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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE EASTERN DISTRICT OF CALIFORNIA**

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>BRIAN JUSTIN PICKARD, et al.,<br><br>Defendants. | Case No. 2:11-CR-449-KJM<br><br>**DEFENDANT BRIAN PICKARD'S NOTICE OF MOTION AND MOTION FOR RECONSIDERATION**<br><br>Date: July 1, 2015<br>Time: 9:00 am<br>Judge: Hon. Kimberly J. Mueller |

## I. INTRODUCTION

On April 17, 2015, this Honorable Court issued a written opinion denying Defendant's Motion to Dismiss the Indictment. In so ruling, the Court determined it "could not say that Congress could not reasonably have decided that marijuana belongs and continues to belong on Schedule I of the CSA." ECF No. 392, p. 28:22-23. The defense had argued that Congress' actions could not be reconciled with such belief, and cited to the Continuing Appropriations Act, 2015 (*H.R. 83,* Congressional Session 2014-2015) as controlling authority for this position. Yet,

in the April 17th Order, this Court found the defense had not amended their motion to rely expressly on *Section 538*, a finding for which reconsideration is here requested.[1] For, as discussed below, the defense not only relied on this statutory provision in the post-hearing briefs (ECF No. 378 and 382), as well as at the oral argument held on February 11, 2015, but argued the language of *Section 538* alone provides justification for granting the motion under any three of the Constitutional challenges made therein.[2]

The defendant now beseeches this Honorable Court reconsider its ruling as the application of *Section 538* to each of the three distinct Constitutional claims alleged against the Government here, under the Court's vast and inherent powers, as well as *Fed. Rule Civ. P. 59(e)*.

## II. RECONSIDERATION IS WARRANTED AND NECESSARY.

### A. Legal Authority for Motion to Reconsider

Although not expressly provided for in the Federal Rules of Criminal Procedure, the Ninth Circuit holds that motions for reconsideration may be filed in criminal actions, so long as they conform to the rules set forth in *Federal Rules of Civil Procedure 59* or *60*. *See*, United States v. Martin, 226 F.3d 1042, 1047 *fn*. 7, 8 (9th Cir. 2000). Such motions are committed to the discretion of the trial court in its inherent powers. School Dist. No. 1J. Mutlinomah County v. ACandS, Inc., 5 F.3d 1255, 1262 (9th Cir. 1993). Moreover, the authority to reconsider under *Rule 59* or *60* are in addition to the Court's inherent powers to reconsider its own orders, as such *Rules* do not "affect, interfere with, or curtail the common-law power of federal courts" to entertain a reconsideration application. Bucy v. Nevada Const. Co. 125 F.2d. 213 (9th Cir. 1942).

> The power to vacate judgments was conceded by the common law to all its courts. Within its proper limitations it is a power inherent in all courts of record and independent of

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[1] It must be noted that by requesting reconsideration of this limited issue, the defense does *not* concede other findings made in the April 17th Order, but rather has limited this request to whether *Section 538* should have been considered controlling and compelling support for the defendant's motion.

[2] To be clear, the defense did not seek to present a separate challenge predicated solely on *Section 538*, and is not here so doing. As such a claim is distinct from those which had been pending before the Court it could not meaningfully be juxtaposed into the Constitutional principles already presented. By the present motion, however, the relevance of *Section 538* to the Constitutional claims must be acknowledged, for as discussed, *infra*, this law is in direct contradiction with a finding that Congress could reasonably believe that marijuana belongs and continues to belong on Schedule I of the CSA.

statute. It may be exercised by the court either on its own motion or on motion or suggestion by a party or interested person."

*Id*., at 217, relying on Freeman on Judgments § 194, pp. 375, 376.

The inherent and statutory power to reconsider a final order certainly extends to criminal cases. "As noted by the Second and Ninth Circuits, motions for reconsideration may be filed in criminal cases." United States v. Fiorelli, 337 F.3d 282, 286 (3d Cir. 2003) referring to United States v. Martin, *supra*, and United States v. Clark, 984 F.2d 31, 34 (2d Cir. 1993).

Thus, this Court is authorized to reconsider the April 17th Order under its inherent authority, in addition to the statutory authority under *Fed. R. Civ. P. 59(e)*.

**B. The Court's Order Regarding Section 538 of the Consolidated and Further Continuing Appropriations Act of 2015.**

In the present case, the defense urges this Court to reconsider its Order of April 17, 2015, (ECF No. 392), a request properly raised pursuant to this Court's inherent authority as well as *FRCP 59(e)*, as it is a final order on the Motion to Dismiss Indictment as Violative of the United States Constitution (*Amend. V; Article VI/Amendment X*) (ECF No. 199). As discussed *infra*, reconsideration is required under *Rule 59* to correct a mistake or inadvertence in this Court's Order denying the defense motion, such that the defendant's Constitutional rights to a fair adjudication of the instant motion may be granted him under *U.S. Const. V, VI*, and such that an appropriate record can be made in this case of great import.

