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6
7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA
9

10 UNITED STATES OF AMERICA, CR 02-00053 CRB

11 Plaintiff,

12 v.

13 EDWARD ROSENTHAL,

14 Defendant.
15 _____/

NOTICE OF MOTION AND MOTION TO
DISMISS FOR DUE PROCESS
VIOLATIONS BASED UPON THE RULE OF
LENITY, LACK OF NOTICE, AND
ENTRAPMENT BY ESTOPPEL

Date: March 2, 2007

Time: 2:00 p.m.

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

18 PLEASE TAKE NOTICE that on the date and at the time
19 indicated above, defendant, through counsel, will and hereby
20 does move to dismiss the indictment charging him with violations
21 of 26 U.S.C. 7206(1) because the prosecution is unable to prove
22 that he acted wilfully and because he was not given fair notice
23 that he may be in violation of the statute.

24 This motion is predicated on the files and records herein,
25 and on the declaration of counsel filed herewith.

26 Dated: February 20, 2007

27 _____
/s/ ROBERT AMPARÁN
28 ROBERT AMPARÁN
Attorney for Defendant
EDWARD ROSENTHAL

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 INTRODUCTION

3 Following the passage of California's Compassionate Use Act
4 (Proposition 215) in 1996, the Oakland City Council unanimously
5 passed Oakland Ordinance No. 12076 on July 28, 1998. This
6 Ordinance created the City of Oakland's Medical Cannabis
7 Distribution Program. To facilitate the cultivation of
8 marijuana for distribution to the seriously ill, the City of
9 Oakland recruited and deputized Ed Rosenthal to grow marijuana.
10 City officials were aware of and supported Mr. Rosenthal's
11 compassionate and charitable operation.

12 At all relevant times, Mr. Rosenthal actively sought to
13 ensure that the operation was thoroughly regulated, and that all
14 business licensing and tax issues were dealt with in a legal and
15 appropriate manner. Mr. Rosenthal participated in City of
16 Oakland-sponsored Medical Marijuana Working Group meetings and
17 inquired repeatedly about the proper procedures and protocols
18 for setting up the business and regulating the cannabis
19 production in conformity with the law. Mr. Rosenthal was
20 informed by Oakland City Councilman and Chair of the Public
21 Safety Commission, Nate Miley, that the City of Oakland was in
22 the process of determining how to address issues related to
23 business structures, tax obligations, and accounting protocols
24 for the revenue generated from the sale of medical cannabis. He
25 relied on this representation, and others, in not reporting the
26 gross receipts from sales of medical cannabis on his personal
27 tax returns, believing in good faith that such reporting was the
28 responsibility of the City of Oakland.

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STATEMENT OF FACTS

In Counts 21 through 25 of the October 12, 2006 superseding indictment, Mr. Rosenthal is charged with violations of 26 U.S.C. § 7206(1), "Fraud and false statements." 26 USC § 7206. These tax charges stem from Mr. Rosenthal's alleged willful failure to report gross receipts from the sale of clones of medicinal marijuana plants while acting as an agent of the City of Oakland. The government chose not to prosecute Mr. Rosenthal on tax charges in the February, 2002 indictment, despite having in its possession all relevant tax filings and financial documents throughout the period of the trial of U.S. v. Rosenthal in 2003 and throughout the entire appellate process.

At this time, Mr. Rosenthal seeks a dismissal of counts 21 through 25 based upon violations of his due process rights as discussed below.

I.

THE RULE OF LENITY REQUIRES A DISMISSAL WHERE THE TAX OBLIGATION IS UNCLEAR AND SUBSEQUENTLY THE GOVERNMENT IS UNABLE TO PROVE THE ELEMENT OF WILLFULNESS FOR A VIOLATION OF 26 U.S.C. 7206(1).

A violation of Section 7206(1) requires that the Defendant "[w]illfully make[] and subscribe[] any return. . . which he does not believe to be true and correct as to every material matter." 26 USCS § 7206(1).

Willfulness ... requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty. ... [I]f the Government proves actual knowledge of the pertinent legal duty, the prosecution, without more, has satisfied the knowledge component of the willfulness requirement. But carrying this burden requires negating a

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1 defendant's claim of ignorance of the law or
2 a claim that because of a misunderstanding
3 of the law, he had a good-faith belief that
4 he was not violating any of the provisions
5 of the tax laws.

