

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 COMBINED RESPONSE AND SUGGESTIONS
IN OPPOSITION TO DEFENDANT'S MOTIONS TO DISMISS INDICTMENT
FOR PURPORTED LEGAL DEFICIENCIES

Comes now the United States of America, through its undersigned attorneys, and offers the following suggestions in opposition to the motions, filed by defendant NaRicco T. Scott, seeking that this Court dismiss the charges against him for a variety of reasons. (D.E. 434-436.) The Government offers the following suggestions in opposition to Scott's motions.

I. Procedural History

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 (4) Count Twelve - using or carrying a firearm in furtherance of a drug trafficking crime in violation of Title 18, United States Code, Section 924(c)(1)(A). (D.E. 380.)

Scott has exercised his right to self-representation, and this Court has granted Scott permission to proceed *pro se* in the pending criminal matter. (D.E. 304, 305.)

On June 1, 2011, Scott presented two motions arguing that the indictment against him should be dismissed and that this Court lacked jurisdiction based on a number of purported legal defects. (D.E. 357, 358.) On June 8, 2011, Scott filed an amended motion to one of those previously filed. (D.E. 378.) In those motions, presented a number of frivolous legal arguments. Scott contended, inter alia, that Title 21 is a non-positive law and unconstitutional; that the United States Government is a “federal corporate government” which lacks authority over him; that Congress exceeded the authority granted by the commerce clause when enacting Title 21; and that the indictment failed to provide the requisite interstate commerce nexus. The Government has filed its requisite responses, and an order on the merits of the motions are pending.

II. Arguments and Authorities

On July 26, 2011, Scott filed additional motions seeking relief, alleging many of the same claims previously raised. (D.E. 434-436.) In each of these motions, Scott requests that this Court take judicial notice of his legal arguments, adopting them in whole, along with certain erroneous facts that support his arguments.

A. This Court May Not Take Judicial Notice of Non-Adjudicative Facts

Scott titles these motions as requests that this Court take judicial notice, under Fed. R. Evid. 201. Rule 201 governs the ability of a district court to take judicial notice of adjudicative facts which are not disputed. *See American Prairie Const. Co. v. Hoich*, 560 F.3d 780, 796-97 (8th Cir. 2009). Adjudicative facts are “facts that normally go to the jury in a jury case. They

relate to the parties, their activities, their properties, their businesses.” *Qualley v. Clo-Tex Intern, Inc.*, 212 F.3d 1123, 1128 (8th Cir. 2000) (quoting *United States v. Gould*, 536 F.2d 216, 219 (8th Cir. 1976) (stating that adjudicative facts concern “who did what, where, when, how and with what motive or intent.”) A court may not take judicial notice of facts which are not adjudicative, or which are legislative or other types of facts. *Qualley*, 212 F.3d at 1128. Nor may a court take judicial notice of facts which are wholly irrelevant to the case before the court. *United States v. Gilkerson*, 556 F.3d 854, 855 n.2 (8th Cir. 2009).

None of the frivolous legal arguments presented by Scott qualifies as “adjudicative facts” which would “normally go to the jury in a jury case.” To the extent that Scott makes statements of legal standing – i.e., Scott claims in one of the motions that this Court is an Article I court and not an Article III court under the Constitution – those facts are contrary to established law. Further, it is not for the jury to determine this Court’s jurisdiction, but for this Court itself, and superior courts on appeal. An examination of the pending motions reveals that none of Scott’s motions contain a single adjudicative fact which would be in the province of the jury when determining guilt.

Accordingly, this Court should decline to take judicial notice of any of the legal arguments and facts provided by Scott in his motions.

B. Scott’s Individual Legal Arguments Are Without Merit

1. Scott’s Pro Se Motion To Suppress All Evidence

In the first of his three *pro se* motions addressed by this response, Scott requests that this Court suppress all evidence and all charges against him. (D.E. 434.) Scott’s motion is not a legitimate motion to suppress any evidence. Scott fails to list any specific evidence seized by law

enforcement, and the constitutional grounds that would requires the suppression of such evidence. Scott simply seeks to have the pending charges against him dismissed.

