IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRIAN JUSTIN PICKARD, et al.,

Defendants.

Case No. 2:11-CR-449-KJM

DEFENDANT BRIAN PICKARD'S OPPOSITION TO GOVERNMENT'S NOTICE OF MOTION AND MOTION FOR RECONSIDERATION

Date: April 16, 2014
Time: 9:00 a.m.
Judge: Hon. Kimberly J. Mueller

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I. RECONSIDERATION IS NOT APPROPRIATE.

Although not expressly provided for in the Federal Rules of Criminal Procedure, the Ninth Circuit holds that motions for reconsideration may be filed in criminal actions, so long as they conform to the rules set forth in *Federal Rules of Civil Procedure 59* or *60*. (See, United States v. Martin, 226 F.3d 1042, 1047 *fn*. 7, 8 (9th Cir. 2000).)

As discussed, *infra*, the Government's Motion for Reconsideration[1] is procedurally defective because this Court's order granting an evidentiary hearing is *not* a judgment nor a *final* order within the meaning of *Rules 59* or *60*. The Government also fails to carry their substantive burden by seeking reconsideration based on a repackaging of the same arguments made in the Opposition and without reference to any change in the legal or factual circumstances, in what is clearly a second attempt at biting the same apple.

A. This Court's Order Granting an Evidentiary Hearing is Not a Final Order Subject to Reconsideration.

Motions for reconsideration apply "only to motions attacking final, appealable orders." Martin, *supra*, 226 F.3d at 1047. A final judgment is defined as "any order from which an appeal lies." *Fed. R. Civ. P. 54*; Bankers Trust Co. v. Mallis, 435 U.S. 381, 384 *fn*. 2 (1978), noting a "judgment" for purposes of the Federal Rules of Civil Procedure is a "final decision" as that term is used in *28 U.S.C. § 1291*; *see also* Martin, *supra*, 226 F.3d at 1048. Only appealable interlocutory orders are considered "final decisions" subject to reconsideration. Balla v. Idaho State Bd. of Corrections, 869 F.2d 461, 466-67 (9th Cir. 1988). Review of tentative, informal, or incomplete decisions is prohibited. Cohen v. Benefit Indus. Loan Corp., 337 U.S. 541, 546 (1949). Notably, appeal "gives the upper court a power of review, not one of intervention." *Id.*

In United States v. Martin, *supra*, 226 F.3d 1042, the Ninth Circuit made clear that *Rule 60* was inapplicable to a government motion for reconsideration of the *setting of a sentencing*

[1] This document (Doc # 264) will be referred to as Motion for Reconsideration; the Defendant's Motion to Dismiss the Indictment as Violative of the United States Constitution (Art. VI; Amend. V, X) and Request for Evidentiary Hearing (Doc #199) will be referred to as "Motion to Dismiss." Plaintiff's Opposition to Defendants' Motion to Dismiss Indictment (Doc. No. 224) hereinafter will be referred to as "Opposition," and Defendants Reply to Government's Opposition to Defendant Pickard's Motion to Dismiss Indictment (Doc. #233) will hereinafter be referred to as "Reply."

hearing because the setting of a hearing is not a final judgment within the meaning of *Rule 60*. The defendant, Martin, filed a Petition for Writ of Habeas Corpus under *21 U.S.C. § 2255*. The District Court granted his Petition and set the case for a re-sentencing hearing. Prior to this hearing, the government filed a Motion to Reconsider based upon an intervening change in the law, as new case law was published months after the granting of the writ, negating the grounds on which the Petition was decided. The Court found that *Fed. R. Civ. P. 59* and *60* did not provide a sufficient basis for the government's motion for reconsideration, as the Order granting a hearing was "deemed to be non-final," thus not subject to appeal, and correspondingly not to reconsideration. *Id*. at 1048. The policy for the finality of judgments "is grounded in the well-entrenched policy concern with avoiding piecemeal appeals" and "to avoid an inefficient state of affairs."[2] *Id*.

Here, the Order sought to be reconsidered is *not* one granting or denying Mr. Pickard's Motion to Dismiss, arguably a decision subject to interlocutory appeal, but rather an Order granting a hearing. (Doc. 264, p. 1.) Like in Martin, this Court should find such Order is not final, and is incomplete, and therefore, not suitable to a motion for reconsideration. To allow otherwise would in effect subject the Court's *procedural* choices to intervention by appellate review, a precedent not authorized under the relevant statutory and case law.[3] In fact, the"final judgment" requirement for applications for reconsideration is purposed to protect against a party manufacturing a final judgment where not otherwise existent in order to circuitously seek interlocutory review:

> The requirement of a judgment as a prerequisite to moving for reconsideration under Rule 59(e) protects against the specter of piecemeal review. This is so because the denial of a Rule 59(e) motion is itself a final, appealable judgment. In Stephenson, we observed that[,] were we to permit Rule 59(e) motions without

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[2] Noting that a court has discretion to *sua sponte* alter its own judgment to (1) correct simple mistakes and (2) to reflect for shifting precedent, the Court in the end relied upon the Local Rule to uphold the government's motion, there C.D. Cal. Local R. 7.16(b), expressly authorized the seeking of reconsideration based on a change in law occurring after a decision. *Id*. at 1049.