6 Cheek v. United States (1991) 498 U.S. 192, 202.

7 The Cheek court further stated that the belief need not be
8 objectively reasonable. Cheek, 498 U.S. 192, 202. The Cheek
9 court reasoned that by including the "willfully" language,
10 Congress intended only to punish intentional violations of the
11 tax laws. Thus, even an unreasonable belief, if sincerely held,
12 negates the *mens rea* of the offense. When viewed under this
13 standard, the facts and circumstances of the instant case lead
14 to the undeniable conclusion that Mr. Rosenthal believed he was
15 acting as an agent of Oakland and did not believe he had any tax
16 obligation.

17 Mr. Rosenthal consistently advocated regulation of the
18 City's medical marijuana program. He repeatedly sought guidance
19 from Oakland officials as to business structure and organiza-
20 tion, and the implementation of protocols and procedures
21 including those related to business licensing and taxes.
22 Oakland officials continually advised Mr. Rosenthal that they
23 were still working out these protocols and procedures.¹

24 Numerous facts convinced Mr. Rosenthal that he had no duty
25 to report on the sales of clones to dispensaries. Mr. Rosenthal
26 was formally deputized as an Agent of Oakland by Jeff Jones.
27 (See the Declaration of Jeffrey Jones, attached as Exhibit A;
see also City Manager Robert Bobb's agreement with Jeff Jones

28 ¹ To this day Oakland has not developed procedures and
protocols for cannabis production associated with the
Compassionate Use Act.

1 regarding the Oakland Cannabis Buyers Club's designation by the
2 City of Oakland as administrators of the City's Medical Cannabis
3 Distribution Program, attached as Exhibit B.) Mr. Rosenthal
4 received official written verification memorializing his deputi-
5 zation and adding further support to his belief that he was
6 acting as an agent of Oakland. (See the September 4, 1998
7 letter from Jeff Jones to Mr. Rosenthal confirming Mr.
8 Rosenthal's status as an "Officer of Oakland," attached as
9 Exhibit C.) Mr. Rosenthal participated in City of Oakland-
10 sponsored "Medical Marijuana Working Group" meetings. (See the
11 Declaration of Joe Devries, attached hereto as Exhibit D.) The
12 City of Oakland's Working Group was composed of members of the
13 City Council, City Manager's office, City Attorney's office,
14 Oakland Police Department, and Medical Marijuana advocates. The
15 Working Group was an "officially sanctioned Working Group by the
16 City of Oakland ... to help to establish protocols to work with
17 the Oakland Cannabis Buyer's Club to make them Agents of the
18 City." (See Transcript of 2003 Press Conference with Nate
19 Miley, attached hereto as Exhibit E.) At these meetings Mr.
20 Rosenthal advocated for the implementation of structures and
21 procedures regulating the City's medical marijuana program.
22 Further supporting Mr. Rosenthal's belief that he had no
23 reporting duty was his understanding that in some jurisdictions
24 the Drug Enforcement Administration "was not interested in
25 interfering with county efforts to implement California Health &
26 Safety Code section 11362.5. ..." (See the Declaration of Mary
27 Pat Jacobs, attached as Exhibit F.)

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28 Mr. Rosenthal expressed his fundamental understanding of

1 his immunity pursuant to being deputized as an agent of Oakland:

2 Well what happened was when the resolution
3 of ordinance was passed which immunized
4 officers of the city and when I was
5 appointed an officer, subofficer, whatever
6 by Jeff Jones and submitted to supervision
7 by Mr. Jones that I felt I was immune and
8 felt that these city officials must know
9 what they're doing and if this you know that
10 who am I to argue with the City Attorney?

11 See excerpt of Court Reporter's transcript of Mr.
12 Rosenthal's previous trial, January 9, 2003, p. 75,
13 attached as Exhibit G.

14 Mr. Rosenthal was informed by Oakland City Councilman and
15 Chair of the Public Safety Commission, Nate Miley, that the City
16 of Oakland was in the process of determining how to address
17 issues related to business structures and protocols for the
18 revenue generated from the sale of medical cannabis.

