IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. CR 06-538 JH

DANUEL DEAN QUAINTANCE, and
MARY HELEN QUAINTANCE,

Defendants.

DEFENDANTS' JOINT MOTION FOR RELEASE PENDING APPEAL

COME 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 Bail Reform Act, Title 18 United States Code, Sections 3141 et seq., move the Court to continue the Defendants' conditions of release–post sentencing–pending their appeal. As grounds in support, the Defendants submit that they do not pose a risk of flight or a danger to the community, their appeal will not be filed for purposes of delay, their appeal raises a substantial question of law or fact, and their case presents exceptional reasons to justify continued release.

The Assistant United States Attorney Luis Martinez opposes the relief requested.

BACKGROUND AND INTRODUCTION

1. The Defendants Danuel Quaintance and Mary Quaintance were arrested on or about February 22, 2006, and after 16 days of detention, were released on conditions. To date, the Defendants have been compliant with all conditions of release. PSR, ¶ 5.

2. The Defendants Danuel Quaintance and Mary Quaintance have pleaded guilty to the *Superseding Indictment*, specifically to 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. The parties stipulate that the Defendants are responsible for approximately 150 kilograms of marijuana. The parties agree, pursuant to the *Conditional Plea Agreement*, that the Defendants may appeal all issues raised during the pendency of the proceedings. See *Conditional Plea Agreement*, Docs. 374, 377, at p. 5.

3. Over the course of these proceedings, the Defendants have litigated numerous motions, and have brought an interlocutory appeal to the Tenth Circuit Court of Appeals which was ultimately dismissed for lack of jurisdiction. The parties had filed a *Motion to Dismiss the Indictment* and *Reply*, Docs. 34, 68, which sought a ruling that the Controlled Substances Act (CSA) constitutes a substantial burden on the Defendants' exercise of their religion as 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 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.

4. After the district court denied the *Motion to Dismiss*, the Defendants filed a *Motion to Reconsider*, Doc. 219, which was denied by the Court on May 9, 2007. Doc. 235.

5. The Defendants filed a *Motion 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.

6. Prior to trial, the Defendants filed a *Joint Motion to Dismiss For Failure to State a Valid Cause of Action,* Doc. 364, which motion was ultimately denied by the district court. Doc. 380. Additionally, the Defendants had filed a *Motion to Suppress*, Doc. 39, and the Defendant Mary Quaintance filed a *Motion for Severance*. Doc. 38. Both of these motions were denied by the district court.

7. Sentencing is scheduled to occur on January 8, 2009, almost three years after the Defendants' arrests.

ARGUMENT

NEITHER DEFENDANT POSES A RISK OF FLIGHT OR A DANGER TO THE COMMUNITY

8. The arrests of the Defendants occurred approximately 35 months prior to sentencing, and but for two weeks, the Defendants have been out-of-custody on pre-trial services release. As noted in the PSR, the Defendants have been compliant with all conditions of release. PSR, ¶ 5. The Defendants submit that this record of compliance constitutes 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).

9. Danuel and Mary Quaintance have lived in Pima, Arizona since 1986. In 1989, they purchased 4 adjoining lots where they presently reside. The Defendants' daughter and son-in-law, and three grand-children, own and live on one of the adjoining lots. Both the

Defendants' children attended school in Pima, as do their grand-children, who were born in the nearest hospital. The Quaintance's son-in-law is also a long-standing member of the local community, and the son-in-law's father lives essentially across the street in the same subdivision. Similarly, the Quaintance's daughter-in-law is from Arizona, and her parents live approximately 45 miles away. Both sets of in-laws regularly visit the Quaintance residence, and the extended families celebrate holidays together. Danuel and Mary Quaintance provide child care for their youngest grand-children when their parents are at work. The Quaintances' ties to their community are very strong.

10. Finally, the opportunity to be vindicated on appeal provides exceptionally strong motivation for Danuel and Mary Quaintance to continue their "compliance" with all conditions of release. The Quaintances have everything to lose and nothing to gain were they to flee in violation of their conditions of release.

THE APPEAL IS NOT FOR PURPOSES OF DELAY

11. The history of this case demonstrates that the filing of the appeal, after sentencing, is not done for purposes of delay. 18 U.S.C. § 3143(b)(1)(B). The Defendants desire to have the legal issues raised throughout the pendency of this case resolved by a higher court. The interlocutory appeal attempted to achieve this resolution, but the Tenth Circuit ruled that said appeal was premature, and would have to be brought back at the appropriate time in the future. The fact that the Defendants pursued the interlocutory appeal clearly and convincingly demonstrates that their future appeal is not merely designed to cause added delays.

