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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. TODD P. MCCORMICK, and KIRILL N. DYJINE, Defendants.	No. CR 97-997-GHK GOVERNMENT'S OPPOSITION TO DEFENDANT McCORMICK'S MOTION FOR REVIEW OF BOND AND MODIFICATION OF CONDITIONS OF RELEASE DATE: March 10, 1998 TIME: 11:00 a.m.

Plaintiff United States of America, by and through its counsel of record, Assistant United States Attorneys Fernando L. Aenlle-Rocha and Mary E. Fulginiti, hereby files its opposition to

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defendant Todd P. McCormick's motion for review of bond and modification of conditions of release.

DATED: This 2nd day of March, 1998.

Respectfully submitted,

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I.

INTRODUCTION

Defendant Todd P. McCormick ("McCormick") is presently charged with manufacturing approximately 4,116 marijuana plants, in violation of 21 U.S.C. § 841(a)(1). Given the large quantity of marijuana, McCormick faces a mandatory minimum term of ten years incarceration and a maximum term of life imprisonment. Accordingly, a statutory presumption exists that McCormick is a risk of flight and danger to the community.

These allegations arise from the search and seizure of approximately 4,116 marijuana plants growing at McCormick's residence located at 1605 Stone Canyon Road, Bel Air, California (hereinafter the "Stone Canyon Residence"). During the search of this residence law enforcement officers also seized numerous bags of marijuana, sophisticated cultivation equipment and a number of records, including cultivation diagrams, expenditure sheets, profit projections and employee payment schedules regarding the marijuana grow.

On August 1, 1997, United States District Judge Terry J. Hatter, Jr. ordered that McCormick's appearance bond be increased to $500,000 and that it be secured with an affidavit of surety and full deeding of property. He also required McCormick to surrender his passport or provide an affidavit regarding the loss of his passport, refrain from using or possessing illegal drugs, including marijuana, and submit to drug testing. Defendant subsequently posted the bond, filed an affidavit regarding the loss of his passport and was released from custody.

Defendant now contends, with no new material facts or circumstances, that his bail should be exonerated and that he should be allowed to use and possess marijuana while on pre-trial release. Defendant's motion should be denied for the following reasons.

First, a bond review hearing may be reopened only if new information exists that was not known to the defendant at the time of the original hearing which has a material bearing on the issues of flight risk and safety to other persons and the community. Here, McCormick has presented no new material information that justifies any modification. Moreover, defendant's claim that he has not been indicted for distribution does not justify any modification in his bond. In fact, evidence seized from the defendant's residence has confirmed that McCormick was not, as he contends, growing over 4,000 plants for his "personal medical marijuana use" (See Defendant's Motion at 1) but, instead, cultivating marijuana for commercial distribution and profit.

Second, defendant should not be allowed to use or possess marijuana while on pre-trial release. Federal law clearly prohibits the possession and use of marijuana. See 21 U.S.C. § 844. An order allowing McCormick to possess and use marijuana is tantamount to granting defendant immunity from prosecution for this offense. In addition, defendant can neither litigate the medicinal usefulness of marijuana before this tribunal nor rely upon Proposition 215 to authorize his proposed unlawful conduct.

II.

FACTUAL BACKGROUND

A. Nature of the Case

On July 30, 1997, McCormick first appeared before this court pursuant to the filing of a criminal complaint charging McCormick and others with conspiring to manufacture and possess with intent to distribute over 1,000 marijuana plants, in violation of 21 U.S.C. §§ 846 and 841(a)(1). The government moved for detention on the grounds that defendant was a flight risk and danger to the community. At that time, the Pre-trial Services Office recommended, and the court set, a $100,000 appearance bond with a justified affidavit of surety and full deeding of property, along with the condition that the defendant refrain from possessing or using any illegal drugs, including marijuana. The government requested a stay of the court's order and appealed said order to the district court.

On August 1, 1997, United States District Judge Terry J. Hatter, Jr. ordered that McCormick's appearance bond be increased to $500,000 with a justified affidavit of surety and full deeding of property. The court also prohibited McCormick from using or possessing any illegal drugs, including marijuana. Thereafter, at McCormick's request, the government stipulated that the bond be secured with cash provided by Woody Harrelson, a well known actor. A true and correct copy of the Stipulation and accompanying documents are attached hereto as Exhibit "A."

On October 14, 1997, a grand jury returned a single count indictment charging McCormick and one of his accomplices, Kirill Dyjine ("Dyjine"), a.k.a. Hermes Zygott, with manufacturing over

1,000 marijuana plants, in violation of 21 U.S.C. § 841(a)(1). On February 11, 1998, McCormick filed a motion seeking judicial review of his bond and conditions of pre-trial release.

B. The Underlying Offense

In or about July 1997, law enforcement officers received information that Todd McCormick was operating a large scale marijuana cultivation site at a "castle-type" house in Bel Air, California and that he was associated with other individuals considered to be professional marijuana growers and distributors.

Drug Enforcement Administration ("DEA") agents subsequently determined that McCormick's residence was located at 1605 Stone Canyon Road, Bel Air, California and conducted surveillance. On July 29, 1997, Los Angeles County Sheriff's Deputies ("LASD") observed, among other things, numerous marijuana plants outside of the residence and individuals tending to the plants while McCormick and Dyjine unloaded several bags of potting soil and fertilizer from a van. The LASD also observed McCormick, Dyjine and others smoking from a large glass "bong," a device used to inhale marijuana, for approximately 45 minutes, and then depart from the residence in their respective vehicles.

