BENJAMIN B. WAGNER
United States Attorney
SAMUEL WONG
Assistant United States Attorney
501 I Street, Suite 10-100
Sacramento, CA 95814
Telephone: (916) 554-2772

Attorneys for Plaintiff
United States of America

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BRYAN SCHWEDER, ET AL., Defendants.	CASE NO. 2:11-CR-449-KJM PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS INDICTMENT Court: Hon. Kimberly J. Mueller Time: 9:00 a.m. Date: March 19, 2014

Plaintiff United States of America respectfully submits this memorandum in opposition to defendant Brian Pickard's motion, in which the remaining defendants have joined, to dismiss the Indictment charging defendants with conspiracy to manufacture at least 1,000 marijuana plants, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Defendants argue that Congress' and the Drug Enforcement Administration's classification of marijuana as a Schedule I Controlled Substance violates their equal protection rights because: (1) there is no rational basis for treating marijuana as a Controlled Substance in light of the current scientific and medical research; and (2) the United States' decision to prosecute defendants is based on the arbitrary classification of marijuana as a Schedule I Controlled Substance. Defendants also argue that the federal prosecution policy as stated in the Department of Justice's "Guidance Regarding Marijuana Enforcement" issued on August 29, 2013, by Deputy Attorney General James M. Cole (hereafter "Cole Memorandum", and attached hereto as Appendix 1), **after**

defendants committed their crime, violates the doctrine of equal sovereignty of states and federalism.

The United States opposes defendants' motion on the grounds that: (1) to the extent that defendants seek to reschedule marijuana, this Court lacks jurisdiction to entertain any challenge of the classification of marijuana as a Schedule I Controlled Substance; (2) the courts have consistently upheld the classification of marijuana as a Schedule I Controlled Substance; and (3) the guidance in the Cole Memorandum for federal prosecutors does not violate any of defendants' rights.

I. INTRODUCTION

A. The Indictment

The Indictment filed on October 20, 2011, charges sixteen defendants with conspiracy during the time period in or about February 2008 to and including October 4, 2011, to manufacture at least 1,000 marijuana plants in Trinity and Tehama Counties, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

B. Statement Of Facts

Link Between Four Properties Searched

The investigation by the United States Forest Service and the Trinity County Sheriff's Office established that beginning no later than February 2008, and continuing until October 4, 2011, defendants Bryan Schweder and Brian Pickard joined forces and worked together and with their criminal underlings to manufacture at least a combined 1,884 marijuana plants. The investigation showed Pickard and Schweder purchased adjoining properties on Dirt Road near Hayfork, California, on the same day, February 11, 2008, for the same purchase price of $32,000 each. The investigation revealed that, in 2008, the Trinity County Sheriff's Department executed search warrants against both Dirt Road properties and located approximately 50 marijuana plants growing on each property.

During searches on October 4, 2011, at four separate properties Schweder and Pickard used to manufacture marijuana, law enforcement officers found: approximately 1,291 marijuana plants near Jims Creek on the Shasta-Trinity National Forest; approximately 347 marijuana plants on Schweder's residence at 420 Highway 3, Hayfork, California; approximately 146 marijuana plants on Schweder's Dirt Road property; and approximately 100 marijuana plants on Pickard's Dirt Road property.

Prior law enforcement surveillance established that all four marijuana manufacturing sites were linked to the Schweder/Pickard organization. On July 14, 2011, Forest Service Special Agent Steve Frick was traveling on Highway 3 near Hayfork and encountered Schweder's black 2005 GMC truck, California license 8L57260 pulling a water tank trailer registered to Pickard to Schweder's 420 Highway 3 residence. Later investigation on August 3, 2011, discovered that Pickard's water tank trailer was used to bring water to both Dirt Road properties and the water was used to irrigate the marijuana plants on both properties. The water tank trailer was used to transport water to the two Dirt Road properties as the Dirt Road parcels do not have an accessible natural water source because both properties lack electrical utilities to power a water pump and there are no surface water sources, such as creeks or streams, on the property.

Prior law enforcement surveillance also established that defendant Juan Madrigal Olivera, a.k.a. Juan Olivera Madrigal, played the role of a labor contractor to bring in workers for each of the marijuana gardens run by Schweder and Pickard. Law enforcement affixed electronic trackers on Olivera's two vehicles. The trackers showed that the vehicles traveled between his residence in Corning, Schweder's 420 Highway 3 residence, Pickard/Schweder's Dirt Road marijuana gardens, and the drop point for the marijuana garden near Jim's Creek on the Shasta-Trinity National Forest on seven different days. On an eighth occasion, the same places were visited by Olivera's pickup truck, except for Schweder's residence. On one surveillance day, officers observed Juan Madrigal Olivera load 5 bags of fertilizer in his vehicle while at his residence in Corning, travel to Schweder's residence at 420 Highway 3, and proceed to Pickard's Dirt Road property. The tracker later established that Olivera's truck went to the Jim's Creek marijuana garden drop point on national forest land after leaving the Dirt Road property.

