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
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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