest which the government presented in court. That claim wholly lacks support. Mr. Quaintance has, from the beginning, described his religion as neo-Zoroastrian. Dr. Bagli claimed to be Zoroastrian[2]. Mr. Quaintance described in detail the origins and derivations of his beliefs, which included early Zoroastrian writings. His description was consistent with his writings. Mr. Quaintance never claimed to be what Dr. Bagli claims to be, which is why Dr. Bagli's testimony was of

[2] Although, as Dr. Bagli noted, members of that belief system originally held that one could not convert to Zoroastrianism; one must be born to the religion. Since those bloodlines were lost long ago, under that formulation there can be no modern Zoroastrians. Dr. Bagli's own claim may thus be suspect.

no value whatever. Dr. Bagli claims that marijuana is a desecration, but acknowledges that early practitioners of his religion worshiped it. Conservative Jews refrain from practices engaged in by Reform Jews. Would the government claim that Reform Judaism is not a religion, but simply a lifestyle?

The government asserts that Mr. Quaintance's lack of sincerity is "patent". No number of repetitions of what the government wishes were true will make those wishes a reality. Mr. Quaintance has engaged in spiritual study to an extent that most of us cannot comprehend, and has come to a deeply held belief in many things, among them the sanctity of the cannabis plant. Obviously, one who believes in the sanctity of the cannabis plant must also believe that secular governmental proscription of its use is wrong. That such a belief is also held by many people for secular reasons does not belie the genuine, hard-earned spiritual origins of Mr. Quaintance's beliefs. As Dr. Pruitt testified, Mr. Quaintance is by no means alone in a religious belief in the power and value of the cannabis plant as well as more powerful entheogens.

Timothy Kripner The government manifests an unquestioning belief in the veracity of Timothy Kripner, as I suppose it must. By any objective standard, that faith is misplaced. Mr. Kripner himself told the Court that he had and would lie to stay out of jail. He then testified, under oath, that he had no thought at all of shortening his own jail term by testifying. That is palpably and wholly unworthy of belief. That he would say such a thing makes it clear that there is no lie that he will not tell to earn his way out of prison. His mendacity, and his purpose, are made more clear by the embellishments he added to his story as he testified. It

is beyond dispute that Kripner was not involved in the transportation of this cannabis for religious purposes, his oath to Mr. Quaintance notwithstanding. His contrast to Mr. Quaintance could not be more stark.

Mr. Quaintance respectfully requests that the Court find that he is engaged in sincere religious practice, and set this matter for a further hearing at which the government will bear the burden to show a compelling interest to oppress Mr. Quaintance's religious practice, and that the means of so doing are the least oppressive available.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Rebuttal Argument was served upon Assistant United States Attorneys Luis A. Martinez and Amanda Gould, 555 S. Telshor, Suite 300, Las Cruces, New Mexico 88011 (fax number 505.522.2391), by placing a copy of the same in the United States Attorney's box at the Las Cruces office of the United States District Court Clerk on September 6, 2006.

electronically filed on September 6, 2006
MARC H. ROBERT

L:\Robert\quaintance\dismiss argument rebuttal.wpd

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. Cr. No. 06-538 JCH

DANUEL DEAN QUAINTANCE,
MARY HELEN QUAINTANCE,
TIMOTHY JASON KRIPNER, and
JOSEPH ALLEN BUTTS,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendant Joseph Allen Butts's Motion to Suppress Physical Evidence and Statements, filed July 18, 2006 **[Doc. No. 136]**. On August 22, 2006, the Court held an evidentiary hearing on the Motion to Suppress. Defendant Joseph Allen Butts was present at the hearing and was represented by Bernadette Sedillo, Esq. The United States was present and represented by Assistant United States Attorney Luis Martinez and Special Assistant U.S. Attorney Amanda Gould. After considering the evidence presented at the hearing, along with the arguments of counsel, written briefs, and applicable law, the Court concludes that the Motion is not well taken and should be denied.

FINDINGS OF FACT

Based upon the evidence presented at the hearing, the Court makes the following findings of fact.

On February 13, 2006, Missouri State Highway Patrol Corporal G. C. Swartz stopped a

pickup truck operated by Defendant Joseph Allen Butts approximately 45 miles west of St. Louis for the traffic violations of following too closely and running off the right side of the roadway. Defendant Butts had been traveling eastbound, towards St. Louis, on Interstate 44 at the 245 mile marker in Franklin County, Missouri. Corporal Swartz observed a subject, later determined to be Defendant Butts, following a tractor trailer too closely at a distance of approximately two car lengths. Thereafter, the subject signaled to pass the tractor trailer and as he signaled ran his vehicle off of the right side of the roadway. The subject then changed lanes into the passing lane, traveled up to the tractor portion of the tractor trailer, slowed down, and pulled back into the right lane behind the tractor trailer. Corporal Swartz activated his red lights and siren and pulled the subject over. Corporal Swartz initiated this traffic stop at 10:40 a.m.

The subject Defendant Butts pulled into the right shoulder. Corporal Swartz exited his patrol car and walked up to the passenger side of the vehicle. Corporal Swartz noticed that the vehicle had a plastic tunnel covering the truck bed. Corporal Swartz had noticed this type of cover on many occasions, and on a few occasions had seen this type of cover used to conceal marijuana.

Corporal Swartz asked Defendant Butts for his driver's license and vehicle registration and informed Butts of the reason he had stopped him. As he was handing Corporal Swartz his driver's license, Defendant Butts said that he was sorry, that he was just looking around at the scenery, and that he did not mean to do anything wrong. Corporal Swartz asked Defendant Butts to whom the vehicle belonged, and Defendant Butts indicted that it belonged to his sister-in-law. Defendant Butts appeared nervous, and his hands were shaking when he handed Corporal Swartz his driver's license and registration. Defendant Butts did not know what he was going to say

next, and he was just "blurting stuff off the cuff."

At that time, Corporal Swartz asked Defendant Butts if he would accompany Corporal Swartz back to his patrol car. As Corporal Swartz was asking Butts to accompany him, Swartz used a hand gesture to motion Butts back to his patrol car. Corporal Swartz began walking back to his patrol car and out of the corner of his eye saw Butts reaching into the back seat of his car. Swartz turned around to make sure Butts was exiting his vehicle and to observe whether Butts was bringing anything out of his vehicle.

The Missouri State Highway Patrol has no standard procedure regarding the manner in which officers should conduct their traffic stops. Corporal Swartz normally conducts his traffic stops by asking subjects to accompany him to his patrol car. Corporal Swartz conducts his traffic stops in this manner for a variety of reasons. First, Corporal Swartz must return to his vehicle to run computer checks on licenses and registrations, and Swartz need not exit his patrol car to discuss any issues that may arise from the checks if subjects are present in his vehicle. Second, removing subjects from their vehicles helps ensure officer safety by allowing Corporal Swartz to have control of the subjects' environment. Finally, by placing subjects in his patrol car, Corporal Swartz need not worry about traffic on the interstate. Officers have been injured while standing on the side of the road conducting traffic investigations and noise from the traffic makes it difficult to hear subjects. Corporal Swartz has allowed subjects who have refused to accompany him to his vehicle to remain in their own vehicles.

Corporal Swartz directed Defendant Butts to sit in the front seat of his patrol car. After Defendant Butts was seated, Corporal Swartz began the process of running checks to determine whether Defendant's vehicle had been reported stolen and whether there were any warrants out

for Defendant's arrest. Corporal Swartz also contacted his troop headquarters to request a criminal history check on Defendant Butts.

While he was waiting for responses to these inquiries, Corporal Swartz asked Defendant Butts where he was headed, and Defendant Butts indicated that he had moved from Arizona and that he was traveling to St. Louis to look for work in welding. Corporal Swartz found this "strange" because February is mid-winter, and he did not believe outdoor welding jobs would be available during the winter; he also believed that indoor welding jobs were reserved for union workers. Moreover, Corporal Swartz wondered why, if Defendant Butts was looking for work in welding, Butts would be leaving Arizona, an area much more likely to have outdoor welding jobs than St. Louis. Corporal Swartz also thought it was suspicious that Defendant Butts would be driving to an unspecified location in St. Louis for an unspecified job, particularly when Corporal Swartz observed Yahoo- or MapQuest-type driving directions laying on the front seat of Defendant's vehicle. In Corporal Swartz's experience maps of this type typically provide directions to specific destinations.[1]

At that point, Defendant Butts changed the subject by indicating that he was not only looking for work but that he also was collecting antiques along the way. Corporal Swartz did not see any antiques in Defendant Butts's truck. In addition, Defendant Butts indicated that he was going to take antiques back to California when he had earlier told Corporal Swartz that he had moved from California to Arizona and that he had lost his antiques business in California because of a divorce. Furthermore, Butts had stated that he and his wife had owned the antiques company

[1] Later, after Defendant's arrest, Corporal Swartz learned that the map did not provide directions to a specific location but rather to St. Louis generally.

for 33 years, and Swartz concluded that based upon Butts's age, Butts would have been approximately 15 years old when he first started the business. Based upon these discrepancies, Corporal Swartz did not find Defendant Butts's story credible.

Corporal Swartz became more suspicious when Defendant Butts changed his story and informed Swartz that his sister, and not his sister-in-law, owned the vehicle he was driving. In addition, the name on the registration of Defendant Butts's vehicle indicated that the vehicle was registered in Arizona to a male, Hispanic subject, and that the subject had registered the vehicle on or around December 21st. When Corporal Swartz questioned Defendant about the identify of the male subject, Defendant indicated that his sister had bought the vehicle one month prior to Defendant Butts's move to Arizona. Based upon the facts Defendant had already told him, Corporal Swartz estimated that Defendant's sister would have purchased the vehicle on or around December 13th. Corporal Swartz found this suspicious because the vehicle was registered to someone who was not Defendant Butts's sister after Defendant's sister allegedly purchased the vehicle. In addition, the male subject would have registered the vehicle for an additional year when he had plans to, and did in fact, sell the vehicle.

Corporal Swartz's suspicions were further raised because Defendant Butts gave conflicting reasons for his traffic violations. Defendant Butts initially indicated that he drove off of the road because he was admiring the scenery. Later, he blamed it on the weather by saying it was windy. Defendant Butts also stated that he had had his cruise control set at the time the tractor trailer slowed down, and that he ran up behind the tractor trailer because the tractor trailer slowed down when the driver saw Swartz's police vehicle. Corporal Swartz found Defendant's explanations suspicious because it is unusual for a subject to give three separate reasons for a

traffic violation.

As Defendant Butts was sitting in Corporal Swartz's patrol car, Butts became increasingly nervous. Defendant Butts had a nervous, "almost . . . forced laugh." In addition, Defendant Butts frequently changed the subject.

At no time did Corporal Swartz use his handcuffs or display his firearm. The tone of the conversation between Corporal Swartz and Defendant was pleasant and unthreatening. Although Corporal Swartz asked Defendant questions, these questions were conversational in tone. Defendant himself initiated and contributed to the conversation. At no time did Defendant indicate that he did not wish to converse with Swartz. The conversation was reciprocal and voluntary. Although Corporal Swartz's K-9 was in the rear of Swartz's vehicle, there is no evidence that Defendant was aware of the K-9's presence. In addition, Corporal Swartz's K-9 is quiet, and was quiet during the duration of the stop of Defendant, and subjects usually do not know that the K-9 is in the back of the vehicle.

After a few minutes of conversing with Defendant Butts, Corporal Swartz's troop headquarters informed him that Defendant had a criminal history but that it was not drug related. Corporal Swartz also found out that Defendant Butts' vehicle had not been reported stolen. Corporal Swartz informed Butts that he was going to give him a warning for the violations that he had observed.

At this point, based upon his experience and training, Corporal Swartz suspected that Defendant Butts was engaged in some type of criminal activity. Corporal Swartz suspected drug-related activity because of the area from which Defendant Butts was driving. Corporal Swartz asked Butts if there was anything illegal in his vehicle. Defendant Butts replied that there was

not. Corporal Swartz then asked Defendant whether there was any marijuana, cocaine, or other substance of that nature in Defendant's vehicle. Defendant Butts did not answer the question directly, but rather asked Corporal Swartz whether Butts looked like he was the type of person who would be "doing that sort of thing." Corporal Swartz asked Defendant Butts for permission to search his vehicle. Defendant Butts did not give Swartz permission but rather indicated that the vehicle was his sister's and that she would want Corporal Swartz searching it. Corporal Swartz asked for Defendant Butts's consent to search the vehicle at 10:47 a.m., seven minutes after Swartz initiated the traffic stop.

When Corporal Swartz began asking about consent and drugs, Defendant Butts's demeanor changed. He became very serious and got "rather fidgety." At that time, Corporal Swartz informed Defendant Butts that he was contacting his troop headquarters to ask for a backup officer to be dispatched to their location so that he could conduct a K-9 sniff of Defendant Butts's vehicle. While they were waiting for backup, Defendant Butts asked Corporal Swartz if he could go to his vehicle to retrieve some water. Corporal Swartz told Defendant to "stay right there." At that time, Defendant was not free to enter his vehicle.

At 10:55 a.m., backup arrived on the scene, and Corporal Swartz deployed his K-9 on Defendant Butts's vehicle. At 11:02 a.m., the K-9 alerted to the odor of narcotics and indicated that the odor was coming from the rear of the vehicle. By 11:04 a.m., officers had seized approximately 338 pounds of marijuana, which had been hidden in the vehicle's bed beneath the locked plastic cover. Officers also found just over $1,500 in cash. Corporal Swartz placed Defendant Butts under arrest, at which time Butts made a statement not responsive to any interrogation. Specifically, Butts said, "You can't do that because it's a hate crime." Butts then

requested that the police look in his duffel bag, in which officers found a certificate indicating that Butts had been ordained by a church as a courier for the church. Officers also found and seized a membership card to the Church of Cognizance.

DISCUSSION

The Fourth Amendment protects "[t]he right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV. The Fourth Amendment applies to seizures of persons, including brief investigatory stops of vehicles. *United States v. Cortez*, 449 U.S. 411, 417 (1981). A traffic stop is a "seizure" within the meaning of the Fourth Amendment, "even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). Routine traffic stops are analyzed under the principles developed for investigative detentions set forth in *Terry v. Ohio*, 392 U.S. 1 (1968). To determine the reasonableness of an investigative detention, a court must make a dual inquiry, asking first "whether the officer's action was justified at its inception," and second "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20.

The Court concludes that Corporal Swartz's initial traffic stop of Defendant was justified at its inception. Corporal Swartz credibly testified that he observed Defendant following too closely to the tractor trailer in front of him and that Defendant's actions constituted a violation of the law. Corporal Swartz also credibly testified that he observed Defendant cross over the line on the right side of the roadway in violation of the law. Based upon these violations of the Missouri traffic code, Corporal Swartz activated his lights and effectuated a traffic stop of Defendant.

The Court must next determine whether Corporal Swartz's actions were reasonably

related in scope to the circumstances that justified the interference in the first place. Defense counsel argues that Corporal Swartz's detention of Defendant in his patrol unit and the "persistent questioning" of Defendant were not reasonably related in scope to the traffic stop for following too closely or driving off of the roadway. The Court disagrees. There is no standard procedure governing the manner in which officers conduct their traffic stops, and Officer Swartz normally conducts his traffic stops by asking subjects to return to his patrol car. Conducting his traffic stops in this manner allows Swartz to (1) run computer checks on a suspect's license and registration while simultaneously discussing any questions he may have with the suspect, (2) place subjects in an officer-controlled, instead of subject-controlled, environment, thereby improving officer safety, and (3) eliminate the safety- and noise-related concerns of questioning a subject while standing on the side of the roadway. The Court concludes that Corporal Swartz's actions in placing Defendant in his patrol unit were reasonably related in scope to the stop for the traffic violations.

The Court likewise concludes that Corporal Swartz's questions regarding the ownership of Defendant's vehicle, the name on the vehicle's registration, and the reason for Defendant's traffic violations were reasonably related in scope to the traffic stop. Corporal Swartz's questions regarding the location to which Defendant was driving and the reason for which he was driving to that location also were reasonably related to the scope of the initial traffic stop. An officer stopping a subject for traffic violations reasonably could pose questions regarding the origin and destination of the subject's travel. Corporal Swartz's tone was pleasant and conversational and Defendant Butts was a participant in the conversation. At no time did Butts indicate he did not wish to talk to Swartz. In addition, only seven minutes elapsed from the time of Defendant's

initial stop and the time Officer Swartz indicated that he would be issuing warnings for the traffic violations. Based upon the foregoing, the Court concludes that Swartz's actions were reasonably related in scope to the traffic stop.

The Court must next determine whether Corporal Swartz's detention of Defendant was reasonable after the stop no longer was related to the traffic violations, *i.e.*, after Corporal Swartz informed Defendant that he was issuing warnings for the traffic violations. An officer may detain a driver for reasons unrelated to an initial traffic stop if (1) the officer has "an objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring or (2) if the initial stop has become a consensual encounter." *United States v. Cervine*, 347 F.3d 865, 868-69 (10th Cir. 2003). The Government concedes that the stop at issue here never became a consensual encounter. The Court therefore must determine whether Corporal Swartz had an objectively reasonable and articulable suspicion that illegal activity was occurring to justify his continued detention of Defendant.

The Government maintains that based upon the circumstances known to Corporal Swartz at the time he decided to detain Defendant Butts after the conclusions of the traffic stop, Corporal Swartz had a reasonable articulable suspicion that criminal activity was afoot. The Court agrees. First, from the outset Defendant was nervous. His hands were shaking when he handed Corporal Swartz his driver's license and registration, he did not know what he was going to say next, and he was just "blurting stuff off the cuff."

Second, Defendant Butts informed Corporal Swartz that his sister owned the vehicle when he originally had told Swartz that the vehicle was owned by his sister-in-law.

Third, the name on the registration of Defendant Butts's vehicle indicated that the vehicle

was registered in Arizona to a male, Hispanic subject and not to Butts's sister. Butts's comments to Swartz indicated that his sister had bought the vehicle around December 13th, but the vehicle had been registered by the male subject around December 21st, more than a week after Defendant's sister allegedly purchased the vehicle. In addition, the male subject would have registered the vehicle for an additional year when he likely knew that he would be selling the vehicle.

Fourth, Defendant Butts gave conflicting reasons for his traffic violations. Butts initially indicated that he drove off the road because he was admiring the scenery. Later, he blamed it on the weather by saying it was windy. Butts also stated that he was following too closely to the tractor trailer because the tractor trailer slowed down when its driver saw Swartz's patrol car.

Fifth, Butts became increasingly nervous as he was sitting in Swartz's patrol car, exhibiting a nervous, "almost . . . forced laugh," and changing the subject when Swartz questioned him.

Sixth, Defendant Butts indicated that he was traveling to St. Louis to look for work in outdoor welding. However, St. Louis does not have a lot of outdoor welding jobs during February and Corporal Swartz testified that he believed indoor welding jobs are reserved for union workers. In contrast, Arizona, the area from which Defendant allegedly was moving, would have significantly more outdoor welding jobs available in mid-winter. In addition, Defendant Butts was traveling to an unspecified location in St. Louis for an unspecified job.

Finally, Defendant was traveling to St. Louis to look for work but also was collecting antiques along the way. Defendant Butts indicated that he was going to take the antiques back to California, when he had earlier told Corporal Swartz that he was now living in Arizona and that

he had lost his business in California because of a divorce. Based upon Butts's story, he would have been approximately fifteen years old when he had started his antiques business.

The Court concludes that based upon the totality of the circumstances a law enforcement officer in Corporal Swartz's position would have had an objectively reasonable and articulable suspicion that illegal activity was occurring. Reasonable suspicion need "not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *United States v. Arvizu*, 534 U.S. 266, 274 (2002). Rather, "reasonable suspicion represents a 'minimum level of objective justification.'" *United States v. Mendez*, 118 F.3d 1426, 1431 (10th Cir. 1997) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). In determining whether reasonable suspicion exists, a court may not evaluate and reject each reasonable suspicion factor in isolation. *United States v. Gandara-Salinas*, 327 F.3d 1127, 1130 (10th Cir. 2003) (citing *Arvizu*, 534 U.S. at 274-75). "[T]he totality of the circumstances--the whole picture--must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Cortez*, 449 U.S. at 417-18. Here, a reasonable officer in Corporal Swartz's position would have had an objective basis for suspecting Defendant Butts of engaging in criminal activity.

At the hearing on Defendant's Motion to Suppress, defense counsel argued that Corporal Swartz's detention of Defendant in his patrol car rose to the level of a *de facto* arrest requiring probable cause rather than an investigative detention requiring reasonable suspicion. There is no bright-line test for determining when a detention turns into a *de facto* arrest; rather, an evaluation must be guided by common sense and ordinary human experience. *See United States v.*

Melendez-Garcia, 28 F.3d 1046, 1052 (10th Cir. 1994). Therefore, the Court must weigh "both the character of the official intrusion [on the person's liberty] and its justification." *Michigan v. Summers*, 452 U.S. 692, 701 (1981). An officer need not place a person formally under arrest to effect a *de facto* arrest. *See, e.g.*, *Melendez-Garcia*, 28 F.3d at 1052. For example, the Tenth Circuit has held that an officer's use of handcuffs and display of firearms may transform an investigative detention into an arrest, even though the officer did not formally arrest the suspect. *Id.* Likewise, the Tenth Circuit has held that an officer's request that a defendant accompany him to a police station exceeded the scope of an investigative detention and became a full-fledged arrest, even though the officer did not place the suspect formally under arrest. *United States v. Gonzalez*, 763 F.2d 1127, 1132-33 (10th Cir. 1985).

The Court concludes that Corporal Swartz's detention of Defendant Butts in his patrol car did not rise to the level of a *de facto* arrest. Corporal Swartz did not use handcuffs or a display of firearms, and he did not ask Defendant Butts to return to the police station with him. Rather, Swartz merely requested that Defendant return to his patrol car with him. Corporal Swartz testified that he regularly conducts his traffic stops in this fashion for a variety of reasons. The Court already has concluded that Swartz's actions in requesting that Defendant return to his patrol car were reasonably related in scope to the traffic stop. In addition, the Court notes that the character of Corporal Swartz's intrusion did not rise to a *de facto* arrest. Corporal Swartz directed Defendant to sit in the front, and not the rear, seat of his patrol car, and Swartz also was seated in the front of the patrol car. While Corporal Swartz was running checks on Butts and his vehicle, Swartz and Defendant engaged in a reciprocal and voluntary conversation, the tone of which was pleasant and unthreatening. Defendant Butts initiated and contributed to the

conversation. Although Swartz's K-9 was in the rear of the patrol car, there was no evidence that Defendant was aware of the K-9's presence or that the K-9 intimidated him. Moreover, a silent K-9 in the back of a patrol car is not akin to an officer pointing a weapon at a subject. Swartz's detention of Defendant Butts was brief: seven minutes for the traffic stop and seventeen minutes after the stop.[2] The fact that Swartz would not allow Defendant to return to his vehicle to obtain some water during the course does not render this brief detention akin to an arrest. Weighing the character of the official intrusion on Defendant's liberty and Corporal Swartz's justification for that intrusion, the Court concludes that the detention did not rise to the level of a *de facto* arrest.

Because the Court has concluded that Defendant's detention was not a *de facto* arrest requiring probable cause but rather an investigative detention requiring reasonable suspicion, and because the Court has concluded that Officer Swartz did have a reasonable and articulable suspicion that criminal activity was afoot, the Court denies Defendant Butts's Motion to Suppress the marijuana seized from Defendant's truck and Defendant's post-arrest statements.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant Joseph Allen Butts's Motion to Suppress Physical Evidence and Statements, filed July 18, 2006 **[Doc. No. 136]**, is hereby **DENIED**.

Dated this 9th day of November 2006.

JUDITH C. HERRERA
UNITED STATES DISTRICT JUDGE

[2] Corporal Swartz initiated the traffic stop at 10:40 a.m., the traffic stop had concluded at approximately 10:47 a.m., backup had arrived at 10:55 a.m., the K-9 had alerted to the odor of narcotics at 11:02 a.m., and police had seized the marijuana by 11:04 a.m.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Cause No. CR 06-538 JH
	§	
DANUEL DEAN QUAINTANCE,	§	
	§	
Defendant.	§	

MR. QUAINTANCE'S FIRST MOTION IN LIMINE

DANUEL DEAN QUAINTANCE, Defendant, by and through the undersigned appointed counsel, Marc H. Robert, Assistant Federal Public Defender, presents his First Motion in Limine, and in support of his motion would respectfully show the Court as follows:

1. Mr. Quaintance is charged by superseding indictment filed on May 17, 2006 [Doc. 65] with possession of more than 50 kilograms of marijuana with intent to distribute it and conspiracy to possess more than 100 kilograms of marijuana with intent to distribute it. Mr. Quaintance was arraigned on June 2, 2006 and entered not guilty pleas to both charges. Mr. Quaintance has filed a motion to dismiss the indictment [Doc. 34] on the basis that the indictment violates his Constitutional and statutory rights to religious freedom. The government responded [Doc. 41] and Mr. Quaintance replied [Doc. 68]. Before other tenets of the Religious Freedom Restoration Act (RFRA) could be addressed, Mr. Quaintance first bore the burden to establish the sincerity of his religious beliefs. A hearing on that aspect of Mr. Quaintance's RFRA claim was held on August 21 through 23, 2006 in Albuquerque. Following the hearing, Mr. Quaintance submitted a written closing argument [Doc. 160]. The

government responded with its argument [Doc. 163], and Mr. Quaintance submitted a reply [Doc. 166]. That motion remains pending. Trial is set for January 16, 2007 in Albuquerque.

2. Mr. Quaintance contends that his alleged possession of marijuana, and the alleged conspiracy, were integral to the practice of his religion. Under RFRA, his sincere religious practice is a part of his defense to the charges.

3. The question of the sincerity of Mr. Quaintance's religious belief is a question of fact for the jury. *United States v. Seeger*, 380 U.S. 163, 185 (1965); *United States v. Hsia*, 24 F.Supp.2d 33, 46 (D.D.C. 1998).

4. Mr. Quaintance intends to present evidence of his religious practice; his religious beliefs; its origins; anthropological evidence of other religions, modern and ancient, and their use of entheogens (psychoactive substances) in religious practice in defense of the charges at trial.

5. RFRA provides that once a litigant's religious sincerity is determined, and that the sincere religious practice is burdened by the government's action (in this case, by the enforcement of the Controlled Substances Act (CSA)), the government must establish a compelling interest in burdening the religious practice, and that the manner of the particular burden is the least intrusive means of furthering that compelling interest. *See* 42 U.S.C. § 2000bb-1(b).

6. Mr. Quaintance further intends to present evidence regarding the RFRA factors involving whether the government's enforcement of the Controlled Substances Act meets a

compelling interest, and that such enforcement is the least intrusive means of accomplishing that goal.

7. Mr. Quaintance hereby provides notice of such intent so that the Court, and the government, might be able to plan for the length and substance of the trial.

8. The undersigned counsel has conferred with Assistant United States Attorney Luis A. Martinez regarding this motion. The government opposes this motion.

WHEREFORE, for the foregoing reasons, DANUEL DEAN QUAINTANCE, Defendant, respectfully prays that the Court permit the presentation of the above described evidence during the trial of this cause, and provide such other and further relief to which the Court may find Mr. Quaintance to be justly entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion in Limine was served on Assistant United States Attorneys Luis A. Martinez and Amanda Gould, 555 Telshor, Suite 300, Las Cruces, New Mexico, 88011, by placing it in the box designated for the United States Attorney's Office at the United States District Court Clerk's office; Mr. Mario A. Esparza, P.O. Box 2468, Las Cruces, New Mexico 88004; and Ms. Bernadette Sedillo, 201 N. Church St., Suite 330, Las Cruces, New Mexico 88001 on December 8, 2006.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. Cr. No. 06-538 JCH

DANUEL DEAN QUAINTANCE,
MARY HELEN QUAINTANCE,
TIMOTHY JASON KRIPNER, and
JOSEPH ALLEN BUTTS,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendant Danuel Dean Quaintance's Motion to Dismiss Indictment and Incorporated Memorandum, filed April 7, 2006, **[Doc. No. 34]** ("Motion to Dismiss"). Defendants Mary Helen Quaintance and Joseph Allen Butts join in the Motion to Dismiss. On August 21, 2006, the Court conducted a three-day evidentiary hearing on the Motion to Dismiss. Defendant Danuel Dean Quaintance was present at the hearing and was represented by Marc H. Robert, Esq. Defendant Mary Helen Quaintance was present and represented by Mario A. Esparza, Esq. Defendant Joseph Allen Butts was present and represented by Bernadette Sedillo, Esq. The United States was present and represented by Assistant United States Attorney Luis Martinez and Special Assistant United States Attorney Amanda Gould. After considering the evidence presented at the hearing, along with the arguments of counsel, written briefs, and applicable law, the Court concludes that the Motion to Dismiss is not well taken and should be denied.

BACKGROUND

Defendants Danuel Quaintance, Mary Quaintance, and Joseph Butts are charged with possession of more than 50 kilograms of marijuana with the intent to distribute in violation of the Controlled Substances Act (CSA), 21 U.S.C. § 841, and with conspiracy to possess more than 100 kilograms with the intent to distribute in violation of the CSA, 21 U.S.C. § 846.[1]

Defendant Danuel Quaintance is the founder of the Church of Cognizance, and Defendants Mary Quaintance and Joseph Butts are members of the Church of Cognizance. Defendants maintain that marijuana is a sacrament and deity and that the consumption of marijuana is a means of worship. Defendants argue that the application of the CSA to members of the Church of Cognizance constitutes a substantial burden on the exercise of religion in violation of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*, as well as the Establishment Clause and First Amendment to the United States Constitution.

DISCUSSION

The Religious Freedom Restoration Act (RFRA) was passed in 1993 in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). In that case, the Supreme Court abolished the compelling interest test for judicial claims involving the free exercise of religion. RFRA re-established the strict scrutiny test for judicial claims involving the free exercise of religion. RFRA states in relevant part:

> Government shall not substantially burden a person's exercise of

[1] Facts regarding Defendants Danuel and Mary Quaintance's arrest are set forth in detail in the Memorandum Opinion and Order, filed July 5, 2006 [Doc. 117], denying the Quaintance Defendants' Motion to Suppress. Facts regarding Defendant Butts's arrest are set forth in detail in the Memorandum Opinion and Order, filed November 9, 2006 [Doc. 178], denying Defendant Butts's Motion to Suppress. The Court does not restate those facts herein.

> religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception.
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1(a) and (b). Defendants maintain that the application of the CSA to the Church of Cognizance constitutes a substantial burden on the exercise of religion by members of the Church of Cognizance. Although Defendants also argue that the application of the CSA to members of the church is not in furtherance of a compelling governmental interest and that it is not the least restrictive means of furthering that interest, the parties seek only a ruling on whether the CSA substantially burdens their religious beliefs.

A person claiming that the government has placed a substantial burden on his or her practice of religion must establish that the governmental action (1) substantially burdens (2) a religious belief, not just a philosophy or way of life, (3) which belief is sincerely held. *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996) (citing *Thiry v. Carlson*, 78 F.3d 1491 (10th Cir. 1996)). That showing must be made by a preponderance of the evidence. *Id.*

The Government concedes that application of the CSA substantially burdens the Defendants' beliefs. Accordingly, the only questions before the Court are (1) whether Defendants' beliefs are religious, and not simply a philosophy or way of life, and (2) whether

those beliefs are sincerely held.

I. Religious Belief.

In *United States v. Meyers*, the Tenth Circuit set forth the following five factors a district court should consider in determining whether a belief is "religious" for purposes of RFRA: (1) ultimate ideas, (2) metaphysical beliefs, (3) moral or ethical system, (4) comprehensiveness of beliefs, and (5) accoutrements of religion. *Id.* at 1483. In *Meyers*, the United States charged the defendant with two offenses stemming from marijuana possession and trafficking. 906 F. Supp. at 1495. Meyers asserted that the United States could not prosecute him for these crimes because, as a "Reverend" of the "Church of Marijuana," his possession and distribution of marijuana was legally protected religious conduct. *Id.* The question before the *Meyers* court was whether the "Church of Marijuana" was a bona fide religion that triggered the protections of RFRA. *Id.* The district court concluded that Meyers's beliefs were secular and not religious, *id.* at 1508, and the Tenth Circuit affirmed. In so holding, the Tenth Circuit explained that Meyers's beliefs "more accurately espouse a philosophy and/or way of life rather than a 'religion.'" 95 F.3d at 1484.

In applying the *Meyers* factors, the Tenth Circuit explained that a district court "'cannot rely solely on established or recognized religions to guide it in determining whether a new and unique set of beliefs warrants inclusion.'" *Id.* (quoting *Meyers*, 906 F. Supp. at 1503). Moreover, the Tenth Circuit indicated that "'no one of these factors is dispositive,'" and that "the factors should be seen as criteria that, if minimally satisfied, counsel the inclusion of beliefs within the term 'religion.'" *Id.* (quoting *Meyers*, 906 F. Supp. at 1503). That said, the court concluded that "'purely personal, political, ideological, or secular beliefs'" would not likely "'satisfy enough criteria for inclusion.'" *Id.* (quoting *Meyers*, 906 F. Supp. at 1504) (additional citations omitted);

see also Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) (philosophical and personal beliefs are not religious beliefs); *Africa v. Pennsylvania*, 662 F.2d 1025, 1036 (3d Cir. 1981) (finding beliefs are secular and not religious); *Berman v. United States*, 156 F.2d 377, 380-81 (9th Cir. 1946) (beliefs that are moral and social are not religious); *Church of the Chosen People v. United States*, 548 F. Supp. 1247, 1253 (D. Minn. 1982) (beliefs that are sexual and secular are not religious). Whether a particular set of beliefs are "religious" within the meaning of RFRA is a legal question reviewed *de novo*. *Meyers*, 95 F.3d at 1482.

Defendants maintain that their beliefs meet the criteria of *Meyers*.[2] The Government disagrees. The Court addresses each of the *Meyers* factors in turn.

A. Application of the Meyers Factors.

1. Ultimate Ideas.

In explaining this factor, the *Meyers* court stated, "Religious beliefs often address fundamental questions about life, purpose, and death. As one court has put it, 'a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters.'" *Id.* at 1483 (quoting *Africa*, 662 F.2d at 1032). "These matters may include existential matters, such as man's sense of being; teleological matters, such as man's purpose in life; and cosmological matters, such as man's place in the universe." *Id.* The district court in *Meyers* concluded that Meyers's beliefs did not deal with "ultimate concerns" such as life, purpose, and death; they did not address "a fear of the unknown, the pain of loss, a sense of alienation, feelings of

[2] As a threshold matter, Defendants urge the Court not to apply the *Meyers* factors. Defendants maintain that the *Meyers* factors are "inappropriate and dangerous" because they define what constitutes a "religion" through the lens of "convention" and a "mainstream religious tradition." Defendants, however, do not provide any authority in support of their position.

purposelessness, the inexplicability of the world, and the prospects of eternity." 906 F. Supp. at 1505. The district court "simply was unable to discern anything ultimate, profound, or imponderable about Meyers's beliefs." *Id.*

Defendants' beliefs likewise do not meet the "ultimate ideas" factor.[3] In describing how the Church of Cognizance meets this criterion, Defendant Danuel Quaintance testified that the "purpose of life is to live a good life and help others. You start as a seed and you grow from that point, and you expand in knowledge and wisdom, and hopefully, on a right path, a narrow path, to the longevity, to the longest life that you can live." Aug. 22, 2006, Tr. at 240-41; *see also id.* at 248 (Testimony of D. Quaintance) (The Church of Cognizance is a "truth-based religion, where we seek longevity, we seek to live the longest, healthiest life within our means. It's a narrow path to that."); *id.* at 226 (Testimony of D. Quaintance) (the church teaches that the "main thing in life is extending life and to live as long a life as possible"). Mr. Quaintance also explained that the purpose of the church "is to try to, you know, bring people around to the right way of life. . . . [T]here[] [are] two paths, the broad path through destruction and the narrow path through righteousness." *Id.* at 227.

Although the Church of Cognizance attempts to answer questions regarding the purpose of life, the Court does not believe that these answers are sufficient to qualify as "ultimate ideas" within the meaning of *Meyers*. There is nothing "ultimate, profound, or imponderable," *Meyers*,

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[3] Defendants Helen Quaintance and Joseph Allen Butts testified by proffer that their beliefs are the same as the beliefs described by Defendant Danuel Quaintance during his testimony. Accordingly, because Danuel Quaintance's testimony regarding his beliefs is representative of the beliefs of Ms. Quaintance and Mr. Butts and because Ms. Quaintance and Mr. Butts set forth little or no independent evidence, the Court conducts a single analysis of whether Defendants' beliefs are "religious."

906 F. Supp. at 1505, about Danuel Quaintance's explanation of the Church of Cognizance's definition of the purpose of life. Living as long a life as possible is a relatively simplistic purpose confined to the physical world. It is not a comprehensive, profound, inexplicable, or imponderable *religious* philosophy that addresses purpose in relationship to the spiritual or intangible world. Although Defendants express a belief about leading a "good" life on a "narrow path," this asserted belief is amorphous and does not address the more imponderable aspects of that idea, such as why Defendants should lead a good life or what constitutes a good life.

Moreover, even if Defendants' definition of the purpose of life is an "ultimate idea," the purpose life is only one of the many "ultimate ideas" that the *Meyers* court identifies. Defendants' beliefs do not address other ultimate ideas, such as life and creation, a fear of the unknown, the pain of loss, a sense of alienation, or the inexplicability of the world. *Cf. id.* Defendants' beliefs also ignore existential or cosmological concerns, *cf.* 95 F.3d at 1483, such as an individual's existence, his or her place in the universe, the nature or natural order of the universe, and the origin, structure, and space-time relationships of the universe. Furthermore, although Mr. Quaintance testified to his beliefs regarding an afterlife,[4] neither his beliefs, nor the beliefs of the other members of the Church of Cognizance, provide a uniform answer to questions regarding the prospects of eternity or an afterlife. *Cf.* 906 F. Supp. at 1505. Mr. Quaintance specifically testified that each member of the church is entitled to have his or her own individual beliefs

[4] Danuel Quaintance testified that when "[he] was younger [he] believed in a heaven and a hell," but that "today [he] seek[s] the truth in life, and [he doesn't] see that there is an afterlife." Aug. 22, 2006, Tr. at 241-42.

regarding the question of afterlife.[5] Because Defendants' beliefs do not address the fundamental questions answered by most religions, the Court therefore concludes that Defendants' beliefs do not satisfy the "ultimate ideas" criterion.

2. Metaphysical Beliefs.

In describing this factor, the *Meyers* court stated, "Religious beliefs often are 'metaphysical,' that is, they address a reality which transcends the physical and immediately apparent world. Adherents to many religions believe that there is another dimension, place, mode, or temporality, and they often believe that these places are inhabited by spirits, souls, forces, deities, and other sorts of inchoate or intangible entities." *Meyers*, 95 F.3d at 1483. In considering this criterion, the district court in *Meyers* rejected the defendant's argument that his beliefs were metaphysical because smoking marijuana induced an altered state of being. The court thoughtfully explained,

> There is nothing metaphysical about Meyers' beliefs. Indeed, everything about his beliefs is physical. He smokes the dried leaves of a plant, and the resulting psycho-pharmacological effects leave him in a state of 'peaceful awareness.' Though the Court does not doubt that certain physical states of being can engender or induce different mental states of being, this does not mean that deliberately altered physical states of being are themselves 'religious.' The Court also recognizes that certain religions use mind-altering substances, or engage in mind-altering physical activities (such as fasting or sitting in sweat lodges), as a means to a spiritual end. The end usually is movement toward, or the perception of, a different reality or dimension. Here, there is no such end.

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[5] Danuel Quaintance testified that he does not "tell [members] or dictate to them whether they have to believe in a heaven or a hell, or anything to that aspect." Aug. 22, 2006, Tr. at 241-42. "Some members believe in [an after life]." *Id.* at 241. The church's "individual orthodox members monasteries," however, "have the right to their own individual belief" with respect to whether there is an afterlife. *Id.*

> Meyers did not say that smoking 10 to 12 joints a day propelled him into a perpetual state of religious awareness, or that smoking 10 to 12 joints a day was a means to a religious end. For Meyers, the end appears to be smoking marijuana. Meyers never equated marijuana smoking with a spiritual dimension, mystical plane, or transcendent reality. Although Meyers thinks that smoking marijuana has great therapeutic value, he did not assert that smoking marijuana lofts him into the realm of the religious. Thus, there does not appear to be anything metaphysical about Meyers' beliefs.

906 F. Supp. at 1505.

The evidence is ambiguous whether Defendants' beliefs qualify as metaphysical. The district court in *Meyers* explained that there was nothing metaphysical about the fact that smoking marijuana left the defendant in a different mental state of being or that it left him in a state of "peaceful awareness" because such states were not in themselves religious. *Id.* The fact that "cannabis has helped [Danuel and Mary Quaintance] focus before," Aug. 22, 2006, Tr. at 242, or that marijuana makes "many people feel more alive, more aware, more in tune," Aug. 21, 2006, Tr. at 118 (Testimony of M. Senger), likewise is not metaphysical or religious. If marijuana use results in expanded mental capabilities, such as increased focus or awareness, this result occurs simply because of the physical (and not spiritual or religious) interaction between the mind-altering substance and the user.

Defendants, however, have presented other evidence from which one could conclude that their use of marijuana propels them into the "spiritual dimension, mystical plane, or transcendent reality" described by the district court in *Meyers*. 906 F. Supp. at 1505. Unlike the defendant in *Meyers*, Defendant Danuel Quaintance testified that he believes that cannabis or haoma is in the nature of a spiritual force that has the ability to accomplish things in the physical world. *Id.* at 243. Mr. Senger testified that the cannabis teaches "the agenda of the divine mind" by

"implanting" thoughts regarding that agenda into the minds of those who consume it. *See, e.g.*, Aug. 21, 2006, Tr. at 119; *see also id.* at 95 (Testimony of M. Senger) (cannabis led him to an elevated spiritual sense and that it inspired him on a quest for truth). The informational pamphlet on the Church of Cognizance states that "Marijuana . . . utilized in the proper mode, and setting, will allow the Cogniscenti to expand upon mental capabilities to a point some believe to be myths. Telekinesis is possible!"[6] Defendants Exh. 8; *see also* Aug. 22, 2006, Tr. at 243 (Testimony of D. Quaintance) ("When I ask for a boom, . . . I quite often receive an answer. This morning I was in the room and I got up and said haoma . . . and I seen a sign that was telling me . . . I'm going to be with you in the courtroom today."); *id.* (cannabis has helped "remove the resistance so you can build faith in what you're trying to do because faith can move mountains").

The *Meyers* court rejected the defendant's contention that his beliefs were metaphysical because smoking marijuana induced an altered state of being. The court reasoned that Meyers' altered state was limited to a physical and not spiritual end. *Meyers*, 906 F. Supp. at 1505 ("Meyers never equated marijuana smoking with a spiritual dimension, mystical plane, or transcendent reality."). In contrast, Defendants have presented evidence that, although weak, indicates that they consume marijuana to reach a spiritual end. Specifically, Defendants have testified that they believe cannabis is a "spiritual force that has the ability to accomplish things in the physical world," Aug. 22, 2006, Tr. at 243 (Testimony of D. Quaintance), and that it allows a

[6] Although telekinesis can be viewed as an expanded mental capability, and therefore not metaphysical within the meaning of *Meyers*, it also has been defined as "[t]he movement of objects by scientifically inexplicable means, as by the exercise of an occult power." *American Heritage Dictionary* (4th ed. 2000). Because the definition of telekinesis can involve an otherworldly power, the Court construes the reference to telekinesis as evidence of a metaphysical belief within the meaning of *Meyers*.

person to "act in furtherance of . . . the agenda of the divine mind . . . sort of like thought implantation," Aug. 21, 2006, Tr. at 119 (Testimony of M. Senger). The Tenth Circuit has stated, "[T]he [*Meyers*] factors should be seen as criteria that, if minimally satisfied, counsel the inclusion of beliefs within the term 'religion.'" 95 F.3d at 1484 (quoting *Meyers*, 906 F. Supp. at 1503). Although under a more stringent standard the Court would not consider Defendants' beliefs "metaphysical," under the standard articulated by the Tenth Circuit the Court concludes that Defendants minimally have satisfied the metaphysical requirement.[7]

3. Moral or Ethical System.

In describing this factor, the Tenth Circuit has explained, "Religious beliefs often prescribe a particular manner of acting, or way of life, that is 'moral' or 'ethical.' In other words, these beliefs often describe certain acts in normative terms, such as 'right and wrong,' 'good and evil,' or 'just and unjust.' The beliefs then proscribe those acts that are 'wrong,' 'evil,' or 'unjust.' A moral or ethical belief structure also may create duties--duties often imposed by some higher power, force, or spirit--that require the believer to abnegate elemental self-interest." *Id.* at 1483.