McCormick was thereafter arrested. After being advised of his Miranda rights, which he voluntarily waived, McCormick admitted he had thousands of marijuana plants at his residence, which served as a "medical research facility," and that he planned on either doubling or tripling the size of his marijuana grow within a few months. When asked about his rent and financial resources, McCormick stated he paid his rent and monthly expenses by working as a writer. He stated that he received "obscene" monthly advances

for future articles from his "backers."

On that same day, LASD deputies obtained and executed a state search warrant for the Stone Canyon residence. During the search, DEA agents and LASD deputies seized approximately 4,116 marijuana plants growing indoors and outdoors, including several hundred marijuana "clones," cultivation equipment, including grow lights, hoods, exhaust fans, ballasts, and scales, zip lock baggies, and approximately ten sieves of varying sizes with hash residue. In addition, agents recovered numerous records, including, cultivation diagrams, expenditure sheets, profit projections regarding the marijuana grow and employee payment schedules which reflected payments in cash and processed marijuana.

Significantly, the profit projections revealed that McCormick anticipated earning from "$118,400" to "$166,500" "every 8 weeks," depending on the price of the processed marijuana per pound, with annual earnings of "$710,400 to $999,000." Other documents revealed that defendant anticipated a "clone production of 17,000 units over [the] next 15 weeks" wherein he expected to earn "$42,500."

Most telling, no significant articles or drafts of any books that McCormick was purportedly writing in 1997 were located.[1] Rather, documents containing references to a loan in the amount of $133,000 and letters from McCormick to his purported publisher which pertained to the grow operation and which stated "[t]he only

[1] At most, agents located inside defendant's computer a table of contents, an outline and the beginnings of a chapter last drafted and/or edited in late 1995 and early 1996, at least one year before defendant moved into the Stone Canyon residence and agreed to write a book for his purported publisher.

agreement . . . to date [was] me taking care of the plant material . . . and us splitting the harvest three ways, you receiving 2/3rd for providing space and equipment and me receiving 1/3 for labor and expertise. In exchange you were to provide me with a loan to procure my own place and I [was] to pay you back in the time agreed." (Emphasis added.)

Agents also located a copy of the lease agreement for the Stone Canyon residence which revealed that the monthly rent was $6,000 and that McCormick had leased the property for two years.

C. The Bail Hearings

On July 30, 1997, McCormick initially appeared before Magistrate Judge James W. McMahon on charges that McCormick, and others, conspired to manufacture and possess with intent to distribute over 1,000 marijuana plants, in violation of 21 U.S.C. §§ 846 and 841(a)(1). The government sought defendant's detention because McCormick was a flight risk and danger to the community. The court ordered an appearance bond in the amount of $100,000, secured with an affidavit of surety and justified with full deeding of property. In addition, the court ordered that McCormick, among other things, surrender his passport or provide the court with an affidavit regarding its whereabouts, submit to drug testing and refrain from using any illegal drugs. The government obtained a stay of the court's order and appealed the bond to United States District Judge Terry J. Hatter, Jr.

On August 1, 1997, the district court conducted a bail hearing. At this hearing, the government again requested that McCormick be detained and proffered the Pre-trial Services report, criminal complaint and accompanying affidavit. The latter

described a large scale marijuana grow operation that McCormick was primarily responsible for organizing, overseeing and operating. The government reiterated that a statutory rebuttable presumption in favor of detention applied in the case, wherein McCormick was presumed to be both a flight risk and danger to the community.

In support of its request for detention, the government emphasized the following facts:(1) McCormick's short term residence (4 months) and lack of substantial ties to this district;(2) McCormick's travel, residence and connection to the Netherlands; (3) McCormick's lost passport; (4) McCormick's substantial income of $250,000/year; (5) the size and scope of the marijuana grow operation which included a 5-story "castle" McCormick rented for $6,000/month with sophisticated lighting and irrigation systems and which demonstrated McCormick's significant assets and/or access to substantial sums of money; (6) the marijuana was part of a large scale commercial operation; (7) marijuana was found in numerous packages and in various quantities; and (8) McCormick faced a substantial sentence and a minimum mandatory ten years imprisonment. See Reporter's Transcript, August 1, 1997 proceedings, Exhibit "A" to McCormick's motion at 29-34.[2]

During the hearing, McCormick's counsel confirmed defendant's short term residence in this district as being "four or five months" and McCormick's income as being "about $250,000 a year on a monthly basis" for "book services." RT at 38. In addition, defense counsel argued that McCormick was an "amateur scientist"

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[2] The Reporter's Transcript of the August 1, 1997 bond hearing hereinafter will be referred to as "RT" and will be followed by the applicable page number.

experimenting with different strains of marijuana for his own personal use, not for profit. RT at 39-40. When asked by the court to present evidence which would overcome the presumption, counsel reiterated McCormick's lack of criminal record and argued that McCormick was "not likely to flee this jurisdiction because he ha[d] a very strong interest in this case and . . . in the issues concerning this case . . . he believe[d], rightly or wrongly, that Proposition 215 ha[d] allowed California citizens . . . to use marijuana where medically indicated under the guidance of a doctor. . . . And I don't think there [was] any evidence . . . presented here to show that he was doing anything other than growing marijuana for that use." RT at 43-44.

The district court then specifically rejected McCormick's "medical experimentation" claim and stated, "as I understand it, there was a secret kind of operation going on which seems to just fly in the face of what you say to me." RT at 48. In addition, the court considered all the facts presented and expressed its concern about defendant's failure to appear in another matter (RT at 42), his travel to Ohio and the Netherlands (RT at 46), his lost or stolen passport (RT at 47) and "the sheer volume of the items of illegal nature found" at the Stone Canyon residence. RT at 47. At the conclusion of the hearing, Judge Hatter increased McCormick's bond to $500,000, affirmed all other conditions of release originally ordered by Magistrate Judge McMahon and specifically prohibited McCormick from using or possessing illegal drugs, including marijuana. RT at 54.

