IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	)	CR. NO. 10-00384 LEK-01,-02
	)	
Plaintiff,	)	MEMORANDUM OF LAW
	)	
	)	
ROGER CUSICK CHRISTIE, (01)	)	
SHERRYANNE L. CHRISTIE, (02)	)	
formerly known as	)	
“Sherryanne L. St. Cyr”,	)	
SUSANNE LENORE FRIEND, (03)	)	
TIMOTHY M. MANN, (04)	)	
RICHARD BRUCE TURPEN, (05)	)	
WESLEY MARK SUDBURY, (06)	)	
DONALD JAMES GIBSON, (07)	)	
ROLAND GREGORY IGNACIO, (08)	)	
PERRY EMILIO POLICICCHIO, (09)	)	
JOHN DEBAPTIST BOUEY, III, (10)	)	
MICHAEL B. SHAPIRO, (11)	)	
also known as "Dewey",	)	
AARON GEORGE ZEEMAN, (12)	)	
VICTORIA C. FIORE, (13)	)	
JESSICA R. WALSH, also (14)	)	
known as "Jessica Hackman”,	)	
	)	
Defendants.	)	

_____)

MEMORANDUM OF LAW

During last week’s status conference on July 31, 2013, this Court announced, sua sponte, that pursuant to United States v. Martines, 903 F.Supp.2d 1061 (D.Hawaii 2012), defendants Roger Christie and Sherryanne Christie would be permitted to rely upon their religious beliefs at trial to counter the element of “intent to distribute” in the charged conspiracy/substantive possession with intent to distribute offenses. Neither side had

cited or even relied upon Martines in the briefing on the instant RFRA motion in limine, nor was there any opportunity for the parties to brief this particular matter. We therefore wish to take this opportunity to briefly address this issue in order to seek reconsideration and/or a clarification of this Court's ruling.

In Martines, the defendant had claimed to be a Rastafarian and that his conduct constituting the charged crimes of conspiracy/substantive manufacture and possession with intent to distribute marijuana plants were exercises of his religious beliefs protected by the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb et. seq. District Judge Ezra of this Court held in Martines that the prosecution had established its burden under RFRA of having a compelling interest in enforcing the Controlled Substances Act ("CSA") against defendant and that this was the least restrictive means. Consequently, defendant's conduct was not protected by RFRA. 903 F.Supp at 1066-7.

Judge Ezra also went on to state in Martines as follows:

> However, defendant may mount a religious defense to the element of intent. The Government has the burden of proving that Defendant intended to distribute marijuana. Defendant may introduce evidence of his Rastafarian beliefs, including the expert testimony of Professor Erskine, in order to negate the Government's evidence of his intent to distribute.
>
> 903 F.Supp at 1067.

We submit that Judge Ezra's overly expansive language with

respect to "intent to distribute" in this quotation can possibly be misinterpreted. What Judge Ezra really meant was evidenced by the jury instruction on this particular issue which he actually gave during the Martines trial:

> Rastafarianism is a recognized religion and marijuana operates as a sacrament and plays a necessary and central role in the practice of Rastafarianism. A Rastafarian's person possession and use of marijuana is a valid religious defense to possession of marijuana. The defendant has presented evidence that he is a practicing Rastafarian and that in accordance with his religious beliefs, he possessed marijuana for sacramental use. It is solely for you to determine whether a defendant's religious beliefs are sincerely held.
>
> A Rastafarian's personal possession of marijuana for use in his religion is not a defense to the crime of possession of marijuana with intent to distribute. It is not a defense to the crime of conspiracy to manufacture (cultivate) marijuana plants with intent to distribute [emphasis added].
>
> Court's Jury Instructions filed 11/15/12 (Docket #134 at 31, USA v. Martines, USDC(Hawaii) Cr. No. 11-0952DAE.

In this memorandum, the United States attempts to clarify Judge Ezra's language in the Martines opinion and the jury instruction he gave at trial, and its precedential impact upon the instant case.

First, the element of "intent to distribute" differentiates two possessory crimes under the CSA. The first is 21 U.S.C. 844, which is the misdemeanor offense prohibiting the knowing possession of a controlled substance; this crime has generally been referred-to as "simple" possession or "personal use"

possession. The second is the felony crime proscribed by 21 U.S.C. 841(a)(1) of knowingly possessing a controlled substance with intent to distribute. "Distribute", as defined in 21 U.S.C. 802(11), means "to deliver" a controlled substance to another person (NOTE: no sale is necessary for a distribution under the statute). Put another way, to be convicted under 21 U.S.C. 841(a)(1), the offender's possession of the controlled substance was not for his/her own personal use, but rather was for the purpose of delivery to another person or persons.

