U. S. Department of Justice

Civil Division

Washington, D.C. 20530

Mark T. Quinlivan
(202) 514-3346

December 5, 2003

VIA OVERNIGHT DELIVERY

Cathy Catterson
Clerk, United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: United States v. Marin Alliance for Medical Marijuana, No. 02-16335
United States v. Oakland Cannabis Buyers' Cooperative, No. 02-16534
United States v. Ukiah Cannabis Buyer's Club, No. 02-16715
Wo/Men's Alliance for Medical Marijuana v. United States, No. 03-15062

Submitted: September 17, 2003
Before: Chief Judge Schroeder, Judges Reinhardt and Silverman

Dear Ms. Catterson:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, the United States responds to the Rule 28(j) letter submitted by appellants, which directs attention to the decision in United States v. Stewart, No. 02-10318 (9th Cir. Nov. 13, 2003), in which this Court held that 18 U.S.C. § 922(o), exceeds Congress' authority under the Commerce Clause as applied to the intrastate possession of a homemade machinegun.

The decision in Stewart did not address the constitutionality of the Controlled Substances Act. Thus, for example, the panel in Stewart perhaps believed it to be significant that Congress "failed to make any legislative findings when it enacted [section 922(o)]." Slip op. at 16071. In contrast, as this Court has previously recognized, the Controlled Substances Act "contains express legislative findings regarding the relationship between purely intrastate activities and interstate commerce." United States v. McCoy, 323 F.3d 1114, 1128 n.24 (9th Cir. 2003) (citing 21 U.S.C. §§ 801(4) & (6)). Stewart therefore does not undermine this Court's line of decisions holding that 21 U.S.C. § 841(a) "'is

constitutional and that no proof of an interstate nexus is required in order to establish jurisdiction of the subject matter.'" United States v. Visman, 919 F.2d 1390, 1392-93 (9th Cir.1990), *cert. denied*, 502 U.S. 969 (1991) (quoting United States v. Montes-Zarate, 552 F.2d 1330, 1331 (9th Cir.1977), *cert. denied*, 435 U.S. 947 (1978)). Accord United States v. Kim, 94 F.3d 1247, 1250 (9th Cir. 1996) (reaffirming Visman). This argument is consistent with the arguments set forth at pages 28-43 of the Brief for Appellee in Nos. 02-16335, 02-16534, and 02-16715, and pages 15-38 of the Brief for Appellee in No. 03-15062, and the argument made by counsel during oral argument.

The Stewart panel also stated, in dicta, that "whether a given statute can constitutionally be applied to a claimant is an inquiry that occurs in *every* constitutional case." Slip op. at 16077. This statement is incompatible with this Court's en banc decision in United States v. Sacco, 491 F.2d 995 (9th Cir. 1974), which holds that "Congress can declare that an entire class of activities affects interstate commerce," and that, "[i]f the class of activities is within the reach of the federal power and the regulation imposed is reasonable, a court's investigation is concluded. There is no need for inquiry on a case-by-case basis or proof that a particular activity had an effect on commerce." Id. at 999 (citing, *e.g.*, Perez v. United States, 402 U.S. 146 (1971), and United States v. Darby, 312 U.S. 100 (1941)).

Respectfully submitted,

MARK T. QUINLIVAN
Senior Trial Counsel
Civil Division
Counsel for United States of America in
Appeal Nos. 02-16335, 02-16534, 02-16715, and 03-15062

Enclosures

cc:

Annette P. Carnegie
Heather A. Moser
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105
(By Federal Express)

Robert A. Raich
1970 Broadway, Suite 1200
Oakland, CA 94612
(By Federal Express)

Gerald F. Uelmen
Santa Clara University School of Law
500 El Camino Real
Santa Clara, CA 95053
(By Federal Express)

Randy E. Barnett
Boston University School of Law
765 Commonwealth Ave.
Boston, MA 02138
(By Federal Express)

Susan B. Jordan
515 South School Street
Ukiah, CA 95482
(By Federal Express)

Benjamin Rice
331 Soquel Ave
Suite 110
Santa Cruz, CA 95053
(By Federal Express)

Greg Anton
P.O. Box 299
Lagunitas, CA 94938
(By U.S. Mail)

Taylor S. Carey
Special Assistant Attorney General
1300 I Street
Sacramento, CA 95814
(By U.S. Mail)

Richard E. Winnie
Alameda County Counsel
1221 Oak Street, #450
Oakland, CA 94612
(By U.S. Mail)

John A. Russo
Barbara J. Parker
Office of the City Attorney
City Hall
One Frank Ogawa Plaza, 6th Floor
Oakland, CA 94612
(By U.S. Mail)

Alice P. Mead
California Medical Association
221 Main Street, Third Floor
San Francisco, CA 94120-7690
(By U.S. Mail)

David A. Handro
Julie M. Carpenter
Robin M. Meriweather
Jenner & Block, LLC
601 13th St., N.W.
Washington, D.C. 20005
(By U.S. Mail)