[3] *See U.S. Const. Art. III, § II, cl. 2*, investing judicial review in Supreme Court; *see also 28 U.S.C. § 1291*, delegating *Art. III, § II,* review to intermediate appellate courts, "[t]hrough a succession of recodifications and technical amendments, § 6 of the 1891 Act has been carried forward as *28 U. S. C. § 1291*," as noted in Arizona v. Manypenny, 451 U.S. 232, 245, *fn*. 19 (1981).

> entry of judgment, litigants could obtain appellate review of partial judgments by simply appealing a Rule 59(e) order, completely bypassing the requirements of... *28 U.S.C. § 1291.*

Balla, *supra*, 869 F.2d at 466-467, internal citations omitted, quoting Stephenson v. Calpine Conifers II, Ltd., 652 F.2d 808, 812 (9th Cir. 1981), overruled in part on other grounds.

As the Order granting an evidentiary hearing is not appealable as a "final decision" under *28 U.S.C. § 1291*, the Government should not be allowed to pierce the protection "against the specter of piecemeal review" by moving for reconsideration upon arguments already made and decided with no reference to legal or factual changes warranting a second review. For, in effect, this is to allow a party to manufacture grounds for an interlocutory appeal by filing a Motion for Reconsideration which clearly fails to meet the standards defining the burden for bringing such motions. Accordingly, this Court should reject the motion as procedurally defective in that it fails to attack a final order or judgement.

B. The Government Fails to Provide Sufficient Justification for Reconsideration.

While *Rule 59(e)* authorizes a party to seek reconsideration within 28 days of a judgment, *Rule 60 (b)* authorizes a party to move for relief of a judgment upon the following grounds:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59 (b).

In addition, an intervening change in the law is also sufficient justification for a motion for reconsideration. Donaldson v. Liberty Mut. Ins. Co., 947 F. Supp. 429, 430 (D. Haw. 1996).

In the present case, the Government contends that reconsideration is appropriate because they "initially" opposed Defendant's motion on grounds the Court lacked jurisdiction. (Motion for Reconsideration, Doc. No. 264, p. 3.) "Now," accepting they were incorrect on this issue, "the Government addresses the constitutional issue as clarified." *Id.* Any implication that the prosecution's initial opposition relied exclusively on the jurisdictional argument is easily discredited, for only one of the 18 page brief proposed this ground for denying Defendant's Motion, and the remainder raised nearly identical issues to those now presented as "three alternative theories."

Further, these alternative theories in no way implicate any of the bases on which a motion for reconsideration may rest pursuant to *Rule 60(b)*. In fact, when compared to the Opposition, the instant motion relies on nearly all the same cases and arguments.

Even assuming, however, the Government presented an alternative theory (which they have not), the considered choice to exclude these arguments from the Opposition cannot be cured through a motion for reconsideration. As the United States Supreme Court has insisted: "[t]here must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from. Ackermann v. United States, 340 U.S. 193, 198 (1950). Defendant Pickard's Motion to Dismiss the Indictment was filed on November 20, 2013, the government was provided nearly *three months* to respond, and could have requested a further extension. The significant preparation time afforded them renders any excuse for excluding an "alternative theory" suspect and must inform this Court's analysis of the instant motion.

Further, there is no assertion that the Government mistakenly or inadvertently failed to advance the alleged "alternative theories," nor can it be said that there were any surprise inquiries raised at the March 19, 2014, hearing. Nor does the Government offer a single new fact or contravening legal authority. In effect, even if the arguments presented in the Motion for Reconsideration could be considered different from those raised in the Opposition, the prosecution still fails to meet the standard authorizing the requested review.

Accordingly, this Court is respectfully asked to reject the Government's Motion for Reconsideration as procedurally defective and substantively deficient.[4]

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[4] Eastern District of California *Local Rule 430.1(I)* sets forth additional procedural requirements for the filing of a motion to reconsider, declaring in mandatory language, "it *shall* be the duty of counsel" seeking reconsideration to file an affidavit or brief setting forth the material facts and circumstances surrounding the motion for which reconsideration, including "what new or different facts or circumstances are claimed to exist that did not exist or were not shown upon such prior motion or what other grounds exist for the motion." *E.D. Cal. Local R. 403.1(i)(2)*. The Rule does not provide any additional authority above and beyond what is authorized by this Circuit or the United States Supreme Court in settled case law, as discussed in Part I (A), (B), *supra*. *See* Martin, *supra*, 226 F.3d at 1049, holding that the Central District of California's local rule provided an additional "textual source of authority for the Government's motion for reconsideration." Here, the same is not true, as the Local Rules merely set forth the procedural mechanism for such motions. The Rule also explicitly ties Motions for Reconsideration to Local Rule 303, stating that when a motion for reconsideration is made, "*see L.R. 303*, it shall be the duty of counsel..." *E.D. Cal. Local Rule 430.1(I)*. The Rule's plain language referencing Local Rule 303 arguably raises the inference that Motions for Reconsideration are authorized only under Local Rule 303, whereby a party may seek

