

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

DANUEL DEAN QUAINANCE,

Defendant.

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Cause No. CR 06-538 JH

**MOTION TO DISMISS INDICTMENT
AND INCORPORATED MEMORANDUM**

DANUEL DEAN QUAINANCE, 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 James¹: "everyone is entitled to entertain such view respecting his relations 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 seem 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 “Kenah 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 psilocybin 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,

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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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