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:

Filed Electronically
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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