19 At the time of Mr. Rosenthal's trial in 2003, Councilman
20 Miley participated in a news conference in which he provided the
21 following facts:

22 Mr. Rosenthal met with Mr. Miley in Mr. Miley's office on
23 at least four occasions, spoke on the phone with Mr. Miley
24 often, and interacted with Mr. Miley's staff regarding Mr.
25 Rosenthal's role in Oakland's implementation of the Compassion-
26 ate Use Act, Proposition 215. Mr. Miley toured the cultivation
27 site and believed that it was a lawful, compassionate, and
28 charitable endeavor. "[E]verything associated with providing
29 medical cannabis, you know, the whole chain of uh ... of uh ...
30 what needed to take place from the uh ... from the actual
31 growing to distribution, all of that was part of uh, an effort
32 that was cloaked in uh, the City of Oakland's uh, protocol, so
33 that people would not be subject to prosecution, harassment, or

1 anything else of that nature." Transcript of Nate Miley's News
2 Conference, attached as Exhibit E, pgs. 3-4. Ed's "necessary"
3 operation was "part of the whole uh, chain of uh ... operations
4 for uh, cannabis uh, dis... distribution. ..." Exhibit E, p. 4.
5 In that interview, Councilman Miley also said that the working
6 group was determining how to handle Business License tax issues.
7 Exhibit E, p. 4. Mr. Miley emphasized his belief that Mr.
8 Rosenthal was not making a profit, but was participating in
9 Oakland's efforts at implementing the Compassionate Use Act.
10 Exhibit E, pgs. 4-6.

11 The Working Group also suggested that the City of Oakland
12 assume all responsibility for production and supply from
13 Medifarm, as a way of immunizing those supplying medical
14 cannabis to dispensaries. The assumption of responsibility for
15 the cannabis production was tabled by the Working Group until
16 the protocols surrounding the dispensaries had been implemented.
17 Working Group members understood that efforts at regulation and
18 assumption of responsibility for the supply of medical cannabis
19 by the City served two goals: to provide consistent medication
20 to patients while shielding medical cannabis providers from
21 potential liability. This potential assumption of responsi-
22 bility also factored into Mr. Rosenthal's belief that the
23 operation would ultimately constitute the City of Oakland's
24 property and responsibility.

25 This Court also summarized Mr. Rosenthal's relationship
26 with the Oakland Cannabis Buyers' Cooperative in United States
27 v. Rosenthal, 266 F. Supp. 2d 1091, 1098 (D. Cal. 2003):

28 Shortly after the City passed the Ordinance
it designated the Oakland Cannabis Buyers'

1 Cooperative ("OCBC") to "enforce" the
2 Ordinance. The OCBC in turn designated the
3 defendant as its agent for purposes of what
4 the City characterized as "enforcement" of
5 the Ordinance, that is, cultivation of
6 marijuana in accordance with the Ordinance.

7 United States v. Rosenthal, 266 F. Supp. 2d 1091, 1098
8 (D. Cal. 2003).

9 In James v. United States (1961) 366 U.S. 213 the High
10 Court reversed convictions for tax evasion because the state of
11 the law regarding whether embezzled funds need be reported was
12 uncertain. Under those circumstances, the Court found that
13 willfulness could not be proven.

14 Similarly, in the instant case, the Compassionate Use Act,
15 and its implementation by the City of Oakland created an
16 uncertainty in the state of the law with regards to Mr.
17 Rosenthal's culpability. Nate Miley, as well as Mr. Miley's
18 aide Joe DeVries, informed Mr. Rosenthal that business struc-
19 turing would be decided by the City at a later date through the
20 legislative or committee process. They instructed Mr. Rosenthal
21 not to get a business license or proceed with any other aspects
22 of operating a business unless informed otherwise. Addition-
23 ally, Mr. Rosenthal was informed that the City of Oakland might
24 be assuming the Medifarm operation.

25 "[A]mbiguity concerning the ambit of criminal statutes
26 should be resolved in favor of lenity." Rewis v. United States
27 (1971) 401 U.S. 808.

28 Following James, uncertainty in tax law negates mens rea
and a dismissal of tax charges is appropriate where the
requisite willfulness can not be proven. Moreover, following
Cheek, the argument that Mr. Rosenthal's reliance on Nate Miley

1 is unreasonable is not persuasive. The belief need not be
2 objectively reasonable.