18 U.S.C. § 1343(B)(1)(B)'S "LIKELY TO RESULT IN REVERSAL" REFERS TO REVERSAL *IF* THE APPELLATE COURT REACHES A DIFFERENT RESULT; A DISTRICT COURT NEED NOT FIND THAT THE APPELLATE COURT *WILL* LIKELY REACH A DIFFERENT RESULT

12. 18 U.S.C. § 1343(b)(1)(B) requires that the "substantial question be likely to result in reversal, an order for a new trial, a sentence that does not include a prison term, or a reduced prison sentence that would be less than the total time the defendant has already served, plus the expected duration of the appeals process." Early district court cases interpreted "likely to result in reversal or order for new trial" as requiring a finding that their own rulings were likely to be reversed. *See United States v. Miller, supra* 53 F.2d at 22 (discussing district court's analysis). The appellate courts have consistently rejected that approach as being capricious, inconsistent with congressional intent, and a "Catch–22 interpretation." *See United States v. Bayko*, 774 F.2d 516, 522-23 (1st Cir. 1985) (citing cases) (agreeing with *United States v. Miller*, 753 F.2d 19 (3d Cit. 1985), that bail pending appeal cannot be made contingent upon a finding by the district court that it is likely to be reversed: "We also agree with the other circuits that the language in the statute which reads "likely to result in reversal or an order for a new trial" is a requirement that the claimed error not be harmless or unprejudicial."); *accord United States v. Affleck*, 765 F.2d 944 (10th Cir.1985) (en banc). Rather, the courts have defined "likely to result in reversal" as describing "the type of question that must be presented." *See United States v. Bilanzich*, 771 F.2d 292, 299 (7th Cir. 1985); *United States v. Handy, supra*, 761 F.2d at 1280. It must be "so integral to the merits of the conviction that it is more probable than not that reversal or a new trial will occur if the question is decided in the defendant's favor." *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985) (underline added) (quoting *United States v. Powell,*

supra, 761 F.2d 1227, 1233-34 (8th Cir. 1985)).[1]

13. The issues raised in the present case, and to be raised on appeal, are so integral to the merits of the conviction that is more probable than not, if the question is decided in Danuel and Mary Quaintance's favor, that reversal, acquittal, or a new trial will occur. This is clearly a case where the Court is authorized, and it is appropriate that this Court issue an Order, to allow Danuel and Mary Quaintance to remain on current conditions of release pending their appeal.

18 U.S.C. § 3145(C) AUTHORIZES RELEASE WHEN THE DISTRICT COURT FINDS "EXCEPTIONAL REASONS"

14. As interpreted by the courts, the "exceptional reasons" provision of section 3145(c) is not dependant upon section 3142(a)'s "likely to prevail" provision. That is to say, to qualify for release under section 3145(c) based upon a finding of exceptional reasons, the defendant is not also required to meet the requirements of § 3143(a)(2), that he was likely to prevail on a motion for acquittal or new trial, or that the government had recommended no sentence of imprisonment.

15. In *United States v. Jones*, the Tenth Circuit joined other circuits to hold that district courts have authority to determine whether there are exceptional reasons that would justify release pending appeal. *United States v. Jones*, 979 F.2d 804, 805-06 (10th Cir 1992)(per curiam); *also see United States v. Herrera-Soto*, 961 F.2d 645, 647 (7th Cir. 1992) (per curiam) *United States v. DeSomma*, 951 F.2d 494, 496 (2d Cir 1991); *United States v. Carr*, 947 F.2d

[1] The position rejected by *Bayko* was best illustrated by Judge Hauk, a former U.S. District Court Judge in Los Angeles. Judge Hauk is reported to have commented when denying bail on appeal, "How can this appeal raise a substantial question? I denied all of the motions and objections you are seeking to review on appeal. If they had any merit, I would have ruled in your favor."

1239, 1240 (5th Cir. 1991)(per curiam). In *United States v. Kinslow*, 105 F.3d 555 (10th Cir. 1997), the Tenth Circuit noted:

> "...[A]ppellant could obtain release under 18 U.S.C. 3145(c), by meeting the conditions of release set forth in 18 § 3143(a)(1) and by making a clear showing of exceptional reasons why his detention would not be appropriate ... Under § 3143(a)(1), he was required to show, by clear and convincing evidence, that he was not "likely to flee or pose a danger to the safety of any other person or the community if released." He did not have to show, however, as he would have under § 3143(a)(2), that he was likely to prevail on a motion for acquittal or new trial, or that the government had recommended no sentence of imprisonment."

105 F.3d at 557. In a subsequent decision, the Tenth Circuit explained:

> "As a preliminary matter, we agree with the *DiSomma* court's observation that a 'case by case evaluation is essential.' [ ]. Further, the court's observation that 'exceptional reasons' must present 'a unique combination of circumstances giving rise to situations that are out of the ordinary' is instructive. A substantial question of law sufficient to satisfy the criteria for release required of any convicted person, in a remarkable or unique factual context, may render detention pending appeal inappropriate. Or, as in *DiSomma*, a legal issue may be of such weight that it forms the basis of an 'exceptional reason' against detention."

