

JAN - 2 2024

No. 23A661

IN THE SUPREME COURT OF THE UNITED STATES

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Andrew Tablack,  
Petitioner.

v.

United States of America

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APPLICATION FOR BAIL

Andrew Tablack  
Victorville U.S.P.  
PO BOX 3900  
Adelanto, CA 92301

Dated: 1/2/24

Pro Se'

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On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Third Circuit

Applicant Andrew Tablack applies to Justice Alito, the Honorable Third Circuit Justice, pursuant to Rule 22 of the Supreme Court Rules for: an order granting release on bail pending disposition of the applicant's petition for writ of certiorari. Tablack is wrongfully charged and convicted under the Controlled Substances Act, 21 U.S.C. 801 et seq., for a drug that was not scheduled as a controlled substance by the Attorney General; therefore, it was not an illegal substance in violation of 21 U.S.C. 841(a)(1).

## ARGUMENT FOR BAIL

"Requests for bail to this Court are granted only in extraordinary circumstances, especially if, as here, a previous bail application has been denied." McGEE v. Alaska, 463 U.S. 1339, 1340 (1983) (Rehnquist, J., in chambers). "Applicants must also demonstrate a reasonable possibility that four Members of this Court will vote to grant the petition for certiorari." Ibid.

### 1. Tablack was denied bail.

On July 22, 2019 in the District Court of New Jersey (Trenton), Magistrate Judge Tonianna J. Bongiovanni granted Tablack's motion for release from custody. See criminal no. 19-374 (MAS): Dkt., # 53. However, the government's motion to revoke the release order was granted by District Court Judge Michael A. Shipp on August 13, 2019. Dkt., # 62.

### 2. The Federal indictment legally fails to state an offense as a matter of law.

a. The omission of a controlled-substance from 21 U.S.C. 841(a)(1) is a fatal defect in the indictment.

The first constitutional requirement for an indictment is that it must contain the elements of the offense charged. United States v. Resendiz-Perce, 549 U.S. 102, 108 (2007). See also Ruan v. United States, 142 S.Ct. 2370, 2385 (2022) (Alito, J., concurring) ("For one thing, it is black-letter law that an indictment must allege 'the elements of the offense charged.'" (quoting Hamling v. United States, 418 U.S. 87, 117 (1974))); Russell v. United States, 369 U.S. 749, 768 n. 15 (1962) (explaining that every ingredient of the offense must be clearly and accurately alleged in the indictment to enable the court to decide whether the facts alleged are sufficient in law).

Tablack is charged in a two-count Federal indictment in which count one alleges he did knowingly conspire to manufacture and distribute . . . a Schedule I controlled substance-analogue, as defined in section 802(32)(A) of Title 21, namely "Cyclopropyl fentanyl," contrary to 21 U.S.C. 841(a)(1), (b)(1)(c), and § 813, in violation of § 846. Count two alleges Tablack did knowingly . . . manufacture and distribute . . . a Schedule I controlled substance-analogue, as defined in § 802(32)(A), namely "Cyclopropyl fentanyl," in violation of §§ 841(a)(1), (b)(1)(c), and § 813. Count one alleges the activity occurred between March 2017 and December 20, 2017. Count two alleges the activity occurred on September 13, 2017. See App. pp. A1-A2. See also Dkt., #33.

The statutory offense codified at 21 U.S.C. 841(a)(1) provides: Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally - - to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. The term "controlled substance" means a

Drug or other substance, or immediate precursor, included in schedule I, II, III, IV or V of part B of this title [21 U.S.C. 812]. 21 U.S.C. 802(6). Section 812 provides the initial schedules of controlled substances and also specifies to see 21 CFR Part 1308 for the amended schedules. Id., at § 812(c). Accordingly, "the feature of a substance that br[ings] it within the scope of" § 841(a)(1) is the fact that it is 'controlled.'" McFadden v. United States, 576 U.S. 186, 196 (2015) (citing § 802(6)).