The district court in *Meyers* rejected Meyers's argument that his church's motto of "give a hand up, not a hand out" constitutes a moral or ethical system. Meyers explained that his church

[7] Defendants also have presented evidence that "karma" plays a role in their beliefs. When asked how the Church of Cognizance meets the metaphysical criterion, Danuel Quaintance testified that "if you have a lot of people thinking bad about you, you're going to get bad." Aug. 22, 2006, Tr. at 242; *see also id.* at 181. "[T]he metaphysical is the karma aspect." *Id.* at 242. Although Mr. Quaintance's belief that if "people [are] thinking bad about you, you're going to get bad" is not consistent with the definition of karma (karma is the principle according to which a person is rewarded or punished in this life or another according to *that person's* deeds and not according to the thoughts of others), the Court construes Mr. Quaintance's testimony liberally and assumes that his statement has some limited relationship to a metaphysical world, *i.e.*, a reality beyond what is perceptible to the senses.

"gives others 'a hand' by helping drug addicts and alcoholics kick their habits. The church does so by using marijuana as a substitute for other drugs or alcohol." *Meyers*, 906 F. Supp. at 1505. In rejecting this argument, the district court explained,

> Although helping others kick detrimental habits certainly is a laudable goal, it hardly supplies church members with the pervasive guidance that ethics or morals provide. A single precept that encourages church members to help drug addicts or alcoholics kick their habits does not answer questions such a s: How should I live my life? How should I treat others? What is forbidden? What is allowed? A single injunction to help others may itself be moral or ethical under the standard of most religions (or under the standard of secular ethics and morals), but that does not transform the injunction into an ethics or morality.
>
> This aside, Meyers did not discuss any beliefs or commands that require believers to abandon base or elemental self-interest. Nothing about Meyers' 'religion' restrains members from doing that which they should not do, or binds them to do that which they should do. It is apparent, therefore, that Meyers' alleged religion has neither produced nor adopted an ethical code or moral system.

Id.

Defendants here likewise have not presented evidence sufficient to indicate that their asserted belief in marijuana as a deity, plant, and sacrament constitutes a moral or ethical system. Danuel Quaintance testified that his beliefs, and those of his church, meet the moral or ethical system criterion by virtue of their belief that "having good thoughts, produc[es] good words, produc[es] good deeds." Aug. 22, 2006, Tr. at 243. Mr. Quaintance also explained that his church believes that "any action that were to create a victim . . . is an punishable offense." *Id.* at 244. The "good thoughts, good words, good deeds" motto, according to Danuel Quaintance,

"pretty well covers all Ten Commandments."[8] *Id.* When asked how the saying provides specific guidance, Mr. Quaintance explained that there is "not much more than that inside the Zoroastrian religion."[9] *Id.*

A spiritual or ethical system is not comprised of simply one vague and unspecific motto. A simple phrase may sum up a morality, but the phrase alone cannot be the extent of the morality. The phrase must be underpinned by a more elaborate ethics. Here, it is unclear from Defendants' motto "good thoughts, good words, good deeds" precisely what, for example, is "good." A "moral or ethical system," as defined by *Meyers*, should provide sufficient information to determine the definition of "good," or conversely, "bad." In one religion, it might be considered "good" to be an active participant in life, to defend order through action, and to embrace all of life's experiences through action; asceticism might be frowned upon in such a religion. In another religion, asceticism and avoidance of the pleasures of life might be valued. Although both religions may sum up their ethics as "good thoughts, good words, good deeds," that phrase would have significantly different meanings in each religion. Because the extent of the moral or ethical system espoused by Defendants is "good thoughts, good words, good deeds," the Court concludes that Defendants have not demonstrated that their beliefs constitute a moral or ethical system within the meaning of *Meyers*.

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[8] Anna Dibble testified that she finds direction from the church about how to conduct herself in the world and how to live her life morally based upon the church's good thoughts, good words, good deeds motto. Aug. 22, 2006, Tr. at 165. The phrase, according to Ms. Dibble, means that she should respect other people, that she should be careful in her choice of words, in her actions, and in her deeds. And, that her words and deeds should always be "toward the good." *Id.* at 166.

[9] Mr. Senger likewise testified that "good thoughts, good words, good deeds" is one of the "fundamental tenets of the Zoroastrian religious." Aug. 21, 2006, Tr. at 118.

The Court also notes that although Defendants maintain that "good thoughts, good words, good deeds" constitutes a moral or ethical system, Defendants have set forth no evidence that this alleged system has a religious, as opposed to secular or philosophical, connotation. "Good thoughts, good words, good deeds" does not create duties "imposed by some higher power, force, or spirit," and those duties do not necessarily "require the believer to abnegate elemental self-interest." *Meyers*, 95 F.3d at 1483. Defendants have not, for example, presented evidence that a higher power, force, or spirit (presumably cannabis, their asserted deity) expects them to behave in a manner consistent with "good thoughts, good words, good deeds." Defendants likewise have not presented evidence that if they do not behave in a manner consistent with "good thoughts, good words, good deeds," they will face religious consequences. Defendants do not maintain, for example, that they will face a final judgment day on which a higher power will pass judgment on their thoughts, words, and deeds to determine whether their souls will pass to heaven or hell. Because "good thoughts, good words, good deeds" has no religious or spiritual significance, it does not constitute a moral or ethical system within the meaning of *Meyers*. *Cf.* 906 F. Supp. at 1505 (Meyers's beliefs not metaphysical because they are confined to the physical world and do not have spiritual or religious significance); *id.* at 1506 (Meyers's beliefs not comprehensive because they are not tied to a spiritual end).

4. Comprehensiveness of Beliefs.

The Tenth Circuit has explained, "Another hallmark of 'religious' ideas is that they are comprehensive. More often than not, such *beliefs* provide a telos, an *overreaching array of beliefs* that coalesce to provide the believer with answers to many, if not most, of the problems and concerns that confront humans. In other words, religious *beliefs* generally are not confined to

one question or a single teaching." *Meyers*, 95 F.3d at 1483 (emphasis added) (quoting *Africa*, 662 F.2d at 1035); *see also Meyers*, 906 F. Supp. at 1506 ('A religion is not generally confined to one question or one moral teaching; it has a broader scope.'") (quoting *Malnak v. Yogi*, 592 F.2d 209 (3d Cir. 1979)). The Tenth Circuit's definition of comprehensiveness requires multiple beliefs. *Meyers*, 95 F.3d at 1483. A single belief, therefore, by definition, is not comprehensive. *See id.*

Defendants' beliefs are monofaceted. They undisputably are centered around marijuana. *See, e.g.*, Aug. 21, 2006, Tr. at 114 (Testimony of M. Senger) ("the central tenet" of the Church of Cognizance is consuming cannabis); Aug. 22, 2006, Tr. at 241 (Testimony of D. Quaintance) (it is each individual orthodox members monastery's "belief . . . in the teacher, provider, protector" that "unite[s] [the monasteries] together"); *see generally* Defendants' Exh. 7 (purported "bible" of the Church of Cognizance, which has a singular focus on marijuana).[10] Based upon the monofaceted nature of the defendant's beliefs in *Meyers*, the district court held that the beliefs were not "comprehensive." 906 F. Supp. at 1506 ("There is nothing comprehensive about Meyers' beliefs. He worships a single plant; as he put it, the marijuana plant is 'the center of attention.' . . . Indeed, as the Court sees it, it would be difficult to conceive of a more monofaceted 'religion.'). The Court likewise concludes here that because Defendants' beliefs center solely around marijuana, those beliefs are not comprehensive within the meaning of

[10] By virtue of an oversight, defense counsel did not formally move to admit Defendants' Exhibit Seven at the hearing on the Motion to Dismiss. Defense counsel represented that the parties would submit a stipulation to the admission of Exhibit Seven. To date, no such stipulation has been submitted to the Court. However, because defense counsel has represented that the Government stipulates to the admission of the exhibit, and because the Government has failed to refute this representation, the Court will consider Defendants' Exhibit Seven.

Meyers.

In addition, the Court concludes that Defendants' beliefs are not comprehensive because they are not uniform. Each member of the Church of Cognizance is entitled to adopt his or her own individual beliefs. *See* Aug. 22, 2006, Tr. at 224 (Testimony of D. Quaintance) (there is no one leader instructing and telling everyone "'You do it my way'"); *id.* at 170 (Testimony of A. Dibble) ("each monastery has the right, according to the church, to worship from their [sic] own family traditions"); Aug. 21, 2006, Tr. at 112-13 (Testimony of M. Senger) ("[T]he church [does] not dictat[e] to each member . . . some exact religious rituals that are to be performed . . . at a certain time or a certain day, or even a certain frequency. [The church] give[s] . . . quite a bit of degree of flexibility for each member monastery[] to . . . adopt within the constraints of the pledge of the Church.). A set of beliefs cannot be comprehensive if the sole shared belief concerns marijuana.

The implication of the district court in *Meyers* that the defendant's beliefs might have been "comprehensive" if he had asserted that his use of marijuana played a more active role does not persuade the Court otherwise. In rejecting Meyers's claim that his consumption of marijuana was comprehensive, the district court explained that marijuana played a "passive" role in Meyers's beliefs and that Meyers had not claimed that: (1) marijuana had "spoken to him," "counsel[ed] him," "guide[d] him," or "t[aught] him"; (2) marijuana was a "a means to an end, the end being to attain a state of religious, spiritual, or revelatory awareness"; or (3) the use of marijuana resulted in a "religious epiphany, spiritual revelation, or transcendental awareness" and that the awareness led to "to enlightened percipience concerning the past, present, or the future." 906 F. Supp. at 1506. These negative implications (suggesting that had Meyers so claimed, the court might have

held differently) are dicta and are not the holding of the *Meyers* district court. Indeed, the district court in *Meyers* specifically emphasized that its holding was narrow and limited to the facts before the court. *Id.* at 1509. In addition, the district court's implication that a singular belief in marijuana could be "comprehensive" if marijuana provides comprehensive guidance in daily life is contrary to the definition of "comprehensiveness" adopted by the district court and the Tenth Circuit. *See Meyers*, 95 F.3d at 1483 (ideas are comprehensive if "*an overreaching array of beliefs* . . . coalesce to provide the believer with answers to many, if not most, of the problems and concerns that confront humans") (emphasis added); *Meyers*, 906 F. Supp. at 1502 (same). The Court therefore is not persuaded to apply the *Meyers* district court dicta here. It therefore is irrelevant to the Court's inquiry of comprehensiveness whether Defendants believe marijuana is an active teacher that speaks to them and guides them or whether marijuana is a means to a spiritual (and not physical) end.[11] *See, e.g.*, Aug. 21, 2006, Tr. at 119 (Testimony of M. Senger) (the deity cannabis teaches "the agenda of the divine mind" by "implanting" thoughts regarding that agenda into the minds of those who consume it); Aug. 22, 2006, Tr. at 243 (Testimony of D. Quaintance) (cannabis or haoma is in the nature of a spiritual force that has the ability to accomplish things in the physical world). Defendants' singular belief in the power of marijuana (even if that belief

[11] Defendants presented evidence that, unlike the *Meyers* defendant, they do not consume marijuana to obtain a physical end. *See, e.g.*, Aug. 22, 2006, Tr. at 175 (Testimony of D. Quaintance) ("I have never experienced what people would call a high, I guess stoned."); Aug. 21, 2006, Tr. at 94 (Testimony of M. Senger) ("I never really used [marijuana] to become intoxicated or to party or, anything like that."); *id.* at 114 (ground hemp seeds is not an intoxicating mixture); *id.* at 117 (the Church of Cognizance "wouldn't encourage people to become intoxicated" or to use marijuana in a recreational sense); *id.* at 118 ("[J]ust because when someone smokes marijuana, that's not to say that they're intoxicated. You know, they may have a slightly altered state of consciousness, but they feel more – many people feel more alive, more aware, more in tune[.] . . . And these are all good things if it leads to good thoughts, good words, good deeds.").

allegedly provides Defendants with a comprehensive set of answers to life's problems) is insufficient as a matter of law to constitute a "comprehensive" set of religious beliefs.[12]

5. Accoutrements of Religion.

In describing the final factor, which is comprised of ten subfactors, the Tenth Circuit has explained, "By analogy to many of the established or recognized religions, the presence of [various] external signs may indicate that a particular set of beliefs is 'religious.'" *Meyers*, 95 F.3d at 1483. To determine whether Defendants have presented evidence sufficient to meet this criterion, the Court considers each of the subfactors in turn.

a. Founder, Prophet, or Teacher.

"Many religions have been wholly founded or significantly influenced by a deity, teacher, seer, or prophet who is considered to be divine, enlightened, gifted, or blessed." *Meyers*, 95 F.3d at 1483. In evaluating this criterion, the district court in *Meyers* explained,

> Although Meyers founded the church in 1973, he does not claim that he alone possessed the kind of spiritual wisdom, ethereal knowledge, or divine insight that often leads to the founding of a

[12] The district court in *Meyers* also implied, by negative inference, that Meyers's belief in marijuana might be comprehensive if Meyers had shown that marijuana, although central, was "the center that held everything else together." 906 F. Supp. at 1506. This dicta likewise is not binding or persuasive, and Defendants' evidence that marijuana is "at the center of a broad array of human issues today" or that marijuana is "a provider of every substance" from clothing, to fuel, to housing, to food, *see e.g.*, Aug. 22, 2006, Tr. at 246, therefore is not relevant to the question of comprehensiveness. Even if it were relevant, the Court notes that Defendants' belief in marijuana as the provider of all substances is secular and not religious, and that it therefore does not demonstrate that Defendants have a set of comprehensive religious beliefs. *Compare* Meyers, 906 F. Supp. at 1506 (beliefs not comprehensive where marijuana used for a physical, and not spiritual, end); *Kiczenski v. Ashcroft*, No. CIV S-03-2305 MCE GGH PS, 2006 U.S. Dist. LEXIS 7007 (E.D. Cal. Feb. 24, 2006) (statement by individual asserting his use of marijuana is protected under RFRA "that no other plant can meet all the basic necessities of life, that it is central to our survival, and that it is necessary in order for him to live in the most healthy and harmonious possible way" constitutes evidence that marijuana is a way of life).

> religion. Meyers calls himself a 'Reverend' of the church, but does not assert that he alone is fit for that role, and does not contend that he is divine, enlightened, or gifted. The Church of Marijuana apparently has no founder or teacher similar to an Abraham, Jesus, Mohammed, Buddha, Confucius, Krishna, Smith, or Black Elk.

906 F. Supp. at 1506.

The evidence concerning this subfactor is conflicting. Although Danuel Quaintance testified that "most of the members of the church consider" him to be the prophet and teacher, that he considers himself to be an "enlightener," that he has "all of [his] working life . . . been a leader of people," and that he does "a lot of counseling and give[s] people advice," Aug. 22, 2006, Tr. at 246, Mr. Quaintance also testified that he does not consider himself to be a deity, *id.* at 247, and that cannabis, or haoma, is Defendants' deity, *see, e.g.*, *id.* at 206-08. In addition, Defendants do not maintain that Mr. Quaintance alone is fit for the role of founder or that Mr. Quaintance alone possesses the kind of spiritual wisdom, ethereal knowledge, or divine insight that often leads to the founding of a religion. *Cf. Meyers*, 906 F. Supp. at 1506. Indeed, the evidence indicates that almost all of the underpinnings of Defendants' beliefs are based upon ideas from other religions and upon knowledge conveyed by other people. *See, e.g.*, Defendants' Exh. 8 (scripture of the Church of Cognizance). Because the Tenth Circuit has instructed courts to find in favor of religion if the *Meyers* criteria are minimally satisfied, however, the Court concludes that Defendants have (minimally) satisfied this subfactor.

b. Important Writings.

"Most religions embrace seminal, elemental, fundamental, or sacred writings. These writings often include creeds, tenets, precepts, parables, commandments, prayers, scriptures, catechisms, chants, rites, or mantras." *Meyers*, 95 F.3d at 1483. In evaluating this criterion, the

district court in *Meyers* stated,

> Meyers testified that the church's 'bible' is Hemp, which was written by Jack Herer. . . . Except for 4 pages of the book that discuss the historical and contemporary use of marijuana by various religions and sects, the remaining 200 and some odd pages cover the following secular topics: the history of hemp, the uses of hemp, the cash value of hemp, the legalization of hemp, the prohibition of hemp, medicinal uses of hemp, therapeutic uses of hemp, the food value of hemp, the sociology of hemp, the environment and hemp, and energy and hemp. Hemp contains little original writing; it is filled primarily with reprints from newspapers, magazines, books, newsletters, studies, and cartoons. These reprints, of course, are about marijuana. The last 30 pages of Hemp contain helpful advertisements and order forms. . . .
>
> Hemp does not purport to be a sacred or seminal book containing tenets, precepts, rites, creeds, or parables. While it is an interesting book full of information, statistics, studies, data, reprints, history, arguments, and advertising, it does not touch upon the lofty or fundamental issues associated with religious works. Hemp bears absolutely no resemblance to recognized religious texts such as the Talmud, Bible, Gnostic Gospels, Koran, Veda, Bhagavad-Gita, or Book of Mormon. Hemp's profane concerns are so topical, political, and commercial, that it could not even be called a work of philosophy. More importantly, Meyers did not claim that the Church of Marijuana uses or relies on Hemp in any way, and he did not claim that the book provides him with any sort of inspiration or guidance. He simply asserted, unconvincingly, that Hemp was his 'bible.'

906 F. Supp. at 1506-07.

The evidence presented at the hearing is ambiguous as to whether the Church of Cognizance has "important writings" within the meaning of *Meyers*. Danuel Quaintance testified that the important writings of the church are contained in a make-shift folder (admitted as Defendants' Exhibit 7), and that these writings are considered to be the church's "bible." Aug. 22, 2006, Tr. at 247. Danuel Quaintance testified that the Church of Cognizance's bible:

> is a work in constant progress and [it has] the neoZoroastrian Book of Cognizance expanding volume of wisdom, cognizance of wisdom. And it starts with the basics of what persons should know about the religion. There's the [Yasna], translated by [Danuel Quaintance], 9 through 11, because number 9 speaks basically of the benefits to be derived; 10 speaks of what it looks like, where it's found; 11 is the praises to it. And that's the primary of the religion there. But it's also, other, the Bible has good parts in it that, and good lessons there as well to be learned, and there's lots of things to be learned, and that's what [the church] saying is, it's a work in constant progress. [People] shouldn't stop [their] knowledge and just stagnate there, [they] have to grow.

Id. These writings are, according to Mr. Quaintance, the "starting." *Id.*

Certain evidence indicates that Defendants' bible is not an important writing within the meaning of *Meyers*. First, Defendants maintain that their "scripture" is constantly evolving. *Id.* at 247 (Testimony of D. Quaintance). As such, it is difficult to see how any portion of the scripture could be classified as "important" in the larger sense. In addition, like "Hemp," Defendants' bible includes many secular works. For example, it contains a pamphlet produced by the Church of Cognizance entitled, "An Interview with Dr. Robert Melamede," discussing the purported effects of cannabis on the human body; a recipe for making haoma; an appendix of the ethnobotanic uses of hemp and common names of cannabis; excerpts from Hemp, by Jack Herer, a secular work, *see Meyers*, 906 F. Supp. at 1506-07; and, excerpts from various other works concerning the biological effects of marijuana, the human body's production of marijuana, the medicinal effects of marijuana, the nutritional value of marijuana, and the origins of marijuana. Defendants' bible also includes a reprint of the Religious Freedom Reformation Act, as well as other federal and state laws, and the Church of Cognizance's "Natural Doctrine," which sets forth the church's position on marijuana use in relationship to the law. These writings represent 32 pages of the Church of

Cognizance's scripture.

On the other hand, however, the scripture contains materials that could be viewed as religious in nature. For example, the writings (mainly writings of others, although some are original writings of the Quaintances) include an eight-page "translation" of the Yasna 9 through 11, in which the word "marijuana" is substituted for "haoma," as well as three pages of excerpts from the scriptures of other religions. In addition, the writings include a work entitled, "The Zoroastrian Priest in the Avesta," as well as 29 pages of articles discussing the historical uses of marijuana by various religions and the connection between "soma" or "haoma" in the Zoroastrian religion and cannabis. Because the Tenth Circuit has instructed district courts to find in favor of religion if any factor is minimally met, the Court concludes that Defendants have satisfied this subfactor.

c. Gathering Places.

"Many religions designate particular structures or places as sacred, holy, or significant. These sites often serve as gathering places for believers. They include physical structures, such as churches, mosques, temples, pyramids, synagogues, or shrines; and natural places, such as springs, rivers, forests, plains, or mountains." *Meyers*, 95 F.3d at 1483. In evaluating this criterion, the district court in *Meyers* explained, "Although the Church of Marijuana apparently has a building of some sort at which members gather to smoke marijuana, Meyers did not assert that the building was in any way holy, sacred, or significant. The building in which church members gather apparently has no larger significance to them, as might a synagogue, mosque, temple, or shrine." 906 F. Supp. at 1507.

The Church of Cognizance has no official gathering place for its members. Rather, each

member's residence is considered an "individual orthodox member monastery," or IOMM. Aug. 21, 2006, Tr. at 113 (Testimony of M. Senger). Members of the church are allowed to worship individually at any time and any place. *See, e.g.*, Aug. 22, 2006 Tr., at 159 (Testimony of A. Dibble). Danuel Quaintance testified that the Church of Cognizance has no central place where its members congregate on a regular basis because the church does not believe in "putting [its] money into a fancy steeple and then lett[ing] the people go hungry in [the] area. [The church would] rather take care of the needs of those people." *Id.* at 249. Accordingly, the Court concludes that Defendants have not met this subfactor.[13]

d. Keepers of Knowledge.

"Most religions have clergy, ministers, priests, reverends, monks, shamans, teachers, or sages. By virtue of their enlightenment, experience, education, or training, these people are keepers and purveyors of religious knowledge." *Meyers*, 95 F.3d at 1483. In evaluating this criterion, the district court in *Meyers* explained,

> Meyers asserts that he is a 'Reverend' of the 'Church of Marijuana.' How he attained this revered position remains a mystery. Meyers did not mention any special training, experience, or education that qualified him for this position. Apparently, he is the only 'clergy' member of the church. Because Meyers did not testify about any special duties he had, teachings he provided, or guidance he gave, the Court can only guess that (based on his descriptions of church 'services') it is his sacerdotal duty to obtain

[13] Mr. Quaintance testified that the Church of Cognizance is like the Society of Friends from the Quaker religion. "[A]nother member's house is just as good a meeting place as any place else." Aug. 22, 2006, Tr. at 249. The Quaintances's house is "quite regularly used as a meeting place because [he and Mary] do have a large living room"; they have "had 50 people in there at a time." *Id.* This testimony, however, simply confirms the fact that no formal gathering place exists. Mr. Quaintance's testimony that they "are in the process of building a larger gathering area" by stacking tires, *see id.*, likewise confirms that at present no such gathering place exists.

marijuana, grow it, prepare it, smoke it, and share it.

906 F. Supp. at 1507.

Danuel Quaintance testified that he and the other "enlightened cogni[sce]nti" are the keepers of the knowledge of the Church of Cognizance. Aug. 22, 2006, Tr. at 249-50. Michael Senger testified that his title of "enlightened cogniscenti just means that I have demonstrated a certain degree of knowledge and mastery of, of the tenets of the Church of Cognizance, and that I have been found worthy to hold the title of enlightened cogniscenti." Aug. 21, 2006, Tr. at 91.

Although Defendants maintain that their religion has keepers of knowledge, the evidence belies this assertion. First, the evidence demonstrates that there is no uniform set of knowledge to keep. Defendants repeatedly have testified that there is no one person in the Church of Cognizance instructing other members of the church what to believe. *See, e.g.*, Aug. 22, 2006, Tr. at 224 (Testimony of D. Quaintance) (There is no one leader instructing and telling everyone, "'You do it my way.'"). The evidence also indicates that each IOMM passes down its own family traditions to the younger members of the family; therefore, neither the Quaintances nor Mr. Senger would be a keeper of knowledge of any one IOMM's family traditions. *See* Defendants' Exh. 8. The evidence further indicates that the church's scripture is a constantly-evolving work in progress. Aug. 22, 2006, Tr. at 247 (Testimony of D. Quaintance). What may be part of the scripture one day may not be part of the scripture on another day. The church therefore does not have any singular body of knowledge to keep or pass down.

Second, the evidence does not indicate that Danuel Quaintance, Mary Quaintance, or Michael Senger (enlightened cogniscenti) have any special duties, that they provide any special teachings, or that they give any special guidance related to the spiritual aspects of the church.

Although Danuel Quaintance testified he does "a lot of counseling and give[s] people advice," *id.* at 246, there is no evidence that Mr. Quaintance provides any special religious or spiritual guidance to church members. Likewise, although the evidence indicates that Mr. Senger provides church members with legal advice, Aug. 21, 2006, Tr. at 91-92 (Testimony of M. Senger), there is no evidence that he provides church members with spiritual or religious advice. For these reasons, the Court concludes that Defendants have not met this subfactor.

e. Ceremonies and Rituals.

"Most religions include some form of ceremony, ritual, liturgy, sacrament, or protocol. These acts, statements, and movements are prescribed by the religion and are imbued with transcendent significance." *Meyers*, 95 F.3d at 1483. In evaluating this subfactor, the district court in *Meyers* explained, "The Church of Marijuana has only one ceremony or ritual: to smoke and pass joints. The church has no services, no prayers, no liturgy, no sacrament, and no blessings (such as baptism or marriage)." 906 F. Supp. at 1507.

The Church of Cognizance, like the Church of Marijuana, has one ceremony or ritual: to consume the "sacrament" of cannabis. The consumption of cannabis is not accompanied by ceremony or ritual. The "church [does] not dictat[e] to each member . . . some exact religious rituals that are to be performed . . . at a certain time or a certain day, or even a certain frequency." Aug. 21, 2006, Tr. at 112-13 (Testimony of M. Senger). The church believes that its members can worship at any time they want, individually. *Id.* at 159 (Testimony of A. Dibble). The church is comprised of IOMMs and "each monastery has the right, according to the church, to worship from their own family traditions." *Id.* (Testimony of A. Dibble). Timothy Kripner testified that no ceremony or ritual was performed when he became a member of the church or when he

smoked marijuana with the Quaintances. Aug. 22, 2006, at 290-91. The church has "no services, no prayers, no liturgy, and no blessings." *Meyers*, 906 F. Supp. at 1507. Because the evidence indicates a complete absence of any ceremony or ritual, the Court concludes that Defendants have not satisfied this subfactor.

f. Structure or Organization.

"Many religions have a congregation or group of believers who are led, supervised, or counseled by a hierarchy of teachers, clergy, sages, priests, etc." *Meyers*, 95 F.3d at 1483. In evaluating this subfactor, the district court in *Meyers* noted, "The Church of Marijuana has approximately 800 members, 20 of whom are 'teachers.' Meyers did not explain what teachers did. To give Meyers the benefit of the doubt, the Court will assume (because Meyers did not state) that as 'Reverend,' Meyers is the foremost church member, and that the teachers are immediately below him either in terms of learning, prestige, knowledge, seniority, or authority." 906 F. Supp. at 1507.

The dominant structural aspect of the Church of Cognizance is that it is comprised of IOMMs, which are independent entitles entitled to adopt their own beliefs. There are approximately 130 members of the Church of Cognizance nationwide (50 or 60 of whom reside in Arizona). Aug. 21, 2006, Tr. at 111-12 (Testimony of M. Senger). There are 72 IOMMs in the United States, one IOMM in Canada, one in Mexico, one in Germany, and one in France. *Id.* The members of the Church of Cognizance do not have regular contact with other members of the church. *Id.* at 158.

Although the Church of Cognizance has "enlightened cogniscenti," the members of the church are not led, supervised, or counseled by these cogniscenti. Aug. 22, 2006, Tr. at 224

(Testimony of D. Quaintance) (There is no one leader instructing and telling everyone, "'You do it my way.'"). Rather, each IOMM "has the right, according to the church, to worship from [its] own family traditions." Aug. 22, 2006, Tr. at 170 (Testimony of A. Dibble); *see also* Aug. 21, 2006, Tr. at 113 (Testimony of M. Senger) (The church "give[s] . . . quite a bit of degree of flexibility for each member monastery[] to . . . adopt within the constraints of the pledge of the Church. . . . [S]ome members of the church believe in reincarnation, others don't. So . . . there's certainly that freedom of individual beliefs that we offer as to--we're not going to dictate that everyone has to believe in reincarnation."). The Court concludes that based upon these facts, Defendants do not meet the structure and organization subfactor.

g. Holidays.

"As is etymologically evident, many religions celebrate, observe, or mark 'holy,' sacred, or important days, weeks, or months." *Meyers*, 95 F.3d at 1483. Defendants did not set forth evidence that the Church of Cognizance has holidays. Although Danuel Quaintance testified that the church has the "soltic cycle," which is "based upon the Egyptian calendar," Aug. 22, 2006, Tr. at 250, he explained that this is not a holiday, but rather an "honored time," *id.* at 251. Based upon the evidence, the Court concludes that Defendants have not met this subfactor. *Cf. Meyers*, 906 F. Supp. at 1507 (factor not met where defendant did not mention any church holidays, special days, or holy days).

h. Diet or Fasting.

"Religions often prescribe or prohibit the eating of certain foods and the drinking of certain liquids on particular days or during particular times." *Meyers*, 95 F.3d at 1483. Defendants did not present any evidence that the Church of Cognizance prescribes or prohibits

the eating of certain foods or liquids on particular days. Danuel Quaintance testified that the church would "prefer that everybody would eat hemp seeds," and "use haoma, because that is the ultimate diet of longevity." Aug. 22, 2006, Tr. at 245. This, however, does not constitute a "prescribed" or "prohibited" consumption of a food or liquid. Accordingly, Defendants do not meet this subfactor. *Cf. Meyers*, 906 F. Supp. at 1507 (factor not met where defendant did not testify about any special diet or days of fasting that church members are required or asked to observe).

i. Appearance and Clothing.

"Some religions prescribe the manner in which believers should maintain their physical appearance, and other religions prescribe the type of clothing that believers should wear." *Meyers*, 95 F.3d at 1483-84. Danuel Quaintance testified that the church has "no clothing restrictions." Aug. 22, 2006, Tr. at 245. Rather, the particular manner of dress is what is "[a]ppropriate for the occasion."[14] *Id.* at 251. Defendants, therefore, do not meet this subfactor. 906 F. Supp. at 1507 (factor not met where defendant did not mention any beliefs concerning a church member's appearance or clothing).

j. Propagation.

"Most religious groups, thinking that they have something worthwhile or essential to offer non-believers, attempt to propagate their views and persuade others of their correctness. This is sometimes called 'mission work,' 'witnessing,' 'converting,' or proselytizing." *Meyers*, 95 F.3d at 1484. Danuel Quaintance specifically testified that members of the Church of Cognizance "are

[14] The fact that Mr. Quaintance pointed out that the Baptist and Methodist churches do not prescribe the type of clothing a member should wear, *see* Aug. 22, 2006, Tr. at 245, does not change the fact that the Church of Cognizance does not meet this subfactor.

not out proselytizing." Aug. 22, 2006, Tr. at 225. "[P]eople, you know, they're already utilizing and stuff when they come to the church and they believe that there's another higher level that [the church] offer[s] as a religious aspect to it." *Id.* Although the purpose of the church's website is to "speak[] to the entire world," *id.* at 252, this fact, in light of Mr. Quaintance's specific testimony that members do not proselytize, does not constitute proselytizing within the meaning of *Meyers*. Accordingly, Defendants do not meet this subfactor. *Cf.* 906 F. Supp. at 1507 (factor not met where defendant testified that the Church of Marijuana does not engage in any type of mission work or witnessing in an effort to convert non-believers or non-smokers).

Defendants' beliefs meet only two of ten of the subfactors that a district court must consider in evaluating the criterion of accoutrements of religion. Accordingly, the Court concludes that Defendants have not satisfied this requirement.

6. Conclusion.

The Court has evaluated Defendants' beliefs within the *Meyers* framework set forth by the Tenth Circuit and has concluded that Defendants meet only one of the five factors indicative of whether a particular set of beliefs is "religious" for purposes of RFRA.[15] The Court therefore concludes that Defendants have not met their burden of demonstrating by a preponderance of the evidence that their beliefs are "religious" within the meaning of RFRA. Accordingly, the Court denies the Motion to Dismiss the Indictment.

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[15] Even if the Court had applied the *Meyers* district court's broader definition of comprehensiveness, *see* 906 F. Supp. at 1506, and found that Defendants beliefs were comprehensive, Defendants still would have (minimally) satisfied only two of the five *Meyers* factors. The Court therefore still would have concluded that Defendants failed to meet their burden of demonstrating by a preponderance of the evidence that their beliefs are "religious" for purposes of RFRA.

B. Other Considerations.

Although the Court denies the Motion to Dismiss the Indictment because Defendants' beliefs do not satisfy sufficient criteria to render them "religious" within the meaning of *Meyers*, the Court also notes that Defendants' beliefs are more aptly characterized as secular and therefore not entitled to statutory protection. *Cf. Meyers*, 95 F.3d at 1484 ("'purely personal, political, ideological, or secular beliefs'" would not likely "'satisfy enough criteria for inclusion'") (quoting *Meyers*, 906 F. Supp. at 1504) (additional citations omitted). At the evidentiary hearing on the Motion to Dismiss, Defendants presented a multitude of evidence indicating that they believe marijuana is a provider of all things needed by human beings, including food, clothing, fuel, and shelter.[16] Defendants also presented evidence regarding their belief in marijuana's medicinal and therapeutic effects,[17] and their belief that marijuana will extend their lives, Defendants' Exh. 4, at 1 (Aff. of M. Senger); Defendants' Exh. 5 (Aff. of A. Dibble). Defendants further presented evidence that marijuana helps them "focus" and heightens their "awareness," Aug. 22, 2006, Tr. at 242 (Testimony of D. Quaintance); Aug. 21, 2006, Tr. at 118 (Testimony of M. Senger), and that marijuana encourages individuals to act in a socially desirable manner. *See, e.g.*, *id.* at 94

[16] *See, e.g.*, Aug. 22, 2006, Tr. at 246 (marijuana is "a provider of every substance . . . needed by mankind . . . from clothing, to fuel, [to] housing. [O]ne acre of [marijuana] would . . . feed ten members of [a] family," would create "fiber to make . . . clothes . . . for years to come," and would create materials for "building a house.").

[17] *See, e.g.*, Defendants' Exh. 4, at 2 (Affidavit of M. Senger) ("I have come to know Haoma to possess . . . the ability to avert symptoms of disease"); Defendants' Exh. 5, at 2 (Aff. of A. Dibble) (same); *see also* Aug. 21, 2006, Tr. at 119 (cannabis is a healer because "there's sufficient evidence to show that it is a virtual panacea for virtually any disease that afflicts mankind. It literally is. . . . [I]f it's cancer, heart disease, diabetes, . . . multiple sclerosis, . . . it balances the systems, and it just seems to correct whatever imbalances that you have within your physical body. It knows what to do and where to go to correct those imbalances.").

(Testimony of M. Senger) ("I felt that the general effect [of marijuana] on most people . . . was to enlighten people. I mean it made people think about very . . . significant, important issues about themselves, the planet, . . . where we're all going as a humanity. And . . . it just stimulates those thought patterns. And people, you know, decided to save the forest, and save whales, and . . . save the planet, . . . based upon revelations that they received."). Beliefs regarding marijuana's uses and marijuana's medical, physical, and social effects are secular and not religious.[18] *Cf. Meyers*, 906 F. Supp. at 1508 (concluding that the "Church of Marijuana" was not a religion and stating that Meyers's beliefs are secular and not religious); *supra* § I.A.1; *id.* at I.A.2; *id.* at I.A.5.b. To the minimal extent any of Defendants' beliefs are "religious," these beliefs appear to be derived entirely out of their secular beliefs. *See infra* § II.A (describing the transformation of Defendants' beliefs from secular to religious). As the district court in *Meyers* aptly noted, "Meyers' secular and religious beliefs overlap only in the sense that Meyers holds secular beliefs which he believes in so deeply that he has transformed them into a 'religion.'" 906 F. Supp. at 1508. Defendants' beliefs, like Meyers's beliefs, have an "'ad hoc quality'" that "'neatly justify his desire to smoke marijuana.'" *Meyers*, 95 F.3d at 1484 (quoting *Meyers*, 906 F. Supp. at 1509); *see infra* § II.A.

II. Sincerely Held.

Although the Court denies Defendants' motion to dismiss the indictment based upon Defendants' failure to demonstrate that their beliefs are "religious," the Court also denies the

[18] The Court also notes that the fact that the Church of Cognizance excludes minors from participating in the sacrament of marijuana (unlike other religions which allow minors to consume sacramental wine), further indicates that Defendants' beliefs are a lifestyle choice and not a religion.

motion on a second, independent ground. A person claiming that the government has placed a substantial burden on his or her practice of religion must establish the existence of a religious belief which is sincerely held. *See, e.g.*, *Meyers*, 95 F.3d at 1482. Sincerity is a factual matter, and a district court's findings shall not be overturned unless clearly erroneous. *Id.* The Court concludes that even if it had found Defendants' beliefs "religious," it would not find those beliefs sincerely held.

A. Ad Hoc Beliefs.

The evidence indicates that Defendants adopted their "religious" belief in cannabis as a sacrament and deity in order to justify their lifestyle choice to use marijuana.[19] Mr. Quaintance testified, for example, that he initially used marijuana recreationally, to increase his "focus" and "creativity," and to better "see things," Aug. 22, 2006, Tr. at 176, 172-73, and later medicinally, to treat his chronic pancreatitis, *id.* at 172, 177. Mr. Quaintance concedes that his earlier beliefs regarding the therapeutic and medicinal benefits of marijuana were philosophical, and not religious, in nature. *Id.* at 175. It was only years later that Mr. Quaintance made the ad hoc decision to refer to the physical effects of marijuana as "religious" experiences. *See id.* Specifically, Mr. Quaintance testified that he later came to believe that marijuana enhanced his focus, creativity, and awareness because marijuana is a "teacher" or "converter," a concept that Mr. Quaintance maintains is religious in nature. *Id.* at 175-76. Mr. Quaintance also testified that

[19] The Court has no doubt that Defendants were aware of the possible protections they could obtain by citing the First Amendment or RFRA. *Cf. Meyers*, 906 F. Supp. at 1509 (questioning the sincerity of the defendant, who the court "suspect[ed was] . . . astute enough to know that by calling his beliefs 'religious,' the First Amendment or RFRA might immunize him from prosecution"). Defendants' purported "bible" contains a copy of RFRA, state and federal constitutional laws, and the Natural Doctrine of the Church of Cognizance, which sets forth Defendants' alleged rights regarding marijuana in relationship to the law. *See* Defendants' Exh. 7.

he thereafter came to believe that the medicinal effects of marijuana were religious in nature. *Id.* at 186.

The evidence further indicates that Defendants created their "religion" to justify their civil and social belief that marijuana produces no victim and should be legalized. When Danuel Quaintance was arrested in 1984 for his self-professed non-religious use of cannabis, Aug. 22, 2006, Tr. at 177, Mr. Quaintance justified his behavior at that time by stating that his use of marijuana produced no victim, *id.* at 178 ("I was injuring no persons . . . and nothing was coming out of me that was injurious to any other persons."), and that it was his right to use marijuana for non-religious reasons even though that use was against the civil law, *id.* ("I was an adult" and using marijuana "was within my right"; "it's a plant that, within my liberty of conscience, it was my conscience was dictating what I would do within my own body, . . . what's going into me"). Then, years later, Mr. Quaintance conveniently founded a "religion" that affirms his right to use the same substance for "religious" purposes that Mr. Quaintance believed he was entitled to use for non-religious purposes in 1984, and that espouses a core belief that the proper use of marijuana promotes good thoughts, good words, good deeds, "none of which is harmful to the health, safety, welfare, or morals of society in general," Defendants' Exh. 8.

Defendants had great incentive to redefine their secular beliefs as "religious." When Danuel Quaintance was arrested "for cannabis" and placed on six months of probation, he testified that he informed his probation officer that if the officer was going to make Quaintance take regular urinalysis tests, "[the officer] might as well just put [Quaintance] back in jail for the period because [Quaintance] was an adult and it was [his] intention to stay with what [he] felt was within [his] right. [Quaintance] was harming nobody." Aug. 22, 2006, Tr. at 178. Defendants clearly

were committed to their marijuana use, and they intended to continue that use at all costs, even incarceration. The Court has no doubt that if Mr. Quaintance was willing to go to jail to protect his admittedly non-religious use of marijuana, he willingly would recast his secular beliefs as "religious" beliefs to ensure his continued ability to use marijuana.

B. Quantity of Marijuana.

The quantity of the marijuana found in Defendants' possession also supports the Court's finding of insincerity. On the day of the Quaintances's arrest, officers seized 77 kilograms of marijuana, Aug. 23, 2006, Tr. at 344, and on the day of Mr. Butts's arrest, officers seized 152 kilograms of marijuana. *Id.* at 345. Two hundred and twenty-nine kilograms of marijuana is equivalent to 229,000 marijuana cigarettes. *Id.* This quantity of marijuana suggests that Defendants possessed marijuana for commercial, as opposed to religious, purposes.[20]

The fact that Mr. Quaintance testified that 20 to 25 pounds, or between 9 and 11 kilograms, of marijuana per year is necessary to sustain a single church member, Aug. 22, 2006, Tr. at 232, does not persuade the Court otherwise. Nothing in Defendants' "religion" requires them to obtain a quantity of marijuana sufficient to supply 22 church members with marijuana for one year. *Cf. United States v. Bauer*, 84 F.3d 1549, 1559 (9th Cir. 2000) (RFRA did not protect defendants because nothing in Rastafarianism required defendants to possess quantities of marijuana sufficient for distribution). Defendants presented no evidence that their beliefs require

[20] The possession of small amounts of marijuana for personal use might indicate possession for a sincere religious purpose. *Compare United States v. Bauer*, 84 F.3d 1549, 1559 (9th Cir. 2000) (finding that RFRA was "relevant" to counts of simple possession of marijuana, but that the statute did not apply to protect defendants from counts relating to conspiracy to distribute, possession with intent to distribute, and money laundering because "nothing before [the court] suggests that Rastafarianism would require this conduct").

them to provide a significant number of church members with a yearly supply of marijuana, or that they did in fact regularly supply a significant number of church members with a yearly supply of marijuana. Although Defendants made vague references to a "wellness clinic," the Court does not find this testimony credible.

C. Evidence of Commerce.

Evidence of Defendants' commercial involvement with marijuana further supports the Court's finding of insincerity. Mr. Kripner, the Quaintances's long-time drug dealer,[21] testified that the Quaintances hired him to pick up three loads of marijuana and to deliver two of those loads to California and the third load to Arizona. The Quaintances told Mr. Kripner that the persons in California to whom he delivered the first load of marijuana would stash $100,000 of cash in his car. *Id.* at 292. The Quaintances agreed to pay Mr. Kripner $35,000 for delivering the three loads. *Id.* at 294. The Quaintances explained that they needed $100,000 in cash to bail Mary Quaintance's brother, Defendant Joseph Allen Butts, out of jail. *Id.* at 286-87.

The Court finds Defendant Kripner's testimony credible, and notes that the Quaintances had a motive (*i.e.*, bail money for Mr. Butts) to undertake a large drug transaction for monetary, as opposed to religious, purposes. Mr. Kripner's testimony indicates that Defendants were engaged in the business of selling marijuana for profit and that they were not simply purchasing marijuana for their own religious needs or the religious needs of other members of the church. The fact that on several occasions the Quaintances told Mr. Kripner that they had trouble "getting rid of" "bad" marijuana that Mr. Kripner had sold them, and that their inability to do so hurt their

[21] Mr. Kripner regularly sold marijuana to the Quaintances (once every two weeks) for approximately one and one-half to two years.

business," Aug. 22, 2006, Tr. at 278, further buttresses the Court's conclusion that Defendants were engaged in commerce and not a sincere religious practice.