United States v. Herrera-Soto, 961 F.2d 645, 647 (10th Cir. 1992); *see DiSomma*, 951 F.2d at 497 (stating that "an unusual legal or factual question can be sufficient [to justify a finding of exceptional reasons]; ... a merely substantial question may be sufficient, in the presence of one or more remarkable and uncommon factors, to support a finding of exceptional reasons for the inappropriateness of detention"); *also see United States v. Garcia*, 340 F.3d 1013, 1020-21 (9th Cir. 2003)(stating that "if one or more issues raised on appeal has not previously been decided by the court to which the petitioner will appeal, that may, in at least some cases, also weigh in favor of finding exceptional reasons ... Similarly, if the appellate issues are highly unusual in other respects, a district court may consider that factor when evaluating all of the circumstances.)

IN ADDITION TO PRESENTING EXCEPTIONAL REASONS, THE APPEAL RAISES SUBSTANTIAL QUESTIONS OF LAW OR FACT THAT ARE LIKELY TO RESULT IN REVERSAL OR AN ORDER FOR A NEW TRIAL

16. The appeal also raises substantial questions of law of fact that will likely result in a reversal of their convictions and an order for a new trial. In light of subsequent Tenth Circuit and United States Supreme Court jurisprudence, and given the promulgation of federal statutes, the viability of the Tenth Circuit decision of *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996), is in question. Despite the fact that this Court has considered and denied the Defendants' challenge to *Meyers*, Defendants submit that it is entirely likely that the Tenth Circuit will have to re-examine *Meyers* through the broader lens of more recent caselaw and statutes. See e.g. *Gonzales v. O Centro Espiritu Beneficente Uniao Do Vegetal,* 546 U.S. 418 (2006); *Grace United Methodist Church v. City of Cheyenne,* 451 F.3d 643 (10th. Cir. 2006); *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001); 42 U.S.C. § 2000bb-2(4) (1999). *Meyers*' narrow and rather myopic view of "religion" and "exercise of religion" must cede to the more-inclusive approach of present-day caselaw and statutes.

17. As argued earlier in this case, a central problem inherent in the *Meyers*' approach is its delegation of crucial fact-finding to the district court, wherein a district court judge is vested with the obligation to determine whether or not a litigant's views are religious and sincerely held. Because these matters point to a defense that is properly raised at trial, they are more appropriately left to the decision of the jury. RFRA is explicit that it may be used as a "defense in a judicial proceeding, 42 U.S.C. § 2000bb-1(c), and applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." *Id.*, § 2000bb-3(a). Consequently, the CSA's lack of a specific

provision allowing a religious freedom defense does not prevent the Defendants from raising a religious defense at trial.

18. Defendants respectfully submit that this Court misapplied *Meyers*. As a preliminary matter, the instant case is distinguishable from *Meyers* in two principle aspects. First, the defendant in *Meyers* claimed to have founded his own "new and unique religion" which led to skepticism by the district court to note that "Meyers' professed beliefs have an ad hoc quality that neatly justify his desire to smoke marijuana." *United States Meyers,* 906 F.Supp. 1494, 1509 (D. Wyo. 1995). In the instant case, Defendants do not claim to have founded a "new and unique religion." They are the founders of a church, The Church of Cognizance, which professes and practices a form of the Zoroastrian religion. The Government conceded the Defendants "claim to observe a form of Zoroastrianism in which cannabis is both a deity and a sacrament ". Doc 41 at 10. At the August, 2006, evidentiary hearing, the Government argued that the testimony of its witness, a Parsi Zoroastrian Priest, was relevant by reasoning: "it's the religion that these defendants claim to be" . . . "and to follow some of the tenets of the Zoroastrian faith, and they've attempted to establish that as part of the factors, and we're attempting to rebut that by showing they are nowhere near the Zoroastrian faith." . . . "we're attempting to show his [Dr. Bagli's] religion […] and how it is so different from what the defendants have demonstrated here for the last few days". Transcript of August 2006 Evidentiary Hearing (hereafter "Transcript"), at 313-314.

19. Second, in *Meyers*, the defendant's religion was not based on his "interpretation" of scripture from any recognized religion. To the contrary, Danuel and Mary Quaintance's beliefs are based on interpretation of Zoroastrian scripture known as the Avesta, as well as years

of research connected to the Zoroastrian religion. Transcript at 190-195. The Church of Cognizance was "Established" in the State of Arizona to manifest a derived perception of what members consider to be the "truest" interpretation of the ancient Zoroastrian religion. *See* "Declaration of Religious Sentiment", included in Exhibit 7 admitted at the August, 2006, evidentiary hearing.