3 While the law since James has been resolved, and all income
4 must be reported no matter how derived, Mr. Rosenthal did not
5 believe he had any income from his assistance in the provision
6 of medical cannabis to Oakland's patients. The property
7 interest in the proceeds of the medical marijuana belonged to
8 Oakland, and it was being considered that authority and control
9 over the Medifarm operation might revert to Oakland. After Mr.
10 Rosenthal paid the various expenses associated with the cannabis
11 nursery there were no remaining funds. There was no profit from
12 Medifarm. Contrary to the grandiose and false claims of James
13 Halloran relating to the production capacity and actual
14 production at the Mandela Parkway operation, the monthly
15 expenses of the nursery and the investment in establishing the
16 operation far exceeded whatever meager income was generated.
17 The Government has had access to all of Mr. Rosenthal's
18 financial records for five years. Despite having every
19 opportunity to thoroughly investigate those records, the
20 Government has not produced a shred of evidence that the Mandela
21 Parkway operation ever realized a profit. Significantly,
22 Assistant United States Attorney George Bevan told the grand
23 jury in this matter that the government was not charging Mr.
24 Rosenthal with tax evasion, because the government could not
25 establish any tax loss. See the excerpt of the September 14,
26 2006 Grand Jury transcript, attached as Exhibit H.

27 Mr. Rosenthal has two distinct defenses that flow from his
28 status as a deputy of Oakland: First, he has no tax obligation

1 whatsoever because the tax obligation belonged to the City of
2 Oakland. Second, Mr. Rosenthal is entitled to a dismissal
3 because the government cannot prove the requisite willfulness.

4 In this Court's sentencing decision at Mr. Rosenthal's
5 previous prosecution, the Court discussed Mr. Rosenthal's belief
6 as to whether he was acting as a City of Oakland official:
7 "Moreover, regardless of whether the defendant was in fact a
8 City official (a fact which has not been adjudicated), the Court
9 finds that the defendant had a good faith belief that he was
10 acting as a City of Oakland official." United States v.
11 Rosenthal, 266 F. Supp. 2d 1091 (D. Cal. 2003). This undisputed
12 finding dictates that the prosecution will be unable to meet
13 their burden in proving willfulness under 21 U.S.C. 7206(1)
14 because Mr. Rosenthal had a good faith belief that he had no tax
15 obligation to report. Because Mr. Rosenthal did not believe
16 that he had a reporting duty he has a complete defense to the
17 Superseding Indictment, under Cheek.

18 II.

19 DUE PROCESS BARS THE INSTANT PROSECUTION BECAUSE MR.
20 ROSENTHAL WAS NOT GIVEN FAIR NOTICE THAT HE MAY BE IN
VIOLATION OF SECTION 7206

21 "Due process requires that a person be given fair notice as
22 to what constitutes illegal conduct so that he may conform his
23 conduct to the requirements of the law." United States v.
24 Dahlstrom, 713 F.2d 1423, 1427 (9th Cir. 1983). In Dalstrom the
25 Ninth Circuit reversed the defendant's convictions for conspir-
26 acy to defraud the United States, in violation of 18 U.S.C. §
27 371, and of aiding and abetting the preparation and presentation
28 of fraudulent income tax returns, in violation of 26 U.S.C. §

1 7206(2), in relation to their promotion of advice regarding a
2 tax shelter program. At the time of trial "the use of foreign
3 trusts to save taxes was still a highly debatable issue." United
4 States v. Dahlstrom, 713 F.2d 1423, 1424 (9th Cir. 1983). Due
5 to the unsettled state of the law, the court found that the
6 defendant was not given fair notice that his acts constituted
7 illegal conduct and reversed the convictions.

8 In Cox v. Louisiana (1965) 379 U.S. 559 the leader of a
9 civil rights protest was arrested for picketing near a court-
10 house after police and city officials informed him that the
11 place they had chosen to meet was not "near" the courthouse
12 within the terms of the statute. Cox, 379 U.S. 559, 571. In
13 reversing the convictions the Court stated, "[t]he Due Process
14 Clause does not permit convictions to be obtained under such
15 circumstances."