III.

THE DISTRICT COURT PROPERLY SET BAIL

Defendant contends that his bail should be significantly reduced because new material information exists that justifies a re-hearing on the amount of his bond. Specifically, McCormick argues there is new information regarding the charges against him, his salary, his lost passport and his length of residence in this district that justifies a bail reduction. Defendant's claims are without merit and should be rejected.

A close review of the purportedly new and material information reveals that it is virtually identical to the information presented to the district court at the prior bail hearing during which the court raised McCormick's bail to $500,000.

A. The Applicable Law

1. Standard of Review

A bail hearing may be reopened prior to trial only if:

> the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community (emphasis added).

18 U.S.C. § 3142(f)(2)(B).

2. Defendant is Presumed to be a Risk of Flight and Danger to the Community.

The Bail Reform Act of 1984 ("the Act") establishes a rebuttable presumption that a defendant is both a flight risk and a danger to the community in cases involving narcotics offenses punishable by a term of imprisonment of ten years or more. 18 U.S.C. § 3142(e). A finding that a defendant is a danger to the

community must be supported by clear and convincing evidence. 18 U.S.C. § 3142(f). A finding that a defendant is a flight risk must be supported by a preponderance of the evidence. United States v. Motamedi, 767 F.2d 1403, 1406 (9th Cir. 1985).

A grand jury indictment, as returned in this case, establishes "probable cause" under 18 U.S.C. § 3142(e) and gives rise to the Act's presumption. United States v. Vargas, 804 F.2d 157, 162-63 (1st Cir. 1986); United States v. Suppa, 799 F.2d 115, 117-19 (3d Cir. 1986); United States v. Contreras, 776 F.2d 51, 53-55 (2d Cir. 1985). Once the presumption is triggered, a defendant has the burden of producing or proffering evidence to rebut the presumption. United States v. Hare, 873 F.2d 796, 798 (5th Cir. 1989); United States v. King, 849 F.2d 485, 488 (11th Cir. 1988).

If a defendant proffers evidence to rebut the presumption, the Act identifies several relevant factors to determine whether pretrial detention is, nevertheless, appropriate: (1) the nature and seriousness of the offense charged; (2) the weight of the evidence against the defendant; (3) the defendant's character, physical and mental condition, family and community ties, past conduct, history relating to drug or alcohol abuse, and criminal history; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release. 18 U.S.C. § 3142(g); United States v. Winsor, 785 F.2d 755, 757 (9th Cir. 1986); Motamedi, 767 F.2d at 1407. The weight of the evidence is the least important of the four factors, and the Act neither requires nor permits a pre-trial determination that the person is guilty. Winsor, 785 F.2d at 757. However, the nature of the offense and the evidence of guilt are relevant indicators of

the likelihood that a person will fail to appear or will pose a danger to the community. Id.

Congress intended that the statutory presumption have a practical effect. United States v. Jessup, 757 F.2d 378, 382 (1st Cir. 1985). The presumption does not disappear when a defendant meets his burden of producing rebuttal evidence. United States v. Perez-Franco, 839 F. 2d 867, 870 (1st Cir. 1988); United States v. Dominguez, 783 F.2d 702, 707 (7th Cir. 1986). The presumption remains in the case as an evidentiary finding militating against release, to be weighed along with other evidence relevant to the factors listed in Section 3142(g). Id.

B. McCormick Has Not Introduced Any New Material Information Warranting A Reduction In His Bond.

McCormick contends that since the last bond hearing on August 1, 1997, "new information has been revealed which has a material bearing to this case." See Defendant's Motion at 9. McCormick primarily contends that at the bond hearing "there was confusion on the issue of whether Mr. McCormick was distributing marijuana," and "confusion regarding [his] salary, passport and length of residence in and ties to this community," which he now attempts to clarify. See Defendant's Motion at 12. A close review of the transcript from the prior hearing reveals that at the conclusion of the hearing there was no confusion at all regarding these issues. As discussed in detail below, McCormick has presented no new evidence regarding these issues that justifies any modification in his bond.

1. The Charges

McCormick baldly contends that the grand jury "refused" to indict him for distribution of marijuana and that this purportedly

changed circumstance "is a significant and material difference from the facts used by Judge Hatter in setting the bond amount." See Defendant's Motion at 13.

McCormick, however, has presented no evidence that the grand jury "refused" to indict him for other offenses.[3] Significantly, the evidence presented to the district court at the bond hearing clearly revealed that McCormick was responsible for organizing and overseeing a large scale marijuana grow operation at a five story "castle" in Bel Air, California. Law enforcement officers seized from McCormick's residence, among other things, over 4,000 marijuana plants along with sophisticated cultivation equipment, scales, baggies and bags of marijuana. Indeed, the district court rejected McCormick's incredible claim that he was an "amateur scientist" growing all of this marijuana for his own personal use and experimentation and commented on "the sheer volume of the items of illegal nature found" at the Stone Canyon residence. RT at 47-48.

Moreover, the government's claim that McCormick was "suspected of being involved in a large scale marijuana production conspiracy" (RT at 30) is further substantiated by records recovered from McCormick's residence which revealed anticipated annual earnings from the marijuana grow of nearly 1 million dollars. In addition, employee payment schedules were recovered which reflected payments in cash and processed marijuana.

