IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA **11-20058-CR**

vs. **HON. CECILIA ALTONAGA**

IMAD MAHMOUD EL MOKADDEM

DEFENDANT IMAD MAHMOUD EL MOKADDEM'S
MOTION TO DISMISS THE INDICTMENT

TO THE HONORABLE JUDGE ALTONAGA:

Defendant Imad Mahmoud El Mokaddem, through undersigned counsel, moves to dismiss both Count One and Count Two of the indictment.

Count One charges a "*conspiracy to aid and abet*" the manufacture and distribution of a controlled substance. Count Two charges a conspiracy to sell drug paraphernalia.

Factual Basis

This indictment is one of over twenty resulting from an investigation the government named, "*Operation Cedar Sweep*." *Operation Cedar Sweep* seemed to have as its goal the arrest, detainment, and prosecution of Lebanese Muslim operators of businesses the government alleged to be head shops. The Cedar is the national tree and symbol of Lebanon. It appears prominently on the Lebanese flag. The case is being prosecuted by Alyson Fritz, a National Security Agency Prosecutor. The lead police officer involved is the head of an anti-terrorism task force. When asked by the defense why the government was targeting Lebanese head shop owners, Fritz replied that the Lebanese were the only ones selling cut. Preliminary

defense investigation has cast serious doubt on that assertion. [1]

The government has chosen to charge these offenses as a conspiracy to aid and abet manufacture and distribution of drugs in Count 1; and as conspiracy to sell paraphernalia in Count 2. Although the latter charge appears to more narrowly capture the conduct complained of, the government has chosen to up the ante, and attempt to charge the sale of alleged paraphernalia as an act intended to further and in furtherance of a drug conspiracy. All items defendant is accused of selling are legal; they are not controlled substances at all. The government seeks to turn the sale of legal goods into the overt acts of a drug conspiracy, raising the punishment range from a cap of three years on the paraphernalia charge, to ten to life on the conspiracy. This exercise of charging discretion also arms the government with the presumptions that the accused is a flight risk and a danger to the community when he is under consideration for pretrial release.[2] In this case, the government successfully employed those presumptions to win pretrial detention of Imad Mokaddem, a United States Citizen with no prior arrests, the father of three children who has resided in the Miami area for more than 10 years. Mokaddem's sole alleged involvement in the government's dreamed-up conspiracy was to sell items the government contends can be used to adulterate drugs, cut. There is no allegation that Imad Mokaddem ever possessed, delivered, or agreed to possess or deliver any controlled substance. Moreover, there is no allegation anyone else did either. The government is seeking to make a conspiracy where none existed; and to draw an inference of conspiratorial intent based solely on the statements of police officers made at the point of sale. The government's overreaching efforts in this vein must fail for the following reasons:

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1 *See* Ebay: 94 sellers presently selling powdered caffeine, 440 sellers currently selling inositol, 36 sellers currently offering mannitol, lidocaine, procaine, benzoncaine, and other legal numbing agents are for sale throughout the internet.

2 *See 1*8 USC 3142.

Legal Basis for Dismissal of Both Count 1 and Count 2

(1) It is not legally possible to conspire to aid and abet an incomplete offense.

(2) A conspiracy cannot exist, as a matter of law, where the only conspirators other than the accused are police or government agents.

(3) The Rule of Lenity forecloses prosecution for the more general offense of conspiracy to aid and abet manufacture and distribution of a controlled substance when the same conduct is prohibited by the more specific offenses of conspiracy to distribute drug paraphernalia, sale of drug paraphernalia, and 21 USC §§ 843 (6) and (7) and those offenses are less harshly punished.

(4) Count Two of the Indictment must be dismissed because it fails to specify what item of drug paraphernalia, the defendant is accused of conspiring to sell and offer for sale. This omission deprives the accused of that degree of notice required by the Fifth Amendment due process clause.

(5) This indictment violates Equal Protection of the Law to the extent the government singled out Lebanese nationals for prosecution while leaving uncharged, other similarly situated non-Lebanese.

