No. 05-16466

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

*Plaintiff-Appellee*

vs.

MARIN ALLIANCE FOR MEDICAL MARIJUANA/ LYNNETTE SHAW

*Defendants-Appellants*

# APPELLANTS' REPLY

Appeal From Entry of Final Judgment by the United States District Court
For the Northern District of California
District Court Nos. CV-98-00-86-98-00087-98-00088 CRB
The Honorable Charles R. Breyer

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## I. STATEMENT OF THE CASE

Appellants Marin Alliance for Medical Marijuana file this supplemental brief in reply to the Government's response to Appellants' supplemental brief challenging the rational basis for classifying medical cannabis as a Schedule I narcotic under the Controlled Substance Act (CSA) 21 USCS §812.

Appellants do not at this time take issue with the Government's statements regarding jurisdiction, standard of review, or procedural history of the case.

## II. INTRODUCTION

Appellants do not dispute the Government's position that when conducting a rational basis review, courts will defer to a legislative determination if it is not arbitrary, is based on substantial evidence, and is rationally related to a legitimate government interest. Appellants and Appellee also agree that when a legislative action appears to be arbitrary or unsubstantiated, it is within the court's authority to find that action irrational and therefore unconstitutional.

As well, Appellants agree with the bulk of the Government's argument in which it describes in detail the legislative and administrative processes involved in classifying medical marijuana as a Schedule I drug. However, Appellants assert that there is indisputable evidence before the court which shows that the classification does not meet the requirements stated in the Controlled Substances Act (CSA) and that the classification is irrational.

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## III. SUMMARY OF ARGUMENT

A. To qualify as a Schedule I substance, Congress has stated that three requirements must be met. Based on the evidence before the court, no reasonable person could rationally conclude that marijuana meets these requirements. Most specifically, to be classified as a Schedule I substance, the substance must have "no currently accepted medical use in treatment in the United States." Medical marijuana has demonstrated acceptance in the United States as evidenced by the fact that millions of citizens and thousands of medical doctors accept its use in treatment and legislatures in 13 states have proactively legalized its medical use, thus to conclude that it has *no* acceptance is irrational.

B. It is irrational to classify marijuana as a Schedule I substance while classifying Marinol®, an exact synthesis of the most psychoactive ingredient in marijuana, as a Schedule III substance.

C. Using the current scheduling of medical marijuana as a way to protect the public from alleged dangers has proven itself to be an irrational approach. Congress' purpose of protecting the public from dangers is legitimate. Enforcing a Schedule 1 classification of marijuana has been shown to actually increase the risks of danger to the public.

## IV. ARGUMENT

A. THE LEGISLATIVE DETERMINATION THAT MEDICAL MARIJUANA MEETS THE STATED REQUIREMENTS OF 21 USCS §812 FOR A SCHEDULE I DRUG IS IRRATIONAL.

Throughout this country's history, conditions have changed, science has advanced and social values have shifted. Laws are continually evolving and adapting to these changes through a combination of legislative actions and judicial oversight. Laws regarding such things as slavery, women's rights, sexual expression, alcohol prohibition, and conflicts between horses and automobiles, once regarded as rational, were later determined to be unacceptable under our constitution.

Congress stated, when promulgating the CSA, "placing marijuana in Schedule I may indeed be temporary, and is subject to change as information becomes available."[1] "Perhaps the greatest advantage to this approach (the CSA), is that drugs may be moved from one schedule to another as scientific information and law enforcement problems come to light . . ."[2]

The U.S. Supreme Court has recognized that, "regulations under the police power, although valid or presumed valid when made, may become arbitrary and irrational in the light of later events." (*Chastleton Corp. v. Sinclair* (1924) 264 U.S. 543, 547-48; *Korematsu v. U.S.* (1944) 323 U.S. 214; *Bauer v. U.S.* (9th Cir. 1944) 162 F.2d 128.) A

[1] CSA, H.R. Rep. No. 9-1444, 91st Cong., 1st Sess. (1970) at pgs. 4578-79.
[2] Testimony of John Ingersoll before the Committee of the Judiciary, Sept 15, 1969, page 214.

court is "not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared." (*Chastleton Ibid at page* 547.)

