

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

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UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. 8:08-cr-00388
	)	
DEJAY MONSON,	)	
Defendant.	)	

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**DEFENDANT’S MOTION TO DISMISS  
FOR FAILURE TO STATE A VALID CAUSE OF ACTION**

Comes Now the Defendant Dejay Monson, by and through his attorney Michael F. Maloney, and pursuant to Fed.R.Crim.P. 47(a) and the Fifth and Sixth Amendments to the Constitution of the United States of America, and respectfully moves the court for an order dismissing the Indictment for failing to state a justiciable cause of action, depriving this court of jurisdiction.

As grounds in support, Defendant states as follows:

1. The indictment is facially invalid because the essential element of the operative statute, 21 U.S.C. § 841, has been rendered a nullity. 21 U.S.C. § 841(a)(1) expressly requires a showing, with proof beyond a reasonable doubt, that a “controlled substance” be involved in the offense. See 21 U.S.C. § 841(a)(1) (“Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally — to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, *a controlled substance*”) (emphasis added).

2. The Government alleges that marijuana is a “controlled substance” when in fact marijuana’s alleged placement where such placement would be a

violation of law renders its status as a controlled substance a legal nullity. Based upon marijuana's current "accepted medical use in treatment in the United States", as a matter of law, the Controlled Substance Act's preemption provision as contained in 21 U.S.C. § 903 has precluded the Drug Enforcement Administration from including marijuana in Schedule I, 21 C.F.R. § 1308.11, since November 1996.

3. 21 U.S.C. §§ 841 and 846 rely upon 21 C.F.R. § 1308.11 (regarding the placement of marijuana in Schedule I) as the implementing regulation. 21 U.S.C §§ 812(b)(1)(A)-(C) provide legal standards and limitations to placement of substances in 21 C.F.R. § 1308.11, Schedule I.

4. To be placed, or to remain, in Schedule 1, a substance must meet all the requirements of 21 U.S.C §§ 812(b)(1)(A)-(C), i.e., the substance "has no currently accepted medical use in treatment in the United States", "has a high potential for abuse," and has "a lack of accepted safety for use . . . under medical supervision." *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 492 (2001).

5. 21 U.S.C §§ 812(b)(1)(A)-(C), and 21 CFR §1308.11, are further legally controlled and limited by the Controlled Substances Act and its preemption provision. 21 U.S.C. § 903 indicates that, absent a positive conflict, none of the CSA's provisions should be "construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State." 21 U.S.C. § 903. *Cf. Gonzales v. Oregon*, 546 U.S. 243, 275

(2006) (“The Government, in the end, maintains that the prescription requirement delegates to a single Executive officer the power to effect a radical shift of authority from the State to the Federal Government to define general standards of medical practice in every locality. The text, structure, and legislative history of the CSA show that Congress did not have this far reaching intent to alter the federal-state balance and the congressional role in maintaining it.”).

6. Further, in analyzing the language of 21 U.S.C. § 812(b)(1)(B), it was determined that “. . . Congress did not intend ‘accepted medical use in treatment in the United States’ to require a finding of recognized medical use in every state . . .”. *Grinspoon v. DEA*, 828 F.2d 881, 886 (1st Cir. 1987).

7. In *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936 (D.C. Cir. 1991), the District of Columbia Circuit Court indicated that “neither the statute nor its legislative history precisely defines the term ‘currently accepted medical use’ . . .”). *Alliance for Cannabis Therapeutics*, 930 F.2d at 939. The Federal Government may determine “accepted medical use” only in the absence of a State determination of “accepted medical use”.

8. In *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001), the U.S. Supreme Court held that the DEA could not put marijuana in Schedule I if marijuana had any accepted medical use: “Schedule I is the most restrictive schedule (footnote omitted). The Attorney General can include a drug in schedule I only if the drug “has no currently accepted medical use in treatment in the United States,” “has a high potential for abuse,” and has “a lack of accepted

safety for use . . . under medical supervision.” §§ 812(b)(1)(A)-(C). “Under the statute, the Attorney General could not put marijuana into schedule I if marijuana had any accepted medical use.” *Oakland Cannabis Buyers’ Cooperative*, 532 U.S. at 492.

9. In *Gonzales v. Raich*, 545 U.S. 1 (2005) the U.S. Supreme Court noted that Congress put marijuana in Schedule I. Schedule I is only the “initial” schedule for marijuana, and Congress never intended the initial scheduling placement to be permanent. Indeed, 21 U.S.C. § 811(a) requires the DEA to “add to”, “transfer between”, or “remove” substances from the schedules as necessary. *See* 21 U.S.C. § 812(c) (“ . . . Initial schedules of controlled substances Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated.” Revised schedules are published in the Code of Federal Regulations, Part 1308 of Title 21, Food and Drugs.).

