

FILED
United States Court of Appeals
Tenth Circuit

NOV 20 1991

ROBERT L. HOECKER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ROBERT WIDDOWSON, also known as Rob Sullivan, BRUCE BACHMAN, and MICHAEL WHITELEY,

Defendants-Appellees.

**Nos. 89-2075, 89-2085,
and 89-2086**

(D.C. Nos. CR 88-459-1,
CR 88-459-2, CR 88-459-3)
(D. New Mexico)

OPINION ON REMAND

Before HOLLOWAY, SETH and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

This matter is before us on remand from the United States Supreme Court, which granted certiorari and remanded for our reconsideration in light of Touby v. United States, 111 S. Ct. 1752 (1991). Our opinion is reported as United States v. Widdowson, 916 F.2d 587 (10th Cir. 1990). We there affirmed the District Court for the District of New Mexico's dismissal of indictments against Robert Widdowson, Bruce Bachman, and Michael Whiteley for conspiracy to manufacture, manufacture, possession with intent to

distribute, and distribution of the drug N-hydroxy-3, 4-methylenedioxyamphetamine, temporarily classified as a Schedule I controlled substance.

We determined the dismissal was proper because delegation of the temporary scheduling function to the U.S. Attorney General was unconstitutional and, alternatively, although the Attorney General had subdelegated the scheduling function to the Drug Enforcement Administrator he lacked power to do so under 21 U.S.C. § 811(h). The Supreme Court, considering a decision of the Third Circuit in Touby, ruled that 21 U.S.C. § 811(h) permitted the subdelegation, and the law was constitutional. Thus, the Supreme Court decided the same issues we considered in Widdowson in a manner contrary to our determinations. We believe there is nothing left for us to decide that is not controlled by the Supreme Court's Touby decision.

We therefore vacate our earlier judgment, and now conclude that the Supreme Court's action in Touby requires that the judgment of the United States District Court for the District of New Mexico dismissing the indictments be reversed. The cause is remanded to that district court for further proceedings in accordance with the opinion of this court and of the United States Supreme Court in Touby.

IT IS SO ORDERED.