Scott first argues that the statutes under which he has been charged were not promulgated in the Federal Register and possess no implementing instructions in the Code of Federal Regulations, and therefore this Court lacks authority to enforce the statutes. These arguments are erroneous. *See United States v. Schiefen*, 139 F.3d 638, 639 (8th Cir. 1998) (“the Federal Register notice requirements do not apply to federal criminal statutes”) (citing 44 U.S.C. § 1505(a) (matters to be published in Federal Register); 5 U.S.C. §§ 551(1)(A) (Congress excluded from definition of agency); 5 U.S.C. § 552 (material agencies must publish)); *United States v. Walls*, 546 F.3d 728, 739-40 (also rejecting argument that because Title 21 prescribes a penalty, publication is required in the Federal Register because those requirements do not apply to criminal statutes passed by Congress).¹

Next, Scott argues that the statutes have not been enacted in the positive law. However, simply because those titles of the United States Code may not have been through the reviewing and editing process², the laws remain enforceable. *See United States v. McDowell*, No. 09-

¹The cases cited by Scott offer no assistance to his argument, since those cases concern reporting requirements promulgated by the Secretary of the Treasury regarding currency transactions. Those cases do not concern criminals statutes enacted by Congress. *See United States v. Reinis*, 794 F.2d 506, 508 (9th Cir. 1986) (overruling recognized by *United States v. Hoyland*, 960 F.2d 94, 96 (9th Cir. 1992)); *United States v. Murphy*, 809 F.2d 1427, 1430 (9th Cir. 1987).

²Described in *Positive Law Codification in the United States Code* at 2, available at <http://uscode.house.gov/codification/Positive%20Law%20Codification.pdf> (last accessed July 27, 2011.)

20133, 2011 WL 675916, at *1 (D.Kan. 2011) (denying motion challenging Title 21 on the ground it was not positive law).

Next, Scott contends 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. However, the statutes specify that they can be enforced against “any person,” and do not require any individual consent or contract.

Next, Scott argues that this Court, the United States District Court for the Western District of Missouri, are admiralty courts established under Article I of the Constitution and therefore the courts have no jurisdiction over criminal offenses. This claim is similarly meritless. This Court, like all other district courts in the 94 districts throughout the United States, was established by Congress through the Judiciary Act, under the authority granted by the Constitution of the United States, Article III, § 1. *See* 28 U.S.C. §§ 105 and 133 (statute passed by Congress establishing the District Court for the Western District of Missouri and the number of judges to serve); *see also Correa*, id. at n.2 (noting that district courts are Article III courts); 18 U.S.C. § 3231 (delegating jurisdiction over “all offenses against the laws of the United States” to district courts); *Schiefen*, 139 F.3d at 639 (same and citing); *Williams v. Rogers*, 449 F.2d 513, 517-18 (8th Cir. 1971) (“[f]ederal courts are courts of limited jurisdiction, possessing only the power that Congress expressly has conferred upon them by statute”) (citing *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943)).

Scott next seems to allege that Congress does not have authority to institute drug laws because it exceeds the scope of 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 these activities, rendering the statutes unconstitutional, is not supported by statute or case law.

Next, Scott seems to allege that Congress lacks authority to restrict the Second Amendment right to own firearms. Scott is not charged with mere possession of a firearm, but rather with possession of a firearm during a crime of violence or drug trafficking crime. Additionally, Supreme Court case law has held that the Second Amendment does not restrict the authority of Congress to restrict gun ownership and possession by felons and others. *See District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008) (“nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms); *McDonald v. City of Chicago, Ill.*, — U.S. —, 130 S.Ct. 3020, 3047 (2010) (citing and same).