16 Because the City of Oakland, through its representatives'
17 implementation of the Working Group, informed Mr. Rosenthal that
18 the method of dealing with the business licensing and subse-
19 quently tax liabilities was yet unclear and directed him to
20 forestall any activities connected with the creation of a
21 business entity and accounts until informed otherwise, Mr.
22 Rosenthal's case is governed by the long-standing rules from
23 Dahlstrom and Cox. Mr. Rosenthal was informed by City Officials
24 from Oakland that the state of the law was unclear at least
25 insofar as Oakland had not decided how the business licensing
26 and taxation issues should be resolved. This lack of clarity
27 creates a defense under Dahlstrom, given that Mr. Rosenthal
28 deferred to the Oakland City Attorney's office and other Oakland

1 officials regarding whether he should be reporting any funds
2 received from his participation in implementing the Compassion-
3 ate Use Act for the City of Oakland. Moreover, given that the
4 Working Group, composed of the City Council, City Manager's
5 office, City Attorney's office, and the Oakland Police
6 Department advised him that he was immune from prosecution, and
7 as long as he was not making a profit, not to set up a business,
8 including not to file taxes, Mr. Rosenthal has a defense under
9 Cox. Just like the civil rights advocates in Cox, Mr.
10 Rosenthal's conduct was endorsed by city officials. The
11 counter-argument, that an agent of California had no authority
12 to absolve Mr. Rosenthal of his federal tax obligation, is
13 unpersuasive given that it is Mr. Rosenthal's state of mind that
14 is at issue, not whether he actually had the obligation.

15
16 III.

17 THE GOVERNMENT IS ESTOPPED FROM PROSECUTING
18 MR. ROSENTHAL ON THE TAX CHARGES BECAUSE MR.
19 ROSENTHAL REASONABLY RELIED ON THE ACTIONS
20 AND STATEMENTS OF PUBLIC OFFICIALS

21 Among the demands of due process is that the appearance of
22 justice be satisfied. See, e.g., Offut v. U.S. (1971) 348 U.S.
23 11, 14. One manifestation of this principle is the idea that it
24 is fundamentally unfair to prosecute a person who has been led
25 by government conduct to believe that his actions are author-
26 ized. This defense is frequently referred to as "entrapment by
27 estoppel."²

28 ² A similar defense is the "public authority" defense. Entrapment by estoppel is available when a government official commits an error which the defendant relies on and thereby violates the law, whereas the public authority defense is available when a government official makes some statement or

1 An entrapment-by-estoppel defense against a federal
2 criminal charge usually requires reliance by the defendant on
3 the statements or actions of a federal agent or official.
4 However, this is far from the usual case. It is well-settled
5 that when applying a federal tax statute, a federal court first
6 looks to state law to determine the nature of the defendant's
7 interest in the property in question. The United States Supreme
8 Court enunciated this principle, "it has long been the rule that
9 'in the application of a federal revenue act, state law controls
10 in determining the nature of the legal interest which the
11 taxpayer had in the property . . . sought to be reached by the
12 statute.'" Aquilino v. U.S. (1960) 363 U.S. 509, 513 quoting
13 Morgan v. Commissioner (1940) 309 U.S. 78, 82. See also United
14 States v. National Bank of Commerce (1985) 472 U.S. 713 , 722
15 (1985); United States v. Stonehill, 83 F.3d 1156 , 1159 (9th
16 Cir. 1996); Little v. U.S., 704 F.2nd 1100, 1105 (9th Cir.
17 1983). The federal tax laws only apply *consequences* to what is
18 essentially a determination of state law.

19 For example, in Mapes v. U.S., 15 F.3d 138 (9th Cir. 1994),
20 a legatee's renunciation of his half-interest in his mother's
21 estate was held to preclude the government from attaching a tax
22 lien on that property. The Ninth Circuit agreed with the
23 legatee that "as a matter of state law, the Renunciation

24 _____
25 performs some act and the defendant relies on it, possibly
26 mistakenly, and commits an offense by relying on the government
27 official. U.S. v. Burt, 410 F.3d 1100, 1104 n.2 (9th Cir. 2005)
28 (internal quotes and citations omitted). The Ninth Circuit has
recognized that the difference between the public authority and
entrapment by estoppel defenses is "not great." Id. For the
sake of clarity and ease of reading, all references herein to
entrapment by estoppel should be read as also referring to the
public authority defense.