"There is no question that it is a federal crime to possess with intent to ... distribute ... a controlled substance," 21 U.S.C. 841(a)(1), 'one of which is marijuana, § 812(c)." Moncrieffe v. Holder, 569 U.S. 184, 192 (2013). See also Mellouli v. Lynch, 575 U.S. 798, 803 (2015) (Adderall, the brand name of an amphetamine-based drug is a controlled substance) (citing 21 CFR 1308.12 (b)(1) (2014)); Jeffers v. United States, 432 U.S. 137, 140 n. 3 (1977) (Heroin is a Schedule I controlled substance) (citing 21 U.S.C. 812(c), 21 CFR 1308.11(c)(1) (1976)); United States v. Mirc, 725 F.3d 665, 667 (CA7 2013) (21 CFR 1308.11(d)(23), (d)(26) (listing "marijuana" and "peyote" as controlled substances); United States v. Abdulle, 564 F.3d 119, 125 (CA2 2009) (cathinone, [is] a Schedule I controlled substance, 21 CFR 1308.11(f)(3)).<sup>①</sup>

The indictment fails to allege that Cyclopropyl fentanyl was a controlled substance. § 802(6). The indictment alleges that Cyclopropyl fentanyl was a controlled substance-analogue, § 802(32)(A), which is not the unlawful legal element in the definition of § 841(a)(1) that the drug be

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<sup>①</sup> "Updated schedules of controlled substances are published in the Code of Federal Regulations." MacKay v. DEA, 664 F.3d 808, 810 n. 2 (CA10 2011). See also Borrone v. AG, 687 F.3d 150, 158 (CA3 2012) (citing § 812, 21 CFR 1308.11-.15).

listed in the controlled substance schedules. § 812(c); 21 CFR 1308.11-15 (2017). Because Cyclopropyl fentanyl was not listed as a controlled substance in the U.S. Code or Code of Federal Regulations, it was not illegal at the time under the law. See e.g., Mire, 725 F.3d at 667 (That "the plant" is not illegal in the United States. It is not listed in the U.S. Code or Code of Federal Regulations (CFR) controlled substances schedules.).

The Attorney General may temporarily add a substance in schedule I on an emergency basis if the substance is not listed in any other schedule in [21 U.S.C. 812]. 21 U.S.C. 811(h)(1). However, an order to temporarily schedule a drug may not be issued before the expiration of thirty (30) days from the publication by the Attorney General of a notice in the Federal Register of the intention to issue such order, . . . 21 U.S.C. 811(h)(1)(A). See also Tabby v. United States, 500 U.S. 160, 166 (1991) (the Attorney General must publish 30-day notice of the proposed scheduling in the Federal Register).

Pursuant to Section 811(h), on November 21, 2017 the Attorney General published a 30-day Notice of Intent to list Cyclopropyl fentanyl in Schedule I. See 82 FR 55333-36 (Nov. 21, 2017). On January 4, 2018 the Attorney General published the order in the Federal Register to temporarily add Cyclopropyl fentanyl to Schedule I. See 83 FR 469-472 (Jan. 4, 2018). The order expressly states:

"Possession of any quantity of this substance in a manner not authorized by the CSA on or after January 4, 2018 is unlawful and those in possession of any quantity of this

Substance may be subject to prosecution pursuant to the CSA." 83 FR 471 n.1 (Requirements for Handling)(Registration).

"Any activity involving cyclopropyl fentanyl not authorized by, or in violation of the CSA, occurring as of January 4, 2018 is unlawful, and may subject the person to administrative, civil, and/or criminal sanctions." 83 FR 472 n.11 (Liability).<sup>②</sup>

"It should be noted that the general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of an offense include a legal element." United States v. Freed, 401 U.S. 601, 615 (1971)(Brennan, J., concurring). "And here, there is arguably a legal element in Section 841(a)(1)-that the substance be 'controlled.'" McFadden, 576 U.S., at 199 (Roberts, C.J., concurring in part and concurring in judgment). See United States v. Caudle, 828 F.2d 1111 (CA5 1987)(affirming dismissal of indictments in finding that MDMA was not on the list of controlled substances); United States v. Spain, 825 F.2d 1426 (CA10 1987)(reversing judgment and conviction finding that there was no order as contemplated by 21 U.S.C. 811(h) that the drug became a Schedule I drug; only a 30-day notice of intention was issued); United States v. Gavrilovic, 551 F.2d 1099, 1106 (CA8 1977)(concluding that the defendants' conduct occurred prior to the effective date of the placement of mclqualone on Schedule I and therefore was not in violation of §841(a)(1) and §846).