2. Scott's Pro Se Judicial Notice For Lack of Jurisdiction and Notice Of Hearing Requested

In the second of his three *pro se* motions addressed by this response, Scott requests that this Court take judicial notice of lack of jurisdiction. (D.E. 435.) Scott contends that Supreme Court precedent holds that the interstate commerce clause permits Congress to create laws only involving federal programs where recipients or registrants of federal program benefits are implicated. Scott contends that he never enrolled or registered in any federal programs, and as a result, the Government lacks jurisdiction over the charged offenses.

Again, Scott cites a case which doesn't stand for the proposition he claims. *Wickard v. Filburn*, 317 U.S. 111 (1942), discusses the power of the federal government to set prices for wheat, and does not deal with either firearms or illegal drug trafficking. While *Wickard* does provide for a history of the interstate commerce clause, from conception until the date of that case, *Wickard*, 317 U.S. at 121, the case ultimately upheld the federal government's ability to regulate commodities prices. *Id.* at 133. *Wickard* does not limit the commerce clause as Scott suggests.

The Government has already noted that the Eighth Circuit case law supports the use of the interstate commerce clause to regulate drug trafficking. The Supreme Court has also upheld that the Controlled Substances Act, 21 U.S.C. § 801 et seq., "is a valid exercise of federal power," even when state laws permit certain drug-related activities. *See Gonzales v. Raich*, 545 U.S. 1, 9 (2005). In *Gonzales*, the Supreme Court addressed whether Congress had the authority to regulate marijuana growing and dispensing in California, after that state had legalized marijuana. *Id.* at 7. *Gonzales* reaffirmed that Congress may "regulate purely local activities that

are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.” *Id.* at 17 (citing *Wickard*, 317 U.S. at 128-29) (other citations omitted)). *Gonzales* reaffirmed, after a detailed examination, that the Controlled Substances Act is a valid exercise of Congressional power under the commerce clause. *Gonzales*, 545 U.S. at 22-33.

As noted above, both *Heller* and *McDonald* reaffirm that Congress may regulate the interstate commerce of firearms, and that the bans against using firearms by felons, and by extension the use of firearms by those engaging in crimes, are valid.

This claim is without merit, and Scott’s motion should be denied.

3. *Scott’s Pro Se Judicial Notice: Request the Courts to Take Judicial Notice of Adjudicative Facts, Opportunity to Be Heard, Hearing Requested, Demand Right for Due Process*

In the third of his three *pro se* motions addressed by this response, Scott reiterates his previous claims regarding the constitutionality of the statutes under which he has been indicted, this Court’s jurisdiction over criminal matters, and whether Title 21 of the United States Code was enacted into positive law. (D.E. 436.) Scott requests that this Court provide him documentation that this Court has jurisdiction over these criminal matters, and again suggests that only District Courts for the District of Columbia have jurisdiction over criminal cases.

These claims have been responded to previously in this response. This Court is not required to provide documentation establishing jurisdiction. This Court should deny Scott’s requests and this motion.

C. *Summary*

It is clear, from a review of these motions, that Scott is seeking a “magic bullet,” which would foreclose the Government from proceeding in the case against him. However, Scott’s

arguments are not the panacea for which he argues. The facts are simple: (1) Congress has passed laws restricting firearms and drug trafficking under the interstate commerce clause of the constitution; (2) those laws were properly passed and are enforceable sections of the United States Code; (3) those laws have been found constitutional by the courts; and (4) this Court is authorized, under the relevant statute, to preside over criminal matters. Scott points to no case where any of these incredible arguments and allegations were adopted, even in part, by any court, let alone where the arguments resulted in the dismissal of any charges.

This Court should deny each of Scott's pending motions attacking the indictment or charges based on jurisdiction or constitutionality of the statutes.

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 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 this 9th day of August, 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 Venneman
Brent Venneman
Assistant United States Attorney