Search And Investigation Of 420 Highway 3, Hayfork, California

On October 3, 2011, at approximately 7:00 a.m., a group of law enforcement officers executed a search warrant at Schweder's residence at 420 Highway 3, Hayfork. Schweder came to the front door of his residence as a marked law enforcement vehicle arrived at his gate. Schweder exited the residence and

confronted law enforcement. Schweder falsely claimed there were no guns at the residence even though 8 guns were later found on the property and many of the guns were in plain view.

Upon entering the Schweder residence, Special Agent Frick noticed defendant Efren Rodriguez and an uncharged female adult on a bed in the bedroom to the left of the front door. There was a loaded Colt .45 caliber pistol on the dresser within arm's reach of both Rodriguez. On the dresser near the pistol were several small marijuana buds. There was a stolen Glock pistol, approximately 6.9 grams of suspected methamphetamine, and approximately $9,893 cash in the dresser drawer directly below the Colt firearm.

Officers found defendant Fred Holmes, III, who was lying on the living room couch next to a coffee table that was used to process marijuana. On the coffee table, there was marijuana plant material, compact scissors, and basket containing marijuana buds. Underneath the couch cushion where Holmes was laying, there was a purple and black mesh bag containing $9,580 cash. Holmes later claimed this cash belonged to him and admitted to hiding it in the couch. Just above the couch on the wall was a rifle in a gun rack.

Outside the residence, officers located a shed within the back yard next to growing marijuana plants, where seven Hispanic males, namely, defendants Rafael Mojica-Reyes, Homero Lopez-Barron, Victorino Betancourt-Meraz, Oseas Cardenas-Tolentino, Fernando Reyes-Mojica, Juan Cisneros-Vargas, and Manuel Madrigal Olivera were apparently sleeping in a marijuana processing area beneath an estimated 200 pounds of hanging cut marijuana plants. Several of the suspects ran away from this sleeping/processing area, including Rafael Mojica-Reyes, who was carrying a loaded AK-47 7.62 x 39 millimeter semi-automatic rifle. They were all apprehended by law enforcement. Also found in the back of the residence in the area where Manuel Madrigal Olivera was arrested, officers found a discarded loaded Smith & Wesson 9 millimeter pistol in the dirt. There was a loaded Uzi firearm with a high capacity magazine in the processing area in a centralized location within the sleeping areas within easy reach of all seven suspects. During Mirandized interviews conducted with the seven defendants arrested in the sleeping/processing area, six of them identified Schweder as the boss of the marijuana manufacturing operation. Four of these defendants admitted seeing firearms at the marijuana operation.

Outside the residence in a small travel trailer located at the corner of the property near the front gate, officers found defendant Paul Bruce Rockwell alone within arm's reach of a loaded .44 Magnum caliber lever action rifle. Rockwell admitted that he was there to trim marijuana.

Schweder waived his Miranda rights and reported that the marijuana belonged to him and "they" processed marijuana at his residence. Schweder falsely claimed he did not have any other places where he grew marijuana. Schweder denied that he grew marijuana at his Dirt Road property in Hayfork.

A total of 347 growing marijuana plants were eradicated from the Schweder Highway 3 property. Approximately 110 pounds of processed and packaged marijuana was found and approximately 300 pounds of hanging marijuana was removed from the sleeping/processing area and another wood shed in the back yard. A total of eight firearms were found at the residence and seized as evidence. Six of the eight firearms were loaded.

Search Of Jims Creek Marijuana Garden

On October 4, 2011, at about 10:00 a.m., officers and agents entered into the Jims Creek marijuana manufacturing site on the Shasta/Trinity National Forest for the purpose of arresting suspects and processing the area for evidence. Upon arriving at the site, law enforcement officers noticed that all of the suspects had left the garden. However, the camp was packaged as if the workers were going to return to the site. There were still standing marijuana plants found within one of the two sites. Officers and agents removed approximately 1,100 marijuana root balls from the marijuana manufacturing site and collected other evidence. There was evidence that approximately 1,247 marijuana plants were grown at this site. There was additional evidence that marijuana plants were grown at the same site in 2010 and harvested. Importantly, there was not any significant marijuana processing area at or near the marijuana garden on national forest land, indicating the marijuana plants grown there were taken elsewhere for processing.

Search Of Brian Pickard's Residence, 18890 Cobblestone Drive, Cottonwood

On October 4, 2011, at approximately 12:00 p.m., law enforcement executed a search warrant at the residence of Brian Pickard located at 18890 Cobblestone Drive in Cottonwood, California. During the

search of the residence law enforcement located a marijuana processing area in a detached shed at the rear of the residence. There were drying lines for hanging marijuana plants in approximately one-third of the shed. There was a workbench covered with fresh marijuana leaves and remnants of marijuana, nine pairs of trimming shears/scissors, a digital scale, a "hashish" press used for producing concentrated cannabis, and less than a pound of marijuana in a box. As there was no marijuana garden on the property, it was obvious that marijuana plants were brought to this location for processing.