<sup>②</sup> See 44 U.S.C. 1507 ("contents of the Federal Register shall be judicially noticed").

Ultimately, the omitted legal element in the indictment from the Federal offense in Section 841(a)(1) is a fatal defect that requires dismissal of the charges; cyclopropyl fentanyl was not scheduled as a controlled substance in 21 CFR 1308.11-15 (2017). Tablack therefore was not subject to criminal liability under § 841(a)(1) and § 841(b) (penalties for actual scheduled controlled substances). See Fed. R. Crim. P. 12(b)(3)(B) (defect in the indictment)(v) (failure to state an offense).

b. Cyclopropyl fentanyl is legally excluded from the term "controlled substance analogue" in the indictment.

A provision of the Controlled Substances Act, codified at 21 U.S.C. 813(a) states: "A controlled substance analogue shall, to the extent intended for human consumption, be treated, for purposes of any Federal law as a controlled substance in schedule I."

Except as provided in subparagraph (c), the Act defines the term "controlled substance analogue" in 21 U.S.C. 802(32)(A). Such term does not include—"a controlled substance." 21 U.S.C. 802(32)(C)(i). House Report No. 99-848 at 7-8 (1986) further explains: The term "controlled substance analogue" does not include:

(i) A controlled substance. If a substance has been scheduled as a controlled substance, then it cannot and should not be treated legally as a controlled substance analogue, even if its history of abuse was before it was controlled. (Emphasis added)

Currently, Cyclopropyl fentanyl is permanently scheduled as a controlled substance at 21 CFR 1308.11(b)(27). Thus, it was not to be treated legally in the indictment as a controlled substance analogue pursuant to § 813.

## APPLICANT SHOULD BE RELEASED

3. Tablack is wrongfully imprisoned because Cyclopropyl fentanyl was not unlawful pursuant to the CSA.

a. The order published in the Federal Register by the Department of Justice expressly declares cyclopropyl fentanyl unlawful occurring as of January 4, 2018; and as of that date a person may be subject to criminal sanctions. See ante, 83 FR at 472 n.11 (Liability).

b. Tablack is seriously charged for distributing an uncontrolled drug or other substance in the year of 2017. See ante, 83 FR at 471 n.1 (Registration) (Possession of any quantity of this substance on or after January 4, 2018 is unlawful).

4. Tablack was originally charged in a two-count criminal complaint on December 19, 2017 for Cyclopropyl fentanyl; and on May 20, 2019 he was indicted for dealing with Cyclopropyl fentanyl. The government did not seek any additional charges prior to trial on July 7, 2021. Tablack was convicted on the 14<sup>th</sup> for manufacturing and distributing and conspiring to manufacture and distribute Cyclopropyl fentanyl. Tablack refused to take acceptance of responsibility prior to being sentenced under the CSA to thirty years.

5. Tablack is currently imprisoned at a United States Penitentiary, which is constantly locked down for extended periods of time due to extreme violence, i.e., stabbings and beatings with rocks from the prison yard. The conditions at Victorville USP are harsh and hard-time is an understatement. Being locked in a cell 24 hrs for consecutive weeks here is unjust.

c. He is not a threat to any person in the community. He is also not a gang member or affiliated. He does not get high on drugs or currently use any medications.



7. From September 2012 through July 2015 Tablack was living with a girlfriend 24 years older than him; despite a week or so every other blue moon due to domestic tensions. However, it was a committed relationship that ended somewhat peacefully in light of the age gap. The two rekindled briefly in March of 2016.