II. THREE "ALTERNATIVE THEORIES"

A. Ninth Circuit Precedent

In Section I.A. of the Motion for Reconsideration, the Government reiterates the argument presented in the Opposition at pp. 10 - 12, relying on nearly all of the same cases, including United States v. Miroyan, 577 F.2d 489 (9th Cir. 1978), and United States v. Kiffer, 477 F.2d 349 (2d. Cir. 1972), as well as the unpublished cases of United States v. Oakland Cannabis Buyer's Cooperative, and Sacramento Nonprofit Collective v. Holder. In fact, the only case not relied upon in the Opposition is United States v. Rogers, 549 F.2d 107 (9th Cir. 1976), which upholds the scheduling of marijuana based on Kiffer in one sentence. While these cases were addressed in the Reply, an expanded analysis is presented below.

First, neither United States v. Miroyan, 577 F.2d 489, *supra*, nor United States v. Rogers, 549 F.2d 107 (9th Cir. 1976), include a legal or factual analysis. Rather, the Court in each instance simply concludes that the scheduling of marijuana is not constitutionally invalid based in large part on the findings in United States v. Kiffer, 477 F.2d 349, *supra*. Significantly, the Court in Kiffer held an evidentiary hearing at which the defense relied primarily on the testimony of Lester Grinspoon, as well as a stipulation that five other experts would testify consistent with Dr. Grinspoon. In response, the government submitted an affidavit of Dr. Forest Tennant, who "recommended against legalization *at the present time*." The Court observed:

> "While acknowledging the need for reform of the present marihuana laws, Dr. Tennant indicated that legalization would be inappropriate until (1) an easily applied blood or urine test is developed to detect intoxicated drivers, (2) more is learned about the differences between marihuana and hashish, and (3) a system of controls is established to keep marihuana and other harmful substances out of the possession of minors.

Id., at p. 353.

In the forty years since Kiffer was decided on the facts as presented in 1972, each of Dr. Tanner's concerns have been addressed. First, easily applied blood and urine tests have been

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reconsideration of a Magistrate Judge's ruling by the District Judge, and that Rule 430.1 simply provides the form. Here, there is no ruling by a Magistrate Judge and, as such, it is questionable whether the Local Rule is applicable to the instant circumstances.

developed to determine not only the presence of marijuana, but also the level of the psychoactive component in the system for detecting intoxicated drivers. Second, there is a great deal of information which the defense would present through expert witness Christopher Conrad, regarding the difference between marijuana and hashish. In fact, there are labs which test for levels of THC in all marijuana products, including hashish, which are being licensed in the state of Colorado in order to assist in developing labeling protocol. Third, as is evident from the successful implementation of medical cannabis laws in 21 states, and the recreational use in two states, systems of control can be established to keep marijuana out of the possession of minors.[5] Thus, the rationale for classifying marijuana in Schedule I proffered by the government in a forty-year-old case have now each been addressed, and the Ninth Circuit has since been relying on a record made nearly a half century ago. As the Supreme Court made clear in both Shelby County (Alabama) v. Holder, __ U.S.__, 133 S.Ct. 2612, 2623 (2013), and United States v. Windsor, __ U.S. __, 47, 133 S.Ct. 2675 (2013), and discussed in detail in the Motion to Dismiss and the Reply, federal statutes can not rely on facts existing in past decades. (See also, United States v. Caroline Products, 304 U.S. 144, 153-154 (1938), "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.") In fact, the Second Circuit in Kiffer recognized that the understanding of the effects of marijuana was far from concluded:

> It is true that the rationale for the criminalization of marihuana has shifted over time. See Bonnie & Whitebread, supra note 9, at 1012-16, 1055-57, 1061-62, 1071-74, 1126-27, 1162 (first explained, inter alia, by fear that drug would induce violent criminal conduct, insanity and even death, then by concern that it would serve as a stepping stone to harder drugs, and finally by apprehension as to its short- and long-term physical and psychological effects). This, however, does not negate the possibility that the justification now principally relied upon may have some merit.

Id., at 354.

As the Kiffer, court anticipated the shifting of precedent some four-decades ago, it follows that an evidentiary hearing is long overdue.