The CSA states that Schedule I substances must have no *currently* accepted medical use in treatment (emphasis added). §812 also requires that the schedules be updated and republished on an annual basis.

As the Government points out, the legislative processes are in place, marijuana scheduling has been reevaluated, and some courts and administrators in the past have upheld the classification. However Appellant asserts that now, more than ever before, the classification is irrational.[3]

To be classified as a Schedule I substance, the CSA states that a determination must be made that a substance meet the following three criteria:

1. It has a high potential for abuse;
2. It has no currently accepted medical use in treatment in the United States;

and

3. It has a lack of accepted safety for use under medical supervision.

Based on the evidence now available, no reasonable person could conclude that medical marijuana currently meets any of these requirements. To conclude that it meets all three requirements stands the concept of rationality on its head.

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[3] According to the Government's cited cases, the most recent case in the Ninth Circuit which refers to the rationality of classifying marijuana Schedule I, was decided 29 years ago. The most recent case cited by the Government in other circuits was decided 17 years ago. Furthermore, the cases which the Government cite are not directly on point and do not in fact apply a rational basis analysis but rather defer to previous cases which are older still. *U.S. v. White Plume* (8th Cir. 2006) 447 F.3d 1067, the one recent case cited, dealt with the cultivation of industrial hemp which, unlike the use of medical marijuana, is not currently occurring in the United States.

The first requirement is disproved by an overwhelming amount of scientific evidence. (*See* ER 120-22, 952-1436, 1453-1570.) Furthermore, the record is devoid of evidence which indicates that medical marijuana has a higher potential for abuse than a plethora of commonly prescribed drugs currently on the market, all of which are scheduled less restrictively. As well, there is no evidence that medical marijuana has a greater potential for abuse than many commercially available over-the-counter medications or highly addictive regulated substances such as alcohol and tobacco.

As for requirements 2 and 3, according to the clear language of the statute, they involve a straightforward determination of whether or not there is *any* 'currently accepted medical use in treatment in the United States or accepted safety under medical supervision.' To acknowledge that many of our most reputable health and science institutions have accepted medical marijuana's usefulness in treatment, [4] thirteen of our state legislatures have legalized its use in treatment, [5] four additional state legislatures are

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[4] The following are among the numerous organizations that have stated their acceptance of the use of medical marijuana in treatment: The American Public Health Association (Governing Council Resolution #9513, November, 1995), The National Academy of Sciences (Institute of Medicine report, *Marijuana and Medicine*, 1999), The American Nurses Association (Resolution adopted June, 2003), The American Academy of Family Physicians (AAFP Reference Manual: Selected Policies on Health Issues, 2001), The Lymphoma Foundation of America (Resolution Jan, 1997), The National Commission on Marijuana and Drug Abuse (*Marihuana: A Signal of Misunderstanding*, 1982), The President's Commission on Mental Health Task Panel (*Psychoactive Drug Use/Misuse,* Feb. 1978), The California Medical Board (Resolution passed May, 2007), The National Institute of Health (1997).

[5] Appellants assume that in its brief, the Government inadvertently omitted New Mexico as the thirteenth state where medical marijuana was legalized in April 2007. Note: The number of States, citizens, physicians, and medical organizations that are accepting the use of medical marijuana is consistently increasing, not decreasing, indicating that the benefits of treatment that both governments and individuals are experiencing is outweighing any alleged risks.

currently considering legalizing it,[6] millions of U.S. citizens are currently using it medicinally, thousands of licensed physicians are currently recommending it, and then to conclude that it has '*no* currently accepted medical use in treatment in the United States,' is nothing less than irrational. (ER 1420.)[7]

The Government's argument regarding the rationality of classifying medical marijuana under Schedule I is circular in nature, i.e. the classification must be rational because administrators have classified it as such. (The Government tries to somehow create a panacea for rationality by saying the law delegates authority to the Attorney General and the Attorney General has made the determination.)