8. Tablack began dating someone in April 2016 and started living with the girl from June 2016 till he was arrested on 12/20/17. He purchased an engagement ring in full and intended to propose over the holiday, however, he was arrested and the ring was seized by the government.

9. Under the Bail Reform Act, 18 U.S.C. 3142(e)(3)(A), a judge may order a defendant to be detained if an offense carries more than ten years of imprisonment under the Controlled Substances Act, 21 U.S.C. 801 et seq. Tablack was wrongfully sentenced to two (2) consecutive fifteen (15) year terms pursuant to 21 U.S.C. 841(b)(1)(C) (penalties for "a controlled substance" in Schedule I or II) for Cyclopropyl fentanyl, which was not scheduled as a controlled substance in 2017.

10. Tablack has family in California and Ohio where he can stay pending the disposition of the applicant's petition for writ of certiorari. Tablack can easily appear in Court for any future proceeding(s).

### RELIEF SOUGHT

Tablack is requesting to be released on bail without any restrictions (personal recognizance) pending the disposition of the applicant's petition for writ of certiorari. Although ignorance or mistake of law is a rare case, there is no question that the two-count Federal indictment fails to charge a valid drug offense at the time under the CSA, 21 U.S.C. 801 et seq.

## CONCLUSION

Tablack is respectfully requesting the Honorable Justice Alito and other Honorable Members of the Supreme Court to release him immediately on personal recognizance or bail without restrictions.

Respectfully submitted,

*A. Tablack*

Andrew Tablack, Pro Se  
Reg no. 75731-112  
Victorville U.S.P.  
PO Box 3900  
Adelanto, CA 92301

APPENDIX

Indictment . . . . .	A1-A3
House Report No., 99-848(1986) . . . . .	B1-B3

RECEIVED

MAY 20 2019

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

AT 8:30 \_\_\_\_\_ M  
WILLIAM T. WALSH, CLERK

FILED

MAY 20 2019

AT 8:30 2:25pm  
WILLIAM T. WALSH  
CLERK

UNITED STATES OF AMERICA	:	Hon. (MAS)
	:	
v.	:	Criminal No. 19- 374
	:	
ANDREW TABLACK	:	21 U.S.C. § 846
	:	21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), 813

INDICTMENT

The Grand Jury in and for the District of New Jersey, sitting at Newark, charges:

COUNT ONE

(Conspiracy to Manufacture and Distribute Fentanyl Analogue)

From in or around March 2017 through on or about December 20, 2017, in Monmouth County, in the District of New Jersey and elsewhere, the defendant,

ANDREW TABLACK,

did knowingly and intentionally conspire and agree with others to manufacture, distribute, and possess with intent to manufacture and distribute a quantity of a mixture and substance containing a detectable amount of a Schedule I controlled substance analogue, as defined in Title 21, United States Code, Section 802(32)(A), namely N-(1-phenethylpiperidin-4-yl)-N-phenylcyclopropanecarboxamide ("cyclopropyl fentanyl"), knowing that the substance was intended for human consumption, contrary to Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(C), and 813.

In violation of Title 21, United States Code, Section 846.

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**COUNT TWO**

(Manufacture and Distribution of Fentanyl Analogue)

On or about September 13, 2017, in Monmouth County, in the District of New Jersey and elsewhere, the defendant,

ANDREW TABLACK,

did knowingly and intentionally manufacture, distribute, and possess with intent to manufacture and distribute a quantity of a mixture and substance containing a detectable amount of a Schedule I controlled substance analogue, as defined in Title 21, United States Code, Section 802(32)(A), namely N-(1-phenethylpiperidin-4-yl)-N-phenylcyclopropanecarboxamide ("cyclopropyl fentanyl"), knowing that the substance was intended for human consumption.

In violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(C), and 813, and Title 18, United States Code, Section 2.