D. Lack of Ceremony or Ritual.

Mr. Kripner's testimony regarding the timing and manner in which the Quaintances made him a member of the Church of Cognizance also supports the Court's finding of insincerity. Mr. Kripner testified that on February 21, 2006, the day before he was scheduled to pick up the first load of marijuana, the Quaintances provided him with the church's membership pledge to sign. *Id.* at 290; Defendants' Exh. 8. The Quaintances did not require Mr. Kripner to read the pledge before signing it, *id.* at 295-96, and the Quaintances did not perform any ceremony to celebrate Mr. Kripner's new membership,[22] Aug. 22, 2006, Tr. at 290-91. The same day, the Quaintances also provided Mr. Kripner with a certificate designating Mr. Kripner as a "certified courier" of the Church of Cognizance. *See* Government's Exh. 3. Defendants presented no evidence indicating that the Quaintances questioned Mr. Kripner about his beliefs regarding the Church of Cognizance prior to (or even after) the time he became a member of the church. At no point during the process of becoming a member or receiving the courier certificate did Mr. Kripner believe that marijuana was his sacrament or deity. Aug. 22, 2006, Tr. at 294. The timing of Mr. Kripner's membership and the lack of ceremony accompanying his membership indicate that the Quaintances were acting for the sake of convenience, *i.e.*, because they believed the church would cloak Mr. Kripner with the protection of the law, and not because they had a sincere religious

[22] The Court also notes that Kripner smoked marijuana with the Quaintances without any ceremony or ritual. *Id.* at 291.

belief that marijuana is a sacrament and deity.[23]

E. Other Illegal Substance.

The Court's finding of insincerity further is supported by Mr. Kripner's testimony that he sold cocaine to the Quaintances on a monthly basis and that he consumed cocaine with Mary Quaintance. *Id.* at 281-82. The fact that the Quaintances have purchased and used cocaine recreationally undermines Defendants' assertion that they consume marijuana for religious, as opposed to secular, purposes.

F. Defendants' Sincerity.

Based upon the foregoing evidence, the Court concludes that Defendants do not sincerely hold a belief that marijuana is a sacrament and deity. Defendants cannot avoid prosecution for illegal conduct simply by transforming their lifestyle choices into a "religion." As one court aptly noted, "Those who seek the constitutional protections for their participation in an establishment of religion and freedom to practice its beliefs must not be permitted the special freedoms this sanctuary may provide merely by adopting religious nomenclature and cynically using it as a shield to protect them when participating in antisocial conduct that otherwise stands condemned." *United States v. Kuch*, 288 F. Supp. 439, 445 (D.D.C. 1968). Because Defendants have not met their burden of establishing the existence of a sincerely held religious belief, the Court denies Defendants' Motion to Dismiss the Indictment.

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[23] The fact that Mr. Kripner testified that the Quaintances sincerely believe that marijuana is the "tree of life," Aug. 22, 2006, Tr. at 283, does not persuade the Court otherwise. Defendants presented no evidence that the "tree of life" has a spiritual or religious meaning. The Court assumes that Defendants meant that marijuana is the provider of "every substance needed by mankind," from food, to "clothing, to fuel, [to] housing." Aug. 22, 2006, Tr. at 246. The Court already has concluded that this concept has a secular, and not religious, meaning. *See supra* note 12.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant Danuel Dean Quaintance's Motion to Dismiss Indictment and Incorporated Memorandum, filed April 7, 2006, **[Doc. No. 34]**, is hereby **DENIED**.

Dated this 22nd day of December 2006.

JUDITH C. HERRERA
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
DANUEL DEAN QUAINTANCE,	)	**No. CR 06-538 JH**
MARY HELEN QUAINTANCE, and	)	
JOSEPH ALLEN BUTTS,	)	
	)	
Defendants.	)	

GOVERNMENT'S MOTION IN LIMINE NO. 1

COMES NOW the United States of America, by and through Larry Gomez, Acting United States Attorney for the District of New Mexico, and Luis A. Martinez, Assistant United States Attorney for said District, and hereby moves in limine requesting this Honorable Court to order that the defendants not be allowed to present or argue to the jury religious beliefs as a defense.

The Government understands and acknowledges that the existence of the defendants' purported beliefs will, by necessity, be made known to the jury. For example, subsequent to the arrest of Joseph Butts, Missouri State Police found a certificate in Mr. Butts' duffle bag indicating that Butts had been "ordained by a church as a courier for the church. Officers also found and seized a membership card to the Church of the Cognizance." *(Doc. No. 136, Court's Memorandum Opinion and Order, pp. 7-8, filed July 18, 2006, denying Mr. Butts' Motion to Suppress.)* The aforementioned documents were signed and prepared by defendant Danuel Quaintance, as was the courier certificate seized from defendant Timothy Kripner. *R. pp. 255-259, Motion to Dismiss Indictment, 22 August*

2006.) The government intends to offer these exhibits in its case-in-chief to establish the existence of a conspiracy.

However, the Court's rulings on the issue of the defendants' "religion" and lack of sincerely-held beliefs as to said "religion" negates their use as a defense. The defendants should, as a result, be precluded from attempting to use religion or sincerity of belief to negate criminal culpability at their upcoming trial. Assuming, *arguendo*, that sincerity of belief were a mixed question of law and fact and a proper inquiry for a jury, the issue is moot. The Court has ruled that the defendants' beliefs are not "religious" within the meaning of RFRA. *Doc. No. 136 (p. 29).* Hence, even if the Court had found the defendants' beliefs to be sincerely held, an adverse finding as to the issue of religion renders the use of RFRA to negate criminal intent inapplicable.

Wherefore, the United States respectfully requests this Honorable Court grant the United States' *Motion in Limine* and order the defendants not to use or attempt to use "religion" or their belief therein in an attempt to negate criminal culpability in the upcoming trial.

Respectfully submitted,

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Acting United States Attorney

Electronically filed by
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I HEREBY CERTIFY that a true copy of the foregoing pleading was delivered to opposing counsel of record on the _19th_ day of April, 2007.

/s/
LUIS A. MARTINEZ
Assistant U.S. Attorney

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Cause No. CR 06-538 JH
	§	
DANUEL DEAN QUAINTANCE,	§	
	§	
Defendant.	§	

MOTION TO RECONSIDER DENIAL OF MOTION TO DISMISS INDICTMENT

DANUEL DEAN QUAINTANCE, Defendant, by and through the undersigned appointed counsel, Marc H. Robert, Assistant Federal Public Defender, moves the Court to reconsider its decision to deny Mr. Quaintance's motion to dismiss indictment in this cause, [Doc. 192], and in support of his motion would respectfully show the Court as follows:

1. Mr. Quaintance is charged by superseding indictment filed on May 17, 2006 [Doc. 65] with possession of more than 50 kilograms of marijuana with the intent to distribute it, and with conspiracy to possess more than 100 kilograms of marijuana with the intent to distribute it. Mr. Quaintance is presently residing at his home in Pima, Arizona under conditions of release set by United States Magistrate Judge Martinez. Trial is set for May 21, 2007.

2. Mr. Quaintance moved for dismissal of the charges in this case on the grounds that his prosecution is proscribed by the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution, the Religious Freedom Restoration Act ("RFRA") and 22 U.S.C. § 6401(a) [Doc. 34]. The government responded [Doc. 41], and

Mr. Quaintance replied [Doc. 68]. Mary Helen Quaintance and Joseph Butts joined in that motion. A hearing was held on August 21, 22 and 23, 2006. The Court denied the motion to dismiss by Memorandum Opinion filed on December 22, 2006 [Doc. 192]. The Court held that Mr. Quaintance's professed religious beliefs do not fall within the legal definition of religion, and therefore do not qualify for the statutory and constitutional protections asserted; and that Mr. Quaintance's religious beliefs are not sincere. For the reasons set forth below, Mr. Quaintance respectfully requests that the Court reconsider its ruling.

THE MATRIX FOR DEFINING A RELIGION CREATED IN *UNITED STATES V. MEYERS* IS INAPPLICABLE BECAUSE THE RFRA DEFINITION OF RELIGIOUS PRACTICE WAS BROADENED FOLLOWING THE *MEYERS* DECISION

3. The Court's decision in this case was driven almost entirely by the Tenth Circuit's formulation in *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996). In that case, the Tenth Circuit purported to define what is and what is not a religion. The Court established a set of criteria, a matrix, for determining what qualifies as a religion. The *Meyers* Court was operating under a broad concept of "exercise of religion" under the original version of RFRA, which was enacted in 1993. In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). Included in that legislation was a broadened definition of the concept of exercise of religion. After the 2000 amendment, exercise of religion under RFRA is defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4), 2000cc-5(7)(A). *See Navajo Nation v. United States Forest Service*, 479 F.3d 1024, 1033 (9th Cir. 2007) ("To the extent that our RFRA cases prior to RLUIPA depended on a narrower definition of 'religious exercise,' those cases are no longer good law").

4. *Meyers* was decided under that "narrower definition of religious exercise". Indeed, the main thrust of the *Meyers* majority opinion was to define religious exercise by reference to the hallmarks of mainstream, conventional "system[s] of religious belief". All of the criteria adopted by the *Meyers* court are tailor-made for the traditional church-and-steeple religious practices common in the Western world. The revised definition after RLUIPA directly rejects such a formulation by specifically eliminating any requirement that the religious practice be a part of a "system of religious belief". Because of the significant change in the statutory language, *Meyers* is no longer good law. This Court should reconsider its ruling, and on the strength of applicable definitions of religion, grant Mr. Quaintance's motion to dismiss.

THE DEFINITION OF "RELIGION" EMPLOYED IN THE COURT'S DECISION IS CONTRARY TO WELL ESTABLISHED SUPREME COURT PRECEDENT

5. In his motion to dismiss and the briefing and argument thereon, Mr. Quaintance submitted that the *Meyers* matrix was an improper and unconstitutionally restrictive definition of religion and religious practice. In the Memorandum Opinion, this Court indicated that Mr. Quaintance had not provided authority for that proposition.

6. In his written closing argument [Doc. 160], Mr. Quaintance cited and quoted from *United States v. Seeger*, 380 U.S. 163, 174-75 (1965). In *Seeger*, the Supreme Court held that a person who holds a sincere belief which "in his life fills the same place as a belief in God fills in the life of an orthodox religionist" was entitled to consideration as a conscientious objector to the draft. *Id*. at 192-93. *Seeger* involved three people who challenged the denials of their applications for conscientious objector status under the Selective Service Act. Under

the SSA, conscientious objector status required a belief system which was based in a belief in a supreme being. Mr. Seeger argued that his skepticism in the existence of a supreme being did not indicate a lack of faith in anything, and citing Plato, Aristotle and other philosophers, maintained that his world-view occupied a place in his life as significant as the place God occupies in the life of a believer. Mr. Jakobsen "defined religion as the 'sum and essence of one's basic attitudes to the fundamental problems of human existence'". *Seeger*, 380 U.S. at 168. He submitted a long memorandum discussing his spiritual beliefs, espousing a belief in a horizontal approach to "Godness, toward Mankind and the World", as distinguished from a "vertical" approach. *Id.* Mr. Peter declined to directly comment on his belief in a supreme being by saying that it depended on the definition of "supreme being", but indicated that the taking of life violated his moral code, and that that moral code was superior to his obligation to the state. *Id*. at 169. He "quoted with approval Reverend John Haynes Holmes' definition of religion as 'the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands * * * (; it) is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best.'" *Id.* Mr. Peter arrived at his conviction through reading and meditation.

7. The Supreme Court enunciated the standard thus: "does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption [by virtue of a manifest belief in a supreme being]?" *Id*. at 184. "'Surely a scheme of life designed to obviate (man's inhumanity to man), and by removing temptations, and all the allurements of ambition and avarice, to nurture the virtues of unselfishness, patience, love, and service, ought not to be denounced as not pertaining to

religion when its devotees regard it as an essential tenet of their religious faith.'" *Id*. (quoting *State v. Amana Society*, 132 Iowa 304, 109 N.W. 894, 8 L.R.A.,N.S., 909 (1906)).

8. In his testimony at the hearing on the motion to dismiss last August, Mr. Quaintance described at length his decades-long study of the Bible and earlier religious texts, and his syncretic[1] formulation of his own religious philosophy. He went to the extent of learning ancient languages and attempting to understand religious texts from thousands of years ago. His religious philosophy, embodied in the phrase "Good Thoughts, Good Words, Good Deeds" was the product of a lifetime of seeking a connection with his spiritual essence. His religious philosophy and practice do not fit neatly within the catechism of mainstream religions. Like the members of the Iowa Amana Colonies nearly 100 years ago, however, his philosophy, which Mr. Quaintance regards as a central tenet of his religious belief, "ought not be denounced as not pertaining to religion", particular in view of the Supreme Court's properly expansive view of the nature and definition of religion.

9. Such was Judge Brorby's point in his impassioned dissent in the *Meyers* case, cited and quoted in Mr. Quaintance's motion to dismiss. He recognized that excluding a belief system which does not fit into neat categories is centrally antithetical to this country's history and tradition of religious tolerance.

10. The Supreme Court revisited the question in *Welsh v. United States*, 398 U.S,. 333 (1970). The Court noted the similarities between that case and *Seeger*: "[B]oth Seeger and

[1] Dr. Deborah Pruitt, who also testified at the hearing as an expert in religious anthropology, pointed out that a religious philosophy taking elements of other religious traditions, which she named syncretism, is no less a legitimate religion for not falling into one of the previously identified and more commonly adopted belief systems.

Welsh were brought up in religious homes and attended church in their childhood, but in neither case was this church one which taught its members not to engage in war at any time for any reason. Neither Seeger nor Welsh continued his childhood religious ties into his young manhood, and neither belonged to any religious group or adhered to the teachings of any organized religion during the period of his involvement with the Selective Service System. At the time of registration for the draft, neither had yet come to accept pacifist principles. Their views on war developed only in subsequent years . . .". *Id*. at 335-36. The *Welsh* Court noted that the *Seeger* Court "made it clear that these sincere and meaningful beliefs that prompt the registrant's objection to all wars need not be confined in either source or content to traditional or parochial concepts of religion." *Welsh*, 398 U.S. at 339. Mr. Welsh stepped further from religion than had Messrs. Seeger, Peter and Jakobsen: he specifically denied that his beliefs were based in religion, stating instead that his beliefs were derived from his readings in history and sociology. *Id*. at 341. The Court accepted the lower court's conclusion that Mr. Welsh held his beliefs with the strength of more traditional religious convictions, *id*. at 343, and reversed his conviction. *Id*. at 344.

11. The Ninth Circuit in *Navajo Nation* has said that the definition of religion after RFRA and RLUIPA is even broader than the definition set forth by the Supreme Court before the passage of those statutes.

12. In its ruling, this Court cited *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981). In that case, John Africa, founder of the political organization MOVE, sought an order of the court compelling the Pennsylvania prison system to provide him with a special diet. Discussing the definition of religion, the *Africa* court cited *Seeger* and said that "[i]t is

inappropriate for a reviewing court to attempt to assess the truth or falsity of an announced article of faith. Judges are not oracles of theological verity, and the Founders did not intend for them to be declarants of religious orthodoxy." *Africa*, 662 F.2d at 1030. The court also cited the Supreme Court's decision in *Torcaso v. Watkins*, 367 U.S. 488 (1961) in which Justice Black, "writing for a unanimous Court, concluded that a state could not favor 'those religions based on a belief in the existence of God as against those religions founded on different beliefs'; in a footnote, he observed that a number of religious groups within the United States do not hold to theistic doctrines." *Africa*, 662 F.2d at 1031-32. The court also quoted Judge Adams' concurring opinion in *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979): "beliefs holding the same important position for members of one of the new religions as the traditional faith holds for more orthodox believers are entitled to the same treatment as the traditional beliefs". *Malnak*, 592 F.2d at 207 (Adams, J. concurring). The *Africa* court recognized that a pantheistic philosophy would qualify as a religion, *Africa*, 662 F.2d at 1033, but declined to find that MOVE was an organization with a pantheistic philosophy. *Africa* was decided in the Third Circuit, and before either RFRA or RLUIPA. Aside from those obvious caveats, the case at bar presents an entirely different situation. Mr. Quaintance's protracted and exhaustive spiritual journey has led him to a spiritual, religious philosophy which he described in detail during the hearing. He testified to his belief in a spiritual interconnectedness with the world central to which is the cannabis plant; and to his research, which indicated that the plant was integral to many religious cultures at various times in the development of humankind. Mr. Quaintance's beliefs are not political or "revolutionary", as were MOVE's; he is a seeker after spiritual knowledge. His testimony demonstrated that. His

beliefs are not personal or secular (*see Africa*, 662 F.2d at 1034); they occupy for him the same place that belief in God does for mainstream Christians.

13. This Court also cited *Yoder v. Wisconsin*, 406 U.S. 205 (1972), in the Memorandum Opinion denying the motion to dismiss. *Yoder* was decided just two years after *Welsh*, and barely referred to the *Welsh* decision in Chief Justice Burger's opinion for the Court. Certainly, *Yoder* did not overrule *Welsh* or *Seeger*. In *Yoder*, the Court made reference to the long and organized tradition of the Amish religion in determining that religious, and not secular, matters were at issue in the respondents' decision not to place their children in public school after the eighth grade. Chief Justice Burger wrote that personal or secular concerns would not rise to a level protected by the First Amendment, specifically pointing out the secular views of Henry David Thoreau as not qualifying as "religious". *Yoder*, 406 U.S. at 216 .

14. In *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), the Supreme Court took another look at the definition of religion. In this case, the petitioner, a Jehovah's Witness, had quit his job because his employer changed his work from making rolled steel to making tank turrets. Making tank turrets offended his religious beliefs. Because he had struggled to articulate his religious objection to the change of work, and because it found Thomas' particular belief system unclear, the Indiana supreme court rejected his claim for unemployment benefits, holding that he had quit for personal, not religious reasons. The Supreme Court noted that

> "[t] determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. However, the resolution of that question is not to turn upon a judicial

> perception of the particular belief or practice in question; religious beliefs need not be *acceptable, logical, consistent, or comprehensible to others* in order to merit First Amendment protection.

Thomas, 450 U.S. at 714 (footnote omitted, emphasis added). The fact that other Jehovah's Witnesses found the work "scripturally acceptable" to be relatively unimportant. "Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses." *Thomas*, 450 U.S. at 715. This statement by the Supreme Court highlights the irrelevance of the testimony of the Zoroastrian priest, Dr. Bagli, at the evidentiary hearing to a determination of the qualification of Mr. Quaintance's beliefs as religious. "Particularly in this sensitive area [religion], it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716.

15. The importance of the Court's statement that a religious belief need not be "acceptable, logical, consistent or comprehensible" cannot be overstated. The Court sends a clear message that the courts should not disqualify a religious belief simply because its thesis is different from, or even abhorrent to, more conventional beliefs. It is natural that one who strongly holds a religious belief will be resistant to, even offended by, a less mainstream, more esoteric religious pursuit. The Supreme Court's holding avoids the risk of declaring illegitimate a deeply held but unusual religious belief because that belief may be at extreme odds with the beliefs of the deciding judge.

MR. QUAINTANCE EXPRESSED BELIEFS WHICH FALL WITHIN THE SUPREME COURT'S DEFINITION OF RELIGION

Mr. Quaintance expressed a simple but profound religious philosophy in his testimony. Like Mr. Thomas in the *Thomas* case, Mr. Quaintance may have had difficulty expressing that philosophy to this Court's satisfaction. However, as expressed the Court's Memorandum Opinion, Mr. Quaintance expressed a spiritual philosophy in his testimony. *See* Memorandum Opinion at 6. The Court, again referring to *Meyers*, objects that Mr. Quaintance's expressed philosophy was insufficiently "imponderable", "inexplicable" or "profound". The Supreme Court does not require such rigor. Mr. Quaintance's religious beliefs are simple and profound. He believes, based on years of exhaustive anthropological research, that cannabis was worshiped in ancient religions and is a deity and a sacrament, a healer and a teacher. He believes that cannabis played a central role in events related in both the Old and New Testaments of the Bible, as well as in the seminal texts of other religions. As noted by Dr. Pruitt, and in other resources cited by Mr. Quaintance in his briefing of this matter, his beliefs in this regard are shared by other scholars. *See, e.g.*, *Entheogens and the Future of Religion*, Albert Hofmann, et al., ed. (Council on Spiritual Practices, 2000); *Persephone's Quest: Entheogens and the Origin of Religion*, R. Gordon Wasson, Stella Kramrisch, Carl Ruck, Jonathan Ott (Yale University Press, 1992). Mr. Quaintance believes that our purpose in life is to live honestly, simply and fairly; to help others; to be true and faithful to one's own beliefs; to always strive to do good. His beliefs form the genuine core of his spiritual being. His beliefs clearly occupy the same space as a belief in God occupies in a devout Christian, and a belief in Allah in a devout Muslim.

16. This Court compares Mr. Quaintance to Meyers, about whom the *Meyers* court said that the smoking of 10 to 12 marijuana cigarettes a day appeared to be an end in itself. *See* Memorandum Opinion at 9. Mr. Quaintance and Mr. Senger both testified to their strong and long-held beliefs that cannabis consumption is not an end in itself, but a sacred vehicle to achievement of a higher spiritual plane, much as the use of peyote assists the spiritual pursuits of practitioners of the Native American church. This Court opines that the change in mental state results from the physical effects of cannabis on the body and mind. The same could be said of the NAC's use of peyote, which enjoys a specific exclusion from criminal sanction. Disparate treatment of cannabis from that of peyote constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. No rational basis can be identified to justify this disparity. *See Johnson v. Robison*, 415 U.S. 361, 375, n. 14 (1974); *see also McDaniel v. Paty*, 435 U.S. 618 (1978).

17. This Court says that Mr. Quaintance presented no evidence that a higher power expects him to act in accordance with the precepts he described. *See* Memorandum Opinion at 14. Demanding proof of the veracity of a particular religious belief is the essence of what the Supreme Court has said cannot be done by this nation's courts. Many of the most important, central precepts of the world's most prevalent and powerful religions are taken on pure faith, in the absence of evidence in the ordinary, legal sense. The veracity of a belief is not for the courts to decide. *See Seeger*, 380 U.S. at 185.

18. The Court notes that some of Mr. Quaintance's beliefs about the bounty of the cannabis plant are secular, not religious. *See* Memorandum Opinion at 18, n. 12. Mr. Quaintance would point out that many religious beliefs derive from practical things. An

example is the Jewish and Muslim prohibitions against eating pork, which can be said to have derived from the very secular concern that untreated or refrigerated pork can kill if eaten. The versatility of the cannabis plant explains why is has been revered in various religious traditions for thousands of years, as Dr. Pruitt told us. A secular component to a religious symbol or belief does not make the belief any less religious.

19. The Court said that there is no ritual associated with the Church of Cognizance. *See* Memorandum Opinion at 24-25. Mr. Quaintance and Mr. Senger testified about the ritual of making the drink haoma, which has passed down through millennia through ancient writings. The oils produced by the cannabis seed are used in anointing, also rituals passed down through millennia.

20. The Court said that the Church of Cognizance does not propagate its beliefs. *See* Memorandum Opinion at 29. Mr. Quaintance testified that the Church website is used for this purpose.

21. The Court concluded that the evidence supports the conclusion that Mr. Quaintance formed his religion for the purpose legitimizing his secular use of marijuana. *See* Memorandum Opinion at 33. In fact, the evidence supports the opposite conclusion. Mr. Quaintance testified that he research ancient theology for years in arriving at his beliefs. His research was spurred by his dissatisfaction with other religious teachings. Dr. Pruitt, an expert in the anthropology of religion and the use of entheogens, found Mr. Quaintance to be more knowledgeable than she in the areas he had studied. Mr. Quaintance formed the Church of Cognizance in 1991, fifteen years before his arrest.

THE QUESTION OF THE SINCERITY OF MR. QUAINTANCE'S RELIGIOUS BELIEFS IS A QUESTION OF FACT FOR DETERMINATION BY THE JURY

22. In addition to holding that Mr. Quaintance's beliefs do not constitute a religion, this Court ruled that Mr. Quaintance's beliefs are not sincerely held. Mr. Quaintance strongly disputes that conclusion. However, the question of Mr. Quaintance's sincerity is an issue of fact and must be presented to the jury for determination. *See United States v. Seeger*, 380 U.S. at 185; *United States v. Hsia*, 24 F.Supp. 2d 33, 46 (D.D.C. 1998) ("juries are routinely asked to determine whether a person sincerely holds a religious belief and whether she acted out of or was motivated by that belief or for some other reason".)

The definition of religious exercise employed by the Tenth Circuit in *Meyers* is different from the one which is to be employed now, as recognized in *Navajo Nation*. The change in definition goes directly to the flaws in the *Meyers* approach to defining a religion, and fundamentally alters the way the question should be assessed. Accordingly, *Meyers* is no longer good law. To the extent that the Court's decision in this case was based on *Meyers*, that decision should be reconsidered.

CONCLUSION

For that reason and all the other reasons discussed herein, Mr. Quaintance respectfully requests that this Court reconsider its decision regarding Mr. Quaintance's motion to dismiss, order the dismissal of the indictment in this cause, and grant such other and further relief to which the Court may find Mr. Quaintance to be justly entitled.

Respectfully Submitted,

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MARC H. ROBERT
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Counsel for Mr. Quaintance

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Reconsider Order Denying Motion to Dismiss was served upon Assistant United States Attorneys Luis A. Martinez and Amanda Gould, 555 S. Telshor, Suite 300, Las Cruces, New Mexico 88011 (fax number 505.522.2391), by placing a copy of the same in the United States Attorney's box at the Las Cruces office of the United States District Court Clerk; and on Mr. Mario A. Esparza, counsel for Mary Quaintance, P.O. Box 2468, Las Cruces, New Mexico 88004; and Ms. Bernadette Sedillo, counsel for Joseph Butts, 201 N. Church St., Suite 330, Las Cruces, New Mexico 88001 on April 26, 2007.

electronically filed on April 26, 2007
MARC H. ROBERT

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
Clerk's Minutes
Before the Honorable Judith C. Herrera

USA v. Quaintance, et al.		Case No.	06-538 JH
Date:	May 3, 2007		
Courtroom Clerk:	Lincoln Sorrell	Court Reporter:	Paul Baca
Court in Session:	11:32 a.m./11:46 a.m.	14 minutes	
Type of Proceeding:	Status conference		

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
Luis Martinez	Marc Robert (Danuel Quaintance) Mario Esparza (Mary Helen Quaintance) Bernadette Sedillo (Joseph Allen Butts)

Proceedings:

Court in Session:

11:32 a.m.	Court in session by phone; Robert: wants to move trial to June to facilitate possible pretrial resolution.
11:37 a.m.	Sedillo: opposes a trial continuance because client (Butts) is in custody
11:38 a.m.	Robert: if rulings go against defendants, will seek interlocutory appeal.
11:38 a.m.	Court: will have ruling out on reconsideration out by next week. Motion in limines appear to be cross motions. A ruling could come out on those in about a week. Court: will rule on pleadings. Evaluate rulings and let court know. June 18 docket is fairly full now.
11:42 a.m.	Robert: will file a reply on Monday.
11:44 a.m.	Court: will leave alone the May 21 trial date.
11:45 a.m.	Esparza: decisions on the motion by the calendar call (May 10)? Court: Will get out rulings by that time.
11:46 a.m.	Court in recess.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
DANUEL DEAN QUAINTANCE,	)	**No. CR 06-538 JH**
MARY HELEN QUAINTANCE, and	)	
JOSEPH ALLEN BUTTS,	)	
	)	
Defendants.	)	

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO RECONSIDER DENIAL OF MOTION TO DISMISS INDICTMENT

THE UNITED STATES OF AMERICA, by and through Larry Gomez, Acting United States Attorney for the District of New Mexico, and Luis A. Martinez, Assistant United States Attorney for said District, files this Response in Opposition to Defendants' Motion to Reconsider Denial of Motion to Dismiss Indictment.

I.

DEFENDANTS' RELIANCE ON *UNITED STATES v. SEEGER* AND *UNITED STATES v. WELSH* IS MISPLACED.

The Defendants' reliance on *United States v. Seeger*, 380 U.S. 163 (1965), is misplaced. *Seeger* involves and is limited to cases involing claims of conscientious objectors under §6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. §456(j) (1958 ed.) *Seeger* at 164. *Seeger* is further inapplicable in an analysis of the case at bar, in that *Seeger* does not define religion per se. *Seeger* teaches that all "religions are embraced pursuant to the meaning of religious training and belief. *Seeger* goes on to

exclude political, sociological and philosophical views. Id. But *Seeger* does not define religion. The issue is *Seeger* was what Congress meant by the term "Supreme Being" as used in §6(j), whether it means orthodox God or the broader concept of a power or being or faith. *Seeger* at 174. Hence, *Seeger* is irrelevant to the case at bar.

Likewise, Defendants' reliance on *United States v. Welsh*, 398 U.S. 333 (1970), is misplaced. *Welsh*, too, is a conscientious objector case and therefore inapplicable. *United States v. Meyers*, 906 F. Suppl. 1494, FN 5.

II.

DEFENDANTS' BELIEFS CANNOT FALL WITHIN THE SUPREME COURT'S DEFINITION OF RELIGION BECAUSE NO SUCH DEFINITION EXISTS.

The Defendants assert boldly that ". . . *Meyers* is no longer good law." Doc. 219, pp. 3; 13 and offer no legal support for this assertion. *Meyers* is the definitive Tenth Circuit case on the issue of religion for RFRA purposes. It has not been overruled and is based on sound legal reasoning. The defendants are unable to reference any Supreme Court established definition of Religion, because none exists.

The impetus for the Defendants' assertion that *Meyers* is no longer "good" law appears to be derived from the Ninth Circuit Court of Appeals' decision in *Navajo Nation v. United States Forest Service*, 479 F. 3d 1024. The Ninth Circuit said in *Navajo Nation*, "To the extent that our RFRA cases prior to RLUIPA depended on a narrower definition of 'religious exercise', those cases are no longer good law." Id. At 1033.

III.

RLUIPA AND THE DECISION IN *NAVAJO NATION v. UNITED STATES FOREST SERVICE* HAS NO EFFECT ON THE *MEYERS* DECISION.

Meyers is a Tenth Circuit Appellate decision and cannot be overruled by a Ninth Circuit Appellate decision.

The Defendants rely on *Navajo Nation* to argue that the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) somehow overrules the Tenth Circuit decision in *Meyers*. This is simply not the case. Congress enacted RLUIPA to address a need which RFRA did not. RLUIPA applies to state and local governments and is not applicable to the case at bar. "Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") Pub. I. No. 106-274, 114 stat. 803 (cofified at 42 U.S.C. §§ 2000 cc et seq.). RLUIPA prohibits state and local governments from imposing substantial burdens on the exercise of religion through prisons or land-use regulations. 42 U.S.C. §§ 2000 cc, 2000 cc-1," *Navajo Nation* at 1032. RFRA is still the law of the case since it is the standard to be applied to the federal government. RLUIPA cannot and does not expand the definition of religion as it relates to the case at bar. To cite *Navajo Nation* for the porposition that RLUIPA overrules *Meyers* is beyond the pale.

RLUIPA is applicable only to state and local governments and applies only to prisoner and land use regulations. The Defendants' attempt to apply RLUIPA by extrapolation to RFRA and the Federal government is borne of desperation.

IV.

THE COURT PROPERLY FOUND THE DEFENDANTS' BELIEFS WERE NOT SINCERELY HELD.

This Honorable Court found, and the government agrees, "The evidence further indicates that Defendants created their 'religion' to justify their civil and social belief that marijuana produces no victim and should be legalized." Doc. 178, p. 33. The Court went on to find the "defendants possessed marijuana for commercial, as opposed to religious, purposes." Id p. 34.

Further, since the Court has found the Defendants' beliefs do not rise to the level of "religion" for RFRA purposes, the issue of sincerity before the jury is moot. Assuming, *arguendo*, that sincerity, in this context, were an issue of fact for the jury, standing alone it cannot provide the Defendants RFRA protection. It is the government's position, however, that sincerity in this context, although a factual matter, is the sole province of the Court. Sincerity is a factual matter, and a **district court's** [emphasis added] findings shall not be overturned unless clearly erroneous. *Meyers*, 95 F. 3d at 1482.

CONCLUSION

Defendants' Motion to Reconsider should be denied. The legal analysis contained therein is suspect and its conclusions weak and unsupported. *United States v. Meyers* continues to be "good" law and the law of the case. RLUIPA is inapplicable to the case at bar. *United States v. Seeger* and *United States v. Welsh* are conscientious objector cases and apply to the Universal Military Training and Service Act. The aforementioned case law is irrelevant to RFRA and further offers no working definition of "religion" for RFRA

purposes. On the contrary, *United States v. Meyers*, the law of the case, as well as that of the Tenth Circuit does.

The Supreme Court has not set out a definition of religion for RFRA purposes.

And, as the court has ruled, the Defendants' beliefs are neither sincere nor "religious" for RFRA purposes.

Based on the foregoing the United States requests this Honorable Court to deny defendants' Motion to Reconsider denial of motion to dismiss indictment.

Respectfully submitted,

LARRY GOMEZ
Acting United States Attorney

Electronically filed by
LUIS A. MARTINEZ
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Las Cruces, New Mexico 88011
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I HEREBY CERTIFY that a true copy of the foregoing pleading was delivered to opposing counsel of record on the 3rd day of May, 2007.

/s/
LUIS A. MARTINEZ
Assistant U.S. Attorney

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Cause No. CR 06-538 JH
	§	
DANUEL DEAN QUAINTANCE,	§	
	§	
Defendant.	§	

MR. QUAINTANCE'S REPLY TO THE GOVERNMENT'S RESPONSE TO MOTION FOR RECONSIDERATION

DANUEL DEAN QUAINTANCE, Defendant, by and through the undersigned appointed counsel, Marc H. Robert, Assistant Federal Public Defender, submits the following Reply to the government's Response to Mr. Quaintance's Motion for Reconsideration of his Motion to Dismiss Indictment, and in support of the Motion for Reconsideration would respectfully show the Court as follows:

1. The government claims that the Supreme Court's definitions of religion in the *Seeger* and *Welsh* cases are inapplicable to this case. The government then claims that no definition of religion exists. It is precisely because of the paucity of clear statements by the Supreme Court about the definition of religion and religious practice that the *Seeger* and *Welsh* formulations are so important in determining the issues in this case. Notwithstanding their provenance, different from this case, they represent the nation's highest Court's rare statements on this critical issue. To that extent, the definitions contained in those cases supersede inconsistent Tenth Circuit law and guide the Court's decision in this case.

2. The government calls Mr. Quaintance's citation of the *Navajo Nation* case from the Ninth Circuit an "act of desperation". *Navajo Nation* describes a critical amendment of a critical part of the Religious Freedom Restoration Act, a part which bears directly on the Court's consideration of the issues presented here. The amendment described in *Navajo Nation* was not a Ninth Circuit amendment, but a Congressional enactment which applies to all the circuits. Mr. Quaintance contends that the Ninth Circuit's interpretation of that statutory amendment is highly relevant to this Court's evaluation of the issues. *See also Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005) (discussing the definition of religious exercise under RLUIPA, 42 U.S.C. § 2000cc-1 *et seq*.).

3. Mr. Quaintance believes that the Court misunderstood his description of his religious beliefs and practices during the evidentiary hearing on August 21-23, 2006. Attached to this Reply is a Statement of Danuel D. Quaintance which provides additional information about those beliefs and practices and their origins.

WHEREFORE, for the foregoing reasons, DANUEL DEAN QUAINTANCE, Defendant, by and through the undersigned counsel, respectfully prays that the Court reconsider its decision denying Mr. Quaintance's motion to dismiss the indictment in this cause, enter an order dismissing the indictment, and providing for such other and further relief to which the Court may find Mr. Quaintance to be justly entitled.

Respectfully Submitted,

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filed electronically on May 7, 2007
MARC H. ROBERT
Assistant Federal Public Defender
Las Cruces Office

Counsel for Mr. Quaintance

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply to Response to Motion to Reconsider Denial of Motion to Dismiss Indictment was served on Assistant United States Attorney Luis A. Martinez and Amanda Gould, 555 Telshor, Suite 300, Las Cruces, New Mexico, 88011, by placing it in the box designated for the United States Attorney's Office at the United States District Court Clerk's office; Mr. Mario A. Esparza, P.O. Box 2468, Las Cruces, New Mexico 88004; Ms. Bernadette Sedillo, 201 N. Church St., Suite 330, Las Cruces, New Mexico 88001 on May 8, 2007.

filed electronically on May 7, 2007
MARC H. ROBERT

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Statement of Danuel D. Quaintance
in Support of his Motion for Reconsideration

What the Church of Cognizance, as a modern sect of this ancient religion, has rediscovered and seeks to manifest in teaching, practice, worship, and observance, is the reintroduction of that element which enlightened the mind of the ancient founders, and provided the essential teachings of precepts that lead to founding of that original religion of "good conscience". The "mystery" element is of central focus throughout the scripture of the Zoroastrian religion, and is the central element of the "Haoma Offering", which is given in Yasna 11, just prior to the Zoroastrian Creed, given in the Avesta, Yasna 12.

Today many sects of Zoroastrians have given up adherence to this vital element of the Haoma Offering, or they substitute "Para" elements in place of the original. The problem is the "Para-haoma" offers none of the benefits ascribed to the "original" Haoma. This error has been compounded by the fact most modern Zoroastrians turn to literature composed in the not so distant past, in an attempt to better understand their ancient religion. It is a fact that many Zoroastrian scholars of today show the majority of their reference material is found in books that date no further back then the 1920's, and with the majority of their references to material dating no further back than the 1970's. Even where reference is made to the "Sacred Text of the East", which are volumes of Zoroastrian scripture translated in the late 1800's, they turn to modern printings from the 1970's. This of course is the result of the rare nature of the original translations.

I have been fortunate in acquiring several writings on Zoroastrian topics dating back to 1882. These rare works, combined with personal experiences, have provided me with a

deeper insight than most scholars into the Zoroastrian religion. One prized work is an original printing, of 5,000 copies, of a lecture given by Col. Henry S. Olcott, in Bombay, India Feb 27, 1882, on “The Spirit of the Zoroastrian Religion”. Amongst other insights gained from this work, is a logical explanation given to a question regarding Zarathrusta. A question that has perplexed scholars sufficiently they have variously placed Zarasters existence, and the founding of Zoroastrianism, as being anywhere from 6,000 B.C. to 600 B.C., which leaves plenty of room for debate. This enigma is answered (on pages 10-11) where it is revealed there were in reality at least 15 Zar-asters between those periods. This section explains that “Zar” correlates with Great, and “Aster” with brilliance, or wisdom. Thus a Zaraster was a person the people went to for advice, because they were considered “Enlightened”, for the “Great Wisdom” they possessed.

My studies into this “good religion” have been further assisted through research into Archeological, and other scientific, works related to Zoroastrians. These works have been included in the anthological archives of the COC, which I maintain, and which also includes various modern versions of translations of The Sacred Text, as well as many other books on such topics as, linguistics, transliteration, the classics, several older Encyclopedia sets, Dictionaries, cross references on Religions in general, and significant scholarly works on the particulars of this previously “lost” element, which has now been rediscovered.

ZOROASTRIANISM

Zoroastrianism is considered the oldest existing monotheistic religion. It has numerous schools of thought regarding, origin, teachings, customs, and traditions. Today there are “some” scholars that declare there are three major divisions, which can be recognized by the

calendars they follow. These include the, Shahenshahis of India known as Parsis, the Qadimis of Iran, and the Faslis. Of the Parsis of India there are three recognized sub-divisions of "Traditionalists." They are the common faithful, and the occult schools of the Ilm-e Khshnumists, and the Pandole Groups. Other scholars divide the major sects into two major divisions according to their race, considering the Persians, the Parsi Zoroastrian, and Iranians known as the Irani Zoroastrian. Then still other scholars divide them as Institutionalized, Liberal, and Orthodox. This last division is most interestingly deceptive, and causes the greatest division, which could lead to the extinction of what was the largest modern group known as the "Parsi" Zoroastrians. Institutionalized Parsi is from a group of Zoroastrians that fled to India to avoid persecution in Iran. They persist in a misplaced belief of "next of kin" marriage believing this demands that no one can convert into the religion. That only those born into the religion can be considered Zoroastrian. This concept is not supported by scripture, such as given in the Dadestan-i Denig, ('Religious Decisions') Chapter 65, sixty-forth question and reply, which provides a similar story as the story of Adam and Eve being the first parents of all human kind, thus all are related in the human race. Thus, with everyone being related, and as the scripture also teaches, anyone desiring to convert can. Some groups believe that anyone professing the Zoroastrian Creed of Avesta, Yasna 12, therein professes their self to be a member of the Zoroastrian "Mazdayasnian" Religion. And yet other groups believe you must go through various rituals of initiation. And within the Zoroastrian religion there are sects, much like the Christian religion, where there is no proof of your religion other than your profession it is.

Regardless of, calendar, race, customs, rituals, practices, lifestyles, or philosophical divisions, there are common links amongst all Zoroastrians by which they can be recognized as a member of that religion. One feature they all share in common is found in the mantra "good thoughts, good words, good deeds", which provides the moral and ethical compass for all Zoroastrians. Other features include worship of Ahura Mazda (lit. Great Wisdom), and the common sources of scripture found in the Gathas, and Avesta, of which some are attributed as being composed by Zarathrusta Spitama.

For modern Zoroastrians, however, even these scriptures are a point of division with some adhering only to the Gathas, others the Avesta, and its fragments, and still others of the institutionalized Zoroastrians upon nearly anything labeled Zoroastrian.

The Church of Cognizance is founded upon exploration of the many schools of thought in attempt to return to the truest, beneficent, and original practices of the "good religion", which through enlightenment caused weapons to be put down, which clothed and sheltered the people, and which provided abundantly, the "best" nutrition for the bodies, minds, and souls of the original followers.

I have personally handed out literally thousands of laminated business cards professing this essential "mystery" element, which has been "lost" for so many years, but is now resurrected in teaching, practice, worship, and observance by members of the Church of Cognizance, and which is stated here below in exact words incorporated on the back my business cards:

"THE HOM YASHT Sacred Books of the East, American Edition, 1898Yasna 9 (2000-1400 B.C.) 8. All other toxicants go hand in hand with the Rapine of the bloody spear,but Marijuana's stirring power goes hand in hand with friendship. 16. Thereupon spake

Zarathrusta: Praise be to Marijuana, Good is Marijuana, the well-endowed, exact and righteous in its nature, and good inherently, and healing, beautiful of form…good in deed… successful in its working…. . **the most nutritious for the soul** …17. I make my claim of thee, O yellow one! For inspiration, I make my claim on thee for strength…I make my claim on thee for health and healing (when healing is my need); I make my claim on thee for progress and increased prosperity…vigor of the entire frame, for understanding, of each adorning kind . . .overwhelming malice, and conqueror of lies. . .25. Hail to thee, O Marijuana, who hast power as thou wilt, and by thine inborn strength! Hail to thee, thou art well-versed in many sayings, and true and holy words. Hail to thee for thou dost ask no wily questions,**. . . but questioneth direct . .**

The word Hom is the Pahlavi word with the same meaning of Haoma. The Avestan Yashts dedicated specifically to Haoma, which is the part of the Avesta are known as the Hom Yasht, Avesta, Yasna 9-11.

I have given selected verses from Yasna 9 above. Yasna 10, below, deals more with identifying properties and ends with these important observations and professions:

17. Thereupon spake Zarathushtra: Praise to Haoma, Mazda-made. Good is Haoma, Mazda-made. All the plants of Haoma praise I, on the heights of lofty mountains, in the gorges of the valleys, in the clefts (of sundered hill-sides) cut for the bundles bound by women. From the silver cup I pour Thee to the golden chalice over. Let me not thy (sacred) liquor spill to earth, of precious cost. 18. These are thy Gathas, holy Haoma, these thy songs, and these thy teachings, and these thy truthful ritual words, health-imparting, victory-giving, from harmful hatred healing giving. 19. These and thou art mine, and forth let thine exhilarations flow; bright and sparkling let them hold on their (steadfast) way; for light are thine exhilaration(s), and flying lightly come they here. Victory-giving smiteth Haoma, victory-giving is it worshipped; with this Gathic word we praise it. 20. Praise to the Kine; praise and victory (be) spoken to her! Food for the Kine, and pasture! 'For the Kine let thrift use toil; yield thou us food.' 21. We worship the yellow lofty one; we worship Haoma who causes progress, who makes the settlements advance; we worship Haoma who drives death afar; yea, we worship all the Haoma plants. And we worship (their) blessedness, and the Fravashi of Zarathushtra Spitama, the saint.