Arguments for Dismissal of Count 1 and Count 2

I. **A conspiracy to aid and abet may not exist as a matter of law absent a completed object offense; and**

II. **A conspiracy cannot exist, as a matter of law where the only conspirators other than the accused are police or government agents.**

While count one of the indictment charges Imad Mokaddem with knowingly and intentionally agreeing to aid and abet the manufacture and distribution of a controlled substance, it does not allege, nor could it allege, that any such substance was ever manufactured or distributed. The government's evidence allegedly consists of recordings of police undercover officers discussing their plans to use the legal substances allegedly sold to them by Imad and by his brother, Ali, for the illegal purpose of adulterating controlled substances. It is well settled that liability for conspiracy does not arise when the accused is

alleged to have conspired only with police or their agents.[3] No inherently illegal drugs were ever seized in this case. What the government seeks to punish so punitively, is acquiescence with, or silence in the face of its own agent's expressed desire to use the substances for drug--cutting purposes. One can see that absent some completed crime, this method of charging is very close to thought policing; which is precisely why the law does not permit such prosecutions.

In *United States v. Superior Growers Supply,*[4] the court held that an indictment charging grow equipment sellers with conspiracy to aid and abet the manufacture of marijuana failed to state an offense because it did not allege that any marijuana had ever been manufactured. The court reasoned that one cannot criminally aid and abet that which has not occurred, nor can one be held criminally accountable for conspiring or agreeing to help in aiding that which has not yet occurred.

In *Superior Growers*, the court was confronted with sellers of lights and other equipment used to grow hydroponic marijuana indoors. The indictment alleged in 89 charged overt acts that the sellers: advertised in High Times Magazine; sold literature that concerned growing of marijuana; provided information and advice on growing marijuana; and accepted payment for materials in hashish or marijuana. In ruling upon Superior's motion to dismiss, the trial court astutely noted, "There is no allegation in the indictment here of any underlying crime."[5]
On appeal to the Sixth Circuit, the government contended that by charging a *conspiracy* to aid and abet, it had relieved itself of the burden of having to prove that a crime had actually occurred. The court disposed of this argument by holding, "Without an underlying crime, there

3 *See, United States v. Delgado*, No. 07-41041 Slip Op. 5th Cir. January 19, 2011, United States v. Lewis, 53 F.3d 29, 33 (4th Cir.1995)
4 982 F.2d 173 (6th Cir. 1992).
5 S*uperior Growers,* 982 F.2d at 175.

can be no knowledge or intent to further it."[6]

Our indictment pleads no overt acts; no precise dates; no times or places where the alleged misconduct occurred. No description beyond the conclusory allegations referencing the statute allegedly violated are provided. As such, the indictment in its current states deprives the accused of constitutionally fair notice of the charges and for that reason alone should be dismissed.[7] The Supreme Court has cautioned,

> Undoubtedly the language of the statute may be used in the general description of the offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description with which he is charged.[8]

Because the present indictment fails to charge facts sufficient to provide constitutionally sufficient notice under the Fifth Amendment, it must be dismissed.

Without waiving the deprivation of notice, Imad Mokaddem further moves for dismissal because the government could not plead or proffer any set of facts, based on his alleged conduct of selling legal substances to undercover police officers who hint at a plan to use the substance to adulterate illegal drugs, that would bring him within the scope of either allegation charged.[9] The Supreme Court has expressly held that evidence of a particular buyer's expression of intent to use the items as paraphernalia to the seller at the time of purchase is not legally sufficient evidence of the seller's culpable mental state in selling the items.[10]

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6 *Id*. at 178.

7 *See Fleisher v. United States,* 302 U.S. 218, 58 S.Ct. 148, 82 L.Ed. 208 (1937) for the proposition, "To be legally sufficient, the indictment must assert facts which in law constitute an offense; and which, if proved, would establish prima facie, the defendant's commission of that crime. *See also United States v. Polychron,* 841 F.2d 833 (8th Cir.) cert. denied 488 U.S. 851, 109 S.Ct. 135, 102 L.Ed.2d 107 (1988) Whether an indictment adequately alleges the elements of the offense is a question of law subject to de novo review. *United States v. Chaney*, 964 F.2d 437, 446 (5th Cir. 1992). A bill of particulars cannot cure a legal deficiency; rather, the proper result is dismissal of the indictment. *See, United States v. Sturman,* 951 F.2d 1466 (6th Cir. 1991), cert. denied 112 S.Ct. 2964, 119 L.Ed.2d 586 (1992).