Inside the residence, agents located hashish in the laundry room. In the search of the cellular telephone belonging to Brian Pickard, he was texting about marijuana and the prices for the different names of the marijuana, "gas" and "sour". Evidence of purchasing large amounts of marijuana were also found on the telephone, "shopping for 2 300". Brian Pickard was also texting about money he received and money owed, "39k thanks you owe 35k". Pickard was also texting about shopping for marijuana for a friend who wanted some by the following week, "wants 200 next week". In the garage of the residence agents located multiple photographs of marijuana.

There was a Mossburg, Model 500A, 12 gauge shotgun found underneath the bed in the master bedroom. The shotgun was loaded with six rounds of double 00 buck shot in the magazine tube. The shotgun contained an extended magazine tube to allow for storage of additional ammunition in the gun. The shotgun did not contain a stick plug within the magazine tube. A plug is used in shotguns to limit the number of shells in the magazine of a shotgun used for hunting per hunting regulations.

Brian Pickard's wife, Teresa Pickard, who is not charged, claimed ownership of the shotgun and informed Special Agent Brett Letendre that she used the shotgun to hunt. Teresa Pickard did not elaborate on what she hunted and could not provide a hunting license. Upon searching the residence, hunting licenses were found for Brian Pickard. No hunting licenses were found for Teresa Pickard. Per Title 14 of the California Code of Regulations Sections 311(a) and 507(a)(4), it is unlawful to hunt any game bird in California with a shotgun capable of holding more than three shells in the magazine and chamber combined.

Double 00 buck is the equivalent of a .33 caliber spherical ball (.33" in diameter) and is not suitable for birds, but instead used against much larger game or humans. Special Agent Frick, an expert on the methods and practices of marijuana manufacturers, believes that Brian Pickard used the loaded shotgun to protect his approximate $10,000 in precious metal bars found in the residence, and his marijuana processing operation on his property.

Searches Of The Two Dirt Road Properties

Law enforcement arrested defendants Filiberto Espinoza-Tapia; his son, Leonardo Tapia on October 4, 2011, during the execution of separate search warrants against the two Dirt Road properties owned by Pickard and Schweder, respectively. At the Pickard property, four males were observed near a travel trailer and the 100 marijuana plants grown there. Filiberto Espinoza-Tapia's son, Leonardo Tapia, remained on the property while three males fled on foot; however, two of the males, and Osiel Valencia-Alvarez, were apprehended. Two other individuals also fled from a trailer located on the Schweder property, which was adjacent to Pickard's property, and were not apprehended. Leonardo Tapia informed the officers he was growing marijuana for Northern Patients Group Incorporated in exchange for a place to grow his marijuana, and it was legal. Leonardo Tapia stated his father, Filiberto Espinoza-Tapia, had been staying with him and his brother, Saul Tapia (who was not apprehended or charged), at the Pickard property for approximately one week. Leonardo Tapia indicated Valencia-Alvarez was visiting from "the other side" as if Leonardo Tapia were identifying both properties were connected. Leonardo Tapia said the other property was owned by Schweder.

Inside the trailer, officers found nine pounds of processed marijuana, $15,000 under a mattress, and a notebook documenting hours worked or pounds of marijuana processed by individuals. Three of the five names in the notebook were those of Leonardo Tapia, Filiberto Espinoza-Tapia, and Saul Tapia. Outside the trailer, 40 pounds of marijuana was found. Further, wood growing boxes containing marijuana plants were found, which were similar to the boxes used to grow marijuana plants found on both Schweder's properties. An old marijuana processing area was found near the property line of both properties and trails leading to

both Pickard's and Schweder's properties. A total of 100 marijuana plants (60 had been cut) and 400 pounds of marijuana was found. On the Schweder Dirt Road property, agents found 10 pounds of processed marijuana, an identification card belonging to Juan Jose Barajas Olivera, and 146 marijuana plants. The total marijuana plants material seized from the Pickard and Schweder Dirt Road properties weighed approximately 5,490 pounds.

Based on the amount of processed marijuana found at the two Dirt Road properties and Schweder's 420 Highway 3 residence, and the limited number of marijuana plants actually grown at those properties, it is evident that marijuana plants brought from another location were brought to each of those properties for processing. In other words, marijuana harvested from the Jim's Creek marijuana garden on the Shasta-Trinity National Forest was brought to the two Dirt Road properties, Schweder's residence, and Pickard's residence for processing.

Anticipated Expert Testimony

An experienced law enforcement agent would testify that firearms are tools of the trade for marijuana manufacturers and that the eight firearms possessed by the various workers at the Schweder marijuana garden and processing area, and the loaded shotgun found at Pickard's residence, were used to protect the marijuana operation from law enforcement and ripoffs from other criminals who might otherwise steal the marijuana and drug proceeds.

II. ARGUMENT

A. This Court Lacks Jurisdiction To Hear Defendants' Challenge Of The Scheduling Of Marijuana As A Schedule I Controlled Substance

Defendants claim that there is no rational basis for Congress and the Attorney General, through his delegatee, the Drug Enforcement Administrator, to treat marijuana as a Schedule I Controlled Substance in light of current scientific and medical research. Defendants cite the declarations of their purported experts and voluminous other paperwork in support of their contention. In essence, defendants request that this Court perform a de facto rescheduling of marijuana out of Schedule I so that

they may escape the instant criminal prosecution.