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[3] Moreover, it is completely irrelevant which offense within 21 U.S.C. § 841 has been charged. Given the large quantity of marijuana plants found at McCormick's residence (over 1,000), the same statutory presumption and minimum and maximum penalties apply.

Accordingly, any purported confusion has been created solely by McCormick who continues to claim that he was growing over 4,000 plants for his "personal medical marijuana use" (See Defendant's Motion at 1) when, instead, the evidence revealed that he was, in fact, cultivating the marijuana for commercial distribution and profit.

2. Salary and Assets

At the previous bond hearing, the government argued, and McCormick's counsel and the Pre-trial Services Office confirmed, that McCormick's annual salary was $250,000. RT at 38.[4] McCormick does not refute this fact and, in fact, confirms that the $250,000 "was a one time, one year advance on the expected profits from his book." See Defendant's Motion at 15. McCormick, however, now claims that he "has been unable to meet his publisher's deadlines, and thus has not been receiving his advances." Id. Defendant concludes that this "new material information shows that Mr. McCormick does not have a large salary, and thus is unlikely to flee the court's jurisdiction with a reduced bond." Id.

Again, McCormick has presented no evidence to substantiate this claim. Nonetheless, he does not deny the fact that he received a $250,000 advance, which was the same information presented to the district court at the prior bond hearing. Moreover, the evidence presented to the district court confirmed

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[4] Accordingly, there was no confusion over this fact. Initially, there appeared to be some discrepancies between the face page and the body of the Pre-trial Services report regarding McCormick's income. The face page of the report indicated a monthly gross income of $25,000, while the body of the report indicated an income of $250,000. RT at 45. This discrepancy, however, was cleared up by the Pre-trial Services officer and McCormick's counsel. RT at 38.

that McCormick had significant assets and/or access to substantial sums of money. In fact, McCormick continued to reside at the Stone Canyon residence and pay $6,000/month in rent, until recently.[5]

The fact that the bond is a "heavy burden upon him" is not a relevant concern. See Defendant's Motion at 16. Here, the bond has been secured with cash provided by Woody Harrelson, not McCormick. The fact that McCormick may feel somewhat indebted to Mr. Harrelson is precisely the reason the court required that the bond be fully secured. It is precisely this "burden" that will hopefully provide McCormick with the incentive to abide by the conditions of his release and remain in this jurisdiction.

3. McCormick's Lost Passport

McCormick has presented no new material information regarding the status of his passport. At the prior bond hearing he claimed, as he does now, that his passport was lost. RT at 47. McCormick's submission of an affidavit confirming this fact does not create new material information. Indeed, one of his conditions of release was to surrender his passport or provide the court with an affidavit regarding its whereabouts. As a result, on approximately August 6, 1997, McCormick filed an affidavit regarding his lost or stolen passport. McCormick cannot now claim that his compliance with this condition of release is a new fact that justifies a bond reduction.

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[5] McCormick suggests that the district court was presented with repeated misportrayals by the government concerning his assets because "[a]t the time of his arrest, he only had $40 on his person and about $640 in his savings account." See Defendant's Motion at 15. This specious argument was presented to the district court and rejected. RT at 31. Moreover, it flies in the face of McCormick's own admission regarding the purported "obscene" advances he received to write a book.

Moreover, the fact that McCormick has not fled this jurisdiction in the past four months does mitigate in favor of reducing or exonerating his bond. See Defendant's Motion at 17. Rather, it establishes that the current bond amount creates an incentive for McCormick not to flee this jurisdiction and thus should not be reduced.

4. Length of Residence and Community Ties

McCormick again claims that there "was confusion at the bond rehearing regarding how long [he] had lived in the community." See Defendant's Motion at 17. This claim is also meritless. At the prior bond hearing the government proffered the Pre-trial Services report which stated that McCormick's length of residence in this community was four months. Defense counsel confirmed this fact at the hearing when he stated that McCormick had lived in this district for "four or five months." RT at 38.[6]

McCormick also now claims he has numerous relatives in Southern California and that "this new material information was not available to Judge Hatter at the time of the rehearing." See Defendant's Motion at 17. This information, however, apparently was available to defendant at the time of the initial bail hearing and, thus, does not justify re-opening these proceedings. See 18

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[6] Initially, there appeared to be a discrepancy between the face page and the body of the Pre-trial Services report regarding McCormick's length of residence in this community. The face page of the report indicated five years, while the body of the report indicated 4 months. RT at 45. At the hearing, however, both the Pre-trial Services officer and McCormick's counsel confirmed that defendant's length of residence in this community was four or five months. RT at 38, 45.

U.S.C. § 3142(f)(2)(B).[7]

5. Conclusion

For these reasons, McCormick has presented no new material information justifying a bond reduction. Accordingly, Judge Hatter's bond determination should by affirmed.

IV.

DEFENDANT SHOULD NOT BE PERMITTED TO POSSESS OR USE MARIJUANA WHILE ON PRETRIAL RELEASE

Defendant also contends that the terms and conditions of his pretrial release should be modified to allow for the use of marijuana. Specifically, defendant argues that marijuana has numerous beneficial medical uses, that Proposition 215 authorises the use and possession of marijuana for personal medicinal purposes under state law, that defendant has a prescription from a foreign doctor and numerous recommendations from other doctors supporting his use of marijuana, and that defendant's physical condition would benefit from the use of marijuana. The government respectfully opposes defendant's request and submits that defendant should not be allowed to use or possess marijuana while on pretrial release.