8 *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907 (1974).

9 Rule 12 (b) (2) permits dismissal when, assuming the establishment of the government's allegations, no offense had been proven. *United States v. Moesser, Slip op*. 2010 WL 4811945 D. Utah, November 19, 2010.

10 *Posters "N" Things., LTD., v. United States*, 511 U.S. 513, 522 114 S.Ct. 1747, 1752 128 L.Ed.2d 539 (1994), in which the Court, interpreting the previous rendition of Section 863 said, "We disagree with Justice Scalia insofar as he would hold that a box of paper clips is converted into drug paraphernalia by the mere fact that a customer mentions to the seller

Under the government's strained reasoning, the clothing store clerk who sold a ski mask to a person claiming that he planned to use it in a robbery would become a co-conspirator in the robbery. This would be the case even if the customer was actually an undercover officer who had no real intent to commit a robbery.

Summarizing the evidence that brought the accused's conduct in selling cut within the purview of a controlled substances conspiracy charge, the court in *United States v. Hammoud*[11], said,

> The evidence shows an agreement between Hammoud and Stroy[12] to distribute cocaine. (Because Papincolas participated in the drug ring only *after* becoming a government agent, Hammoud cannot be convicted for conspiring with him. *See, United States v. Lewis*, 53 F.3d 29, 33 (4th Cir. 1995).

In the case at bar, there was no Stroy. There was no non-police agent. It is clear one cannot conspire with government agents, and one cannot conspire to aid and abet a non-existent crime. As the court stated in *Superior Growers*,

> The only way to make the indictment stick is to supply an inference that customers who purchase hydroponic equipment, and customers who buy marijuana-related publications, and customers who seek advice on the growing of marijuana, (who we must assume are distinct groups since the indictment does not allege otherwise); have the specific intent to grow marijuana. To supply that inference would be to ignore the Supreme Court's admonition in *Direct Sales Co. v. United States*, 319 U.S. 703, 63 S.Ct. 1265, 87 L.Ed. 1674 (1943), that charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what … [is] called a drag net to draw in all substantive crimes. *Id.* at 711, 63 S.Ct. At 1269.
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> We believe the result reached here is reinforced by a comparison with two Supreme Court cases. *United States v. Falcone*, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940) and *Direct Sales*, 319 U.S. 703, 63 S.Ct. 1265. In *Falcone*, the Supreme Court affirmed the judgment reversing the convictions of sugar and yeast suppliers who knowingly sold the products to illegal distillers. The defendants had been charged with conspiring to violate the revenue laws by operation of illicit stills. In affirming the Court stated,

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that the paper clips will make excellent roach clips. Section 857 (d) states that items "primarily intended" for use with drugs constitute paraphernalia, indicating that it is the likely use of customers generally, not any particular customer, that can render a multiple-use item drug paraphernalia.

11 2006 WL 2277729 (4th Cir. 2006) unpublished

12 Stroy was not an informant or government agent, but an actual co-conspirator.

> Those having no knowledge of the conspiracy are not conspirators, and one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a part but of which the supplier had no knowledge. Id. 311 U.S., at 211, 61 S.Ct. At 207. By contrast, in *Direct Sales*, the Supreme Court affirmed the conviction of a drug manufacturer and wholesaler who had, over a period of years, supplied large amounts of morphine sulfate to a doctor who was illegally distributing the drug. The Court distinguished *Falcone*:
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> The commodities sold in *Falcone* were articles of free commerce, sugar, cans, etc. They were not restricted as to sale by order form, registration, or other requirements. When they left the sellers stock and passed to the purchaser's hands, they were not in themselves restricted commodities, incapable of further legal use except by compliance with rigid regulations, such as apply to morphine sulfate. All articles of commerce may be put to illegal ends. But all do not have the same susceptibility to harmful and illegal use. Nor, by the same token, do all embody the same capacity, from their very nature, for giving the seller notice the buyer will use them unlawfully. Gangsters, not hunters or small boys, comprise the normal private market for machine guns. So drug addicts furnish the normal outlet for morphine which gets outside the restricted channels of legitimate trade. *Id*. 319 U.S. At 710, 63 S.Ct. At 1267.