Yasna 11 is the “Prelude to the Haoma/Marijuana offering”, which significantly reads in part:

10. To thee, O holy Haoma/Marijuana! bearer of the ritual sanctity, I offer this my person which is seen (by all to be) mature, (and fit for gift); to Haoma/Marijuana the effective do

I offer it, and to the sacred exhilaration which he bestows; and do thou grant to me (for this), O holy Haoma/Marijuana! thou that drivest death afar, (Heaven) the best world of the saints, shining, all brilliant.
11. (The Ashem Vohu, &c.)
12-15. May'st Thou rule at Thy will, O Lord ....(Repeat Y8.5-7)
16. I confess myself a Mazdayasnian of Zarathustra's order.
17. I celebrate my praises for good thoughts, good words, and good deeds for my thoughts, my speeches, and (my) actions. With chanting praises I present all good thoughts, good words, and good deeds, and with rejection I repudiate all evil thoughts, and words, and deeds.
18 Here I give to you, O ye bountiful Immortal! Sacrifice and homage with the mind, with words, deeds, and my entire person; yea, (I offer) to you the flesh of my very body (as your own). And I praise Righteousness. A blessing is Righteousness (called) the Best, &c.

Some declare the identity of Haoma remains questionable. The discoveries in the Bactria-Margiana Archeological Complex, and association of Ephedra, Poppies, and Cannabis, with the Haoma of the Zoroastrians, combined with physical descriptions given in the Sacred Text of the Zoroastrian religion, removed all doubt from my mind. Neither, Ephedra, nor Poppies, fit all the descriptions of Haoma. Cannabis was the only other plant matter found and it fits all of the identifying features perfectly.

What has been provided above is less than exhaustive of the "Ahuric wisdom" to be gained from deeper study and adherence to this "Great" religion of "good conscience". However I do hope this short expose provides a starting place for others to seek the truth, and thereby giving my meager yet humble support to the religion of "good conscience", and "conquering the lie"!

The Government's witness, Dr. Bagli, was a "Parsi" Zoroastrian. "Parsi" are one "Sect" of many, and even within the "Parsi", there are numerous interpretations, and selections of scripture, of primary focus to various individuals within that sect.

The COC is a "Church" which adheres to the Zoroastrian religions creed of, "good thoughts, good words, good deed" as a moral and ethical compass just as "most" Zoroastrian sects do.

Haoma is a Zoroastrian Deity, a plant of questionable identity, and a "drink" made from the plant referred to throughout the Avesta: Yasna as "the averter of death, and conqueror of the lie."

For all intents and purposes the COC should have easily been seen as a "sect" of a religion, which relies on interpretation of Zoroastrian scripture.

Don't let the sect of Zoroastrians, which believe you must be born into their sect to be a Zoroastrian, take away from reality of the many sects, which do not hold this same belief.

The religion of the Church of Cognizance is based on an interpretation of Zoroastrian, scripture, practices, lifestyle, and philosophy.

There is a strong difference between a "Church" and a "Religion". This should easily be seen in the various "Churches/Sects" of the Christian Religion.

The Church of Cognizance is not the creation of a new religion. It is simply a new “church”, dedicated to manifesting valuable precepts, which have been lost from the ancient religion of Zoroastrians. A church is simply an assembly, or congregation, of adherents to a particular belief, and cognizance is “to know”. The Church of Cognizance “knows” it has rediscovered the greatest truth, and seeks to enlighten others of this essential element of the “good religion”.

Today most modern Zoroastrians will admit they no longer know the identity of this essential element of the “good religion”, which “mysteriously” became “lost” due to

changing social climes, persecutions, migrations, and or simply attrition of age. However, regardless of changing political climates, or any other cause, there are some elements you cannot remove from a religion and still consider it the same religion. To do so would be like taking Christ out of the Christian religion!

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. **Cr. No. 06-538 JH**

DANUEL DEAN QUAINTANCE,
MARY HELEN QUAINTANCE,
TIMOTHY JASON KRIPNER, and
JOSEPH ALLEN BUTTS,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendant Danuel Quaintance's *Motion to Reconsider Denial of Motion to Dismiss Indictment* [Doc. No. 219]. Having reviewed the motion, the law, and the arguments of the parties, the Court concludes that the motion to reconsider should be denied.

DISCUSSION

Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. *See Brumark Corp. v. Samson Resources Corp*., 57 F.3d 941, 948 (10th Cir. 1995). "Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Arguments raised for the first time in a motion for reconsideration are not properly before the court and generally need not be addressed. *Burnette v. Dresser Indus., Inc*., 849 F.2d 1277, 1285 (10th Cir. 1988) (citing *Eureka-Carlisle Co. v. Rottman*, 398 F.2d 1015, 1019 (10th Cir. 1968)).

I. 2000 AMENDMENT TO RFRA

In support of his motion to reconsider, Defendant argues first that this Court should not have followed the Tenth Circuit's decision in *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996) because in 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). At the same time, Congress incorporated RLUIPA's definition of "religious exercise" into the Religious Freedom Restoration Act ("RFRA"). *See* 42 U.S.C. § 2000bb-2(4). Prior to 2000, and at the time the Tenth Circuit decided *Meyers*, RFRA defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution." *Id.* (historical and statutory notes). Defendant argues that the revised definition of "religious exercise" is broader than the original definition, and that along with the Ninth Circuit's recent opinion in *Navajo Nation v. United States Forest Service*, 479 F.3d 1024, 1033 (9th Cir. 2007), it invalidates the multi-pronged test adopted in *Meyers* to determine what constitutes "religious" beliefs. *Meyers*, 95 F.3d at 1483-84. This argument fails for several reasons. As an initial matter, this is the first time Defendant has argued that RFRA's amended definition of "exercise of religion" invalidates *Meyers*. He failed to present that argument in his original briefing, at the evidentiary hearing, and in his written closing arguments submitted after the evidentiary hearing. That failure is critical, since Defendant's argument turns on a 2000 amendment of RFRA that took place approximately six years before this case commenced, and Defendant certainly could have raised the argument the first time he briefed his motion to dismiss the indictment. In other words, this was not an "intervening" change in the controlling law; it took place years before the issue came before the Court. Defendant's failure to raise this argument until the motion to reconsider is sufficient grounds to reject it.

Second, the argument fails on its merits. Defendant makes the conclusory statement that the amended definition of "religious exercise" nullifies *Meyers*, but he fails to adequately explain why this is so. He summarily contends that *Meyers* is geared toward "traditional church-and-steeple religious practices common in the Western world," and that the new definition "rejects such a formulation by specifically eliminating any requirement that the religious practice be part of a 'system of religious belief." Motion at p.3. Defendant overlooks the fact that under either definition of "religious exercise," RFRA protects only *religion*, as opposed to secular beliefs and practices. Thus, whether or not that religious exercise is part of a system of religious belief, it still must be religious in nature. *Meyers*, which is binding upon this Court, provides a framework for that determination. Furthermore, the Court rejects Defendant's suggestion that under a balancing of the *Meyers* factors, only a western religion in the Judeo-Christian tradition could qualify as religion; indeed, a broad array of world religions could satisfy the *Meyers* factors.

Finally, Defendant's reliance upon *Navajo Nation* is misplaced. In that case, the Ninth Circuit observed that "Congress expanded the statutory protection for religious exercise" by amending the statutory definition, which "protects a broader range of religious conduct than the Supreme Court's interpretation of 'exercise of religion' under the First Amendment." 479 F.3d at 1033. The Ninth Circuit then held that any of its prior RFRA decisions which relied upon the old definition of "religious exercise" were no longer good law. Based on that, Defendant argues that Tenth Circuit RFRA opinions before 2000, including *Meyers*, are no longer good law. However, the Ninth Circuit has no power to overrule a Tenth Circuit decision such as *Meyers*, which remains the law in this Circuit. Furthermore, and most importantly, Defendant has failed to explain how and why the *Meyers* factors are incompatible with the 2000 definition of "religious exercise." The amended definition includes any exercise of religion, even if it is not compelled by or central to a

"system of religious belief."[1] However, it still requires the protected activity to be religious in nature. The *Meyers* framework, designed specifically to help a reviewing court determine whether a particular activity is "religious," still informs that issue. Having no authority to the contrary, the Court concludes that *Meyers* is still the law in the Tenth Circuit and did not err in applying its multi-factor test.[2]

II. SUPREME COURT CASES PREDATING *MEYERS*

Next, Defendant argues that this Court should refuse to apply the *Meyers* factors because they conflict with Supreme Court opinions issued prior to *Meyers*. In this regard, Defendant expands upon his previous reliance on *United States v. Seeger*, 380 U.S. 163 (1965) and *Thomas v. Review Bd. of the Indiana Emp. Sec. Div.*, 450 U.S. 707 (1981). He also cites for the first time to *Welsh v. United States*, 398 U.S. 333 (1970) and *Torcaso v. Watkins*, 367 U.S. 488 (1961). The Court concludes that *Meyers* does not directly conflict with the rationales and holdings in any of these cases and therefore is not unconstitutional, as Defendant contends.

Defendant also argues that in its prior Memorandum Opinion and Order [Doc. No. 192], this Court held that he failed to present evidence that a higher power expects him to act in accordance with the motto "good thoughts, good words, good deeds," and that the Supreme Court has forbidden courts from demanding proof of the veracity of particular religious beliefs. Defendant misapprehends this Court's analysis and opinion. As the Court set forth in pages 11-14 of its Memorandum Opinion and Order, under *Meyers* a religion is often characterized by a moral or

[1] Neither Defendants nor the statute distinguish a "system of religious belief" from "any exercise of religion" within the amended definition.

[2] At some point the Tenth Circuit may revisit the *Meyers* factors, and may choose to modify or even eliminate them altogether. However, that issue will be left to the Tenth Circuit; this Court is constrained to follow established precedent.

ethical system that distinguishes right from wrong, and often imposes duties which its adherents believe to be imposed by some higher power, force, or spirit. *Meyers*, 95 F.3d at 1483. In its analysis, the Court merely observed that Defendants had failed to present evidence of their *belief* that any higher power expects them to act in accordance with the philosophy of "good thoughts, good words, good deeds," and that their failure to present evidence of such a belief was a further indicator that their beliefs are secular, as opposed to religious. The Court did not purport to require the Defendants to prove that a higher power exists and expects them to behave in a particular way; the Court merely observed that Defendants espoused no belief in a moral code imposed by any sort of higher force, power, or spirit.

In sum, the Court declines to reconsider its determination that Defendant's beliefts are not "religious" as required by RFRA.

III. SINCERITY OF BELIEF

Defendant argues that the Court erred in finding that his beliefs, in addition to not being religious, are not sincerely held. Defendant contends that sincerity is a fact issue for the jury and is not an issue for the court. This argument fails for two reasons. First, Defendant never argued that the issue of sincerity should be decided by a jury, not the Court, until he filed his motion to reconsider. As explained above, arguments raised for the first time in a motion for reconsideration are not properly before the Court. Second, Defendant effectively waived this argument in his motion to dismiss by affirmatively asking the Court to find that his beliefs are sincere. *See* Motion [Doc. No. 34] at p. 5 ("Mr. Quaintance will establish that his use of cannabis is a sincere religious practice . . ."); Defendants' Reply [Doc. No. 68] at p. 9 ("The government questions both the sincerity of Mr. Quaintance's beliefs and that those beliefs constitute a religion. The first challenge, to Mr. Quaintance's sincerity, is nothing more than an uninformed opinion held by the prosecutor.

. . . At the evidentiary hearing on Mr. Quaintance's motion, Mr. Quaintance will describe the arc of the development of his religious beliefs. . . . The briefing so far has discussed the sincerity of Mr. Quaintance's religious practice, a threshold consideration for the Court."). In addition, at the hearing on the motion to dismiss, Defendant presented the Court with evidence relating to the sincerity of his beliefs. Furthermore, after the hearing Defendant briefed the issue and urged the Court to find that his beliefs are not only religious, but also sincere. *See* Defendant's Closing Argument [Doc. No. 160] at pp. 5, 7, and 11 ("Listening to the descriptions of their separate quests for higher spiritual knowledge and understanding, one is hard pressed to question the sincerity of Danuel Quaintance . . . . Again, it is difficult to question Mr. Quaintance's sincerity after listening to him describe the basis and path of his journey of discovery and belief. But is it religious? . . . . The Court should find that Mr. Quaintance acted out of sincere religious belief, and this matter should be set for the next phase of the hearing on his motion to dismiss, dealing with compelling government interest and least intrusive means of satisfying any such interest."). Having placed the issue of his sincerity before the Court, having presented evidence on the issue, and having asked the Court to find in his favor on that same issue, Defendants may not now be heard to argue that the Court should have left the question of his sincerity to the jury.

IV. NEW MATERIALS PRESENTED IN REPLY BRIEF

Finally, in his reply brief in support of the motion to reconsider [Doc. No. 230], Defendant argues that the Court misapprehended his description of his religious beliefs and practices during the evidentiary hearing. Consequently, he attached to his reply an eight-page "statement" containing an explanation of his beliefs, presumably in an effort to persuade the Court that it erred in finding that those beliefs are neither religious nor sincerely held. However, the Court will not consider the statement for two reasons. First, it is unsigned and unsworn, and therefore inadmissible into

evidence. Second, it contains facts and allegations that could have been raised before the Court decided Defendant's motion to dismiss. On a motion to reconsider, the Court will not consider evidence that was available to the Defendant, but which he failed to present, at the evidentiary hearing.

IT IS THEREFORE ORDERED that Danuel Quaintance's *Motion to Reconsider Denial of Motion to Dismiss Indictment* [Doc. No. 219] is **DENIED**.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. **Cr. No. 06-538 JH**

DANUEL DEAN QUAINTANCE,
MARY HELEN QUAINTANCE,
TIMOTHY JASON KRIPNER, and
JOSEPH ALLEN BUTTS,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on cross motions in limine on the same subject matter. Defendant Danuel Quaintance moves for an order allowing him to present to the jury evidence of the nature and sincerity of his religious practices in order to support his Religious Freedom Restoration Act ("RFRA") defense to the charges against him. The Government has filed a motion in limine in direct opposition, arguing that Defendants should not be permitted to present such evidence at trial. After considering the law, the facts, and the arguments of the parties, the Court concludes that Defendant's motion should be denied, and the Government's motion should be granted.

DISCUSSION

Defendants present several arguments in support of their request to present the evidence of their religious beliefs to the jury. First, they contend that the evidence demonstrates that they lacked the requisite intent to commit the crimes of possession of marijuana with intent to distribute it, as well as conspiracy to possess marijuana with intent to distribute. As grounds for this argument, they state that due to their religious beliefs, they believed they were not violating the law because they thought

they had a valid defense under RFRA, that therefore they did not intend to commit a crime, and therefore they were not committing a crime by possessing and distributing marijuana. In other words, they contend that the evidence of their religious beliefs will negate the element of intent. *See* Docket No. 227 at pp. 1-3; Docket No. 224 at p. 1. This argument fails because under the statutes at issue, the Government must prove only that the Defendants committed the alleged crimes "knowingly;" they do not require the Government to prove a wilful violation. *See* 21 U.S.C. 846(a)(1) ("Except as authorized by this subchapter, it shall be unlawful for any person *knowingly* or intentionally. . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance") (emphasis added); *see also* Superseding Indictment.

As the Supreme Court has observed, "unless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." *Bryan v. United States*, 524 U.S. 184, 193 (1998) (footnote omitted). The term does not require knowledge that one's actions are unlawful or a desire to violate the law. *Id.* In contrast, "[a]s a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." *Id.* at 191-92 (internal quotation marks omitted). Thus, Defendants' subjective belief that they were acting lawfully would be relevant only to a charge of a wilful violation of the law. However, because they are charged with violating a statute that requires only a "knowing" violation, the Government need only prove that the Defendants had knowledge of the underlying facts to support the charge, e.g., that they knew that the substance was marijuana, and that they knew it was in their possession. Their lack of intent to violate the law is not relevant to the charges against them.

Defendants also argue that the Court's pretrial ruling finding a lack of sincerity in their religious beliefs under RFRA does not preclude them from bringing the issue of sincerity–a fact question–before the jury at trial. Defendants rely upon *Crane v. Kentucky*, 476 U.S. 683 (1986), for this proposition. However, *Crane* is distinguishable. In that case, the defendant had filed a motion to suppress evidence of his confession, which he alleged was obtained through coercive tactics that violated his Fourth Amendment rights. Finding no Fourth Amendment violation, the Court declined to suppress the evidence and allowed it to be admitted at trial. As a result, the Government presented the evidence of defendant's confession during the trial. However, the credibility of the confession, and therefore the weight to be given to that evidence, was an issue of fact for the jury, and one to which the voluntariness of the confession pertained. As a result, the trial court should have permitted the jury to hear evidence regarding the circumstances surrounding defendant's confession. In short, the Court resolved fact issues in order to resolve the pretrial *legal* questions of voluntariness and admissibility, but the issue of the weight to give the evidence of the confession remained with the jury.

In this case, in contrast, in their motion to dismiss the indictment the Defendants asked the Court to resolve two separate pretrial issues: the legal question of whether their beliefs are "religious" as required by RFRA, and the fact question of the sincerity of their beliefs. Because the Court has concluded that Defendants' beliefs are not religious under RFRA, that legal defense is no longer open to Defendants, and therefore there is no reason for the jury to resolve the fact issue of sincerity; it is simply moot. Thus, this situation is unlike that presented in *Crane*.

In sum, the Court concludes that evidence of Defendants' religious beliefs, or of the sincerity of those beliefs, is not admissible to show that Defendants have a defense under RFRA, nor is it

admissible to show that they lacked the intent to violate the law.

IT IS THEREFORE ORDERED that *Mr. Quaintance's First Motion in Limine* [Doc. No. 187] is **DENIED**, and the *Government's Motion in Limine No. 1* [Doc. No. 217] is **GRANTED**.

JUDITH C. HERRERA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Cause No. CR 06-538 JH
	§	
DANUEL DEAN QUAINTANCE,	§	
	§	
Defendant.	§	

NOTICE OF APPEAL

DANUEL DEAN QUAINTANCE, Defendant, by and through the undersigned appointed counsel, Jerry D. Herrera, hereby gives notice of his appeal from the district court's Order [Doc. 236] denying his Motion in Limine [Doc. 187] and granting the government's Motion in Limine [Doc 217], entered on May 11, 2007; the district court's Memorandum Opinion and Order [Doc. 235] denying Mr. Quaintance's Motion for Reconsideration of Motion to Dismiss Indictment [Doc 219], entered on May 9, 2007; and the district court's Memorandum Opinion and Order, entered on December 22, 2006 [Doc. 192] denying Danuel D. Quaintance's Motion to Dismiss Indictment [Doc. 34]. This Notice of Appeal is filed pursuant to the Collateral Order Doctrine. *See United State v. Musson*, 802 F.2d 384 (10th Cir. 1986); *United States v. David A.*, 436 F.3d 1201 (10th Cir. 2006).

/s/ electronically signed

JERRY DANIEL HERRERA
Attorney for Defendant Quaintance
509 13th Street SW
Albuquerque, New Mexico 87102
Telephone: (505) 262.1003

I hereby certify that a true and correct copy of the foregoing was faxed to the Assistant United States Attorney on this 21st day of May, 2007.

/s/ electronically signed

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Cause No. CR 06-538 JH
	§	
DANUEL DEAN QUAINTANCE,	§	
MARY QUAINTANCE,	§	
	§	
Defendants.	§	

ORDER GRANTING EXTENSION OF TIME

THIS MATTER comes before the Court on motion of Defendants DANUEL DEAN QUAINTANCE and MARY QUAINTANCE for extension of time to file interlocutory appeal in this cause. The Court, having reviewed the Motion, being aware of the positions of the parties and being otherwise fully advised in the premises, is of the opinion that the Motion is well taken and should be granted.

It is therefore **ORDERED** that time to file an interlocutory appeal is hereby extended for 10 day's following the appointment of new counsel of record.

The Court further finds that the interest of justice would best be served by the granting of, and that this outweighs the interest of the public and the defendants in a speedy trial, 18 U.S.C. 3161 (h)(8)(A).

JUDITH C. HERRERA
UNITED STATES DISTRICT JUDGE

TRANSCRIPT ORDER FORM - DIRECTIONS ON REVERSE SIDE

PART I - To be completed by appellant within ten days of filing the notice of appeal

Short Title: USA v. Quaintance District: New Mexico
District Court Number: CR 06-538 JH Circuit Court Number: 07-~~2137~~ 2143
Name of Attorney: John F. Robbenhaar
Name of Law Firm: Robbenhaar Law Office, P.C.
Address of Firm: 1011 Lomas NW
Telephone of Firm: 505-242-1950 Attorney for: Mary Helen Quaintance
Name of Court Reporter: Paul Baca Telephone of Reporter: 348-2228

PART II - COMPLETE SECTION A OR SECTION B

SECTION A - I HAVE NOT ORDERED A TRANSCRIPT BECAUSE

[] A transcript is not necessary for this appeal, or
[] The necessary transcript is already on file in District Court
[] The necessary transcript was ordered previously in appeal number ______

SECTION B - I HEREBY ORDER THE FOLLOWING TRANSCRIPT:
(Specify the date and proceeding in the space below)

Voir dire: ______; Opening Statements: ______;
Trial proceedings: ______; Instruction Cnf: ______;
Jury Instructions: ______; Closing Arguments: ______;
Post Trial Motions: ______; Other Proceedings: **Motion to Dismiss Indictment proceedings, Aug. 21–23, 2006 (Las Cruces)**

(Attach additional pages if necessary)

[] **Appellant will pay the cost of the transcript.**
My signature on this form is my agreement to pay for the transcript ordered on this form.

[X] **This case is proceeding under the Criminal Justice Act.**
NOTE: Leave to proceed *in forma pauperis* does not entitle appellant to a free transcript. An order of the district court allowing payment for the transcript at government expense must be obtained. *See* 28 U.S.C. §753(f).

CERTIFICATE OF COMPLIANCE

I certify that I have read the instructions on the reverse of this form and that copies of this transcript order form have been served on the **court reporter (if transcript ordered), the Clerk of U.S. District Court, all counsel of record or pro se parties, and the Clerk of the U.S. Court of Appeals for the Tenth Circuit.** I further certify that satisfactory arrangements for payment for any transcript ordered have been made with the court reporter(s).

Signature of Attorney/Pro Se: John F. Robbenhaar Date: 6/7/07

PART III - TO BE COMPLETED BY THE COURT REPORTER

Upon completion, please file one copy with the Clerk of the U.S. Court of Appeals and one copy with the Clerk of the U.S. District Court.

Date arrangements for payment completed: ______
Estimated completion date: ______
Estimated number of pages: ______
I certify that I have read the instructions on the reverse side and that adequate arrangements for payment have been made.

Signature of Court Reporter: ______ Date: ______

TRANSCRIPT ORDER FORM

UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARY HELEN QUAINTANCE,,

Defendant-Appellant.

District Court No. CR 06-538 JH

Court of Appeals No. 07-2137
07-2143

NOTE: THIS DESIGNATION FORM MUST BE COMPLETED AND FILED IN ACCORDANCE WITH THE INSTRUCTIONS ON THE REVERSE SIDE OF THE FORM.

Those original papers which have been designated by circling their respective docket numbers (or dates of entry) on the attached copy of the district court's docket sheets should be included in the record on appeal prepared by the clerk of the district court and transmitted to the clerk of the court of appeals. (If the district court clerk so elects, original papers may be retained in the district court and copies thereof may be included in the record on appeal.)

The following items should also be included in the record on appeal. (Portions of transcripts should be designated by hearing dates and page numbers.)

1. Transcripts of proceedings on Defendant's Motion to Dismiss Indictment, held in the district court on August 21, 22, and 23, 2006 (entered on docket on September 12, 2006).
2. _____
3. _____
4. _____
5. _____

(Attach additional sheets if necessary)

Signature: John F. Robinson

Counsel for: Mary Helen Quaintance

I hereby certify that a copy of this designation, with docket sheets attached, was mailed on opposing counsel and the clerk of the court of appeals on June 8, 2007.

Signature: John F. Robinson

United States District Court
District of New Mexico
Office of the Clerk
Pete V. Domenici United States Courthouse

333 Lomas Blvd. N.W. - Suite 270
Albuquerque, New Mexico 87102
(505) 348-2000 - Fax (505) 348-2028

Matthew J. Dykman
Clerk of Court

Divisional Offices
120 South Federal Place
P.O. Box 2384
Santa Fe, NM 87504-2384
(505) 988-6481
Fax (505) 988-6473

200 East Griggs
Las Cruces, NM 88001
(505) 528-1400
Fax (505)528-1425

September 17, 2007

Elisabeth Schumaker, Clerk
United States Court of Appeals
for the Tenth Circuit
The Byron white United States Courthouse
1823 Stout Street
Denver, Colorado 80257

Re: USA v. Danuel Dean Quaintance; Mary Helen Quaintance; Joseph Allen Butts; USCA# 07-2140; 07-2143; USCA# 07-2137

Dear Ms. Schumaker,

Enclosed is the record on appeal in four (4) volumes which consists of the following:

Volume I	Pleadings
Volume II	Transcript of Motion Hearing 08/21/2006
Volume III	Transcript of Motion Hearing 08/22/2006
Volume IV	Transcript of Motion Hearing 08/23/2006

Please acknowledge receipt of this record on the copy of the letter and return to this office.

Matthew J. Dykman, Clerk
of the United States District Court
for the District of New Mexico

enclosures
cc: counsel of record

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

May 07, 2008

Douglas E. Cressler
Chief Deputy Clerk

Matthew Dykman
United States District Court for the District of New Mexico
Office of the Clerk
200 East Griggs
Las Cruces, NM 88001-0000

RE: 07-2140, United States v. Quaintance (Danuel)
Dist/Ag docket: CR-06-538-JH

Dear Clerk:

Please be advised that the mandate for this case has issued today. Please file accordingly in the records of your court.

Please contact this office if you have questions.

Sincerely,

Elisabeth A. Shumaker
Clerk of the Court

cc: Terri J. Abernathy
Jerry Daniel Herrera
Luis Armando Martinez
John F. Robbenhaar
Leon Schydlower
Bernadette Sedillo

FILED
United States Court of Appeals
Tenth Circuit

April 15, 2008

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DANUEL DEAN QUAINTANCE, MARY HELEN QUAINTANCE, and JOSEPH ALLEN BUTTS, Defendants - Appellants, and TIMOTHY JASON KRIPNER, Defendant.	Nos. 07-2137, 07-2140 and 07-2143

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. NO. CR-06-538-JH)

John F. Robbenhaar, Albuquerque, New Mexico, for Defendants-Appellants.

Terri J. Abernathy, Assistant United States Attorney (Larry Gomez, United States Attorney, with her on the brief), Las Cruces New Mexico, for Plaintiff-Appellee.

Before **KELLY**, **ANDERSON**, and **MURPHY**, Circuit Judges.

MURPHY, Circuit Judge.

Defendants Joseph Allen Butts, Danuel Dean Quaintance, and Mary Helen Quaintance were indicted for conspiracy to possess and possession of marijuana with intent to distribute.[1] The defendants moved to dismiss the indictment, arguing the prosecution constituted a substantial burden on the exercise of their religion in violation of the Religious Freedom Restoration Act ("RFRA"). 42 U.S.C. §§ 2000bb–2000bb-4. The district court denied the motion and granted the government's motion in limine barring the defendants from raising a RFRA defense at trial. The defendants filed these interlocutory appeals.[2] We hold the defendants have not asserted a valid right not to be tried under the collateral order exception to the final judgment rule. *See* 28 U.S.C. § 1291. We therefore **DISMISS** the appeals.

I. Background

The defendants were charged in a two-count indictment with conspiring to possess and actual possession of marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), and 846. In their motion to dismiss the indictment, the defendants argued they are members of the Church of Cognizance and sincerely believe cannabis is a deity and sacrament essential to the practice of

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[1]Co-defendant Timothy Jason Kripner is not a party to this appeal.

[2]The defendants each filed a notice of appeal. This court consolidated those appeals for briefing purposes only. The defendants participated in joint briefing and assert the same arguments in their appeals.

their religion. The defendants further argued that this enforcement of the Controlled Substances Act is contrary to RFRA because it substantially burdens their free exercise of religion, without furthering a compelling government interest.

The district court, after conducting a three-day evidentiary hearing on the motion, determined the defendants had not established the existence of a sincerely held religious belief. It therefore denied the motion to dismiss the indictment. It also denied the defendants' motion to reconsider its decision. The parties filed cross motions in limine, the defendants moving for an order allowing them to present a RFRA defense at trial and the government arguing such evidence should not be presented. The district court denied the defendants' motion and granted the government's motion. The defendants each filed a notice of appeal from the district court's orders denying the motion to the dismiss, denying the motion to reconsider, and granting the government's motion in limine. The government filed a motion to dismiss the appeals for lack of jurisdiction.

II. Discussion

This court has jurisdiction to hear appeals from "final decisions of the district court." 28 U.S.C. § 1291. The government argues the appeals must be dismissed for lack of jurisdiction because there is no final judgment of the district court and the orders appealed do not meet the requirements of the collateral order doctrine. The defendants acknowledge the interlocutory nature of their appeals,

but contend their claim falls under the collateral order exception to the final judgment rule.

The collateral order doctrine encompasses only a small class of cases "that 'finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" *Mesa Oil, Inc. v. United States*, 467 F.3d 1252, 1254 (10th Cir. 2006) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). Three requirements must be met before this court can entertain an appeal under this exception: "[1] the order must conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Generally, an order is effectively unreviewable under the third prong of this test "only where the order at issue involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498-99 (1989) (quotations omitted). Because we conclude the orders appealed here cannot satisfy this third requirement, we will not consider the first two prongs of the test. *See Mesa Oil*, 467 F.3d at 1255.

A right not to be tried "rests upon an explicit statutory or constitutional guarantee that trial will not occur." *Midland Asphalt Corp. v. United States*, 489

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U.S. 794, 801 (1989). "Because of the compelling interest in prompt trials, the [Supreme] Court has interpreted the requirements of the collateral-order exception to the final judgment rule with the utmost strictness in criminal cases." *Flanagan v. United States*, 465 U.S. 259, 265 (1984). This court has held there is no right not to be tried for ordinary speech protected by the First Amendment because there is no such statutory or constitutional guarantee. *United States v. Ambort*, 193 F.3d 1169, 1171 (10th Cir. 1999). In so holding we relied upon "'the crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges.'" *Id.* (quoting *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 269 (1982)). We concluded "First Amendment defenses like those [at issue in *Ambort*] are adequately safeguarded by review after any adverse final judgment." *Id.* at 1172.

The defendants claim the orders at issue here are effectively unreviewable because RFRA and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc–2000cc-5, codify a First Amendment right not be tried. They argue a First Amendment free exercise right is lost if not vindicated before trial because the act of going to trial may chill the exercise of the right and, if the defendants are convicted, that loss of liberty can never be remediated. This court must "view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994).

Like the defendants in *Ambort*, the defendants here have asserted only a First Amendment defense rather than a right not to be tried. They have pointed to no explicit guarantee in the Constitution or in statute indicating such a right attaches to their free exercise claims. To the contrary, both RFRA and RLUIPA explicitly state they may be used as a *defense* in a judicial proceeding. 42 U.S.C. § 2000bb-1 ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding . . . ."); 42 U.S.C. § 2000cc-2(a) ("A person may assert a violation of this chapter as a claim or defense in a judicial proceeding . . . ."). Unlike the scenario in *United States v. P.H.E., Inc.*, where this court considered the chilling effect a prosecution had on a First Amendment right, the defendants here have not shown "substantial evidence of an extensive government campaign . . . designed to use the burden of repeated criminal prosecutions to chill the exercise of First Amendment rights." 965 F.2d 848, 855 (10th Cir. 1992) (noting the case presented "an unusual, perhaps unique confluence of factors"). Further, were we to conclude that the possibility of wrongful imprisonment rendered an order immediately reviewable, the collateral order exception would certainly swallow the final judgment rule.

The rights asserted here can be vindicated by appellate review after the district court has entered a final judgment. We therefore hold the district court's orders are not reviewable under the collateral order doctrine.

III. Conclusion

For the reasons stated above, this court grants the government's motion and **DISMISSES** the appeals for lack of jurisdiction.

FILED
United States Court of Appeals
Tenth Circuit

April 15, 2008

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DANUEL DEAN QUAINTANCE, Defendant - Appellant.	No. 07-2140 (D.C. No. CR-06-538-JH)

JUDGMENT

Before **KELLY**, **ANDERSON**, and **MURPHY**, Circuit Judges.

This case originated in the District of New Mexico and was argued by counsel.

It is the judgment of the court that the appeal is dismissed for lack of jurisdiction.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. CR 06-538 JH

MARY HELEN QUAINTANCE,

Defendant.

DEFENDANTS' JOINT, SECOND MOTION TO DISMISS THE INDICTMENT

COMES NOW the Defendants Danuel Quaintance and Mary Quaintance, by and through their respective attorneys Jerry Daniel Herrera and John F. Robbenhaar, and pursuant to the Fifth and Sixth Amendments to the United States Constitution, respectfully move the Court to dismiss the charges contained in the *Superseding Indictment*.

The Government, by and through its Assistant United States Attorney Luis Martinez, opposes the relief sought in this motion.

As grounds in support, Defendants state as follows:

BACKGROUND AND INTRODUCTION

1. The Defendants Mary Helen Quaintance, along with her husband Danuel Dean Quaintance, have been charged in a *Superseding Indictment* with Count 1, Conspiracy to Possess with the Intent to Distribute 100 Kilograms or More of Marijuana, contrary to 21 U.S.C. § 841(a)(1) and 21 U.S.C. § (b)(1)(B), and Count 2, Possession with the Intent to Distribute 50 Kilograms or More of Marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C) and 846. Doc. 25.

2. Co-Defendant Danuel Quaintance filed a *Motion to Dismiss the Indictment* and *Reply*, Docs. 34, 68, which were joined by the Defendant Mary Quaintance. Docs. 35, 69. The *Motion to Dismiss* sought a ruling that the Controlled Substances Act (CSA) constitutes a substantial burden on the Defendants' exercise of their religion as leaders and members of their church, the Church of Cognizance. Defendants argued that application of the CSA to the Church of Cognizance is not in furtherance of a compelling governmental interest, and even if application of the CSA to the Church of Cognizance furthers a compelling governmental interest, it is not the least restrictive means of furthering that interest, thereby violating the Defendants' rights as guaranteed by the Religious Freedom and Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.* (2006). Defendants argued below that application of the CSA to members of the Church of Cognizance violates the RFRA as well as the Free Exercise Clause of the First Amendment to the United States Constitution.

3. The Court held an evidentiary hearing on August 21–23, 2006, and ultimately denied the *Motion to Dismiss*. Doc. 192. Defendant Danuel Quaintance filed a *Motion to Reconsider*, Doc. 219, which was joined by Mary Quaintance. Doc. 220. The *Motion to Reconsider* was denied by the Court on May 9, 2006. Doc. 235.

4. Both the Defendant Danuel Quaintance and the United States filed separate *Motions in Limine*, seeking a ruling on the ability of the Defendants to present a religious use defense at trial. Docs. 187, 188. The district court denied the Defendants' *Motion in Limine* and granted the United States' *Motion in Limine*, ordering that the Defendants are precluded from offering a religious-use defense. Doc. 236.

5. Defendants assert that the Court should dismiss the *Superseding Indictment,* based

upon the fact that the case upon which the District Court previously relied in denying Defendants' earlier motions to dismiss, *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996), doesn't control the instant case, as the RFRA, upon which *Meyers* relied, has been amended by the passage of the RLUIPA in 2000. 42 U.S.C. §§ 2000cc *et seq.*; 42 U.S.C. § 2000bb-2(4).

6. Trial is scheduled to commence on or about August 18, 2008.

ARGUMENT

MEYERS DOESN'T CONTROL THE INSTANT CASE, AS THE RFRA HAS BEEN AMENDED

7. The Tenth Circuit decided *United States v. Meyers* in 1996, just three years after RFRA was signed into law. *Meyers* is based upon the RFRA definition of "exercise of religion", as the "exercise of religion under the First Amendment to the Constitution." *See* 42 U.S.C. § 2000bb-2(4) (1999); 95 F.3d at 1482. In 2000, Congress responded to the Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157 (1997), which invalidated RFRA as applied to the States and their subdivisions, and passed the RLUIPA, which effectively amended the RFRA's definition of "exercise of religion" to now mean "religious exercise, as defined in [42 U.S.C. §] 2000cc-5." *Id.*, § 2000bb-2(4). "Religious exercise" is defined in 42 U.S.C. § 2000cc-5(7)(A) to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *See Kikumura v. Hurley*, 242 F.3d 950, 960-61 (10th Cir. 2001); *see also Cutter v. Wilkinson*, 544 U.S. 709 (2005). RLUIPA states that it is to be construed in favor of a broad protection of religious exercise, "to the maximum extent permitted" by the terms of the RLUIPA and the United States Constitution. 42 U.S. C. § 2000cc-3(g).

8. The passage of the RLUIPA amended the RFRA in several important ways. First,

as the RLUIPA was Congress' reaction to the Supreme Court's 1997 decision in *City of Boerne*, it should be viewed as Congress' attempt to reapply the compelling interest test to state and local laws, at least when the claimants are persons who object to land use regulations or are prisoners in state facilities. But RLUIPA did more than that, in ways that directly impact Defendants' claimed exemption from application of the CSA. RLUIPA altered the RFRA's definition of what kind of "exercise of religion" might support a RFRA-plaintiff's claim. Both pre-1990 Supreme Court doctrine interpreting the Free Exercise Clause and RFRA cases between 1993 and 2000, recognized a religious claimant's arguable right to be exempt only when the religious activity was mandated by or, at the very least, central to the claimant's religion. *See, e.g., Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829 832, 109 S.Ct 1514, 1517 (1989) ("Our judgments in [*Sherbert v. Verner* and *Thomas v. Review Bd.*] rested on the fact that each of the claimants had a sincere belief that religion required him to refrain from the work in question."); *also see City of Boerne*, 521 U.S. 507, 117 S.Ct. 2157 (1997). By contrast, the RLUIPA defines the protected "exercise of religion" for purposes of both RLUIPA and RFRA to "include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief. 42 U.S.C. § 2000cc-5(7)(A). The RLUIPA definition broadens the notion of religious liberty, insofar as to permit conduct by religious claimants that the RFRA by itself may not have permitted. Post-RLUIPA, then, a wider range of religious sensibilities are protected: if a person's religion directs or even mildly inclines him to do something–for example, use cannabis as a sacrament–then such activity could still be protected and may compel a government exemption.

9. The Tenth Circuit recently acknowledged that the passage of the RLUIPA

"substantially modified and relaxed the definition of 'religious exercise.'" *Grace United Methodist Church v. City of Cheyenne,* 451 F.3d 643, 663 (10th. Cir. 2006). In that case, the church relied on *Kikumura* to contend that the RLUIPA's relaxed definition of "religious exercise" was not limited to "fundamental" church activities, as *Kikumura* noted that "a religious exercise need not be mandatory for it to be protected under RFRA." 451 F.3d at 662, *citing Kikumura*, 242 F.3d at 960-61. *Grace United* concluded that a jury instruction regarding a government's "substantial burden" was erroneous, even though harmless, in that the instruction articulated the substantial burden test in terms of activities that are "fundamental" to religion. 451 F.3d at 663-64.

10. In *Navajo Nation v. United States Forest Service*, the Ninth Circuit Court of Appeals addressed the impact that the passage of the RLUIPA had on the RFRA. 479 F.3d 1024 (9th Cir. 2007), *reh'g en banc granted*, ___ F.3d ___, 2007 WL 3010747 (9th Cir. 2007). The Ninth Circuit concluded that RLUIPA's new definition of "exercise of religion" was "broader" than RFRA's original, constitution-based definition of "exercise of religion".

> "Under the amended definition... RFRA now protects a broader range of religious conduct than the Supreme Court's interpretation of 'exercise of religion' under the First Amendment. To the extent that our RFRA cases prior to RLUIPA depended on a narrower definition of "religious exercise", those cases are no longer good law."

479 F.3d at 1033 (internal citations omitted). The Ninth Circuit in *Navajo Nation* reversed the district court for not considering the amended definition of "exercise of religion", and for requiring the religious groups to prove that the Forest Service's action prevents them from engaging in conduct or having a religious experience "which the faith mandates." *Id.* (citation omitted).

11. In the present case, the use of cannabis as a sacrament is central and fundamental to the Defendants' religious practice, and consequently RLUIPA's amended definition of "exercise of religion" strengthens Defendants' claim to a compelled government exemption. In light of the passage of the RLUIPA and its effects on the RFRA, *see* Doc. 235, it is error to view this case through a narrow (and fundamentally flawed) *Meyers'* construct. At a minimum, based upon the Government's concession that the CSA results in a substantial burden on the Defendants' exercise of religion, this Court should dismiss the Superseding Indictment based upon the protections offered by the RFRA and the RLUIPA. In the alternative, the Court should compel the Government to prove that the burden is in furtherance of a "compelling governmental interest" and is the "least restrictive means of furthering that compelling governmental interest."

CONCLUSION

12. The Supreme Court noted that a plaintiff need not hew to any particular religious orthodoxy to make a prima facie free exercise claim; "it is enough for the plaintiff to demonstrate that a government has interfered with the exercise or expression of his or her own deeply held faith." *Thomas v. Review Bd.*, 450 U.S. at 714-16, 101 S.Ct. at 1430-31. The free exercise of religion necessarily includes the rights of individuals to define their own religion, *Meyers*, 95 F.3d at 1489-90 (Brorby, J. diss.), and such religion may be incomprehensible or even repugnant to others. The concept of "religion" is certainly not easily defined by law, but because one has difficulty expressing his or her religious beliefs, or defining his or her deity, does not mean the individual's beliefs are any less religious than those of a mainstream religious believer.

13. Defendants submit that they have "passed" the *Meyers'* multi-factor test, and have proven both legally and factually that their beliefs are "religious" and "sincerely held".

Furthermore, *Meyers* ultimately is inapplicable, since the RFRA definition of "exercise of religion" was broadened following the *Meyers* decision by the passage of the RLUIPA. Just as the Ninth Circuit in *Navajo Nation* concluded that RLUIPA expanded the reach of religious exercise, so should the Tenth Circuit and this Court. Due to the RFRA and the RLUIPA, the *Meyers'* decision becomes inapposite to the instant appeal.

14. Defendants submit that the *Meyers'* criteria are unconstitutional and tend to relegate non-mainstream religions beyond the protection of the First Amendment. In *United States v. Seeger*, 380 U.S. 163 (1965), the Supreme Court held that a person who holds a sincere belief which "in his life fills the same place as a belief in God fills in the life of an orthodox religionist" was entitled to consideration as a conscientious objector to the draft. 380 U.S. at 192-93. "Surely a scheme of life designed to obviate (man's inhumanity to man), and by removing temptations, and all the allurements of ambition and avarice, to nurture the virtues of unselfishness, patience, love, and service, ought not to be denounced as not pertaining to religion when its devotees regard it as an essential tenet of their religious faith." *Id.* at 184 (citation omitted). Similarly, Defendants' religious beliefs, with the essential tenet they live consistent with "good words, good thoughts, good deeds" through the sacramental use of their deity the cannabis plant, demand the same amount of respect as any other religion.

15. Application of the CSA to the Defendants interferes with the free exercise of their religion. This Court should dismiss the *Superseding Indictment*.

Respectfully submitted:

Filed Electronically
JOHN F. ROBBENHAAR
Attorney for Mary Helen Quaintance
1011 Lomas NW
Albuquerque, NM 87102
(505) 242-1950

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 31, 2008 I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing: LUIS MARTINEZ, Assistant U.S. Attorney; JERRY DANIEL HERRERA, Attorney at Law.

Filed Electronically
JOHN F. ROBBENHAAR

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. CR 06-538 JH

MARY HELEN QUAINTANCE,

Defendant.

DEFENDANTS' MOTION TO RECONSIDER THE DENIAL OF THEIR *MOTION IN LIMINE* [DOCS. 187, 188] (REGARDING "RELIGIOUS USE" DEFENSE)

COMES NOW the Defendants Danuel Quaintance and Mary Quaintance, by and through their respective attorneys Jerry Daniel Herrera and John F. Robbenhaar, and pursuant to the Fifth and Sixth Amendments to the United States Constitution and the Religious Freedom Restoration Act, respectfully move the Court to reconsider its former ruling denying the Defendants the ability to raise a "religious use" defense at trial.

The Government, by and through its Assistant United States Attorney Luis Martinez, opposes the relief sought in this motion.