A. Possession and Use of Marijuana Is Unlawful Under Federal Law.

Marijuana is a Schedule I controlled substance.[8] As such, federal law makes it unlawful to manufacture,[9] distribute, or

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[7] McCormick argues other factors, i.e., lack of criminal convictions, dedication to "the cause for medicinal marijuana", all of which were previously considered by the district court.

[8] See 21 U.S.C. § 812 Schedule I(c)(10).

[9] Congress defined "manufacture" as "the production, preparation, propagation, compounding, or processing of a drug or other substance * * * *." 21 U.S.C. § 802(15). Congress defined "production" as "the manufacturing, planting, cultivation,

possess marijuana, or possess the drug with the intent to manufacture or distribute it, except as otherwise authorized by the Controlled Substances Act. See 21 U.S.C. §§ 841(a)(1), 844. As with all criminal prohibitions, Congress also made it unlawful to conspire to violate the Act. Id. § 846.

To control the "problems related to drug abuse," H.R. Rep. No. 91-1444, pt. 1, at 3 (1970), Congress made it unlawful, except as otherwise authorized by the Act, to "manufacture [or] distribute" any controlled substance without an appropriate DEA registration, or to "possess with the intent to manufacture [or] distribute" a controlled substance. 21 U.S.C. § 841(a)(1). For the same reason, Congress made it unlawful, except as authorized by the Act, to possess a controlled substance. Id. § 844.

Because marijuana is listed in Schedule I of the Controlled Substances Act, it cannot lawfully be cultivated, distributed, possessed, or possessed with the intent to cultivate or distribute the substance, for any purpose outside of a research project registered with the DEA and approved by the Secretary of Health and Human Services, acting through the Food and Drug Administration ("FDA"). See 21 U.S.C. §§ 841(a)(1), 823(f).[10]

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growing, or harvesting of a controlled substance." Id. § 802(22). For ease of reference, this memorandum refers to the "cultivation" of marijuana.

[10] For controlled substances in Schedule I, DEA may grant a registration to a practitioner to conduct research with a Schedule I controlled substance only in a research project that has been approved by the Secretary of Health and Human Services, acting through the FDA. 21 U.S.C. § 823(f). By contrast, for substances in Schedules II through V, DEA alone has the statutory authority to grant registrations to practitioners who are authorized to prescribe, administer, or dispense controlled substances. Id. § 823(f).

Nor can there be any doubt that Congress has the constitutional authority to prohibit the cultivation, distribution, or possession of marijuana. When it passed the Act, Congress made specific findings that the traffic in controlled substances [was] of paramount national concern, including that: "[a] major portion of the traffic in controlled substances flow[ed] through interstate and foreign commerce;" that the "[l]ocal distribution and possession of controlled substances contribute[d] to swelling the interstate traffic in such substances;" that "[c]ontrolled substances manufactured and distributed intrastate [could not] be differentiated from controlled substances manufactured and distributed interstate;" and that "[f]ederal control of the intrastate incidents of the traffic in controlled substances [was] essential to the effective control of the interstate incidents of such traffic." 21 U.S.C. §§ 801(3)-(6).

Based on these express congressional findings, the Ninth Circuit has uniformly rejected Commerce Clause challenges to the Act. See, e.g., United States v. Bramble, 103 F.3d 1475, 1479-80 (9th Cir. 1996) ("The district court correctly held that the Controlled Substances Act, 21 U.S.C. §§ 841(a), 844(a), is constitutional under the Commerce Clause. We have so held." (internal citations omitted)); United States v. Tisor, 96 F.3d 370, 373-75 (9th Cir. 1996) ("In adopting the Controlled Substances Act, Congress expressly found that intrastate drug trafficking has a 'substantial effect' on interstate commerce."), cert. denied, 117 S. Ct. 1012 (1997); United States v. Kim, 94 F.3d 1247, 1249-50 (9th Cir. 1996) (rejecting Commerce Clause challenge to Act premised on United States v. Lopez, 115 S. Ct. 1624 (1995)); United States v.

Staples, 85 F.3d 461, 463 (9th Cir.) ("Unlike education, drug trafficking is a commercial activity which substantially affects interstate commerce."), cert. denied, 117 S.Ct. 318 (1996); United States v. Visman, 919 F.2d 1390, 1393 (9th Cir. 1990) ("Congress may constitutionally regulate intrastate criminal cultivation of marijuana plants found rooted in the soil."), cert. denied, 502 U.S. 969 (1991).

In addition, the Ninth Circuit is not alone in this judgment. Every other court of appeals to consider the issue is in agreement. See, e.g., United States v. Edwards, 98 F.3d 1364, 1369 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1437 (1997); United States v. Lerebours, 87 F.3d 582, 584-85 (1st Cir. 1996), cert. denied, 117 S.Ct. 694 (1997); Proyect v. United States, 101 F.3d 11, 13-14 (2d Cir. 1996); United States v. Leshuk, 65 F.3d 1105, 1112 (4th Cir. 1995); United States v. Clark, 67 F.3d 1154, 1165-66 (5th Cir. 1995), cert. denied, 116 S. Ct. 1432 (1996); United States v. Tucker, 90 F.3d 1135, 1139-41 (6th Cir. 1996); United States v. Rogers, 89 F.3d 1326, 1338 (7th Cir.), cert. denied, 117 S. Ct. 495 (1996); United States v. Bell, 90 F.3d 318, 321 (8th Cir. 1996); United States v. Wacker, 72 F.3d 1453, 1475 (10th Cir. 1995), cert. denied, 117 S. Ct. 136 (1996); United States v. Jackson, 111 F.3d 101, 102 (11th Cir.), cert. denied, 118 S. Ct. 200 (1997).

