UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 1:14-cr-00067
Honorable Robert J. Jonker
U.S. District Judge

v.

BRANDON SCOTT TWISS,

Defendant.
_________________________________/

REPLY TO GOVERNMENT'S RESPONSE
OPPOSING MOTION TO DISMISS

Brandon Twiss, defendant, by his attorney, Kenneth P. Tableman, replies to the government's amended response in opposition to defendant's motion to dismiss. (Doc# 439).

Defendant Twiss has joined in the motion of Shawn Taylor to dismiss the indictment. (Doc# 376) (joining Taylor's motion, Doc# 372, and Taylor's memorandum in support, Doc# 373).

A summary of the government's response is that the defendants cannot attack the placement of marijuana in Schedule I by bringing the motion to dismiss before the Court because a statute governs the judicial review of the scheduling of controlled substances; that even if the Court were to address the issue, the standard of review would be rational basis because there is no fundamental right to manufacture, distribute, possess, or use

marijuana; that therefore an evidentiary hearing is unnecessary; and that Congress has a rational basis for listing marijuana as a Schedule I controlled substance. The government also argues that the decision to prosecute Taylor does not violate equal protection based on his compliance with state law because he has not complied with state law, and that the government's policy of prosecuting marijuana cases in some states, but not others, does not violate equal sovereignty because the federal government has reserved for itself to prosecute in all states, even under the memoranda that it has issued concerning its non-prosecution policies in Colorado and Washington.

This reply will address only the government's argument that the Court does not have any authority to consider whether the classification of marijuana in Schedule I by Congress is unconstitutional.

The Court should reject the government's argument that it does not have authority to consider the motion to dismiss. On the contrary, the Court has the duty in the first instance to determine whether acts of Congress pass constitutional muster. Since the decision in *Marbury v. Madison*, 5 U.S. 137 (1803), the Courts have held that it is the province of the Court to decide whether an act of Congress is constitutional, not the Congress or the executive branch. No statutory scheme, not even that set forth in 21 U.S.C. § 877, can override this Court's duty to measure the law against the requirements of the Constitution.

The Court may, and should, hold an evidentiary hearing to determine whether any

facts support Congress's placement of marijuana in Schedule I.

> The constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support and reason because the article, although within the (particular) class, is so different from others of the class as to be without the reason for the prohibition.

United States v. Carolene Products Co., 304 U.S. 144, 153–54 (1938).

A defendant may challenge a statutory scheme under the Equal Protection Clause by showing that facts that may have initially supported the challenged provision have ceased to exist. *United States v. Moore*, 644 F.3d 553, 556–57 (7th Cir. 2011) (acknowledging that the Court has jurisdiction to consider whether the statutory distinction between one form of cocaine and another is constitutionally justified).

The Court should reject the government's argument that it may not consider the defendant's motion to dismiss.

Dated: August 4, 2014

Respectfully submitted,

/s/ Kenneth P. Tableman
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