As grounds in support, Defendants state as follows:

BACKGROUND AND INTRODUCTION

1. The Defendants Mary Helen Quaintance, along with her husband Danuel Dean Quaintance, have been charged in a *Superseding Indictment* with Count 1, Conspiracy to Possess with the Intent to Distribute 100 Kilograms or More of Marijuana, contrary to 21 U.S.C. § 841(a)(1) and 21 U.S.C. § (b)(1)(B), and Count 2, Possession with the Intent to Distribute 50 Kilograms or More of Marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C) and 846.

Doc. 25.

2. Co-Defendant Danuel Quaintance filed a *Motion to Dismiss the Indictment* and *Reply*, Docs. 34, 68, which were joined by the Defendant Mary Quaintance. Docs. 35, 69. The *Motion to Dismiss* sought a ruling that the Controlled Substances Act (CSA) constitutes a substantial burden on the Defendants' exercise of their religion as leaders and members of their church, the Church of Cognizance. Defendants argued that application of the CSA to the Church of Cognizance is not in furtherance of a compelling governmental interest, and even if application of the CSA to the Church of Cognizance furthers a compelling governmental interest, it is not the least restrictive means of furthering that interest, thereby violating the Defendants' rights as guaranteed by the Religious Freedom and Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.* (2006). Defendants argued below that application of the CSA to members of the Church of Cognizance violates the RFRA as well as the Free Exercise Clause of the First Amendment to the United States Constitution.

3. The Court held an evidentiary hearing on August 21–23, 2006, and ultimately denied the *Motion to Dismiss*. Doc. 192. Defendant Danuel Quaintance filed a *Motion to Reconsider*, Doc. 219, which was joined by Mary Quaintance. Doc. 220. The *Motion to Reconsider* was denied by the Court on May 9, 2006. Doc. 235.

4. Both the Defendant Danuel Quaintance and the United States filed separate *Motions in Limine*, seeking a ruling on the ability of the Defendants to present a religious use defense at trial. Docs. 187, 188. The district court denied the Defendants' *Motion in Limine* and granted the United States' *Motion in Limine*, ordering that the Defendants are precluded from offering a religious-use defense. Doc. 236.

5. Defendants move the Court to reconsider its previous ruling that precludes the Defendants from offering a "religious use" defense at trial, as said ruling contravenes the Defendants' Fifth and Sixth Amendment rights to due process of law, and the clear intent of the RFRA and the RLUIPA.

6. Trial is scheduled to commence on or about August 18, 2008.

ARGUMENT

THE COURT SHOULD RECONSIDER ITS RULING THAT APPELLANTS MAY NOT PRESENT A "RELIGIOUS USE" DEFENSE AT TRIAL

7. This Court previously ruled that the Defendants were precluded from offering a defense at trial that they possessed marijuana in order to practice their faith. Doc. 236. Defendants submit that this ruling deprives them of their constitutional right to put forth a defense. U.S. Const., amends V, VI.

8. The purposes of the RFRA are to "restore the compelling interest test... and to guarantee its application in all cases where the free exercise of religion is substantially burdened", and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). Regarding "judicial relief", RFRA specifically provides that an individual whose "religious exercise has been burdened" may assert such violation as a "claim or defense in a judicial proceeding...." 42 U.S.C. § 2000bb-1(c).

9. This Court has ruled that the Defendants' beliefs are not "religious", and that the Defendants were not "sincere" in their beliefs. Docs. 192, 219. Defendants submit that the issue concerning the sincerity of their beliefs is a factual matter and is properly resolved by the jury. Additionally, whether or not the Defendants' "knowingly or intentionally" violated the CSA is

properly determined in light of the Defendants' religious views. Defendants should be able to rely on the RFRA as a defense to the allegations that they violated the CSA.

10. The Supreme Court noted that a plaintiff need not hew to any particular religious orthodoxy to make a prima facie free exercise claim; "it is enough for the plaintiff to demonstrate that a government has interfered with the exercise or expression of his or her own deeply held faith." *Thomas v. Review Bd.*, 450 U.S. at 714-16, 101 S.Ct. at 1430-31. The free exercise of religion necessarily includes the rights of individuals to define their own religion, *Meyers*, 95 F.3d at 1489-90 (Brorby, J. diss.), and such religion may be incomprehensible or even repugnant to others. The concept of "religion" is certainly not easily defined by law, but because one has difficulty expressing his or her religious beliefs, or defining his or her deity, does not mean the individual's beliefs are any less religious than those of a mainstream religious believer.

11. In this vein, it is error for a district court to act as arbiter over the issue of whether one's beliefs are religious or sincerely held. Defendants submit that they have "passed" the *Meyers'* multi-factor test, and have proven both legally and factually that their beliefs are "religious" and "sincerely held". Furthermore, Defendants submit that *Meyers* ultimately is inapplicable, since the RFRA definition of "exercise of religion" was broadened following the *Meyers* decision by the passage of the RLUIPA. Just as the Ninth Circuit in *Navajo Nation* concluded that RLUIPA expanded the reach of religious exercise, so should the Tenth Circuit and this Court. Due to the RFRA and the RLUIPA, the *Meyers'* decision becomes inapposite to the instant appeal.

12. Defendants further submit that the *Meyers'* criteria are unconstitutional and tend to relegate non-mainstream religions beyond the protection of the First Amendment. In *United*

States v. Seeger, 380 U.S. 163 (1965), the Supreme Court held that a person who holds a sincere belief which "in his life fills the same place as a belief in God fills in the life of an orthodox religionist" was entitled to consideration as a conscientious objector to the draft. 380 U.S. at 192-93. "Surely a scheme of life designed to obviate (man's inhumanity to man), and by removing temptations, and all the allurements of ambition and avarice, to nurture the virtues of unselfishness, patience, love, and service, ought not to be denounced as not pertaining to religion when its devotees regard it as an essential tenet of their religious faith." *Id.* at 184 (citation omitted). Similarly, Defendants' religious beliefs, with the essential tenet they live consistent with "good words, good thoughts, good deeds" through the sacramental use of their deity the cannabis plant, demand the same amount of respect as any other religion. The jury should decide whether or not the Defendants are exempt from prosecution under the CSA.

CONCLUSION

13. The purposes of the RFRA are to "restore the compelling interest test... and to guarantee its application in all cases where the free exercise of religion is substantially burdened", and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). Regarding "judicial relief", RFRA specifically provides that an individual whose "religious exercise has been burdened" may assert such violation as a "claim or defense in a judicial proceeding...." 42 U.S.C. § 2000bb-1(c). Based upon the clear language of the RFRA and upon notions of fundamental fairness, this Court should reconsider its prior ruling and authorize the Defendants to present a "religious use" defense at trial.

Respectfully submitted:

Filed Electronically
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 31, 2008 I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing: LUIS MARTINEZ, Assistant U.S. Attorney; JERRY DANIEL HERRERA, Attorney at Law.

Filed Electronically
JOHN F. ROBBENHAAR

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CRIMINAL NO. 06-538 JCH
	)	
DANUEL DEAN QUAINTANCE and MARY HELEN QUAINTANCE,	)	
	)	
Defendants.	)	

GOVERNMENT'S RESPONSE TO DEFENDANTS' JOINT SECOND MOTION TO DISMISS SUPERSEDING INDICTMENT

The United States of America files this Response to Defendants' Joint Second Motion to Dismiss Superseding Indictment, filed on July 31, 2008.

The United States renews its argument set forth in Governement's Response to Defendant's Motion to Dismiss Indictment, which was filed on April 24, 2006 (Doc. 41). In further support, the government relies on the Memorandum Opinion and Order issued by District Judge Judith C. Herrera on December 22, 2006 (Doc. 192) and on government's Response to Defendant's Motion for Reconsideration of Order Denying Motion to Dismiss, filed on May 3, 2007 (Doc. 223).

Based on the foregoing the United States requests this Honorable Court to deny Defendants' Joint Second Motion to Dismiss Superseding Indictment.

Respectfully submitted,

GREGORY J. FOURATT
United States Attorney

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I HEREBY CERTIFY that I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to opposing counsel of record on this date.

Electronically filed
LUIS A. MARTINEZ
Assistant United States Attorney

N:\ERivera\ATTORNEYS\LUIS\QUAINTANCE TRIAL\resp_jt 2d mtn dismiss si.wpd

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CRIMINAL NO. 06-538 JCH
	)	
DANUEL DEAN QUAINTANCE and MARY HELEN QUAINTANCE,	)	
	)	
Defendants.	)	

GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION TO RECONSIDER THE DENIAL OF THEIR *MOTION IN LIMINE* [DOCS. 187, 188] (REGARDING "RELIGIOUS USE" DEFENSE)

The United States of America files this Response to Defendants' Motion to Reconsider the Denial of Their *Motion In Limine*, filed July 31, 2008 (Doc. 348).

The United States renews its argument set forth in the United States' Motion In Limine filed April 19, 2007 (Doc. 217) and asks this Honorable Court to continue in force the court's decision filed May 11, 2007 (Doc. 236).

In further support and response, the government relies on the Memorandum Opinion and Order issued by District Judge Judith C. Herrera on December 22, 2006 (Doc. 192).

Respectfully submitted,

GREGORY J. FOURATT
United States Attorney

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I HEREBY CERTIFY that I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to opposing counsel of record on this date.

Electronically filed
LUIS A. MARTINEZ
Assistant United States Attorney

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. Cr. No. 06-538 JCH

DANUEL DEAN QUAINTANCE, and
MARY HELEN QUAINTANCE,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendants Danuel Dean Quaintance and Mary Helen Quaintance's *Joint Second Motion to Dismiss the Indictment*, dated July 31, 2008 [Doc. no. 347]. After considering the written brief and applicable law, the Court concludes that the motion is not well taken and should be denied.

DISCUSSION

The basis for Defendants' motion is Defendants' assertion that "the case upon which the District Court previously relied in denying Defendants' earlier motions to dismiss, *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996), doesn't control the instant case, as the RFRA, upon which *Myers* relied, has been amended by the passage of the RLUIPA in 2000" [Doc. no. 347 at 3].

This same argument has largely already been made in Defendant Danuel Quaintance's *Motion to Reconsider Denial of Motion to Dismiss Indictment*, dated April 26, 2007 [Doc. no. 219], and the Court thoroughly discussed and rejected it in its *Memorandum Opinion and Order,* dated May 9, 2007 [Doc. no. 235] denying Defendant's motion.

Defendants argue that this Court should not have followed the Tenth Circuit's decision in *Meyers* because in 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). At the same time, Congress incorporated the RLUIPA's definition of "religious exercise" into the Religious Freedom Restoration Act ("RFRA"). *See* 42 U.S.C. § 2000bb-2(4). Prior to 2000, and at the time the Tenth Circuit decided *Meyers*, the RFRA defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution." *Id.* Defendants argue that the revised definition of "religious exercise" is broader than the original definition, and that invalidates the multi-pronged test adopted in *Meyers* to determine what constitutes "religious" beliefs. *Meyers*, 95 F.3d at 1483-84. This argument fails for at least two reasons.

First, the RLUIPA only addresses state and local laws relating to land use regulations or prisoners in state facilities. Clearly, this case concerns neither land use nor prison conditions, and Defendants are charged with a violation of federal law. Defendants argue that, even though the context of this case is different from those addressed in the RLUIPA, the new legislation nonetheless broadened the protected "exercise of religion" in *all* contexts. Defendants cite two Tenth Circuit cases for this proposition: *Kikumura v. Hurley*, 242 F.3d 950, 960-61(10th Cir. 2001) and *Grace United Methodist Church v. City of Cheyenne*, 451 F3d 643, 663 (10th Cir. 2006). However, *Kikumura* concerned the rights of a prisoner to receive pastoral visits in prison, and *Grace United* concerned a land use regulation, so clearly the revised definition of "exercise of religion" in the RLUIPA was germane to those two cases. The Court reads both cases as applying only in the context of a RLUIPA claim, and does not find that either case

overturned *Myers* or any of the cases based on the *Myers* methodology. Absent an explicit holding to the contrary by the Tenth Circuit, *Myers* is still the law in this Circuit, and the decisions based on it remain valid.[1]

Furthermore, and most importantly, Defendants have failed to explain how the *Meyers* factors are incompatible with the expanded definition of "religious exercise" found in the RLUIPA. Under the definition in the RFRA, the claimant had to demonstrate that the religious activity being burdened was mandated by or, at the very least, fundamental to the claimant's religion. Under the expanded definition in the RLUIPA, *any* exercise of religion is protected whether or not it is compelled by or central to a system of religious belief. However, in order to be protected, the activity in question still must be pursued as part of a "religion." The *Meyers* framework, designed specifically to help a reviewing court determine whether a the context in which a particular activity is pursued is "religious,"still informs that issue. Simply broadening the definition of "exercise of religion" gives no help to Defendants, as the analysis of what constitutes a "religion" has not changed.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendants Danuel Dean Quaintance and Mary Helen Quaintance's Joint Second Motion to Dismiss the Indictment, dated July 31, 2008

[1] Defendants also argue that the Ninth Circuit's recent opinion in *Navajo Nation v. United States Forest Service*, 479 F.3d 1024, 1033 (9th Cir. 2007) requires this court to consider the broader definition of "exercise of religion" in all contexts. In that case, the Ninth Circuit held that any of its prior RFRA decisions which relied upon the old definition of "religious exercise" were no longer good law. However, the Ninth Circuit has no power to overrule a Tenth Circuit decision such as *Meyers*, which remains the law in this Circuit.

[Doc. No. 347] is hereby **DENIED**.

Dated this 6th day of August 2008.

JUDITH C. HERRERA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. Cr. No. 06-538 JCH

DANUEL DEAN QUAINTANCE, and
MARY HELEN QUAINTANCE,

Defendants.

ORDER DENYING MOTION FOR RECONSIDERATION

THIS MATTER is before the Court on Defendants' *Motion to Reconsider the Denial of their Motion in Limine* [Doc. no. 348], and the Court having considered all submissions of counsel, finds that the Motion fails to set out any law or fact not considered by this Court prior to the entry of its Memorandum Opinion and Order of May 9, 2007 denying Defendant Danuel Quaintance's *Motion for Reconsideration* [Doc. no. 235] and its Memorandum Opinion and Order of May 11, 2007 denying Defendant Danuel Quaintance's *Motion in Limine* and granting the Government's *Motion in Limine* [Doc. no. 236]. The Motion is therefore DENIED. *See Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000); *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985).

SO ORDERED this 6th day of August, 2008.

JUDITH C. HERRERA
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. CR 06-538 JH

MARY HELEN QUAINTANCE,

Defendant.

DEFENDANTS' JOINT REPLY TO THE GOVERNMENT'S RESPONSE [DOC. 355] TO DEFENDANTS' JOINT, SECOND MOTION TO DISMISS THE INDICTMENT [DOC. 347]

COMES NOW the Defendants Danuel Quaintance and Mary Quaintance, by and through their respective attorneys Jerry Daniel Herrera and John F. Robbenhaar, and pursuant to the Fifth and Sixth Amendments to the United States Constitution, respectfully submit this *Reply* to the Government's *Response* to their *Second Motion to Dismiss*.

The Government submitted a one paragraph *Response*, simply claiming that the United States renews its argument set forth in its *Response to Defendant's Motion to Dismiss Indictment* [Doc. 41] and its *Response to Defendant's Motion for Reconsideration of Order Denying Motion to Dismiss* [Doc. 223], and relies on the *Memorandum Opinion and Order* issued by the Court [Doc. 192]. The Government fails to provide any meaningful response to the arguments set forth by the Defendants, despite the fact that the Defendants, in their *Second Motion to Dismiss*, elaborate more fully on the claims made previously.

The Defendants cited to *United States v. Seeger*, 380 U.S. 163, 185 (1965), a "conscientious objector" case, where the Court couched sincerity in terms of a belief which "fills

the same place as a belief in God fills in the life of an orthodox religionist." 380 U.S. at 192-93. The Government previously dismissed *Seeger* as inapposite to the present case. In the *Second Motion to Dismiss*, the Defendants have renewed their reliance on *Seeger* in light of this Court's finding that the Defendants lack "sincerity" of their beliefs. *See Gillette v. United States,* 401 U.S. 437, 457 (1971) ("`[T]he "truth" of a belief is not open to question'; rather, the question is whether the objector's beliefs are `truly held'" (quoting *United States* v. *Seeger,* 380 U. S. 163, 185 (1965)); *also see Cutter v. Wilkinson*, 544 U.S. 709, 725 n13. (2005) (although RLUIPA bars inquiry into whether a particular belief or practice is "central" to a prisoner's religion, *see* 42 U. S. C. § 2000cc-5(7)(A), the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity). Accordingly, the Government's flat rejection of *Seeger* is misplaced.

The United States Supreme Court has recently instructed that RFRA requires an individualized analysis applied "to the person". See *Gonzales v. O Centro Espiritu Beneficente Uniao Do Vegetal,* 546 U.S. 418, 430-31 (2006) (RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person" - the particular claimant whose sincere exercise of religion is being substantially burdened.). The plain meaning of RFRA demonstrates congressional intent that RFRA applies to the "person", and not to the church to which the person belongs. *See* 42 U.S.C § 2000bb–1 (a) (Government shall not substantially burden "a person's" exercise of religion); (c) Judicial relief "A person" whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding. . .).

Thus, rather than looking to the Church of Cognizance and whether or not it contains the sufficient "trappings" of conventional churches around the United States or even throughout the

world, in order to comport with Supreme Court jurisprudence on First Amendment religion claims, district courts must turn to the individual's beliefs. The Defendants submit that the specifics of their religious practice, or religious beliefs, are not determinative of whether they receive protection under the RFRA. It matters not whether the Defendants belong to a "church", whether they profess "ultimate ideas" that are understandable to a non-believer, whether their beliefs are" comprehensive", or whether or not their religion requires a specific moral and ethical code. The Supreme Court has "made it clear that these sincere and meaningful beliefs... need not be confined in either source or content to traditional or parochial concepts of religion." *Welsh*, 398 U.S. at 339.

> "It held that [the conscientious objector statute] does not distinguish between externally and internally derived beliefs"... and also held that 'intensely personal' convictions which some might find 'incomprehensible' or 'incorrect' come within the meaning of "religious belief"... What is necessary under *Seeger*.. to be "religious" within the meaning... is that this... stem from... moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions."

Welsh, 398 U.S. at 339-40 (citations omitted).

Defendants submit that the Court erred by finding that their beliefs were not religious in nature and, even if they were religious, that they are not sincerely held. Enough evidence was presented, through the testimony of witnesses such as Dr. Pruitt, Mr. Senger, Ms. Dibble, and Defendant Danuel Quaintance, to support the conclusion that the Defendants sincerely practice a neo-Zoroastrian faith which treats the cannabis plant as a deity and a sacrament. While Defendants' faith may not be "mainstream" in terms of the tradition and history of the United States, the First Amendment guarantees to all faiths the ability to practice their religion. It matters not that the Defendants' beliefs did not comport with those of the "Fire Priest", and even

Meyers does not teach that courts are to determine whose beliefs are more "correct" in their interpretation of Zoroastrianism. Furthermore, it is not the business of the courts to determine whether or not a believer is "correct" or reasonable in his interpretation of religious thought. *See Thomas v. Review Bd.*, 450 U.S. 707, 714-16, 101 S.Ct. 1425, 1430-31 (1981) ("Courts should not undertake to dissect religious beliefs... Courts are not arbiters of scriptural interpretation."). By ruling that the Defendants beliefs are not religious and are not sincere, the Court disregarded the evidence and has rendered the First Amendment protection a nullity.

The Defendants' submit that as soon as it was established that their beliefs were rooted in a recognized religion (i.e. Zoroastrianism), the inquiry into whether these beliefs were religious in nature should have been complete. Defendants respectfully request that the *Superseding Indictment* should be dismissed, or as an alternative, the Government should be compelled to prove its "compelling interest".

Respectfully submitted:

Filed Electronically
JOHN F. ROBBENHAAR
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1011 Lomas NW
Albuquerque, NM 87102
(505) 242-1950

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 7, 2008 I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing: LUIS MARTINEZ, Assistant U.S. Attorney; JERRY DANIEL HERRERA, Attorney at Law.

Filed Electronically
JOHN F. ROBBENHAAR

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. CR 06-538 JH

MARY HELEN QUAINTANCE,

Defendant.

DEFENDANTS' JOINT MOTION TO DISMISS FOR FAILURE TO STATE A VALID CAUSE OF ACTION

Come Now the Defendants Danuel D. Quaintance and Mary H. Quaintance, by and through their respective attorneys Jerry Daniel Herrera and John F. Robbenhaar, and pursuant to Fed.R.Crim.P. 47(a) and the Fifth and Sixth Amendments to the Constitution of the United States of America, respectfully move the court for an order dismissing the *Superseding Indictment* for failing to state a justiciable cause of action, depriving this court of jurisdiction.

The Government, by and through its Assistant United States Attorney Luis Martinez, opposes the relief sought in this motion.

As grounds in support, Defendants state as follows:

1. The indictment is facially invalid because the an essential element of the operative statute, 21 U.S.C. § 841, has been rendered a nullity. 21 U.S.C. § 841(a)(1) expressly requires a showing, with proof beyond a reasonable doubt, that a "controlled substance" be involved in the offense. *See* 21 U.S.C. 841(a)(1) ("Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally— to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, *a controlled substance"*) (emphasis added).

2. The Government alleges that marijuana is a "controlled substance" when in fact marijuana's illegal placement in an incorrect schedule renders its status as a controlled substance a nullity. Based upon marijuana's current "accepted medical use in the United States", the Controlled Substance's Act's preemption provision as contained in 21 U.S.C. 903 precludes the Drug Enforcement Administration from including marijuana in Schedule I. 21 C.F.R. § 1308.11.

3. 21 U.S.C. §§ 841 and 846 rely upon 21 C.F.R. § 1308.11 (regarding the placement of marijuana in Schedule I) as the implementing regulation. 21 U.S.C §§ 812(b)(1)(A)-(C) provide legal standards and limitations to placement of substances in 21 C.F.R. § 1308.11, Schedule I.

4. To be placed, or to remain, in Schedule 1, a substance must meet all the requirement's of 21 U.S.C §§ 812(b)(1)(A)-(C), i.e., the substance "has no currently accepted medical use in treatment in the United States", "has a high potential for abuse," and has "a lack of accepted safety for use . . . under medical supervision." *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 492 (2001).

5. 21 U.S.C §§ 812(b)(1)(A)-(C), and 21 CFR §1308.11, are further legally controlled and limited by the Controlled Substances Act and its preemption provision. 21 U.S.C. § 903 indicates that, absent a positive conflict, none of the CSA's provisions should be "construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates … to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State." 21 U.S.C. § 903. *Cf. Gonzales v. Oregon*, 546 U.S. 243 (2006) ("The Government, in the end, maintains that the prescription requirement delegates to a single Executive officer the power to effect a radical shift of authority from the

State to the Federal Government to define general standards of medical practice in every locality. The text and structure of the CSA show that Congress did not have this far reaching intent to alter the federal-state balance and the congressional role in maintaining it.").

6. Further, in analyzing the language of 21 U.S.C. § 812(b)(1)(B), it was determined that ". . . Congress did not intend 'accepted medical use in treatment in the United States' to require a finding of recognized medical use in every state . . .". *Grinspoon v. DEA*, 828 F.2d 881, 886 (1st Cir. 1987).

7. In *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936 (D.C. Cir. 1991), the District of Columbia Circuit Court indicated that "neither the statute nor its legislative history precisely defines the term 'currently accepted medical use' . . .". *Alliance for Cannabis Therapeutics*, 930 F.2d at 939. Accordingly, the individual States, and not the Federal Government, determine what is "accepted medical use".

8. In *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001), the U.S. Supreme Court held that the DEA could not put marijuana in Schedule I if marijuana had any accepted medical use:

> "Schedule I is the most restrictive schedule (footnote omitted). The Attorney General can include a drug in schedule I only if the drug "has no currently accepted medical use in treatment in the United States," "has a high potential for abuse," and has "a lack of accepted safety for use . . . under medical supervision." §§ 812(b)(1)(A)-(C). Under the statute, the Attorney General could not put marijuana into schedule I if marijuana had any accepted medical use."

Oakland Cannabis Buyers' Cooperative, 532 U.S. at 492.

9. In *Gonzales v. Raich*, 545 U.S. 1 (2005) the U.S. Supreme Court noted that Congress put marijuana in Schedule I. Schedule I is only the "initial" schedule for marijuana,

and Congress never intended the initial schedules to be permanent. Indeed, 21 U.S.C. § 811(a) requires the DEA to "add to", "transfer between", or "remove" substances from the schedules as necessary. *See* 21 U.S.C. § 812(c) (". . . Initial schedules of controlled substances Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated: Revised schedules are published in the Code of Federal Regulations, Part 1308 of Title 21, Food and Drugs.").

10. Since 1996 when California recognized "accepted medical use", other States have made the same determination that marijuana has "accepted medical use". Twelve States currently have laws in place recognizing "accepted medical use" of marijuana and accept the safety of marijuana for medical use.[1] All of these states allow medical marijuana use, possession, and cultivation. Because marijuana has "accepted medical use in the United States", according to the express terms of §§ 812(b)(1)(A)-(C), marijuana cannot legally be listed in Schedule I. 21 CFR § 1308.11.

11. Each of the twelve states allows medical users to cultivate marijuana at home.

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[1] See:
Alaska: Alaska Stat. § 17.37.070(8) (2008);
California: Cal. Health & Saf. Code § 11362.5 (2008);
Colorado: Colo. Const. Art. XVIII, Section 14(b) (2007);
Hawaii: Haw. Rev. Stat. § 329-121(3)(paragraph 3) (2008);
Maine: 22 Maine Rev. Stat. §2383-B(5) (2008);
Montana: Mont. Code Anno., § 50-46-102(5) (2007);
Nevada: Nev. Rev. Stat. Ann. § 453A.120 (2007);
New Mexico: N.M. Stat. Ann. § 26-2B-2 (2008);
Oregon: Ore. Rev. Stat. § 475.302(8) (2007);
Rhode Island: R.I. Gen. Laws § 21-28.6-3(4) (2008);
Vermont: 18 Vermont Stat. Ann. §4472(10) (2007);
Washington: Rev. Code Wash. (ARCW) § 69.51A.010(2) (2008).

Because the twelve states have the authority to determine accepted medical practice under federal law, that means that marijuana does not even belong in any of the federal schedules. The only other substances one can manufacture at home are alcohol and tobacco, which are both specifically exempted from the act. Importantly, in 1970, marijuana was the only controlled substances which Congress expressed any doubt about including in the Controlled Substances Act. *See* Exhibit 1 and 2. In 1972, the "National Commission on Marihuana and Drug Abuse" recommended that personal use and sharing of marijuana should not be criminalized. *See* Exhibit 3. Furthermore, the findings of an administrative law judge, authorized under the Controlled Substances Act to make findings of fact, found that "Marijuana, in its natural form, is one of the safest therapeutically active substances known to man." *See* Exhibit 4. The fact that the principle psychoactive ingredient in marijuana, THC, has been rescheduled by the DEA twice (as well as once internationally), show that even the pure psychoactive ingredient in marijuana is safer than anything in schedules I or II. Exhibits 5, 6, and 7.

12. The DEA's abrogation of its duty to "move" or "remove" marijuana from Schedule I as required by 21 U.S.C. § 811(a) doesn't provide legitimacy or cure the legal nullity caused by marijuana illegally remaining in Schedule I. Because marijuana's placement in Schedule 1 is a legal nullity and the DEA has not acted in accordance with provisions of the Controlled Substances Act to move marijuana into any other schedule, marijuana cannot be legally considered to be a "controlled substance" for purposes of enforcement of 21 U.S.C. §§ 841 and 846.

13. The points made above are not and should not be construed simply as an argument that marijuana has "accepted medical use in the United States". Rather, they are offered to

support the argument that marijuana is incorrectly and illegally placed in 22 C.F.R § 1308.11 Schedule I. Because marijuana has not been "moved" to an legally enforceable schedule within the CSA, its present scheduling results in a jurisdictional defect for the present case. Accordingly, the charges contained in the *Superseding Indictment* should be dismissed.

CONCLUSION

14. Defendants assert that for the foregoing reasons the *Superseding Indictment* is facially invalid and should be dismissed as a matter of law.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 8, 2008 I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing: LUIS MARTINEZ, Assistant U.S. Attorney; JERRY DANIEL HERRERA, Attorney at Law.

Filed Electronically
JOHN F. ROBBENHAAR

Both bills contain authority to evaluate programs under this Act. Such evaluation should include examination of individual training grants and contracts to assure that desired results are being achieved.

Title II of bill (national materials policy)

Title II of the Senate amendment provided for the establishment of a presidentially appointed National Commission on Materials Policy to make recommendations on the supply, use, recovery, and disposal of materials and to report thereon by June 30, 1973. The House bill had no comparable provision. The House receded with an amendment which requires the Commission to determine which Federal agency would have continuing responsibility in the materials policy area.

HARLEY O. STAGGERS,
JOHN JARMAN,
PAUL G. ROGERS,
WILLIAM L. SPRINGER,
ANCHER NELSEN,
Managers on the Part of the House.

COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970

P.L. 91–513, see page 1437

House Report (Interstate and Foreign Commerce Committee) No. 91–1444, Sept. 10, 1970 [To accompany H.R. 18583]

Senate Report (Judiciary Committee) No. 91–613, Dec. 16, 1969 [To accompany S. 3246]

Conference Report No. 91–1603, October 13, 1970 [To accompany H.R. 18583]

Cong. Record Vol. 116 (1970)

DATES OF CONSIDERATION AND PASSAGE

House September 24, October 14, 1970

Senate October 7, 14, 1970

The House bill was passed in lieu of the Senate bill. The House Report and the Conference Report are set out.

HOUSE REPORT NO. 91–1444

THE Committee on Interstate and Foreign Commerce, to whom was referred the bill (H.R. 18583) to amend the Public Health Service Act and other laws to provide increased research into, and prevention of, drug abuse and drug dependence; to provide for treatment and rehabilitation of drug abusers and drug dependent persons; and to strengthen existing law enforcement authority in the field of drug abuse, having considered the same,

ILLEGAL POSSESSION FOR PERSONAL USE

The bill also provides that illegal possession of controlled drugs by an individual for his own use is a misdemeanor, with a sentence of up to 1 year imprisonment and a fine of not more than $5,000 or both. The possession involved here is possession for one's own use; possession with intent to manufacture, distribute, or dispense controlled substances is subject to the penalties prescribed for the act of manufacture, distribution, or dispensing itself. The quantity of a drug found in the possession of a person, of course, bears upon the question of whether or not his possession is for his own use, or is for the purpose of illicit transactions involving others, for which much more severe penalties are provided.

In the case of a first prosecution for the offense of possession, the bill provides that if the defendant is found guilty or pleads guilty, the judge may, in lieu of entering a judgment of guilty place the accused person upon probation. The period of probation may not exceed 1 year and shall be subject to such conditions as the court may prescribe. After the defendant has completed his probation, the court shall discharge the defendant and dismiss the proceedings against him without entering a judgment of guilty. This procedure is only available to a defendant one time, and a nonpublic record is to be retained by the Department of Justice of this discharge or dismissal for the purpose of insuring that this lenient treatment is provided only once to a defendant.

The bill further provides that in the case of a person below the age of 21 years who is found guilty, or pleads guilty, to a charge of simple possession, the court may, after dismissal or discharge and upon application, issue an order expunging from all official records all recordation relating to the arrest, indictment, or information, trial, finding of guilty, and dismissal or discharge (except for the nonpublic record retained by the Department of Justice). This expunging of all records restores the defendant to the status he occupied before his arrest and he may not thereafter be held guilty of perjury or giving a false statement for failure to reveal or acknowledge his arrest, indictment, or trial in response to any inquiry made to him for any purpose.

MARIHUANA

The extent to which marihuana should be controlled is a subject upon which opinions diverge widely. There are some who not only advocate its legalization but would encourage its use; at the other extreme there are some States which have established the death penalty for distribution of marihuana to minors. During the hearings, Dr. Stanley F. Yolles, who was the Director of the National Institute of Mental Health, submitted a chart of fable and fact concerning marihuana. That chart is as follows:

MARIHUANA

FABLE	FACT
1. Marihuana is a narcotic.	1. Marihuana is not a narcotic except by statute. Narcotics are opium or its derivations (like some synthetic chemicals with opium-like activity).

FABLE	FACT
2. Marihuana is addictive.	2. Marihuana does not cause physical addiction, since tolerance to its effects and symptoms on sudden withdrawals does not occur. It can produce habituation (psychological dependence).
3. Marihuana causes violence and crime.	3. Persons under the influence of marihuana tend to be passive. It is true that sometimes a crime may be committed by a person while under the influence of marihuana. However, any drug which loosens one's self-control is likely to do the same and relates primarily to the personality of the user.
4. Marihuana leads to increase in sexual activity.	4. Marihuana has no aphrodisiac property.
5. Marihuana is harmless.	5. Instances, of acute panic, depression, and psychotic states are known, although they are infrequent. Certain kinds of individuals can also become over-involved in marihuana use and can lose their drive. We do not know the effects of long-term use.
6. Occasional use of marihuana is less harmful than occasional use of alcohol.	6. We do not know. Research on the effects of various amounts of each drug for various periods is underway.
7. Marihuana use leads to heroin.	7. We know of nothing in the nature of marihuana that predisposes to heroin abuse. It is estimated that less than 5% of chronic users of marihuana go on to heroin use.
8. Marihuana enhances creativity.	8. Marihuana might bring *fantasies* of enhanced creativity but they are illusory, as are "instant insights" reported by marihuana users.
9. More severe penalties will solve the marihuana problem.	9. Marihuana use has increased enormously in spite of the most severely punitive laws.
10. It is safe to drive while under the influence of marihuana.	10. Driving under the influence of any intoxicant is hazardous.

In the bill as recommended by the administration and as reported by the committee, marihuana is listed under schedule I, as subject to the

most stringent controls under the bill, except that criminal penalties applicable to marihuana offenses are those for offenses involving non-narcotic controlled substances.

The committee requested recommendations from the Department of Health, Education, and Welfare concerning the appropriate location of marihuana in the schedules of the bill, and by letter of August 14, 1970 (printed in this report under the heading "Agency Reports"), the Assistant Secretary for Health and Scientific Affairs recommended "that marihuana be retained within schedule I at least until the completion of certain studies now underway."

In addition, section 601 of the bill provides for establishment of a Presidential Commission on Marihuana and Drug Abuse. The recommendations of this Commission will be of aid in determining the appropriate disposition of this question in the future.

REHABILITATION

The reported bill would provide increased authority for Federal agencies dealing with problems of drug abuse. Title I would provide increased research, training, education, and rehabilitation authority for the Secretary of Health, Education, and Welfare. That title would also provide increased authority for rehabilitation efforts through community mental health centers and through special projects in areas having more serious drug abuse problems for rehabilitation efforts directed to narcotic addicts and drug dependent persons. A total of $164 million in additional appropriations over a 3-year period is authorized in this title for these increased rehabilitation efforts and activities.

COMMUNITY MENTAL HEALTH CENTERS AMENDMENTS AND SPECIAL PROVISIONS FOR NARCOTIC ADDICTS

In 1963 the Congress enacted the Community Mental Health Centers Act, authorizing Federal matching grants for the construction of community mental health centers, designed to provide for the treatment of the mentally ill in facilities close to their homes, where through intensive care they could be returned to their families and jobs at an earlier date than generally is the case where patients are cared for in State institutions. In 1965 this legislation was amended to authorize Federal grants to pay a portion of the costs of staffing of these facilities.

In 1968, this legislation was further amended to authorize specially earmarked funds for the construction and staffing of facilities affiliated with community mental health centers for the treatment of alcoholics or narcotic addicts.

The reported bill would further expand the authority contained in the 1968 amendments to provide funds for construction or staffing of facilities for the treatment and rehabilitation of drug dependent persons, in addition to narcotic addicts. There are approximately 350 community mental health centers in operation in the United States today, and the purpose of the amendments made by the reported bill is to provide increased activities at these centers to provide for persons within the centers' catchment areas suffering from drug problems.

Public Law 91-513

October 27, 1970
[H. R. 18583]

AN ACT

To amend the Public Health Service Act and other laws to provide increased research into, and prevention of, drug abuse and drug dependence; to provide for treatment and rehabilitation of drug abusers and drug dependent persons; and to strengthen existing law enforcement authority in the field of drug abuse.

Comprehensive Drug Abuse Prevention and Control Act of 1970.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Comprehensive Drug Abuse Prevention and Control Act of 1970".

TABLE OF CONTENTS

DEFENDANT'S EXHIBIT 2
PENGAD-Bayonne, N. J.

TABLE OF CONTENTS—Continued

TITLE II—CONTROL AND ENFORCEMENT—Continued

PART E—ADMINISTRATIVE AND ENFORCEMENT PROVISIONS

(b) Moneys expended from appropriations of the Bureau of Narcotics and Dangerous Drugs for purchase of controlled substances and subsequently recovered shall be reimbursed to the current appropriation for the Bureau.

Funds, advancement, authority of Attorney General.

(c) The Attorney General is authorized to direct the advance of funds by the Treasury Department in connection with the enforcement of this title.

PART F—ADVISORY COMMISSION

ESTABLISHMENT OF COMMISSION ON MARIHUANA AND DRUG ABUSE

SEC. 601. (a) There is established a commission to be known as the Commission on Marihuana and Drug Abuse (hereafter in this section referred to as the "Commission"). The Commission shall be composed of—

Membership.

(1) two Members of the Senate appointed by the President of the Senate;

(2) two Members of the House of Representatives appointed by the Speaker of the House of Representatives; and

(3) nine members appointed by the President of the United States.

At no time shall more than one of the members appointed under paragraph (1), or more than one of the members appointed under paragraph (2), or more than five of the members appointed under paragraph (3) be members of the same political party.

Quorum.

(b)(1) The President shall designate one of the members of the Commission as Chairman, and one as Vice Chairman. Seven members of the Commission shall constitute a quorum, but a lesser number may conduct hearings.

Travel expenses, etc.

Compensation.

(2) Members of the Commission who are Members of Congress or full-time officers or employees of the United States shall serve without additional compensation but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of the duties vested in the Commission. Members of the Commission from private life shall receive $100 per diem while engaged in the actual performance of the duties vested in the Commission, plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such duties.

Meetings.

(3) The Commission shall meet at the call of the Chairman or at the call of a majority of the members thereof.

Personnel.

80 Stat. 443, 467. 5 USC 5101, 5331. *Ante*, p. 198-1.

(c)(1) The Commission shall have the power to appoint and fix the compensation of such personnel as it deems advisable, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such title, relating to classification and General Schedule pay rates.

Experts and consultants. 80 Stat. 416.

Travel expenses, etc.

80 Stat. 499; 83 Stat. 190.

(2) The Commission may procure, in accordance with the provisions of section 3109 of title 5, United States Code, the temporary or intermittent services of experts or consultants. Persons so employed shall receive compensation at a rate to be fixed by the Commission, but not in excess of $75 per diem, including traveltime. While away from his home or regular place of business in the performance of services for the Commission, any such person may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703(b) of title 5, United States Code, for persons in the Government service employed intermittently.

Information, availability.

(3) The Commission may secure directly from any department or agency of the United States information necessary to enable it to

carry out its duties under this section. Upon request of the Chairman of the Commission, such department or agency shall furnish such information to the Commission.

Marihuana, study.

(d) (1) The Commission shall conduct a study of marihuana including, but not limited to, the following areas:

(A) the extent of use of marihuana in the United States to include its various sources, the number of users, number of arrests, number of convictions, amount of marihuana seized, type of user, nature of use;

(B) an evaluation of the efficacy of existing marihuana laws;

(C) a study of the pharmacology of marihuana and its immediate and long-term effects, both physiological and psychological;

(D) the relationship of marihuana use to aggressive behavior and crime;

(E) the relationship between marihuana and the use of other drugs; and

(F) the international control of marihuana.

Report to President and Congress.

(2) Within one year after the date on which funds first become available to carry out this section, the Commission shall submit to the President and the Congress a comprehensive report on its study and investigation under this subsection which shall include its recommendations and such proposals for legislation and administrative action as may be necessary to carry out its recommendations.

Drug abuse, study and investigation.

Interim reports, final report to President and Congress.

(e) The Commission shall conduct a comprehensive study and investigation of the causes of drug abuse and their relative significance. The Commission shall submit to the President and the Congress such interim reports as it deems advisable and shall within two years after the date on which funds first become available to carry out this section submit to the President and the Congress a final report which shall contain a detailed statement of its findings and conclusions and also such recommendations for legislation and administrative actions as it deems appropriate. The Commission shall cease to exist sixty days after the final report is submitted under this subsection.

Termination.

Expenditures, limitation.

(f) Total expenditures of the Commission shall not exceed $1,000,000.

PART G—CONFORMING, TRANSITIONAL AND EFFECTIVE DATE, AND GENERAL PROVISIONS

REPEALS AND CONFORMING AMENDMENTS

Repeals.

79 Stat. 227, 232, 228; 82 Stat. 1361.

SEC. 701. (a) Sections 201(v), 301(q), and 511 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(v), 331(q), 360(a) are repealed.

Penalties.

82 Stat. 1361.

(b) Subsections (a) and (b) of section 303 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 333) are amended to read as follows:

"SEC. 303. (a) Any person who violates a provision of section 301 shall be imprisoned for not more than one year or fined not more than $1,000, or both.

"(b) Notwithstanding the provisions of subsection (a) of this section, if any person commits such a violation after a conviction of him under this section has become final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than $10,000 or both."

79 Stat. 232.

(c) Section 304(a)(2) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 334(a)(2)) is amended (1) by striking out clauses (A) and (D), (2) by striking out "of such depressant or stimulant

National Commission on Marihuana and Drug Abuse
801 19th Street N.W.
Washington, D.C. 20006

March 22, 1972

To The President and Congress of the United States:

As Chairman of the National Commission on Marihuana and Drug Abuse, I am pleased to submit to you our first year Report in conformance with the mandate contained in Section 601 of Public Law 91-513, The Comprehensive Drug Abuse Prevention and Control Act of 1970.

This Report "Marihuana, A Signal of Misunderstanding" is an all-inclusive effort to present the facts as they are known today, to demythologize the controversy surrounding marihuana, and to place in proper perspective one of the most emotional and explosive issues of our time. We on the Commission sincerely hope it will play a significant role in bringing uniformity and rationality to our marihuana laws, both Federal and State, and that it will create a healthy climate for further discussion, for further research and for a continuing advance in the development of a public social policy beneficial to all our citizens.

Whatever the facts are we have reported them. Wherever the facts have logically led us, we have followed and used them in reaching our recommendations. We hope this Report will be a foundation upon which credibility in this area can be restored and upon which a rational policy can be predicated.

By Direction of the Commission

Raymond P. Shafer

Raymond P. Shafer
Chairman

The President
The President of the Senate
The Speaker of the House

of existing regulatory schemes, together with an uncertainty about the permanence of social interest in marihuana and the approval inevitably implied by adoption of such a scheme, all impel us to reject the regulatory approach as an appropriate implementation of a discouragement policy at the present time.

Future policy planners might well come to a different conclusion if further study of existing schemes suggests a feasible model; if responsible use of the drug does indeed take root in our society; if continuing scientific and medical research uncovers no long-term ill-effects; if potency control appears feasible; and if the passage of time and the adoption of a rational social policy sufficiently desymbolizes marihuana so that availability is not equated in the public mind with approval.

PARTIAL PROHIBITION

The total prohibition scheme was rejected primarily because no sufficiently compelling social reason, predicated on existing knowledge, justifies intrusion by the criminal justice system into the private lives of individuals who use marihuana. The Commission is of the unanimous opinion that marihuana use is not such a grave problem that individuals who smoke marihuana, and possess it for that purpose, should be subject to criminal procedures. On the other hand, we have also rejected the regulatory or legalization scheme because it would institutionalize availability of a drug which has uncertain long-term effects and which may be of transient social interest.

Instead we recommend a partial prohibition scheme which we feel has the following benefits:

- Symbolizing a continuing societal discouragement of use;
- Facilitating the deemphasis of marihuana essential to answering dispassionately so many of the unanswered questions;
- Permitting a simultaneous medical, educational, religious, and parental effort to concentrate on reducing irresponsible use and remedying its consequences;
- Removing the criminal stigma and the threat of incarceration from a widespread behavior (possession for personal use) which does not warrant such treatment;
- Relieving the law enforcement community of the responsibility for enforcing a law of questionable utility, and one which they cannot fully enforce, thereby allowing concentration on drug trafficking and crimes against persons and property;
- Relieving the judicial calendar of a large volume of marihuana possession cases which delay the processing of more serious cases; and
- Maximizing the flexibility of future public responses as new information comes to light.