1 prevented Mapes from acquiring a half-interest in the estate
2 and, in the absence of his having inherited anything, there was
3 nothing to which a tax lien could have attached." Id.

4 Because this is a tax case, Mr. Rosenthal's reliance on the
5 actions and statements of Oakland officials may suffice to
6 establish those defenses, despite the fact that those officials
7 were not representatives of the federal government. In the
8 present case, Mr. Rosenthal relied on (1) his deputization by
9 the City of Oakland, and (2) the statements of Mr. Miley and
10 members of the Working Group that the City of Oakland's priority
11 was to regulate the dispersement of medical marijuana under
12 Proposition 215, and that protocols regarding the cultivation
13 would be subsequently devised. Mr. Rosenthal was directed not
14 to create a business entity, particularly given that there were
15 no profits derived from his participation in the Compassionate
16 Use Act. Once protocols were established for the safe provision
17 of cannabis to patients, the City would exercise greater control
18 over the production of cannabis. Thus, Mr. Rosenthal reasonably
19 believed that any profits derived from the medical grow opera-
20 tion were not his own income, any more than the fares collected
21 by a city bus driver are the driver's income.

22 Before the federal tax laws even come into play, the
23 determination must be made whether or not Mr. Rosenthal had a
24 property interest in the money the government seeks to tax.
25 This is a question of state law. Thus, Mr. Rosenthal could rely
26 on the actions and statements of Oakland officials regarding the
27 extent of his property interest in the income from the operation
28 he was conducting on their behalf. Moreover, Mr. Rosenthal was

1 led to believe that the City of Oakland was preparing to assume
2 responsibility for the entire Medifarm grow operation. It was
3 eminently reasonable for Mr. Rosenthal to conclude that he would
4 not have to report said proceeds on his own tax returns.

5 The entrapment-by-estoppel defense has been generally held
6 to require that the defendant's reliance be reasonable.
7 Although Mr. Rosenthal certainly urges that his reliance in this
8 case was reasonable, such a determination should not be neces-
9 sary for Mr. Rosenthal to prevail on this motion. This is
10 because in a tax case, even an unreasonable belief on the part
11 of a defendant that his actions were legal serves as a defense
12 to the charges. Cheek, 498 U.S. 192, 202.

13 In Cheek, the Supreme Court held that if the defendant
14 could prove that he believed that his actions did not violate
15 the tax laws, he could not be found guilty of tax evasion, even
16 if his belief was unreasonable. The Supreme Court reasoned that
17 the inclusion of the word "willfully" in the statutes defining
18 the crime of tax evasion expressed Congress' intent to only
19 penalize willful violations of the tax laws. For this Court to
20 require that Mr. Rosenthal's reliance be reasonable before he
21 can avail himself of the entrapment-by-estoppel defense would be
22 to impose a higher burden on the defense than that which is
23 required by law, and would effectively rewrite 26 USC § 7206(1)
24 to eliminate the *mens rea* element. This Court should consider
25 the reasonableness requirement of the entrapment-by-estoppel
26 defense in a tax case, in light of Cheek, and hold that even an
27 unreasonable reliance on the conduct or statements of government
28 officials - even local government officials - can suffice to

1 establish an entrapment by estoppel defense in a tax case.
2 This case is outside the realm of the ordinary entrapment-by-
3 estoppel case, both by virtue of its nature as a tax case and by
4 virtue of the highly unusual factual circumstances presented.
5 Due process concerns militate in favor of an expansion of the
6 entrapment-by-estoppel and public authority doctrines to
7 encompass this unusual situation. Mr. Rosenthal made every
8 effort to ensure that his Medifarm nursery was operating within
9 the law. Mr. Rosenthal was assured by Oakland officials such as
10 Nate Miley and members of the city's Medical Marijuana Working
11 Group that Oakland would be responsible for business license and
12 tax issues, and was diligently working to address those issues.
13 Mr. Rosenthal reasonably believed that he was not required to
14 report Medifarm nursery receipts on his personal income taxes.
15 Significantly, this Court has previously articulated a finding
16 that "[Mr. Rosenthal] had a good faith belief that he was acting
17 as a City of Oakland official." United States v. Rosenthal, 266
18 F. Supp. 2d 1091 (D. Cal. 2003).