Appellant is able to discern only one sentence of the Government's argument that attempts to directly address the rationality of the classification at issue. Unfortunately, the sentence itself appears to be irrational. (Gov. Br. p. 20.) Appellee responds to Appellants' question: "how can marijuana be deemed to have 'no currently accepted medical use in treatment' when it has been legalized in thirteen states?" Appellee responds: "the Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." Appellants have not asserted that state laws are legislative directives over federal laws, but rather that the state legislators' actions certainly indicate "acceptance" by themselves and their constituents

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[6] Alabama HB 206, Massachusetts HB 2247, South Carolina S. 220, Tennessee HB 486.

[7] "The issue of whether marijuana has medicinal benefits no longer seems to be in question. Hundreds of scientific studies and thousands of testimonials from patients have established marijuana's effectiveness in controlling nausea of cancer patients undergoing chemotherapy and/or radiation; in enhancing appetites for AIDS patients who suffer a wasting syndrome or who have adverse reactions to their new medications; in reducing intraocular pressure for persons with glaucoma; in giving relief form spasms of muscular dystrophy; and for relieving pain from dozens of other serious diseases. (*Providing Medical Marijuana: The Importance of Cannabis Clubs,* Harvey W. Feldman, Ph.D. & Jerry Mandel, Ph.D., National Institutes of Health 1997.)

of the medical value of marijuana. Appellants can only infer that the Government is asserting that the Supremacy Clause means the federal government has supremacy in discerning facts. For example, because of the Supremacy Clause, the Attorney General may determine that there is *no* accepted use in treatment in the United States even though organizations representing tens of thousands of licensed physicians,[8] and the majority of voters in 26% of the states have clearly indicated their acceptance. Appellants query: If the actions of the country's citizens, medical experts, and their elected representatives are not to be considered as evidence, whose actions are to be considered in determining if there is *any* accepted use of medical marijuana in the United States? When the law states that to be classified Schedule I, a drug must have no accepted medical use in treatment in the United States, it does not mean, as the Government seems to be contending: "accepted by the Attorney General." Rather, the law clearly states: "accepted . . . in the United States."

The logical extension of the irrationality of the government's position would be to have medical experts as well as the citizens and governments of all 50 states accept the use of medical marijuana in treatment, but if the Attorney general says it has no accepted use, that determination should somehow be considered rational because of the Supremacy Clause.

In 1988, the DEA's chief Administrative Law Judge, Francis L. Young, ruled: "Marijuana, in its natural form, is one of the safest therapeutically active substances known . . . [T]he provisions of the [Controlled Substances] Act permit and require the

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[8] By way of example: *The California Medical Board* has published procedures for its physicians when administering medical marijuana in treatment. That organization licenses and regulates over 120,000 physicians. (2004-2005 annual report.)

transfer of marijuana from Schedule I to Schedule II. It would be unreasonable, arbitrary and capricious for the DEA to continue to stand between those sufferers and the benefits of this substance." The DEA administrator inexplicably disregarded this opinion. [9]

In *United States v. Carolene Products Co.* (1938) 304 U.S. 144 at page 153-54, the Supreme Court stated, "We recognize that the constitutionality of a statute, valid on its face may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reasons for the prohibition."

Appellants assert that, with what is known of the current acceptance of medical marijuana in the United States, the decision to maintain a Schedule I classification has been based on policy considerations rather than being a rational determination based on evidence and reason. This type of action is exactly what the rational basis review is designed to guard against. "[P]olicy judgments . . . do not amount to a reasoned justification for declining to form a scientific judgment." (*Massachusetts v. E.P.A.* (2007) 127 S.Ct. 1438.) "We . . . may reverse any such action found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (*Ibid at pgs.* 1462-1463.) "Post-enactment congressional actions and deliberations do not change the meaning of an otherwise unambiguous statute." (*Ibid at pg.* 1443.) The Supreme Court in *Massachusetts v. EPA (supra)* discussed the flexibility and "breadth" of EPA laws in similar ways that the Government in the instant case describes the CSA. However, the court found the broadness of a regulatory process to be more reason, not less, to hold a

[9] US Department of Justice, Drug Enforcement Agency, "In the Matter of Marijuana Rescheduling Petition," [Docket #86-22] (September 6, 1988), p. 57.

regulatory agency to its own requirements. "There is no reason, much less a compelling reason, to accept . . . (an) . . . invitation to read ambiguity into a clear statute." (*Ibid at pg.* 1461.) In the instant case, the law states "*no* currently accepted medical use in treatment in the United States." (emphasis added.) The law could not be more clear. "[T]he use of the word 'judgment' is not a roving license to ignore the statutory text." (*Ibid at pg.* 1461.)