No major change is required in existing law to achieve all of these benefits. In general, we recommend only a decriminalization of possession of marihuana for personal use on both the state and federal levels. The major features of the recommended scheme are that: production and distribution of the drug would remain criminal activities as would possession with intent to distribute commercially; marihuana would be contraband subject to confiscation in public places; and criminal sanctions would be withdrawn from private use and possession incident to such use, but, at the state level, fines would be imposed for use in public.*

Specifically, we recommend the following statutory schemes.

RECOMMENDATIONS FOR FEDERAL LAW

Under the Comprehensive Drug Abuse Prevention and Control Act of 1970, Congress provided the following scheme with respect to marihuana, by which was meant only the natural plant and its various parts, not the synthetic tetrahydrocannabinol (THC):

- Cultivation, importation and exportation, and sale or distribution for profit of marihuana are all felonies punishable by imprisonment for up to five years for a first offense and by up to 10 years for a second offense (the available penalty is doubled for sale to a minor).
- Possession of marihuana with intent to distribute is a felony punishable by imprisonment for up to five years for the first offense and by up to 10 years for a second offense.
- Possession of marihuana for personal use is a misdemeanor punishable by up to one year in jail and a $1,000 fine for first offense and by up to two years in jail and a $2,000 fine for second offense (expungement of criminal record is available for first offenders).

*Commissioners Rogers, Congressman from Florida, and Carter, Congressman from Kentucky, agree with the Commission's selection of a discouragement policy and also agree that criminalization and incarceration of individuals for possessing marihuana for their own use is neither necessary nor desirable as a means of implementing that policy.

At the same time, both Commissioners feel that the contraband concept is not a sufficiently strong expression of social disapprobation and would recommend in addition a civil fine for possession of any amount of marihuana in private or in public.

Both Commissioners feel that the civil fine clearly symbolizes societal disapproval and is a simple mechanism for law enforcement authorities to carry out. If a person is found by a law enforcement officer to be in possession of marihuana, the officer would issue such person a summons to appear in court on a fixed day. Although a warrant would not issue for search of a private residence unless there were probable cause to believe a *criminal* offense was being committed, a police officer legitimately present for other reasons could issue a civil summons for violation of the "possession" proscription.

456-964 O - 72 - 11

- Transfer of a small amount of marihuana for no remuneration is a misdemeanor punishable by up to one year in jail and a $1,000 fine for first offense and by up to two years in jail and a $2,000 fine for second offense (Congress singled out marihuana in this way to allow misdemeanor treatment of casual transfers and permitted first offender treatment, as allowed for possession for personal use).

The Commission recommends *only* the following changes in federal law:

- POSSESSION OF MARIHUANA FOR PERSONAL USE WOULD NO LONGER BE AN OFFENSE, BUT MARIHUANA POSSESSED IN PUBLIC WOULD REMAIN CONTRABAND SUBJECT TO SUMMARY SEIZURE AND FORFEITURE.
- CASUAL DISTRIBUTION OF SMALL AMOUNTS OF MARIHUANA FOR NO REMUNERATION, OR INSIGNIFICANT REMUNERATION NOT INVOLVING PROFIT WOULD NO LONGER BE AN OFFENSE.

The Commission further recommends that federal law be supplemented to provide:

- A PLEA OF MARIHUANA INTOXICATION SHALL NOT BE A DEFENSE TO ANY CRIMINAL ACT COMMITTED UNDER ITS INFLUENCE, NOR SHALL PROOF OF SUCH INTOXICATION CONSTITUTE A NEGATION OF SPECIFIC INTENT.

Commissioners Rogers and Carter believe that the legal system must be utilized directly to discourage *the person* from using marihuana rather than being utilized only indirectly as in the case of contraband.

This civil fine would not be reflected in a police record, nor would it be considered a criminal act for purposes of future job consideration, either in the private sector or for government service.

Agreeing with the other Commissioners that the casual transfers of marihuana for no profit should be treated in the same manner as possession for one's own use, Congressmen Rogers and Carter do not agree that it should extend to transfers involving remuneration. They prefer the limiting language of the Comprehensive Drug Abuse Prevention and Control Act of 1970 which does not include the term "or insignificant remuneration not involving a profit."

Apart from the addition of the civil fine to the contraband recommendation in the respects set out above, Congressmen Carter and Rogers are in complete agreement with the statutory recommendations set out in the Report.

Commissioner Ware concurs completely with the statements made by Congressmen Rogers and Carter but wishes to reemphasize that the social policy and legal scheme adopted is applicable only to marihuana and should not be construed to embrace other psychoactive drugs. The policy set forth in this Report, subject to the already noted comments of the two Congressional Commissioners, makes sense for marihuana on the basis of what is known about the drug and in the absence of any conclusive showing which would verify

RECOMMENDATIONS FOR STATE LAW

Under existing state marihuana laws, cultivation, distribution and possession with intent to distribute are generally felonies and in most states possession for personal use is a misdemeanor. The Commission strongly recommends uniformity of state laws and, in this regard, endorses the basic premise of the Uniform Controlled Substances Act, drafted by the National Conference of Commissioners on Uniform State Laws. The following are our recommendations for a uniform statutory scheme for marihuana, by which we mean, as under existing federal law, only the natural cannabis plant and its various parts, not the synthetic tetrahydrocannabinol (THC):

Existing Law

- CULTIVATION, SALE OR DISTRIBUTION FOR PROFIT AND POSSESSION WITH INTENT TO SELL WOULD REMAIN FELONIES (ALTHOUGH WE DO RECOMMEND UNIFORM PENALTIES).

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some of the anecdotal law enforcement testimony heard by the Commission regarding criminal behavior exhibited while under the influence of marihuana.

Commissioner Ware feels that some penalty short of criminalizing the user, such as a civil fine or some type of intensive drug education, will act as a positive deterrent toward minimizing the incidence of marihuana use especially among the young. Further, he is opposed to the use of *any* drug for the express purpose of getting intoxicated, and includes alcohol within this category. The Commissioner feels that what is needed is an internalizing of discipline among our citizenry, with the legal system assisting this process through the use of disincentives.

Commissioners Hughes, Senator from Iowa, and Javits, Senator from New York, feel that the Commission has taken a major, highly laudable step in recommending that the private use of marihuana be taken out of the criminal justice system. They concur in its threshold judgment that overall social policy regarding this drug should seek to discourage use, while concentrating primarily on the prevention of irresponsible use. They disagree, however, with three specific recommendations relating to the implementation of this discouragement policy.

First, they would eliminate entirely the contraband provision from the partial prohibitory model adopted by the Commission. They want it eliminated first because its legal implications are confusing and the subject of disagreement even among lawyers. Whether or not possession of a given substance is criminal, possession of material designated as contraband makes that possession *unlawful.* Also, marihuana designated as contraband would be subject to government search and seizure, even though the underlying possession is no longer criminal. The provision—which does not apply to marihuana held for personal use within the home—is considered by both Commissioners to be an unnecessary "symbol" of the discouragement policy. It will not foster elimination of the misunderstanding and mistrust which is a hallmark of our current marihuana policy.

Commissioner Hughes and Javits seek to eliminate it also because as a practical matter it serves no useful law enforcement purpose within the overall partial prohibitory model. If marihuana held for personal use within the home is not contraband, why should marihauna held for personal use within one's

Private Activities

- POSSESSION IN PRIVATE OF MARIHUANA FOR PERSONAL USE WOULD NO LONGER BE AN OFFENSE.
- DISTRIBUTION IN PRIVATE OF SMALL AMOUNTS OF MARIHUANA FOR NO REMUNERATION OR INSIGNIFICANT REMUNERATION NOT INVOLVING A PROFIT WOULD NO LONGER BE AN OFFENSE.

Public Activities

- POSSESSION IN PUBLIC OF ONE OUNCE OR UNDER OF MARIHUANA WOULD NOT BE AN OFFENSE, BUT THE MARIHUANA WOULD BE CONTRABAND SUBJECT TO SUMMARY SEIZURE AND FORFEITURE.
- POSSESSION IN PUBLIC OF MORE THAN ONE OUNCE OF MARIHUANA WOULD BE A CRIMINAL OFFENSE PUNISHABLE BY A FINE OF $100.
- DISTRIBUTION IN PUBLIC OF SMALL AMOUNTS OF MARIHUANA FOR NO REMUNERATION OR INSIGNIFICANT REMUNERATION NOT INVOLVING A PROFIT WOULD BE A CRIMINAL OFFENSE PUNISHABLE BY A FINE OF $100.
- PUBLIC USE OF MARIHUANA WOULD BE A CRIMINAL OFFENSE PUNISHABLE BY A FINE OF $100.
- DISORDERLY CONDUCT ASSOCIATED WITH PUBLIC USE OF OR INTOXICATION BY MARIHUANA WOULD BE A MISDEMEANOR PUNISHABLE BY UP TO 60 DAYS IN JAIL, A FINE OF $100, OR BOTH.

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automobile be contraband? The area of operation of the contraband provision is extremely narrow. If one possesses *more* than one ounce of marihuana in public, it may be seized without regard to the contraband doctrine since such possession is a criminal violation.

Since the contraband provision does not apply to marihuana possession and use in private, the only effective area covered by the contraband provision is the area of possession in public of *less* than one ounce. The Commission has chosen to remove the stigma of the criminal sanction in this kind of case. To impose instead a contraband provision, which it is argued is in the nature of a civil "in rem" seizure which does not operate against the person, is to cloud the issue and to weaken the force of the basic decriminalization. A persuasive justification simply has not been made.

Both Commissioners seek to eliminate it also because they believe that the voice of the Commission should be loud and clear that the preservation of the right of privacy is of paramount importance and cannot be casually jeopardized in the pursuit of some vague public or law enforcement interest which has not been defined and justified with clarity and precision.

The second area of disagreement with the Commission's recommendations concerns the casual distribution of marihuana and the not-for-profit sale. As understood:

- OPERATING A VEHICLE OR DANGEROUS INSTRUMENT WHILE UNDER THE INFLUENCE OF MARIHUANA WOULD BE A MISDEMEANOR PUNISHABLE BY UP TO ONE YEAR IN JAIL, A FINE OF UP TO $1,000, OR BOTH, AND SUSPENSION OF A PERMIT TO OPERATE SUCH A VEHICLE OR INSTRUMENT FOR UP TO 180 DAYS.
- A PLEA OF MARIHUANA INTOXICATION SHALL NOT BE A DEFENSE TO ANY CRIMINAL ACT COMMITTED UNDER ITS INFLUENCE NOR SHALL PROOF OF SUCH INTOXICATION CONSTITUTE A NEGATION OF SPECIFIC INTENT.
- A PERSON WOULD BE ABSOLUTELY LIABLE IN CIVIL COURT FOR ANY DAMAGE TO PERSON OR PROPERTY WHICH HE CAUSED WHILE UNDER THE INFLUENCE OF THE DRUG.

DISCUSSION OF FEDERAL RECOMMENDATIONS

The recommended federal approach is really a restatement of existing federal policy. From official testimony and record evaluation, we know that the federal law enforcement authorities, principally the Federal Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs, do not concentrate their efforts on personal possession cases. The avowed purpose of both Bureaus is to eliminate major traffickers and sources of supply. For the most part, the federal

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(1) The totally donative transfer is not subject to criminal penalty, regardless of where it takes place.

(2) The transfer of *small* amounts for *insignificant* remuneration *not involving a profit* is not subject to criminal penalty (except if it is accomplished in public, in which case it is subject to criminal sanction), but

(3) The transfer of "*large* amounts" for "*significant*" remuneration not involving a profit is subject to criminal penalty.

Footnote 4 on page 158 of the Report, the Commission refers to a Report of The Senate Judiciary Committee on the Comprehensive Drug Abuse Prevention and Control Act of 1970. In substance, it implies that within the meaning of the Act, transfers of more than one or two marihuana cigarettes in return for 50 cents or one dollar to cover cost are not intended to be covered as casual transfers, but rather are to be treated as unlawful sales.

Commissioners Hughes and Javits feel that the Commission has failed to set forth a clear standard which will adequately inform the public of their obligations under the law. The recommendation and its discussion in the Report are confusing and fail to provide the individual with sufficient guidance to allow him to act without having to dodge in and out of illegality. It also undermines a basic, stated objective of the Commission i.e., to concentrate the weight of the criminal sanction upon significant supply and distribution activities, rather than upon casual consumption.

Moreover, proscribing even the most casual not-for-profit transfers when they occur in public is, in their opinion, wrong. Such transfers are necessarily inci-

National Commission on Marihuana and Drug Abuse
801 19th Street N.W.
Washington, D.C. 20006

March 22, 1973

To The President and Congress of the United States:

As Chairman of the National Commission on Marihuana and Drug Abuse, I am pleased to submit to you our second and final Report in conformance with the mandate contained in Section 601 of the Public Law 91-513, The Comprehensive Drug Abuse Prevention and Control Act of 1970.

Our final Report, "Drug Use in America: Problem in Perspective," is an effort to examine the roots of the drug problem in the United States, to analyze the assumptions upon which present policy is based, and to recommend policy directions for both the public and private sectors. We on the Commission believe that policy should be focused on the behavioral concomitants of drug use rather than on the drugs themselves. By so doing, policy makers can refine national objectives and devise more effective strategies for reducing the social costs of drug misuse.

This Report describes the phenomena of drug use, drug-induced behavior and drug dependence and establishes a process for assessing their social impact. We have also submitted concrete recommendations for the present and have speculated about the policies which may prove useful in the future. We sincerely hope that our Report will enhance the efforts of the American people to understand and respond effectively to this most troublesome social concern.

By Direction of the Commission

Raymond P. Shafer

Raymond P. Shafer
Chairman

The President
The President of the Senate
The Speaker of the House

INDEX OF FIRST YEAR RECOMMENDATIONS

Marihuana: A Signal of Misunderstanding

(First Report of the National Commission on Marihuana and Drug Abuse [1])

PRINCIPAL RECOMMENDATIONS

Federal

1. Possession of marihuana for personal use would no longer be an offense, but marihuana possessed in public would remain contraband subject to summary seizure and forfeiture.

2. Casual distribution of small amounts of marihuana for no re-

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[1] The 13 Commissioners are in basic agreement with the Report and its recommendations. However, several Commissioners differ with specific recommendations and their opinions are presented in a footnote on pages 151–156 of the First Report. A brief summary of this footnote follows:

Commissioners Rogers and Carter agree with the discouragement policy and the decriminalization aspects of the recommendations, but feel that the contraband concept is not a sufficiently strong expression of societal disapproval of the use of marihuana. They would recommend, in addition, a civil fine for possession of any amount of marihuana in private or in public. This civil fine would not be reflected in a police record.

Commissioner Ware agrees completely with the statements of Congressmen Rogers and Carter but wishes to reemphasize that the social policy and legal scheme adopted is applicable only to marihuana and should not be construed to embrace other psychoactive drugs. He advocates some penalty short of criminalizing the users, such as a civil fine or some type of extensive drug education. Further, he is opposed to the use of *any* drug, including alcohol, for the express purpose of becoming intoxicated.

Commissioners Hughes and Javits, while agreeing with the Commission's recommendation that the private use of marihuana be taken out of the criminal justice system, disagree with three specific recommendations relating to the implementation of the discouragement policy.

First, they would eliminate the contraband provision from the partial prohibition scheme adopted by the Commission. Second, believing the Commission has not set forth a clear standard as to what constitutes the casual not-for-profit sale, they recommend that all not-for-profit sales be excluded from criminal sanction. Third, they feel there is no need to retain criminal sanction on public possession of more than one ounce of marihuana and would permit public possession of "some reasonable amount" for personal use.

muneration, or insignificant remuneration not involving profit, would no longer be an offense.

3. A plea of marihuana intoxication shall not be a defense to any criminal act committed under its influence, nor shall proof of such intoxication constitute a negation of specific intent.

State

1. Cultivation, sale or distribution for profit and possession with intent to sell would remain felonies (although we do recommend uniform penalties).

2. Possession in private of marihuana for personal use would no longer be an offense.

3. Distribution in private of small amounts of marihuana for no remuneration, or insignificant remuneration not involving a profit, would no longer be an offense.

4. Possession in public of one ounce or under of marihuana would not be an offense, but the marihuana would be contraband subject to summary seizure and forfeiture.

5. Possession in public of more than one ounce of marihuana would be a criminal offense punishable by a fine of $100.

6. Distribution in public of small amounts of marihuana for no remuneration or insignificant remuneration not involving a profit would be a criminal offense punishable by a fine of $100.

7. Public use of marihuana would be a criminal offense punishable by a fine of $100.

8. Disorderly conduct associated with public use of or intoxication by marihuana would be a misdemeanor punishable by up to 60 days in jail, a fine of $100, or both.

9. Operating a vehicle or dangerous instrument while under the influence of marihuana would be a misdemeanor punishable by up to one year in jail, a fine of up to $1,000, or both, and suspension of a permit to operate such a vehicle or instrument for up to 180 days.

10. A plea of marihuana intoxication shall not be a defense to any criminal act committed under its influence nor shall proof of such intoxication constitute a negation of specific intent.

11. A person would be absolutely liable in civil court for any damage to person or property which he caused while under the influence of the drug.

ANCILLARY RECOMMENDATIONS

In addition to these legal recommendations for federal and state action, the Commission believes certain other ancillary recommendations should be presented for action.

Legal and Law Enforcement Recommendations

Federal

1. Federal law enforcement agencies, especially the Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs, should improve their statistical reporting systems so that policies may be planned and resources allocated on the basis of accurate and comprehensive information.

2. The Federal Bureau of Narcotics and Dangerous Drugs should increase its training programs of state and local police with special emphasis on the training in the detection of trafficking cases.

3. Increased border surveillance, a tightening of border procedures, and a realistic eradication program to diminish the supply of drugs coming into the country, coupled with a more effective program for diminishing the domestic production and distribution of marihuana, are required.

State

1. All states should adopt the Uniform Controlled Substances Act to achieve uniformity with regard to marihuana and other drug laws, with the exception that the legal response to possession for one's own use be uniformly adopted in accordance with our recommendation in Chapter V of this report.

2. Each state should establish a centralized compulsory reporting and record-keeping authority so that adequate and accurate statistics of arrests, sentences and convictions on a statewide basis are available.

3. Those states requiring physicians to report drug users seeking medical assistance should change such requirements to insure the confidentiality of the drug user's identity, so that persons needing medical help will feel free to seek it.

International

If the United States should become a signatory of the proposed Psychotropic Convention, we recommend that cannabis be removed from the existing Single Convention and consideration be given to listing it in the proposed Psychotropic Convention among drugs which have similar effects.

Medical Recommendations

1. Fuller coordination of the marihuana research conducted by governmental and private agencies is needed to reduce the duplication of effort, assure a diversity of new approaches and new objectives, and

to provide efficient integration of findings into the available body of knowledge.

2. Research efforts to develop an inexpensive, easy method for detecting and quantifying the presence of marihuana in the blood, breath or urine of a person suspected of being intoxicated should be accelerated.

3. An accelerated program for funding foreign research should be undertaken immediately.

4. Increased support of studies which evaluate the efficacy of marihuana in the treatment of physical impairments and disease is recommended.

5. Community-based treatment facilities should be promoted in caring for problem drug users utilizing existing health centers when possible and appropriate.

6. Public health courses on the social aspects of drug use should be included in the curricula of the schools of the health professions.

Other Recommendations

1. The Commission recognizes that several state legislatures have improperly classffied marihuana as a narcotic, and recommends that they now redefine marihuana according to the standards of the recently adopted Uniform Controlled Substances Act.

2. A single federal agency source should disseminate information and materials relating to marihuana and other drugs. The National Clearinghouse for Drug Abuse Information should be charged with this responsibility.

3. The Special Action Office for Drug Abuse Prevention in the White House should be responsible for the coordination, development and content review of all federally-supported drug educational materials and should issue a report as soon as possible, evaluating existing drug education materials.

4. The Commission notes the significant role played by the voluntary sector of the American community in influencing the social, religious and moral attitudes of our nation's citizens and recommends that the voluntary sector be encouraged to take an active role in support of our recommended policy of discouraging the use of marihuana.

UNITED STATES DEPARTMENT OF JUSTICE

Drug Enforcement Administration

In The Matter Of MARIJUANA RESCHEDULING PETITION	)	Docket No. 86-22

OPINION AND RECOMMENDED RULING, FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION OF ADMINISTRATIVE LAW JUDGE

FRANCIS L. YOUNG, Administrative Law Judge

APPEARANCES:

KEVIN B. ZEESE, Esq.
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for National Organization For The Reform of Marijuana Laws

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KARL BERNSTEIN
for National Federation of Parents for Drug-Free Youth

VIRGINIA PELTIER, Esq.
for the International Association of Chiefs of Police

DATED: SEP 6 1988

DEFENDANT'S EXHIBIT 4

PENGAD-Bayonne, N. J.

VIII.

ACCEPTED SAFETY FOR USE UNDER MEDICAL SUPERVISION

With respect to whether or not there is "a lack of accepted safety for use of [marijuana] under medical supervision", the record shows the following facts to be uncontroverted.

Findings of Fact

1. Richard J. Gralla, M.D., an oncologist and Professor of Medicine who was an Agency witness, accepts that in treating cancer patients oncologists can use the cannabinoids with safety despite their side effects.

2. Andrew T. Weil, M.D., who now practices medicine in Tucson, Arizona and is on the faculity of the College of Medicine, University of Arizona, was a member of the first team of researchers to perform a Federal Government authorized study into the effects of marijuana on human subjects. This team made its study in 1968. These researchers determined that marijuana could be safely used under medical supervision. In the 20 years since then Dr. Weil has seen no information that would cause him to reconsider that conclusion. There is no question in his mind but that marijuana is safe for use under appropriate medical supervision.

3. The most obvious concern when dealing with drug safety is the possibility of lethal effects. Can the drug cause death?

4. Nearly all medicines have toxic, potentially lethal effects. But marijuana is not such a substance. There is no record in the extensive medical literature describing a proven, documented cannabis-induced fatality.

5. This is a remarkable statement. First, the record on marijuana encompasses 5,000 years of human experience. Second, marijuana is now used daily by enormous numbers of people throughout the world. Estimates suggest that from twenty million to fifty million Americans routinely, albeit illegally, smoke marijuana without the benefit of direct medical supervision. Yet, despite this long history of use and the extraordinarily high numbers of social smokers, there are simply no credible medical reports to suggest that consuming marijuana has caused a single death.

6. By contrast aspirin, a commonly used, over-the-counter medicine, causes hundreds of deaths each year.

7. Drugs used in medicine are routinely given what is called an LD-50. The LD-50 rating indicates at what dosage fifty percent of test animals receiving a drug will die as a result of drug induced toxicity. A number of researchers have attempted to determine marijuana's LD-50 rating in test animals, without success. Simply stated, researchers have been unable to give animals enough marijuana to induce death.

8. At present it is estimated that marijuana's LD-50 is around 1:20,000 or 1:40,000. In layman terms this means that in order to induce death a marijuana smoker would have to consume 20,000 to 40,000 times as much marijuana as is contained in one marijuana cigarette. NIDA-supplied marijuana cigarettes weigh approximately .9 grams. A smoker would theoretically have to consume nearly 1,500 pounds of marijuana within about fifteen minutes to induce a lethal response.

9. In practical terms, marijuana cannot induce a lethal response as a result of drug-related toxicity.

10. Another common medical way to determine drug safety is called the therapeuic ratio. This ratio defines the difference between a therapeutically effective dose and a dose which is capable of inducing adverse effects.

11. A commonly used over-the-counter product like aspirin has a therapeutic ratio of around 1:20. Two aspirins are the recommended dose for adult patients. Twenty times this dose, forty aspirins, may cause a lethal reaction in some patients, and will almost certainly cause gross injury to the digestive system, including extensive internal bleeding.

12. The therapeutic ratio for prescribed drugs is commonly around 1:10 or lower. Valium, a commonly used prescriptive drug, may cause very serious biological damage if patients use ten times the recommended (therapeutic) dose.

13. There are, of course, prescriptive drugs which have much lower therapeutic ratios. Many of the drugs used to treat patients with cancer, glaucoma and multiple sclerosis are highly toxic. The therapeutic ratio of some of the drugs used in antineoplastic therapies, for example, are regarded as extremely toxic poisons with therapeutic ratios that may fall below 1:1.5. These drugs also have very low LD-50 ratios and can result in toxic, even lethal reactions, while being properly employed.

14. By contrast, marijuana's therapeutic ratio, like its LD-50, is impossible to quantify because it is so high.

15. In strict medical terms marijuana is far safer than many foods we commonly consume. For example, eating ten raw potatoes can result in a toxic response. By comparison, it is physically impossible to eat enough marijuana to induce death.

16. Marijuana, in its natural form, is one of the safest therapeutically

active substances known to man. By any measure of rational analysis marijuana can be safely used within a supervised routine of medical care.

17. Some of the drugs most widely used in chemotherapy treatment of cancer have adverse effects as follows:

> Cisplatin, one of the most powerful chemo-therapeuic agents used on humans - may cause deafness; may lead to life-threatening kidney difficulties and kidney failure; adversely affects the body's immune system, suppressing the patient's ability to fight a host of common infections.
>
> Nitrogen Mustard, a drug used in therapy for Hodgkins disease - nauseates; so toxic to the skin that, if dropped on the skin, this chemical literally eats it away along with other tissues it contacts; if patient's intravenous lead slips during treatment and this drug gets on or under the skin the patient may suffer serious injury including temporary, and in extreme cases, permanent, loss of use of the arm.
>
> Procarbizine, also used for Hodgkins disease - has known psychogenic, i.e., emotional, effects.
>
> Cytoxin, also known as Cyclophosphanide - suppresses patient's immune system response; results in serious bone marrow depletion; studies indicate this drug may also cause other cancers, including cancers of the bladder.
>
> Adriamycan, has numerous adverse effects; is difficult to employ in long term therapies because it destroys the heart muscle.

While each of these agents has its particular adverse effects, as indicated above, they also cause a number of similar, disturbing adverse effects. Most of these drugs cause hair loss. Studies increasingly indicate all of these drugs may cause other forms of cancer. Death due to kidney, heart or respiratory failure is a very real possibility with all of these agents and the margin for error is minimal. Similarly, there is a danger of overdosing a patient weakened by his cancer. Put simply, there is very great risk associated with the medical

use of these chemicals agents. Despite these high risks, all of these drugs are considered "safe" for use under medical supervision and are regularly administered to patients on doctor's orders in the United States today.

18. There have been occasional instances of panic reaction in patients who have smoked marijuana. These have occurred in marijuana-naive persons, usually older persons, who are extremely anxious over the forthcoming chemotherapy and troubled over the illegality of their having obtained the marijuana. Such persons have responded to simple person-to-person communication with a doctor and have sustained no long term mental or physical damage. If marijuana could be legally obtained, and administered in an open, medically-supervised session rather than surreptitiously, the few instances of such adverse reaction doubtless would be reduced in number and severity.

19. Other reported side effects of marijuana have been minimal. Sedation often results. Sometimes mild euphoria is experienced. Short periods of increased pulse rate and of dizziness are occasionally experienced. Marijuana should not be used by persons anxious or depressed or psychotic or with certain other health problems. Physicians could readily screen out such patients if marijuana were being employed as an agent under medical supervision.

20. All drugs have "side effects" and all drugs used in medicine for their therapeutic benefits have unwanted, unintended, sometimes adverse effects.

21. In medical treatment "safety" is a relative term. A drug deemed "safe" for use in treating a life-threatening disease might be "unsafe" if prescribed for a patient with a minor ailment. The concept of drug "safety" is relative. Safety is measured against the consequences a patient would confront in the absence of therapy. The determination of "safety" is made in terms of

whether a drug's benefits outweigh its potential risks and the risks of permitting the disease to progress.

22. In the context of glaucoma therapy, it must be kept in mind that glaucoma, untreated, progressively destroys the optic nerve and results in eventual blindness. The danger, then, to patients with glaucoma is an irretrievable loss of their sight.

23. Glaucoma is not a mortal disease, but a highly specific, selectively incapacitating condition. Glaucoma assaults and destroys the patient's most evolved and critical sensory ability, his or her vision. The vast majority of patients afflicted with glaucoma are adults over the age of thirty. The onset of blindness in middle age or later throws patients into a wholely alien world. They can no longer do the work they once did. They are unable to read a newspaper, drive a car, shop, walk freely and do all the myriad things sighted people take for granted. Without lengthy periods of retaining, adaptation and great effort these individuals often lose their sense of identity and ability to function. Those who are young enough or strong-willed enough will regain a sense of place, hold meaningful jobs, but many aspects of the life they once took for granted cannot be recaptured. Other patients may never fully adjust to their new, uncertain circumstances.

24. Blindness is a very grave consequence. Protecting patients from blindness is considered so important that, for ophtholmologists generally, it justifies the use of toxic medicines and uncertain surgical procedures which in other contexts might be considered "unsafe." In practice, physicians often provide glaucoma patients with drugs which have many serious adverse effects.

25. There are only a limited number of drugs available for the

treatment of glaucoma. All of these drugs produce adverse effects. While several government witnesses lightly touched on the side effects of these drugs, none provided a full or detailed description of their known adverse consequences.

26. The adverse physical consequences resulting from the chronic use of commonly employed glaucoma control drugs include a vast range of unintended complications from mild problems like drug induced fevers, skin rashes, headaches, anorexia, asthma, pulmonary difficulties, hypertension, hypotension and muscle cramps to truly serious, even life-threatening complications including the formation of cataracts, stomach and intestinal ulcers, acute respiratory distress, increases and decreases in heart rate and pulse, disruption of heart function, chronic and acute renal disease, and bone marrow depletion.

27. Finally, each FDA-approved drug family used in glaucoma therapy is capable of producing a lethal response, even when properly prescribed and used. Epinephrine can lead to elevated blood pressure which may result in stroke or heart attack. Miotic drugs suppress respiration and can cause respiratory paralysis. Diuretic drugs so alter basic body chemistry they cause renal stones and may destroy the patient's kidneys or result in death due to heart failure. Timolol and related beta-blocking agents, the most recently approved family of glaucoma control drugs, can trigger severe asthma attacks or cause death due to sudden cardiac arrhythmias often producing cardiac arrest.

28. Both of the FDA-approved drugs used in treating the symptoms of multiple sclerosis, Dantrium and Lioresal, while accepted as "safe" can, in fact, be very dangerous substances. Dantrium or dantrolene sodium carries a boxed warning in the Physician's Desk Reference (PDR) because of its very high toxicity. Patients using this drug run a very real risk of developing sympto-

matic hepatitis (fatal and nonfatal). The list of sublethal toxic reactions also underscores just how dangerous Dantrium can be. The PDR, in part, notes Dantrium commonly causes weakness, general malaise and fatigue and goes on to note the drug can also cause constipation, GI bleeding, anorexia, gastric irritation, abdominal cramps, speech disturbances, seizure, visual disturbances, diplopia, tachycardia, erratic blood pressure, mental confusion, clinical depression, renal disturbances, myalgia, feelings of suffocation and death due to liver failure.

29. The adverse effects associated with Lioresal baclofen are somewhat less severe, but include possibly lethal consequences, even when the drug is properly prescribed and taken as directed. The range of sublethal toxic reactions is similar to those found with Dantrium.

30. Norman E. Zinberg, M.D., one of Dr. Weil's colleagues in the 1968 study mentioned in finding 2, above, accepts marijuana as being safe for use under medical supervision. If it were available by prescription he would use it for appropriate patients.

31. Lester Grinspoon, M.D., practicing psychiatrist, researcher and Associate Professor of Medicine at Harvard Medical School, accepts marijuana as safe for use under medical supervision. He believes its safety is its greatest advantage as a medicine in appropriate cases.

32. Tod H. Mikuriya, M.D., a psychiatrist practicing in Berkley, California who treats substance abusers as inpatients and outpatients, accepts marijuana as safe for use under medical supervision.

33. Richard D. North, M.D., who has treated Robert Randall for glaucoma with marijuana for nine years, accepts marijuana as safe for use by his patient

under medical supervision. Mr. Randall has smoked ten marijuana cigarettes a day during that period without any evidence of adverse mental or physical effects from it.

34. John C. Merritt, M.D., an expert in ophthalmology, who has treated Robert Randall and others with marijuana for glaucoma, accepts marijuana as being safe for use in such treatment.

35. Deborah B. Goldberg, M.D., formerly a researcher in oncology and now a practicing physician, having worked with many cancer patients, observed them, and heard many tell of smoking marijuana successfully to control emesis, accepts marijuana as proven to be an extremely safe anti-emetic agent. When compared with the other, highly toxic chemical substances routinely prescribed to cancer patients, Dr. Goldberg accepts marijuana as clearly safe for use under medical supervision. (See finding 17, above.)

36. Ivan Silverberg, M.D., board certified in oncology and practicing that specialty in the San Francisco area, has accepted marijuana as a safe anti-emitic when used under medical supervision. Although illegal, it is commonly used by patients in the San Francisco area with the knowledge and acquiesence of their doctors who readily accept it as being safe for such use.

37. It can be inferred that all of the doctors and other health care professionals referred to in the findings in Sections V, VI and VII, above, who tolerate or permit patients to self-addminister illegal marijuana for therapeutic benefit, accept the substance as safe for use under medical supervision.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

Schedules of Controlled Substances: Rescheduling of Synthetic Dronabinol in Sesame Oil and Encapsulated in Soft Gelatin Capsules From Schedule I to Schedule II; Statement of Policy

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Final Rule and Statement of Policy.

SUMMARY: This final rule is issued by the Administrator of the Drug Enforcement Administration (DEA) to transfer U.S. Food and Drug Administration (FDA) approved drug products that consist of synthetic dronabinol in sesame oil encapsulated in soft gelatin capsules from Schedule I into Schedule II of the Controlled Substances Act (CSA). Dronabinol is the synthetic equivalent of the isomer of delta-9-tetrahydrocannabinol (THC) which is the principal psychoactive substance in *Cannabis sativa L.*, marijuana. This action is based on a finding that U.S. Food and Drug Administration approved drug products which contain dronabinol fit the statutory criteria for inclusion in Schedule II of the CSA. As a result of this rule, the regulatory controls and criminal sanctions of Schedule II of the CSA will apply to the manufacture, distribution, importation and exportation of dronabinol pharmaceutical products. This rule does not affect the Schedule I status of any other substance, mixture or preparation which is currently included in 21 CFR 1308.11(d)(21), Tetrahydrocannabinols. The Administrator herein also issues a statement of policy regarding review, under the public interest criteria of 21 U.S.C. 823(f) and 824(a)(4), of the DEA registrations of practitioners who distribute or dispense dronabinol for purposes at variance with the FDA approved indications for use of the approved product. A notice is published elsewhere in this isue of the **Federal Register** that withdraws the proposed rule entitled Changes in Protocol Requirements for Researchers and Prescription Requirements for Practitioners (50 FR 42184–42186, October 18, 1985).

EFFECTIVE DATE: May 13, 1986.

FOR FURTHER INFORMATION CONTACT: Howard McClain, Jr., Chief, Drug Control Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Telephone: (202) 633–1366.

SUPPLEMENTARY INFORMATION:

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Narcotics, Prescription drugs.

A proposed rule was published in the **Federal Register** on October 18, 1985 (50 FR 42186–42187), proposing that dronabinol in sesame oil and encapsulated in soft gelatin capsules in a drug product approved by the U.S. Food and Drug Administration be transferred from Schedule I to Schedule II of the Controlled Substances Act (21 U.S.C. 801 et seq.). Concurrently, a proposal was published which proposed changes in protocol requirements for researchers and prescription requirements for practitioners (50 FR 42184–42186). Interested persons were given until November 18, 1985, to submit comments or objections regarding each of the proposals.

Thirteen individuals or organizations availed themselves of the opportunity to comment, object or request an administrative hearing. Two organizations, Cannabis Corporation of America and National Organization for the Reform of Marijuana Laws (NORML), requested hearings. Both requests for hearings were subsequently withdrawn. Comments or objections were submitted by or on behalf of the following: Alliance for Cannabis Therapeutics, American College of Neuropsychopharmacology, American Medical Association, American Pharmaceutical Association, Arkansas Department of Health, Committee on Problems of Drug Dependence, Inc., Mr. Ansis M. Helmanis, the law offices of Kleinfeld, Kaplan and Becker, Marcos A. S. Lima, M.D., H. G. Pars Pharmaceutical Laboratories and the Pharmaceutical Manufacturers Association.

Having considered the comments and objections presented by the above listed parties, the requirements of the Controlled Substances Act and the Convention on Psychotropic Substances (T.I.A.S. 9725, July 15, 1980), the Administrator has decided (a) to proceed with the rescheduling of dronabinol as proposed at 50 FR 42186–42187 and (b) to issue a statement of policy regarding review of the distribution or dispensing of dronabinol by practitioner registrants which deviates from approved medical use to insure compliance with the obligations of the United States as a signatory to the Convention on Psychotropic Substances. The previously proposed regulations relating to dronabinol are withdrawn elsewhere in this issue of the **Federal Register.**

(a) Transfer of FDA Approved Dronabinol Drug Products From Schedule I to Schedule II

Having considered the comments and objections presented by the above listed parties and based on the investigations and review of the Drug Enforcement Administration, with attention to the obligations of the United States under the Convention on Psychotropic Substances, and relying on the scientific and medical evaluation and recommendation of the Assistant Secretary for Health of the Department of Health and Human Services, acting on behalf of the Secretary of the Department of Health and Human Services, in accordance with 21 U.S.C. 811(b), and the Food and Drug Administration approval of a new drug application for Marinol capsules, the Administrator of the Drug Enforcement Administration, pursuant to the provisions of 21 U.S.C. 811(a), finds that:

1. Dronabinol (synthetic) in sesame oil and encapsulated in soft gelatin capsules in a U.S. Food and Drug Administration approved drug product has a high potential for abuse;

2. Dronabinol (synthetic) in sesame oil and encapsulated in soft gelatin capsules in a U.S. Food and Drug Administration approved drug product has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions, and

3. Dronabinol (synthetic) in sesame oil and encapsulated in soft gelatin capsules in a U.S. Food and Drug Administration approved drug product may lead to severe psychological or physical dependence.

The above findings are consistent with placement of dronabinol approved drug products into Schedule II of the CSA. The transfer of the product from Schedule I to Schedule II is effective on May 13, 1986 with selected implementation dates as indicated. In the event that this imposes special hardships on any registrant, the Drug Enforcement Administration will entertain any justified request for an extention of time to comply with the Schedule II regulations. The applicable regulations are as follows:

1. *Registration.* Any person who manufactures, distributes, delivers, imports or exports a FDA approved dronabinol drug product, or who engages in research or conducts instructional activities with such a substance must be registered to conduct such activities in accordance with Parts

1301 and 1311 of Title 21 of the Code of Federal Regulations. Any person currently registered to handle dronabinol in Schedule I may continue activities under that registration until approved or denied registration in Schedule II, provided such registrant has filed an application for registration in Schedule II with DEA on or before June 12, 1986. Any persons not currently registered and proposing to engage in such activities may not conduct activities with the drug product until properly registered in Schedule II.

2. *Security.* FDA approved dronabinol drug products must be manufactured, distributed and stored in accordance with §§ 1301.71, 1301.72(a), (c) and (d), 1301.73, 1301.74, 1301.75(b) and (c) and § 1301.76 of Title 21 of the Code of Federal Regulations. Dronabinol and all mixtures, compounds and preparations thereof, except for dronabinol in sesame oil and encapsulated in soft gelatin capsules in a FDA approved drug product, remain in Schedule I and must be stored in accordance with § 1301.75(a).

3. *Labeling and Packaging.* All labels and labeling for commercial containers of FDA approved dronabinol drug products must comply with the requirements of §§ 1302.03–1302.05 and 1302.07–1302.08 of Title 21 of the Code of Federal Regulations. Current products distributed or dispensed for approved research and labeled as Schedule I products may continue to be distributed and dispensed until May 13, 1987.

4. *Quotas.* All persons required to obtain quotas for dronabinol drug products shall submit applications pursuant to §§ 1303.12 and 1303.22 of Title 21 of the Code of Federal Regulations.

5. *Inventory.* Every registrant required to keep records and who possesses any quantity of FDA approved dronabinol drug product shall take an inventory, pursuant to § 1304.04 and §§ 1304.11–1304.19 of Title 21 of the Code of Federal Regulations, of all stocks on hand as of June 12, 1986.

6. *Records.* All registrants required to keep records pursuant to §§ 1304.21–1304.27 of Title 21 of the Code of Federal Regulations shall do so regarding FDA approved dronabinol drug products.

7. *Reports.* All registrants required to submit reports pursuant to §§ 1304.34–1304.37 of Title 21 of the Code of Federal Regulations shall do so regarding FDA approved dronabinol drug products.

8. *Order Forms.* All registrants involved in the distribution of dronabinol drug products shall comply with the order form requirements of Part 1305 of Title 21 of the Code of Federal Regulations.

9. *Prescriptions.* FDA approved dronabinol drug products have been approved for use in medical treatment and the drug may be dispensed by prescription. All prescriptions for FDA approved dronabinol drug products shall comply with §§ 1306.01–1306.08 and §§ 1306.11–1306.15 of Title 21 of the Code of Federal Regulations.

10. *Importation and Exportation.* All importation and exportation of dronabinol drug products shall be in compliance with Parts 1311 and 1312 of Title 21 of the Code of Federal Regulations.

11. *Criminal Liability.* Any activity with respect to FDA approved dronabinol drug products not authorized by or in violation of the Controlled Substances Act or the Controlled Substances Import and Export Act continues to be unlawful. The applicable penalties after May 13, 1986 shall be those of a Schedule II substance.

12. *Other.* In all other respects, this order is effective on May 13, 1986.

(b) Statement of Policy

The Administrator takes special note of the fact that synthetic tetrahydrocannabinol in all forms, including dronabinol, remains internationally controlled in Schedule I of the Convention on Psychotropic Substances. Under the special obligations of the Convention, to which the United States is a party, relative to Schedule I substances, Article 7 requires in part that parties shall "prohibit all use except for scientific and *very limited medical purposes* . . ." (emphasis added). The Administrator also notes that the official "Commentary on the Convention on Psychotropic Substances" provides guidance to parties in meeting this obligation consistent with national laws and policies.

The Administrator finds that the existing requirements of Schedule II of the Controlled Substances Act can provide adequate controls and restrictions to comply with the obligations of the Convention on Psychotropic Substances when coupled with effective oversight and enforcement, such as provided for in the Dangerous Drug Diversion Control Act of 1984 (part B of chapter V of Title II of Pub. L. 98–473). The Administrator notes that experience has demonstrated that there are medical practitioners registered to dispense Schedule II substance who abuse that registration and prescribe or dispense Schedule II substances outside the scope of the legitimate medical practice.

On May 31, 1985, the Food and Drug Administration (FDA) approved the drug product, Marinol capsules, containing dronabinol for nausea associated with cancer treatment. Considering the nature of this drug, it is reasonable to assume that drug abusers will attempt to seek out practitioner registrants willing to prescrible the drug for abuse purposes, under the guise of legitimate medical practice, as frequently occurs with other Schedule II substances. DEA has encountered practitioners who attempt to justify illegal or improper distribution or dispensing by claiming unique knowledge of a drug's effectiveness for a broad range of medical indications. While it is expected that legitimate structured research programs may document additional medical indications for dronabinol prescribing which deviates from the recognized approved medical use must be questioned in keeping with the United States obligations to prohibit all use except for scientific and very limited medical purposes.

Therefore, in keeping with sound domestic drug control policy and the United States obligations under the Convention on Psychotropic Substances, the Administrator hereby issues this statement of policy:

Any person registered by DEA to distribute, prescribe, administer or dispense controlled substances in Schedule II who engages in the distribution or dispensing of dronabinol for medical indications outside the approved use associated with cancer treatment, except within the confines of a structured and recognized research program, may subject his or her controlled substances registration to review under the provisions of 21 U.S.C. 823(f) and 824(a)(4) as being inconsistent with the public interest. DEA will take action to revoke that registration if it is found that such distribution or dispensing constitutes a threat to the public health and safety, and in addition will pursue any criminal sanctions which may be warranted under 21 U.S.C. 841(a)(1). See United States v. *Moore,* 423 U.S. 122 (1975).

The proposed rule which was published at 50 FR 42184–42186, October 18, 1985, entitled Changes in Protocol Requirements for Researchers and Prescription Requirements for Practitioners, is withdrawn elsewhere in this issue of the **Federal Register**.