19 It is contrary to principles of justice for the government
20 to prosecute Mr. Rosenthal in light of his good-faith reliance
21 on Oakland officials for his belief that his conduct was legal,
22 whether or not that reliance was reasonable. Due process
23 considerations support the expansion of the entrapment-by-
24 estoppel doctrine to encompass situations in which an individual
25 tries in good faith, but fails, to comply with the tax laws due
26 to the actions or statements of government officials. Such an
27 expansion would be entirely consistent with already-established
28 case law regarding the *mens rea* requirement in tax offenses.

1 Moreover, this factual scenario is completely unique, and as
2 such similar defenses likely could not be raised or be
3 appropriate to another defendant in the future.

4 IV.

5 MR. ROSENTHAL IS ENTITLED TO A JURY
6 INSTRUCTION ON THE ENTRAPMENT BY ESTOPPEL
AND PUBLIC AUTHORITY DEFENSES

7 Even if this Court finds that dismissal is not warranted on
8 the basis of the defenses set forth above, Mr. Rosenthal is
9 still entitled to a jury instruction as to those defenses. "A
10 defendant is entitled to instructions relating to a defense
11 theory for which there is any foundation in the evidence, even
12 though the evidence may be weak, insufficient, inconsistent, or
13 of doubtful credibility." United States v. Wofford, 122 F.3d
14 787, 789 (9th Cir. 1997). Mr. Rosenthal will present evidence
15 that he was acting as the agent of the City of Oakland, that
16 city officials represented to him that any tax obligations
17 arising from his charitable operation would be the responsi-
18 bility of the City of Oakland, and that Mr. Rosenthal reasonably
19 relied on those officials' representations in not reporting
20 Medifarm gross receipts on his tax returns. In light of this
21 evidence, it is appropriate to give both the entrapment-by-
22 estoppel and public authority instructions to the jury. The
23 jury could find from this evidence that Mr. Rosenthal reasonably
24 relied on the statements and actions of Oakland officials in
25 forming the belief that he had no property interest in the
26 Medifarm proceeds, and thus did not have the obligation to
27 report said proceeds.

1 CONCLUSION

2 _____Traditionally, federal officers have used their powers over
3 the states to enforce civil rights. See Katzenbach v. McClung
4 (1964) 379 U.S. 294, where the Commerce Clause was used to
5 prevent discrimination in an Alabama diner in the sixties. In
6 the Medical Marijuana context however, executive officers seek
7 to eradicate marijuana at the cost of the civil rights of the
8 victims of the war on medical marijuana patients and their
9 doctors. The Honorable Judge Fern Smith, the Honorable Judge
10 William Alsup and the Ninth Circuit have found that a Civil
11 Rights claim was ripe and an injunction appropriate when federal
12 officials attempted to discipline physicians for recommending
13 medical marijuana to their patients. Conant v. McCaffrey, 172
14 F.R.D. 681 (D. Cal. 1997); Conant v. McCaffrey, 2000 U.S. Dist.
15 LEXIS 13024 (D. Cal. 2000); Conant v. Walters, 309 F.3d 629 (9th
16 Cir. 2002). Mr. Rosenthal has endured five years of continuous
17 persecution by the government due to his humanitarian efforts to
18 lawfully and safely provide medicine for seriously-ill
19 individuals. Mr. Rosenthal did so with the approval and support
20 of physicians and the voters of the State of California, and as
21 an agent of the City of Oakland. The instant tax fraud prosecu-
22 tion is yet another effort by the United States Attorneys office
23 to undermine the growing movement in support of the provision of
24 medical cannabis according to state law. Following state law,
25 the most that can be shown regarding Mr. Rosenthal's tax
26 obligation is that it was uncertain. Under the circumstances
27 elucidated above, it is fundamentally unfair to allow this
28 prosecution to continue.

1 For all the foregoing reasons, Mr. Rosenthal respectfully
2 requests this court to grant the instant motion and dismiss
3 counts 21 through 25 of the Superseding Indictment.

4 Dated: February 19, 2007

5 Respectfully submitted,

6 ROBERT AMPARÁN
7 SHARI L. GREENBERGER
8 OMAR FIGUEROA
9 Attorneys for Defendant
10 ED ROSENTHAL

11 /s/ ROBERT AMPARÁN
12 by ROBERT AMPARÁN

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