Even more importantly, in addition to the scientific and medical evidence proffered in

[5] These facts are among those which will be attested to by expert witnesses at the hearing.

this case (evidence which was not available to the Kiffer court in 1972, nor to those that followed), the defense here proffered evidence establishing the Federal Government's own actions over the past several months render any official claim that marijuana is one of the most dangerous substances in our County an absurdity. These actions encompass far more than the enforcement policy described in the Cole Memorandum, and the marijuana banking regulations authorized by the Department of Justice and United States Department of the Treasury, but also additional government actions implemented since the filing of the Reply and the hearing on this Motion that further facilitates the distribution of this purportedly dangerous substance:

First, on March 17, 2014, it was reported that the Department of Heath and Human Services cleared the way for the University of Arizona to conduct studies on the use of cannabis to treat veterans suffering from post-traumatic stress disorder (PTSD).[6] [7]

Second, the Federal Communications Commission [FCC] has done nothing to limit or curtail television and radio advertising of marijuana and marijuana related products which have become common place to audiences particularly in the State of Colorado.[8]

Third, Attorney General Holder recently stated that he would like to see marijuana

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[6] *See*, Matthew Perrone, Associated Press, "*Federal Government Signs Off On Study Using Marijuana To Treat Veterans' PTSD*," published on March 17, 2014, and located online at http://www.huffingtonpost.com/2014/03/17/ptsd-medical-marijuana-study_n_4980702.html.

[7] This was a welcome breakthrough for Iraq War veteran, Sergeant Ryan Begin who was injured in Iraq when an Improvised Explosive Device [IED] exploded near his convoy in an ambush. Sgt. Begin will be a proffered defense witness at the evidentiary hearing in this case based on new evidence that surfaced since the filing of the Reply in Support of the Motion to Dismiss, including the federal government's approval of the study of marijuana for war veterans suffering from PTSD, such as Sgt. Begin. Sgt. Begin served for the United States Marine Corps from November 2001 until he was honorably discharged in 2007. Approximately 4-6 inches of Sgt. Begin's right arm was blown off during the ambush in Iraq, and he underwent approximately 35 surgeries to repair his arm. His VA physicians prescribed him a cocktail of opiates and numerous other controlled substances to treat the debilitating pain. He describes this period as "the darkest time of my life." In 2009, he began using medical cannabis and he states he "started feeling noticeably more mentally and emotionally healthy than I had since before my deployments... The pain in my elbow became manageable without the massive opiates or other substances the physicians had previously prescribed me. I began to rebuild my relationships with my family, I started to feel like a regular functioning human again." Most importantly, he regained full custody of his daughter.

[8] *See,* Report on National Public Radio entitled, *"The Growing Industry Of Marijuana Advertising,"* that aired on April 6, 2014, and is located online at: http://www.npr.org/2014/04/06/299913844/the-growing-industry-of-marijuana-advertising?utm_medium=Email&utm_source=npr_email_a_friend&utm_campaign=storyshare.

rescheduled, testifying before Congress on April 4, 2014:[9]

> We'd be more than glad to work with Congress if there is a desire to look at and reexamine how the drug is scheduled, as I said there is a great degree of expertise that exists in Congress... It is something that ultimately Congress would have to change, and I think that our administration would be glad to work with Congress if such a proposal were made.

Yet, as indicated in the Reply and supported by Exhibit F, members of Congress are placing the responsibility on the Executive to make the change. Each of these actions by the federal government evidence the defense position that there is no rational basis to classify marijuana as one of the most dangerous drugs in this Nation, and marks the present motion as distinct from all others relied upon by the Government.

As in the Opposition, the Government again cites to the unpublished opinions United States v. Oakland Cannabis Buyers' Coop. [OCBC], 259 Fed. Appx. 936, 938 (9th Cir. 2007), and Sacramento Nonprofit Collective v. Holder, 2014 U.S. App. LEXIS 803 (9th Cir. 2014), though each of these cases rely on United States v. Miroyan, *supra*, which in turn relies in large part on the evidence produced in Kiffer. Importantly, *both* unpublished cases anticipate the evidence may at some point challenge these holdings. Indeed, in OCBC, the Court noted that "new information has been developed concerning the use of marijuana since 1978, "which may be properly considered if such "developments... left [a previous case's] central holding obsolete." *Id*., citing Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 860 (1992).[10]

Likewise, in Sacramento Nonprofit Collective v. Holder, 2014 U.S. App. LEXIS 803 (9th Cir. 2014), the Court was not presented with any evidence in support of the Equal Protection claim, and the totality of the discussion as it related to Equal Protection was as presented in the Opposition. The primary issue raised in that case was whether there is a fundamental right to use marijuana, a claim that has never been raised in the present matter. Even there, however, the

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[9] Ryan J. Reilly, "*Eric Holder Would Be 'Glad To Work With Congress' To Reschedule Marijuana,*" published on April 4, 2014, located online at http://www.huffingto npost.com/2014/04/04/eric-holder-reschedule-marijuana_n_5092010.html