Pursuant to sections 3(c)(3) and 3(e)(2)(C) of Executive Order 12291 (46

FR 13193), this statement of policy has been submitted for review by the Office of Management and Budget. In accordance with the provisions of 21 U.S.C. 811(a), this order to reschedule certain drug products which contain synthetic dronabinol from Schedule I to Schedule II is a formal rulemaking "on the record after opportunity for a hearing." Such proceedings are conducted pursuant to the provisions of 5 U.S.C. 556 and 557 and as such have been exempted from the consultation requirements of Executive Order 12291.

Pursuant to 5 U.S.C. 605(b), the Administrator certifies that the rescheduling of formulations which contain dronabinol, as ordered herein, will not have a significant impact upon small businesses or other entities whose interests must be considered under the Regulatory Flexibility Act (Pub. L. 96–354, September 19, 1980). This action will allow the marketing of a drug product which has been approved by the FDA.

Pursuant to the authority vested in the Attorney General by section 201(a) of the CSA [21 U.S.C. 811(a)], as redelegated to the Administrator of the Drug Enforcement Administration by 28 CFR 0.100, and for the reasons set forth above, the Administrator hereby orders that 21 CFR 1308.12 be amended as follows:

PART 1308—[AMENDED]

1. The authority citation for 21 CFR Part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b).

2. 21 CFR 1308.12 is amended by redesignating the existing paragraph (f) as paragraph (g) and by adding a new paragraph (f), reading as follows:

§ 1308.12 Schedule II.

* * * * *

(f) *Hallucinogenic substances.*

(1) Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved drug product 7369

[Some other names for dronabinol: (6a*R*-*trans*)-6a,7,8,10a-tetrahydro-6,6,9-trimethyl-3-pentyl-6*H*-dibenzo[*b,d*]pyran-1-ol, or (-)-delta-9-(trans)-tetrahydrocannabinol]

* * * * *

Dated: May 1, 1986.

John C. Lawn,

Administrator, Drug Enforcement Administration.

[FR Doc. 86–10724 Filed 5–12–86; 8:45 am]

BILLING CODE 4410-09-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 914

Approval of Permanent Program Amendments From the State of Indiana Under the Surface Mining Control and Reclamation Act of 1977

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Final rule.

SUMMARY: OSMRE is announcing the appproval of amendments to the Indiana Permanent Regulatory Program (hereinafter referred to as the Indiana program) received by OSMRE pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

On January 31, 1986, Indiana submitted amendments to its program requirements regarding civil penalties, incidental boundary revisions and use of explosives.

After providing opportunity for public comment and conducting a thorough review of the program amendments, the Director, OSMRE, has determined that the amendments meet the requirements of SMCRA and the Federal regulations. Accordingly, the Director is approving these amendments. The Federal rules at 30 Part 914 which codify decisions concerning the Indiana program are being amended to implement this action.

This final rule is being made effective immediately in order to expedite the State program amendment process and encourage States to conform their programs to the Federal standards without undue delay; consistency of the State and Federal standards is required by SMCRA.

EFFECTIVE DATE: May 13, 1986

FOR FURTHER INFORMATION CONTACT: Mr. Richard D. Rieke, Director, Indianapolis Field Office, Office of Surface Mining Reclamation and Enforcement, Federal Building and U.S. Courthouse, Room 522, 46 East Ohio Street, Indianapolis, Indiana 46204. Telephone: (317) 269–2600.

SUPPLEMENTARY INFORMATION:

I. Background

Information regarding the general background on the Indiana State program, including the Secretary's findings, the disposition of comments and a detailed explanation of the conditions of approval of the Indiana program can be found in the July 26, 1982 **Federal Register** (47 FR 32071–32108). Subsequent actions concerning the Indiana program are identified in 30 CFR 914.15 and 30 CFR 914.16.

II. Discussion of Proposed Amendment

On January 31, 1986, the Indiana Department of Natural Resources submitted to OSMRE pursuant to 30 CFR 732.17, proposed State program amendments for approval (Administrative Record No. IND 0453). The amendments modify requirements for civil penalty assessments, incidental boundary revisions and use of explosives.

OSMRE published a notice in the **Federal Register** on February 26, 1986, announcing receipt of the proposed program amendments and procedures for the public comment period and for requesting a public hearing on the substantive adequacy of the proposed amendments (51 FR 6751). The public comment period ended March 28, 1986. There was no request for a public hearing and the hearing scheduled for March 24, 1986, was not held.

III. Director's Findings

The Director finds, in accordance with SMCRA and 30 CFR 732.15 and 732.17, that the program amendments submitted by Indiana on January 31, 1986, meet the requirements of SMCRA and 30 CFR Chapter VII. Only those areas of particular interest are discussed below in the specific findings. Discussion of only those provisions for which findings are made does not imply any deficiency in any provisions not discussed.

Civil Penalties

Indiana has amended 310 IAC 12–6–11 to provide that the regulatory authority shall assess a penalty for a violation which leads to a cessation order and for notices of violation assigned 31 points or more under the point system established in 310 IAC 12–6–12.5. The rule provides that the regulatory authority may assess a penalty for 30 points or less. Under the rule, a penalty of $5000 per day shall be assessed for mining without a permit, except under certain circumstances.

Indiana has amended 310 IAC 12–6–12 to establish the requirements for assigning points for penalties based on certain factors. The factors to be considered are: The permittee's history of violations at the particular operation (up to 30 points); the seriousness of the violation for which the penalty is being assessed (up to 15 points); the degree of the permittee's negligence or fault in the violation (up to 25 points); and degree of good faith determined from the permittee's efforts to abate the violation (up to negative 30 points).

(m) *Primary protective barrier for mammography x-ray systems.* For mammography x-ray systems manufactured after September 30, 1999:

(1) At any SID where exposures can be made, the image receptor support device shall provide a primary protective barrier that intercepts the cross section of the useful beam along every direction except at the chest wall edge.

(2) The x-ray tube shall not permit exposure unless the appropriate barrier is in place to intercept the useful beam as required in paragraph (m)(1) of this section.

(3) The transmission of the useful beam through the primary protective barrier shall be limited such that the exposure 5 centimeters from any accessible surface beyond the plane of the primary protective barrier does not exceed $2.58X10^{-8}$ C/kg (0.1 mR) for each activation of the tube.

(4) Compliance for transmission shall be determined with the x-ray system operated at the minimum SID for which it is designed, at the maximum rated peak tube potential, at the maximum rated product of x-ray tube current and exposure time (mAs) for the maximum rated peak tube potential, and by measurements averaged over an area of 100 square centimeters with no linear dimension greater than 20 centimeters. The sensitive volume of the radiation measuring instrument shall not be positioned beyond the edge of the primary protective barrier along the chest wall side.

Dated: June 16, 1999.

Margaret M. Dotzel,

Acting Associate Commissioner for Policy Coordination.

[FR Doc. 99–16835 Filed 7–1–99; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Parts 1308, 1312

[DEA–180F]

Schedules of Controlled Substances: Rescheduling of the Food and Drug Administration Approved Product Containing Synthetic Dronabinol [(-)-Δ^9-(trans)-Tetrahydrocannabinol] in Sesame Oil and Encapsulated in Soft Gelatin Capsules From Schedule II to Schedule III

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Final rule.

SUMMARY: This is a final rule of the Deputy Administrator of the Drug Enforcement Administration (DEA) transferring a drug between schedules of the Controlled Substances Act (CSA) pursuant to 21 U.S.C. 811. With the issuance of this final rule, the Deputy Administrator transfers from schedule II to schedule III of the CSA the drug containing synthetic dronabinol [(-)-Δ^9-(*trans*)-tetrahydrocannabinol] in sesame oil and encapsulated in soft gelatin capsules in a product approved by the Food and Drug Administration (FDA). This rule also designates this drug as a schedule III non-narcotic substance requiring an import/export permit. As a result of this rule, the regulatory controls and criminal sanctions of schedule III will be applicable to the manufacture, distribution, importation and exportation of this drug.

EFFECTIVE DATE: July 2, 1999.

FOR FURTHER INFORMATION CONTACT: Frank Sapienza, Chief, Drug and Chemical Evaluation Section, Drug Enforcement Administration, Washington, DC 20537, 202–307–7183.

SUPPLEMENTARY INFORMATION:

Background

Dronabinol is the United States Adopted Name (USAN) for the (-)-isomer of Δ^9-(*trans*)-tetrahydrocannabinol [(-)-Δ^9-(*trans*)-THC], which is believed to be the major psychoactive component of *Cannibas sativa L.* (marijuana). On May 31, 1985, FDA approved for marketing the product Marinol®—which contains synthetic dronabinol in sesame oil and encapsulated in soft gelatin capsules—for the treatment of nausea and vomiting associated with cancer chemotherapy. Following this FDA approval, DEA issued a final rule on May 13, 1986, transferring FDA-approved products of the same formulation as Marinol® from schedule I to schedule II of the CSA in accordance with 21 U.S.C. 811(a). (For simplicity within this document, the term "Marinol®" will be used hereafter to refer to Marinol® and any other products, which may by approved by FDA in the future, that have the same formulation as Marinol®.) The 1986 rescheduling of Marinol® was based on a medical and scientific evaluation and scheduling recommendation from the Assistant Secretary for Health in accordance with 21 U.S.C. 811(b). The transfer of Marinol® to schedule II did not affect the CSA classification of pure dronabinol, which—as a tetrahydrocannabinol with no currently accepted medical use in treatment in the United States—remains a schedule I controlled substance. On December 22, 1992, FDA expanded Marinol®'s indications to include the treatment of anorexia associated with weight loss in patients with AIDS.

The Petition To Reschedule Marinol®

On February 3, 1995, UNIMED Pharmaceuticals, Inc. petitioned the Administrator of DEA to transfer Marinol® from schedule II to schedule III. In response to this petition, and in view of supplemental information that UNIMED provided to DEA on December 11, 1996, DEA had to determine whether this proposed rescheduling of Marinol® would comport with United States obligations under the Convention on Psychotropic Substances, 1971 (Psychotropic Convention). See 21 U.S.C. 811(d). Under the Psychotropic Convention, dronabinol and all dronabinol-containing products, such as Marinol®, are listed in schedule II. As a result, the United States is obligated under the Psychotropic Convention to impose certain restrictions on the export and import of Marinol®. DEA has concluded that, in order for the United States to continue to meet its obligations under the Psychotropic Convention, DEA will continue to require import and export permits for international transactions involving Marinol®, even though Marinol® will be transferred to schedule III of the CSA. (As set forth below, to accomplish this, DEA is hereby amending 21 CFR 1312.30 to require import and export permits for international transactions involving Marinol®.)

After determining that Marinol® could be transferred to schedule III while maintaining the controls required by the Psychotropic Convention, and after gathering the necessary data, on August 7, 1997, DEA requested from the Acting Assistant Secretary for Health, Department of Health and Human Services (DHHS), a scientific and medical evaluation, and recommendation, as to whether Marinol® should be rescheduled, in accordance with 21 U.S.C. 811(b).

On September 11, 1998, the Acting Assistant Secretary for Health sent to DEA a letter recommending that Marinol® be transferred from schedule II to schedule III of the CSA. Enclosed with the September 11, 1998, letter was a document prepared by the FDA entitled "Basis for the Recommendation for Rescheduling Marinol® Capsules from schedule II to schedule III of the Controlled Substances Act (CSA)." In this document, the FDA defines the Marinol® product as "an FDA-approved drug product containing synthetically produced dronabinol dissolved in sesame oil and encapsula

gelatin capsules (2.5 mg, 5 mg, and 10 mg per dosage unit)." The document contained a review of the factors which the CSA requires the Secretary to consider, which are set forth in 21 U.S.C. 811(c).

The Proposed Rule

On November 7, 1998, the then-Acting Deputy Administrator of DEA published a notice of proposed rule making in the **Federal Register** (63 FR 59751), proposing to transfer Marinol® from schedule II to schedule III of the CSA. The proposed rule was based on the DHHS scientific and medical evaluation and scheduling recommendation and DEA's independent evaluation. Also under the proposed rule, 21 CFR 1312.30 would be amended to include Marinol® as a schedule III non-narcotic controlled substance specifically designated as requiring import and export permits pursuant to 21 U.S.C. 952(b)(2) and 953(e)(3). As discussed above, this proposed amendment to 21 CFR 1312.30 is necessary for the United States to continue to meet its obligations under the Psychotropic Convention. The notice of proposed rule provided an opportunity for all interested persons to submit their comments, objections, or requests for hearing in writing to DEA on or before December 7, 1998.

Comments From the Public

DEA received comments regarding the proposed rule from ten persons. Nine of the commenters supported the proposed rule. One commenter objected to the proposed rule and requested a hearing thereon. The comments are briefly summarized below.

The nine commenters who supported the proposed rule included organizations, physicians, and one individual. Eight of the nine commenters who supported the proposed rule expressed the opinion that Marinol® is a safe and effective alternative to smoking marijuana for treatment of nausea and loss of appetite and has low abuse potential.

One commenter who supported the proposed rule expressed the view that the rescheduling of Marinol® should not serve as a substitute for making marijuana legally available for medical use. This commenter stated that it supported the use of marijuana for medical purposes and, therefore, wished to emphasize that the proposed rule affected the CSA status of Marinol®—not that of marijuana, which remains a schedule I controlled substance.

The one commenter who objected to the proposed rule, and requested a hearing thereon, asserted that Marinol® should not be transferred to schedule III unless and until marijuana and all other THC-containing drugs are simultaneously and likewise rescheduled. This commenter asserted that Marinol® has the same potential for abuse as marijuana and all other THC-containing drugs. This commenter agreed with the proposed rule that Marinol®'s potential for abuse is less than the "high potential for abuse" commensurate with schedules I and II of the CSA. Accordingly, this commenter agreed that Marinol® should be transferred to a less restrictive schedule than schedule II. However, this commenter disagreed with what would be the resultant status of Marinol® vis-á-vis marijuana and THC if the NPRM becomes final: Marinol® would be in schedule III while marijuana and THC would remain in schedule I. This commenter asserted that the CSA prohibited transferring Marinol® to a less restrictive schedule unless marijuana and all THC-containing drugs are simultaneously transferred to the same schedule. DEA has determined that this commenter's objections are based on a misinterpretation of the CSA, which can be addressed, as a matter of law, without conducting a fact-finding hearing. Accordingly, as this commenter presented no material issues of fact, DEA denied this commenter's request for a hearing.

Findings

Relying on the scientific and medical evaluation and scheduling recommendations of the Assistant Secretary for Health, and based on DEA's independent review thereof, the Deputy Administrator of the DEA, pursuant to 21 U.S.C. 811(a) and 811(b), finds that:

(1) Based on information now available, Marinol® has a potential for abuse less than the drugs or other substances in schedules I and II.

(2) Marinol® is a FDA-approved drug product and has a currently accepted medical use in treatment in the United States; and

(3) Abuse of Marinol® may lead to moderate of low physical dependence or high psychological dependence.

Rescheduling Action

Based on the above findings, the Deputy Administrator of the DEA concludes that Marinol® should be transferred from schedule II to schedule III. Schedule III regulations will, among other things, allow five prescription refills in six months and lessen record keeping requirements and distribution restrictions. The schedule III control of Marinol® will become effective July 2, 1999, except that certain regulatory provisions governing registrants who handle Marinol will take effect as indicated below. In the event that the regulations impose special hardships on the registrants, the DEA will entertain any justified request for an extension of time to comply with the schedule III regulations regarding Marinol®. The applicable regulations are as follows.

1. *Registration.* Any person who manufactures, distributes, dispenses, imports or exports Marinol® or who engages in research or conducts instructional activities with Marinol®, or who proposes to engage in such activities, must be registered to conduct such activities in accordance with part 1301 of Title 21 of the Code of Federal Regulations.

2. *Security.* Marinol® must be manufactured, distributed and stored in accordance with §§ 1301.71, 1301.72(b), (c), and (d), 1301.73, 1301.74, 1301.75(b) and (c) and 1301.76 of Title 21 of the Code of Federal Regulations.

3. *Labeling and Packaging.* All commercial containers of Marinol®, which are packaged on or after January 3, 2000 must have the appropriate Schedule III labeling as required by §§ 1302.03–1302.07 of Title 21 of the Code of Federal Regulations. Commercial containers of Marinol® packaged before January 3, 2000. After April 3, 2000, all commercial containers of Marinol must bear the CIII labels as specified in §§ 1302.03–1302.07 of Title 21 of the Code of Federal Regulations.

4. *Inventory.* Registrants possessing Marinol® are required to take inventories pursuant to §§ 1304.03, 1304.04 and 1304.11 of Title 21 of the Code of Federal Regulations.

5. *Records.* All registrants must keep records pursuant to §§ 1304.03, 1304.04 and 1304.21–1304.23 of Title 21 of the Code of Federal Regulations.

6. *Prescriptions.* All prescriptions for Marinol® are to be issued pursuant to §§ 1306.03–1306.06 and 1306.21–1306.26 of Title 21 of the Code of Federal Regulations. All prescriptions for Marinol® issued on or after July 2, 1999, if authorized for refilling, shall as of that date be limited to five refills and shall not be refilled after January 2, 2000.

7. *Importation and Exportation.* Due to its international control status, import and export permits for Marinol® will be required in accordance with 21 CFR 1312.30. All importation and exportation of Marinol® shall be in compliance with part 1312 of Title 21 of the CFR.

8. *Criminal Liability.* Any activity with Marinol® not authorized by, or in violation of, the CSA or the Controlled

Substances Import and Export Act shall continue to be unlawful.

In accordance with the provisions of the CSA (21 U.S.C. 811(a)), this action is a formal rule making "on the record after opportunity for a hearing." Such proceedings are conducted pursuant to the provisions of 5 U.S.C. 556 and 557 and, as such, are exempt from review by the Office of Management and Budget pursuant to Executive Order (E.O.) 12866, section 3(d)(1). The Deputy Administrator, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this final rule and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities. Marinol® is a prescription drug used to treat nausea due to cancer chemotherapy and AIDS wasting. Handlers of Marinol® are likely to handle other controlled substances used to treat cancer or AIDS which are already subject to the regulatory requirements of the CSA. Further, placement of Marinol® in schedule III of the CSA will mean a significant decrease in the regulatory requirements for persons handling Marinol®.

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under provisions of the Unfunded Mandates Reform Act of 1995.

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with E.O. 12612, it is determined that this rule, if finalized, will not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects

21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Narcotics, Prescription drugs.

21 CFR Part 1312

Administrative practice and procedure, Drug traffic control, Exports, Imports, Narcotics, Reporting requirements.

Under the authority vested in the Attorney General by section 201(a) of the CSA (21 U.S.C. 811(a)), and delegated to the Administrator of the DEA by the Department of Justice regulations (28 CFR 0.100) and redelegated to the Deputy Administrator pursuant to 28 CFR 0.104, the Deputy Administrator hereby amends 21 CFR parts 1308 and 1312 as follows:

PART 1308—[AMENDED]

1. The authority citation for 21 CFR part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b) unless otherwise noted.

§ 1308.12 [Amended]

2. Section 1308.12 is amended by removing paragraph (f)(1) and redesignating the existing paragraph (f)(2) as (f)(1).

3. Section 1308.13 is amended by adding a new paragraph (g) to read as follows:

§ 1308.13 Schedule III.

* * * * *

(g) *Hallucinogenic substances.*

(1) Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved product—7369.

[Some other names for dronabinol: (6a*R*-*trans*)-6a,7,8,10a-tetrahydro-6,6,9-trimethyl-3-pentyl-6*H*-dibenzo [*b,d*]pyran-1-ol] or (-)-delta-9-(*trans*)-tetrahydrocannabinol]

(2) [Reserved]

PART 1312—[AMENDED]

1. The authority citation for part 1312 continues to read as follows:

Authority: 21 U.S.C. 952, 953, 954, 957, 958.

2. Section 1312.30 is amended by adding a new paragraph (a) and reserving paragraph (b) to read as follows:

§ 1312.30 Schedule III, IV and V non-narcotic controlled substances requiring an import and export permit.

* * * * *

(a) Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved product.

(b) [Reserved]

Dated: June 28, 1999.

Donnie R. Marshall,

Deputy Administrator, Drug Enforcement Administration.

[FR Doc. 99–16833 Filed 7–1–99; 8:45 am]

BILLING CODE 4410–09–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[LA–29–1–7403; FRL–6370–8]

Approval and Promulgation of Air Quality Implementation Plans; Louisiana: Reasonable-Further-Progress Plan for the 1996–1999 Period, Attainment Demonstration, Contingency Plan, Motor Vehicle Emission Budgets, and 1990 Emission Inventory for the Baton Rouge Ozone Nonattainment Area; Louisiana Point Source Banking Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this action, the EPA is finalizing its approval of revisions to the Louisiana State Implementation Plan (SIP) for the Baton Rouge ozone nonattainment area. These revisions were submitted by the State of Louisiana for the purpose of satisfying the Post-1996 Rate-of-Progress (ROP), Attainment Demonstration, and Contingency Plan requirements of the Federal Clean Air Act (the Act), which will aid in ensuring the attainment of the National Ambient Air Quality Standard (NAAQS) for ozone. The EPA is also approving the associated 1999 Motor Vehicle Emissions Budgets (MVEBs) for the area.

The EPA is also taking final action to approve additional SIP revisions submitted by Louisiana including codifying revisions that were made to the 1990 base year emission inventory and submitted to the EPA as part of the Baton Rouge 15% Rate-of-Progress Plan approved on October 22, 1996. Furthermore, the EPA is approving additional revisions to the 1990 base year emissions inventory submitted as part of the Post-1996 ROP Plan. The EPA is also approving the State's point source banking regulations. This rulemaking action is being taken under sections 110, 301, and part D of the Act.

EFFECTIVE DATE: This action is effective on August 2, 1999.

UNITED NATIONS

E

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REPORT OF THE COMMISSION ON NARCOTIC DRUGS ON ITS THIRTY-FOURTH SESSION*

(Vienna, 29 April to 9 May 1991)

* The present document is a mimeographed version of the report of the Commission on Narcotic Drugs on its thirty-fourth session. It will be issued subsequently in final form as Official Records of the Economic and Social Council, 1991, Supplement No. 4 (E/1991/24, Supp. No. 4).

91-17220 3017-18a (E)

2. At its 1045th meeting, on 30 April 1991, the Commission considered agenda item 3, which related to: (a) the possible rescheduling of one substance and its stereochemical variants under the provisions of the Convention on Psychotropic Substances, 1971 1/ (E/CN.7/1991/17, paras. 1-6, and Add.2, paras. 1-2); (b) the possible descheduling of one substance under the provisions of the 1971 Convention (E/CN.7/1991/17, paras. 7-16, and Add.2, paras. 3-4); (c) the possible termination of the exemption by one Government of 55 preparations under the provisions of the 1971 Convention (E/CN.7/1991/17, paras. 17-24, and Add.2, paras. 5-6); and (d) the indexing of the E/NL. series of national laws and regulations (E/CN.7/1991/17/Add.1 and E/CN.7/1991/CRP.11). For its consideration of this agenda item, the Commission also had before it the twenty-seventh report of the WHO Expert Committee on Drug Dependence. 2/

A. Consideration of recommendations for rescheduling, for descheduling and for terminating exemption under the Convention on Psychotropic Substances, 1971

1. Recommendation for rescheduling delta-9-tetrahydrocannabinol and its stereochemical variants

3. The Commission had before it a notification from the Director-General of the World Health Organization (WHO) recommending that delta-9-tetrahydrocannabinol (delta-9-THC) and its stereochemical variants should be rescheduled from Schedule I to Schedule II of the 1971 Convention, together with the comments received by the Secretary-General from Governments on the possible rescheduling of delta-9-THC and its stereochemical variants (E/CN.7/1991/17 and Add.2).

4. The observer for WHO made a statement on the notifications before the Commission. He drew attention to the fact that, in recommending the transfer of delta-9-THC and its stereochemical variants, there would be no need to make a technically difficult differentiation between its stereochemical variants in enforcing the regulation.

5. Some representatives expressed their support for the WHO recommendation and mentioned that the substance was under national control in that it was subject to the same control as substances listed in Schedule I of the Single Convention on Narcotic Drugs, 1961, and that Convention as amended by the 1972 Protocol; 3/ others expressed the view that stricter controls could always be applied at the national level. One representative stated that, while his Government could accept the transfer of delta-9-THC and its stereochemical variants, it should not be used as a precedent to review the 1961 Convention with regard to cannabis or cannabis resin. Several representatives emphasized that the flexibility provided by such a transfer would be highly desirable, in view of the therapeutic usefulness of the substance, and that to keep it under control in Schedule I of the 1971 Convention might limit its availability to patients undergoing chemotherapy. Several representatives stated that in

their opinion there was no link between the therapeutic use of delta-9-THC and the abuse of cannabis. Some representatives did not agree with the WHO recommendation. One said that another drug had proved to be quite effective in the treatment of cancer and that, for that reason, rescheduling the substance did not seem to offer any therapeutic advantage and might even be interpreted as an attempt to legalize cannabis.

6. The Commission, by a vote of 33 in favour and 5 against, with no abstentions, decided to transfer delta-9-THC and its stereochemical variants from Schedule I to Schedule II of the 1971 Convention. The five States voting against the decision were Colombia, Côte d'Ivoire, Egypt, France and Pakistan. For the text of the decision drafted by the Secretariat at the request of the Commission to reflect the results of the vote, see chapter XIV, section B, decision 2 (XXXIV).

2. Recommendation for descheduling of propylhexedrine

7. The Commission also had before it a notification from WHO (E/CN.7/1991/17 and Add.2) recommending that propylhexedrine (N, -dimethylcyclohexaneethylamine) should be deleted from Schedule IV of the 1971 Convention and should not be transferred to any other Schedule.

8. Several representatives expressed their agreement with the WHO recommendation. One, however, expressed concern about making frequent changes in the scope of control of substances, adding that it might result in regulatory and administrative instability within member States.

9. The Commission unanimously decided to remove propylhexedrine from Schedule IV of the 1971 Convention. For the text of the decision drafted by the Secretariat at the request of the Commission to reflect the results of the vote, see chapter XIV, section B, decision 3 (XXXIV).

3. Recommendation for terminating the exemption of 55 preparations containing butalbital by the Government of the United States of America

10. The Commission also had before it a notification from WHO recommending the termination of the exemption by the Government of the United States of America of 55 preparations containing butalbital from certain control measures, under the provisions of article 3 of the 1971 Convention (E/CN.7/1991/17 and Add.2).

11. The Commission decided unanimously to terminate the exemption by the Government of the United States of the 55 preparations containing butalbital, so that the requirements of article 12, paragraph 2, of the 1971 Convention should apply to those preparations. For the text of the decision drafted by the Secretariat at the request of the Commission to reflect the results of the vote, see chapter XIV, section B, decision 4 (XXXIV).

B. Cumulative index of laws and regulations relating to the control of narcotic drugs and psychotropic substances published in the E/NL. series

12. For its consideration of the cumulative index of laws and regulations relating to the control of narcotic drugs and psychotropic substances published in the E/NL. series, the Commission had before it a note by the Secretariat (E/CN.7/1991/17/Add.1) containing an explanation of the improvements on the format of the cumulative index for the period 1987-1990, that would make it a more useful tool for legislative research in connection with the provisions of the 1988 Convention. The Commission took note of the cumulative index for the period 1987-1990 (E/CN.7/1991/CRP.11) and agreed that it should be issued as a United Nations sales publication.

13. One speaker emphasized the quality and usefulness of the cumulative index. He suggested that, while the Secretariat should continue to distribute it to Governments, it should leave it to them to request the texts of laws and regulations that they required.

292. The Commission, at its thirty-fourth session, adopted the following decisions:

Decision 1 (XXXIV)

Adoption of revised part B of the annual reports questionnaire*

At its 1059th meeting, on 9 May 1991, the Commission on Narcotic Drugs decided to replace part B of the annual reports questionnaire with its revised version, 1/ beginning with the annual reports questionnaire for the calendar year 1991.

1/ E/CN.7/1991/CRP.10.

Decision 2 (XXXIV)

Transfer of delta-9-THC and its stereochemical variants from Schedule I to Schedule II of the Convention on Psychotropic Substances, 1971**

At its 1045th meeting, on 29 April 1991, the Commission on Narcotic Drugs, in accordance with article 2, paragraphs 5 and 6, of the Convention on Psychotropic Substances, 1971, decided that delta-9-tetrahydrocannabinol (also referred to as delta-9-THC) and its stereochemical variants should be transferred from Schedule I to Schedule II of that Convention.

Decision 3 (XXXIV)

Deletion of propylhexedrine from Schedule IV of the Convention on Psychotropic Substances, 1971***

At its 1045th meeting, on 29 April 1991, the Commission on Narcotic Drugs, in accordance with article 2, paragraphs 1 and 6, of the Convention on Psychotropic Substances, 1971, decided that N, dimethylcyclohexaneethylamine (also referred to as propylhexedrine) should be deleted from Schedule IV of that Convention.

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* See paragraph 133 above.

** See paragraph 6 above.

*** See paragraph 9 above.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. CR 06-538 JH

MARY HELEN QUAINTANCE,

Defendant.

DEFENDANTS' JOINT REPLY
TO GOVERNMENT'S RESPONSE [DOC. 370]
TO DEFENDANTS' MOTION TO DISMISS
FOR FAILURE TO STATE A VALID CAUSE OF ACTION [DOC. 364]

Come Now the Defendants Danuel D. Quaintance and Mary H. Quaintance, by and through their respective attorneys Jerry Daniel Herrera and John F. Robbenhaar, and hereby submit their *Reply* to the Government's *Response* to their *Joint Motion to Dismiss for Failure to State a Valid Cause of Action.* As grounds in support, Defendants state as follows:

1. The Defendants' argument is centered upon an analysis of controlling statutes and case law to demonstrate that marijuana is not properly scheduled in the Controlled Substances Act, based upon the Drug Enforcement Administration's abrogation of its duty to properly schedule substances within the CSA. Based upon this incorrect scheduling, the *Superseding Indictment* is facially invalid because an essential element of the operative statute, 21 U.S.C. § 841, has been rendered a nullity. 21 U.S.C. § 841(a)(1).

2. Unfortunately, the Government fails to address the substance of this argument, but rather presents a response that is conclusory and lacking in meaningful analysis. The Government fails to discuss the DEA's (or Attorney General's) abrogation of its duty to

reschedule marijuana, fails to analyze why marijuana remains in Schedule I despite the fact that 21 U.S.C. § 812(b)(1)(A)-(C) requires that Schedule I substances must have "no currently accepted medical use in treatment in the United States...", and fails to analyze the effects of the preemption provision of 21 U.S.C. § 903 by not addressing the clear language in *Gonzales v. Oregon,* 546 U.S. 243 (2006) concerning the federal-state balance in determining medical use of various substances. Indeed, the Government's simplistic retort that the Defendants rely upon a "circular 'medical use' argument" misses the point: marijuana is presently not properly scheduled, the Government has failed to fulfill its duty to schedule marijuana, and this failure to act results in a jurisdictional defect in the *Superseding Indictment*.

3. The fact that "the CSA designates marijuana as contraband for any purpose", *Response* at 3, cannot overcome the problems inherent in an incorrect scheduling of the substance. The States and not the Federal Government determine accepted medical use under 21 U.S. C. § 903. *See Gonzales v. Oregon*, 546 U.S. 243 (2006) ("The Government, in the end, maintains that the prescription requirement delegates to a single Executive officer the power to effect a radical shift of authority from the State to the Federal Government to define general standards of medical practice in every locality. The text and structure of the CSA show that Congress did not have this far reaching intent to alter the federal-state balance and the congressional role in maintaining it.").

4. The Defendants acknowledge that the exhibits offered in support of their motion are not "binding" upon this Court, and do not rise to the level of stare decisis. Nevertheless, United States Supreme Court precedent is binding authority on this Court. Furthermore, the exhibits provide support to the arguments raised by the Defendants as to the present incorrect

scheduling of marijuana in the CSA. For example, Exhibit 3 was offered to show Congressional doubt as to whether or not Marijuana should even be placed in the CSA. Similarly, Exhibit 4 is an excerpt of a 69 page decision that supports the mis-scheduling argument, and further establishes that marijuana's Schedule I designation was not permanent but requiring further review. Simply put, the exhibits support the Defendants' argument that, according to the unambiguous words of the CSA and the fact that marijuana presently has accepted medical use in the United States, marijuana could not legally remain in 21 C.F.R. § 1308.11, Schedule I.

5. As a result of DEA inaction, marijuana is not legally within any Schedule of the CSA. Because marijuana is not legally placed in any schedule of the CSA, marijuana's placement in the CSA is a legal nullity. Because marijuana is not a legally controlled substance within the confines of the CSA, an indictment under 21 U.S.C. § 841 or § 846 alleging "possession of a controlled substance to wit marijuana" is facially invalid.

6. At page 2, paragraph 4, the Government relies upon *Gonzales v. Raich*, 545 U.S. 1, 14-15 (2005) to assert that prior failed efforts to reclassify marijuana mean that marijuana is firmly set in Schedule I. This argument is misplaced, as it does not address the preemption doctrine that is recognized in 21 U.S.C. § 903 nor the arguments raised in *Gonzales v. Oregon*. Indeed, *Raich* was limited to events from 1972 to 1994. 545 U.S. at 15, fn. 23. And as noted in the Defendants' motion, it wasn't until 1996 that California first recognized the accepted medical use of marijuana, to be followed by at least 11 other states. Because Congress specifically recognized that the States may determine "accepted medical use", 21 U.S.C. § 903, and because numerous states have since done so, the failure by the Attorney General and the DEA to re-schedule marijuana carries fatal jurisdictional effects on the present case.

7. The Government dismissively rejects the legal issues presented by the Defendants, yet by taking such a dismissive (if not insulting) tone, the Government reveals how its *Response* is lacking in substance. The Defendants move the Court to dismiss the *Superseding Indictment* in the present case, based upon the jurisdictional defect contained therein.

Respectfully submitted:

Filed Electronically
JOHN F. ROBBENHAAR
Attorney for Mary Helen Quaintance
1011 Lomas NW
Albuquerque, NM 87102
(505) 242-1950

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 15, 2008 I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing: LUIS MARTINEZ, Assistant U.S. Attorney; JERRY DANIEL HERRERA, Attorney at Law.

Filed Electronically
JOHN F. ROBBENHAAR

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANUEL DEAN QUAINTANCE,

Defendant.

CRIMINAL NO. 06-538 JCH

CONDITIONAL PLEA AGREEMENT

Pursuant to Rule 11, Fed. R. Crim. P., the parties hereby notify the Court of the following agreement between the United States Attorney for the District of New Mexico, the defendant, **DANUEL DEAN QUAINTANCE**, and the defendant's counsel, JERRY DANIEL HERRERA:

REPRESENTATION BY COUNSEL

1. The defendant understands the defendant's right to be represented by an attorney and is so represented. The defendant has thoroughly reviewed all aspects of this case with the defendant's attorney and is fully satisfied with that attorney's legal representation.

RIGHTS OF THE DEFENDANT

2. The defendant further understands the following rights:

   a. to plead not guilty;

   b. to have a trial by jury;

   c. to confront and cross-examine witnesses and to call witnesses to testify for the defense; and

   d. against compelled self-incrimination.

WAIVER OF RIGHTS AND PLEA OF GUILTY

3. The defendant hereby agrees to waive these rights and to plead guilty to a two-count superseding indictment charging in Count 1 violation of 21 U.S.C. § 846, that being Conspiracy to possess with intent to distribute 100 kilograms and more of a mixture or substance containing a detectable amount of marijuana, contrary to 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B); and charging in Count 2 violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), that being possession with intent to distribute 50 kilograms and more of a mixture or substance containing a detectable amount of marijuana, and 18 U.S.C. § 2, that being aiding and abetting.

SENTENCING

4. The defendant understands that the maximum penalty the Court can impose as to Count 1 is:

a. imprisonment for a period not less than five (5) years nor greater than forty (40) years;

b. a fine not to exceed $2,000,000.00;

c. a mandatory term of supervised release of not less than four (4) years. (If the defendant serves a term of imprisonment, is then released on supervised release, and violates the conditions of supervised release, the defendant's supervised release could be revoked--even on the last day of the term--and the defendant could then be returned to another period of incarceration and a new term of supervised release); and

d. a mandatory special penalty assessment of $100.00.

5. The defendant understands that the maximum penalty the Court can impose as to Count 2 is:

a. imprisonment for a period of not more than twenty (20) years;

b. a fine not to exceed $1,000,000.00;

c. a mandatory term of supervised release of not less than three (3) years. (If the defendant serves a term of imprisonment, is then released on supervised release, and violates the conditions of supervised release, the defendant's supervised release could be revoked--even on the last day of the term--and the defendant could then be returned to another period of incarceration and a new term of supervised release); *and*

d. a mandatory special penalty assessment of $100.00.

6. The parties recognize that the Sentencing Guidelines are advisory, and that the Court is required to consider them in determining the sentence it imposes.

7. It is expressly understood and agreed by and between the defendant and the United States that:

a. *The United States has made, and will make,* NO AGREEMENT pursuant to Rule 11(c)(1)(C), Fed. R. Crim. P., that a specific sentence is the appropriate disposition of this case.

b. The United States has made, and will make, NO AGREEMENT to approve, to oppose, or not to oppose pursuant to Rule 11(c)(1)(B), Fed. R. Crim. P., any request made by the defendant or on behalf of the defendant for a particular sentence in this case, other than the stipulations agreed to in paragraph 8, below. JDH 8 LM 8/19/08

c. The United States hereby expressly reserves the right to make known to the United States Probation Office, for inclusion in the presentence report prepared pursuant to Rule 32(c), Fed. R. Crim. P., any information that the United States believes may be helpful to the Court.

STIPULATIONS

8. The United States and the defendant stipulate as follows:

a. Pursuant to U.S.S.G. § 2D1.1(c), the parties stipulate that the defendant is responsible for approximately 150 kilograms of marijuana.

b. Pursuant to U.S.S.G. § 3E1.1(a), the defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for the defendant's criminal conduct. Consequently, the defendant is entitled to a reduction of two (2) levels from the base offense level as calculated under the sentencing guidelines. This reduction is contingent upon the defendant providing an appropriate oral or written statement to the United States Probation officer who prepares the presentence report in this case in which the defendant clearly establishes the defendant's entitlement to this reduction.

c. Provided the defendant meets the requirements of U.S.S.G. §3E1.1(b), the government agrees to move for a reduction of one (1) additional level from the base offense level as calculated under the sentencing guidelines.

d. If the defendant meets all of the criteria set forth at 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2, including providing a complete and truthful statement to the Government concerning all information and evidence the defendant has about the offense or offenses that were part of the same course of conduct underlying this agreement, the defendant is entitled to a reduction of two (2) levels, pursuant to U.S.S.G. § 2D1.1(b)(11).

e. The defendant recognizes and understands that this plea agreement with the United States is expressly contingent on co-defendant, MARY HELEN QUAINTANCE, also entering a plea of guilty, at the same time, in conformity with their individual plea agreements with the United States. The United States reserves the right, in its sole discretion, to revoke the plea agreements pertaining to the defendant and co-defendant, should the defendant and co-defendant fail to enter guilty pleas in accordance with their individual agreements with the United States, or attempt to withdraw those guilty pleas.

9. The United States and the defendant understand that the above stipulations are not binding on the Court and that whether the Court accepts these stipulations is a matter solely within the discretion of the Court after it has reviewed the presentence report. The defendant understands and agrees that if the Court does not accept any one or more of the above stipulations, the defendant hereby waives the right to appeal the Court's rejection of such stipulations.

CONDITIONAL PLEA

Pursuant to Fed. R. Crim. P. 11(a)(2), the defendant, with the consent of the United States, reserves the right to appeal any and all issues litigated through the pendency of the proceedings. If Defendant prevails on his appeal of the Court's Order, he shall be allowed to withdraw his guilty plea.

DEFENDANT'S OBLIGATIONS

10. The defendant understands the defendant's obligation to provide the United States Probation Office with truthful, accurate, and complete information, including, but not limited to defendant's true identity, citizenship status, and any prior criminal convictions. The defendant hereby represents that the defendant has complied with and will continue to comply with this obligation. The defendant understands that any misrepresentation with respect to the above obligations may be considered a breach of this plea agreement.

GOVERNMENT'S AGREEMENT

11. Provided that the defendant fulfills the defendant's obligations as set out above, the United States agrees not to bring additional charges against the defendant arising out of the defendant's conduct now known to the United States Attorney's Office for the District of New Mexico.

12. This agreement is limited to the United States Attorney's Office for the District of New Mexico and does not bind any other federal, state, or local agencies or prosecuting authorities.

VOLUNTARY PLEA

13. The defendant agrees and represents that this plea of guilty is freely and voluntarily made and not the result of force or threats or of promises apart from those set forth in this plea agreement. There have been no representations or promises from anyone as to what sentence the Court will impose.

VIOLATION OF PLEA AGREEMENT

14. The defendant understands and agrees that if the defendant or the defendant's attorney violates any provision of this plea agreement, the United States may declare this plea agreement null and void, and the defendant will thereafter be subject to prosecution for any criminal violation including, but not limited to, any crime(s) or offense(s) contained in or related to the indictment filed in this case, as well as perjury, false statement, and obstruction of justice.

SPECIAL ASSESSMENT

15. At the time of sentencing, the defendant will tender a money order or certified check payable to the order of the United States District Court, District of New Mexico, 333 Lomas Boulevard, NW, Albuquerque, New Mexico 87102, in the amount of $100.00 in payment of the special penalty assessment described above.

ENTIRETY OF AGREEMENT

16. This document is a complete statement of the agreement in this case and may not be altered unless done so in writing and signed by all parties.

AGREED TO AND SIGNED this 18th day of August, 2008.

GREGORY J. FOURATT
United States Attorney

LUIS A. MARTINEZ
Assistant U.S. Attorney
555 S. Telshor Blvd., Ste. 300
Las Cruces, NM 88011
(575) 522-2304 - Tel.
(575) 522-2391 - Fax

I have read this agreement and carefully reviewed every part of it with my attorney. I understand the agreement and voluntarily sign it.

DANUEL DEAN QUAINTANCE
Defendant

JERRY DANIEL HERRERA
Attorney for Defendant

C:\Temp\notes6ED8F7\~8408288.wpd

PLEA PROCEEDINGS BEFORE JUDGE SCHNEIDER

United States v. Danuel Quaintance No. CR 06-538 JH

Date: August 18, 2008 Reporter: P. Baca Clerk: I. Duran

Court in Session: 10:33 A.M. Court in Recess: 10:50 AM
Total Court Time: 17 Minutes

USA by: Luis Martinez, Asst. U.S. Attorney
Deft. present by: Jerry D. Herrera, Esquire (x) Apptd. ( ) Retd.
Interpreter: None ( ) Official ( ) Sworn
Probation Officer(s) present: None
(x) Albuquerque ( ) Las Cruces ( ) Santa Fe ( ) Roswell ___ Bench warrant ordered

_x_ Defendant sworn (age 56)

_x_ Court questions Defendant regarding his/her physical and mental conditions

_x_ ***Memorandum of Understanding*** regarding plea agreement filed in Open Court

___ ***Waiver of Indictment*** executed and filed, and ***Information*** filed

_x_ Court advises Defendant of the charge and possible penalty:

Imprisonment: 5-40 years on Ct. I and not more than 20 years on Ct. II
Fine: $2,000,000 on Ct. I & $1,000,000 on Ct. II
Supervised Release: Not less than 4 years on Ct. I & Not less than 3 years on Ct. II
SPA: $100 for each Count

_x_ Defendant enters plea of GUILTY to Counts I & II of Superceding Indictment

_x_ Court finds Defendant competent to proceed

_x_ Sentencing to be set within 75 days

___ Defendant to remain in custody

_x_ Present ***Conditions of Release*** to continue

___ Conditions of Release changed:

_x__ Consent to Proceed before Magistrate Judge

Comments: Ct. finds that plea was made knowingly and willingly. Ct. accepts deft's guilty plea.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

Clerk's Minutes

Before the Honorable Judith C. Herrera

CASE NO. CR 06-538 JH **DATE:** August 18, 2008

TITLE: USA v. Danuel Quaintance & Mary Quaintance

COURTROOM CLERK: **I. Duran** **COURT REPORTER:** P. Baca

PROBATION/PRETRIAL SERVICES OFFICER: None

COURT IN SESSION: 8:46 A.M. 10:08 A.M. **COURT IN RECESS:** 8:49 A.M. 10:12 A.M.

TOTAL COURT TIME: 7 MINUTES

TYPE OF PROCEEDING: Jury Selection/Trial Vacated. & Plea Hearings set before Judge Schneider on 8/18/08.