Consistent with *Local Rule 430.1(i),* the defense further provides:

(1) The motion was brought before the Honorable Kimberly J. Mueller on November 20, 2013. (ECF No. 199.) Subsequently, extensive briefing supplemented the initial motions, including, but not limited to Post-Hearing Briefs (ECF No. 374 and 378), and Replies to Post-Hearing Briefs. (ECF No. 381 and 382.)

(2) The Court granted an evidentiary hearing limited to the scientific and medical evidence related to the Constitutional challenges made in the motion, but ultimately denied all claims by Order dated April 17, 2015. (Order, ECF No. 392.)

(3) In so finding, this Court noted "Defendants have not sought to amend their motion to rely expressly on section 538 and have not argued clearly that the language of section 538 alone

provides an additional reason for dismissal." (Order, ECF No. 392, 38:11-13.)

(4) The defense seeks reconsideration of this Order on the grounds that the Court precluded consideration of *Section 538* which was offered as essential legal authority supporting each of the three the Constitutional Challenges.

**C. The 2015 Appropriations Act, *Section 538***

**1. Defendant Expressly Relied on *Section 538* as Support of Each of the Three Distinct Constitutional Challenges.**

In November, 2013, the defense filed a Motion to Dismiss predicated on the Equal Protection Clause of the Fifth Amendment and the doctrine of Equal Sovereignty of the States. A request for an evidentiary hearing was granted but, by this Court's ruling, the testimonial evidence was limited to the scientific and medical evidence supporting the parties respective positions. Following the testimony of witnesses, the parties submitted exhibits, and post-evidentiary hearing briefs were filed and responded to. Finally, on February 11, 2015, this Court entertained oral argument on the motion and the matter thereafter was submitted.

After the conclusion of the presentation of evidence, but prior to the filing of the post-hearing briefs, Congress and the President passed the Continuing Appropriations Act, 2015 (*H.R. 83,* Congressional Session 2014-2015), a statute which cut funding to the Department of Justice for taking any action "to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."

The defense put great emphasis on this statute as support for both the Equal Protection and Equal Sovereignty Claims in the post-hearing briefs, reciting the entirety of the statute, as well as some legislative history of the same, in support of *each* of the defendant's three distinct Constitutional claims, as follows:

a. In Light of the Current Scientific and Medical Research, There Is No Rational Basis for Treating Marijuana as a Controlled Substance. (*See*, ECF No. 199, p. 12.)

In support of defendant's claim under *U.S. Amend. V* and United States v. Carolene Prods. Co., 304 U.S. 144 (1938), defendants pled as follows:

> 1. [S]ince the testimonial evidence was presented, the federal government has taken actions which leave no doubt of the absurdity of this *irrational classification*... [the] [m]ost significant is the passage of *Section 538* of the Continuing Appropriations Act,

2015 (*H.R. 83,* Congressional Session 2014-2015) in which the law recognizes "medical marijuana" as a substance worthy of shielding from CSA enforcement. (ECF No. 378, p. 1, *fn* 1.)

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2. This statute ... expressly recognizes the existence of marijuana as medicine. Of great significance is the fact that the statute uses the words "medical marijuana," without caveat or limitation. This Court must query how it is Congress can justify a finding that marijuana has no medical benefit while demanding that the distribution of medical marijuana be protected from federal government interference. This is not only irrational, it is absurd. (ECF No. 378, p. 35-36.)

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3. In addition, neither the policy memorandum issued by the Department of Justice (Def. Exh. J, "Cole Memo"), nor *Section 538* of the Continuing Appropriations Act 2015 (Def. Exh. WW, Doc. 378-1) provide any standards for medical supervision, or the standardization of the medical cannabis' quality, potency, origin and safety, nor controls on dosages and oversight.

It is unimaginable to believe that if heroin, cocaine, methamphetamine, or even over-the-counter medications were being distributed in 23 states and the District of Columbia, Congress and the President would abdicate *all* regulatory authority to those jurisdictions, and then cut off all funds (and therefore power) to intervene in related distribution activities. Yet, this is precisely what the federal government has done in the case of the distribution of medical marijuana by passing *Section 538* of the Continuing Appropriations Act. Even the most vivid imagination would be hard pressed to reconcile such action with a "rational belief" that marijuana is one of the most dangerous drugs in the Nation. (ECF No. 382, p. 35.)