10. Importantly, in 1970, marijuana was the only controlled substances which Congress expressed any doubt about including in the Controlled Substances Act. *See* Exhibit 1 and 2. In 1972, the “National Commission on Marihuana and Drug Abuse” recommended that personal use and sharing of marijuana should not be criminalized. *See* Exhibit 3.

11. Furthermore, the findings of an administrative law judge, authorized under the Controlled Substances Act to make findings of fact, found that

“Marijuana, in its natural form, is one of the safest therapeutically active substances known to man.” *See* Exhibit 4.

12. The fact that the principle psychoactive ingredient in marijuana, THC, has been rescheduled by the DEA twice (as well as once internationally), shows that even the pure psychoactive ingredient in marijuana is safer than anything in schedules I or II. *See* Exhibits 5, 6, and 7.

13. The fact that the U.S. Department of Health and Human Services has begun patenting natural extracts from marijuana proves that marijuana is now recognized by the United States government to be an accepted source of pharmaceutical drugs. *See* Exhibits 8, 9, and 10.

14. Since 1996 when California recognized “accepted medical use”, twelve other States have made the same determination that marijuana has “accepted medical use”. Thirteen States currently have laws in place recognizing “accepted medical use” of marijuana and accept the safety of marijuana for medical use. *See*: Alaska: Alaska Stat. § 17.37.070(8) (2008); California: Cal. Health & Saf. Code § 11362.5 (2008); Colorado: Colo. Const. Art. XVIII, Section 14(b) (2007); Hawaii: Haw. Rev. Stat. § 329-121(3)(paragraph 3) (2008); Maine: 22 Maine Rev. Stat. §2383-B(5) (2008); Montana: Mont. Code Anno., § 50-46-102(5) (2007); Nevada: Nev. Rev. Stat. Ann. § 453A.120 (2007); New Mexico: N.M. Stat. Ann. § 26-2B-2 (2008); Oregon: Ore. Rev. Stat. § 475.302(8) (2007); Rhode Island: R.I. Gen. Laws § 21-28.6-3(4) (2008); Vermont: 18 Vermont Stat. Ann. §4472(10) (2007); Washington: Rev. Code Wash. (ARCW) § 69.51A.010(2) (2008). On November 4, 2008, Michigan

Proposal 1 received 63% of the votes, making Michigan the thirteenth state to legalize the medical use of marijuana. All of these states allow medical marijuana use, possession, and cultivation. Because marijuana has “accepted medical use in the United States”, according to the express terms of §§ 812(b)(1)(A)-(C), marijuana cannot legally be listed in Schedule I. 21 CFR § 1308.11.

15. Each of the thirteen states allows medical users to cultivate marijuana for medical use at home. Because these thirteen states have the authority to determine accepted medical practice under federal law, this means that marijuana does not even belong in any of the federal schedules. The only other substances one can manufacture at home are alcohol and tobacco, which are both specifically exempted from the act.

16. The fact that the United States government has been growing marijuana and supplying it to a handful of medical patients since 1978 proves that the United States government knows marijuana is safe and effective. *See Conant v. Walters*, 309 F.3d 629, 648-649 (9<sup>th</sup> Cir. 2002) (affidavits of patients receiving marijuana from the United States government). And, *See, Kuromiya v. United States*, 37 F.Supp.2d 717 (E.D. Pa. 1999); *Kuromiya v. United States*, 78 F.Supp.2d 367 (E.D. Pa. 1999). *See Exhibit 11.*

17. The DEA's abrogation of its duty to “move” or “remove” marijuana from Schedule I as required by 21 U.S.C. § 811(a) doesn't provide legitimacy or cure the legal nullity caused by marijuana illegally remaining in Schedule I. Because marijuana's placement in Schedule 1 is a legal nullity and the DEA has not acted in

accordance with provisions of the Controlled Substances Act to move marijuana into any other schedule, marijuana cannot be legally considered to be a “controlled substance” for purposes of enforcement of 21 U.S.C. §§ 841 and 846.

18. The points made above are not submitted simply as an argument that marijuana has “accepted medical use in the United States”. Rather, they are offered to support the argument that marijuana has not been qualified to be placed in 22 C.F.R § 1308.11 Schedule I since November 1996. Because the DEA has not moved marijuana to a legally enforceable schedule within the CSA, marijuana has not been a legally scheduled drug since 1996. The fact that marijuana cannot legally be scheduled as a Schedule I substance results in a jurisdictional defect for the present case.

Accordingly, the charges contained in the Indictment should be dismissed.

### **CONCLUSION**

Defendant asserts that for the foregoing reasons the Indictment is facially invalid and should be dismissed as a matter of law.

Respectfully submitted:

*Filed Electronically*

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on November 12, 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:

KIMBERLY C. BUNJER, Assistant U.S. Attorney

*Filed Electronically*

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