Section 877 of Title 21, United States Code, is a bar that defendants cannot surmount as this Court lacks jurisdiction to grant defendants' motion and reclassify or reschedule marijuana. Section 877 provides, in pertinent part:

> **Judicial review**
>
> All final determinations, findings, and conclusions of the Attorney General under this subchapter shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision. Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive.

In Young v. U.S. Attorney General, 2013 WL 1934949 (D.D.C. 2013), a federal prisoner sought a writ of mandamus from the district court to compel the Attorney General to respond to the prisoner's petition to reschedule marijuana. Based on § 877, the district court concluded that it lacked subject matter jurisdiction to hear the prisoner's lawsuit. The court reasoned:

> The Attorney General's decision to reclassify marijuana under the Controlled Substances Act ("CSA") is discretionary. See U.S. v. Wables, 731 F.2d 440, 450 (7th Cir.1984) (holding "that the proper statutory classification of marijuana is an issue that is reserved to the judgment of Congress and to the discretion of the Attorney General"). Furthermore, judicial review for "any person aggrieved by [the Attorney General's] final decision" is available exclusively in the United States Court of Appeals for the District of Columbia Circuit or other circuit courts. 21 U.S.C. § 877; see Olsen v. Holder, 610 F.Supp.2d 985, 995 (S.D.Iowa 2009), quoting John Doe, Inc. v. Drug Enforcement Admin., 484 F.3d 561, 568 (D.C.Cir.2007) ("21 U.S.C. § 877 vests exclusive jurisdiction in the courts of appeals over '[a]ll final determinations, findings and conclusion' of the DEA applying the CSA."); John Doe, Inc. v. Gonzalez, No. 06–966, 2006 WL 1805685, at *18 (D.D.C. June 29, 2006) ("A plain reading of Section 877 indicates that jurisdiction over challenges to the DEA's determinations under the CSA rests exclusively with the Court of Appeals; indeed, the statute itself provides no other explicit avenue for judicial review and relief.")). Hence, this case must be dismissed for want of subject matter jurisdiction.

Here, defendants could have petitioned the DEA Administrator to reschedule marijuana, pursuant to 21 U.S.C. § 811(a) (review "on the petition of any interested party"), and, if aggrieved, then sought review from the appropriate court of appeals under § 877. Defendants took no such action. Based on § 877 and the reasoning in the cases cited in Young, this Court lacks jurisdiction to entertain

defendants' current efforts before this Court to reschedule marijuana. Accordingly, the Court should reject defendants' request to reschedule marijuana based on its lack of subject matter jurisdiction.

B. Marijuana Is Properly Listed As A Schedule I Controlled Substance

In order to deny defendants' motion to dismiss, this Court need not look further than the long line of cases that have held that marijuana is properly listed as a Schedule I Controlled Substance. The Ninth Circuit previously applied the rational basis test to determine whether the listing of marijuana as a Schedule I Controlled Substance violated the equal protection clause, and found marijuana's scheduling is rationally based. United States v. Oakland Cannabis Buyers' Co-op, 259 Fed.Appx. 936, 2007 WL 4390325 (9th Cir. 2007) Going back further, starting approximately thirty-five years ago with United States v. Miroyan, 577 F.2d 489, 495 (9th Cir. 1978), the Ninth Circuit rejected that claim that marijuana cannot rationally be deemed to meet the requirements for a Schedule I Controlled Substance listing. In Raich v. Gonzales (Raich II), 500 F.3d 850, 864-866 (9th Cir. 2007), the Ninth Circuit dismissed as without merit a claim that the Ninth Amendment and the Fifth Amendment's due process provisions, when combined, protected an alleged fundamental right to distribute, possess, and use medical cannabis in compliance with California state law. Most recently, in Sacramento Nonprofit Collective v. Holder, 2014 WL 128998 (9th Cir. Jan. 15, 2014), the Ninth Circuit cited favorably Miroyan and Raich II, and again rejected Fifth and Ninth Amendment challenges to the prosecution of marijuana violations under the Controlled Substances Act and, in doing, so held that the federal ban on medical marijuana was rationally based.

Approximately one year ago, in Americans For Safe Access v. Drug Enforcement Administration, 706 F.3d 438 (D.C. Cir. 2013), rehearing denied, the District of Columbia Circuit examined the scientific and medical evidence submitted by proponents advocating for the rescheduling of marijuana from Schedule I. In that case, the marijuana rescheduling proponents petitioned the DEA Administrator to consider their scientific and medical evidence, and conclude that marijuana has an accepted medical use in the United States. The court noted that the DEA Administrator was statutorily required to request from the Department of Health & Human Services (DHHS) a scientific and medical evaluation, as well as a recommendation for marijuana's appropriate schedule listing. Id., at 391. The

court recounted DHHS' finding that marijuana lacks a currently accepted medical use in the United States. Id., at 392. The court cited DHHS' specific evaluation procedure:

> In reaching this conclusion, DHHS applied the DEA's established five-prong test, which requires a known and reproducible drug chemistry, adequate safety studies, adequate and well-controlled studies demonstrating efficacy, acceptance of the drug by qualified experts, and widely available scientific evidence. See id. at 40,559–60 [citation to administrative record]. DHHS stated that there are approximately 483 known components of the cannabis plant. Id. at 40,554. The components include 66 compounds called cannabinoids, and marijuana is the only plant in which these compounds are known to exist. Id. DHHS stated, however, that marijuana's chemistry was not "known and reproducible" as there had not been "a complete scientific analysis" of its components. Id. at 40,552, 40,560. In addition, although there was ongoing research, there were no studies of sufficient quality to assess "the efficacy and full safety profile of marijuana for any medical condition." Id. at 40,560. Further, there was "a material conflict of opinion among experts" as to medical safety and efficacy, thereby precluding a finding that qualified experts accepted marijuana as a medicine. Id. Additionally, the raw research data typically were not available in a format that would allow "adequate scientific scrutiny of whether the data demonstrate safety or efficacy." Id.
>
> DHHS gave the DEA its evaluation and scheduling recommendation on December 6, 2006. See id. at 40,552–66. The DEA subsequently denied the petition to reschedule on July 8, 2011, finding that "[t]he limited existing clinical evidence is not adequate to warrant rescheduling of marijuana under the CSA." Id. at 40,567.

(Bracketed text added.)

In rejecting the marijuana proponent's contentions, the District of Columbia Circuit determined that it need only look at whether there were adequate and well-controlled studies proving medical marijuana's efficacy. 706 F.3d at 450. After examining the administrative record, the court concluded that more than the "peer-reviewed" studies proffered by the marijuana proponents are required to satisfy DEA's standard because peer-reviewed studies were a historically notorious and inadequate means of ensuring the safety and efficacy of a drug. Id., at 452. Based on the lack of adequate studies performed on "medical marijuana", the court found that the DEA's listing of marijuana as a Schedule I Controlled Substance was reasonable and rationally based. Id., at 452.

Thus, it is no surprise that the Supreme Court had earlier held in United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001), that no medical necessity defense exists for the illegal distribution of marijuana because the Controlled Substances Act "reflects a determination that marijuana has no medical benefits worthy of an exception." Equally evident, despite extensive litigation over many years in numerous

cases nationwide, no court has ever held that marijuana should be removed from Schedule I.

Based on the foregoing, the Court find: (1) there is a rational basis for treating marijuana as a Schedule I Controlled Substance in light of the current scientific and medical research; and (2) the United States' decision to prosecute defendants is not based on any arbitrary classification of marijuana as a Schedule I Controlled Substance.

C. The August 29, 2013, DOJ "Guidance Regarding Marijuana Enforcement Memorandum Does Not Violate Any Of Defendants' Rights

As a preliminary matter, defendants committed their ongoing conspiracy from February 2008 to October 4, 2011, before the issuance of the non-retroactive Cole Memorandum on August 29, 2013. Therefore, the memorandum does not directly apply to defendants and the Court should reject their complaints.

Nevertheless, defendants erroneously claim that the federal government's prosecution policy against marijuana as stated in the Cole Memorandum violates the doctrines of equal sovereignty of states and federalism. Neither doctrines provide any shelter for defendants for their criminal activities.

As explained by the Supreme Court in Shelby County, Alabama v. Holder, 133 S.Ct. 2612, 2618-2619 (2013), the doctrine of equal sovereignty stems from the principle that all States enjoy equal sovereignty vis-à-vis the states and the federal government. Consistent with that principle, the federal government may not treat one state more harshly than other states, absent extreme circumstances justifying the disparate treatment. Id., at 2619, 2622, 2624. Shelby County was a voter rights case where an aggrieved county in Alabama sought relief from the application of certain provisions of the Voter's Rights Act that was enacted in 1965 and continuously periodically renewed to combat discriminatory circumstances then extant. In 2006, Congress renewed the Act again. The Court held that Congress' reliance on circumstances that existed long ago at the first enactment of the law could not justify the renewal of the challenged statutory provisions given a wide and drastic improved change of circumstances that established close parity in voting between blacks and whites, and the election of minority candidates to political office in unprecedented number. Id., at 2619-2622, 2630-2631.

Shelby County actually undercuts defendants' equal sovereignty claim as the Court instructed:.

> The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect. A proposal to grant such authority to "negative" state laws was considered at the Constitutional Convention, but rejected in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause. [Citations omitted.]
>
> Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens [under the Tenth Amendment].

Id., at 2623 (bracketed text added).