Second, there are only two sources of Federal law which would authorize a defendant to mount a religious belief defense to criminal charges asserted against him/her, as follows:

-The Free Exercise Clause of the First Amendment to the U.S. Constitution: however, as a result of the Supreme Court's ruling in Employment Division v. Smith, 494 U.S. 872 (1990), neutral laws of general applicability do not violate the Free Exercise Clause even if they actually impair religious practices. In that case, the Supreme Court said that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion prescribes". Id. at 879. In Stormans, Inc. v. Selecky, 571 F.3d 960, 984 (9th Cir. 2009), the Ninth Circuit observed that a law is neutral as long as it does not

"single out . . . the practice of any religion because of its religious content", and a law is generally applicable as long as it is not "substantially underinclusive", meaning that the law does not impose burdens that fall only on religious practitioners and not on other persons". Moreover, it has been recognized that the CSA and associated regulations are both neutral and generally applicable, as they do not single out religious practices, and they affect religious drug use and nonreligious drug use equally. See, e.g., Olsen v. Mukasey, 541 F.3d 827, 832 (8th Cir. 2008), O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 389 F.3d 973, 992 (10th Cir. 2004), af'fd sub nom. Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418 (2006); Multi-Denominational Ministry of Cannabis & Rastafari, Inc. v. Gonzales, 474 F.Supp.2d 1133, 1144 (N.C. Cal 2007). In other words, defendants herein may not mount a Constitutional religious belief defense, even if their religious practices have been impacted by the CSA.

-RFRA: This statute has been briefed at length by the parties, and in its current procedural posture, should this Court find that the Government has met its burden of establishing a compelling interest with respect to these defendants and that this is the least restrictive means, then as a matter of law, the application of the CSA against them is not protected by RFRA, because in that statute's own words, the

"Government may substantially burden a person's exercise of religion" under those circumstances. 42 U.S.C. 2000bb-1(b).

Third, we emphasize these two sources of Federal law because this Court at the status conference seemed to indicate that Martines authorized a third means for a defendant to raise religious belief vis a vis "intent to distribute", which was independent of RFRA. With all due respect, the prosecution does not believe this to be the case. As will be discussed shortly, what Judge Ezra did in Martines was just an adjunct of RFRA, arising from United States v. Bauer, 84 F.3d 1549 (9th Cir. 1996).

Fourth, it arguably may be possible to infer from Judge Ezra's above-quoted language in Martines that even if this Court found for the Government under RFRA-- namely, that the substantial burdening of defendants' exercise of religious beliefs was justified—- a defendant may still put on evidence at trial that these same religious beliefs (which included alleged tenets of distribution of marijuana to others) in order to contend that such a religious belief did not constitute the requisite "intent to distribute". We submit that such an interpretation is not logically possible. If so determined by the Court, RFRA would expressly permit the burdening and curtailing of the defendant's religious beliefs vis a vis distribution and consequently, any religious motive to

distribute would still constitute the requisite intent to distribute.

Fifth, United States v. Bauer, 84 F.3d 1549 (9th Cir. 1996), created the possibility of RFRA protection with respect to the simple possession/personal use of marijuana for religious purposes. However, the Ninth Circuit also cautioned in Bauer that such an exception for simple possession/personal use did not also necessarily apply to other crimes such as possession with intent to distribute. Judge Ezra was very aware of this dichotomy and discussed Bauer at length in his Martines opinion.

Sixth, when Judge Ezra spoke of "intent to distribute" in Martines, he was merely using this term as a shorthand means of differentiating between the crimes of simple possession and possession with intent to distribute. In this way, he was leaving open the possibility for the defendant to contend that the marijuana was solely for his own personal religious use, and not for the purpose of distribution to other persons. This interpretation and understanding was borne-out in the jury instruction which Judge Ezra eventually gave in that case.

Lastly, this Court's attention is also called to Chief U.S. District Judge Mollway's Order issued in United States v. Barnes, USDC(Hawaii) Cr. No. 03-0502SOM on May 18, 2004 (a copy of which is attached as Exhibit "2"), wherein after ruling in the Government's favor on the RFRA issue, she stated:

> [W]ith respect to the 'intent to distribute' element of Count II, Defendant may present evidence that all of the marijuana in issue was intended for personal use. Personal use would include, but need not be restricted to, use for oil in which Defendant alone planned to bathe himself. In connection with proof of an intent to use all the marijuana for an oil bath Defendant will be allowed to state that he intended to follow a recipe from what he understood the Bible to say, that this recipe was accepted by The Hawaii Cannabis Ministry, and that he is a member and minister of The Hawaii Cannabis Ministry.
>
> Attached Ex. "2" at 2.

In other words, consistent with what Judge Ezra did in Martines, Judge Mollway in Barnes would only permit evidence of religious belief for the purpose of establishing personal use.

The bottom line is that if the United States prevails on the RFRA issue herein, then under Martines and Barnes, the defendants may only present evidence of their religious beliefs at trial for the sole purpose of demonstrating their personal use of marijuana in conformance with said beliefs. Religion cannot be used to justify their manufacture and possession thereof with intent to distribute.

It may very well be that the United States' observations discussed herein were consistent with what the Court meant when it issued its bench ruling. If this be the case, then only a

//

//

//

//

clarification for the benefit of the parties is necessary.

DATED: Honolulu, Hawaii, August 5, 2013

FLORENCE T. NAKAKUNI
United States Attorney

/s/ Michael K. Kawahara
By_____
MICHAEL K. KAWAHARA
Assistant U.S. Attorney