

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 10-00162-06-CR-W-FJG
)	
NARICCO T. SCOTT,)	
)	
Defendant.)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION
TO DISMISS FOR THE UNCONSTITUTIONALITY OF 21 U.S.C. § 841

Comes now the United States of America, through its undersigned attorneys, and offers the following suggestions in opposition to the motion to dismiss due to the unconstitutionality of the statutes in violation (D.E. 378), filed by the defendant, NaRicco T. Scott. The Government offers the following suggestions in opposition to Scott's motion.

I. Argument and Authorities

Scott has been charged, by indictment, with: (1) Count One - conspiracy to distribute cocaine, in an amount of five kilograms or more, and crack cocaine, in an amount of five grams or more, in violation of Title 21, United States Code, Sections 841(a)(1), (b)(1)(A) and 846; (2) Counts Four and Five - distribution of some amount of crack cocaine in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(C); (3) Count Eleven - possession with intent to distribute crack cocaine, in an amount of fifty grams or more, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A); and Count Twelve - possession of a firearm in furtherance of a drug trafficking crime in violation of Title 18, United States Code, Section 924(c)(1)(A).

Although entitled as “Judicial Notice” (D.E. 378), Scott argues that the statutes under which he is charged, Title 18, United States Code, Sections 924(c)(1)(A), Title 21, United States Code, Sections 841(a)(1), (b)(1)(A), and 846, are not valid laws. First, Scott alleges that he cannot be charged in violation of Title 21 because it is a non-positive law. Additionally, Scott alleges that the law is inapplicable to him because he is “not a party to any contract or agreement to the Federal Corporate Government,” and so the federal government has no authority over him. (D.E. 378 at 3.) Scott also argues that the statutes which he has violated are unconstitutional because their promulgation exceeds the scope of congressional power under the Commerce Clause. As well as being unconstitutional, Scott contends that the statutes are unlawful because they were not promulgated in the Federal Register, and therefore lack the force and effect of law. Finally, Scott argues that his indictment is invalid because it does not establish the connection between interstate commerce and the crime.

Despite Scott’s first argument that Title 21 is a non-positive law it is still enforceable. Scott is correct that Title 21 has not yet been through the reviewing and editing process described in *Positive Law Codification in the United States Code* at 2, available at [http:// uscode.house.gov/codification/PositiveLaw Codification.pdf](http://uscode.house.gov/codification/PositiveLawCodification.pdf). However, “it has been enacted by Congress as an enforceable criminal statute [and] provisions in ‘non-positive laws’ are prima facie evidence of the actual law.” *United States v. McDowell*, No. 09-20133, 2011 WL 675916, at *1 (D.Kan. 2011). In addition, Title 21 includes Congress’s intent stating that it can be enforced against “any person,” regardless of individual consent or contract. Title 21, United States Code, Sections 841, 846 and 848.

Scott ignores precedent established by the judicial system and argues that Title 21 is unconstitutional because it exceeds Congress's power to regulate interstate commerce. Congress and the federal courts have expressly stated that drug activity affects interstate commerce, and therefore may be regulated under the Commerce Clause. *See* 21 U.S.C. § 801 (3)-(6); *United States v. Patterson*, 140 F.3d 767, 772 (1998); *United States v. Owens*, 996 F.2d 59, 61 (1993). Likewise, Title 18, United States Code, Section 924(c) also does not violate the Constitution because it "applies only to the use or carrying of a firearm during or in relation to a *federal crime*. It is a valid measure designed to deter the violence associated with drug trafficking, an activity validly regulated by Congress under the Commerce Clause." *United States v. Owens*, 996 F.2d 59, 59 (5th Cir. 1993) quoting *United States v. Dumas*, 934 F.2d 1387, 1390 (6th Cir. 1990); *see also United States v. McMillian*, 535 F.2d 1035, 1037 n.1 (8th Cir. 1976). Scott's claim that Congress does not have the power to regulate drug activities rendering the statutes unconstitutional is not supported by statute or case law.

Scott's additional argument, that the statutes are unconstitutional because they were not first promulgated in the Federal Registry, is also erroneous. He mistakenly relies on the Administrative Procedure Act (APA) for support. However, the APA applies to administrative agencies and the regulations they promulgate, not the statutes passed by Congress. *See* 5 U.S.C. § 551(1) ("'[A]gency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include –(A) the Congress.").

Finally, Scott challenges the sufficiency of the indictment because it did not include the connection between the violations and interstate commerce. Scott argues that the indictment is invalid, and therefore he was never actually charged resulting in the violation of his Due Process

rights. The Federal Rules of Criminal Procedure require only that the indictment be “plain, concise and definite written of the essential facts,” and that it gives the “official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated.” Fed.R.Crim.P. 7(c)(1). Interstate nexus is not a statutory element of the charged offense under Title 21, United States Code, Sections 841 and 846, and therefore does not need to be mentioned in the indictment. Additionally, many circuits have held that proof of interstate nexus is not required in order to establish jurisdiction or for an indictment to be valid when indicting violations of Section 841. *United States v. Atkinson*, 513 F.2d, 39-40 (4th Cir. 1975); *United States v. Fernandez*, 388 F.3d 1199 (9th Cir. 2004). Additionally, Scott’s claim ignores years of precedent allowing the federal government to regulate both intrastate and interstate drug crimes. *Curran v. Wallace*, 306 U.S. 1, 11 (1939); *White v. United States*, 399 F.2d 813 (8th Cir.1968). “It is well-established...that drug trafficking and other forms of organized crime have a sufficient effect on interstate commerce to allow for regulation by Congress.” *United States v. Crenshaw*, 359 F.3d 977, 986 (8th Cir. 2004).

Scott’s main complaint is that the federal government does not have the authority over him and he tries to establish this by stating that regulating drug activity is beyond the scope of Congress’s enumerated powers, citing the APA, and arguing that the indictment and Title 21 are invalid. Despite these assertions, Title 21 is enforceable, and Scott’s motion should be denied by this Court.

II. Conclusion

Accordingly, for all of the reasons and authorities previously outlined, the Government respectfully requests that this Court deny Scott's motion to dismiss the charges brought against him.

Respectfully submitted,

Beth Phillips
United States Attorney

By */s/ Brent B. Venneman*

Brent Venneman
Assistant United States Attorney

Charles Evans Whittaker Courthouse
400 East 9th Street, Fifth Floor
Kansas City, Missouri 64106
Telephone: (816) 426-3122

Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on June 14, 2011, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery and a hard copy mailed to:

Naricco Scott
Correctional Corporation of America
100 Highway Terrace
Leavenworth, Kansas 66048

/s/ Brent B. Venneman

Brent Venneman
Assistant United States Attorney