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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10

11 UNITED STATES OF AMERICA,

CR 02-0053 CRB

12 Plaintiff,

NOTICE OF MOTION FOR DISCOVERY
AND MOTION TO DISMISS FOR
SELECTIVE PROSECUTION

13 v.

14 EDWARD ROSENTHAL,

Date: March 2, 2007

15 Defendant.

Time: 2:00 p.m.

16

TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO THE UNITED
17 STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA:

18 PLEASE TAKE NOTICE that on the date and at the time
19 indicated above, EDWARD ROSENTHAL, through counsel, will and
20 hereby does move this Court for an order dismissing the
21 Indictment filed against him due to the government's selective
22 prosecution, or at a minimum for an order to compel this
23 discovery.

24 Mr. Rosenthal contends that the instant prosecution must be
25 dismissed on the grounds that he was targeted and selectively
26 prosecuted due to his exercise of his right to free speech
27 guaranteed under U.S. Const. amends. I and XIV., in violation of
28 the Equal Protection Clause on the Fifth Amendment. U.S. Const.

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1 amend. V.

2 This motion is predicated on the files and records herein,
3 and on the following memorandum of points and authorities and
4 declaration of counsel.

5 Dated: February 20, 2007

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/s/ ROBERT AMPARÁN

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ROBERT AMPARÁN

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Attorney for Defendant

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EDWARD ROSENTHAL

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1 **INTRODUCTION**

2 The government targeted and selectively prosecuted Mr.
3 Rosenthal for exercising his constitutional right to free
4 speech. U.S. Const. amends. I and XIV., and U.S. Const. amend.
5 V. Shortly, after the verdict of the first trial, Mr. Rosenthal
6 publicly condemned the trial proceedings, explaining that he was
7 denied a fair trial due to the fact that the Court restricted
8 the jury from learning about the totality of circumstances
9 relating to the charges against him.

10 The government, specifically Assistant United States
11 Attorney, George Bevan, targeted Mr. Rosenthal for a successive
12 prosecution for precisely this reason. George Bevan made no
13 attempt to hide the selective nature of the prosecution,
14 explaining in open court that the reason for the successive
15 prosecution of Mr. Rosenthal is because he "took to the
16 microphone and said 'I didn't get a fair trial.'"

17 A defendant is entitled to exercise his First Amendment
18 right to free speech and talk to the press without retaliation,
19 in the form of selective prosecution. Mr. Rosenthal was denied
20 such Constitutional protection and, accordingly the Superceding
21 Indictment against him must be dismissed. In the alternative,
22 Mr. Rosenthal seeks an order compelling the production of
23 discovery of any and all inter-office/jurisdictional memorandums
24 generated between the U.S. Attorneys Office and the Department
25 of Justice in Washington, D.C. regarding and or authorizing the
26 filing and charging decisions against Mr. Rosenthal in relation
27 to both the 2002 and 2006 successive prosecution.

1 **STATEMENT OF FACTS**

2 The government initially indicted Mr. Rosenthal on February
3 12, 2002, charging him with: 1) cultivation of marijuana, in
4 violation of 21 USC section 841(a)(1), 2) conspiracy to
5 cultivate marijuana, in violation of 21 USC section 846, 3) and
6 maintaining a place for cultivating marijuana, in violation 21
7 USC 856(a)(1).

8 Upon indicting Mr. Rosenthal, the government was well aware
9 that he is a renowned author on the subject of marijuana and
10 that his indictment would attract significant media attention.

11 Not surprisingly, the indictment and trial of Rosenthal
12 were reported on the front page of the *San Francisco Chronicle*
13 and in the *New York Times*.

14 During the first trial, this Court precluded Mr. Rosenthal
15 from explaining his sincere humanitarian reasons for his
16 marijuana cultivation. Moreover, he was restricted from
17 explaining his deputization by the City of Oakland and his
18 reliance on the City of Oakland's support and guidance and
19 promise of protection from Federal prosecution. Denied a full
20 factual scenario, the jury convicted Mr. Rosenthal on January
21 31, 2003. However, once the jurors learned the full facts
22 surrounding Rosenthal's activities, a majority called a press
23 conference to condemn their verdict only four days after it was
24 issued.