As such, the very passage of the Act is, in itself, an expression of the public interest by the branches of government entrusted by the Constitution with the responsibility to make such decisions. See Able v. United States, 44 F.3d 128, 132 (2d Cir. 1995) (per curiam) (holding that "it would be inappropriate for this court to substitute its own determination of the public

interest for that arrived at by the political branches" where Congress had made specific findings in a statute which Congress believed justified a policy).

With respect to defendant's request for authorization to use and possess marijuana pending trial, there is no evidence defendant has ever registered with the DEA or been approved through the FDA to conduct research on the medicinal effectiveness of marijuana. Likewise, there is no evidence defendant has ever become a participant in any such approved research project. Consequently, defendant's use of marijuana would result in a blatant violation of the Controlled Substances Act and would constitute a direct affront to the laws passed by Congress and the President. See United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 175 (9th Cir. 1987) ("Once Congress has decided the order of priorities in a given area, it is for the courts to enforce them when asked."). In addition, judicial authorization of defendant's proposed criminal conduct would require the court, in essence, to grant defendant transactional immunity from prosecution for future criminal conduct. The government respectfully submits that, under these circumstances, the court should reject defendant's request.

B. Defendant Is Precluded from Litigating in Federal Court the Medicinal Usefulness of Marijuana.

In 1970, Congress passed the Controlled Substances Act as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. While recognizing that many controlled substances "have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people," 21 U.S.C. § 801(1), Congress found that "[t]he

illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." Id. § 801(2).[11]

As a result, Congress established a comprehensive regulatory scheme in which controlled substances are placed in one of five "Schedules" depending on their potential for abuse, the extent to which they may lead to psychological or physical dependence, and whether they have a currently accepted medical use in treatment in the United States. Id. § 812(b). Controlled substances in "Schedule I" have been determined to have a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and a "lack of accepted safety for use under medical supervision." Id. § 812(b)(1). Given these characteristics, Congress has mandated that substances in Schedule I be subject to the most stringent regulation. In particular, no physician may dispense any Schedule I controlled substance to any patient outside of a strictly controlled research project registered with the DEA, and approved by the Secretary of Health and Human Services, acting through the FDA. Id. § 823(f).[12] When it passed the Act in 1970, Congress placed marijuana in Schedule I,

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[11] Congress defined a controlled substance as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." Id. § 802(6).

[12] In contrast, controlled substances in Schedules II through V are subject to decreasing levels of controls because they have been determined to have some currently accepted medical uses in treatment in the United States. Id. §§ 812(b)(2)-(5). Nonetheless, given their potential for abuse, the Act requires all persons involved in the distribution of a substance in Schedules II through V to be registered with the DEA and to keep records of all transfers of controlled substances. Id. § 823.

where it remains today. Id. § 812 Schedule I(c)(10).

Congress recognized, however, that the schedules may sometimes need to be modified to reflect changes in scientific knowledge and patterns of abuse of particular drugs. A controlled substance that has been placed in Schedule I (or any other schedule) therefore may be rescheduled, or removed from the five schedules, in one of two ways. First, Congress itself may add or delete drugs from, or transfer drugs between, the five schedules. Second, Congress authorized the Attorney General to promulgate rules to add or delete drugs from, or transfer drugs between, the five schedules, pursuant to the rulemaking procedures of the Administrative Procedures Act, 5 U.S.C. § 552.[13] See 21 U.S.C. § 811(a). Such proceedings may be initiated by the Attorney General, acting through the DEA Administrator: "(1) on his own motion, (2) at the request of the Secretary [of Health and Human Services], or (3) at the petition of any interested party." Id. The implementing regulations to the Act thus allow "[a]ny interested person to submit a petition" asking the DEA Administrator to initiate a rulemaking proceeding to reschedule a controlled substance. 21 C.F.R. §§ 1308.44(b), (c).[14]

Several groups and individuals who believe that marijuana

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[13] The Attorney General has delegated this authority to the Administrator of the DEA. See 28 C.F.R. § 0.100(b).

[14] For example, in 1986, the DEA Administrator rescheduled "Marinol," or synthetic dronabinol in sesame oil and encapsulated in soft gelatin capsules, a substance which is the synthetic equivalent of the isomer of delta-9-tetrahydrocannabinol ("THC"), the principal psychoactive substance in marijuana, from schedule I to Schedule II. 51 Fed. Reg. 17,476 (May 13, 1986). Marinol currently is approved in treatment for nausea and anorexia associated with cancer and AIDS patients.

should be permissible for therapeutic purposes have petitioned the Administrator to move marijuana from Schedule I (where Congress placed it) to Schedule II. In 1992, the Administrator declined to reschedule marijuana, finding that the record demonstrated that marijuana had "no currently accepted medical use in treatment in the United States," and thus had to remain in Schedule I. 57 Fed. Reg. 10,499 (Mar. 26, 1992). This decision was upheld by a unanimous panel of the D.C. Circuit, which held that the Administrator's findings were "consistent with the view that only rigorous scientific proof can satisfy the [Controlled Substances Act's] 'currently accepted medical use requirement.'" Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131, 1137 (D.C. Cir. 1994).[15]

Thus, to the extent defendant believes he is subject to a hardship as a result of Congress's placement of marijuana in Schedule I, he is entitled to petition the Administrator of the DEA to conduct another rulemaking and, if appropriate, reschedule marijuana. As described above, Congress has established an administrative process to determine whether a controlled substance should be rescheduled so that it may be used for medical purposes. In thereby ensuring that drugs may be used for medical purposes only after they have been proven safe, effective, and reliable through a rigorous system of research and testing, this federal drug approval process has protected the American public from