Appellee, in its argument, attempts to divert the court's attention from the clear, unambiguous language of the CSA. The law states that Schedule I drugs must have no currently *accepted* medical use. If the court were to ignore (as the CSA administrators have) the overwhelming body of scientific and medical evidence and assume arguendo, that millions of Americans and thousands of licensed medical doctors are wrong and the results they are experiencing are somehow invalid; there is, nonetheless, currently accepted use in the United States. The fact is simply indisputable.

## B. IT IS IRRATIONAL TO CLASSIFY MARIJUANA IN SCHEDULE I AND MARINOL IN SCHEDULE III.

The Government argues that the statutory procedures established by Congress for the reclassifying of drugs functions adequately and the Government uses the reclassification of Marinol® as an example. (Gov. Br. p. 5.)

The DEA's findings regarding Marinol®, an exact synthesis of the most active ingredient in marijuana, state that there is accepted use in treatment and low potential for abuse. The DEA reclassified Marinol® (dronabinol) from Schedule I to Schedule II in

1986 and then to Schedule III in 1999.[10] In so doing, the Administrator acknowledged that "Dronabinol is the synthetic equivalent of . . . the principal psychoactive substance in marijuana."[11] In reclassifying dronabinol to Schedule III, the Administrator found that[12]:

1. Based on information now available, Marinol® has a potential for abuse less than the drugs or other substances in Schedules I and II.
2. Marinol® is a FDA-approved drug product and has a currently accepted medical use in treatment in the United States; and
3. Abuse of Marinol® may lead to moderate to low physical dependence or high psychological dependence.

The Government fails to explain how it can nonetheless contend that medical marijuana has no accepted use in treatment in the United States. At a minimum, the findings of the DEA administrator indicate that there is *some* accepted use in treatment of marijuana. Marinol® is a concentrated synthesis of the strongest, most active psychoactive ingredient of marijuana (THC). (ER1217.) If natural medical marijuana were to be properly scheduled and regulated, its dosages could also be known and precisely controlled and it would be as safe if not more safe than Marinol®. The findings of the DEA regarding Marinol® are further evidence that Schedule I is an irrational classification of medical marijuana.

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[10] A large corporation (Unimed Pharmaceuticals) received this schedule change for its patented drug, Marinol

[11] 51 Federal Register 17476.

[12] 64 Federal Register 35928.

C. IT IS IRRATIONAL TO PLACE MEDICAL MARIJUANA IN SCHEDULE I OF 21 USCS §812 TO FURTHER THE GOVERNMENT'S LEGITIMATE INTEREST IN PROTECTING THE PUBLIC FROM ANY POTENTIAL HARM FROM USING MARIJUANA.

The Government states at page 13 (and repeats at page 15) of its brief: "Congress's [sic] purpose in combating drug abuse and protecting the public from the physical dangers associated with the use of unsafe and unapproved drugs is manifestly legitimate, and the rules regarding the scheduling of controlled substances are a rational way of pursuing them." Appellants agree that Congress' purpose of protecting the public is legitimate. However, trying to protect the public by scheduling marijuana among the most dangerous narcotics, rather than regulating it, is irrational.

Most compelling is the fact that, as evidenced throughout the record, withholding access to medical marijuana causes medical patients to suffer trauma and, in some cases, death. (See *Gonzales v. Raich,* 2007 U.S. App. LEXIS 5834, in which this court acknowledged that the Appellant in that case might suffer death without access to medical marijuana.) Inversely, in the thousands of years of its use, there are no known cases of death caused by using marijuana. Appellants assert that, in protecting the public from physical dangers, it is irrational to withhold a drug which prevents unnecessary deaths while its use carries no risk whatsoever of causing deaths.