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4. Further, although Congress is authorized to reschedule cannabis within *21 U.S.C. § 812,* it also may choose not to, or to create an entirely new schedule for this substance, as is recommended by the American Medical Association. Presently, the defendant makes no comparison, advisement, nor request, as to where or how cannabis should be scheduled, as such a determination should not be made in a courtroom. It has, however, become painfully obvious to the people of this Nation (as evidenced by percipient defense witnesses Jennie Stormes and Sgt. Ryan Begin), to our leading scientific researchers and physicians (as evidenced by Dr. Hart, Dr. Carter, and Dr. Denney), to Congress (in Section 538), to our own President (in public statements appropriate for judicial notice, *FRE 201*), that the Schedule I status has no footing in reality. (ECF No. 382, p. 40.)

b. There is No Rational Basis for the Selective State-Based Prosecution Policy. (*See,* ECF No. 199, p. 28.)

In support of the defense allegation that the selective prosecution of persons based on the application of the CSA violates *U.S. Amend. V* and Wayte v. United States, 470 U.S. 598, 608 (1985), the defense argued:

1. This statute [*Section 538*].... codifies the Administration's State-based enforcement policies shielding medical cannabis distributors from prosecution based upon the State in

which they conduct business. (ECF No. 378, p. 35.)

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2. Without doubt the passage of *Section 538* runs afoul of the concern raised by the Ninth Circuit Court of Appeal in James v. City of Costa Mesa, 700 F.3d 394 (9th Cir. 2012), where the Court held that there was no disparate treatment between California and Washington D.C., because the federal government applied federal prohibition in both jurisdiction. The Circuit Court noted:

> [T]he unambiguous *federal* prohibitions on medical marijuana use set forth in the CSA continue to apply equally in both jurisdictions, as does the ADA's illegal drug exclusion. There is no unequal treatment, and thus no equal protection violation. *Id.,* at 405, emphasis in original.

It can no longer be said that the federal government applies federal law evenly among local jurisdictions. For *Section 538* of the Continuing Appropriations Act (2015) specifically prohibits federal law from being applied equally in all jurisdictions by cutting off funding for enforcement of marijuana laws in specified states, and the District of Columbia. (ECF No. 378, p. 35.)

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3. Not surprisingly, the Government's standing argument fails to address defendants' other two constitutional challenges relating to the State-based enforcement of the CSA as to cannabis, since codified by Congress in December, 2014. (ECF No. 382, p. 41.)

c. The Present Prosecution Violations the Principle of Equal Sovereignty. (*See,* ECF No. 199, p. 30.)

In support of defendant's third challenge under *Art. VI* and *U.S. Amend. V*, as well as Shelby County (Alabama) v. Holder, __ U.S.__, 133 S.Ct. 2612, 2623 (2013), defendant argued to this Court regarding *Section 538* as follows:

> 1. In summarily dismissing defendant's Equal Sovereignty claim the Government contends this Court has tentatively held against this constitutional challenge, and that nothing has changed in the intervening months. Such a position ignores the passage of the 2015 Appropriations Act, *Section 538*, which, as discussed below, speaks directly to the Government's prior arguments, as well as this Court's previous articulated doubts regarding the Equal Sovereignty claim.
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> The legislative history to *Section 538* of *H.R. 83* is relevant to the Equal Sovereignty challenge as, when this portion of the law was being debated on the House floor on May 30, 2014, one Congressman foretold its impact on the disparate the enforcement of the Controlled Substance Act as to cannabis, stating:
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> > What this amendment would do is, it wouldn't change the law, it would just make it difficult, if not impossible, for the DEA and the Department of Justice to enforce the law... So now we are going to start going down the road of selective enforcement for our drug policy." (ECF No. 382, p. 37.)
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> 2. The District Court cases cited by the Government were decided prior to the enactment

> of *Section 538*, and therefore, in addition to being irrelevant to the Equal Sovereignty claim, do not take into account the implications of the new law. *Based on this Congressional Act alone*, defendants meet their burden of establishing a geographically disparate application of the CSA. (ECF No. 382, p. 37-38, emphasis added.)
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> 3. In United States v. Heying, 2014 U.S. Dist. LEXIS 147499, 2014 WL 5286153, *17, the District Court found that the Magistrate did not clearly err in recommending the Equal Sovereignty challenge be denied, finding in part that the Controlled Substances Act, "applies equally to all states." *Id*., p.4. Again, this can no longer be said, as *Section 538*, specifically limits the application of the CSA in specified states. (ECF No. 382, p. 37, *fn.* 43.)

d. Oral Argument on February 11, 2015.