20. Dr. Bagli, the government's expert witness, testified that:

> "haoma was a deity as well as a plant. And we have no knowledge of what that plant was at that time. Scholars have speculated that it may have had hallucinogenic properties. And historical records and archeological finding indicate that several different plants may have been used, or even the mixture of plants may have been used at different parts of the area of the world, in that area, and at different times. So we have no knowledge of what that plant was at that time."

Transcript at 319.

21. When asked if there was a Haoma ceremony today amongst Zoroastrians, the witness admitted that "Today, Haoma ceremony is a central sacrament of the higher inner liturgical ceremony in the Zoroastrian faith." Transcript at 319. When questioned by the Government as to whether there was "any particular day or time for these events to occur?", Dr. Bagli replied "No, Haoma ceremony *can be performed whenever anyone chooses*." Transcript at 319. And in response to questioning about gathering places, Dr. Bagli responded there were some, but admitted that "Zoroastrians can do their worship and devotion in their own house also." Transcript at 325. When asked if Haoma could be the cannabis plant, Dr. Bagli, replied "…it may have been". Transcript at 329.

22. The evidence below confirmed that the Defendants' religious beliefs are sincere and are the product of years of research, based upon one of the oldest recognized religions of the

world. The Government faults the Defendants because their perceptions of the Zoroastrian faith are not identical to those of its witness. However, the Supreme Court has instructed that "[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Thomas v. Review Board,* 450 U.S. 707, 715-716 (1981). "Particularly in this sensitive area, 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." *Id.* at 716. Thus, because we are dealing with Defendants' "interpretation" of an already recognized religion, *Meyers* fails to control the instant case, and this Court improperly applied its factors.

23. The *Joint Motion to Dismiss For Failure to State a Valid Cause of Action,* Doc. 364, sought a legal and factual determination whether, as a matter of law, statutory requirements precluded the substance "marijuana" from remaining in Schedule I after 1996, when the first State recognized "accepted medical use" of marijuana. The argument was based on *Gonzales v. Oregon,* 546 U.S. 243 (2006) which held that section 903 of the CSA established Congressional intent not to interfere with the States' right to individually determine accepted medical practices with respect to the use of drugs. Thus, in 1996 when California formally recognized that marijuana had "accepted medical use", the Attorney General was obligated to move marijuana out of Schedule I. Section 812(a) of Title 21, United States Code, establishes five schedules which "shall initially consist of the substances listed in this section", and further requires that the "schedules... shall be updated and republished on an annual basis." Section 812(b) requires explicit findings that "a drug or other substance may not be placed in any schedule unless the findings *required* for such schedule are made" (italics added). Because placement of a substance

in Schedule I requires that the drug or substance "has no currently accepted medical use in treatment in the United States", the condition precedent has been abrogated. The Attorney General has failed in its obligation to re-schedule marijuana, and marijuana's continued inclusion in Schedule I creates a legal nullity for present prosecutions under the CSA.

24. Certainly, the facts of this case are far more exceptional than those in *DiSomma*, *supra*. Whereas in *DiSomma*, the necessary element of violence was in dispute, in the present case the *un*lawfulness of the Defendants' possession of marijuana as an element of the CSA is at issue. The rationale underlying *DiSomma* would appear to be equally applicable in the instant case because the "element of the crime called into question on appeal" (i.e. "*unlawful"* possession with intent to distribute a "*controlled substance")* "[is] the element of the bail statute that bars release." *DiSomma*, 951 F.2d at 498. A successful appeal in the instant case would either allow Defendants to withdraw their pleas and take their religious defense under RFRA before a jury in a new trial, and/or result in dismissal because of lack of jurisdiction.

CONCLUSION

25. This case presents unique and very complicated issues that will be addressed on appeal to the Tenth Circuit Court of Appeals. While criminal defendants who are sentenced to terms of incarceration typically are remanded to custody at the time of (or shortly after) their sentencing hearings, such practice is not a requirement. Rather, the Bail Reform Act specifically envisions a scenario wherein criminal defendants may remain on conditions of release pending the appeal of their convictions. Criminal defendants who do not pose a risk of flight or a danger to the community, whose appeal will not be filed for purposes of delay, whose appeal raises a substantial question of law or fact, and whose case presents exceptional reasons to justify

continued release, may remain at liberty pending their appeals. Defendants Danuel and Mary Quaintance submit that their case raises a substantial question of law or fact likely to result in reversal, specifically on their RFRA claims. Accordingly, the Defendants Danuel and Mary Quaintance request that the district court make the appropriate findings, pursuant to 18 U.S.C. § 3143(b) and/or 3145, and permit them to remain on conditions of release throughout the pendency of their appeals.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 24, 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.

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