25 Thereafter, on June 4, 2003, this Court sentenced Mr.
26 Rosenthal to one-day imprisonment and three years of supervised
27 release, with credit for time served. Mr. Rosenthal maintained
28 his innocence and appealed the verdict, whereafter the 9th

1 Circuit found reversible error. United States v. Rosenthal (9th
2 Cir. 2006) 454 F.3d 943.

3 Unsatisfied by the Ninth Circuit ruling, Assistant United
4 States Attorney George Bevan, who also prosecuted the first
5 trial, insisted on commencing two grand jury proceedings, one in
6 2003 and continuing on in 2006, seeking additional charges
7 against Mr. Rosenthal.

8 A Superceding Indictment was filed on October 12, 2006, for
9 money laundering and filing false tax returns for failing to
10 include gross receipts for his medical marijuana cultivation.

11 At the first court appearance on the new charges, the
12 discriminatory nature of the present prosecution surfaced when
13 the Court inquired as to why Mr. Bevan was bringing this
14 successive prosecution:

15 The Court: So one wonders what is the
16 purpose of this prosecution.

17 Mr. Bevan: The purpose is this: Mr.
18 Rosenthal, after the verdict took the
19 microphones and said, I didn't get a fair
20 trial. The jury didn't know that I was
21 growing for clubs. ... So I'm saying, this
time around, he wants the financial side
reflected, fine, let's air this thing out.
Let's have the whole conduct before the
jury: Tax, money laundering, marijuana.

22 (Exhibit I, Transcript of October 25, 2006, line 16: pages
23 20-25; and 17: 1-4).

24 Mr. Bevan further explained to the Court that he was
25 uncomfortable to be on the receiving end of accusations that the
26 trial was unfair to the extent that:

27 Mr. Rosenthal did not report his income on
28 his tax returns and otherwise committed
money laundering, that's fair game to get
the entire issue before the jury. ... We

1 only charged and only tried a portion of his
2 conduct, and what we're saying now is, Okay
3 we're going to put all of his conduct in
front of the jury. ... And that's the basis
for the indictment.

4 (Exhibit I, Transcript, 18: 3-14)

5 Despite the fact that Mr. Bevan's answer to this Court
6 indicates the obvious vindictive nature of this prosecution, it
7 is further evident that Mr. Bevan is targeting Mr. Rosenthal for
8 prosecution due to his exercise of his Constitutional right to
9 openly express his ideas and freely voice his beliefs without
10 oppression. Immediately concerned with the implications of the
11 government's reasoning behind it's actions, the Court responded:

12 THE COURT: Well, wait, I would like to say
several things:

13 Number one, if in fact you are -- you have
14 reindicted him because of something he said
after his trial, then I simply want to
15 remind you that the First Amendment to the
Constitution provides the opportunity for
16 him to speak. He can say whatever he wants
to about the prosecution, and he can say
whatever he wants to about the judge. That
17 is his constitutional right.

18 MR. BEVAN: Your Honor -

19 THE COURT: And if, in fact, he said things
which were offensive, so be it.

20 On the other hand, to reindict him or to
continue or to have a prosecution that is in
21 some measure contributing -- the emphasis is
on "some measure" -- the result of what he
22 may have said, I think that would be the
subject of a motion, if the parties think
23 it's appropriate.

24 (Exhibit I, Transcript, 17: 6-12)

25 This Court added: "I am simply inviting the parties to
26 comment in writing on this issue." (Exhibit I, Transcript, 19:
27 13)

28 From the foregoing colloquy it is evident that the

1 government targeted and selectively prosecuted Mr. Rosenthal due
2 to his choice to openly voice his emotions and frustrations with
3 the first trial in full accordance with the exercise of his
4 First Amendment rights as enumerated under the United States
5 Constitution. U.S. Const. amend. I.

6 A prosecutor's discretion is subject to constitutional
7 constraints. One of these constraints, imposed by the equal
8 protection component of the Due Process Clause of the Fifth
9 Amendment, is that the decision whether to prosecute may not be
10 based on an unjustifiable standard as that which the government
11 applied in the present proceedings. For the foregoing reasons,
12 the present Indictment must be dismissed.

13 **ARGUMENT**

14 I.

15 THE PRESENT INDICTMENT MUST BE DISMISSED BECAUSE THE
16 DECISION TO PROSECUTE MR. ROSENTHAL WAS DISCRIMINATORY
IN EFFECT AND INTENT

17 The Superseding Indictment against Mr. Rosenthal should be
18 dismissed on grounds of selective prosecution because of the
19 government's discriminatory effect and intent in deciding to
20 prosecute Mr. Rosenthal. The government indicted Mr. Rosenthal
21 in retaliation for the exercise of his right to free speech
22 guaranteed under U.S. Const. amends. I and XIV.