In the present case, the items the government alleges convert Imad from legitimate merchant into willful drug conspirator were all legal and uncontrolled substances with legitimate uses. Inositiol is Vitamin B, sold in every vitamin shop as a dietary supplement. Caffeine is sold in very high doses at *Starbucks*. Powdered caffeine is sold freely to be used for its intended purpose as a stimulant. Benzocaine and Lidocaine are legal numbing agents or topical anesthetics sold in powder form for treatment of toothaches, sunburn, and pain from fresh tattooing. Mannitol is a sugar alcohol made from fructose that does not increase blood glucose levels, making it a good sweetener for diabetics. In doses greater than twenty grams, it has laxative qualities. It is also useful as a facilitator that helps other substances cross the blood brain barrier more efficiently. Combinations of these substances are sold as legal party powders – that is safer, legal alternatives to cocaine. Sale of these of these substances actually diverts users from cocaine.

Yet the government contends that, when a police agent makes statements at or near the time of purchase hinting that the undercover officer/agent intends to use the substance illegally to cut cocaine or other drugs, some duty on the part of the seller kicks in. The nature and scope of the duty is unclear. Does the government believe that the seller must refrain from making the sale? Must the seller report the incident to police? The reason the precise contours of the duty are not clear is because no such duty exists under our law. The Supreme Court did away with any such notion in 1994 when it expressly held the buyer's statement of intent insufficient evidence of the seller's culpable mental state. The Court explained,

> Congress did not include among the listed factors a defendant's statements about his intent or other factors directly establishing subjective intent. This omission is significant in light of the fact that the parallel list contained in the Drug Enforcement Administration's Model Drug Paraphernalia Act, on which § 857 was based, includes among the relevant factors [statements by an owner...concerning [the object's] use and [d]irect or circumstantial evidence of the intent of an owner...to deliver it to person whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act. [13]

It is crucial to note that the sole evidence of a conspiracy arose when the undercover agent made statements in the presence of Imad and Ali indicating that he personally intended to use these substances to cut drugs. Stated differently, without the evidence that the police officer expressed an intention to violate the drug laws when he bought the substances, there is no evidence that the defendants harbored knowledge or intent when they sold the substances. Because there can be no conspiracy with police, the indictment must be dismissed.

III. The Rule of Lenity forecloses prosecution for the more general offense of conspiracy to aid and abet manufacture and distribution of a controlled substance when the same conduct is prohibited by the more specific offenses of conspiracy to distribute drug paraphernalia, sale of drug paraphernalia, and 21 USC §§ 843 (6)and (7), and those offenses are less harshly punished.

Several statutes arguably cover the same ground as the government's charge of

13 Posters 'N' Things, LTD., v. United states, 511 U.S. 513, 520 114 S.Ct. 1747, 1751 128 L.Ed.2d 539 (1994)

conspiracy to aid and abet the manufacture of a controlled substance. Close reading of all possible statutes is required to appreciate this point.

Failure to State an Offense/ Deprivation of Notice/Deprivation of Due Process

Prior to beginning this statutory analysis, Imad seeks to clarify that it is only the government's incorrect reading and interpretation of the term *manufacture,* that results in this conflict between statutes. The truth is that knowing sale of items that can be used to adulterate a controlled substance, even with knowledge of their intended illicit purpose does not violate any of the statutes charged in the indictment. That is the case because cutting or adulterating already existent controlled substances is not *manufacturing* given the ordinary usage of the term. According to Webster, to manufacture, is "to make (as raw material) into a product suitable for use."[14] The substance existed, it had already been manufactured from raw ingredients before adulterants were added. Adulterating is not manufacturing. "Manufacture," is also specifically defined in Title 21. Section 802 (15) provides,

> The term "manufacture" means the production, preparation, propagation, compounding or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis and includes any packaging or repackaging of such substance or labeling or relabeling of its container...

Had the legislature wished to include adulterating or diluting within the definition of manufacture, it could have readily done so.