Defendants' two assertions at 6:14-19 of their motion that: (1) "on August 29, 2013, the Department of Justice released a memorandum to all United States Attorneys directing them to decline prosecution of cannabis cases against individuals who are possessing, cultivating and/or distributing marijuana in compliance with their state law" ("Cole Memorandum"); and (2) the memorandum "demonstrates a recognition of the benign nature of the cannabis plant" are both wrong. Defendants misconstrue the clear language and import of the Cole Memorandum. A review of the Cole Memorandum reveals the following important points relevant to defendants' instant motion to dismiss:

1. The memorandum provides guidance to federal prosecutors in prioritizing the most serious marijuana offenses for federal prosecution in light of the fact that recent state ballot initiatives legalized the possession of small amounts of marijuana by adults.

2. Marijuana is a dangerous drug and its possession, distribution, and possession is and remains a federal crime under the Controlled Substances Act ("CSA").

3. The Department is committed to enforcing the CSA, and will use its limited investigative and prosecutorial resources to address the most significant threats, which include the following eight areas as top federal priorities (including the three in bold text that have particular application to the case here):

a.. Preventing the distribution of marijuana to minors;

b.. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;

c. Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;

d. Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

e. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;

f. Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;

g. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and

h. Preventing marijuana possession or use on federal property.

4. Federal prosecutors will remain aggressive when it comes to protecting these eight federal enforcement interests, including exercising their prosecutorial discretion to investigate and prosecute individuals who infringe against any of these stated federal interests, no matter where they live or what the laws in their state may permit.

5. Outside of these stated priorities, however, the Department will continue with its traditional approach of relying on state and local authorities to address lower-level or localized marijuana activity through enforcement of their own narcotics laws. For purposes of federal enforcement, the primary question in all cases and in all jurisdictions should be whether the conduct at issue implicates one or more of the eight enforcement priorities.

6. The Department of Justice is trying to make charging decisions regarding federal drug laws more uniform across all 50 states. No matter whether a state has enacted laws to legalize marijuana for medical use, recreational use, or not at all, the guidance to federal prosecutors is the same: continue to prioritize those cases that implicate one or more of the stated federal priorities, and leave lower-level or localized activity to state and local authorities.

7. Federal prosecutors should not consider the size or commercial nature of a marijuana operation alone in assessing whether that operation implicates a key federal interest, but that a marijuana operation's large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority. This guidance will sharpen the focus of federal enforcement efforts to the public health and safety harms posed by marijuana trafficking, in all states.

8. For states, such as Colorado and Washington, that have enacted laws to authorize the production, distribution and possession of marijuana the Department expects these states to establish strict regulatory schemes backed by strong enforcement actions that protect the eight federal interests identified in the Department's guidance. But if any of the stated harms do materialize—either in spite of a strict regulatory scheme, or because of the lack of one—federal prosecutors will act aggressively to bring individual prosecutions and may challenge the regulatory scheme themselves.

9. The memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion and does not alter in any way the Department of Justice's authority to enforce federal laws relating to marijuana, regardless of state law. Neither the guidance memorandum nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by

> any party in any matter civil or criminal. **It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution.**

(Bold emphasis added.)

In James v. City of Costa Mesa, 700 F.3d 394, 405 (9th Cir. 2012), a case analogous to the case here, the Ninth Circuit rejected an equal protection claim by California customers of medical marijuana collectives allowed to operate under state law, but not under federal law. There, the plaintiffs argued that implementation of a District of Columbia medical marijuana initiative resulted in unequal treatment of District of Columbia and California residents by allowing the former to purchase marijuana, but denying marijuana to the latter. The plaintiffs argued that Congress' initial listing of marijuana as a Schedule I Controlled Substance, followed by Congress' inaction in blocking implementation of the District of Columbia's initiative denied them equal protection. The court found that Congress did not violate the plaintiff s equal protection rights and explained, "[l]ocal decriminalization notwithstanding, the unambiguous *federal* prohibitions on medical marijuana use set forth in the CSA continue to apply equally in both jurisdictions. . .". Id., at 405 (italics in the original).

Similarly, in United States v. Canori, 737 F.3d 181, 184-85 (2d Cir. 2013), the Second Circuit rejected a convicted marijuana trafficker's contention that an October 19, 2009, "Memorandum for Selected United States Attorneys" issued by Deputy Attorney General David W. Ogden ("Ogden Memorandum" attached as Appendix 2) created a de facto rescheduling of marijuana such that his conviction denied him of his due process and equal protection rights. The Second Circuit found that the Ogden Memorandum only provides guidance to United States Attorneys on exercising their prosecutorial discretion in those states which have legalized medical marijuana. Id., at 183. The court noted the memorandum advises federal prosecutors to "focus their resources on illegal drug trafficking activity (including marijuana) involving factors such as firearms, violence, sales to minors, and significant amounts of marijuana, i.e., factors that are inconsistent with compliance with applicable state law [pertaining to medical marijuana for sick individuals" Id., at 183 (bracketed text added). Notably, the court explained that the memorandum did not reschedule marijuana or change federal law outlawing marijuana:

> Marijuana remains illegal under federal law, even in those states in which medical marijuana has been legalized. See 21 U.S.C. § 903 (providing for preemption where "there is a positive conflict between [a provision of the CSA] and that State law such that the two cannot consistently stand together"). That the Department of Justice has chosen to prioritize certain types of prosecutions unequivocally does not mean that some types of marijuana use are now legal under the CSA. Rather, "prosecutors are permitted discretion as to which crimes to charge and which sentences to seek." United States v. Gonzalez, 682 F.3d 201, 204 (2d Cir.2012); see also United States v. Nixon, 418 U.S. 683, 693, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."). T**he Attorney General's exercise of that discretion, in the Ogden Memo, neither legalizes marijuana nor creates a constitutional crisis.**

Id., at 184-185 (bold emphasis added). Equally significant, the court expressly held that "A U.S. Attorney's decision to exercise prosecutorial discretion by not prosecuting uses of marijuana consistent with state law, in the circumstances presented here, does not conflict with the principles of federalism, preemption, or the supremacy of federal law." Id., at 185.