**CASE NUMBER: 19-374 (MAS)**

**United States District Court  
District of New Jersey**

**UNITED STATES OF AMERICA**

**v.**

**ANDREW TABLACK**

**INDICTMENT FOR**

**21 U.S.C. § 846**

**21 U.S.C. §§ 841(a)(1), (b)(1)(c), 813**

**A True Bill,**

**[REDACTED]**

**Foreperson**

**CRAIG CARPENITO**

**UNITED STATES ATTORNEY**

**NEWARK, NEW JERSEY**

**TAZNEEN SHAHABUDDIN**

**ASSISTANT U.S. ATTORNEY**

**973-645-2813**

**USA-48AD 8  
(Ed. 1/97)**

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COMPLETED

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DESIGNER DRUG ENFORCEMENT ACT OF 1986

SEPTEMBER 19, 1986.—Ordered to be printed

Mr. HUGHES, from the Committee on the Judiciary,  
submitted the following

REPORT

ORIGINAL

[To accompany H.R. 5246 which on July 24, 1986, was referred jointly to the  
Committee on the Judiciary and the Committee on Energy and Commerce]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill  
(H.R. 5246) to amend the Controlled Substances Act to prohibit cer-  
tain conduct with respect to controlled substance analogs, having  
considered the same, report favorably thereon with an amendment  
and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Designer Drug Enforcement Act of 1986".

SEC. 2. INCLUSION OF DESIGNER DRUGS IN CONTROLLED SUBSTANCES ACT.

(a) DEFINITION.—Section 102 of the Controlled Substances Act (21 U.S.C. 802) is  
amended by adding at the end thereof the following:

"(31)(A) Except as provided in subparagraph (B), the term 'controlled sub-  
stance analogue' means a substance—

"(i) the chemical structure of which is substantially similar to the chemi-  
cal structure of a controlled substance in schedule I or II; and

"(ii) which has a stimulant, depressant, or hallucinogenic effect on the  
central nervous system; or

"(iii) with respect to a particular person, which such person represents or  
intends to have a stimulant, depressant, or hallucinogenic effect on the cen-  
tral nervous system substantially similar to or greater than the stimulant,  
depressant, or hallucinogenic effect on the central nervous system of a con-  
trolled substance.

"(B) Such term does not include—

"(i) a controlled substance;

"(ii) any substance for which there is an approved new drug application;

"(iii) with respect to a particular person any substance, if an exemption is  
in effect for investigational use, for that person, under section 405 of the  
Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) to the extent conduct  
with respect to such substance is pursuant to such exemption; or

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Coffee, for example, has a stimulant effect on the central nervous system, but it is not chemically substantially similar to a controlled substance. To punish someone under the Controlled Substances Act who makes or distributes a new substance that has a chemical structure similar to a controlled substance, there ought to be evidence either of some effect on the central nervous system (such as that of caffeine), or that the person has made a representation or has evidenced an intent that the drug mimic the effect of a controlled substance. If the person were to merely say this substance is as powerful as a cup of coffee, and no stimulant or other central nervous system effect is found, then no harm has been committed that ought to involve the Controlled Substances Act.

A pre-introduction discussion draft of H.R. 5231, circulated to Drug Enforcement Administration and the industry for comment, had proposed that the effect test in the second branch of the definition require that the analogue's effect be "substantially similar" to the effect of a controlled substance. The Drug Enforcement Administration had expressed concern that the conjunctive requirement of chemical structure and a "substantially similar" central nervous system effect might be difficult to prove. Before H.R. 5321 was introduced, Mr. Hughes modified the effect requirement in the bill so that the evidence of central nervous system effect is minimal compared to the research burden that Drug Enforcement Administration has to sustain in order to bring a drug under control.<sup>9</sup> Indeed, as defined in the bill, a person could be convicted of felony offenses regarding a particular controlled substance analogue which as a substance could not be scheduled under the Controlled Substances Act. This could result if the analogue's effects did not meet the requirements for scheduling under section 201(c) of the Controlled Substances Act (21 U.S.C. 811(c)), for example, the analogue could lack a potential for abuse or a psychic or physiological dependence liability.

Representative Lungren offered an amendment, adopted by the Committee by a voice vote, to add an alternative representation or intent that the analogue have an effect greater than a controlled substance. A trafficker in controlled substance analogues should not escape sanction because he represents the drug he is selling as, "The greatest high in the world, greater than anything known to DEA."