[10] The defense references the argument made in the Reply, Doc. No 233, p. 10:

Court noted that "the passage of time coupled with changing social views may alter the fundamental rights analysis." *Id.*[11]

As in the Opposition, the Government turns to Americans for Safe Access (ASA) v. DEA, 706 F.3d 438 (D.C. Cir. 2013), as purported precedent in this case. Again the defense asks this Court to find ASA is not controlling because: (1) it was based on "the limited existing clinical evidence" available in 2002, (2) it was limited to the issue of whether an administrative decision not to undergo further studies into the medical benefits of cannabis was arbitrary and capricious, and (3) the decision was made only *after an evidentiary hearing* was held.

The defense now, and in its moving papers, agrees courts have consistently upheld the inclusion of marijuana in Schedule I; however, not a single one of those courts were presented with the evidence existing at this time in history, as proffered to this Court. For example, no Judge has been asked to question the rationality of a statute which defines a substance as one of the most dangerous in the Nation, while the Department of Heath and Human Services clears the way for a University to conduct studies on the use of cannabis to treat veterans suffering from post-traumatic stress disorder (PTSD).[12] Testing the most dangerous drugs on our psychologically impaired soldiers returning from war is truly the definition of irrationality.

B. Inappropriate to Conduct a Hearing when Standard of Review is Reasonable Basis.

1. Fundamental Rights

While the defense concedes that there is no precedent for this Court finding that strict scrutiny applies when challenging a statute a violation of which results in incarceration, the authority relied upon by the Government as stating otherwise actually supports the defense position. Indeed, Chapman v. United States, 500 U.S. 453 (1991), makes a clear distinction

[11] The government contends that the Court has "rejected – without an evidentiary hearing – a nearly identical set of arguments presented in motions to dismiss the indictments." (Doc. 264, p. 5, *fn.* 3.) However, none of these cases addressed the Constitutional challenges before this Court, nor proffered any factual support for their positions and, certainly, not a single one addressed the recent shift in federal policies and actions described herein which facilitate the distribution of marijuana.

[12] *See fn.* 7, above; *see also* Lee, Jolie, Huffington Post article entitled, "*Medical marijuana research for PTSD clears major hurdle*," published on March 18, 2014, and located online at http://www.usatoday.com/story/news/nation-now/2014/03/18/medical-marijuana-ptsd-veteran-study/6532021/.

between the impingement on the right to liberty in the context of sentencing as opposed to the right to liberty in the context of the finding of guilt. This distinction is apparent in the very paragraph cited by the Government at page 6:

> Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees . . .But a person who has been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual. . .and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment.

Id., at 465.[13]

It is also important to note that the Court in Chapman engaged in an analysis of the evidence supporting both parties arguments, including analyzing the rationality of Congress' decision to include the weight of the carrier in the Guidelines for LSD. The Court did not simply wholesale conclude that it was so because Congress said it was so, as the government here urges.

Mr. Pickard, "like any other defendant, has a personal right not to be convicted under a constitutionally invalid law." Bond v. United States, *supra*, 131 S.Ct. at 2367 (2011), Ginsburg, conc.; North Carolina v. Pearce, 395 U.S. 711, 739 (1969), overruled on other grounds; Ex parte Siebold, *supra*, 100 U.S. at 376,-377 (1880).

2. Suspect Class

Defendant renews his assertion that Constitutional review of the Controlled Substance as applied to marijuana is subject to strict scrutiny it implicates race-based discrimination, a contention not opposed by the government in their Opposition or Motion to Reconsider. (*See*, Motion to Dismiss, Doc. 199, pp. 10-11, *fn.* 16; Declaration of James J. Nolan, III, Doc. 199-3 p. 3, both noting marijuana laws were based on racially discriminatory intent and resulting in discriminatory impact; *see also* Reply, pp. 4-5, fn. 4 (Doc. No. 233), referencing recent interview with President Obama admitting that "Middle-class kids don't get locked up for smoking pot,

[13] The Court again marks the distinction between the constitutional analysis involving a sentence and that involving a finding of guilt. ("The fact that there may be plausible arguments against describing blotter paper impregnation with LSD as a "mixture or substance" containing LSD does not mean that the statute is vague. This is particularly so since whatever debate there is would center around the appropriate sentence and *not the criminality of the conduct*." Chapman, *supra*, at 468, emphasis added.

and poor kids do... And African-American kids and Latino kids are more likely to be poor and less likely to have the resources and the support to avoid unduly harsh penalties.") (Reply, Exhibit D)

Since the filing of the defense briefs, additional evidence supporting the need for strict scrutiny has become available. For example, in March of this year the Congressional Committee on Oversight and Government Reform held the second of a three-part series of hearings regarding the conflict between federal and state marijuana policies.[14] In those hearings, Congressman Steve Cohen (Tenn) made a statement to the Committee evidencing the CSA, as applied to marijuana, was enacted on race-based fear against African Americans and black people in the United States:

> But the War on Drugs started under President Nixon, but Mr. Haldeman, some people may not remember, Haldeman and Erlichman and these guys were big in the Watergate hearings, but they were the main think tank for President Nixon... Haldeman had a diary entry of April 28, 1969, said "He (Nixon), the President of the United States, emphasized that you have to face the fact that the "whole problem," and this is about drugs and the drug war, "is really the blacks. The key is to devise a system that recognizes this while not appearing to." So we start with Ansligner coming down on the Latinos, and then Haldemen says Nixon did it to get at the blacks, who [another Congressman at the hearing] rightly points out are four times more likely to be arrested and eight times more likely to be convicted."
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> Then we have Mr. Erlichman, White House Counsel to President Nixon in an interview, the author of Smoke and Mirrors: the War on Drugs and the Politics of Failure, Mr. Erlichman said "[l]ook, we understand we couldn't make it illegal to be young, or poor or black in the United States, but we could criminalize their common pleasure. We understand that drugs were not the health problem we were making them out to be, but it was such a perfect issue for the Nixon White House, we couldn't resist it... We knew we were lying about the health effects of marijuana. We knew we were lying about that, but this is what we were doing to win the election. And it worked.
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> That is the underpinnings and the genesis and the policy upon which our drug war is being fought.[15],[16]

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[14] Hearing entitled "Marijuana: Mixed Signals," held on March 4, 2014, before Congress' Committee on Oversight and Government Reform (transcript pending), video located online at http://oversight.house.gov/hearing/mixed-signals-administrations-stance-marijuana-part-two/.

[15] *See fn.* 14, *supra*.

[16] Rep. Cohen further stated that Nixon, in talking to Haldeman, his Chief of Staff, said "I want a GD strong statement on marijuana, I mean one on marijuana that just tears the rear out of them. By God, we're going to hit the

It is anticipated the evidence presented at the hearing will support finding the Controlled Substance Act was enacted with an invidious discriminatory intent and has an unacceptable disparate impact, requiring strict scrutiny review. *See* Village of Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 252 (1978), holding an invidious discriminatory purpose and disparate impact are sufficient to employ strict scrutiny analysis.

3. Active Rational Basis

As previously urged by the defense, should this Court find strict scrutiny is not the appropriate standard by which to test this challenge, an active rational basis analysis should be employed. In Equal Protection challenges to federal statutes involving issues of federalism and the Equal Sovereignty of the States, the Supreme Court has enhanced the rational basis standard. (*See*, United States v. Windsor, 133 S. Ct. 2675, 2693 (2012), and Shelby County v. Holder, 133 S. Ct. 2612 (2013).) Such are the challenges presented in defendant's Motion to Dismiss.

C. The Court Should Not Engage in Fact Finding.

If applied, the Government's assertion that an evidentiary hearing should never be held where the standard of review is rational basis would result in the decimation of the separation of powers upon which this Nation is founded, as the legislature would have no fear of crossing Constitutional boundaries in cases which did not involve fundamental rights or a suspect class.

The Government's broad interpretation of FCC v. Beach Comm. Commission, 508 U.S. 307 (1993) is misguided, at best. In this case, the Supreme Court did *not* state "the court does not engage in fact-finding," as proposed by the government. (Motion for Reconsideration, p. 7, line 9.) Rather, the Court held a "*legislative choice* is not subject to courtroom fact-finding," FCC, *supra*, 508 U.S. at 315, emphasis added. Further, the Court did engage in extensive fact-finding in FCC when analyzing whether the plaintiff's met their burden to "negative every conceivable basis which may support the regulation." *Id*. What the Court refused to do, was require *Congress to explain why* it choose to authorize the FCC to proceed in the manner

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marijuana thing, I want to hit it right square in the puss. You know, it's a funny thing, everyone of the bastards that is out there for legalizing marijuana is Jewish. What the Christ is the matter with the Jews, Bob? What is the matter with them? I suppose its because most of them are psychiatrists." It cannot be disputed that race based policies receive strict scrutiny review. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440.

challenged.

The Court went on to find there were conceivable reasons for the distinction based on the evidence presented in the lower courts, and articulated by the Commission. *Id.* This reason was not simply "because we say so," but rather based on specifically articulated *facts*. Essentially, the Court reasoned that the motivation for Congress to enact a statute need not be the same basis for upholding it.

In the present case, the defense does not contend that should it be established the original motivation for enacting the challenged provision of the CSA are disproved, then the statute must fail.[17] Rather, the defense asserts that the facts which will be presented at the evidentiary hearing will meet the heavy burden of "negating every conceivable basis which might support it."