COURT'S RULINGS/DISPOSITION: Ct. denies Defendants' Joint Motion to Dismiss [Doc. No. 364]

ORDER CONSISTENT WITH COURT'S RULING TO BE PREPARED BY:

DEADLINE FOR SUBMISSION OF ORDER TO COURT:

ATTORNEYS PRESENT FOR PLAINTIFF(S):	**ATTORNEYS PRESENT FOR DEFENDANT(S):**
Luis Martinez	Jerry Herrera for Danuel Quaintance
Amanda Gould	John Robbenhaar for Mary Quaintance

PROCEEDINGS:

8:46 AM Court in Session. Court calls case.

8:46 AM Counsel enter their appearances. Defts present.

8:46 AM Govt. addresses Ct. re: pleas.

8:48 AM Ct. confers w/counsel re: plea status. Ct. will allow parties a short recess to complete their plea negotiations.

8:49 AM Ct. in recess.

10:08 AM Ct. back in session.

10:08 AM Counsel present. Defendants present.

10:08 AM Ct. makes ruling re: Defendants' Joint Motion to Dismiss [364]. Ct. denies defendants' motion.

10:12 AM Ct. informs parties that pleas will taken by Judge Schneider. Ct. in recess.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. CR 06-538 JH

DANUEL QUAINTANCE and
MARY HELEN QUAINTANCE,

Defendants.

ORDER

THIS MATTER having come before the Court on Defendants Danuel D. Quaintance and Mary Helen Quaintance's Joint Motion to Dismiss for Failure to State a Valid Cause of Action, and the Court having reviewed the motion, finds that the motion, for the reasons as stated on the record, shall be denied;

IT IS THEREFORE ORDERED that Defendants' Joint Motion to Dismiss for Failure to State a Valid Cause of Action [Doc.364], is hereby **DENIED**.

JUDITH C. HERRERA
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. No. CR 06-538 JH

DANUEL QUAINTANCE,

Defendant.

DANUEL QUAINTANCE' FORMAL OBJECTIONS TO PRESENTENCE REPORT

Danuel Quaintance, by and through his counsel, hereby provides notice to the court and counsel that he adopts and incorporates by reference *formally,* his objections as contained in his letter of informal objections to Mindy Pirkovic of November 28, 2008.

Electronically filed on 03 January 2009

JERRY DANIEL HERRERA
Attorney for Danuel Quaintance
509 13th Street, SW
Albuquerque, NM 87102
Telephone: (505) 262.1003

I hereby certify that I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to opposing counsel of record on this date.

Electronically filed on 03 January 2009.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. No. CR 06-538 JH

DANUEL QUAINTANCE,

Defendant.

SENTENCING MEMORANDUM ON BEHALF OF DANUEL QUAINTANCE

Danuel Quaintance, by and through his counsel, hereby provides this Sentencing Memorandum to the Court.

I. INTRODUCTION AND BACKGROUND

This matter comes before the court for sentencing. Mr. Quaintance has provided formal and informal objections to the presentence report.

Danuel Quaintance is 56 years old. He has had a few minor brushes with the law earlier in his life, but has no criminal history points. The court is also aware that Mr. Quaintance is a veteran and was honorably discharged. He currently suffers from hypoglycemia and pancreatitis for which he receives social security disability.

II. LAW AND ANALYSIS

One of the objections raised by Mr. Quaintance was the assessment of four additional points against him as a leader and organizer in the presentence report. While counsel has addressed this in his letter to the U.S. Probation Office, it is worth re-examining. The U.S. Attorney attempts to shore up this assessment in its response dated

December 18, 2008. A closer inspection reveals that this upward adjustment is not necessarily warranted.

A. JOSEPH BUTTS/MISSOURI ARREST

In his response, the U.S. Attorney first addresses Joseph Butts and his arrest in Missouri.

AUSA Martinez' argument is, essentially, as follows: Mr. Butts, as the brother-in-law of Mr. Quaintance, had a "courier certificate" issued to him and signed by Danuel Quaintance, along with travel itinerary originating in Pima, Arizona and other "paperwork" indicating his affiliation with the Church of Cognizance. Counsel for the government is, however, relying on a circumstantial leap of faith to equate this as an organizer/leader or participant role for Mr. Quaintance.

As counsel Herrera has pointed out, there is no dispute that Mr. Quaintance provided the so-called "courier certificate" or other church indicia to Joseph Butts. However, **that does not equate with the conclusion that Mr. Butts was transporting marijuana for Mr. Quaintance.** One can conclude, however, that Mr. Butts was correct in his statement that he was transporting it "for the church." The Church of Cognizance is comprised of approximately 200 members, located in various venues across the United States. Counsel referenced this before, but it bears repeating: Couriers, like Mr. Butts, are independent entities and are not under the control of anyone in the Church of Cognizance. Nor are they required to report to anyone about where they are or what they are doing.

There is no evidence to suggest that Mr. Butts was transporting marijuana for the Quaintances.

§3B1.1 of the U.S.S.G. (c) references a two point upward adjustment "If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b)" of this section, rather than four levels. While counsel does not concede that any enhancement is appropriate, if any upward adjustment is applicable, this is the appropriate one. *Application Note 4* of this section provides the appropriate framework and guidance for assessing and determining leadership roles. It reads, in part:

> Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

The government's argument is nothing more than asking the court to **assume** that Mr. Quaintance was somehow an organizer or leader relative to Mr. Butts. The criteria that the court must look at, are simply not present here. In other words, there is no evidence to suggest that Mr. Butts was engaged in this activity for Mr. Quaintance. That is to say, there is no evidence of Mr. Quaintance' decision-making authority, recruitment, claimed right to a larger share of the fruits, the degree of any participation or planning or control and authority over Mr. Butts. Without this evidence, Mr. Butts, while perhaps part of a conspiracy was not lead, organized or directed by Mr. Quaintance.

B. <u>TIMOTHY KRIPNER</u>

The government, in its response, argues that because the defendant disputes the recruitment of Timothy Kripner, that upward role adjustment is not based on recruitment. Again, criteria expressed in *Application Note 4* reference that recruitment is one of the

elements that the court should examine.

This court is well aware of Mr. Kripner's mercenary temperment and his desire to obtain leniency for his role in this matter. This court is also well aware of Mr. Kripner's abuse of controlled substances, including cocaine. It is more than just coincidental that Mr. Kripner's allegation of abuse of other controlled substances by the Quaintances did not surface until after he himself violated pretrial conditions of release. Again, there simply is no evidence to corroborate Mr. Kripner's naked allegations against the Quaintances. There was no evidence of cocaine in either the Quaintance homestead or vehicle during the searches. However, Mr. Kripner conveniently admits that he himself is a cocaine addict. His comments should be viewed with caution and circumspection.

One of Mr. Kripner's more troubling comments as referenced in the presentence report was that "he knows Mr. Quaintance and his religion are not real, but he figured if he would be able to smoke, transport, and possess marijuana, that was reason enough to join the church." Mr. Quaintance has never tried to hide his strongly professed and strongly held beliefs relative to marijuana as both a diety and a sacrament. While this belief may not square with traditional, mainstream religions, it is, nonetheless, his belief. He has not acted clandestinely, but rather openly. Mr. Kripner, on the other hand, is an opportunistic individual, willing to exploit those beliefs for his own personal gain.

C. <u>BACKPACKERS</u>

Counsel provided his objection to any proposed role adjustment increase relative to the "backpackers" in this matter. Mr. Quaintance does not know the backpackers, and he did not, in any fashion, direct the backpackers. Mr.Quaintance does not speak Spanish and could not direct, organize, lead, manage or supervise them, even if he wanted to.

These were individuals who were directed by the monastery in Mexico that was the genesis of this marijuana delivery.

This court heard testimony about a telephone call Mr. Quaintance received, while he, Ms. Quaintance and Kripner were in Deming, instructing him to bring food. It is this lack of knowledge about protocol that clearly demonstrates Mr. Quaintance' non-control. *He was instructed to bring food. He did not instruct, he complied.* Further, there is no evidence that anyone, other than from the monastery, directed where the drop-off point for the marijuana would be. Again, no evidence of leadership, organization, management or supervision; no evidence of decision-making authority; no evidence of recruitment of the backpackers; no evidence of a claimed right to a larger share; no evidence of any degree of control or authority exercised over these individuals.

In essence, Mr. Quaintance can, at best, be held accountable, if at all, for a two level upward role adjustment for his involvement, Ms. Quaintance role (only as a driver) and Mr. Kripner. This assessment would remove him from subsection (a) as an organizer or leader of a criminal activity that involved five or more participants. There's a reason why §3B1.1 addresses this role adjustment in degrees and also talks, not only in numbers of participants, but also in terms of **"or was otherwise extensive"** [emphasis added]. In the grand scheme of things and the big picture, the government, it would seem, be hard-pressed to make a case that this was "otherwise extensive."

But before the Court makes its decision, it should also examine whether or not an aggravating enhancement is even appropriate, given the nature of this case and the serious legal questions and issues presented. It appears clear, that Danuel and Mary Helen are not living a life of grandeur. Their's is not a life that comports with images we've

seen of drug dealers and drug lords, replete with opulent mansions on a lush mountain top, expensive cars and armed guards surrounding a fortress. Quite to the contrary. The real intent of §3B1.1,it seems, would be and should be reserved for meaningful application to such other individuals. To apply it here, is to dilute it's value.

Danuel and Mary Helen, lead quiet lives, living on his disability income of $943.00 per month. They live simple lives in their mobile home near to their children and grandchildren. They surround themselves with very few possessions, short of a few laptop computers they bought on ebay for their grandchildren for use on schoolwork. They paid $50.00 each. The court can see from the presentence report that their financial assets are meager indeed: $12,100.00–their mobile home valued at $10,000.00 and their two 10 year old vehicles valued at $2,100.00.

It seems clear that Mr. Quanitance' actions do not comport with the nature or legislative intent for whom this enhancement provision of the sentencing guidelines was designed. In examining the sentencing factors enumerated under 18 U.S.C. §3553, the court's sentence should be sufficient, but not greater than necessary to comply with the purposes set forth. The court shall consider–

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

A. To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

B. To afford adequate deterrence to criminal conduct; . . .

A sentence without aggravating factors would accomplish this agenda. And, moreover, because of the extensively unique and anomalous nature of this case, Mr.

Quaintance could ostensibly be eligible for a further reduction under the safety valve provision of U.S.S.G. §5C1.2 .

III. CONCLUSION

Counsel would therefore respectfully request that the court consider the following: 1) No imposition of the enhancement provisions as an organizer or leader under U.S.S.G. §3B1.1; 2) imposition of sentence at the low end of the guideline range to include a safety valve reduction; and, 3) allowing Mr. Quaintance to remain on conditions of release pending the appeal in this matter.

Electronically filed on 03 January 2009

JERRY DANIEL HERRERA
Attorney for Danuel Quaintance
509 13th Street, SW
Albuquerque, NM 87102
Telephone: (505) 262.1003

I hereby certify that I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to opposing counsel of record on this date.

Electronically filed on 03 January 2009.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CRIMINAL NO. 06-538 JCH
	)	
DANUEL DEAN QUAINTANCE,	)	
	)	
Defendant.	)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S
FORMAL OBJECTIONS TO PRESENTENCE REPORT

The United States of America hereby provides notice to the court and counsel that the government formally adopts and incorporates by reference its response to defendant's objections as contained in its letter to Mindy Pirkovic dated December 18, 2008, which is attached hereto.

Respectfully submitted,

GREGORY J. FOURATT
United States Attorney

Electronically filed on 1/5/09
LUIS A. MARTINEZ
Assistant United States Attorney
555 S. Telshor Blvd., Suite 300
Las Cruces, NM 88011
(575) 522-2304 - Tel.
(575) 522-2391 - Fax

I HEREBY CERTIFY that I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to opposing counsel of record, and have faxed a copy to United States Probation on this date.
Electronically filed
LUIS A. MARTINEZ
Assistant United States Attorney
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U.S. Department of Justice

United States Attorney
District of New Mexico

555 S. Telshor, Suite 300
Las Cruces, New Mexico 88011

575/522-2304
FAX 575/522-2391

December 18, 2008

Mindy Perkovic
United States Probation Officer
333 Lomas Blvd. NW, Ste. 170
Albuquerque, NM 87102-2242

RE: **USA v. Danuel Quaintance**
No. 06cr538 JCH

Dear Ms. Perkovic:

The government responds to Mr. Quaintance's informal objections[1] to the Presentence Investigation Report ("PSR") as follows:

I. Role Adjustment

A. Introduction:

Danuel Quaintance was assessed +4 as a leader and organizer of an offense which involved at least five participants pursuant to U.S.S.G. § 3B1.1(a). PSR at 37.

Defendant Objections I, V and VI all relate to the foregoing. Hence, the government will respond to these objections as a related unit.

B. Joseph Butts and the Missouri Arrest:

The defendant claims that his brother-in-law, Joseph Butts, was not transporting marijuana for the Quaintances at the time of his arrest by the Missouri State Police. This assertion flies in the face of logic and the facts adduced at numerous pre-trial hearings.

As the defendant notes, the "Courier Certificate" utilized by defendant Butts was signed by then Church of Cognizance leader Danuel Quaintance.

The maps in Mr. Butt's possession at the time of his arrest indicated a travel itinerary originating in Pima, Arizona, the location of the defendant's home/church.

[1] Defendant has not formally filed objections with the Court by December 5, 2008, the Court imposed deadline for such; therefore, the government's response will be sent directly to U.S. Probation.

At the time of his arrest, Mr. Butts was in possession of other paperwork indicating his affiliation with the Church of Cognizance in Pima, Arizona.

However, it is Danuel Quaintance's own testimony which most vividly illustrates his leadership relationship over Joseph Butts. On August 22, 2006, Mr. Quaintance testified at a motion hearing. Mr. Quaintance was asked if he personally gave Mr. Butts the "Courier Certificate" in Butts's name. (R. at p. 258, ll 14-17.) The defendant was asked if he had given then "Courier Certificate", . . . "to carry on his [Butts's] trip to parts unknown, to transport the 335 pounds of marijuana; correct?" (R. at p. 258, ll 18-19.) After being asked again if he gave Mr. Butts the certificate as he began his journey, defendant replied, "I gave that to him prior to, where he was, yes I gave it to him on the 1st." (R. at p. 258, ll 24-25.)

Danuel Quaintance organized and lead the conspiracy to possess with intent to distribute marijuana to which he pled guilty. And as part of his role, the defendant stood in a leadership position in relation to Mr. Butts. Provided this offense involved more than five participants, defendant's leadership status as to Mr. Butts alone is sufficient for this Honorable Court to assess +4 points as to this defendant pursuant to U.S.S.G. § 3B1.1(a). See, *United States v. Okoli*, 20 F.3d. 615, 616 (5th Cir. 1994).

C. Timothy Kripner – Lordsburg, New Mexico:

In defendant's objection V, defendant disputes Mr. Kripner was recruited. The role adjustment is not based on recruitment, but rather on control and organization. "The key determinants of section 3B1.1 are control and organization." *United States v. Rowley*, 975 F.2d 1357, 1364 (8th Cir. 1992).

Defendant claims that Kripner lost contact with the Quaintances around October 2005. (Def. Objections to PSR at p. 3.) This assertion may or may not be the case, but even if true, there is no relevance to the issue of role adjustment.

By the time of their arrest on February 22, 2006, in Lordsburg, New Mexico, Mr. Kripner and Mr. Quaintance had certainly reunited. Subsequent to Kripner's arrest, a two-way handheld radio, set to channel 6. An identical handheld two-way radio also set to channel 6 was retrieved from the vehicle in which the defendant had been a passenger.

Post-Miranda, Kripner stated the Quaintances provided the money for the rental of the vehicle driven by Kripner which contained 78 kilograms of marijuana. PSR at ¶ 14.

Kripner was in possession of a "courier certificate" identical to the one possessed by Mr. Butts and, like Mr. Butts's certificate, signed by Danuel Quaintance. PSR at ¶ 15.

Kripner went on to tell authorities at the time of his arrest and later at a pre-trial hearing, that he was under the direction of Danuel Quaintance and was to be paid after transporting the 78 kilograms to the Quaintance residence. PSR at ¶ 14.

Corroborating Mr. Kripner's statements, Mr. Quaintance, subsequent to his arrest, stated, "I am the head of my church and I have the right to have that marijuana." PSR at ¶ 16.

A defendant need not personally lead five or more participants to receive a § 3B1.1(a) enhancement; leading at least one of the five is sufficient. *United States v. Okoli*, 20F.3d 615, 616 (5th Cir. 1994).

Mr. Quaintance's own testimony on August 22, 2006, further demonstrates Danuel Quaintance's leadership status over Mr. Kripner. Mr. Quaintance stated he gave Mr. Kripner a certificate ". . . yes, that is the duty." (R. at p. 259, ll 3-4.)

Either Mr. Butts or Mr. Kripner would qualify as the basis of a +4 enhancement against Danuel Quaintance pursuant to U.S.S.G. § 3B1.1(a).

D. The Backpackers:

Defendant does not deny the existence or involvement of the Backpackers who delivered the marijuana to the vehicle driven by defendant Kripner. Kripner testified regarding the Backpacker on August 22, 2006. (R. at p. 290, ll 2-4.) The +4 assessment as a leader and organizer of an offense pursuant to U.S.S.G. § 3B1.1(a) requires (1) a defendant lead at least one participant and (2) the offense involve at least five participants.

Certainly, Mr. Quaintance's leadership of Mr. Butts and Mr. Kripner satisfies the first prong of U.S.S.G. 3B1.1(a). We must now determine whether the offense involved at least five participants. It should be noted that only "criminally responsible" individuals may be counted as "participants" under § 3B1.1. *United States v. Jarrett*, 956 F.2d 864, 868 (8th Cir. 1992). Mr. Danuel Quaintance, Ms. Mary Quaintance, Mr. Butts and Mr. Kripner all pled guilty to the charged conspiracy and furthered the conspiracy during its existence. Clearly, all four are participants for § 3B1.1(a) purposes. Five are required. The "[g]uidelines do not require that a "participant" be charged in the offense of conviction." *United States v. Manthei*, 913 F.2d 1130, 1136 (5th Cir. 1990).

The Backpackers were never charged, arrested or even identified. However, without their participation the conspiracy would not have been carried out by its members to the extent that it was. Just one of the several backpackers added to the roster of known conspirators satisfies the requirements of U.S.S.G. § 3B1.1(a) as to Danuel Quaintance. The defendant's control or lack thereof as to the backpackers is irrelevant to the analysis at hand.

E. Role Adjustment is Properly Assessed:

The PSR correctly assesses +4 enhancement as to Danuel Quaintance pursuant to U.S.S.G. § 3B1.1(a). PSR at 11, ¶ 37. Further, the Total Offense Level 27 is correctly calculated by the PSR. This, if the Court finds correctly assessed, yields an imprisonment range of 70-87 months.

II. The Balance of the Objections Do Not Affect the Guidelines.

A. In objection II, defendant objects to his residence referred to as a "compound". The description is a matter of interpretation, but does not affect the guidelines.

B. As to objection III, no firearms were charged nor were the guidelines affected, so this objection is of no consequence.

C. Likewise, objection IV has no affect on the guideline calculations.

III. Conclusion.

The United States asserts that the assessment of a +4 enhancement in the Presentence Investigation Report, pursuant to U.S.S.G. § 3B1.1(a), is correct, as well-supported by the facts in this matter.

Respectfully yours,

GREGORY J. FOURATT
United States Attorney

LUIS A. MARTINEZ
Assistant United States Attorney

LAM/elr
xc: Hon. Judith C. Herrera, U.S. District Judge
Jerry Daniel Herrera, Esq.
John F. Robbenhaar, Esq.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CRIMINAL NO. 06-538 JCH
	)	
DANUEL DEAN QUAINTANCE,	)	
	)	
Defendant.	)	

GOVERNMENT'S RESPONSE TO SENTENCING
MEMORANDUM ON BEHALF OF DANUEL QUAINTANCE

The United States of America files this response to defendants' Sentencing Memorandum, filed on January 3, 2009.

The government stands by the validity of its response to defendant's formal objections to the Presentence Investigation Report filed on January 5, 2009, and formally adopts and incorporates by reference that response.

Respectfully submitted,

GREGORY J. FOURATT
United States Attorney

Electronically filed on 1/5/09
LUIS A. MARTINEZ
Assistant United States Attorney
555 S. Telshor Blvd., Suite 300
Las Cruces, NM 88011
(575) 522-2304 - Tel.
(575) 522-2391 - Fax

I HEREBY CERTIFY that I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will notify opposing counsel of record, and have faxed a copy to the United States Probation on this date.

Electronically filed
LUIS A. MARTINEZ
Assistant United States Attorney
N:\ERivera\ATTORNEYS\LUIS\QUAINTANCE TRIAL\resp_sent memo.wpd

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. No. CR 06-538 JH

DANUEL QUAINTANCE,

Defendant.

DANUEL QUAINTANCE' FORMAL OBJECTIONS TO PRESENTENCE REPORT

Danuel Quaintance, by and through his counsel, hereby provides notice to the court and counsel that he adopts and incorporates by reference *formally,* his objections as contained in his letter of informal objections to Mindy Pirkovic of November 28, 2008.

Electronically filed on 03 January 2009

JERRY DANIEL HERRERA
Attorney for Danuel Quaintance
509 13th Street, SW
Albuquerque, NM 87102
Telephone: (505) 262.1003

I hereby certify that I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to opposing counsel of record on this date.

Electronically filed on 03 January 2009.

28 November 2008

Mindy Perkovic
United States Probation Officer
333 Lomas Blvd., NW
Suite 170
Albuquerque, NM 87102-2242

Sent via facsimile and first class postal
(Facsimile: 348-2701)

RE: **UNITED STATES OF AMERICA VS. DANUEL QUAINTANCE**
No. CR 06 - 538 JH
Objections to Presentence Investigation Report

Dear Ms. Pervkovic:

Mr. Quaintance and I have reviewed the presentence investigative report in the above-referenced cause. This letter will serve as Mr. Quaintance' objections to that investigative report as follows:

On the second page of what is the biographical data page, the PSR references aliases and lists two dates of birth are neither aliases nor accurate as to his date of birth. Mr. Quaintance date of birth is accurately stated as referenced at the top of the second page as April 13, 1952.

I. FACTS RELATIVE TO MR. BUTTS MISSOURI ARREST

Mr. Quaintance objects to paragraphs 34 and 37 as referenced, relative to the arrest of Joseph Butts in Missouri. For clarity, Mr. Quaintance is not objecting as it relates to relevant conduct of conspiracy, but rather as this relates to any increase as an organizer or leader under U.S.S.G. §3B1.1. Mr. Butts' statement that he was transporting the marijuana he possessed "for the church" should not be equated with transporting it for the Quaintances. Nor should that statement create an implication the Quaintances had knowledge that he was transporting it. The Church is comprised of approximately 200 members in various venues around the United States.

Couriers not unlike the IOMM's of the Church of Cognizance are independent entities and not under the control of anyone in the Church. In addition, they are not required to report to anyone about where they are or what activity thy may be engaged in. This Court, in it's *Order and Memorandum*, as shown in Doc. 192 at 26, denying the Motion to Dismiss (under the sub-heading "f. Structure and Organization" stated:

> " . . .Although the Church of Cognizance has "enlightened cogniscenti," the members of the church are not led, supervised or counseled by these cogniscenti." August 22, 2006, Tr at 224.

Mr. Quaintance admits he introduced Mr. Butts to members of the church which may have marijuana. Mr. Quaintance also admits introducing Mr. Butts to members of the church. He also admits that he signed a church document titled "Courier Certificate." Mr. Quaintance reaffirms that the purpose of the certificate was to provide assurance that Mr. Butts was trustworthy to transport "religious instruments, properties, and sacrament" and therefore " authorized to Possess, Transport and Distribute, articles essential to the Cogniscenti mode of worship." Mr. Quaintance has not admitted to having dispatched Mr. Butts.

No documentation exists that declares that the Church "celebrates the use of marijuana." There is documentation, however, which declares that the Church honors Haoma or Marijuana as the Teacher, Provider and Protector."

II. REFERENCES TO QUAINTANCE RESIDENCE AS A "COMPOUND"

In paragraph 14, the report references Mr. Kripner as describing the Quaintance residence as a "compound." Mr. Quaintance objects to this description as being offensive, erroneous and prejudicially inflammatory. Reference to his residence as a compound is not an element of any charged offense, connotes a negative implication and serves only to inflict bias. There have been many references to the Quaintance residence as a compound throughout the investigation of this case, however, this is inaccurate. Discovery at page 77 confirms that there are three separate trailers on three separate lots as follows: 13050 W. La Siesta Belle is the property and residence of the Quaintance' son and daughter-in-law. 13078 W. La Siesta Belle is the property and residence of the Quaintance' daughter and son-in-law. The two parcels, 109-59-41 and 42 with the Klondyke Road addresses are the Quaintance's. Their trailer is on the property line between these two lots.

III. REFERENCES TO ITEMS DISCOVERED AT THE QUAINTANCE RESIDENCE

The discovery erroneously references that during a .25 caliber *Raven* handgun was discovered and taken from the Quaintances. Exhibit –22, page 54, discovery at page 76. This is erroneous. The firearm was actually taken from Tim and Zina's residence. Discovery at page 76. There is also erroneous reference to other items purportedly removed from the Quaintances' home when, in fact they too were removed from Tim and Zina's residence.

IV. UNSUPPORTED REFERENCES TO COCAINE USE

No allegations of other controlled substance use or abuse by Mr. Quaintance surfaced until

after Timothy Kripner violated pretrial conditions of release. His urinalysis revealed his use of cocaine, meth and marijuana. *Evid. Hr. Tr. 297-298.*

TFO case agent Zarate was questioned as to whether any evidence existed to corroborate Mr. Kripner's testimony. No evidence existed corroborating this accusation of co-defendant Kripner. During his testimony, it was established that no evidence of cocaine usage was found during the search of the Quaintances' vehicle on the day of the arrest nor during the search of their residence conducted on March 3, 2006, while they remained in custody following the February 22, 2006 arrest. *Evid. Hr. Tr. At 364 (3-12), 366 (21) to 369 (5).* It should also be noted that Mr. Kripner is a self-reported cocaine "addict." *Evid. Hr. Tr. At 370 (24), at 282 (12-18),* with a readily available supply.

V. <u>REFERENCES TO THE PURPORTED RECRUITMENT OF TIMOTHY KRIPNER</u>

Mr. Quaintance disputes that Mr. Kripner was recruited. There were times that Mr. Quaintance would travel to Tucson to discuss events taking place within the church. On one occasion, Mr. Quaintance mentioned the church had decided to establish wellness centers, and to certify couriers. Mr. Kripner expressed an interest in becoming a courier, but when he was told that his compensation would consist of a little marijuana from monasteries using his services he became disinterested and the subject was not brought up again.

Mr.Kripner testified that Mr.Quaintance had discusses the issue of church couriers only on that one occasion, just before he had lost contact with the Quaintances around October, 2005. *Evid Hr. Tr. 284 at 11-12.*

Mr. Kripner lost contact with the Quaintances because he had moved to Phoenix, and Mr. Quaintance no longer had a phone number or address to be able to contact Mr. Kripner. It should be noted that Mr. Kripner's phone number is not in the Quaintance contact list. In fact, there are no numbers in the Quaintance contact list with the Phoenix area code"602," nor with Mr. Kripner's prefix "399."

VI. <u>NO CONTROL OVER BACKPACKERS</u>

During the evidentiary hearing, Mr. Quaintance was asked, "When you receive this donation of cannabis f5rom the monastery in Mexico, who determined what the quantity was?" *Evid Hr. Tr. At 233.* Mr. Quaintance replied, "Him, he's sending it up, I don't tell him how much I want or anything." *Id.* Further, Mr Kripner testified, "The plans changed when we were at McDonald's because somebody made a phone call to Mr. Quaintance, stating that the backpack runners were already there and the marijuana needed to be picked up." *Id at 291 (25).*

Mr. Quaintance had no knowledge who the "backpackers" were or how to contact them. In fact, Mr. Quaintance speaks no Spanish. At most, Mr. Quaintance was only be able to

meet them at a place directed by the Monastery in Mexico.
The Quaintances were in New Mexico on February 22, 2006. The Quaintances were traveling with Mr. Kripner to show him the remote location where th Monastery would have pre-directed to drop off the loads.

Mr. Quaintance further objects to any increase as an organizer or leader relative to Mary Helen Quaintance. Ms. Quaintance participation was limited only to the role of driver. Danuel Quaintance has no drivers license.

There is also a reference to Mr. Quaintance purchasing food in Deming. It was at the McDonalds, that Mr. Quaintance received a telephone call wherein he was asked to pick up some food for the backpackers. He was advised that he would be compensated for this. Without this call, Mr. Quaintance would not have purchased food for the backpackers. It is this lack of scienter about the protocol of food purchases for backpackers that also displays a lack of control over them.

Sincerely,

Jerry Daniel Herrera

JDH:rc

cc: Danuel Quaintance
Luis Martinez, AUSA
John Robbennhaar, Esq

UNITED STATES DISTRICT COURT, DISTRICT OF NEW MEXICO

SENTENCING MINUTE SHEET

CR No.	06-538 JH	USA vs.	Quaintance
Date:	January 8, 2008	Name of Deft:	Danuel Quaintance
Before the Honorable		Judith C. Herrera	

Time In/Out:	10:49 am - 11:12 am 11:19 am - 11:27 am 11:27 am - 11:45 am			Type of Proceeding:	Sentencing - Non-Evidentiary (Total Mintues: 49 Minutes)			
Clerk:	I. Duran			Court Reporter:	P. Baca			
AUSA:	Luis A. Martinez			Defendant's Counsel:	Jerry D. Herrera			
Sentencing in:	Albuquerque, New Mexico			Interpreter:	None			
Probation Officer:	Mindy Pirkovic			Sworn?		Yes		No
Convicted on:	x	Plea		Verdict	As to:		Information	x Superceding Indictment
If Plea:	x	Accepted		Not Accepted	Adjudged/Found Guilty on Counts:	**Cts. I & II**		
Date of Plea/Verdict:	8/18/08				PSR:		Not Disputed	x Disputed
PSR: x	Court Adopts PSR Findings				Evidentiary Hearing:	x	Not Needed	Needed
Exceptions to PSR:								

SENTENCE IMPOSED	Imprisonment (BOP): 64 months as to Cts. I & II, said terms to run concurrently			
Supervised Release:	4 years as to Ct. I & 3 years as to Ct. II; said terms to run concurrently for a total of 4 years	Probation:		500-Hour Drug Program

SPECIAL CONDITIONS OF SUPERVISION

	No re-entry without legal authorization		Home confinement for months days
	Comply with ICE laws and regulations		Community service for months days
	ICE to begin removal immediately or during sentence		Reside halfway house months days
x	Participate in substance abuse program/drug testing		Register as sex offender
	Participate in mental health program		Participate in sex offender treatment program
x	No alcohol/liquor establishments		Possess no sexual material
x	Submit to search of person/property		No computer with access to online services
x	No contact with co-Deft(s), except: spouse		No contact with children under 18 years
	No entering, or loitering near, victim's residence		No volunteering where children supervised
	Provide financial information		Restricted from occupation with access to children
	Grant limited waiver of confidentiality		No loitering within 100 feet of school yards
x	OTHER: Standard & Mandatory Conditions: Deft shall submit to DNA collection and shall not possess any firearms, etc.		

Fine: $	**0**		Restitution: $				
SPA: $	200 ($100 as to each Count)		Payment Schedule:	x	Due Immediately		Waived

x	Advised of Right to Appeal		Waived Appeal Rights per Plea Agreement
	Held in Custody	x	Voluntary Surrender
x	Recommended place(s) of incarceration:	FCI, Phoenix, AZ or facility closest to Defendant's residence	
	Dismissed Counts:		

AO 245B (Rev 12/03) Criminal Judgment Sheet 1

UNITED STATES DISTRICT COURT

District of New Mexico

UNITED STATES OF AMERICA
V.

Danuel Dean Quaintance

Judgment in a Criminal Case

(For Offenses Committed On or After November 1, 1987)
Case Number: **2:06CR00538-001JH**
USM Number: **34578-051**
Defense Attorney: **Jerry Daniel Herrera, Appointed**

THE DEFENDANT:

☒ pleaded guilty to count(s) **S1 and S2 of Indictment**
☐ pleaded nolo contendere to count(s)
☐ after a plea of not guilty was found guilty on count(s)

The defendant is adjudicated guilty of these offenses:

Title and Section	*Nature of Offense*	*Offense Ended*	*Count Number(s)*
21 U.S.C. Sec. 846	Conspiracy to Violate 21 U.S.C. Sec. 841(b)(1)(B)	02/22/2006	S1
21 U.S.C. Sec. 841(b)(1)(C)	Possession with Intent to Distribute 50 Kilograms and more of Marijuana	02/22/2006	S2

The defendant is sentenced as specified in pages 2 through **5** of this judgment. The sentence is imposed under the Sentencing Reform Act of 1984. The Court has considered the United States Sentencing Guidelines and, in arriving at the sentence for this Defendant, has taken account of the Guidelines and their sentencing goals. Specifically, the Court has considered the sentencing range determined by application of the Guidelines and believes that the sentence imposed fully reflects both the Guidelines and each of the factors embodied in 18 U.S.C. 3553(a). The Court also believes the sentence is reasonable and provides just punishment for the offense.

☐ The defendant has been found not guilty on count .
☐ Count dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

County of Residence

January 8, 2009
Date of Imposition of Judgment

/s/ Judith C. Herrera
Signature of Judge

Judith C. Herrera
United States District Judge
Name and Title of Judge

January 12, 2009
Date Signed

Defendant: **Danuel Dean Quaintance**
Case Number: **2:06CR00538-001JH**

IMPRISONMENT

The defendant is committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **64 months**.

A term of 64 months is imposed as to each of Counts S1 and S2; said terms will run concurrently.

☒ The court makes these recommendations to the Bureau of Prisons:

FCI, Phoenix, Arizona or at a facility closest to Defendant`s residence or nearest family.

☐ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant must surrender to the United States Marshal for this district:
  ☐ at on
  ☐ as notified by the United States Marshal.
☒ The defendant must surrender for service of sentence at the institution designated by the Bureau of Prisons:
  ☐ before 2 p.m. on
  ☒ as notified by the United States Marshal
  ☒ as notified by the Probation or Pretrial Service Office.

RETURN

I have executed this judgment by:

Defendant delivered on _____ to
_____ at _____ with a Certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
Deputy United States Marshal

Defendant: **Danuel Dean Quaintance**
Case Number: **2:06CR00538-001JH**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **4 years** .

A term of 4 years is imposed as to Counts S1. A term of 3 years is imposed as to Counts 2; said terms will run concurrently for a total term of 4 years.
The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. The defendant shall not commit another federal, state, or local crime. The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

- ☐ The above drug testing condition is suspended based on the courts determination that the defendant possesses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any dangerous weapon. (Check, if applicable).
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable).
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.
The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall obtain and maintain full time, legitimate employment, or attend a vocational or academic training program throughout the term of supervised release as directed by the probation officer;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

Defendant: **Danuel Dean Quaintance**
Case Number: **2:06CR00538-001JH**

SPECIAL CONDITIONS OF SUPERVISION

The defendant must participate in and successfully complete a substance abuse treatment program which may include drug testing, outpatient counseling, or residential placement. The defendant may be required to pay a portion of the cost of treatment and/or drug testing as determined by the Probation Office.

The defendant must submit to a search of his person, property, or automobile under his control to be conducted in a reasonable manner and at a reasonable time, for the purpose of detecting alcohol or drugs at the direction of the probation officer. He must inform any residents that the premises may be subject to a search.

The defendant must refrain from the use and possession of alcohol and other forms of intoxicants. He must not frequent places where alcohol is the primary item for sale.

With the exception of his spouse, the defendant shall have no contact with the co-defendants in this case without prior approval from the Probation Office.

Defendant: **Danuel Dean Quaintance**
Case Number: **2:06CR00538-001JH**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments.

☐ The Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

Totals:	Assessment	Fine	Restitution
	$200.00	**$0**	**$0**

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

A ☒ In full immediately; or

B ☐ $ immediately, balance due (see special instructions regarding payment of criminal monetary penalties).

Special instructions regarding the payment of criminal monetary penalties:Criminal monetary penalties are to be made payable by cashier's check, bank or postal money order to the U.S. District Court Clerk, 333 Lomas Blvd. NW, Albuquerque, New Mexico 87102 unless otherwise noted by the court. Payments must include defendant's name, current address, case number and type of payment.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. Cr. No. 06-538 JCH

DANUEL DEAN QUAINTANCE, and
MARY HELEN QUAINTANCE,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendants Danuel Dean Quaintance and Mary Helen Quaintance's *Joint Motion for Release Pending Appeal*, dated December 24, 2008 [Doc. no. 403]. After considering the written brief and applicable law, as well as the argument made at Defendants' sentencing on January 8, 2009, the Court concludes that the motion is not well taken and should be denied.

DISCUSSION

Defendants pled guilty to a *Superseding Indictment* [Doc. 25], specifically to Count 1, Conspiracy to Possess with the Intent to Distribute 100 Kilograms or More of Marijuana, and Count 2, Possession with the Intent to Distribute 50 Kilograms or More of Marijuana. Defendants have been released on conditions since March 9, 2006, and, to date, have been compliant with all conditions of release. The Court sentenced Defendants on January 8, 2009, and granted the Defendants' request for voluntary surrender.

Under 18 U.S.C. § 3143(b), a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal, shall be detained unless the

Court finds each of the following: (1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the community; (2) that the appeal is not for the purpose of delay; (3) that the appeal "raises a substantial question of law or fact"; and (4) that the substantial question of law of fact is "likely to result in: (a) reversal; (b) an order for a new trial; (c) a sentence that does not include a term of imprisonment; or (d) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b)(1)(B).

The Court agrees with Defendants's contention that their record of compliance with all of the conditions of their release has demonstrated, by clear and convincing evidence, that they are not likely to flee or pose a danger to the safety of any other person or the community. *See* 18 U.S.C. § 3143(b)(1)(A). The Court also agrees with Defendants's contention that the filing of their appeal is not done for purposes of delay. *See* 18 U.S.C. § 3143(b)(1)(B). Thus, the Court must determine whether Defendants' appeal "raises a substantial question of law or fact likely to result in reversal [or] an order for a new trial." *Id.*

Defendants' argument focuses almost entirely on the "likely to result in reversal" requirement. Defendants are correct that the issue of whether a question raised is "likely to result in reversal [or] an order for a new trial" should be assessed according to how integral to the conviction the question is, rather than whether a defendant is actually likely to prevail in his appeal. In other words, if it is likely that a reversal of the conviction or a new trial will be granted on appeal if the question at hand is decided in the defendant's favor, the "likely to result in reversal" standard is met, regardless of the defendant's chances of actually prevailing on the question at hand. *See United States v. Affleck*, 765 F.2d 944, 953 (10th Cir. 1985) (*citing United States v. Miller*, 753 F.2d 19, 24 (3d Cir. 1985)).

However, Defendants' argument glosses over the initial requirement that the question of law be "substantial." The *Affleck* court's *en banc* decision interpreting what constitutes a "substantial" question under 18 U.S.C. § 3143(b) relied in part on its finding that Congress promulgated the law "to reverse the presumption in favor of bail pending appeal under the former [version of section 3143] and to make the standards for granting bail pending appeal more stringent." *Affleck*, 765 F.2d at 952. Accordingly, the court held that "a 'substantial question' is one of more substance than would be necessary to a finding that it was not frivolous. It is a 'close' question, or one that very well could be decided the other way." *Id.* (*quoting United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)).

Defendants base their argument that they should remain free on conditions of release pending appeal pursuant to 18 U.S.C. § 1343 on two questions of law: (1) whether the Tenth Circuit decision of *United States v. Myers*, 95 F.3d 1475 (10th Cir. 1996) remains viable, and (2) whether, after 1996, marijuana can legally be maintained as a Schedule I drug under the Controlled Substances Act. Even granting Defendants' contention that prevailing on either one of these questions would likely result in reversal, the Court does not find that Defendants qualify for release pending appeal because it does not find that either of these questions meets the strict criteria for what constitutes a "substantial" question of law as set forth by the *Affleck* court. The Court has previously given extensive explanations of its rulings on these issues. *See, e.g.,* Docs. 235 and 359 as well as the record of the hearing held on August 8, 2008. The Court recognizes that the context of its decision today requires it to undergo a further level of analysis, namely, not only whether this Court's application of existing precedent raises a "close question," but also whether existing Tenth Circuit precedent "very well could be decided the other way" and be revised on appeal. *Affleck*, 765 F.2d at 962. After once again reviewing the case law, the Court

simply does not find that these questions reach the required level of controversy to qualify as "substantial."

Further, the Court sees nothing in the circumstances of this case to enable it to find that Defendants have "clearly shown that there are exceptional reasons" why their detention is not appropriate as contemplated by 18 U.S.C. § 3145(c).

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendants Danuel Dean Quaintance and Mary Helen Quaintance's *Joint Motion for Release Pending Appeal* [Doc. 403] is hereby **DENIED**.

JUDITH C. HERRERA
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. Cause No. CR 06-538 JH

DANUEL QUAINTANCE,

Defendants.

NOTICE OF APPEAL

The Defendant, DANUEL QUAINTANCE, by and through his attorney, Jerry Daniel Herrera, hereby provides notice of his appeal to the United States Court of Appeals for the Tenth Circuit from his Judgment in a Criminal Case in the above-styled and numbered cause.

/s/ electronically signed

JERRY DANIEL HERRERA
Attorney for Danuel Quaintance
509 13th Street SW
Albuquerque, New Mexico 87102
Telephone: (505) 262.1003

I HEREBY CERTIFY that I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to opposing counsel of record on this date.

/s/ electronically signed

Jerry Daniel Herrera

United States District Court
District of New Mexico
Office of the Clerk
Pete V. Domenici United States Courthouse

Matthew J. Dykman
Clerk of Court

333 Lomas Blvd. N.W. - Suite 270
Albuquerque, New Mexico 87102
(505) 348-2000 - Fax (505) 348-2028

Divisional Offices
106 South Federal Place
P.O. Box 2384
Santa Fe, NM 87504-2384
(505) 988-6481
Fax (505) 988-6473

200 East Griggs
Las Cruces, NM 88001
(505) 528-1400
Fax (505)528-1425

January 16, 2009

Elisabeth Shumaker, Clerk
United States Court of Appeals
for the Tenth Circuit
The Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257

Re: USA v Danuel Dean Quaintance ; 2:06-cr-00538-JCH-1

Dear Ms. Shumaker,

A Notice of Appeal was filed in the above referenced case. Enclosed is the preliminary record which consists of the Notice of Appeal filed January 16, 2009, Judgment filed January 12, 2009, Memorandum Opinion and Order filed January 13, 2009 and a copy of the docket entries.

The docket and appeal fee is not required for this case.

Appellant's counsel is required to refer to The Tenth Circuit Court of Appeals web site at www.ca10.uscourts.gov to access the appropriate forms for the notice of appeal, click on Initial Appeal Documents and Instructions.

Sincerely,

Matthew J. Dykman, Clerk
of the United States District Court
for the District of New Mexico

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. Cause No. CR 06-538 JH

DANUEL QUAINTANCE,

Defendants.

NOTICE OF APPEAL

The Defendant, DANUEL QUAINTANCE, by and through his attorney, Jerry Daniel Herrera, hereby provides notice of his appeal to the United States Court of Appeals for the Tenth Circuit from the *Memorandum Opinion and Order* [Doc 416], filed January 13, 2009, referencing the Defendants' *Joint Motion for Release Pending Appeal* [Doc. 403] in the above-styled and numbered cause.

electronically filed

JERRY DANIEL HERRERA
Attorney for Danuel Quaintance
509 13th Street SW
Albuquerque, New Mexico 87102
Telephone: (505) 262.1003

I HEREBY CERTIFY that I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to opposing counsel of record on this date.

electronically filed

Jerry Daniel Herrera

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

Douglas E. Cressler
Chief Deputy Clerk

February 23, 2009

Scott M. Davidson
1011 Lomas Blvd. NW
Albuquerque, NM 87102-0000

RE: 09-2013, United States v. Qaintance
Dist/Ag docket: 2:06-CR-00538-JCH-1

Dear Counsel:

This is to give notice that the district court transmitted the record on appeal or the original file to the clerk of this court on 02/20/2009. *See* 10th Cir. R. 11.2 and 31.1(A)(2).

Appellant's brief must be filed on or before **April 6, 2009**. Appellee's brief shall be filed 30 days after service of appellant's brief. Appellant may file a reply brief within 14 days after service of appellee's brief.

Please contact this office if you have questions.

Sincerely,

Elisabeth A. Shumaker
Clerk of the Court

cc: Terri J. Abernathy

EAS/sds