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

10 UNITED STATES OF AMERICA, CR 02-0053 CRB

11 Plaintiff,

12 v.

13 EDWARD ROSENTHAL,

14 Defendant.

NOTICE OF MOTION AND MOTION TO
DISMISS THE PRESENT INDICTMENT
OR IN THE ALTERNATIVE RECUSE
ASSISTANT UNITED STATES
ATTORNEY, GEORGE L. BEVAN JR.,
FOR GRAND JURY MISCONDUCT

Date: March 2, 2007
Time: 2:00 p.m.

15 _____/
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, EDWARD ROSENTHAL, through counsel, will and
20 hereby does move to dismiss the present Indictment due to a
21 pattern of prosecutorial misconduct that compromised the grand
22 jury's ability to act with independence. In the alternative,
23 defense counsel urges this Court to recuse George Bevan for his
24 egregious prosecutorial misconduct and impartiality.

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

27 Dated: February 20, 2007

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

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INTRODUCTION

Assistant United States Attorney George Bevan, Jr., has engaged in a pattern of deceptions that began with the first grand jury proceeding and continued through and including the second grand jury proceedings. Such underhanded deception in the form of blatant lies, omissions of fact, and misstatements of law, substantially infringed on the grand jury's independence and impartiality and tainted the fundamental fairness of the proceedings.

STATEMENT OF FACTS

Subsequent to a thorough investigation of Mr. Rosenthal, the government indicted him on February 12, 2002, charging him with: 1) cultivation of marijuana, in violation of 21 USC section 841(a)(1), 2) conspiracy to cultivate marijuana, in violation of 21 USC section 846, 3) and maintaining a place for cultivating marijuana, in violation 21 USC 856(a)(1).

During the first grand jury proceeding, the prosecutor, George Bevan, Jr., provided unsworn testimony to the grand jury and made misstatements of fact and misstatements of law to the grand jury. The prosecutor led the grand jurors to believe that federal law offered a "shelter" for 99 plants or less to enable patients to get their medicine, and that state law defenses and a medical defense was available. Otherwise, any reasonable prosecutor knew that this grand jury would never indict Mr. Rosenthal.

Moreover, Mr. Bevan sought to minimize the grand jury's concerns by falsely offering his own testimony to assure the grand jury that "we have not sought to shut down the operations

1 of the club" (GJ I, Trans at 1171). He also testified that
2 "Sonoma County has a tolerance of ... 99 plants". (GJ I, Trans
3 at 1170) Agent Pickette added "that would translate into about
4 25 pounds for indoor marijuana", and agreeing with the prose-
5 cutor that "when a narcotics search takes place, they would
6 actually leave a certain number of plants there" (GJ I, Trans at
7 1170). This testimony was designed to lead the jurors to
8 falsely believe that federal law offered a "shelter" for
9 patients and small caregivers.

10 Due to the deception and distraction of the government, the
11 first grand jury nevertheless indicted Mr. Rosenthal. During
12 trial, this Court precluded Mr. Rosenthal from explaining his
13 sincere humanitarian reasons for his marijuana cultivation as
14 well as his deputization by the City of Oakland. The jury
15 convicted Mr. Rosenthal on January 31, 2003; however, after
16 learning the full facts surrounding Mr. Rosenthal's activities,
17 the jurors publicly condemned the verdict.

18 Thereafter, on June 4, 2003, this Court sentenced Mr.
19 Rosenthal to one-day imprisonment and three years of supervised
20 release, with credit for time served. Mr. Rosenthal steadfastly
21 maintained his innocence and appealed the verdict, whereafter
22 the 9th Circuit found reversible error. United States v.
23 Rosenthal, 454 F.3d 943 (9th Cir. 2006).

24 Mr. Bevan, who also prosecuted the first trial, was
25 disappointed at the Court's one day sentence and insisted on
26 another Grand jury proceeding, seeking additional charges
27 against Mr. Rosenthal.

28 During the second grand jury proceeding which occurred in

1 2003 and 2006 AUSA George Bevan committed much of the same
2 abuses he did in 2002 when he continued his pattern of providing
3 unsworn testimony to the grand jury and offered more mis-
4 statements of fact and misstatements of law to the Grand jury.

5 A second Superseding Indictment was thereafter filed on
6 October 12, 2006, adding money laundering, and filing false tax
7 returns for failing to include gross receipts for his medical
8 marijuana cultivation to the original marijuana charges.