In an analogous case, the Ninth Circuit has also recognized that the exercise of prosecutorial discretion in the interest of conserving prosecutorial and judicial resources in districts with large numbers of illegal immigration cases does not violate the equal protection and due process rights of a defendant denied a "fast-track" downward adjustment in his Sentencing Guidelines calculations where the district in which the defendant is prosecuted does not participate in the fast-track program. United States v. Gonzalez-Zotelo, 556 F.3d 736, 739-740 (9th Cir. 2009); United States v. Marcial-Santiago, 447 F.3d 715, 719 (9th Cir. 2006). So long as there is a legitimate governmental interest in the disparate treatment of defendants in different judicial districts, there is no equal protection or due process violation. Id., at 719.

Applying the Supreme Court's teaching in Shelby County that the federal government should refrain from interfering with the exercise of a state's right to legislate its laws, the Department of Justice should be applauded for not interfering at the first instance with the experiments of Colorado and Washington to legalize small amounts of marijuana for personal use. Shelby County, 133 S.Ct. at 2623. The Cole Memorandum, like the Ogden Memorandum, makes clear marijuana remains a dangerous drug illegal under the CSA in all states (see James, 700 F.3d at 405), and merely provides guidance to federal prosecutors to focus limited prosecutorial resources into those eight important areas outlined in the

memorandum in exercising their prosecutorial discretion. See Canori, 737 F.3d at 185.

The marijuana manufacturing enterprise prosecuted in this case is operated by drug felons, other convicts, firearms crimes violators, and violent offenders. It is significant that five of the sixteen defendants are convicted felons. Four of these defendants have drug felony convictions, including Schweder (three convictions), Pickard [1], Rodriguez (two convictions), and Rockwell. Schweder (three convictions), Pickard, and Rodriguez have convictions involving firearms or weapons violations. Three defendants have convictions for crimes of violence, including Schweder (misdemeanor domestic violence), Holmes (misdemeanor battery), and Rodriguez (voluntary manslaughter and robbery). The fact that the enterprise was protected by eight firearms at Schweder's residence, and an additional loaded shotgun at Pickard's residence, establishes that this was not intended to be a law abiding, peaceful, and non-violent operation. This enterprise extended its criminal reach to national forest land where most of the marijuana plants were grown.

Thus, at least three of the priorities for federal prosecution in the Cole Memorandum (if the memorandum applied) are implicated, and focusing on such a dangerous criminal organization to the exclusion of smaller, less dangerous marijuana violators, such as those regulated by the state law in Colorado and Washington, does not violate the doctrines of equal protection or federalism. Id., at 185. Indeed, this Court should follow the lead of the Ninth Circuit in the fast-track illegal immigration area (see Marcial-Santiago, 447 F.3d at 719) and find that the United States has a legitimate governmental interest in differentiating between some small time marijuana violators in Colorado and Washington, on the one hand, and the remaining large scale, armed and dangerous marijuana manufacturers who grow on public lands, on the other hand.

///

///

[1] Pickard was convicted in 1995 of violating Cal. Welfare & Institutions Code § 3051, being a narcotics addict. This conviction is a felony drug conviction under federal law (see 21 U.S.C. § 802(44) , "felony drug offense" "means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." Under California law, a violation of § 3051 is a felony drug offense. People v. Sanchez, 2 Cal.App.3d 467, 478-479 (1 Dist. 1970).

III. CONCLUSION

Marijuana is properly listed as a Schedule I Controlled Substance as so many courts have consistently held. Defendants' constitutional rights are not violated by this prosecution as there is a legitimate governmental and prosecutorial interest in charging defendants based on their egregious criminal conduct, while allowing those states which have chosen the path of decriminalization or legalization of marijuana to proceed further with their experiments of regulating marijuana for personal use. The Court should deny defendants' motion to dismiss the Indictment without holding an evidentiary hearing, especially since the evidence defendants proffer pertains to their attempt to reschedule marijuana and this Court lacks subject matter jurisdiction under § 877 to reschedule marijuana.

DATED: February 13, 2014

BENJAMIN B. WAGNER
United States Attorney

By: /s/ Samuel Wong
SAMUEL WONG
Assistant U.S. Attorney

APPENDIX 1

U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

August 29, 2013

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Enforcement

In October 2009 and June 2011, the Department issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). This memorandum updates that guidance in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale. The guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

As the Department noted in its previous guidance, Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Department of Justice is committed to enforcement of the CSA consistent with those determinations. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

These priorities will continue to guide the Department's enforcement of the CSA against marijuana-related conduct. Thus, this memorandum serves as guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law.[1]

Outside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above.