23 A defendant seeking relief on a claim of selective
24 prosecution must show some evidence of both discriminatory
25 effect and discriminatory intent. To succeed on a claim of
26 selective prosecution, a defendant must demonstrate that 1)
27 similarly situated person have not been prosecuted (United
28 States v. Bass, (2002) 536 U.S. 862, 864), and 2) that he was

1 selected for prosecution on the basis of an impermissible
2 ground, such as race, religion or the exercise of a
3 constitutional right. United States v. DeTar (9th Cir. 1987) 832
4 F.2d 1110.

5 Moreover, United States v. Armstrong (1996) 517 U.S. 456,
6 464-465 explains that:

7 [A] prosecutor's discretion is "subject to
8 constitutional constraints." United States
9 v. Batchelder (1979) 442 U.S. 114, 125. One
10 of these constraints, imposed by the equal
11 protection component of the Due Process
12 Clause of the Fifth Amendment, Bolling v.
13 Sharpe (1954) 347 U.S. 497, 500, is that the
14 decision whether to prosecute may not be
15 based on 'an unjustifiable standard such as
16 race, religion, or other arbitrary classi-
fication,' Oyler v. Boles (1962) 368 U.S.
448, 456. A defendant may demonstrate that
the administration of a criminal law is
'directed so exclusively against a particu-
lar class of persons ... with a mind so
unequal and oppressive' that the system of
prosecution amounts to a practical denial of
equal protection of the law. Yick Wo v.
Hopkins (1886) 118 U.S. 356, 373.

17 First, the prosecutor, George Bevan, has openly admitted to
18 this Court that he re-indicted Mr. Rosenthal in retaliation for
19 the exercise of his right to free speech guaranteed under U.S.
20 Const. amends. I and XIV, which is facially discriminatory. See
21 United States v. Bass, (2002) 536 U.S. 862, 864; United States
22 v. DeTar (9th Cir. 1987) 832 F.2d 1110; and Leather v. Ten Eyck
23 (2nd Cir. 2001) 2 Fed. Appx. 145, 146 (selective prosecution for
24 retaliation for targeting a vocal public advocate on behalf of
25 vesting control of the E-911 services in civilian hands).
26 Selective prosecution violates the Equal Protection clause
27 "where the decision to prosecute is made either in retaliation
28 for the exercise of a constitutional right, such as the right to

1 free speech or to the free exercise of religion." Esmail v.
2 Macrane (7th Cir. 1995) 53 F.3d 176, 179.

3 Taken alone, Mr. Bevan's surprisingly candid statements to
4 the Court illustrate the discriminatory effect and purpose of
5 the prosecution.

6 Moreover, the discriminatory effect is further elucidated
7 in the fact that other similarly situated individuals who are
8 operating or supplying marijuana dispensaries have not been
9 charged with filing false tax returns, money laundering or for
10 failing to report medical marijuana income. In particular,
11 individuals who are operating marijuana dispensaries are being
12 allowed to operate without federal prosecution for filing false
13 tax returns, cultivation and or the distribution of marijuana.
14 Among the individuals who are similarly situated and have not
15 been charged with filing false tax returns for failing to report
16 medical marijuana income, or any other offense, are Robert
17 Martin and James Halloran. Both individuals are witnesses for
18 the government that testified that they operated or supplied
19 dispensaries, and continue to do so, while undoubtedly neither
20 report their income in tax returns; yet, the government has not
21 indicted them on any of these federal violations.

22 Contrary to other similarly situated individuals who have
23 not faced prosecution, Mr. Rosenthal was trying to operate and
24 establish a system of regulation with the City of Oakland in
25 full accordance with the California's Compassionate Use Act
26 (Proposition 215). Following the passage of Proposition 215,
27 the Oakland City Council unanimously passed Oakland Ordinance
28 No. 12076 on July 28, 1998. This Ordinance created the City of

1 Oakland's Medical Cannabis Distribution Program. To facilitate
2 the cultivation of marijuana for distribution to the seriously
3 ill, the City of Oakland recruited and deputized Mr. Rosenthal
4 to grow marijuana. City officials were aware of and supported
5 Mr. Rosenthal's compassionate and charitable operation.

6 Crucially, Mr. Rosenthal actively sought to ensure that the
7 operation was thoroughly regulated, and that all business
8 licensing and tax issues were dealt with in a legal and
9 appropriate manner. Mr. Rosenthal participated in City of
10 Oakland-sponsored Medical Marijuana Working Group meetings and
11 inquired repeatedly about the proper procedures and protocols
12 for setting up the business and regulating the cannabis
13 production in conformity with the law.