During the time marijuana has been a Schedule I drug, medical use, recreational use, arrests for personal use[13] and availability of marijuana have shown a dramatic

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[13] "U.S. marijuana arrests set an all-time record in 2006. Marijuana arrests totaled 829,627, an increase from 786,545 in 2005. Similar to previous years, 89 percent were

increase. Prohibition, without regulation, has resulted in making marijuana equally available to children and adults alike (ER 1109.); exacerbated the prevalence and risks to the public of an illegal trade which involves other, actually dangerous drugs[14]; resulted in an abundance of readily available marijuana of unregulated quality (ER 1420.); created disrespect for the law by individuals who have had personal experience with medical marijuana and know the classification to be irrational (ER 1087-89.); and has created distrust (especially in young people) of other, perhaps more accurate information that the government disseminates regarding dangerous drugs. (ER 1085, 1088.) As the government continues to commit billions of dollars in resources toward controlling marijuana as a Schedule I substance, other less controlled and regulated substances, such morphine, or even alcohol and tobacco, are less available to adults and/or minors than marijuana. The old saying: 'insanity is doing the same thing over and over and expecting a different result' is apropos. If the government's goal is to protect the public from what it perceives as danger from the use of marijuana, it is irrational to pursue a policy which continues to increase its unregulated availability to the public.

"Marijuana has been almost universally available to American high school seniors (from 83% to 90%) over at least the past 30 years . . . marijuana is reported by 34 percent of teens to be easier to buy than either cigarettes or beer." This is true despite the fact that the government's expenditure on the war on drugs, with the priority being the

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for possession, not sale or manufacture, . . . marijuana possession arrests again exceeded arrests for all violent crimes combined." *FBI Uniform Crime Reports* (September, 2007.)

[14] Johnston, L.D., O'Malley, P.M., Bachman, J.G., & Schulenberg, J.E. (2005). Monitoring the Future, national survey results on drug use, 1975-2004.

enforcement of Schedule I control of marijuana, has increased from $1.65 billion in 1982, to $17.7 billion annually in 1992, and continues to increase.[15]

"Our conclusion is that the present law on cannabis produces more harm than it prevents. It criminalizes large numbers of otherwise law-abiding, mainly young people, to the detriment of their futures. It has become a proxy for the control of public order; and it inhibits accurate education about the relative risks of different drugs including the risks of cannabis itself."[16]

"[T]here is no rational basis for classifying marijuana with the 'hard narcotics,' but, also, there is not even a rational basis for treating marijuana as a more dangerous drug than alcohol." (*People v. Sinclair* (1972) 387 Mich. 91, 104.)

"[T]he current dominant opinion supporting the war on drugs in general, and our antimarijuana laws in particular, is reminiscent of the opinion that supported the nationwide ban on alcohol consumption when I was a student. While alcoholic beverages are now regarded as ordinary articles of commerce, their use was then condemned with the same moral fervor that now supports the war on drugs. The ensuing change in public opinion . . . progressed on a state-by-state basis over a period of many years. But just as prohibition in the 1920s and early 1930s was secretly questioned by thousands of otherwise law-abiding patrons of bootleggers and speakeasies, today the actions of literally millions of otherwise law-abiding users of marijuana, and of the majority of voters in each of the several States that tolerate medical uses of the product, lead me to wonder whether the fear of disapproval by those in the majority is silencing opponents of

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[15] Office of National Drug Control Policy, National Drug Control Strategy: Budget Summary (Washington DC: US Government Printing Office, 1992), pp. 212-214.
[16] Police Foundation of the United Kingdom, *Drugs and the Law: Report of the Foundation (2000).*

the war on drugs. Surely our national experience with alcohol should make us wary of dampening speech suggesting – however inarticulately – that it would be better to tax and regulate marijuana than to persevere in a futile effort to ban its use entirely." (Dissent by Justice Stevens, *Deborah Morse, et al., v. Frederick* (2007) 127 S.Ct. 2618.)