In construing statutes, courts should first consider the language of the act itself.[15]

This is not the first time the government has sought to impute criminal liability by attempting to read the paraphernalia statute in an unjustifiably expansive manner. In *United*

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14 *United States v. Hoang-Liang Lin*, 962 F.2d 251, 255 (2nd Cir.1992) *citing* Webster's New International Dictionary 1378 (3d ed. 1971).

15 *Hughey v. United States*, 495 U.S. 411, 415, 110 S.Ct. 1979, 1982, 109 L.Ed.2d 408 (1990).

States v. Hoang-Liang Lin,[16] the Second Circuit reversed the conviction of a manufacturer of what the government characterized as crack cocaine vials. In *Lin*, the court rejected the government's argument that manufacturing a controlled substance included the manufacture of packages or containers for storing illegal narcotics like crack. The Second Circuit said,

> As defined in the dictionary, to manufacture is to make (as raw material) into a product suitable for use. Webster's New International Dictionary 1378 (3d ed. 1971). While packaging can certainly be an element in some manufacturing processes, Congress's listing of some aspects of that process, such as compounding and converting, while omitting others, such as packaging and containing, leads us to conclude that congress did not intend the phrase manufacturing a controlled substance to include the manufacture of packages or containers.

Likewise, in our case, Congress made no mention of adulterants and diluents or "*cut"* when it enumerated items it meant to condemn as drug paraphernalia. Certainly had Congress wished to include such items it could have readily done so. Moreover, no amendment to the act to include said items was made after *Lin*.

In its state statutes, Texas specifically listed cutting agents. Section 4812.002 (F) of the Texas Controlled Substances Act condemns as drug paraphernalia:

> (F) a dilutant or adulterant, such as quinine hydrochloride, mannitol, inositol, nicotinamide, dextrose, lactose, or absorbent blotter-type material, that is used or intended to be used to increase the amount or weight of or to transfer a controlled substance regardless of whether the dilutant or adulterant diminishes the efficacy of the controlled substance.

Florida, likewise, was able to articulate adulterants and diluents into its paraphernalia statute. Section 893.145 of Title XLVI of the Florida Statutes condemns paraphernalia. Subsection (6) specifically enumerates:

> Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose, used, intended for use, or designed for use in cutting controlled substances.

The DEA Model Drug Paraphernalia Act of 1979 expressly condemned as prohibited

16 962 F.2d, 251 (2nd Cir. 1992).

paraphernalia: “Diluents and adulterants such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose, used, intended for use, or designed for use in cutting substances.”[17] The silence of congress in failing to enumerate or articulate a prohibition of adulterants and dilutants in 21 U.S.C. § 863, clearly demonstrates a congressional intent to not include these substances. One need only look at the fine detail employed by Congress to include other items it sought to ban as illegal paraphernalia to gain full appreciation of the significance of this omission: “(1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes, with or without screens, permanent screens, hashish heads, or punctured metal bowls; (2) water pipes; (3) carberution [sic] tubes and devices; (4) smoking and carberution masks; (5) roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand; (6) miniature spoons with level capacities of one tenth cubic centimeter or less...” Such precise definitions surely prove that the omission of an entire class of items condemned as paraphernalia by other governing bodies and by the DEA Model Act evinces an intent to exclude these items from prohibition. This was precisely the rationale employed the Second Circuit in reversing the conviction in *Hoang-Liang Lin*. The Second Circuit held,

> ...the omission of “cocaine vials” from the list of specific examples of paraphernalia makes clear that congress, although strongly influenced by the Model Act, decided to enact a narrower statute, one that did not include packages and containers among its proscriptions.[18]

Moreover, Congress's decision to exclude these items from the purview of its paraphernalia laws was a rational one. Assuming the government is correct; and people use these substances to dilute drugs, then street drugs are weaker, overdoses are reduced, and drugs

17 Article I Section (6) Model Drug Paraphernalia Act, DEA, Dept. of Justice, August 1979.
18 *Id.*, 962 F.2d at 257.

become less effective, hence less desirable. Imad, therefore moves to dismiss the indictment for failing to state an offense, as for the failure to provide that degree of fair notice that due process of law requires.