For what conceivable basis could the government have for sanctioning the widespread distribution of the most dangerous drug in the Nation? What conceivable basis could the government have for authorizing banks to accept proceeds, and thus facilitating the sales of the most dangerous drug in the Nation? What conceivable basis could the government have for authorizing a study to treat our battle worn soldiers with one of the most dangerous drugs in the Nation? Such actions are truly inconceivable.

The question is no longer simply whether, given current scientific and medical evidence, the Schedule I classification is irrational, it is whether there is a plausible way to reconcile this scheduling with the government's own actions.

It is simply inaccurate and in contravention of established precedent to state that a Court need not consider *any* evidence to uphold a Constitutionally challenged statute on rational basis. For, as the Supreme Court demands, a statute "must find some footing in the realities of the subject addressed by the legislation" to survive a such review. Heller v. Doe, 509 U.S. 312, 321 (1993).[18] The notion that marijuana is one of the most dangerous drugs in the Country no longer

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[17] These original motivations are articulated in Kiffer, *supra*., and described in the Congressional hearing discussed in part II.B.2, *supra*.

[18] The Government's reliance on National Paint & Coatings Association v. City of Chicago, 45 F.3d 1124 (7th Cir. 1995), lends little support for their position. For the decision in this 7th Circuit case opens with a long list

finds any footing in the realities of the subject and, as discussed below, the prosecution's attempt to find such footing by way of this Motion for Reconsideration only reinforces the defense position.

The claim that "the Controlled Substances Act outlaws the use of marijuana based on Congress' judgment that marijuana has a high potential for abuse, no current medical use, and a lack of accepted safety for use under medical supervision," and this "determination was made in furtherance of its obvious and compelling interest in combating drug abuse and protecting the public from the physical dangers associated with the use of unsafe drugs that may be diverted for improper purposes." (Motion for Reconsideration at p. 7-8.) No one here is arguing that protecting the public from the dangers of the use of unsafe drugs is not an important government function; but the point is that marijuana is not a drug deserving of Schedule I classification, and it doesn't become so simply because the government says it is. These self serving conclusions merely parrot the law, but find no footing in reality. The evidence proffered will establish that the obvious and compelling interest articulated above is not served by placing marijuana in Schedule I.[19] However, as even the Government notes there is a dispute of material facts, and an evidentiary hearing is thus required. "Factfinding is the basic responsibility of district courts, rather than appellate courts." Pullman-Standard v. Swint, et. al., 456 U.S. 273, 291 (1982).

Equally unpersuasive is Attachment A to the Motion for Reconsideration, a letter/memo prepared by the DEA. Interestingly, the letter states the DEA's opinion regarding the classification of cannabis is in part "[a]ccording to established case law." Also, the letter relies upon an additional document *not* attached to the Government's exhibit, rendering it useless in supporting their position. The memo references a DHHS letter prepared in 2006, again merely mimicking the statute without articulating any facts to support the conclusions. The document

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of conceivable reasons for the anti-graffiti laws: "Graffiti cover more than five million square feet of walls, signs, windows, and other public surfaces in Chicago. Full-time crews patrol the streets removing paint, but they are losing ground." *Id*., at p. 1126. Notably, the Plaintiffs did not challenge the accuracy of these findings, nor did the Plaintiffs allege the government authorized financial institutions to serve illegal graffiti organizations, as is occurring as to marijuana. The case is simply inapplicable and is not binding on this Court.

[19] It must be emphasized that, as marijuana is classified as a Schedule I Controlled Substance, the criteria necessary to qualify the substance as Schedule I is the standard by which the placement must be examined.

purports to have been sent in 2011 to address a Petition filed in 2002, it is unbelievable this letter took a decade to complete since it conveys only that the DEA believes marijuana "continues to meet the criterial for schedule I control under the CSA" without any factual support, as none exists. Apart from being supported by no facts, these conclusions are eight to twelve years old and thus again fail to address the evidence existing in 2014.[20]

The Government claims there must be a rational basis wherever an issue is open to public debate. However, the federal government has refused to open this issue to public debate. They have refused to publish the results of their own studies and continue to obstruct any attempts to provide information which would allow for an informed decision. Indeed, in the recent Congressional hearing before the Committee on Government Oversight and Reform (see fn. 14), the DEA Deputy Administrator was unable to state whether marijuana was as dangerous as heroin, and was also unable to produce reports substantiating their position upon request. (*See fn.* 13, *supra*.) It is anticipated the government will be unable to substantiate their position at the evidentiary hearing in the instant matter as well.