## V. CONCLUSION

Appellants are not, as the Government contends, asking the court to reschedule medical marijuana. Appellants are respectfully asking the court to require Congress and its administrators to act rationally when making classifications according to their own stated requirements. The classifications made under those requirements must be within reason or the law must be rewritten so that the classification makes sense.

Acceptance in this country of the medical benefits of medical marijuana has increased exponentially since the time marijuana was classified Schedule I, since the time subsequent administrative and judicial evaluations have been made, and even since the time this appeal was filed.[17]

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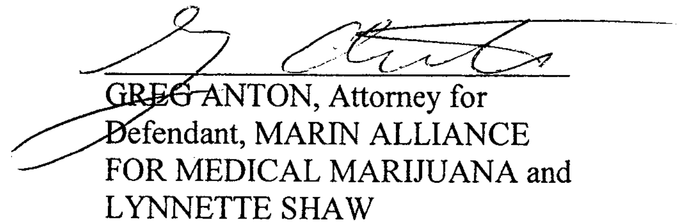
[17] (Sept. 21, 2007) *Latest Pot Discovery Could Yield Major Health Benefits -- And Not Just for Hawaii's Ill; Hawaii Reporter,* citing The Journal of Neuroscience, National Center for Scientific Research (France); and Instuto di Chemica Biomolecolare (Italy); Medical cannabis "may also hold the potential to halt the spread of...neurodegenerative diseases in humans, . . . and other fatal brain disorders. The compound has previously been linked to a reduction in ... Alzheimer's disease." Cannabis is useful in treating breast cancer and other life-threatening diseases. (Sept. 11, 2007). "The medicinal value of cannabis is well documented in the medical literature...in a large survey, ALS patients reported that marijuana relieved the major symptoms of the disease better than prescription medications. The most common reason cited by ALS patients for not considering using cannabis to treat their symptoms was lack of access.; '*Dosing Medical Marijuana: Rational Guidelines on Trial in Washington State*' . (Sept 10, 2007). "Cannabinoids (marijuana) offer a multi-faceted approach for the treatment of Alzheimer's disease" Medscape General Medicine, Gregory T. Carter, MD, MS.

Based on evidence in the record, Appellants estimate that there have been thousands of physician recommended instances of "accepted medical use in treatment in the United States" of medical marijuana, during the time it took the Court to read this brief. It is therefore, irrational to conclude that there is no currently accepted medical use of marijuana in treatment in the United States.

Appellants respectfully ask the Court to find the classification of marijuana as a Schedule I substance under 21 USCS §812 to be unconstitutional.

Dated: September 24, 2007

Respectfully submitted,



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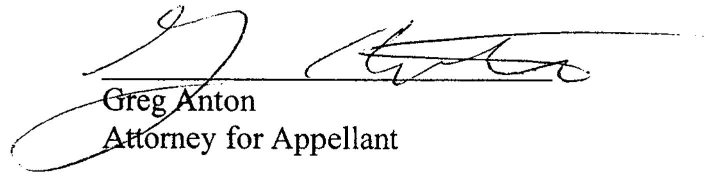
## CERTIFICATE OF COMPLIANCE

Counsel for Appellant hereby certifies that the foregoing Reply Brief for the Appellant satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 32-1. The brief was prepared in Times New Roman and contains 4034 words, according to the count of Corel Word Perfect.



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## CERTIFICATE OF SERVICE

I certify that on September 24, 2007, I filed and served the foregoing Brief for the Appellant pursuant to Federal Rule of Appellate Procedure 25(a)(2)(B), by causing an original and fifteen copies to be delivered to the Clerk of the Court by overnight delivery, and by further causing a paper copy to be delivered to the following counsel for appellants and the government.

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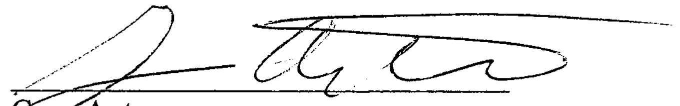

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