#### *(B) Exceptions to the definition*

One major concern of the Committee in the development of this legislation was to guarantee that it did not interfere in legitimate pharmaceutical or medical research in any way.

In order to protect the many types of important scientific research involved in developing drugs to relieve pain or to aid in psychiatry and the treatment of emotional disorders, four exceptions to the definition of a controlled substance analogue have been provided by the Committee.

The term "controlled substance analogue" does not include:

committee on Crime of the House Committee on the Judiciary on Legislation relating to the Problem of Designer Drugs, May 1, 1986, 99th Cong. 2d sess.

<sup>9</sup>Controlled Substances Act, section 201(a), (b) and (c) (21 U.S.C. 811(a), (b) and (c)).

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(i) A controlled substance. If a substance has been scheduled as a controlled substance, then it cannot and should not be treated legally as a controlled substance analogue, even if its history of abuse was before it was controlled.

(ii) Any substance for which there is an approved new drug application. These are drugs which have been found by the Food and Drug Administration to be safe and effective and have been approved for marketing in interstate commerce. Such drugs, if they have a stimulant, depressant or hallucinogenic effect upon the central nervous system are brought to the attention of the Attorney General at the time the new drug application is submitted (section 201(f) of the Controlled Substances Act (21 U.S.C. 811(f)) and, if warranted, scheduled according the regular scheduling procedure of section 201(a) of the Controlled Substances Act (21 U.S.C. 811(a)).

(iii) With respect to a particular person, any substance for which an exemption from the Food and Drug Administration has been granted to permit "investigational use" of the drug by that person, to the extent conduct with respect to the substance is pursuant to the exemption. (Such exemptions under the Federal Food, Drug and Cosmetic Act are called "INDs".)

FDA allows drug manufacturers to carry out clinical research on human beings in the process of developing new drugs by allowing distribution of the drug in interstate commerce. These exemptions are specific as to substance and manufacturer. This exception is drafted to permit prosecution of a person who "diverts" the drug analogue from distribution for the purpose of research to illicit channels for the purpose of drug abuse.

(iv) Any substance to the extent not intended for human consumption before an exemption (that is, an IND) takes effect with respect to that substance. This provision is included in recognition of the fact that drug researchers compound new drugs with an intent that ultimately they will be developed to be sold for human consumption in the course of medical treatment. This provision has been included to assure that, in a temporal sense, to the extent the substance is not intended to be used or distributed for human consumption before the time that an exemption is issued, the substance will not be treated as a controlled substance analog. Similarly, these compounds as manufactured and distributed for research that does not involve human consumption are not considered controlled substance analogs unless they are diverted for human consumption.

*(b) Treatment of controlled substance analogues*

A new section 203 is added to the Controlled Substances Act to provide that a controlled substance analogue, to the extent it is intended for human consumption, is to be treated as a controlled substance in schedule I.

Substances in schedule I do not have any currently recognized medical use in treatment in the United States, but nonetheless, are often used in research—either in the area of drug abuse or, as in the case of marijuana, research in the treatment of the nausea related to cancer chemotherapy or in the treatment of glaucoma.

Section 303(f) of the Controlled Substances Act (21 U.S.C. 823(f)) authorizes researchers whose research involves human consump-

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Andrew Tablack,  
Petitioner.

v.  
United States of America

No. \_\_\_\_\_

Proof of Service

I, Andrew Tablack hereby declare that I notified the party below of the filing of the attached application for bail. I was not able to make a copy of the application because the entire prison has been locked down for multiple weeks as always.

Solicitor General, U.S. DOJ.  
950 Pennsylvania Ave, NW  
Washington, D.C. 20530-  
0001

I make this declaration pursuant to 28 U.S.C. 1746 and under the penalties of perjury.

Respectfully submitted,

A. Tablack

Andrew Tablack, Pro Se'  
Reg no. 75731-112  
Victorville USP  
PO BOX 3900  
Adelanto, CA 92301

Dated: 1/2/24