III. EQUAL SOVEREIGNTY

The Government claims the defendant's Equal Sovereignty argument contains two "flaws," and then proceeds to argue precisely what was presented in their Opposition, each of which are addressed below:

A. The Cole Memorandum Does Not Violate the Defendant's Rights.

The defense again here reiterates that the present challenge to the unequal application of the CSA as it relates to marijuana does not contemplate specific performance of the 2013 Cole Memorandum. The Government's attempt to confuse the Defendant's challenge to the CSA as a challenge against an executive order (a position previously rejected by this Court) is misguided and ignores the fact that *every* statute is carried out by the Executive branch. Under the interpretation urged by the Government, every statute would thus be immune from judicial

[20] The Government again argues the application of *21 U.S.C. § 877*, despite initially conceding the Court correctly found jurisdiction. Now, the prosecution asks this Court to consider adequate the mechanism established by Congress to petition for rescheduling. Given that it took nine years for the DEA to respond to ASA's 2002 petition, this Court should not find *877* an alternative for the defendants in this case.

challenge the minute it was implemented by an executive agency. For it is always the application of a law that is neutral on its face, not its existence, which threatens constitutional impingement. *See, inter alia*, Yick Wo v. Hopkins, 118 U.S. 356 (1886).

It is fundamental that the rights guaranteed by the Constitution are protected against intrusion by a governmental actor. *See, inter alia*, Burdeau v. McDowell, 256 U.S. 465 (1921); Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 (1982). Courts have long held the unconstitutional application of a law *by the executive branch* is subject to challenge by the aggrieved party. Yick Wo, *supra*, 118 U.S. 356.

> It is doubtless true that a State may act through different agencies, -- either by its legislative, **its executive,** or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another Congress."

Virginia v. Rives,100 U.S. 313, 318 (1880); *see also* The Civil Rights Cases, 109 U.S. 3, 17-18 (1883); Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989 (7th Cir. 2006); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

> Under the Constitution, the President, as the head of the Executive Branch, is the person ultimately responsible for a decision to initiate a criminal prosecution. If that decision is contrary to the mores and customs of the community, the community has a visible target for its grievances. No anonymous directorates hold sway here, no impenetrable bureaucracies or commissions obscure the identity of the responsible official; the chain of command leads directly upward to the President.... For no federal government function is it more vital to the protection of individual liberty that ultimately the buck stop with an accountable official -- the President -- than in the prosecution of criminal laws.

In re Sealed Case, 838 F.2d 476 (D.C. Cir. 1988), internal citations omitted.

Indeed, the highly relevant case of Shelby County (Alabama) v. Holder, *supra*, 133 S.Ct. 2612, stands for the proposition that a Congressional enactment is subject to Constitutional challenged by its uneven application by the executive branch. Under Section 5 of the Voting Rights Act of 1965, certain "covered" jurisdiction could petition the Attorney General (the executive branch) or seek clearance from a three-judge panel. *Id*. at 2620. The Attorney General had statutory authority to object to a jurisdictions's request to a change affecting voting, effectively blocking or extending the application process for years, forcing petitioners to seek clearance through the three-judge panel, a "process [that] can take years." *Id*. at 2624; City of Rome v. United States, 446 U.S. 156 (1980), superseded on other grounds; *see also 42 U.S.C. §*

1973c; *28 C.F.R. § 51.9.* Shelby County sued the Attorney General for its unconstitutional application of the Voting Rights Act and the statute was ultimately declared unconstitutional "based on 40-year-old facts having no logical relation to the present day." Shelby County, *supra*, 133 U.S. at 2624. This case thus further evidences that Executive action based upon Congressionally granted authority leaves the Congressional action subject to Constitutional challenge.

Once again, the Government reliance on James v. City of Costa Mesa, 700 F.3d 394 (9th Cir. 2012) is misplaced. As stated in the Reply, the one paragraph addressing a relevant issue actually supports the defense position, in that it finds that Equal Protection is not violated where the federal rules are applied *evenly among the States*. It can no longer be said that the federal government applies the law evenly among local jurisdictions, and the Cole Memo is merely one symptom in a disease which could be called government hypocrisy.

B. Cole Memo Does not Apply to These Defendants

This argument was previously litigated and rejected, and it appears the Motion for Reconsideration merely restates the same legal authority offered in the Opposition. The defense therefore reiterates that the defense does not request, nor will contend, that this Court order specific performance of the 2013 Cole Memo, but rather asks this Court find that the current facilitation policies and conduct improperly implicates the Equal Sovereignty of the States, rendering the current prosecution untenable.

IV. CONCLUSION

The Government's Motion for Reconsideration must be rejected based on its gross lack of procedural or substantive requirements, as the motion is not from a final judgment, nor does the government offer any new or changed circumstances that warrant a second attempt to sway this Court. Additionally, the Motion inappropriately repackages the same arguments made by the Government in its Opposition, relying on nearly identical case law in its questionable effort at a "do over." There must be an end to litigation someday and, as relating to the currently scheduled evidentiary hearing, that day is approaching. The Government's free, calculated and deliberate

choices to address the arguments made in their opposition is not to be relived from. The Constitution and fundamental fairness demand no less.

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all attorneys of record.

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