The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement. The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice. Jurisdictions that have implemented systems that provide for regulation of marijuana activity

[1] These enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA. By way of example only, the Department's interest in preventing the distribution of marijuana to minors would call for enforcement not just when an individual or entity sells or transfers marijuana to a minor, but also when marijuana trafficking takes place near an area associated with minors; when marijuana or marijuana-infused products are marketed in a manner to appeal to minors; or when marijuana is being diverted, directly or indirectly, and purposefully or otherwise, to minors.

must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.

The Department's previous memoranda specifically addressed the exercise of prosecutorial discretion in states with laws authorizing marijuana cultivation and distribution for medical use. In those contexts, the Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers. In doing so, the previous guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other, and advised that the latter continued to be appropriate targets for federal enforcement and prosecution. In drawing this distinction, the Department relied on the common-sense judgment that the size of a marijuana operation was a reasonable proxy for assessing whether marijuana trafficking implicates the federal enforcement priorities set forth above.

As explained above, however, both the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system. A marijuana operation's large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority. The primary question in all cases – and in all jurisdictions – should be whether the conduct at issue implicates one or more of the enforcement priorities listed above.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

cc: Mythili Raman
Acting Assistant Attorney General, Criminal Division

Loretta E. Lynch
United States Attorney
Eastern District of New York
Chair, Attorney General's Advisory Committee

Michele M. Leonhart
Administrator
Drug Enforcement Administration

H. Marshall Jarrett
Director
Executive Office for United States Attorneys

Ronald T. Hosko
Assistant Director
Criminal Investigative Division
Federal Bureau of Investigation

APPENDIX 2

U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

October 19, 2009

MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS

FROM: David W. Ogden
Deputy Attorney General

SUBJECT: Investigations and Prosecutions in States
Authorizing the Medical Use of Marijuana

This memorandum provides clarification and guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana. These laws vary in their substantive provisions and in the extent of state regulatory oversight, both among the enacting States and among local jurisdictions within those States. Rather than developing different guidelines for every possible variant of state and local law, this memorandum provides uniform guidance to focus federal investigations and prosecutions in these States on core federal enforcement priorities.

The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. One timely example underscores the importance of our efforts to prosecute significant marijuana traffickers: marijuana distribution in the United States remains the single largest source of revenue for the Mexican cartels.

The Department is also committed to making efficient and rational use of its limited investigative and prosecutorial resources. In general, United States Attorneys are vested with "plenary authority with regard to federal criminal matters" within their districts. USAM 9-2.001. In exercising this authority, United States Attorneys are "invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority." *Id.* This authority should, of course, be exercised consistent with Department priorities and guidance.

The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on

individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources. On the other hand, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department. To be sure, claims of compliance with state or local law may mask operations inconsistent with the terms, conditions, or purposes of those laws, and federal law enforcement should not be deterred by such assertions when otherwise pursuing the Department's core enforcement priorities.

Typically, when any of the following characteristics is present, the conduct will not be in clear and unambiguous compliance with applicable state law and may indicate illegal drug trafficking activity of potential federal interest:

- unlawful possession or unlawful use of firearms;
- violence;
- sales to minors;
- financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law;
- amounts of marijuana inconsistent with purported compliance with state or local law;
- illegal possession or sale of other controlled substances; or
- ties to other criminal enterprises.

Of course, no State can authorize violations of federal law, and the list of factors above is not intended to describe exhaustively when a federal prosecution may be warranted. Accordingly, in prosecutions under the Controlled Substances Act, federal prosecutors are not expected to charge, prove, or otherwise establish any state law violations. Indeed, this memorandum does not alter in any way the Department's authority to enforce federal law, including laws prohibiting the manufacture, production, distribution, possession, or use of marijuana on federal property. This guidance regarding resource allocation does not "legalize" marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act. Rather, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.

Finally, nothing herein precludes investigation or prosecution where there is a reasonable basis to believe that compliance with state law is being invoked as a pretext for the production or distribution of marijuana for purposes not authorized by state law. Nor does this guidance preclude investigation or prosecution, even when there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests.

Your offices should continue to review marijuana cases for prosecution on a case-by-case basis, consistent with the guidance on resource allocation and federal priorities set forth herein, the consideration of requests for federal assistance from state and local law enforcement authorities, and the Principles of Federal Prosecution.

cc: All United States Attorneys

Lanny A. Breuer
Assistant Attorney General
Criminal Division

B. Todd Jones
United States Attorney
District of Minnesota
Chair, Attorney General's Advisory Committee

Michele M. Leonhart
Acting Administrator
Drug Enforcement Administration

H. Marshall Jarrett
Director
Executive Office for United States Attorneys

Kevin L. Perkins
Assistant Director
Criminal Investigative Division
Federal Bureau of Investigation