9 Mr. Bevan's pattern of deception substantially infringed on
10 the independence of the second Grand jury and therefore, this
11 Court should dismiss the present indictment against Mr. Rosen-
12 thal, or in the alternative, recuse Mr. Bevan from further
13 prosecution of Mr. Rosenthal.

14 **ARGUMENT**

15 I.

16 GEORGE BEVAN'S PATTERN OF DECEPTION
17 SUBSTANTIALLY INFRINGED ON THE INDEPENDENCE
18 OF THE SECOND GRAND JURY AND PREVENTED THE
19 SECOND GRAND JURY FROM EXERCISING ITS
20 CONSTITUTIONAL FUNCTION

21 The primary function of the grand jury is to "protect
22 citizens from unfounded accusations not supported by probable
23 cause." United States v. Sear, Roebuck 719 F.3d 1386, 1393 (9th
24 Cir. 1983). However, constitutional error may be found where
25 the "independence of the grand jury is substantially infringed."
26 United States v. Isgro, 974 F.2d 1091, 1094 (9th Cir. 1992).
27 The relevant inquiry focuses "not on the degree of culpability
28 of the prosecutor, but on the impact of his misconduct on the
grand jury's impartiality." United States v. Sear, Roebuck 719
F.3d 1386, 1391 (9th Cir. 1983). A prosecutor may not force his

1 "views on the jurors or otherwise coerce them to return an
2 indictment. Id. at 1383.

3 Yet, during the second grand jury proceeding which occurred
4 in 2003 and 2006 AUSA George Bevan committed much of the same
5 abuses he did in 2002 by continuing to provide unsworn testimony
6 to the grand jury and feeding more misleading facts and mis-
7 statements of law to the Grand jury.

8 This misinformation involved deliberate misstatements
9 regarding the California State Law as it pertains to the
10 transportation, supply and distribution of marijuana by
11 qualified patients. GJ II Trans, 24769-24774.

12 Moreover Bevan introduced false testimony when he charac-
13 terized Mr. Rosenthal's operation as a large scale commercial
14 grow of 3000, knowing that the Probation Department and this
15 Court had found Mr. Rosenthal responsible only for 673 plants at
16 1419 Mandela Parkway, and that the jury had found that the
17 number of the plants that Mr. Rosenthal conspired to cultivate
18 was more than 100 but less than 1000. United States v.
19 Rosenthal, 266 F.Supp.2d 1091, 1094 (2003).

20 Furthermore when convenient, Mr. Bevan under-represented
21 the true amount of plants found at James Halloran's grow when he
22 stated only 359 out of 4070 plants were rooted. GJ I Trans,
23 1114.

24 The grand jury transcripts are replete with misleading and
25 inaccurate testimony where it is clear that AUSA Bevan is
26 attempting to force his views on the jurors or otherwise coerce
27 them to return an indictment in violation of clearly established
28 rules and long standing precedent against such misconduct.

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II.

GEORGE BEVAN'S PATTERN OF DECEPTION DURING
THE FIRST GRAND JURY CONTINUED THROUGHOUT
THE SECOND GRAND JURY AND FURTHER PREVENTED
THE SECOND GRAND JURY FROM EXERCISING ITS
CONSTITUTIONAL FUNCTION AND CASE GRAVE DOUBT
UPON THE FUNDEMENTAL FAIRNESS OF THE GRAND
JURY PROCEEDINGS

Standing alone, each example of George Bevan's prosecutorial misconduct, as set forth above, compromises the integrity of these proceedings to such an extent that the superceding indictment must be denied. In addition to the present motion, multiple motions filed herewith reflect government's pattern of egregious misconduct, including but not limited to: Motion to Dismiss for Vindictive Prosecution, Motion to Recuse Assistant United States Attorney George Bevan for Prosecutorial Misconduct and Criminal Activity, Motion to Dismiss for Selective Prosecution, and Motion to Dismiss for Pre-Indictment Delay.

Taken together, the government's misfeasance, through George Bevan's actions, forms a clear pattern of misconduct designed to prevent the second grand jury from performing its democratic function of "reject[ing] an indictment that, although supported by probable cause, if based on government passion, prejudice, or injustice." See United States v. Marcucci, 299 F.3d 1156, 1164 (9th Cir. 2002); see also United States v. Samango, 607 F.2d 877, 884 (9th Cir. 1979) ("The cumulative effect of the above errors and indiscretions, none of which alone might have been enough to tip the scales, operated to the defendants' prejudice by producing a biased grand jury.").

George Bevan's conduct during the first Grand jury

1 proceeding further reflects the government's pattern of
2 deception and misconduct that taints the second grand jury
3 proceedings.