Conflict of Law and the Rule of Lenity

The doctrine of *in pari materia* and the Rule of Lenity are applied when two statutes cover the same subject matter. As Justice Scalia held in *Branch v. Smith***, "**And it is, of course, the most rudimentary rule of statutory construction (which one would have thought familiar to dissenters so prone to preachment on that subject, see, *e.g., post,* at 1454, 1458, 1459) that courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes:

> "The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them.... If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute ...; and if it can be gathered from a subsequent statute *in pari materia,* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *United States v. Freeman,* 3 How. 556, 564-565, 11 L.Ed. 724 (1845).

Branch v. Smith 538 U.S. 254, 281, 123 S.Ct. 1429, 1445 (U.S.,2003).

"The policy supporting *in pari materia* is that "a legislature does not deliberately enact inconsistent provisions, when it is cognizant of them both, without expressly recognizing the inconsistency." In other words, the canon is based on the idea that a lawmaking body will not pass a law that conflicts with a prior law it has passed without recognizing that contradiction."[19]

In our case, the government has charged the same offense two different ways, and could have charged it a third as well. 21 U.S.C. § 841 was passed by the legislature on October 27,

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19*U.S. v. Moesser* 2010 WL 4811945, 7 (D.Utah) (D.Utah,2010) *citing* 2B Sutherland Statutory Construction 51:1 (7th ed. 2010 (WL updated)).

1970. The predecessor version of 21 U.S.C. § 863 (21 U.S.C. § 857) was passed into law on October 27, 1986. Section 841 is a general law. Section 863 is more specific. The penalties for violation of section 841 are far more harsh than those applied to section 863.

It is well settled that when a criminal statute is ambiguous in its application to certain conduct, the rule of lenity requires it to be construed narrowly.[20] This rule "requires that unclear penal statutes must be construed in favor of the accused." *Mahn v. Gunter,* 978 F.2d 599, 601 (10th Cir.1992). However, "[t]he rule's application is limited to cases where, after reviewing all available relevant materials, the court is still left with an ambiguous statute." *United States v. Wilson,* 10 F.3d 734, 736 (10th Cir.1993) (citing *Smith v. United States,* 508 U.S. 223, 239, 113 S.Ct. 2050, 124 L.Ed.2d 138(1993))[21]

In our case, the government contends that Imad: (1) conspired to sell paraphernalia which in the context of this case, it claims is any material intended or designed for use in manufacturing a controlled substance, thus bringing Imad within the purview of Section 863; and (2) that he conspired to aid and abet the manufacture of drugs by selling paraphernalia. These two charges have no elements different from one another.

We begin with the government's charge in Count One of the indictment, namely that:

> IMAD MAHMOUD EL MOKADDEM and ALI MAHMOUD EL MOKADDEM did knowingly and intentionally conspire, confederate, and agree with each other and with other persons known and unknown to the grand jury to aid and abet the manufacture and distribution of a controlled substance, in violation of Title 21United States Code Section 841 (a)(1) and Title 18, United States Code Section 2; all in violation of Title 21 United States Code Section 846.

21 USC § 841 (a)(1) provides,

> Except as authorized by this subchapter,it shall be unlawful for any person knowingly or intentionally –

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20 *United States v. McLemore,* 28 F.3d 1160, 1165 (11th Cir. 1994) *citing United States v. Bass,* 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971).

21 *U.S. v. Fillman* 162 F.3d 1055, 1058 (C.A.10 (Kan.),1998

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance.

18 USC § 2 provides,

§ 2 Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

21 USC § 846 provides,

§ 846 Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The government acknowledged that, even under its theory of prosecution, Imad could also be charged with sale of paraphernalia. In fact, that is what the government alleged in Count Two of its indictment. Count two alleges that:

IMAD MAHMOUD EL MOKADDEM and ALI MAHMOUD EL MOKADDEM did knowingly and intentionally, combine, conspire, confederate, and agree together with each other, and with others known and unknown to the Grand Jury, to sell and offer for sale drug paraphernalia, that is equipment, product, and material of a kind which is primarily intended and designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, and otherwise introducing into the human body a controlled substance, in violation of Title 21, United States Code, Section 863 and Title 18 United States Code, Section 2, all in violation of Title 21, United States Code, Section 846.