In addition, at the February 11th, 2015, oral argument, defense counsel repeatedly referred to *Section 538* as a clear demonstration of the absurdity of finding Congress could reasonably believe marijuana fit the criteria of Schedule I, and specifically described how this law implicated the Ninth Circuit's caution in James v. City of Costa Mesa, *supra*, at p. 405 (i.e., the federal government no longer applies federal law evenly among local jurisdictions).

**2. This Court Should Reconsider its Order Regarding Section 538.**

As such arguments, both oral and documentary, were presented *prior to* the parties' submission of the matter to this Court, this law is appropriate to be judicially noticed under *FRE 201*, as the defendants did in fact request, submitting the statute in support of the motion as and Exhibit. (*See*, Exhibit WW, filed with ECF. No. 378.)

Despite the above, in the April 17th Order denying defendant's Motion to Dismiss, this Court writes:

> Defendants have not sought to amend their motion to rely expressly on section 538 and have not argued clearly that the language of section 538 alone provides an additional reason for dismissal. The court need not tease out all the implications of the appropriations language to resolve the motion here.
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> ECF No. 392, p. 38:11-14.

The defense therefore urges this Court to reconsider this conclusion as in the Post-Hearing Briefs the defense *expressly* and *repeatedly* relied upon the 2015 Appropriations Act, *Section 538,* as evidencing a violation of the Equal Protection claims, as well as the Equal Sovereignty claim. As the statute was enacted in December of 2014, these briefs afforded the first opportunity to bring it before this Court. Further, as it is a statute, not documentary or testimonial evidence, the

defense need not seek its admission, but rather may rely on the provision in a manner akin to when a relevant judicial opinion is published during the course of litigation.

Additionally, unlike a bill currently pending before Congress which does not have the force of law, which this Court found to be a fact inappropriate for judicial notice[3] (Davis v. United States, 569 F.Supp.2d 91, 98 (D.C. 2008)), *Section 538* was the law of the land at the time this proceeding was submitted for the Court's consideration on February 11, 2015. Thus, it was properly judicially noticed under *FRE 201*, which allows such notice to be taken at *any stage of the proceeding*, and the *defendants indeed did so request*, as set forth herein. Indeed, in Davis, *supra*, the court denied the request for judicial notice of a pending enactment precisely because the "pending legislation is therefore irrelevant because it does not make the current [challenged statute] any more or less likely to be constitutional." *Id.* Here, however, *Section 538* is essentially the codification of the State-based enforcement of the Controlled Substance Act and it is thus hard to imagine any law that "makes the current [challenged statute] any more or less... constitutional." Davis, 569 F.Supp.2d at 98. Moreover, and as specifically pled by the defense in its Post-Hearing Briefs, and at oral argument, a Congressional enactment that describes marijuana as "medical" cannot be reconciled with cannabis' Schedule I status, declaring:

> Even the most vivid imagination would be hard pressed to reconcile such action with a "rational belief" that marijuana is one of the most dangerous drugs in the Nation. (ECF No. 382, p. 35:7-9.)

**3. Assuming Arguendo, the Defense is Required to Amend the Pleadings to Allow the Court to Consider the Impact of *Section 538* on the Constitutional Challenges, This Court should Permit Such an Amendment.**

Although the defense position is that the enactment of a relevant statute during the pendency of a motion may be relied upon without need to amend the pleadings should this Court find otherwise, it is requested that such an amendment be allowed in order to ensure a matter of great importance not be denied on minor procedural grounds. Specifically, the defense asks this Court to admit *Section 538* as evidence relevant to the rationality of the Congressional Act in question, as presented in the Post-Hearing Briefs and Oral Argument and as described in Part II.C.

[3] See, Order (ECF No. 392), p. 3: 22-25.

1., *supra*.

Indeed, this Court is in the unique position of deciding this motion on an unprecedented record containing the most current medical and scientific evidence regarding Cannabis. Judicial economy would thus require that *Section 538* be considered in conjunction with the medical and scientific evidence and the defense arguments that *Section 538* refutes any Congressional belief that marijuana's continued inclusion in Schedule I is reasonable, lest the defendant's Constitutional claims be reduced to a balkanized review that fails to see the forest for the trees.

## III. CONCLUSION

In the interests of justice, judicial economy, and these matters of great Constitutional importance, Defendant respectfully requests this Court reconsider its ruling upon the Motion to Dismiss Indictment as Violative of the U.S. Constitution on the foregoing grounds.

Dated: May 6, 2015

Respectfully submitted,

*/s/ Zenia K. Gilg*
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