14 Mr. Rosenthal is a public advocate and open supporter of
15 aiding sick and ailing persons through medical marijuana pro-
16 grams. Mr. Rosenthal freely voices his humanitarian ideals and
17 contributes his beliefs to the marketplace of ideas, which adds
18 to the robust and progressive debate regarding medical mari-
19 juana. Following the verdict of the first trial, Mr. Rosenthal
20 did not censor or tailor his speech to fit within the confines
21 of the United States government. Rather, he spoke out and
22 explained to the press the injustice he believed he received
23 from the proceedings.

24 In direct response Assistant United States Attorney Bevan
25 impermissibly retaliated against Mr. Rosenthal for exercising
26 his right to free speech guaranteed under U.S. Const. amends. I
27 and XIV. See United States v. McWilliams (9th Cir. 1984) 730
28 F.2d 1218, 1221 (personal vindictiveness on the part of the

1 charging prosecutor would support a claim of discriminatory
2 prosecution); Esmail v. Macrane (7th Cir. 1995) 53 F.3d 176, 179
3 (selective prosecution is also actionable "where the power of
4 government is brought to bear on a harmless individual merely
5 because a powerful state or local official harbors a malignant
6 animosity toward him"); Indiana State Teachers Ass'n v. Board of
7 School Commissioners (7th Cir. 1996) 101 F.3d 1179, 1181 (where
8 people identical in relevant ways are treated differently, the
9 disadvantaged person can state an equal protection claim).

10 The government's actions amount to selective prosecution
11 and the Superseding Indictment must be dismissed accordingly.

12
13 II.

14 MR. ROSENTHAL IS ENTITLED TO DISCOVERY TO
15 CORROBORATE HIS SELECTIVE PROSECUTION CLAIM

16 George Bevan's admission regarding the reason for this
17 prosecution, standing alone, requires dismissal of the
18 Superseding Indictment. However, in the alternative, discovery
19 of all records relating to the government's decision to commence
20 federal prosecution against Mr. Rosenthal must be disclosed to
21 Defense counsel.

22 For such discovery, a defendant must come forward with
23 "some evidence" of each of the elements of a selective
24 prosecution. United States v. Armstrong (1996) 517 U.S. 456
25 (U.S. 1996). As set forth herein, Mr. Rosenthal has met the
26 standard set forth in Armstrong, and Mr. Rosenthal still seeks
27 any and all inter-office/jurisdictional memorandums generated
28 in Washington, D.C. regarding the filing and charging decisions

1 against Mr. Rosenthal in relation to both the 2002 and 2006
2 successive prosecution. This has previously been requested from
3 AUSA Bevan on two occasions and has been denied, notwithstanding
4 its obvious relevance to selective prosecution, the motion to
5 dismiss for vindictive prosecution, as well as the motion to
6 dismiss for pre-indictment delay. See Exhibits K, L, and O.

7 **CONCLUSION**

8 The efforts of the government to target Mr. Rosenthal where
9 others similarly situated were not prosecuted, in retaliation
10 for his exercise of his First Amendment rights, is evidence of
11 the effect and intent to discriminate on the part of the
12 prosecution. For the reasons set forth herein, Defense counsel
13 respectfully urges this Court to dismiss the present charges
14 against Mr. Rosenthal due to the government's selective
15 prosecution. Alternatively, it is respectfully requested that
16 this Court compel the government to present any and all inter-
17 office/jurisdictional memorandums generated between the U.S.
18 Attorneys Office and the Department of Justice in Washington,
19 D.C. regarding the filing and charging decisions against Mr.
20 Rosenthal in relation to both the 2002 and 2006 prosecutions,
21 and the decision to prosecute Mr. Rosenthal.

22 Dated: February 20, 2007

23 Respectfully submitted,

24 ROBERT AMPARÁN
25 SHARI L. GREENBERGER
26 OMAR FIGUEROA
Attorneys for Defendant
ED ROSENTHAL

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DECLARATION OF COUNSEL

I, ROBERT AMPARÁN, declare:

I am an attorney licensed to practice in the State of California and before this court, and I am one of the attorneys of record for defendant EDWARD ROSENTHAL.

It is my information and belief that the facts and statements set forth in the accompanying document are true and correct to the best of my knowledge and belief, and are based upon a review of all the discovery provided in the case, interviews with my client, and my own investigation.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on February 17, 2007, at San Francisco, California.

/s/ ROBERT AMPARÁN
ROBERT AMPARÁN