The statute upon which this charge is based, 21 U.S.C. § 863 provides,

§ 863. Drug paraphernalia

(a) In general

It is unlawful for any person--

(1) to sell or offer for sale drug paraphernalia;

(2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia; or

(3) to import or export drug paraphernalia.

(b) Penalties
Anyone convicted of an offense under subsection (a) of this section shall be imprisoned for not more than three years and fined under Title 18.

(c) Seizure and forfeiture
Any drug paraphernalia involved in any violation of subsection (a) of this section shall be subject to seizure and forfeiture upon the conviction of a person for such violation. Any such paraphernalia shall be delivered to the Administrator of General Services, General Services Administration, who may order such paraphernalia destroyed or may authorize its use for law enforcement or educational purposes by Federal, State, or local authorities.

(d) "Drug paraphernalia" defined

The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under this subchapter. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, methamphetamine, or amphetamines into the human body, such as--

(1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(2) water pipes;

(3) carburetion tubes and devices;

(4) smoking and carburetion masks;

(5) roach clips: meaning objects used to hold burning material, such as a marihuana

cigarette, that has become too small or too short to be held in the hand;

(6) miniature spoons with level capacities of one-tenth cubic centimeter or less;

(7) chamber pipes;

(8) carburetor pipes;

(9) electric pipes;

(10) air-driven pipes;

(11) chillums;

(12) bongs;

(13) ice pipes or chillers;

(14) wired cigarette papers; or

(15) cocaine freebase kits.

(e) Matters considered in determination of what constitutes drug paraphernalia
In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

(1) instructions, oral or written, provided with the item concerning its use;

(2) descriptive materials accompanying the item which explain or depict its use;

(3) national and local advertising concerning its use;

(4) the manner in which the item is displayed for sale;

(5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;

(7) the existence and scope of legitimate uses of the item in the community; and

(8) expert testimony concerning its use.

(f) Exemptions

This section shall not apply to--

(1) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items; or
(2) any item that, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

21 U.S.C. § 843 entitled *Prohibited Acts* contains two subsections which, following the government's strained theory that the substances sold were cut, and that cut is a component used in manufacturing controlled substances, also applies more aptly to the conduct alleged and is less harsh in penalty than the 841 count. This statute provides that, "It shall be unlawful for any person knowingly or intentionally:

(6) to possess any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or material which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance or listed chemical in violation of this subchapter or subchapter II of this chapter;

(7) to manufacture, distribute, export, or import any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or material which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance or listed chemical in violation of this subchapter or subchapter II of this chapter or, in the case of an exportation, in violation of this subchapter or subchapter II of this chapter or of the laws of the country to which it is exported;

21 U.S.C.A. § 843

The punishment for a violation of section 863 is capped at three years. The punishment for a violation of section 843 is capped at four years.

These doctrines of statutory construction are only to be applied when enactments are truly in conflict. It is the government's theory that gives rise to the conflict. Imad contends that

the statute can be reconciled. However, if the Court accepts the government's interpretation, then the statutes cannot be reconciled and the rule of lenity must apply.

The only way to reconcile the statute to avoid the conflict of law, and application of the rule of lenity, is to recognize that a conspiracy to aid and abet the manufacture and distribution of drugs can only exist if there has been a completed act occurring in violation Section 841. Only then is there a crime in existence to have aided and abetted. In the absence of such a completed crime, Count One cannot lie.

For all the foregoing reasons, the indictment should be dismissed.

IV. Count Two of the Indictment must be dismissed because it fails to specify what item of drug paraphernalia, the defendant is accused of conspiring to sell and offer for sale. This omission deprives the accused of that degree of notice required by the Fifth Amendment due process clause.

Count 2 of the indictment fails to plead with specificity the precise items the sale of which are alleged to bring Imad within the purview of Section 863. This omission deprives Imad of fair notice and due process of law. Moreover, this indefinite charge provides no protection from multiple prosecutions for the same conduct. As such, the indictment must be dismissed.

V. Equal Protection/Selective Prosecution

Imad argues that this prosecution was selectively instituted against Muslim/Lebanese defendants, as such it violates equal protection of the law.