[15] Petitioners did not seek Supreme Court review.

dangerous drugs and unproven treatments for more than 50 years.[16]

Defendant, however, cannot challenge Congress's placement of marijuana in Schedule I in this case before this court. Every court of appeals to have considered the issue has held that the decision as to whether or not marijuana should be reclassified must be presented first to the Administrator of the DEA in the context of a rescheduling petition under 21 U.S.C. § 811(a). See, e.g., United States v. Burton, 894 F.2d 188, 192 (6th Cir. 1990); cert. denied, 498 U.S. 857 (1990); United States v. Greene, 892 F.2d 453, 455-45 (6th Cir. 1989), cert. denied, 495 U.S. 935 (1990); United States v. Fry, 787 F.2d 903, 905 (4th Cir.), cert. denied, 479 U.S. 861 (1986); United States v. Wables, 731 F.2d 440, 450 (7th Cir. 1984); United States v. Fogarty, 692 F.2d 542, 548 & n.4 (8th Cir. 1982), cert. denied, 460 U.S. 1040 (1983); United States v. Middleton, 690 F.2d 820, 823 (11th Cir. 1982), cert. denied, 460 U.S. 1051 (1983); United States v. Kiffer, 477 F.2d 349, 356-57 (2d Cir. 1972), cert. denied, 414 U.S. 831 (1973). As the Sixth Circuit held in Greene, a section 811 petition, "and not the judiciary, is the appropriate means by which defendant should challenge Congress's classification of marijuana as a Schedule I drug." 892 F.2d at 456. See also United States v. LaFrancis, 354 F. Supp. 1338, 1341 (S.D.N.Y. 1973) ("[I]f the defendant were to be

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[16] Even if marijuana were taken out of Schedule I and placed in Schedule II, it could not legally be marketed or made available for prescription use unless it were reviewed and approved by the FDA under the Food, Drug and Cosmetic Act, 21 U.S.C. § 301, et. seq. For a drug to obtain approval under this Food, Drug and Cosmetic Act, appropriate tests in well-controlled studies must be conducted to show substantial evidence that the drug is effective for its intended use and that it is safe. To date, marijuana has not been approved by the FDA to treat any disease or condition.

permitted to seek court review of the placement of marihuana in Schedule I without first applying to the Attorney General for such relief under 21 U.S.C. § 811, Congress' statutory scheme would be thwarted.").

c. Under Federal Law, Proposition 215 Does Not Authorize Defendant's Proposed Use of Marijuana.

Lastly, defendant cannot justify his proposed use of marijuana by relying upon Proposition 215. Proposition 215, enacted in November 1996,[17] which decriminalized the possession and cultivation of marijuana for patients and "caregivers" for purported medical purposes under state law, provides no defense to defendant's unlawful activities under federal law. It is well established that the determination of whether the Controlled Substances Act has been violated is "a federal issue to be determined in federal courts," and is not dependent on state law. United States v. Rosenberg, 515 F.2d 190, 198 (9th Cir.), cert. denied, 423 U.S. 1031 (1975).

Thus, in United States v. Kim, the Ninth Circuit expressly rejected an argument that the Act is an impermissible intrusion "into an area traditionally regulated by the states." In no uncertain terms, the court held that "Congress had authority under the Commerce Clause to criminalize the conduct under § 841(a)(1)," and that "the Supreme Court has recognized Congress' power to regulate illegal drugs." 94 F.3d at 1250 n.4. Indeed, to the extent "a state law purported to eliminate" a duty imposed by the federal Controlled Substances Act, "it would be void under the Supremacy Clause." United States v. Leal, 75 F.3d 219, 227 (6th Cir. 1996). See also United States v. Curtis, 965 F.2d 610, 616

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[17] See Cal. Health & Safety Code § 11362.5.

(9th Cir. 1992) ("It is a basic principle of constitutional law that, under the Supremacy Clause of Article VI of the Constitution, federal law supersedes state law where there is an outright conflict between such laws.").

Just as before the passage of Proposition 215, federal law continues to prohibit the manufacture, distribution, and possession of marijuana, and every court to have considered the issue has upheld Congress's Commerce Clause authority to prohibit these illegal activities. Given the supremacy of federal over state law, Proposition 215 provides no authorization for defendant's use of marijuana. Consequently, Proposition 215 is not directly relevant to this proceeding as Congress has made it unlawful to manufacture, distribute and possess marijuana, except as otherwise authorized by the Act, for any purpose, for any condition, and under any circumstances. See 21 U.S.C. §§ 841(a)(1), 844.

V.

CONCLUSION

For the foregoing reasons, the government respectfully submits that the court should deny defendant's motion and affirm Judge Hatter's bond determination and conditions of release.

COPY

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Attorneys for Defendant
Todd Patrick McCormick

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. TODD PATRICK MCCORMICK, Defendant.	CASE NO. CR-97-1724M STIPULATION AND ORDER MODIFYING BAIL

It is hereby stipulated between the Plaintiff, the United States of America, through its counsel, Assistant United States Attorney Fernando L. Aenlle-Rocha, and Defendant Todd Patrick McCormick, through his counsel, Joel R. Isaacson, as follows:

1. The appearance bond set by the Court on August 1, 1997, concerning the terms and conditions of release of Defendant may be satisfied by the posting of a cashier's check in the amount of Five Hundred Thousand Dollars ($500,000), drawn on the City National Bank, Beverly Hills, California or other acceptable bank, and payable to the Clerk of the United States District Court;

2. An affidavit of surety shall be signed by the third party surety in the presence of counsel for the Government.

EXHIBIT A

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3. The surety shall answer all inquiries regarding the source of funds..