4 During the first grand jury proceeding, Mr. Bevan, provided
5 unsworn testimony to the Grand jury. Moreover, he disingenu-
6 ously made misstatements of fact and misstatements of law to the
7 grand jury.

8 At the prosecutor's first invitation for questions during
9 Agent Pickette's testimony, the grand jury asked the prosecutor
10 whether Rosenthal and the others were acting under "cover of
11 legitimacy from the state." GJ I, Trans at 1155. The grand
12 jury then proceeded to assail Prosecutor Bevan in the following
13 seventeen pages of transcript with no less than fifteen
14 questions regarding: the medical purpose of the marijuana grown
15 by Rosenthal, GJ I, Trans at 1159 & 1162; the interplay between
16 state and federal law, GJ I, Trans at 1155, 1162, 1170-71 &
17 1177; how sick and dying Californians were supposed to obtain
18 their medicine, GJ I, Trans at 1167, 1172, 1175 & 1178; and
19 whether this case was the first of its kind, GJ I, Trans at
20 1171, 1177-78, 1179 & 1181. The most poignant illustration of
21 what weighed on their minds was when one grand juror protested
22 that "[m]ost of us probably voted for [Proposition 215]." GJ I
23 Trans at 1168.

24 To overcome the grand jury's expressed reluctance to indict
25 Rosenthal, Mr. Bevan employed a multi-faceted strategy of
26 deception and distraction. First, he instructed the grand jury
27 in no uncertain terms that Rosenthal's cultivation activity was
28 illegal even under California law, although no California court

1 had so held. Next, he and his lead case agent misleadingly
2 assured the grand jury that it was not blazing any new ground.
3 Finally, in "a last ditch effort to assuage the jurors'
4 consciences and encourage them to indict," see Sigma Int'l, 244
5 F.3d at 873-74, Mr. Bevan assured the grand jury that the
6 federal government is not seeking to shut down the operations of
7 the Harm Reduction Center, and that "[i]f you go in right now
8 with a card in the Cannabis clubs, you know, you're probably
9 okay," GJ I, Trans at 1171 & 1172.

10 Mr. Bevan's comments were all directed at the grand jury's
11 concerns about the federal government's undermining of
12 California's Compassionate Use Act and the consequent loss of
13 medicine for the seriously ill. His deception stripped the
14 grand jury of its constitutional power to exercise its discre-
15 tion and reject an indictment due to injustice or prosecutorial
16 overreaching. Despite the government's argument to the contrary,
17 Mr. Bevan's egregious misconduct substantially infringed the
18 grand jury's ability to act with independence and impartiality.
19 They relied on the representations made by the prosecuting
20 attorney with the belief that such assertions were in fact true.

21 The prosecutorial misconduct occurring before both Grand
22 jury proceedings casts grave doubt upon the integrity of these
23 proceedings. Cf. Sigma Int'l, 244 F.3d at 873-74 (dismissing
24 indictment due to cumulative prejudice of grand jury mis-
25 conduct); Samango, 607 F.2d at 884 (same); United States v.
26 Dixon, 658 F.2d 181, 193 (3d Cir. 1981) (Rule 33 may be applied
27 to order new trial based on misconduct by prosecutor). "If the
28 Grand Jury is to [function as the Framers envisioned it], limits

1 must be set on the manipulation of grand juries by overzealous
2 prosecutors." Samango, 607 F.2d at 882.

3 CONCLUSION

4 For the reasons set forth herein, this Court should dismiss
5 the present charges due to George Bevan's continuous deception
6 in the form of blatant lies, omissions of fact, and mis-
7 statements of the law all in an attempt to manipulate the Grand
8 jury into indicting Mr. Rosenthal. In addition to his
9 unabashed deception, George Bevan's prosecutorial misconduct,
10 including but not limited to, testifying to the grand jury while
11 not under oath, and the overall vindictiveness of this
12 indictment, warrants dismissal of the present indictment. In
13 the alternative, defense counsel urges this Court to recuse Mr.
14 Bevan to ensure an impartial prosecutor prosecutes this case.

15 Dated: February 20, 2007

16 Respectfully submitted,

17 ROBERT AMPARÁN
18 SHARI L. GREENBERGER
19 OMAR FIGUEROA
Attorneys for Defendant
ED ROSENTHAL

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21 /s/ ROBERT AMPARÁN
22 by ROBERT AMPARÁN

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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 20, 2007, at San Francisco, California.

/s/ ROBERT AMPARÁN
ROBERT AMPARÁN