The Equal Protection Clause precludes selective enforcement of the law based on race, reliegion, or national origin. *Whren,* 517 U.S. 806, 811 116 S.Ct. at 1774-75; *Britton v. Rogers,* 631 F.2d 572, 577 (8th Cir.1980), *cert. denied,* 451 U.S. 939, 101 S.Ct. 2021, 68 L.Ed.2d 327 (1981). A person claiming unequal enforcement of a facially neutral statute must

show both that the enforcement had a discriminatory effect, and that the enforcement was motivated by a discriminatory purpose. *United States v. Armstrong,* 517 U.S. 456, 465 116 S.Ct. 1480, 1487, 134 L.Ed.2d 687 (1996); *see United States v. Brown,* 9 F.3d 1374, 1375-76 (8th Cir.1993), *cert. denied,* 511 U.S. 1043, 114 S.Ct. 1568, 128 L.Ed.2d 213 (1994). To establish discriminatory effect in a race case, the claimant must show people of another race violated the law and the law was not enforced against them. *Brown,* 9 F.3d at 1376; *see Armstrong,* 517 U.S. at 465, 116 S.Ct. at 1487. To show discriminatory purpose, the claimant must show the official's decision to enforce the law was at least partially based on race, or other impermissible classification. *See Brown,* 9 F.3d at 1376. If the claimant shows both discriminatory effect and purpose, the burden shifts to the Government to show the same enforcement decision would have been made even if the discriminatory purpose had not been considered. *Sylvia Dev. Corp. v. Calvert County, Md.,* 48 F.3d 810, 819 n. 2 (4th Cir.1995).

The government has charged 27 defendants in this Operation Cedar Sweep. The great majority are Muslim/Lebanese. When confronted off the record with this seeming inequity in prosecutorial discretion, the government informed the defense that only Muslim/Lebanese owned shops were selling these items.

To date, the defense has located two other non-Muslim, non-Lebanese shops, within the Southern District of Florida, selling similar products to those for which Imad is being prosecuted. These shops continue to operate openly and obviously to the present day. Similar products are presently openly sold by non-Muslim, non-Lebanese, shops throughout the United States. Moreover, similar products are being sold by the 55 gallon drum on Ebay and elsewhere on the internet.[22] Moreover, this government operation is code named *Operation*

22 The addresses for the businesses selling these products online are in the U.S.

Cedar Sweep.

The significance of this name cannot be overstated. It is well known that the Cedar Tree is the national symbol of Lebanon. The Cedar tree is at the center of the Lebanese flag. If this investigation was code named *Cedar Sweep* when it began, it begs the question, why? Why was this prosecution directed from its inception toward Muslim/Lebanese persons?

Imad moves for additional discovery of all materials touching upon this exercise of prosecutorial "discretion," including but not limited to: a list of all *Cedar Sweep* cases by name of the accused and case number; the race, ethnicity, and religion of all *Cedar Sweep* defendants; all investigative reports from all *Operation Cedar Sweep* cases; all videos and recordings from all *Cedar Sweep* cases; all internal memoranda in any form, emails, text messages, or other records of electronic communication, concerning *Operation Cedar Sweep* between law enforcement involved in the cases and the Office of the United States Attorney.

Defendant further moves for an evidentiary hearing on these equal protection claims. Defendant is making separate claims based on race, ethnicity, and religion.

Defendant moves for dismissal of the indictment.

Conclusion

For all of the foregoing reasons, Defendant moves to have the indictment dismissed, and for full discovery as set out above.

WHEREFORE PREMISES CONSIDERED, Defendant Imad Mokaddem moves the Court to issue an order dismissing the indictment and granting additional discovery.

Respectfully Submitted,

Norman Silverman
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appearing *pro hac vice*

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CERTIFICATE OF CONFERENCE

I Norman Silverman certify that my office contacted AUSA Allyson Fritz but was not available. A message was left regarding this filing. Counsel has not conferred with AUSA Allyson but anticipate she will be opposed to this filing.

/s/

Norman J. Silverman

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing Motion to Dismiss of the Indict was served be electronic mail on March 22, 2011 on all counsel or parties of record on the service list

/s/

Norman J. Silverman