4. The attached promissory note and letters signed by Ms. Tracy Marshman and Mr. Woody Harrelson are hereby incorporated into this stipulation.

5. The Defendant shall be tested prior to his release from custody for purposes of determining the presence and specific levels of any controlled substances in his body, which shall be used as a control to determine his compliance with the conditions of his release.

6. The Defendant shall file the original notarized letter executed by Mr. Harrelson immediately upon receipt thereof but no later than August 21, 1997.

7. All other terms and conditions of pretrial release shall remain in effect.

Respectfully submitted,

Dated: 8/12/97

Fernando L. Aenlle-Rocha
Assistant United States Attorney
Attorney for Plaintiff

Dated: 8/11/97

JOEL R. ISAACSON
Attorney for Defendant

ORDER

Based upon the stipulation of counsel and good cause appearing therefore, it is so ordered.

Dated: Mar 12, 1998

TERRY J. HATTER

TERRY J. HATTER, JR.
United States District Judge

August 8, 1997

VIA FACSIMILE AND MAIL

Fernando Aenlle-Rocha, AUSA
United States Attorney's Office

Re: United States v. Todd Patrick McCormick;
Case No. 97-1724 M

Dear Mr. Aenlle-Rocha:

This letter will confirm that I have been advised as to all of the conditions of release of Todd McCormick in connection with the $500,000.00 I am posting as part of the appearance bond for Mr. McCormick in the above-titled case.

I have been advised that the money I post is subject to forfeiture in the event Mr. McCormick does not appear as required, or in the event Mr. McCormick violates any other condition of his release, including the condition that he avoid the use of any controlled substance, including but not limited to marijuana.

I also understand that in the event that the bail is forfeited for any reason, my rights with respect to the bond posted for Mr. McCormick's bail are set forth in Rule 46 of the Federal Rules of Criminal Procedure and in the Bail Reform Act of 1986.

Sincerely,

Tracy Harshman

August 8, 1997

VIA FACSIMILE AND MAIL

Fernando Aenlle-Rocha, AUSA
United States Attorney's Office

Re: United States v. Todd Patrick McCormick;
Case No. 97-1724 M

Dear Mr. Aenlle-Rocha:

This letter will confirm that I have been advised that the $500,000.00 I am lending to Tracy Harshman will be posted by Tracy Harshman as part of the appearance bond for Todd McCormick in the above-titled case.

I have been advised that the money Ms. Harshman posts is subject to forfeiture in the event Mr. McCormick does not appear as required, or in the event Mr. McCormick violates any other condition of his release; including the condition that he avoid the use of any controlled substance, including but not limited to marijuana.

I understand that in the event that the bail is forfeited for any reason, I will have no claim against the United States government or the United States District Court for the return of all or any portion of the bail money. In other words, I understand that if the bail is forfeited, the only person who will be able to seek to set aside the forfeiture would be Ms. Harshman or her representative, or Mr. McCormick or his representative. However, I will have no standing to bring a claim on my behalf with respect to the forfeiture. Also, I fully understand that Ms. Harshman will have no standing to bring a claim on my behalf.

Lastly, I understand and acknowledge that any promissory agreement entered into by me, Mr. Herrmann, and/or any other person is expressly not a term or condition of the bond for Mr. Rutkowski. Accordingly, I understand and agree that such promissory note does not provide me any rights, entitlement, obligations or standing in any claim against the United States government, with regard to the posting and/or forfeiture of said bond. I further acknowledge that the United States is neither an express nor implied party to any such promissory agreement.

I also certify that the $500,000.00 I am lending Mr. Herrmann for purposes of Mr. Rutkowski's bond was not earned or derived from any unlawful activity.

Sincerely,

Woody Herrmann

I, Lorni Strickland, Justice of the Peace, of Sydney, NSW, Australia, hereby certify that this is a true signature of Woody Herrmann who signed this statement before me on August 12th, 1997.

Strickland JP

PROMISSORY NOTE

For value received, I, TRACY HARSHMAN, hereby promise to pay to the order of WOODY HARRELSON on demand the sum of $500,000 (Five-Hundred Thousand Dollars and no/100) at any time after the return of said funds which I am posting with the United States District Court as part of the appearance bond for Todd Patrick McCormick in case number 97-1724 M. I also promise that any monies returned to me by the United States District Court in addition to the principal returned to me (i.e., interest earned on the bond while being held by the District Court) I shall pay to the order of WOODY HARRELSON on demand at any time after said additional monies are released by the District Court.

DATED: August 8, 1997

By: _____
TRACY HARSHMAN

Beverly Hills, California

CERTIFICATE OF SERVICE BY MAIL

I, Bonnie T. Vuong, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on March 2, 1998, I deposited in the United States mails in the United States Courthouse at 312 North Spring Street, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of: **GOVERNMENT'S OPPOSITION TO DEFENDANT McCORMICK'S MOTION FOR REVIEW OF BOND AND MODIFICATION OF CONDITIONS OF RELEASE**

addressed to:

David M. Michael, Esq.
Serra, Lichter, Daar, Bustamante, Michael & Wilson
Pier 5 North
The Embarcadero
San Francisco, CA 94111

James D. Perez
Pretrial Services
312 North Spring Street, 7th Floor
Los Angeles, CA 90012

at their last known address, at which place there is a delivery service by United States mail.

This Certificate is executed on March 2, 1998, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

BONNIE T. VUONG